Nos. 126086, 126087, & 126088 (consol.)

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois, Plaintiffs-Appellees, v. ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois, Defendant-Appellant, PEOPLE OF THE STATE OF ILLINOIS *ex rel*. KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN*, in her official capacity as the Clerk of the Circuit Court of Cook County, Intervenor-Defendant-Appellants.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois No. 12-CH-5275 The Honorable JOHN C. ANDERSON, Judge Presiding

BRIEF OF INTERVENOR-DEFENDANT-APPELLANT IRIS MARTINEZ, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

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ORAL ARGUMENT REQUESTED

***IRIS MARTINEZ is the newly elected Clerk of the Circuit Court of Cook County.**

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NATURE OF THE CASE

On April 18, 2012, plaintiff Reuben D. Walker ("Plaintiff Walker") filed a mortgage foreclosure complaint related to property he owned in Will County. (R 131.) Plaintiff Walker filed his complaint with the Will County Circuit Court Clerk ("Will County Clerk") and paid $476 in filing fees to the clerk. (R 136.) The filing fees included a $50 fee to be deposited into the Foreclosure Prevention Program Fund. (C 954.) On August 11, 2015, Plaintiff M. Steven Diamond ("Plaintiff Diamond") filed a mortgage foreclosure complaint in Cook County Circuit Court and paid the $50 filing fee at issue. (C 1721.)

On April 12, 2018, Plaintiffs Walker and Diamond (collectively "Plaintiffs") filed their Second Amended Complaint for Injunctive and Declaratory Relief in the Will County Circuit Court. (C 953.) Plaintiffs challenged the constitutionality of the mortgage foreclosure filing fees, 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31, as enacted and as amended.

On July 26, 2018, intervenor-defendant Dorothy Brown, Clerk of the Circuit Court of Cook County filed her Cross Motion for Summary Judgment. (C 1133.)[1] Circuit Clerk Martinez contends that: (1) the voluntary payment doctrine bars Plaintiff's constitutional challenges and (2) putting the voluntary payment doctrine aside, those constitutional challenges nevertheless fail on the merits. (C 1137.)

[1] On December 1, 2020, Iris Martinez was sworn in as the new Clerk of the Circuit Court of Cook County. She replaced former Circuit Clerk Brown. Hereinafter, pursuant to 735 ILCS 5/2-1008(d), references to the current intervenor-defendant Circuit Clerk of Cook County will be to "Circuit Clerk Martinez."

On March 2, 2020, the circuit court found that the voluntary payment doctrine did not defeat Plaintiff's constitutional claims and found 735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31 to be facially unconstitutional. (C 1967.) The Court denied former Circuit Clerk Brown's summary judgment motion, granted summary judgment in favor of Plaintiffs, and entered a permanent injunction of these fee statutes. (C 1968.)

On May 14, 2020, the circuit court found that pursuant to Rule 304(a) there was no just reason for delaying either enforcement or appeal. (C 1928.) Pursuant to Illinois Supreme Court Rules 302(a)(1) and 304(a), former Circuit Clerk Brown filed a timely notice of appeal to this Court. (C 1976.) No issue is raised concerning the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court improperly applied the duress exception to the common law voluntary payment doctrine.

2. Whether the circuit court improperly invalidated three statutes as unconstitutional under the Illinois Constitution of 1970 (ILL. Const. 1970): 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30, and 20 ILCS 3805/7.31.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Supreme Court Rules 302(a)(1) and 304(a). The Circuit Court entered a final and appealable order on May 14, 2020. The Cook County Circuit Court Clerk filed a timely notice of appeal on June 12, 2020.

STATUTES INVOLVED

The following statutes involved in this appeal have been reproduced in the Appendix:

STATEMENT OF FACTS

On April 18, 2012, Plaintiff Walker filed a mortgage foreclosure complaint related to property he owned in Will County. (R 129; 131.) Plaintiff Walker filed his complaint with the Will County Circuit Court Clerk ("Will County Clerk") and paid $476 in filing fees to the clerk. (R 136.) The filing fees included a $50 fee to be deposited into the Foreclosure Prevention Program Fund. (C 954.) Payment of the filing fee was not a financial hardship for Plaintiff Walker, and he did not seek a fee waiver or ask to not be charged the fee. (R 127; 136.) Plaintiff Walker did not pay the filing fee under protest. (R 137.)

On October 2, 2012, Plaintiff Walker filed the instant Complaint for Injunctive and Declaratory Relief ("Complaint"). (C 11.) On November 9, 2012, the Circuit Court granted certification of Defendant class of circuit court clerks and, upon oral motion, certification of a class consisting of "all plaintiffs who paid the 735 ILCS 5/1504.1 fee." (C 115.)

On August 11, 2015 Plaintiff Diamond filed a mortgage foreclosure complaint in Cook County Circuit Court and paid the $50 filing fee at issue. (C 1952.) On April 12, 2018, Plaintiffs filed their Second Amended Complaint for Injunctive and Declaratory

Relief in the Will County Circuit Court. (C 951.) Plaintiffs challenged the constitutionality of the mortgage foreclosure filing fees, 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31 as enacted and as amended. Plaintiffs filed their Amended Motion for Summary Judgment on July 23, 2018. (C 1023.) Intervenor-Defendant People of the State of Illinois filed their Cross Motion for Summary Judgment on July 24, 2018. (C 1058.)

On June 7, 2018, former Circuit Court Clerk Brown was given leave to intervene in this matter. (C 977.)

On July 26, 2018, former Circuit Clerk Brown filed her Cross Motion for Summary Judgment. (C 1133.) Circuit Clerk Martinez contends that Plaintiff's constitutional challenges are barred by the voluntary payment doctrine and fail on the merits. (C 1137.)

On March 2, 2020, the circuit court found that the voluntary payment doctrine did not defeat Plaintiff's constitutional claims and found Section 15-1504.1 of the Illinois Code of Civil Procedure ("Section 15-1504.1"), 735 ILCS 5/15-1504.1[2] and Sections 7.30 and 7.31 of the Illinois Housing Development Act, 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31,[3] to be facially unconstitutional. (C 1967.) The circuit court denied former Circuit Clerk Brown's summary judgment motion, granted summary judgment in favor of Plaintiffs, and entered a permanent injunction of these fee statutes. (C 1968.)

Former Circuit Clerk Brown filed a timely notice of appeal to this Court pursuant to Illinois Supreme Court Rules 302(a)(1) and 304(a). (C 1976.)

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[2] Section 15-1504.1 is entitled the Filing Fee for Foreclosure Prevention Program Fund, Foreclosure Prevention Program Graduated Fund and Abandoned Residential Property Municipality Relief Fund.

[3] Section 7.30 is entitled the Foreclosure Prevention Program and Section 7.31 is entitled the Abandoned Residential Property Municipality Relief Program.

STANDARD OF REVIEW

This Court reviews a circuit "court's decision as to cross-motions for summary judgment *de novo*." *City of Countryside v. City of Countryside Police Pension Board of Trustees*, 2018 IL App (1st) 171029, ¶34, *citing Pielet v. Pielet*, 2012 IL 112064, ¶30. In addition, as the issues for review in the instant appeal are legal in nature and involve statutory interpretation, the standard of review here, for this additional reason, is *de novo*. *See People v. Frederick*, 2015 IL App (2d) 140540, ¶ 21 (stating that this Court "review[s] issues of law, including issues of statutory interpretation, *de novo*"); *see also People v. Marshall*, 242 Ill. 2d 285, 292 (2011) (same).

ARGUMENT

Illinois courts have long recognized that if a matter can be decided on non-constitutional grounds, then the court should do so before considering constitutional issues. *See Coram v. State*, 2013 IL 113867, ¶56 (2013). Because Plaintiffs did not establish proof of either involuntary payment or an exception to the voluntary payment doctrine, such as duress, the voluntary payment doctrine bars all of Plaintiffs' claims for fees paid under Section 15-1504.1. Consequently, the decision of the circuit court should be reversed on this basis; the case should be remanded to the circuit court with instructions to dismiss the lawsuit; and this Court need not reach the merits of Plaintiffs' constitutional claims. Even if this Court were to reach the merits of those constitutional claims, they fail on the merits.

I. The Voluntary Payment Doctrine Bars Any Claims For Fees That Plaintiff Or The Putative Class Members Have Advanced.

It is axiomatic in Illinois that when "a putative class representative has no valid claim in his own right, he cannot bring such a claim on behalf of a putative class." *Bunting*

v. Progressive Corp., 348 Ill. App. 3d 575, 581 (1st Dist. 2004). That is exactly the case here, as the voluntary payment doctrine bars all of Plaintiffs' claims.[4]

Plaintiffs brought several constitutional challenges to Section 15-1504.1 as well as Sections 7.30 and 7.31 of the Illinois Housing Development Act. ("Sections 7.30 and 7.31") *See* 735 ILCS 5/15-1504.1 (2020); 20 ILCS 3805/7.30 (2020) and 20 ILCS 3805/7.31 (2020). Plaintiffs challenge Section 15-1504.1, Section 7.30 and Section 7.31 under the uniformity (article IX, section 2), free access to justice (article II, section 12), due process (article I, section 2), and equal protection (article I, section 2) clauses of the 1970 Illinois Constitution.

It is, however, unnecessary for this Court to decide any of those constitutional challenges as the voluntary payment doctrine bars Plaintiffs' claims to recover the fee.

A. The Voluntary Payment Doctrine

"The common-law voluntary payment doctrine embodies the ancient and 'universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal.'" *McIntosh v. Walgreen Boots All., Inc.*, 2019 IL 123626, ¶22, *citing Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541 (1908). "To avoid application of this long standing doctrine, it is necessary to

[4] It is axiomatic that if Plaintiffs' claims fail, then the plaintiff class' claims fail as well. *See, e.g., Turnipseed v. Brown*, 391 Ill. App. 3d 88 (1st Dist. 2009) (reversing the denial of the named plaintiffs' Takings Clause claims and dismissing their claims as well as those claims of plaintiff class members). In footnote 4 of its opinion, C 1725, the circuit court asked whether intervenor defendant was raising issues about class certification. In fact, former Circuit Clerk Brown merely posited the following unremarkable contention: if the voluntary payment doctrine bars Plaintiffs' constitutional claims, then the constitutional claims of the plaintiff class members fail as well. See *Turnipseed*, 391 Ill. App. 3d at 100-101.

show not only that the claim asserted was unlawful but also that the payment was not voluntary, such as where there was some necessity that amounted to compulsion and payment was made under the influence of that compulsion." *Id*. at ¶23, *citing King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 28, 30 (2003).

"The voluntary payment doctrine is a common law rule of general application." *Id*. at ¶25. "Common-law rights and remedies remain in full force in this state unless expressly repealed by the legislature or modified by court decision." *Id*. at ¶30. "In addition to compulsion or duress, other recognized exceptions to the voluntary payment doctrine include fraud or misrepresentation or mistake of fact." *Id*. at ¶24, *citing Vine Street Clinic v. Healthlink,* Inc., 222 Ill. 2d 276, 298 (2006).

Absent a protest, a plaintiff can establish the payment of a fee was "involuntary in only two situations: (1) if he or she lacked knowledge of the facts upon which to protest the taxes [or fees] at the time they were paid or (2) the taxpayer [or fee payor] paid the taxes [or fees] under duress." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004), *citing Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989).

B. The Circuit Court's Reliance on *Midwest* is Misplaced.

The First District Appellate Court, in *Midwest Medical Records Association v. Brown*, was asked to address whether the plaintiffs adequately plead involuntary payment in their complaint. *Midwest Med. Records Ass'n v. Brown*, 2018 IL App (1st) 163230 at ¶22. *Midwest* found that "[a]t a minimum, the circuit court should not have resolved the issue of duress as a matter of law on the pleadings, as it is generally a question of fact." *Id*. at ¶39.

The *Midwest* plaintiffs challenged the practice of charging a $60 fee for filing motions to reconsider interlocutory orders of the circuit court. Plaintiffs claimed they had paid the fees without protest, but under duress, because they would have lost the opportunity to contest the rulings otherwise.

The court in *Midwest* observed that "[d]uress is generally an issue of fact but may be decided on a motion to dismiss where the facts are not in dispute." *Id*. at ¶25. The court reasoned that Midwest "would have forfeited the ability to challenge the interlocutory orders if they had not paid the filing fees as the Clerk would have refused to accept their motions." *Id*. at ¶32. The court also found that Midwest "could not avail themselves of the judicial process without payment. Thus, Plaintiff's refusal to pay the fee would have immediately resulted in loss of access to the courts to challenge orders entered against them." *Id*. The First District found that "the trial court erred in holding that plaintiffs' claims were insufficient to plead duress and failed to show they were denied access to a service that was necessary to them." *Id*. at ¶39. Importantly, the court held that, "[a]t a minimum, the circuit court should not have resolved the issue of duress as a matter of law on the pleadings, as it is generally a question of fact." *Id*. *citing Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 850 (1st Dist. 1995)

The circuit court in the instant matter found that the duress exception applied and cited the First District's treatment of duress in *Midwest*. (C 1727.) The circuit court, however, overread the holding in *Midwest* -- a case which considered what a plaintiff needed to do to plead involuntary payment in a complaint -- to cover the instant case, where the issue is whether Plaintiff established facts to show either payment under protest or the duress exemption to the voluntary payment doctrine. *Midwest* offers no aid to Plaintiffs.

Nonetheless, the circuit court misreads the nuanced finding of the *Midwest* court where it states that, "the court concluded that duress existed because the litigants would have forfeited the ability to assert his legal rights if he had not paid the fee. *Midwest Medical Records* at ¶32." (C 1727.)

In fact, *Midwest* did not conclude that duress existed. The holding was far more nuanced. "Accordingly, we find that the trial court erred in holding that plaintiffs' claims were insufficient to plead duress and failed to show they were denied access to a service that was necessary to them." *Midwest*, 2018 IL App (1st) 163230 at ¶39. *Midwest* then held that "[a]t a minimum, the circuit court should not have resolved the issue of duress as a matter of law on the pleadings, as it is generally a question of fact. *Smith*, 276 Ill. App. 3d at 850." *Midwest*, 2018 IL App (1st) 163230 at ¶28. The matter was affirmed in part, reversed in part, and remanded.

Here, the circuit court commits the very error that the First District warned about in *Midwest* and found that "the duress exception applies for two independently sufficient reasons." (C 1727.) The first explicitly "follows the reasoning of *Midwest Medical Records*." *Id*. "The court finds that plaintiffs in this case would have been restricted from reasonably accessing the court system (*i.e.*, they would have lost a substantial right had the fee not been paid.)" *Id*. The circuit court appears to be resolving duress as a matter of law. That is wrong as a matter of law. While *Midwest* refrained from deciding duress as a matter of law based upon what is pled in the complaint, the circuit court below did precisely that.

The circuit court also cited comments during argument from the Assistant Attorney General that "in court-fee cases like this one, duress necessarily and inherently exists." *Id*. Such a comment is, of course, not proof but is, at most, imprecise phrasing during an

argument. That is not evidence of alleged duress that Plaintiffs sustained.[5] On its own, the first independent reason should fail.

For its second independent reason, the circuit court made a finding of fact. The circuit court relied on Mr. Walker's testimony during the February 13, 2020 evidentiary hearing. The circuit court notes that during the hearing, "Mr. Walker testified that he was anxious to get his foreclosure case on file and exercise his rights as mortgagee due to concerns of fraud and other complications to the underlying case." (C 1727.) "His understanding was that he was required to pay the fee in order to file the lawsuit. He was not aware that he could pay the fees under protest, and believed he was ineligible for a fee waiver." *Id*. "He further testified that if the Will County Circuit Clerk informed him that the filing fee was voluntary and not required, he would not have paid the fee." *Id*. The circuit court found this testimony sufficient to make a factual finding that Mr. Walker was under duress when he paid the fee.

But Mr. Walker also testified during that hearing that he never directed his attorneys to ask for a waiver of the fee, or for the court not to charge the fees. (R 136-137.) Mr. Walker testified that he did not ask his attorneys "whether they would pay any of the $476 in fees under protest" or "write on the check they paid to Will County paid under

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[5] The Texas Supreme Court has held that a writer's use of imprecise language did not establish malice in a business disparagement action. *See Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 174-175 (Tex. 2003). Here, the situation is one step removed from *Forbes* and even less favorable for Plaintiffs: the circuit court did not rely on language from the factual record but rather imprecise language in an oral argument from an attorney who did not advance the voluntary payment doctrine as a defense. The statement of the Assistant Attorney General is not evidence and does not establish duress.

protest." *Id*. Mr. Walker also said that he didn't believe his attorneys attempted to get some sort of waiver, even though he had not requested it. *Id*.

The totality of Mr. Walker's testimony provides no factual basis to establish duress. Where duress is "generally a question of fact," the court must require some factual showing of coercion. This was the only foreclosure action Mr. Walker ever filed. (C 1645.) Mr. Walker did not inquire about a waiver or ask not to be charged the fees. Mr. Walker did not take the opportunity to resist or protest. There is insufficient evidence to determine that Mr. Walker was under duress. Duress requires a showing of fraud or coercion, which has not been provided through Mr. Walker's testimony.

Additionally, instead of proving a filing under protest, Plaintiffs offered argument that the current electronic filing system in Illinois does not allow for payment under protest. (C 1588.) Circuit Clerk Chasteen correctly responded that this argument was meritless for two reasons: (1) electronic filing was not mandatory until 2018, years after Plaintiffs filed their filing fees in 2012 and 2015 and (2) even though it has no bearing on this case, Illinois' electronic filing system has a link under "Filings" for a section called "Comments to Court." (C 1588-1591.) In other words, even though this does not pertain to Plaintiffs' claims in the instant case, under the current electronic filing system, a litigant paying a fee can pay that fee under protest.

C. *McIntosh* Shows The Voluntary Payment Doctrine Remains In Place And Bars Any Claims For Fees In This Matter.

In *McIntosh*, the plaintiff McIntosh alleged that Walgreens violated Illinois' Consumer Fraud and Deceptive Business Practices Act (the "Consumer Fraud Act") because it collected a municipal tax that the City of Chicago (the "City") imposed on purchases of bottled water that were exempt from taxation under the City ordinance.

McIntosh paid the tax but did not do so under protest. The circuit court dismissed the lawsuit "on the ground that McIntosh's claim was precluded under the voluntary payment doctrine, which provides that money voluntarily paid with full knowledge of the facts cannot be recovered on the ground that the claim for payment was illegal." *McIntosh*, 2019 IL 123626 at ¶2. The appellate court reversed, holding that the voluntary payment doctrine did not bar McIntosh's claim because he had pleaded that the unlawful collection of the bottled water tax was a deceptive act under the Consumer Fraud Act. *Id*. This Court reversed the appellate court and affirmed the decision on the circuit court.

McIntosh argued before this court that that the voluntary payment doctrine should not apply to cases brought under the Consumer Fraud Act and that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine. This Court rejected that argument, stating:

> McIntosh's assertion that Consumer Fraud Act claims are exempt from the voluntary payment doctrine is in direct conflict with well-established principles that govern a legislative abrogation of a common-law rule. Common-law rights and remedies remain in full force in this state unless expressly repealed by the legislature or modified by court decision. *Rush University Medical Center v. Sessions*, 2012 IL 112906, ¶16. A legislative intent to alter or abrogate the common law must be plainly and clearly stated. *Id.* As a consequence, "Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least—rather than the most—alteration in the common law." *Id.*

McIntosh, 2019 IL 123626 at ¶30. This court concluded that *"[n]*othing in the language of the Consumer Fraud Act reflects a legislative intent to alter the voluntary payment doctrine or its applicability to claims brought under the statute. Therefore, it cannot be said that the Consumer Fraud Act abrogates the voluntary payment doctrine." *Id*. at ¶31.

Because the Consumer Fraud Act did not statutorily abrogate the voluntary payment doctrine, McIntosh had to show involuntary payment or some exception to the voluntary payment doctrine. McIntosh could not, as a matter of fact, show fraud or any other exception. And he did not pay the tax under protest. This Court reversed the appellate court and affirmed the decision of the circuit court dismissing the lawsuit against Walgreen's.

McIntosh shows that the voluntary payment doctrine is still the law of Illinois. And because Plaintiffs cannot show any statutory abrogation, any payment under protest or any evidence to establish an exception to the voluntary payment doctrine, application of the doctrine bars recovery of any fees in this matter.

Here, Plaintiffs did not pay the fee under protest or establish that any of the exceptions to the voluntary payment doctrine apply. Consequently, even if the fee violated some provision of the Illinois Constitution (it does not), Plaintiffs cannot recover anything they paid because they paid the fee voluntarily.

Because the voluntary payment doctrine bars all of Plaintiffs' claims here, they cannot represent a plaintiff class pursuing refund claims. *See Freund v. Avis Rent-A-Car System,, Inc.*, 114 Ill. 2d 73, 83-84 (1986) (holding that the trial court properly dismissed a putative class action for a refund of taxes assessed under the Automobile Renting Occupation and Use Tax Act because the named representatives did not pay the taxes involuntarily or under protest). *Freund* shows that Plaintiffs' class claims should be dismissed.

Illinois courts have routinely required plaintiffs seeking refunds to comply with the voluntary payment doctrine. *See, e.g., Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶l

(2013) (plaintiffs seeking a refund of retail occupation taxes paid such taxes under protest); *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 68 (2008) (plaintiffs seeking the return of a statutory surcharge on the adjusted gross receipts of several riverboat casinos paid the challenged taxes under protest); and *Lusinski v. Dominick's Finer Foods, Inc.*, 136 Ill. App. 3d 640 (1st Dist. 1985) (the voluntary payment doctrine barred action to recover allegedly incorrect amounts of use tax that defendant retailers charged on non-reimbursable store coupons).

II. The Circuit Court Improperly Invalidated The Fee Statutes As Unconstitutional Under The Illinois Constitution of 1970.

A. The Appropriate Level of Review For Plaintiffs' Constitutional Claims.

This court has recognized that "[w]hen the statute under consideration does not affect a fundamental constitutional right, the appropriate level of scrutiny is the rational-basis test." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 368 (1986). Plaintiffs' constitutional challenges to the Fee do not implicate a fundamental right so the rational-basis test is proper. *See Mellon v. Coffelt*, 313 Ill. App. 3d 619, 625 (2nd Dist. 2000).

In *Mellon*, the plaintiff challenged the constitutionality of Section 2-1009A of the Illinois Code of Civil Procedure, a provision which imposed a surcharge on the filing fee in civil litigation to fund court-annexed mandatory arbitration. *Id*. at 622. Just as Plaintiffs here have brought challenges under the uniformity (article IX section 2), access to justice (article II, section 2), due process (article I, section 2), and equal protection (article I, section 2) clauses of the 1970 Illinois Constitution, the plaintiff in *Mellon* brought the same challenges to Section 2-1009A. *Id*. at 623.

The Second District then attempted to determine the appropriate level of review to apply to the plaintiff s constitutional claims:

> The plaintiff appears to argue that the fee impedes the plaintiff s ability to litigate her guardianship proceeding and, therefore, should be subject to strict scrutiny. The premise of the plaintiff s argument is that a proceeding concerning the guardianship of a minor necessarily involves a fundamental right. It is in this faulty premise that the plaintiff s quest for the application of strict scrutiny fails.

Id. at 624. The court then stated that "we have found nothing in any constitutional jurisprudence to suggest that a proceeding involving the guardianship of a minor *per se* implicates a fundamental right." *Id*. at 625. Consequently, the court held that "the appropriate level of scrutiny is the rational relation test." *Id*., *citing Harris*, 111 Ill. 2d at 368.

If a proceeding involving the guardianship of a minor does not implicate a fundamental right, surely the Plaintiffs filing of mortgage foreclosure complaints surely does not implicate a fundamental right. While there is a fundamental right to access to the courts, there is not a fundamental right to such access without expense. *Crocker v. Finley,* 99 Ill. 2d 444, 454 (1984). *See also People v. Carter*, 377 Ill. App. 3d 91, 99 (1st Dist. 2007) (collecting cases).

Without citing any legal authority to establish the existence of a fundamental right, Plaintiffs merely assume that their underlying lawsuits somehow implicate a fundamental right. (C 798.) As a result, Plaintiffs erroneously argue that this Court should apply a "strict scrutiny" standard when considering their challenges to Section 15-1504. *Mellon,* however, shows that the appropriate level of review applicable to Plaintiffs' facial constitutional challenges Section 15-1504.1 is the rational basis test.

B. Legal Standards Regarding Facial Constitutional Challenges.

Plaintiffs' constitutional challenges to Section 15-1504.1 are all facial challenges. As a result, Plaintiffs must show that in all possible applications, the challenged provision

violates the Illinois Constitution. *See, e.g., Bartlow v. Costigan*, 2014 IL 115152, ¶18, n.2, *citing Davis v. Brown*, 221 Ill. 2d 435, 442-443 (2006) (noting that a facial constitutional challenge "requires a showing that under no circumstances would the challenged act be valid").

In *Davis*, the plaintiffs alleged that Section 4-510 of the Illinois Highway Code ("Section 4-510") was facially invalid under the takings clause of the federal constitution and the separation of powers and due process clauses of the Illinois Constitution. *Davis*, 221 Ill. 2d at 442. The Illinois Supreme Court denied plaintiffs' facial challenge because they could not establish that Section 4-510 violated these three constitutional provisions under all circumstances and possible interpretations of the statute. *Id*. at 453.

Under Illinois law, the "the challenging party has the burden to prove the statute is unconstitutional" and that "this burden is particularly heavy when, as here, a facial constitutional challenge is presented." *Bartlow*, 2014 IL 115152 at ¶18, citing *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶33 (2013). In this case, Plaintiffs cannot not meet this heavy burden.

C. Plaintiffs' Access To Justice And Due Process Claims Fail As A Matter Of Law.

Section 15-1504.1 does not unconstitutionally infringe on access to the courts of Illinois. Plaintiffs, however, argued that the Fee is "for use outside the judicial system [and] violate[s] the fundamental right of access to the courts protected under the Constitution of the State of Illinois as well as the Constitution of the United States of America." (C 798.) In advancing this argument in the circuit court, Plaintiffs relied heavily on the Supreme Court's decision in *Crocker* and *Boynton v. Kusper*, 112 Ill. 2d 356 (1986). However, Plaintiffs' reliance on *Crocker* and *Boynton* was misplaced.

Both *Crocker* and *Boynton* involve constitutional challenges to the Domestic Violence Shelter Act (formerly Ill. Rev. Stat. 1983, ch.40 par 2401 et. seq.). That Act directed circuit clerks to collect certain filing fees from county litigants who filed for divorce (*Crocker*) or secure a marriage license (*Boynton*). The Act then directed the fees to be transmitted to the State Treasurer for use in the Domestic Violence Shelter and Service Fund, a statewide program. The statute was invalidated as constitutionally infirm because the program was unrelated to the operation of the court system and, thus, violated the Free Access to Justice Clause. See Ill. Const. art. I, § 12 (1970).

Crocker is distinguishable not only from the instant lawsuit but from two cases that are actually controlling -- *Zamarron v. Pucinski*, 282 Ill. App. 3d 354, 359 (1st Dist. 1996) and *Rose v. Pucinski*, 321 Ill. App. 3d 92, 98 (1st Dist. 2001). *Zamarron* found that civil filing fees paid to the Circuit Clerk to finance the operation of the court system. As a result, Plaintiffs' claim that the County unlawfully spends such fees for general purposes is without merit. *See Id*. at 359-360. *Zamarron* noted that in *Crocker*, the Illinois Supreme Court held "that court filing fees may be imposed 'for purposes relating to the operation and maintenance of the courts.'" *Id., citing Crocker*, 99 Ill.2d at 454. *Zamarron* concluded that:

> The existence and proper functioning of the criminal courts benefit the overall administration of justice. Even assuming that criminal cases generate more costs than the civil cases, the plaintiffs have failed to offer statutory, constitutional or precedential authority which supports a finding that the scheme of funding the court system is unconstitutional. Notably, the concept of a unified court system embodied by our State constitution further weakens the plaintiffs' fragmented view of our system of justice . . . Our constitution, taken with the pronouncements of our supreme court in *Crocker*, lead us to the conclusion that the plaintiffs have failed to establish that a constitutional violation occurs when funds collected through the civil justice system are used to finance the court system as a whole.

Id. In this case, Plaintiffs urged the same fragmented view of the justice system that the appellate court squarely rejected in *Zamarron*.

Zamarron establishes that the Illinois and Federal Constitutions allow the County to use filing fees and court automation fees to finance the court system as a whole. *Id*. *Accord Mellon*, 313 Ill. App. 3d at 629-630 (the statutory surcharge on the filing fee in civil litigation to fund the court-annexed mandatory arbitration system did not violate the Free Access to Justice, Uniformity or Due Process Clauses); *Rose v. Pucinski*, 321 Ill. App. 3d 92 (1st Dist. 2001). In *Rose*, the Court observed that "[b]oth *Zamarron* and *Crocker* stand for the proposition that within the parameters of the Illinois Constitution, funds obtained via the civil justice system may be used to pay for expenses incurred by the court system as a whole." *Rose*, 321 Ill. App. 3d at 98.

In fact, *Crocker* itself recognized that "[s]tatutes imposing litigation taxes . . . do not necessarily offend our State constitution" and noted that in *Ali v. Danaher*, 47 Ill. 2d 231 (1970), it held that the statute establishing the county law-library tax did not violate the Illinois Constitution. This court found that the institution of a county law library furthered the justice system and did not amount to a "purchase of justice." *Id*. at 237-238.

Like *Ali*, *Mellon* is instructive here. In *Mellon*, the Second District noted that in a First District case, "a surcharge to a court filing fee used to fund alternative dispute resolution was upheld as constitutional." *Mellon*, 313 Ill. App. 3d at 630, citing *Wenger v. Finley*, 185 Ill. App. 3d 907 (1st Dist. 1989). *Mellon* noted that in *Wenger*, the appellate court:

> …deferred to the legislature, which had specifically found that there was a compelling need for the dispute resolution centers and that the centers could make a substantial contribution to the operation and maintenance of the courts (Ill. Rev. Stat. 1987, ch. 37, par. 851). The court held that the fee was

> imposed for a court- related purpose and that there was a reasonable, non-arbitrary relationship between the purpose of the fee, improving the administration of the courts, and the means adopted to achieve that purpose, imposing a $1 fee on parties initiating litigation.

Mellon, 313 Ill. App. 3d at 631, citing *Wenger*, 185 Ill. App. 3d at 914. The Second District followed *Wenger*, stating:

> [we] similarly defer to the legislature's judgment in determining that the [Mandatory Arbitration] System may operate to expedite cases within the court system. We accept this unrebutted rationale for the fee. We hold that, because the System functions as part of a unified court system, the legislature may impose a fee on any, or all, litigants in the circuit courts to fund the System.

Mellon, 313 Ill. App. 3d at 631.

Here, the charging of the Fee and distributions from the Fund collectively provide services to prevent foreclosure actions. Just as the mandatory arbitration system expedites the adjudication of cases within the court system and facilitates the functioning of that court system, the Fee and the Fund reduce the number of mortgage foreclosures clogging our courts. In this way, the Fee and Fund facilitate the smooth functioning of that court system. Section 15-1502.5, to be sure, requires mortgagees to notify, at least 30 days prior to filing a residential mortgage foreclosure action, the mortgagor of available housing counseling services. *See* 735 ILCS 5115-1502.5 (2018); *see also Aurora Loan Servs., LLC v. Pajor*, 2012 IL App (2d) 110899, ¶24 (stating that "[t]he purpose of Section 15-1502.5 is clear from its language: to encourage workouts for mortgages in default").

The payment of the Fee and distributions from the Fund encourage workouts of mortgages in default to obviate the need for foreclosure actions in the court system. This regulatory scheme is analogous to the statutory regime in *Wenger* and *Mellon*: the imposition of a fee to fund mandatory arbitration and work out disputes in lieu of litigation.

Thus, *Mellon* and *Wenger* show that *Crocker* and *Boynton* are inapposite and that Plaintiffs' Free Access to Justice and due process claims should have failed as a matter of law. The circuit court in this matter erred in finding that the Fee is too attenuated in its link to the court system. Here, the Fee is collected to provided services directly designed to prevent foreclosure actions and lessen their impact on the court system.

D. Plaintiffs' Separation Of Powers Claim Under Article II, Section I Of The Illinois Constitution Fails As A Matter Of Law.

The Illinois Housing Development Agency (the "IHDA") administers the Fund and this is an issue in this case. 20 ILCS 3805/7.30 (2020). The IHDA is part of the executive branch. *See* 20 ILCS 3805/4 (2020) (creating the IHDA). Plaintiffs argued below that 735 ILCS 5/15-1504.1 and 20 ILCS 3805/7.30 and 3805/7.31 require an arm of the Judicial Branch, the Clerk of the Circuit Court to "administer" a portion of the funds collected for use as part of the Foreclosure Prevention Program and thus violates separation of power principles. (C 805.)

This argument is legally untenable because it presumes, without authority, that circuit clerks administer the Housing Foreclosure Prevention Program and the Fund. Plaintiffs are mistaken. As Section 15-1504.l and 20 ILCS 3805/7.30 show, the IHDA administers this program and the Fund. Plaintiffs' separation of powers claim has no merit.

Moreover, as *Wenger* shows, even if circuit clerks did administer the program and the Fund, as Plaintiffs erroneously argue, such conduct would not violate the separation of powers clause in the Illinois Constitution. *See Wenger*, 185 Ill App. 3d at 916-920 (finding that the chief judge's administration of a dispute resolution fund did not violate the separation of powers provision of the Illinois Constitution). The circuit court in this case appropriately found that “Plaintiffs have failed to establish that the statutes violate Article

II, section 1," (C 1730), and this Court should not affirm the decision below on separation of powers grounds.

E. Plaintiffs' Uniformity Clause And Equal Protection Claims Fail As A Matter Of Law.

The due process and equal protection clauses in Article I, Section 2 of the Illinois Constitution guarantee that:

> No person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws.

Ill. Const. art. I, §2 (1970).

When assessing the constitutional validity of a legislative act, Illinois courts start with the presumption that the enactment is constitutional. *See Hope Clinic for Women, Ltd.*, 2013 IL 112673 at ¶33, *citing Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 351 (1999). The burden of rebutting this presumption is on the party challenging the statute and any doubts must be resolved in favor of finding the law valid. *Id. citing In re R.C.*, 195 Ill. 2d 291, 296 (2001). *See also People v. Inghram*, 118 Ill. 2d 140, 146 (1987).

Here, Plaintiffs have filed a facial challenge to Section 15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. The presumption of validity is hardest to overcome when a facial challenge is raised, because the challenger must establish that under no circumstances would the challenged act be valid. *Hope Clinic*, 2013 IL 112673 at ¶33, *citing Davis v. Brown*, 221 Ill. 2d 435, 442 (2006). A statute is not facially invalid if it may operate constitutionally under some conceivable set of facts. *Id*.

Under the Uniformity Clause, the rational basis test is again two-prong, a non-property tax or fee classification must: (1) be based on a real and substantial difference between the people taxed and those not taxed; and (2) bear some reasonable relationship

to the object of the legislation or to public policy. *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1107 (2nd Dist. 2010), *quoting Valstad v. Cipriano*, 357 Ill. App. 3d 905, 914 (4th Dist. 2005).

The Second District recognized that "[w]hen a party challenges a classification under the uniformity clause, the taxing body has the initial burden of producing a justification for the classification." *Friedman v. White*, 2015 IL App (2d) 140942, ¶31, *citing Jacobsen v. King*, 2012 IL App (2d) 110721, ¶15. "The inquiry is narrow, and we will uphold a taxing classification if a set of facts can be reasonably conceived that would sustain it." *Id*. Moreover, as *Friedman* observed;

> Plaintiffs appear to take the position that the State must begin with the legislative record in support of the classification. This approach is not supported by case law. Rather, the government does not have an evidentiary burden and does not have to produce facts in support of its justification for the statute. *Marks v. Vanderventer*, 2015 IL 116226, ¶23. "Instead, once the governmental entity has offered a reason for its classification, the plaintiff has the burden to show that the defendant's explanation is insufficient as a matter of law or unsupported by the facts." Id.; see also *Arangold Corp*., 204 Ill. 2d at 156 (the taxing body need only assert a justification for the classification, and it has no evidentiary burden in justifying the tax). Thus, while plaintiffs may rely on the legislative debates to argue that the State's position is insufficient or unsupported, this does not mean that the State is not free to articulate an independent rationale in the first place. Indeed, the appellate court has explicitly stated that the taxing entity may create an "after-the- fact justification" for the classification.

Here, Plaintiffs have failed to show that the Legislature's justification for the imposition of the Fee is either unsupported by facts or insufficient as a matter of law. Significantly, courts are "not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers." *Rajterowski*, 405 Ill. App. 3d

at 1107, *quoting Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 252 (1992). The classification in Section 15-1504.1 separates two groups: (1) those who file mortgage foreclosure actions and (2) those who do not. This is a real and substantive difference between the people taxed and the people not taxed. Thus, the first prong of the *Rajterowski* inquiry is satisfied.

The second question then is whether the fee bears is some relationship to the object of the legislation or the public policy and the chosen classifications. Such a relationship clearly exists. As previously discussed, the Fee and the Fund reduce the number of mortgage foreclosures and thereby facilitate the functioning of the court system. The purpose of Section 15-1502.5 is to encourage workouts for mortgages in default. *See Aurora Loan Servs., LLC*, 2012 IL App (2d) 110899 at ¶24.

The payment of the Fee and distributions from the Fund encourage workouts of mortgages in default that seek to avoid the need for foreclosure actions. This satisfies the second prong of the *Rajterowski* inquiry.

Plaintiffs also argue that Section 7.30 of the Housing Act, 20 ILCS 3805/7.30, separately violates the Uniformity Clause because it "creates a burden on those involved in the foreclosure process while, at the same time, providing a benefit to a limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality and giving the remainder on an equally non-uniform basis throughout Illinois." (C 797-798.) This argument is meritless. The fee is imposed *equally* upon all foreclosure filers statewide. Consequently, the imposition of the fee under Section 15-1504.1 cannot, as a matter of law, be local or special legislation. Plaintiffs seem instead

to challenge the distribution of the Fund under 20 ILCS 3805/7.30, suggesting that only Chicago benefits from the Fund. This is categorically false.

Rather, the Fee was established for reasons related to a legitimate State purpose: the desire to reduce foreclosures in the wake of a mortgage foreclosure crisis. The IDHA distributes funds throughout the *entire* State. While Chicago receives a substantial portion of the Fund, Chicago experienced a substantial portion of the foreclosure crisis in 2008. It is well within the General Assembly's discretion to distribute the Fund according to greatest need arising from this crisis. Such a statutory regime is fair, reasonable, and rationally related to a worthy governmental interest. Illinois courts have held that the special legislation clause in the Illinois Constitution does not prohibit all classifications that apply only to a limited area of the State. The reduction of mortgage foreclosure cases in the Illinois court system benefits all Illinois residents. Neither the Fee nor the Fund violate the Uniformity and Equal Protection Clause. The circuit court in this case errs when it accepts Plaintiffs' argument that the statutes impose a "burden of payment of a fee upon Plaintiffs' and others similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather that a specific class of class or classification., thereby creating an unreasonable and arbitrary classification and burden." (C 1735.) By contrast, the Fee is designed to directly impact the foreclosure crisis, and not generally for "property beautification and maintenance" as the court implies. *Id*.

F. The Cook County Clerk Adopts and Incorporates by Reference Pages 16 Through 28 of the People of the State of Illinois' Brief.

Intervenor Defendant People of the State of Illinois ex rel. Kwame Raoul, Attorney General of the State of Illinois, have filed their Appellant's Brief. In order to avoid unnecessary repetition, the Circuit Clerk Martinez hereby adopts and incorporates

by reference the argument section of the People's Brief that argues why Plaintiffs' constitutional claims fail. Plaintiffs join those arguments as if raised here.

CONCLUSION

For all the above-stated reasons, Intervenor Defendant respectfully requests that the Court reverse the circuit court's March 2, 2020 order and remand the matter to the circuit court with instructions to enter summary judgment for defendants.

Respectfully submitted,

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Nos. 126086, 126087, & 126088 (consol.)

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois
Plaintiffs-Appellees,	)	
v.	)	No. 12-CH-5275
ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	The Honorable JOHN C. ANDERSON, Judge Presiding
Defendant-Appellant,	)	
PEOPLE OF THE STATE OF ILLINOIS *ex rel*. KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN*, in her official capacity as the Clerk of the Circuit Court of Cook County,	)	
Intervenor-Defendant-Appellants.	)	

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

/s/ Paul L. Fangman
Assistant State's Attorney

KIMBERLY M. FOXX
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***IRIS MARTINEZ is the newly elected Clerk of the Circuit Court of Cook County.**

CERTIFICATE OF FILING AND SERVICE

I certify that on December 9, 2020, I electronically filed the foregoing Intervenor-Defendant-Appellant's Brief with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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APPENDIX

APPENDIX
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Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 4/12/2018 4:10 PM
Envelope: 876459
Clerk: JH

IN THE CIRCUIT COURT OF THE 12th
JUDICIAL CIRCUIT--WILL COUNTY, ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,	)	
Plaintiffs,	)	No. 12 CH 05275
v.	)	
ANDREA LYNN CHASTEEN, in Her Official Capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Reuben D. Walker and M. Steven Diamond, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers, and on Behalf of All Other Individuals or Institutions Who Are Responsible For Payment of Foreclosure Fees Paid in the State of Illinois, (collectively, "Plaintiffs") by their attorneys Laird M Ozmon, the Law Offices of Laird M. Ozmon, Ltd., David A. Novoselsky, Novoselsky Law Offices P.C., Jonathan P. Novoselsky, and Novoselsky Law, LLC, for their Complaint against Defendant Andrea Lynn Chasteen in Her Official Capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, state as follows:

INTRODUCTION

1. This action challenges the constitutionality of the legislation which imposed an add on fee on any litigant that files an action to foreclose a mortgage, 735 ILCS 5/15-1504.1, 20 ILCS

3805/7.30 and20 ILCS 3805/7.31 both as originally enacted and as later amended. This legislation imposes an obligation on litigants such as Plaintiffs and others similarly situated to bear the ultimate cost of a fee which is charged as a cost against Plaintiff for deposit into the Foreclosure Prevention Program Fund. That Fund is described by the statute as a special fund created and held in the State Treasury. The fees are to be divided between this Fund and a separate fund or collection that is to be held by the Clerk of the Circuit Court in each of the one hundred and two (102) counties within the State of Illinois, ostensibly for payment of certain entities within the State of Illinois as discussed in more detail, *infra*. Plaintiff Walker filed an action before the Circuit Court of the 12th Judicial Circuit—Will County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 12 CH 02010. At the time of filing, Plaintiff, through his counsel, paid various fee including a $50 charge assessed pursuant to the Foreclosure Prevention Program. Plaintiff Diamond filed an action before the Circuit Court Cook County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 15 CH 12027. At the time of filing, Plaintiff, through his counsel, paid various fees including charges assessed pursuant to the Foreclosure Prevention Program.

2. The fees collected pursuant to the Foreclosure Prevention Program Fund described in the first paragraph of this Complaint were also to be disbursed pursuant to the terms of the Illinois Housing Development Act, 20 ILCS § 3805/7.30 and 7.31. Pursuant to that enactment, 25% of monies in the fund are to be used to make "grants to approved counseling agencies that provide services in Illinois outside the City of Chicago;" 25% of the monies in the fund to be "distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for approved housing counseling, or to support foreclosure prevention counseling programs administered by the City of Chicago;" 25% of the monies in the fund to

make grants to "approved community-based organizations located outside of the City of Chicago;" and 25% of the monies in the fund used to make grants to "approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs."

3. In other words, 50% of the monies collected from litigants before the court system under this program are allocated to a single municipality, the City of Chicago.

4. Plaintiffs, both as citizens and taxpayers of the State of Illinois, seek (i) a declaratory judgment that the challenged legislation as listed above violates the Illinois Constitution and, (ii) an injunction to stop the use of these funds in both the operation, administration and regulation of the programs for which this fee is charged as in violation of the Illinois Constitution, as well as an injunction to bar the collection and use of these certain fees by the Clerks of the Circuit Courts of Illinois. Issue a Preliminary Injunction and order that the fees currently being collected under this enactment be placed into a fund to be held under the control and subject to further order of this Court. (See *Crocker v. Finley*, 99 Ill. 2d 444 (1984), which authorizes and approves this procedure.) The Court should thereafter enter a permanent injunction.

THE STATUTES IN ISSUE

Section 735 ILCS 5/15-1504.1 Filing fee for Foreclosure Prevention Program Fund.

(a) With respect to residential real estate, at the time of the filing of a foreclosure complaint, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee of $50 for deposit into the Foreclosure Prevention program Fund, a special fund created in the State treasury. The clerk shall remit the fee to the State Treasurer as provided in this Section to be expended for the purposes set forth in Section 7.30 of the Illinois Housing Development Act. All fees paid by plaintiffs to the clerk of the court as provided in this Section shall be

disbursed within 60 days after receipt by the clerk of the court as follows: (i) 98% to the State Treasurer for deposit into the Foreclosure Prevention Counseling program Fund, and (ii) 2% to the clerk of the court for administrative expenses related to implementation of this Section.

(b) Not later than March 1 of each year, the clerk of the court shall submit to the Illinois Housing Development Authority a report of the funds collected and remitted pursuant to this Section during the preceding year.

(Source: P.A. 96-1419, eff. 10-1-10.)

Section 20 ILCS 3805/7.30 Foreclosure Prevention Program

§ 7.30 Foreclosure Prevention Program.

(a) The Authority shall establish and administer a Foreclosure Prevention Program. The Authority shall use moneys in the Foreclosure Prevention Program Fund, and any other funds appropriated for this purpose, to make grants to (i) approved counseling agencies for approved housing counseling and (ii) approved community-based organizations for approved foreclosure prevention outreach programs. The Authority shall promulgate rules to implement this Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation, the Authority shall make grants from the Foreclosure Prevention Program Fund as follows:

(1) 25% of the moneys in the Fund shall be used to make grants to approved counseling agencies that provide services in Illinois outside the city of Chicago. Grants shall be based upon the number of foreclosures filed in an approved counseling agency's service area, the capacity of the agency to provide foreclosure counseling services, and any other factors that the Authority deems appropriate.

(2) 25% of the moneys in the Fund shall be distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for

approved housing counseling or to support foreclosure prevention counseling programs administered by the City of Chicago.

(3) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located outside of the City of Chicago for approved foreclosure prevention outreach programs.

(4) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs.

As used in this Section:

"Approved community-based organization" means a not-for-profit entity that provides educational and financial information to residents of a community through in-person contact. "Approved community-based organization" does not include a not-for-profit corporation or entity or person that provides legal representation or advice in a civil proceeding or court-sponsored mediation services, or a governmental agency.

"Approved foreclosure prevention outreach program" means a program developed by an approved community-based organization that includes in-person contact with residents to provide (i) pre-purchase and post-purchase home ownership counseling, (ii) education about the foreclosure process and the options of a mortgagor in a foreclosure proceeding, and (iii) programs developed by an approved community-based organization in conjunction with a State for federally chartered financial institution.

(c) As used in this Section, "approved counseling agencies" and "approved housing counseling" have the meanings ascribed to those terms in Section 15-1502.5 of the Code of Civil Procedure.

Section 20 ILCS 3805/7.31 Foreclosure Prevention Program

Sec. 7.31. Abandoned Residential Property Municipality Relief Program.

(a) The Authority shall establish and administer an Abandoned Residential Property Municipality Relief Program. The Authority shall use moneys in the Abandoned Residential Property Municipality Relief Fund, and any other funds appropriated for this purpose, to make grants to municipalities and to counties to assist with costs incurred by the municipality or county for: cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public; demolition of abandoned residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority under the Program. For purposes of this subsection (a), "pests" has the meaning ascribed to that term in subsection (c) of Section 11-20-8 of the Illinois Municipal Code. The Authority shall promulgate rules for the administration, operation, and maintenance of the Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Abandoned Residential Property Municipality Relief Fund derived from fees paid as specified in paragraph (1) of subsection (a-5) of Section 15-1504.1 and subsection (a) of Section 15-1507.1 of the Code of Civil Procedure as follows:

(1) 0% of the moneys in the Fund shall be used to ake grants to municipalities other than the City of Chicago in Cook County and to Cook County;

(2) 25% of the moneys in the Fund shall be used to make grants to the City of Chicago;

(3) 30% of the moneys in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry and Will Counties, and to those counties; and

(4) 15% of the moneys in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane. Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties. Grants distributed to the municipalities and counties shall be based on (i) areas of greatest need within these counties, which shall be determined, to the extent practicable, proportionately on the amount of fees paid to the respective clerks of the courts within these counties, and (ii) on any other factors that the Authority deems appropriate.

The percentages set forth in this subsection (b) shall be calculated after deduction of reimbursable administrative expenses incurred by the Authority, but shall not be greater than 4% of the annual appropriated amount.

(c) Where the jurisdiction of a municipality is included within more than one of the geographic areas set forth in this Section, the Authority may elect to fully fund the municipality from one of the relevant geographic areas.

5. During the course of this litigation the above legislation was twice amended. (See section 15–1504.1 of the Code and section 7.30 and 7-31 of the Act.)

6. The challenged legislation violates the Illinois Constitution and the duties and limitations it imposes on both the legislative and executive branches of government in multiple ways.

Illinois Constitution of 1970

a. Violation of the Separation of Powers Doctrine. The legislation violates the Separation of Powers doctrine of the Illinois Constitution of 1970 as it ostensibly requires an arm of the Judicial Branch of State Government (the Clerks of the Circuit Court of the more than one hundred Circuit Courts of the State of Illinois) to participate in and "administer" a program otherwise managed and controlled by the Executive Branch of

Government. Pursuant to the Separation of Powers Doctrine, the Legislative Branch cannot impose on the Judicial Branch the responsibility to fund, manage, or participate in the activities of the Executive Branch. As the legislation in question explicitly provides for this "mixture" of responsibility and funding between the Executive Branch and the Judicial Branch, it violates this long-standing prohibition and must be stricken by this Court.

b. Violation of the Prohibition of the Use of Fees Charged Litigants for Activities Outside of the Court System. The legislation violates the prohibition on the use of Court fees or fees charged litigants who file matters before the Judicial Branch of the State of Illinois for activities or purposes outside of the court system. The legislation imposes a fee charged litigants for activities which are labeled as and intended to be a Special Fund held and administered by the Treasurer of the State of Illinois for purposes that are explicitly outside of the court system and its maintenance and benefits. As such, the legislation violates the prohibition and must also be stricken by this Court.

c. Violation of the Due Process and Equal Protection Provisions of the Constitution of the State of Illinois. The Illinois Constitution of 1970 prohibits the use of fees charged for a service rendered an individual or entity where those fees are used for and become, by such use, a general tax to be used as a tax. Where a fee is imposed to be paid by a distinct and separate group of individuals within the State of Illinois for the benefit of a class of individuals or entities unrelated to those that pay the fee, this creates an impermissible burden on those charged with the fee that violates the protections guaranteed by the Illinois Constitution of 1970 and violates the protections accorded by the Constitution against the violation of the Due Process and Equal Protection rights of those paying the fee. The legislation in question provides for the creation of a Special Fund which is intended to be paid in part for private consultants and other individual and entities that are to counsel a group of individuals with a portion of that same fund to be retained explicitly for general revenue purposes. The fund, once created, remains within the treasury of the State of Illinois which, based on earlier admissions obtained from the State in other litigation, is kept in a single fund used to benefit general revenue purposes in addition to the explicit provision for general revenue use under this legislation. For this reason as well, the legislation violates the Illinois Constitution and should be stricken by this Court.

d. The Legislation Violates the Uniformity Clause of the Illinois Constitution of 1970. The Illinois Constitution of 1970 requires uniformity in any legislation which creates a tax or fee imposed on one group to the exclusion of all other similarly situated or otherwise obliged to support a certain fund or program. This legislation creates a burden on those involved in the foreclosure process while, at the same time, providing a benefit to a limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality and giving the remainder on an equally non-uniform basis throughout Illinois.

ALLEGATIONS

Plaintiffs

7. Plaintiffs, Reuben D. Walker and M. Steven Diamond (collectively, "Plaintiffs") are citizens and taxpayers of the State of Illinois with their principal residence in Will County and Cook County, Illinois respectively.

8. By virtue of foreclosure actions filed by Plaintiffs before the Circuit Courts of Will and Cook County and as the fees for such filings are taxed against Plaintiffs, Plaintiffs and others similarly situated have been required or will be required to bear the burden of paying the additional fee imposed by the legislation in question in this lawsuit.

Defendants

9. Defendant Andrea Lynn Chasteen is the duly elected Clerk of the Circuit Court of Will County. She is sued not in her individual capacity but solely in her official capacity as Clerk and as a representative of all other Clerks of the Court in each of the other counties of the State of Illinois. Her duties include, according to this legislation, the collection and disbursement of 2% of the $50 fee charged and collected under this statute.

Jurisdiction and Venue

10. The 1970 Constitution of the State of Illinois provides in Article II, Section 1 that the legislature may not impose upon or interfere with the powers of the Judicial Branch. This provision is generally referred to as the "Separation of Powers Doctrine." That provision states as follows: "The Legislative, Executive and Judicial Branches are separate. No branch shall exercise powers properly belonging to another."

11. The Provisions of the legislation before this Court in this case imposes upon the Judicial Branch through the Clerk of the Circuit Court who is a member of the Judicial Branch the obligation to collect and "administer" funds otherwise to be collected and used under the authority

the Executive Branch.

12. This provision violates the Separation of Powers Doctrine set forth in Article II, Section 1 of the Illinois Constitution of 1970. As such, it should be declared to be in violation of the 1970 Constitution and stricken by this Court with all funds previously collected or to be collected during the pendency of this lawsuit, and until final determination to be returned to Plaintiffs and others who paid or will pay this fee.

13. The challenged legislation violates the Uniformity Clause of the Illinois Constitution of 1970 as the fees collected are levied against litigants in all 102 counties of the State of Illinois but given for the benefit of a disproportionate number individuals residing not simply in a single county but within a single municipality, the City of Chicago. This treatment of the funds collected violates not simply the Uniformity Clause, but further provides an impermissible benefit to residents of a single municipality by use of funds collected within both the Judicial System of the State of Illinois and funds collected on behalf of an agency of the Government of the State of Illinois to benefit a municipality in further violation of the Illinois Constitution of 1970.

14. This lawsuit seeks, among other things, declarations that 735 ILCS 5/15-1504.1, 20 ILCS § 3805/7.30 and 7.31violate provisions of the Illinois Constitution and injunctions prohibiting the disbursement of public funds thereon pursuant to the equitable powers of this Court and pursuant to 735 ILCS 5/11-301, *et seq.*, which provides for actions for private citizens to enjoin and restrain the disbursement of public funds. This Court has jurisdiction over the subject matter under Article VI, §9 of the Illinois Constitution. This Court also has jurisdiction over the actual controversy between the parties pursuant to Section 2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701. This Court has personal jurisdiction over Defendants pursuant to the Code of Civil Procedure, 735 ILCS 2-209(a)(1), (b)(2), and (c).

15. Venue is proper under Sections 2-101 and 2-103 of the Code of Civil Procedure, 735 ILCS 5/2-101 and 2-103, because the acts from which this cause of action arose, or a substantial part thereof, took place in Will County, Illinois and because Defendant maintains her office in that venue.

Right To Declaratory And Injunctive Relief

16. There is an actual, existing controversy present in this action in that Defendants will be charged with enforcing, regulating and expending public funds on the unconstitutional laws at issue here.

17. Plaintiffs have clearly ascertainable rights in need of protection. Sections 11-301 and 11-303 of the Illinois Code of Civil Procedure, 735 ILCS 5/11-301, 5/11-303, as well as common-law principles, permit taxpayers to sue to enjoin the unlawful disbursement of public monies by public officials and the imposition of unlawful taxes.

18. Plaintiffs suffer and will continue to suffer irreparable harm as a result of the unlawful and unconstitutional actions set forth above. If left undeterred, there is no adequate remedy at law that will properly compensate Plaintiffs for the injuries they have sustained.

The Challenged Legislation

COUNT I

ILLINOIS CONSTITUTION – SEPARATION OF POWERS

19. Plaintiffs incorporate by reference the allegations of Paragraphs 1-18 above.

20. The "Separation of Powers" provision of the Illinois Constitution of 1970 prohibits the Legislature from enacting legislation that requires any of the three separate and equal branches of Illinois Government from performing activities within the exclusive province of the others. Under the Constitution, the expenditure and management of any funds or activities relating to general revenue rests exclusively within the Executive Branch of Government.

21. 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 require an arm of the Judicial Branch, the Clerk of the Circuit Court to "administer" a portion of the funds collected for use as part of the Foreclosure Prevention Program. As such, it violates the provisions of the Illinois Constitution prohibiting a breach of the Separation of Powers Doctrine, and must be stricken by this Court, and all fees collected or to be collected returned to the plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT II

ILLINOIS CONSTITUTION – EQUAL PROTECTION, DUE PROCESS, AND UNIFORMITY

22. Plaintiffs incorporate by reference the allegations of Paragraphs 1-21 above.

23. The Illinois Constitution of 1970, Article I, Section 2 protects Plaintiffs and others similarly situated their due process and equal protection rights as guaranteed in this provision, as well as unreasonable classification of non-property taxes or fees which fail to provide for a uniform burden of such fees or taxes, as provided for under Article IX, Section 2 of the Illinois Constitution of 1970.

24. 735 ILCS 5/15-1504.1 violates the provisions of the Illinois Constitution of 1970 as set out in the preceding paragraph as it imposes a burden of payment of a fee upon Plaintiffs and other similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden as prohibited by these Constitutional provisions.

25. 20 ILCS 3805/7.30 violates the provisions of the Illinois Constitution of 1970 as it allocates for payment to the residents of as well as the government of a single municipality rather than providing an arguable benefit uniformly to each of the citizens of the 102 counties of the State of Illinois.

26. This statute also violates the above prohibitions as providing for a partial use of the Special Fund created which allows part of the funds to be used explicitly as general revenue rather than ostensibly for the supposed Special Fund as created.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT III

ILLINOIS CONSITUTION – USE OF FEES FOR NON-COURT RELATED PURPOSES

27. Plaintiffs incorporate by reference the allegations of Paragraphs 1-26 above.

28. The Illinois Constitution of 1970, is interpreted by the Illinois Supreme Court, prohibits the imposition of a filing fee upon litigants where the fee is collected for a purpose that is not court–related and which does not remain exclusively within the control of and retained to finance the Court system only. (*Crocker v. Finley*, 99 Ill.2d 444 (1984)).

29. 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 explicitly provide for the imposition of a filing-fee for a non court-related purpose.

30. Because the filing-fee imposed pursuant to this statute is explicitly collected for a court non court-related purpose, and is not retained for the exclusive use and benefit of the Court system, it is in violation of the Illinois Constitution of 1970 as interpreted by the Illinois Supreme Court and must be stricken by this Court.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT IV

CREATION OF A PROTEST FUND

31. Plaintiffs incorporate by reference the allegations of Paragraphs 1-30 above.

32. Illinois law has provided for and approved by the Illinois Supreme Court permits this Court, when legislation creating a fee to be imposed on litigants, ordered that while this lawsuit is pending, all such fees collected or to be collected may be placed into a separate fund under the direction and control of this Court. (See *Crocker v. Finley*, 99 Ill.2d 444, 447-448, where the Illinois Supreme Court reviewed and later approved that the order entered by the trial court where that Court "ordered" the Clerk to segregate all [fees] collected from [litigants] who paid fees pursuant to the challenged statute. The order directed the Clerk to deposit the fees into interest-bearing accounts that [entitled] as a special fund to protest the legislation. The Court appointed a Trustee to supervise the fund, and it temporarily restrained the Clerk and his deputies from transferring the fees to the County Treasurer. (99 Ill. 2d at 448.)

33. Plaintiffs respectfully ask that this Court order the creation of such a fund, direct the Clerk of the Circuit Court of Will County and all other Clerks of Court located throughout the State of Illinois to deposit fees that have been collected and will be collected pursuant to 735 ILCS 5/15-1504.1 into a Protest Fund and placed into an interest-bearing account under the control of this Court and subject to the supervision of a Trustee or a custodian appointed by this Court to supervise and protect this fund pending the conclusion of this litigation.

WHEREFORE, Plaintiffs ask that this Court create a Protest Fund as set forth above and

appoint a Trustee or a custodian of its choosing at its earliest possible convenience.

Dated: April 12, 2018

Respectfully submitted,

REUBEN D. WALKER, et al, Plaintiffs

By: _____
David A. Novoselsky
One of Their Attorneys

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Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 7/23/2018 8:40 AM
Envelope: 1578373
Clerk: BC

IN THE CIRCUIT COURT OF THE 12th
JUDICIAL CIRCUIT--WILL COUNTY, ILLINOIS

REUBEN D. WALKER, an individual, on Behalf of Himself and for the Benefit of the Taxpayers and on Behalf of all other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,	)	
Plaintiffs,	)	
	)	No. 12 CH 05275
v.	)	
ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois,	)	
Defendants.	)	

AMENDED MOTION FOR SUMMARY JUDGMENT

Plaintiffs Reuben D. Walker and M. Steven Diamond, individually and on Behalf of Themselves and for the Benefit of the Taxpayers, and on Behalf of all other Individuals or Institutions Who Are Responsible For Payment of Foreclosure Fees Paid in the State of Illinois**,** (collectively, "Plaintiffs") by their attorneys Laird M. Ozmon, the Law Offices of Laird M. Ozmon, Ltd., David A. Novoselsky, and Novoselsky Law Offices, P.C., and seeking Summary Judgment in their favor and against Defendant Andrea Lynn Chasteen in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, state as follows:

INTRODUCTION

This action challenges the constitutionality of the legislation which imposed add on fees on any litigant that filed or files an action to foreclose a mortgage, 735 ILCS 5/15-1504.1, the Illinois Housing Development Act, 20 ILCS § 3805/7.30 and 30.1, both as originally enacted and

as later amended. This legislation imposes an obligation on litigants such as Plaintiffs and others similarly situated to unfairly bear the cost of this fee before they may to exercise their right of access to the Courts guaranteed to them by the Constitution of the United States and the Constitution of the State of Illinois.

The fee challenged as originally enacted in 2010 and challenged in its original form in this case in 2012 charged this fee as a cost against Plaintiffs for deposit into the Foreclosure Prevention Program Fund. That Fund is described by the statute as a special fund created and held in the State Treasury. Whenever a litigant files a foreclosure action in the Illinois court system, this fee is taxed as a cost and added on to the other costs. The fees paid under this statute are to be divided between this Fund and a separate fund or collection that is to be held by the Clerk of the Circuit Court in each of the one hundred and two (102) counties within the State of Illinois, ostensibly for payment of certain entities within the State of Illinois.

Plaintiff Walker filed an action before the Circuit Court of the 12th Judicial Circuit—Will County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 12 CH 02010. At the time of filing, Plaintiff through his counsel paid various fee including a $50 charge assessed pursuant to the Foreclosure Prevention Program. Plaintiff Diamond filed an action before the Circuit Court Cook County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 15 CH 12027. At the time of filing, Plaintiff through his counsel paid various fees including charges assessed pursuant to the Foreclosure Prevention Program.

The fees collected pursuant to the Foreclosure Prevention Program Fund were also to be disbursed pursuant to the terms of the Illinois Housing Development Act, 20 ILCS § 3805/7.30 and 30.1. Pursuant to that enactment, 25% of monies in the fund are to be used to make “grants to

approved counseling agencies that provide services in Illinois outside the City of Chicago;" 25% of the monies in the fund to be "distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for approved housing counseling, or to support foreclosure prevention counseling programs administered by the City of Chicago;" 25% of the monies in the fund to make grants to "approved community-based organizations located outside of the City of Chicago;" and 25% of the monies in the fund used to make grants to "approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs."

In other words, 50% of the monies collected from litigants as a cost they were required to bear when filing a foreclosure actions in any Circuit Court in all 102 Counties were allocated under this program for the benefit of a single municipality, the City of Chicago. During the course of this litigation the above legislation has been amended twice. As part of this fund diversion, much of the money is used exclusively within Chicago for property maintenance. (See section 15–1504.1 of the Code and section 7.30 and 7.31 of the Act, amended by Pub. Act 97–1164, §§ 5, 15 (eff. June 1, 2013); Pub. Act 98–20, §§ 5, 15 (eff. June 1, 2013).)

Plaintiffs, as both citizens and taxpayers of the State of Illinois, seek the entry of summary judgment in their favor and against Defendants as there is no issue of material fact in dispute as to the issues in this matter that will prevent this Court from finding that they have a clear right at law to have the Court enter an order granting (i) a declaratory judgment stating that the challenged legislation violates the United States Constitution and the Illinois Constitution (ii) an injunction to stop the use of these funds in both the operation, administration and regulation of the programs for which this fee is charged as in violation of the United States Constitution and the Illinois Constitution Illinois Constitution, and, (iii) a Preliminary Injunction and order that the fees currently being collected under this enactment be placed into a fund to be held under the control

and subject to further order of this Court. (See *Crocker v. Finley*, 99 Ill. 2d 444 (1984), which authorizes and approves this procedure.) The Court should thereafter enter a permanent injunction.

ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT.

The challenged legislation violates the Illinois Constitution[1] and the duties and limitations it imposes on both the legislative and executive branches of government in multiple ways. Those violations are detailed below before addressing the relevant case authorities.

Illinois Constitution of 1970

a. Violation of the Separation of Powers Doctrine.[2] The legislation violates the Separation of Powers doctrine of the Illinois Constitution of 1970 as it ostensibly requires an arm of the Judicial Branch of State Government (the Clerks of the Circuit Court of the more than one hundred Circuit Courts of the State of Illinois) to participate in and "administer" a program otherwise managed and controlled by the Executive Branch of Government. Pursuant to the Separation of Powers Doctrine, the Legislative Branch cannot impose on the Judicial Branch the responsibility to fund, manage, or participate in the activities of the Executive Branch.

b. Violation of the Prohibition of the Use of Fees Charged Litigants for Activities Outside of the Court System. The legislation violates the prohibition on the use of Court fees or fees charged litigants who file matters before the Judicial Branch of the State of Illinois for activities or purposes outside of the court system as established by the decisions of the Supreme Court of the State of Illinois. The legislation imposes a fee charged litigants for activities which are labeled as and intended to be a Special Fund held and administered by the Treasurer of the State of Illinois for purposes that are explicitly outside of the court system and its maintenance and

[1] The principles of law Plaintiffs rely on to support their Motion rests on both the Constitution of the State of Illinois as well as the parallel provisions addressing the right of access to the Courts in the Constitution of the United States. For the sake of brevity, reference in the arguments in this Motion will treat these parallel provisions as functionally identical and will generally refer solely to the language of the Constitution of the State of Illinois.
[2] Constitution of the State of Illinois, Article II, Section 1.

benefits.

c. Violation of the Due Process and Equal Protection Provisions of the Constitution of the State of Illinois.[3] The Illinois Constitution of 1970 prohibits the use of fees charged for a service rendered an individual or entity where those fees are used for and become, by such use, a general tax to be used as a tax. Where a fee is imposed to be paid by a distinct and separate group of individuals within the State of Illinois for the benefit of a class of individuals or entities unrelated to those that pay the fee, this creates an impermissible burden on those charged with the fee that violates the protections guaranteed by the Illinois Constitution of 1970 and violates the protections accorded by the Constitution against the violation of the Due Process and Equal Protection rights of those paying the fee. The legislation in question provides for the creation of a Special Fund which is intended to be paid in part for private consultants and other individual and entities that are to counsel a group of individuals with a portion of that same fund to be retained explicitly for general revenue purposes. The fund, once created, remains within the treasury of the State of Illinois which, based on earlier admissions obtained from the State in other litigation, is kept in a single fund used to benefit general revenue purposes in addition to the explicit provision for general revenue use under this legislation. For this reason, as well, the legislation violates the Illinois Constitution and should be stricken by this Court.

d. The Legislation Violates the Uniformity Clause of the Illinois Constitution of 1970.[4] The Illinois Constitution of 1970 requires uniformity in any legislation which creates a tax or fee imposed on one group to the exclusion of all other similarly situated or otherwise obliged to support a certain fund or program. This legislation creates a burden on those involved in the foreclosure process while, at the same time, providing a benefit to a limited and select group of

[3] Constitution of the State of Illinois, Article I, Section 2.
[4] Constitution of the State of Illinois, Article IX, Section 2.

individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality and giving the remainder on an equally non-uniform basis throughout Illinois.

I.
THE STATUTES IN QUESTION, WHICH ADDRESS A FUNDAMENTAL CONSTITUTIONAL RIGHT, MUST BE EXAMINED UNDER A STRICT SCRUTINY STANDARD AND, UNDER THAT STANDARD, IMPOSE AN IMPROPER BURDEN ON PLAINTIFFS AND OTHER SIMILARLY-SITUATED LITIGANTS BEFORE THE ILLINOIS COURTS.

There is a substantial and critical difference between a challenge to a statute that does not implicate a fundamental right and a challenge to a statute that addresses a fundamental constitutionally protected right—such as the carefully guarded fundamental right of access to the court system as in the enactments at issue in this case. This distinction was discussed at length in *Crocker v. Finley*, 99 Ill.2d 444 (1984) and recognized and analyzed further in the decision of that Court in *Arangold v. Zehnder*, 204 Ill. 2d 142, 156 (2003). Under the exacting standard of strict scrutiny, these statutes should be stricken by this Court.

The statutes at issue before this Court, 735 ILCS 5/15-1504.1 and 20 ILCS 3805/7.30 and 31, admittedly address a fundamental constitutionally protected right as they created a "fee" imposed on litigants. That "fee" (in fact, a tax) was to be used outside of the judicial system for, *inter alia*, payment to various private groups to provide "credit counseling" and to assist some municipalities in maintaining abandoned housing—including paying to cut weeds. As such, and as this Court held in *Crocker*, the creation of this fee/tax for use outside the judicial system violated the fundamental right of access to the courts protected under the Constitution of the State of Illinois as well as the Constitution of the United States of America. As the same enactments devote much of the fees collected to fund 'clean up' and general maintenance for abandoned property located within one or more municipal entities, painting fences, cutting grass, and the like, these fees are patently a prohibited as a fee/tax for use outside the judicial system and are not permitted, no

matter how laudable the intentions of the drafters.

The Court in the decision in *Arangold v. Zehnder*, 204 Ill. 2d 142 (2003), stated:

> "In *Crocker* and *Boynton*, [112 Ill.2d 356 (1986)] this court found the relationship between dissolution actions and marriage licensed on one hand and domestic violence programs on the other to be too remote to permit the tax to stand. The main thrust of the *Crocker* decision was its holding that the tax ***unconstitutionally burdened litigants' access to the courts***.
>
> * * *
>
> In addition, we note that the activities being taxed in *Crocker* and *Boynton* ***were constitutionally protected unlike Arangold's activities here.***" (204 Ill.2d at 150-151, emphasis supplied.)

The Court in *Arangold* was quite specific when it noted that the fundamental rights raised in *Crocker* and *Boynton* addressed statutes that "failed to satisfy the heightened strict scrutiny standard of review." (204 Ill.2d at 150.)

Therefore, the standard of review and the burden placed on the taxing body does not allow for review under the "lesser rational-relationship test" as the Court pointed out in succinct fashion in *Boynton*:

> "Here the imposition of the special tax upon the issuance of a marriage license imposes a *direct* impediment to the exercise of the fundamental right to marry and ***must be subjected to the heightened test of strict scrutiny and not to the lesser rational-relation test***. When a statutory classification significantly interferes with the exercise of a fundamental right, ***it cannot be upheld unless it is supported by sufficiently important State interests and is closely tailored to effectuate only those interests***. (*Zablocki v. Redhail* (1978), 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618, 631.) The classification in this case does not meet the strict-scrutiny test." (112 Ill.2d at 369, emphasis in original text and as supplied.)

The Illinois Supreme Court has applied the strict scrutiny standard as appropriate for this Court to apply in this case, and has further stated that Courts should carefully scrutinize legislative enactments in order to "protect the rights of citizens against acts beyond the scope of the legislature's power." (*Lulay v. Lulay*, 193 Ill.2d 455, 469 (2000).)

In the *Lulay* decision, the Court discussed the distinction between statutes that place the

burden on the party challenging the statute, and which requires the Court to consider the statute under a less stringent "rational basis test," and those statutes which impinge or potentially impinge on a fundamental constitutional right:

> "A court generally applies the rational basis test in examining the constitutionality of a statute under substantive due process. See *Tully*, 171 Ill.2d at 304, 215 Ill.Dec. 646, 664 N.E.2d 43. To satisfy this test, a statute need only bear a rational relation to a legitimate state purpose, and must be neither arbitrary nor discriminatory. *Tully*, 171 Ill.2d at 304, 215 Ill.Dec. 646, 664 N.E.2d 43. ***If, however, challenged legislation impinges upon a fundamental constitutional right, the court will examine the statute under the strict scrutiny standard***. *Tully*, 171 Ill.2d at 304, 215 Ill.Dec. 646, 664 N.E.2d 43. To withstand the strict scrutiny standard, a statute ***must serve a compelling state interest, and be narrowly tailored to serve the compelling interest, i.e., the legislature must use the least restrictive means to serve the compelling interest***. See *Tully*, 171 Ill.2d at 304–05, 215 Ill.Dec. 646, 664 N.E.2d 43;*People v. R.G.*,131 Ill.2d 328, 342, 137 Ill.Dec. 588, 546 N.E.2d 533 (1989). Accordingly, we must first determine whether section 607(b)(1) impinges upon a fundamental constitutional right such that we must review the statute under the strict scrutiny test." (193 Ill.2d at 470, emphasis supplied.)

Plaintiffs respectfully submit that Defendants cannot sustain their burden here and the Motion should be granted.

A litigant's access to the court system, at issue in the present appeal, is a fundamental right subject to the strict scrutiny test as noted in *Crocker*. In that decision, the Court recognized that while litigants are not guaranteed a right of access to the courts ***without*** charge, any fee imposed on a litigant is subject to the restriction that it ***must*** be used ***exclusively*** within and for the purpose of maintaining the court system itself. The *Crocker* principle recognizing that a litigant's access to the courts is a fundamental right protected by both the Illinois Constitution and the Constitution of the United States has also been recognized by the Supreme Court of the United States. . (See, for example, *Bounds v. Smith*, 430 U.S. 817, 825 (1977).)

The protection the Supreme Court of the United States has accorded this right has been recognized by our Supreme Court on various occasion, including the decision in *Tedder v.*

Fairman, 92 Ill.2d 216 (1982), citing the *Bounds* decision and tracing the history of this fundamental right as "founded on the due process clause" in other decisions of the Supreme Court of the United States. The Illinois Supreme Court said this right was "first addressed by the Supreme Court in *Ex Parte Holl*, (1941), 312 U.S. 546 85 L. Ed. 1034, 61 S. Ct. 640." (92 Ill.2d at 222.)

The importance of this right, and the importance of the need to extend this fundamental right to civil litigants as well as those within the criminal court system with reference to the ever-growing burden of 'add on' and other fees imposed on litigants was recognized by the Illinois Supreme Court within the last few years when it created what was later adopted by the General Assembly as the "Access to Justice Act." That Act, and the recommendations the Supreme Court asked be considered and then implemented, came to fruition only within the last several months and is now addressed at length in support of the present motion.

The issue of the burden created by these and other increased fees was initially addressed by the Court in adopting Rule 10-100. On August 15, 2013, the General Assembly's adoption of the Court's initiative was signed by the Governor and enacted into law effective on that date.

The intent of this legislation was to further access to the court system by civil litigants by the creation of a "civil Gideon" program to remove barriers to civil litigants seeking access to the court system. Included within the Court's initiative to remove these barriers was recognition that a review of the burden imposed by mandatory court fees was necessary.

The need to address this burden was encompassed in the adopted legislation as 705 ILCS 95/25. That enactment, entitled "Statutory Court Fee Task Force," created a task force to "conduct a thorough review of the various statutory fees imposed or assessed on criminal defendants ***and civil litigants***." (Emphasis supplied.)

In June of 2016, the Report of the Task Force was published. (Attached to this Motion as

Exhibit A.) The Task Force looked at much legislation that had multiplied 'add on' fees and assessments imposed on litigants at a level that was far greater within the same time frame than inflation or the increase of the cost of living.

The Report the Task Force published last year is too lengthy to quote in detail in this Motion. The heart of that Report was clear and direct as Plaintiffs submit it addressed the precise type of legislation now at issue in this case.

> "Today, Illinois is facing a serious threat to this fundamental right of equal access to justice. Skyrocketing filing fees in civil cases and a host of fees, costs, and fines in criminal and traffic proceedings are pricing our most vulnerable citizens out of full participation in the court system and imposing excessive financial burdens on all who do participate. This undermines the legitimacy of the court system, both actual and perceived, and its capacity to disseminate fair and equal justice to all.
>
> Historically, court fees were intended simply to offset a portion of the cost of the services being provided. Recognizing that the court system benefitted *all* members of society, a majority of funding came from taxpayer revenue. Today, civil litigants and defendants in criminal and traffic proceedings still pay fees designed to cover the costs associated with administering their cases. However, they are now required to cover many additional costs, including, but not limited to, those associated with court security, law libraries, and children's waiting rooms, ***as well as programs completely unrelated to the administration of justice like roadside memorials and after-school programs.*** Over the years, more and more costs have been passed on to court patrons through an elaborate web of fees and fines that are next to impossible to decipher and severely lacking in uniformity and transparency." (Report, p.7, emphasis supplied and in original.)

The Report's findings and recommendations were summarized and widely reported throughout Illinois including the December 2016 issue of the *Illinois Bar Journal*, which is attached as Exhibit B to this Motion and noted as follows:

> "In response to these findings, the task force adopted five core principles to guide its recommendations. First, courts should be substantially funded from the state's general revenue, with reasonable assessments designed to offset the cost of the courts. Second, when assessments become a barrier to access to the courts, they should be waived for litigants such as the indigent and the working poor. ***Third, assessments should be simple and uniformly applied. Fourth, they should relate directly to funding the court system; special purpose assessments should only be applied to court proceedings related to that purpose.*** Finally, the General Assembly should periodically review assessments to consider adjusting or

repealing them." (Emphasis supplied.)

In light of the above findings, made after the Illinois Supreme Court considered the order this Court's predecessor entered on the fee office issue only, the impropriety of this fund and the plethora of non-court related programs this legislation intended these court access fees to satisfy may be seen by this Court through how this fund was described to the Illinois Supreme Court in this case by the 'end users' of these funds in briefs before that Court. There admitted purpose for which the fees taken from Plaintiffs and other litigants ism as stated above, anything ***but*** related to the courts or support of only the courts. However laudable its purpose, it should be supported by general revenue funds, not by fees charged "court patrons."

II.
THE "SAVE OUR NEIGHBORS ACT" WHICH CREATED THE STATUTES AT ISSUE, SHOWS THAT THESE ENACTMENTS ARE FOR AN IMPROPER, NON-COURT USE.

At pages 7 through 10 of the *Amicus* Brief,[5] Defendants provided the Supreme Court in this case when it was before that Court with what they believed was a necessary "understanding of the statutory scheme at issue" in this legislation. According to Defendants, the "statutory scheme at issue" involves fees taken from litigants that are given to the Illinois Housing Development Authority ("IHDA"). That ***non-governmental*** agency[6] then takes these court fees and adds them to "other appropriated funds" to make "grants to approved counseling agencies for ***housing***

[5] The briefs submitted by the State and various *Amici* before the Supreme Court are far too voluminous to even be attached as exhibits to this Motion. They will be provided upon request to the Court and opposing counsel, although the latter was severed with them when they were filed. The quotes and pages of the quotations from those briefs are set out, *infra*.

[6] The Foreclosure Prevention Program is administered by IHDA, which distributes grants generated by the Foreclosure Prevention Program Fee to HUD-certified housing counseling agencies and not-for-profit community based organizations throughout the State of Illinois. *See* http://www.ihda.org/partner/ForeclosurePreventionPartners.htm. The said grants are to be used for, ***among other things***, foreclosure prevention outreach programs, including one-on-one and group pre-purchase and post-purchase housing counseling services, foreclosure prevention outreach programs, operational expenses and counselor and employee training. (*See* Amber Lockwood, *IHDA Foreclosure Prevention Initiatives,* (April 23, 2013), *available at* http://www.ilgovemorsconference.org/wp-content/uploads/2014/02/Foreclosure-Prevention-Initatives-Amber-Lockwood.pdf)

counseling and community organizations for foreclosure prevention outreach programs." (Br. p. 8, emphasis supplied)[7]

The description of this statutory scheme continued by acknowledging that the General Assembly also imposed these fees on litigants who file foreclosure actions to support the "Abandoned Residential Property Municipality Relief Fund." (Br. p. 9) The Abandoned Residential Property Municipality Relief Fund, (20 ILCS 3085/7.31) allows these court fees to be given to various municipal entities for the following purpose:

> "cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public; demolition of abandoned residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority under the Program."

In light of the decisions of the Court in *Crocker* and *Boynton* on the issue of whether court fees ***could*** be taken for use outside the court system, it is respectfully submitted that these enactments go far beyond even a possible suggestion that these funds are being used in support of the court system. The Court should strike this legislation under the strict scrutiny test or even using the lesser rational and reasonable basis test, as these programs are patently general welfare programs unrelated to the court system or its needs.

The Task Force Report no doubt had this legislation in mind when it found that:

> "Today, [while] civil litigants *** still pay fees designed to cover the costs associated with administering their cases *** they are now required to cover many

[7] Although Defendants argued before this Court's predecessor that the fees taxed against litigants under this legislation was based on an intent to lessen the burden on the court system created by the number of foreclosure filings, as Defendants conceded in their Supreme Court Brief—quite accurately—the fees in question were not even arguably restricted to foreclosure counseling. Instead, as set out at page 8 of Defendants' Brief, much of the fees go to approved counseling agencies for "housing counseling" with organizations that provide "foreclosure prevention outreach programs" considered as part of a separate category with very little restriction on how much of the funds collected go to which form of program.

> additional costs, including, but not limited to, *** programs completely unrelated to the administration of justice like roadside memorials and after-school programs. Over the years, more and more costs have been passed on to court patrons through an elaborate web of fees and fines that are next to impossible to decipher and severely lacking in uniformity and transparency"

Plaintiffs respectfully submit that this Court should enter summary judgment to strike the burden of this clearly improper imposition fees on Plaintiffs and other "court patrons."

III.
THE LEGISLATION ON ITS FACE VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The "Separation of Powers" provision of the Illinois Constitution of 1970 prohibits the Legislature from enacting legislation that requires any of the three separate and equal branches of Illinois Government from performing activities within the exclusive province of the others. Under the Constitution, the expenditure and management of any funds or activities relating to general revenue rests exclusively within the Executive Branch of Government.

735 ILCS 5/15-1504.1 and 20 ILCS 3805/7.30 and 3805/7.31 require an arm of the Judicial Branch, the Clerk of the Circuit Court to "administer" a portion of the funds collected for use as part of the Foreclosure Prevention Program. As such, it violates the provisions of the Illinois Constitution prohibiting a breach of the Separation of Powers Doctrine, and must be stricken by this Court, and all fees collected or to be collected returned to the plaintiffs.

IV.
CREATION OF A PROTEST FUND.

Illinois law has provided for and approved by the Illinois Supreme Court permits this Court, when legislation creating a fee to be imposed on litigants, ordered that while this lawsuit is pending, all such fees collected or to be collected may be placed into a separate fund under the direction and control of this Court. (See *Crocker v. Finley*, 99 Ill.2d 444, 447-448, where the Illinois Supreme Court reviewed and later approved that the order entered by the trial court where

that Court "ordered" the Clerk to segregate all [fees] collected from [litigants] who paid fees pursuant to the challenged statute. The order directed the Clerk to deposit the fees into interest-bearing accounts that [entitled] as a special fund to protest the legislation. The Court appointed a Trustee to supervise the fund, and it temporarily restrained the Clerk and his deputies from transferring the fees to the County Treasurer. (99 Ill. 2d at 448.)

Plaintiffs respectfully ask that this Court order the creation of such a fund, direct the Clerk of the Circuit Court of Will County and all other Clerks of Court located throughout the State of Illinois to deposit fees that have been collected and will be collected pursuant to 735 ILCS 5/15-1504.1 into a Protest Fund and placed into an interest-bearing account under the control of this Court and subject to the supervision of a Trustee or a custodian appointed by this Court to supervise and protect this fund pending the conclusion of this litigation.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30, and 20 ILCS 3805/7.31 are in violation of the Illinois Constitution;

A declaratory judgment that any expenditures of State funds collected pursuant to these statutes must be returned to Plaintiffs;

A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to these statutes;

An order to return all fees previously collected pursuant to these statutes to Plaintiffs;

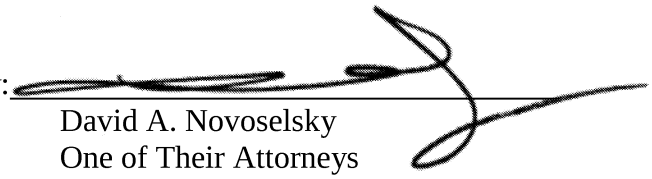
Order the creation of a protest fund:

Grant such other and further relief as this Court deems necessary and proper.

Dated: July 23, 2018

Respectfully submitted,

REUBEN D. WALKER, et al, Plaintiffs

By: 
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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois, Plaintiff, vs. ANDREA LYNN CHASTEEN, in her Official Capacity as Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, Defendants. _____ People of the State of Illinois and Dorothy Brown, Clerk of the Circuit Court of Cook, County, Intervenors.	Case No. 12 CH 5275 Judge John C. Anderson

INTERVENOR PEOPLE OF THE STATE OF ILLINOIS'
CROSS MOTION FOR SUMMARY JUDGMENT

Intervenor, the People of the State of Illinois ("Intervenor"), by its attorney, Lisa Madigan, the Illinois Attorney General, files its Cross Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005(b).

1. Plaintiffs challenge three statutes, the first of which is a section of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1504.1, setting forth Fees for filing any mortgage foreclosure action as to residential real estate, and the second and third of which, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31, provide for the distribution of grants from the

funds to which those fees are allocated to housing counseling and foreclosure prevention programs, respectively. (*See* 2d Am. Comp., attached as Exhibit A).

2. Plaintiffs' claim in Count I is brought under the Separation of Powers Clause of the Illinois Constitution. Summary judgment should be awarded to Intervenor on Count I because there is no genuine issue of material fact in dispute on the issue of whether the challenged statutes require the Clerk of the Circuit Court (a member of the Judicial Branch) to infringe on the Executive Branch's authority. The statutes do not.

3. Counts II and III consist of claims under the Illinois Constitution's Equal Protection, Due Process, Uniformity, and Free Access Clauses. Because these claims do not implicate fundamental rights, the rational basis standard applies. *See Mellon v. Coffelt*, 313 Ill. App. 3d 619, 625 (2d Dist. 2000).

4. There is a rational basis to support the imposition of filing fees under 735 ILCS 5/15-1504.1, and the corresponding distribution of those Fees under 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31.

5. The Fees collected upon the filing of a mortgage foreclosure compliant directly relate not only to Plaintiffs' underlying litigation (foreclosure actions) but also to the operation and maintenance of the court system. The Fees provide services designed to help prevent foreclosure actions and assist municipalities in dealing with abandoned properties.

6. These are rational bases sufficient to support the constitutionality of the challenged statutes and, therefore, summary judgment should be awarded to Intervenor on Counts II and III.

7. Finally, summary judgment also should be awarded to Intervenor on Count IV because a "protest fund" is unnecessary, as none of the challenged statutes are

unconstitutional. In the end, the Fees charged for the filing of a mortgage foreclosure complaint, and the legislative mandates concerning their distribution, are constitutional.

8. Intervenor files a corresponding Memorandum of Law in Support of this Motion, along with a Statement of Undisputed Material Facts. Both are incorporated herein by reference.

Wherefore, for the foregoing reasons, along with those stated in the accompanying Memorandum of Law in Support of Cross Motion for Summary Judgment, Intervenor, People of the State of Illinois, requests that this Court grant summary judgment in its favor and against Plaintiffs on all claims.

Respectfully submitted,

_/s/*Sunil Bhave*_____

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois, Plaintiffs, vs. ANDREA LYNN CHASTEEN, in her Official Capacity as Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, Defendants. _____ People of the State of Illinois and Dorothy Brown, Clerk of the Circuit Court of Cook, County, Intervenors.	Case No. 12 CH 5275 Judge John C. Anderson

INTERVENOR PEOPLE OF THE STATE OF ILLINOIS' MEMORANDUM IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

Intervenor, the People of the State of Illinois ("Intervenor"), by its attorney, Lisa Madigan, the Illinois Attorney General, submits its Memorandum in Support of its Cross Motion for Summary Judgment.

BACKGROUND

Plaintiffs challenge three statutes, the first of which is a section of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1504.1, setting forth Fees for filing any mortgage foreclosure action as to residential real estate, and the second and third of which,

20 ILCS 3805/7.30 and 20 ILCS 3805/7.31, provide for the distribution of grants from the funds to which those Fees are allocated to housing counseling and foreclosure prevention programs, respectively. (*See* 2d Am. Comp., attached as Exhibit A).

In the wake of the mortgage foreclosure crisis that plagued Illinois and, in particular, Chicago (see Transcript of Audio Recording of Legislative Committee of May 7, 2010, attached as Exhibit B, at 6:14-21); *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶21 (citing Cook County Circuit Court GAO 2007-03 which states that foreclosure filings in Cook County were to increase from 16,494 in 2005 to more than 30,000 in 2007), the General Assembly made sweeping changes to the requirements for filing residential mortgage foreclosures. In 2009, the General Assembly implemented homeowner protection provisions to give homeowners a grace period before a foreclosure complaint could be filed and to notify them that housing counseling services are available; at least 30 days prior to filing a foreclosure action for residential real estate, a mortgagee was required to send the mortgagor notice of such services. 735 ILCS 5/15-1502.5 (now repealed); (*see also* Ex. B, at 4:16-5:8). This requirement was designed to encourage workouts of mortgages and prevent foreclosures. *Aurora Loan Svcs., LLC v. Pajor,* 2012 IL App (2d) 110899, ¶24. While 735 ILCS 5/15-1502.5 has now been repealed on its own terms, effective July 1, 2016, mortgagees are still required to provide notice of workout options at the time of service of the complaint in a foreclosure action. 735 ILCS 5/1504.5.

To fund the housing counseling services referenced in the notice provision and "create[] additional programs for people in foreclosure problems," in 2010, the General Assembly passed Public Act 96-1419, codified as 735 ILCS 5/15-1504.1, which included language proposed by financial institutions that would be paying the fee in most cases. (Ex.

B, at 10:11-16, 4:16-6:1 ("The amendment . . . was given to us by the financial community, which makes them neutral on the bill on a funding mechanism . . . that will be used to fund a funding stream for the approved counseling agencies and for the community-based organizations that also provide the same service that the municipality of Chicago does.")[1]; Excerpt of House Debates, attached as Exhibit C, at 1-2; Transcript of Audio Recording of Legislative Committee Meeting of April 4, 2010, attached as Exhibit D, at 2:19-22)).

Section 15-1504.1(a), 735 ILCS 5/15-1504.1(a), requires plaintiffs filing mortgage foreclosure complaints to pay to the Clerk of the Circuit Court a $50 Foreclosure Prevention Program Fee for the Foreclosure Prevention Program Fund ("Foreclosure Prevention Fund"). And section 15-1504.1(a-5), 735 ILCS 15-1504.1(a-5), requires various fees to be deposited into the Abandoned Residential Property Municipality Relief Fund ("Abandoned Property Fund") depending on circumstances and to be paid by a mortgagee who files an action to foreclose on residential real estate. The Clerk of the Court retains 2% and remits the remainder to the State Treasurer for the Foreclosure Prevention Fund and the Abandoned Property Fund, which are both administered by the Illinois Housing Development Authority ("IHDA"). 20 ILCS 3805/7.30; 735 ILCS 5/1504.1(a-5)(2).

Pursuant to 20 ILCS 3805/7.30 of the Housing Development Act, the IHDA must grant 25% of the Foreclosure Prevention Fund to approved housing counseling agencies outside Chicago, based in part upon the number of foreclosures; 25% to approved counseling agencies inside Chicago for housing counseling or foreclosure prevention services; 25% to approved community-based organizations outside Chicago for approved foreclosure

[1] North Carolina has implemented a similar statutory scheme, requiring mortgagees to notify homeowners of options other than foreclosure and to pay a $75 fee before a mortgage foreclosure action is filed. *See* N.C. Gen. Stat. §§45-102, 45-104, 45-107.

prevention outreach; and 25% for such programs inside Chicago. *See* 20 ILCS 3805/7.30(b). A mortgagee may shift the costs of filing a mortgage foreclosure Fee to the mortgagor by mortgage. 735 ILCS 5/15-1510(b).

Section 7.31 of the Housing Development Act, 20 ILCS 3805/7.31, requires the IHDA to distribute proceeds from the Abandoned Property Fund in the following manner: (1) 30% of monies in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County; (2) 25% of the monies in the Fund shall be used to make grants to the City of Chicago; (3) 30% of the monies in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry, and Will Counties, and to those counties; and (4) 15% of the monies in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will. 20 ILCS 3805/7.31(b).

The Funds are designed to "help people who need help with their mortgage situations and in our foreclosure-plagued society." (Ex. B, at 6:19-21).

Ignoring the statutory context and purpose, Plaintiffs attack section 15-1504.1 of the Mortgage Foreclosure Law, 735 ILCS 5/15-1504.1, which sets forth the Fees, and 20 ILCS 3805/7.30, 7.31, which provide for the distributions from the Funds. Plaintiffs allege that they have filed mortgage foreclosure actions and paid the Fees. (Ex. A, 2d Am. Comp., ¶8). Plaintiffs contend that the filing Fees included in section 15-1504.1 and the distribution requirements in sections 7.30 and 7.31 violate several provisions of the Illinois Constitution: (1) the Separation of Powers Clause (Ex. A, 2d Am. Comp., ¶¶19-21); (2) the Equal Protection, Due Process, and Uniformity Clauses (Ex. A, 2d Am. Comp., ¶¶22-26); and (3) a

Count styled "Illinois Constitution – Use of Fees for Non-Court Related Purposes" (Ex. A, 2d Am. Comp., ¶¶27-30). In Count IV, Plaintiffs request the creation of a protest fund. As set forth below, Plaintiffs' claims are legally insufficient, so summary judgment should be awarded in favor of Intervenor and against Plaintiffs.

STANDARD OF REVIEW

Because Plaintiffs challenge the three statutes identified above on their face, a pure question of law is presented which can be decided on a motion for summary judgment. *See Marshall By Marshall v. City of Centralia*, 143 Ill. 2d 1, 6 (1991) ("Where the record only presents a question of law, a trial court may properly enter a motion for summary judgment."). Summary judgment is proper where the pleadings, depositions, and admissions on file, together with affidavits, reveal no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). The purpose of summary judgment is to determine if a triable issue exists. *Frye v. Medicare Glaser Corp.*, 153 Ill. 2d 26, 31 (1992).

ARGUMENT

I. Summary of the argument.

Plaintiffs bring facial challenges against three statutes: 735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31. Challenging the constitutionality of a statute facially is the "most difficult challenge to mount successfully" because Plaintiffs must show that "no set of circumstances exist under which [the statute] would be valid." *See Jacobsen v. King,* 2012 IL App (2d) 110721, ¶12. Plaintiffs' burden in making this showing runs up against the strong presumption that statutes are constitutional, and the heavy burden is on Plaintiffs to "clearly demonstrate a constitutional violation." *See id.* ¶ 13.

Plaintiffs' claim in Count I is raised under the Separation of Powers Clause of the Illinois Constitution. That claim fails for the simple reason that there has been no infringement on the Executive Branch's authority by the Clerk of the Circuit Court—a member of the Judicial Branch.

The level of review for Plaintiffs' remaining claims depends upon whether a fundamental right is impacted. For the claims in Counts II and III, which consist of claims under the Illinois Constitution's Equal Protection, Due Process, Uniformity, and Free Access Clauses, only certain rights—those "that lie at the heart of the relationship between the individual and a republican form of nationally integrated government"—rise to the level of fundamental rights, and the present case does not impact any such fundamental right. *See Mellon v. Coffelt*, 313 Ill. App. 3d 619, 625 (2d Dist. 2000) (holding that case challenging fee for filing a guardianship of minor action did not implicate fundamental right). Accordingly, review of these claims is pursuant to the rational basis standard, rather than the strict scrutiny test. *Id.* Under the rational basis test, a statute will be upheld if the court "can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope." *Crusius v. Ill. Gaming Bd.*, 216 Ill. 2d 315, 325 (2005). "[T]he court may," in fact, "hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the legislative action." *Alamo Rent A Car, Inc. v. Ryan*, 268 Ill. App. 3d 268, 272-73 (1st Dist. 1994). Under such a lenient standard, there is no way that the challenged statutes are constitutionally infirm.

II. Summary judgment in favor of Intervenor should be granted on Count I because the statutes do not violate the Separation of Powers Clause of the Illinois Constitution.

"The separation of powers clause of the Illinois Constitution provides that [t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." *Morawicz v. Hynes*, 401 Ill. App. 3d 142, 149-150 (1st Dist. 2010); *see* Ill. Const. 1970, art. II, §1. "[T]he purpose of the separation of powers provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands." *Morawicz,* 401 Ill. App. 3d at 149-50*; see Best v. Taylor Machine Works*, 179 Ill. 2d 367, 410 (1997). Significantly, "the separation of powers clause does not seek to achieve a complete divorce among the three branches of government." *Morawicz*, 401 Ill. App. 3d at 149-50; *see also In re S.G.*, 175 Ill. 2d 471, 486-87 (1997). Thus, "the clause does not require that governmental powers be divided into rigid, mutually exclusive compartments." *Morawicz*, 401 Ill. App. 3d at 149-50. It is well-established that "[t]he separation of powers doctrine allows for the three branches of government to share certain functions." *Id.*

Here, Plaintiffs claim that the statutes violate the Separation of Powers Clause of the Illinois Constitution because they require the Clerk of the Circuit Court "to 'administer' a portion of the funds collected for use as part of the Foreclosure Prevention Program" which, according to Plaintiffs, is within the exclusive power of the Executive Branch of government. (Ex. A, 2d Am. Comp., ¶¶6(a), 21). Plaintiffs' challenge is misplaced because the IHDA, not the Clerk of the Court, "administers" the Foreclosure Prevention Program and the Abandoned Residential Property Program, along with their respective Funds. *See* 735 ILCS/151504.1, 20 ILCS 3805/7.30, 20 ILCS 3805/7.31. Of course, the IHDA is an arm

of the Executive Branch. 20 ILCS 3805/4. The Clerk's role is limited to the collection of the Fees and remittance of 98% of Funds collected to the State Treasurer. 735 ILCS 5/15-1504.1. The Clerk's limited role includes retaining 2% of the Fee for purely administrative expenses related to collecting fees under Section 15-1504.1 of the Mortgage Foreclosure Law. *Id.*

Even if the Court Clerk "administers" the Housing Foreclosure Prevention Program and the Abandoned Residential Property Program, along with their respective Funds, as Plaintiffs erroneously allege, such conduct does not violate the Separation of Powers Clause of the Illinois Constitution. *See Wenger v. Finley*, 185 Ill. App. 3d 907, 916-920 (1st Dist. 1989) (finding that chief judge's administration of dispute resolution fund funded by litigation filing fee did not violate Separation of Powers Clause of Illinois Constitution). Simply put, the power to administer monies funded by court filing fees is not an exclusive power of the Executive Branch of government. *Id.*

Because the statutes do not violate the Separation of Powers Clause of the Illinois Constitution, summary judgment on Count I should be awarded to Intervenor.

III. Summary judgment should be awarded on Count III because the Fees benefit foreclosure litigants and the court system by funding services meant to prevent foreclosures and conserving court resources. Therefore, Plaintiffs cannot prove a claim under the Free Access Clause.

Although Plaintiffs title Count III as a claim for "Use of Fees for Non-Court Related Purposes," which is not readily identifiable as a constitutional claim, Plaintiffs seem to claim that the Fees imposed upon them for the filing of a foreclosure complaint violate the Free

Access Clause of section 12 of Article I of the Illinois Constitution.[2] The Free Access Clause provides that, "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, property or reputation. He shall obtain justice by law, freely, completely, and promptly." The Free Access Clause "'protect[s] litigants from the imposition of unreasonable fees that interfere with their right to a remedy in the law or impede with the due administration of justice.'" *Schultz v. Lakewood Electric Corp.*, 362 Ill. App. 3d 716, 724-25 (1st Dist. 2005) (quoting *Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (1st Dist. 2001)).

Illinois courts have explained that the Free Access Clause "merely states a philosophy," and does not itself create a fundamental right in the interests it lists. *Schultz*, 362 Ill. App. 3d at 724 (citing *Gavery v. Lake County*, 160 Ill. App. 3d 761, 767 (2d Dist. 1987)). Accordingly, numerous courts have applied the rational basis test to Free Access Clause claims that do not otherwise impact fundamental rights. *See Rose*, 321 Ill. App. 3d at 102-03; *Mellon*, 313 Ill. App. 3d at 624-25; *Zamarron v. Pucinski*, 282 Ill. App. 3d 354, 359-60 (1st Dist. 1996).

Under the Free Access Clause, court filing fees must "relat[e] to the operation and maintenance of the courts." *Crocker v. Finley*, 99 Ill. 2d 444, 454 (1984). But this does not mean that filing fees must remain with the court itself or benefit a particular plaintiff or his case directly, as Plaintiffs here seem to claim; rather, as long as a filing fee relates generally

[2] Plaintiffs have challenged three statutes. 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. As the latter two statutes do not impose any fees, much less any court fees, they are not susceptible to a Free Access Clause challenge. Instead, Intervenor assumes Plaintiffs list the latter two provisions merely to demonstrate the use of the Fees collected through section 15-1504.1, which is the relevant provision imposing the Fees.

to the overall operation of the court system, including providing benefits to litigants or conserving court resources, it will be upheld. *See Rose*, 321 Ill. App. 3d at 99 (upholding arbitration fee that funded third parties because it "serves solely to improve the overall administration of the court system," which benefits plaintiffs "by freeing litigation calendars, courtrooms, judges, and ancillary personnel that otherwise would be engaged in such arbitrable cases to attend to matters which may well include cases in plaintiffs' categories"); *Mellon*, 313 Ill. App. 3d at 631 (upholding mandatory arbitration fee that "may operate to expedite cases within the court system"); *Wenger*, 185 Ill. App. 3d at 91415 (upholding dispute resolution fee remitted to non-court-annexed domestic resolution centers ("DRCs") that provide services to litigants despite plaintiffs' arguments that DRCs were not related to judicial system).

In fact, courts have upheld almost all court filing fees against Free Access Clause challenges, including fees that fund services that are unavailable to the challenging parties, *see Rose*, 321 Ill. App. 3d at 99 (fee for mandatory arbitration program); *Mellon*, 313 Ill. App. 3d at 631 (mandatory arbitration fee); *Wenger*, 185 III. App. 3d at 914-15 (dispute resolution fee); *People ex rel. Flanagan v. McDonough*, 24 Ill. 2d 178 (1962) (jury demand fee); fees for general court resources, *see Ali v. Danaher,* 47 Ill. 2d 231, 237 (1970) (upholding fee for county law library); and fees that benefit the whole court system generally, *see Zamarron*, 282 Ill. App. 3d at 359-60 (upholding automation fee that benefited criminal system because "[t]he existence and proper functioning of the criminal courts benefit the overall administration of justice").

Indeed, few fees have been stricken. In those cases, courts are concerned because the fees impact access to courts where a fundamental right is involved or where the fees were

imposed under false pretenses. *See, e.g., Crocker*, 99 I11.2d at 455-56 (finding that relationship between domestic shelters/programs and court system was too remote to justify imposition of fee for programs on parties seeking dissolution of marriage); *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 629-30 (1st Dist. 1997) (striking fees incorrectly labeled as "court costs" and "statutory mailing fees").

Unlike the fee at issue in *Crocker*—which taxed dissolution-of-marriage litigants with supporting a program that did not benefit them particularly and provided benefits without regard to marital status (a fundamental right)—the Fees in this case directly relate not only to Plaintiffs' underlying litigation (foreclosure actions) but also to the operation and maintenance of the court system. After all, the Fees provide services designed to help prevent foreclosure actions and assist municipalities in dealing with abandoned properties. See 20 ILCS 3805/7, 7.30, 7.31; Ex. B, at 10:11-16, 4:16-6:1. This dovetails with the statutory requirement that residential mortgage foreclosure plaintiffs provide homeowners with notice that housing counseling services are available. *See* 735 ILCS 5/15-1504.5; *Aurora Loan Servs., LLC*, 2012 IL App (2d) 110899, ¶24 (stating that statute clearly "encourage[s] workouts for mortgages in default").

Thus, the statutes taken together are specifically designed to provide services to prevent mortgage foreclosure actions. *See* 735 ILCS 5/15-1504.1(a), (a-5) (setting Fees); 20 ILCS 3805/7.30, 7.31 (describing distributions from Funds); 735 ILCS 5/15-1504.5 (requiring notice to mortgagors of workout options). Fees for services geared toward decreasing the number of mortgage foreclosures certainly relate to foreclosures generally and to the court system, as these services, like those in *Wenger*, *Mellon*, and *Rose*, may reduce

court backlog and conserve court resources, improving the overall operation of the court system to benefit all litigants.

Because a rational basis exists for the imposition of the Fees and the distribution of those Fees per the challenged statutes, summary judgment should be awarded on Count III to the extent Plaintiffs have raised a Free Access Clause challenge.

IV. This Court should grant summary judgment to Intervenor on Count II because there are no genuine issues of material fact in dispute as to whether the challenged statutes do not violate the Uniformity, Equal Protection, or Due Process Clauses of the Illinois Constitution.

A. The Uniformity Clause

The Uniformity Clause of the Illinois Constitution provides that, "[i]n any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const.1970, art. IX, § 2; *see also Marks v. Vanderventer*, 2015 IL 116226, ¶19; *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 152 (2003). It is well-established that, "[t]o survive scrutiny under the uniformity clause, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp.*, 204 Ill. 2d at 153. As the Illinois Supreme Court explained,

> [I]n a uniformity clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers.

Geja's Cafe v. Metro. Pier & Exposition Auth., 153 Ill. 2d 239, 252 (1992). In cases involving a challenge to a court filing fee, "[t]he relevant question is . . . whether . . . the legislature's decision to impose the fee upon all litigants in [certain] civil cases as a single class bears no

reasonable relationship to the object of the fee." *Mellon*, 313 Ill. App. 3d at 627. As long as some set of facts can be reasonably conceived to support the taxing classification, the Uniformity Clause is satisfied. *Marks*, 2015 IL 116226, ¶19.

Here, Plaintiffs allege that 735 ILCS 5/15-1504.1 violates the Uniformity Clause because "it imposes a burden of payment of a fee upon Plaintiffs and others similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden . . . ." (Ex. A, 2d Am. Comp., ¶24). Plaintiffs' allegations are insufficient for a Uniformity Clause challenge because they have not alleged facts sufficient to prove that the classification in section 15-1504.1 is not based on a real and substantial difference between those required to pay the Fees and others, or that this provision bears no reasonable relationship to its object or to public policy. *See Arangold,* 204 Ill. 2d at 152.

Even had Plaintiffs properly pleaded this claim, section 15-1504.1 passes muster. *First*, there is a substantial and obvious difference between those required to pay the Fees (plaintiffs in residential foreclosure actions who must provide the mortgagor notice of workout options that the Fees fund) and those who are not required to pay the Fees (other plaintiffs).

Second, the Fees imposed under 735 ILCS 5/1504.1 bear a reasonable relationship to the object of the legislation (encouraging workouts for mortgages in default and lessening the strain of foreclosure actions on Illinois courts). *See* 735 ILCS 5/15-1504.1, 15-1504.5; *Pajor,* 2012 IL App (2d) 110899, ¶24. The General Assembly, in response to the national foreclosure crisis, in 2009 passed 735 ILCS 5/15-1502.5 (now repealed), which first required a mortgagee to notify a homeowner of available housing counseling services

at least 30 days before filing a foreclosure action. (Ex. B, at 4:16-6:1). This provision's purpose was to encourage workouts for mortgages in default and lessen the strain of foreclosure actions on Illinois courts. *See Pajor,* 2012 IL App (2d) 110899, ¶ 24. And while section 15-1502.5 has subsequently been repealed, mortgagees filing foreclosure complaints are still required to provide notice of workout options to mortgagors. 735 ILCS 5/15-1504.5.

But counseling services and other workout options lack funding. So the General Assembly passed 735 ILCS 5/15-1504.1 to fund counseling services. (Ex. B, at 10:11-16, 4:16-6:1). Therefore, the purposes of sections 15-1504.1 and 15-1504.5 are inextricably intertwined: section 15-1504.5 encourages workouts for mortgages in default to prevent foreclosure, and section 15-1504.1 funds the programs that make such workouts possible. *Id.*; *see also Pajor,* 2012 IL App (2d) 110899, ¶ 24. The means of section 1504.1 (funding foreclosure workout programs) is rationally related to a common purpose (preventing foreclosures). Thus, Plaintiffs' Uniformity Clause challenge to section 15-1504.1 fails.

The same analysis applies to section 15-1504.1(a-5), which creates funding for the Abandoned Property Program. There is a rational basis for imposing fees to fund such a program. Foreclosure actions result in mortgagors leaving their property (given their inability to continue to make mortgage payments), and such property often becomes abandoned. The Abandoned Property Program is designed to assist municipalities with the adverse consequences that result from abandoned property: the need to cut neglected weeds or grass, trimming of trees and bushes, removal of garbage, debris, and graffiti, and so on. *See* 20 ILCS 3805.731 (identifying purposes of Abandoned Property Program). Thus, the means of section 15-1504.1(a-5) (funding assistance to municipalities to deal with

abandoned properties) is rationally related to a common purpose (preventing the nuisances that result when foreclosure actions result in abandoned property). Thus, Plaintiffs' Uniformity Clause challenge to section 15-1504.1(a-5) also fails.

Plaintiffs also seem to allege that section 7.30 of the Housing Development Act, 20 ILCS 3805/7.30, separately violates the Uniformity Clause because "it allocates for payment to the residents of as well as the government of a single municipality rather than providing an arguable benefit uniformly to each of the citizens of the 102 counties of the State of Illinois" (Ex. A, 2d Am. Comp., ¶25), and because "the Special Fund created . . . allows part of the funds to be used explicitly as general revenue rather than ostensibly for the supposed Special Fund as created" (Ex. A, 2d Am. Comp., ¶26). Section 7.30, however, does not establish or impose any tax or fee; therefore, it does not fall within the ambit of the Uniformity Clause. *See* Ill. Const. 1970, art. IX, § 2; *see generally Arangold*, 204 Ill. 2d at 152.

Insofar as Plaintiffs may be attempting through this language to make a challenge pursuant to the Special Legislation Clause of the Illinois Constitution, art. IV, § 13, which provides that "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable," that challenge must fail too. (Ex. A, 2d Am. Comp., ¶¶13, 25). "The special legislation clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated." *Crusius*, 216 Ill. 2d at 325. "A statute will be held unconstitutional as special legislation only if it was enacted for reasons totally unrelated to the pursuit of a legitimate state goal." *Big Sky Excavating Inc. v. M. Bell Tel. Co.*, 217 Ill. 2d 221, 240 (2005).

Here, the Fees are imposed equally upon all residential foreclosure filers state-wide; therefore the *imposition* of the Fee under section 15-1504.1 cannot, as a matter of law, be local or special legislation. Rather, Plaintiffs seem to challenge the *distribution* of the Fees under 20 ILCS 3805/7.30 and 7.31, suggesting that one municipality (the City of Chicago) benefits from the Funds disproportionately to other municipalities and counties. This is simply not the case. As noted above, the Fees were established for reasons related to a legitimate state-goal (reducing foreclosures and the adverse effects of abandoned properties in the wake of a mortgage foreclosure crisis). Thus, IHDA distributes the Funds *throughout the entire State*, not only to Chicago. *See* 20 ILCS 3805/7.30, 7.31. Sections 7.30 and 7.31 therefore do not confer a special benefit only on one group or person. *See Crusius,* 216 Ill. 2d at 325.

And although Chicago receives a large portion of the Funds, this is because foreclosures in Cook County (of which Chicago is the dominant municipality) had doubled between 2005 and 2007 alone. The legislature was justified in requiring the IHDA to distribute a greater portion of the Funds to services in Chicago because of the overwhelming number of mortgage foreclosures in that city. Intervenor is aware of no decision under the Special Legislation Clause overturning similar legislative judgment regarding the best *distribution* of State funds throughout the State.

Further, Plaintiffs have not alleged that they are attempting to use services provided by the Funds but are similarly situated to someone else who is treated better by the distribution of funds; Plaintiffs therefore have not properly stated a Special Legislation claim. *See Crusius*, 216 Ill. 2d at 325 ("The special legislation clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated."). Finally, even if Plaintiffs were correct that the

Funds benefit only a single municipality, the Special Legislation Clause does not prohibit all classifications that apply only to a limited area of the State. *See City of Chicago v. Blvd. Bank Nall Assn,* 293 Ill. App. 3d 767, 782-83 (1st Dist. 1997) (upholding statutory provision covering only Chicago). Plaintiffs' claims pursuant to the Uniformity and/or Special Legislation Clauses fail as a matter of law; accordingly, summary judgment should be awarded to Intervenor.

B. Equal Protection

It is well-established that "[t]he uniformity clause imposes more stringent limitations than the equal protection clause on the legislature's authority to classify the subjects and objects of taxation." *Mellon*, 313 Ill. App. 3d at 627 (citing *Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill. 2d 243, 249 (1996)); *Marks*, 2015 IL 116226, ¶29. Therefore "if a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause." *Mellon*, 313 Ill. App. 3d at 627; *Geja's Caf*e*,* 153 Ill. 2d at 247. Because the statutes are constitutional under the Uniformity Clause (*supra*, pp.12-17), they as a matter of law do not violate the Equal Protection Clause. *See Marks*; 2015 IL 116226, ¶29; *Mellon*, 313 Ill. App. 3d at 627. Plaintiffs' equal protection claim in Count II therefore also fails as a matter of law.

C. Due Process

Because the challenged statutes pass muster under the Free Access Clause, *see supra*, pp.8-12, they also survive a challenge under the Due Process Clause. *See Rose*, 321 Ill. App. 3d at 99 ("[If] legislation pertaining to court fees survives constitutional scrutiny under the free access clause of the Illinois Constitution, the broader concept of due process

is necessarily satisfied."); *Zamarron*, 282 Ill. App. 3d at 358. Accordingly, the Due Process claim in Count II fails, so summary judgment should be awarded to Intervenor.

IV. Summary judgment should be entered on Count IV because the statutes are constitutional.

Where the challenged statute is constitutional, issues concerning a special protest fund are immaterial. *Lee v. Pucinski,* 267 Ill. App. 3d 489, 496 (1st Dist. 1994) ("Having determined that the reproduction fees are constitutional, we need not consider the Temporary Restraining Order and special protest fund issues."). In this case, Plaintiffs request the creation of a "protest fund." (Ex. A, 2d Am. Comp., ¶¶31-33). Because Plaintiffs' constitutional challenges to the statutes are without merit, the Court should grant Intervenor summary judgment on this count as well.

Wherefore, for the foregoing reasons, along with those stated in the accompanying Cross Motion for Summary Judgment, Intervenor, People of the State of Illinois, requests that this Court grant summary judgment in its favor and against Plaintiffs on all claims.

Respectfully submitted,

_/s/*Sunil Bhave*_____

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EXHIBIT A

04/13/18 15:35:08 WCCH

Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 4/12/2018 4:10 PM
Envelope: 876459
Clerk: JH

IN THE CIRCUIT COURT OF THE 12th
JUDICIAL CIRCUIT--WILL COUNTY, ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,	)	
Plaintiffs,	)	No. 12 CH 05275
v.	)	
ANDREA LYNN CHASTEEN, in Her Official Capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Reuben D. Walker and M. Steven Diamond, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers, and on Behalf of All Other Individuals or Institutions Who Are Responsible For Payment of Foreclosure Fees Paid in the State of Illinois, (collectively, "Plaintiffs") by their attorneys Laird M Ozmon, the Law Offices of Laird M. Ozmon, Ltd., David A. Novoselsky, Novoselsky Law Offices P.C., Jonathan P. Novoselsky, and Novoselsky Law, LLC, for their Complaint against Defendant Andrea Lynn Chasteen in Her Official Capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, state as follows:

INTRODUCTION

1. This action challenges the constitutionality of the legislation which imposed an add on fee on any litigant that files an action to foreclose a mortgage, 735 ILCS 5/15-1504.1, 20 ILCS

3805/7.30 and20 ILCS 3805/7.31 both as originally enacted and as later amended. This legislation imposes an obligation on litigants such as Plaintiffs and others similarly situated to bear the ultimate cost of a fee which is charged as a cost against Plaintiff for deposit into the Foreclosure Prevention Program Fund. That Fund is described by the statute as a special fund created and held in the State Treasury. The fees are to be divided between this Fund and a separate fund or collection that is to be held by the Clerk of the Circuit Court in each of the one hundred and two (102) counties within the State of Illinois, ostensibly for payment of certain entities within the State of Illinois as discussed in more detail, *infra*. Plaintiff Walker filed an action before the Circuit Court of the 12th Judicial Circuit—Will County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 12 CH 02010. At the time of filing, Plaintiff, through his counsel, paid various fee including a $50 charge assessed pursuant to the Foreclosure Prevention Program. Plaintiff Diamond filed an action before the Circuit Court Cook County, Illinois, seeking a foreclosure of property located within the County and docketed by the Clerk of the Circuit Court under Docket No. 15 CH 12027. At the time of filing, Plaintiff, through his counsel, paid various fees including charges assessed pursuant to the Foreclosure Prevention Program.

2. The fees collected pursuant to the Foreclosure Prevention Program Fund described in the first paragraph of this Complaint were also to be disbursed pursuant to the terms of the Illinois Housing Development Act, 20 ILCS § 3805/7.30 and 7.31. Pursuant to that enactment, 25% of monies in the fund are to be used to make "grants to approved counseling agencies that provide services in Illinois outside the City of Chicago;" 25% of the monies in the fund to be "distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for approved housing counseling, or to support foreclosure prevention counseling programs administered by the City of Chicago;" 25% of the monies in the fund to

make grants to "approved community-based organizations located outside of the City of Chicago;" and 25% of the monies in the fund used to make grants to "approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs."

3. In other words, 50% of the monies collected from litigants before the court system under this program are allocated to a single municipality, the City of Chicago.

4. Plaintiffs, both as citizens and taxpayers of the State of Illinois, seek (i) a declaratory judgment that the challenged legislation as listed above violates the Illinois Constitution and, (ii) an injunction to stop the use of these funds in both the operation, administration and regulation of the programs for which this fee is charged as in violation of the Illinois Constitution, as well as an injunction to bar the collection and use of these certain fees by the Clerks of the Circuit Courts of Illinois. Issue a Preliminary Injunction and order that the fees currently being collected under this enactment be placed into a fund to be held under the control and subject to further order of this Court. (See *Crocker v. Finley*, 99 Ill. 2d 444 (1984), which authorizes and approves this procedure.) The Court should thereafter enter a permanent injunction.

THE STATUTES IN ISSUE

Section 735 ILCS 5/15-1504.1 Filing fee for Foreclosure Prevention Program Fund.

(a) With respect to residential real estate, at the time of the filing of a foreclosure complaint, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee of $50 for deposit into the Foreclosure Prevention program Fund, a special fund created in the State treasury. The clerk shall remit the fee to the State Treasurer as provided in this Section to be expended for the purposes set forth in Section 7.30 of the Illinois Housing Development Act. All fees paid by plaintiffs to the clerk of the court as provided in this Section shall be

disbursed within 60 days after receipt by the clerk of the court as follows: (i) 98% to the State Treasurer for deposit into the Foreclosure Prevention Counseling program Fund, and (ii) 2% to the clerk of the court for administrative expenses related to implementation of this Section.

(b) Not later than March 1 of each year, the clerk of the court shall submit to the Illinois Housing Development Authority a report of the funds collected and remitted pursuant to this Section during the preceding year.

(Source: P.A. 96-1419, eff. 10-1-10.)

Section 20 ILCS 3805/7.30 Foreclosure Prevention Program

§ 7.30 Foreclosure Prevention Program.

(a) The Authority shall establish and administer a Foreclosure Prevention Program. The Authority shall use moneys in the Foreclosure Prevention Program Fund, and any other funds appropriated for this purpose, to make grants to (i) approved counseling agencies for approved housing counseling and (ii) approved community-based organizations for approved foreclosure prevention outreach programs. The Authority shall promulgate rules to implement this Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation, the Authority shall make grants from the Foreclosure Prevention Program Fund as follows:

(1) 25% of the moneys in the Fund shall be used to make grants to approved counseling agencies that provide services in Illinois outside the city of Chicago. Grants shall be based upon the number of foreclosures filed in an approved counseling agency's service area, the capacity of the agency to provide foreclosure counseling services, and any other factors that the Authority deems appropriate.

(2) 25% of the moneys in the Fund shall be distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for

approved housing counseling or to support foreclosure prevention counseling programs administered by the City of Chicago.

(3) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located outside of the City of Chicago for approved foreclosure prevention outreach programs.

(4) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs.

As used in this Section:

"Approved community-based organization" means a not-for-profit entity that provides educational and financial information to residents of a community through in-person contact. "Approved community-based organization" does not include a not-for-profit corporation or entity or person that provides legal representation or advice in a civil proceeding or court-sponsored mediation services, or a governmental agency.

"Approved foreclosure prevention outreach program" means a program developed by an approved community-based organization that includes in-person contact with residents to provide (i) pre-purchase and post-purchase home ownership counseling, (ii) education about the foreclosure process and the options of a mortgagor in a foreclosure proceeding, and (iii) programs developed by an approved community-based organization in conjunction with a State for federally chartered financial institution.

(c) As used in this Section, "approved counseling agencies" and "approved housing counseling" have the meanings ascribed to those terms in Section 15-1502.5 of the Code of Civil Procedure.

Section 20 ILCS 3805/7.31 Foreclosure Prevention Program

Sec. 7.31. Abandoned Residential Property Municipality Relief Program.

(a) The Authority shall establish and administer an Abandoned Residential Property Municipality Relief Program. The Authority shall use moneys in the Abandoned Residential Property Municipality Relief Fund, and any other funds appropriated for this purpose, to make grants to municipalities and to counties to assist with costs incurred by the municipality or county for: cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public; demolition of abandoned residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority under the Program. For purposes of this subsection (a), "pests" has the meaning ascribed to that term in subsection (c) of Section 11-20-8 of the Illinois Municipal Code. The Authority shall promulgate rules for the administration, operation, and maintenance of the Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Abandoned Residential Property Municipality Relief Fund derived from fees paid as specified in paragraph (1) of subsection (a-5) of Section 15-1504.1 and subsection (a) of Section 15-1507.1 of the Code of Civil Procedure as follows:

(1) 0% of the moneys in the Fund shall be used to ake grants to municipalities other than the City of Chicago in Cook County and to Cook County;

(2) 25% of the moneys in the Fund shall be used to make grants to the City of Chicago;

(3) 30% of the moneys in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry and Will Counties, and to those counties; and

(4) 15% of the moneys in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane. Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties. Grants distributed to the municipalities and counties shall be based on (i) areas of greatest need within these counties, which shall be determined, to the extent practicable, proportionately on the amount of fees paid to the respective clerks of the courts within these counties, and (ii) on any other factors that the Authority deems appropriate.

The percentages set forth in this subsection (b) shall be calculated after deduction of reimbursable administrative expenses incurred by the Authority, but shall not be greater than 4% of the annual appropriated amount.

(c) Where the jurisdiction of a municipality is included within more than one of the geographic areas set forth in this Section, the Authority may elect to fully fund the municipality from one of the relevant geographic areas.

5. During the course of this litigation the above legislation was twice amended. (See section 15–1504.1 of the Code and section 7.30 and 7-31 of the Act.)

6. The challenged legislation violates the Illinois Constitution and the duties and limitations it imposes on both the legislative and executive branches of government in multiple ways.

Illinois Constitution of 1970

a. Violation of the Separation of Powers Doctrine. The legislation violates the Separation of Powers doctrine of the Illinois Constitution of 1970 as it ostensibly requires an arm of the Judicial Branch of State Government (the Clerks of the Circuit Court of the more than one hundred Circuit Courts of the State of Illinois) to participate in and "administer" a program otherwise managed and controlled by the Executive Branch of

Government. Pursuant to the Separation of Powers Doctrine, the Legislative Branch cannot impose on the Judicial Branch the responsibility to fund, manage, or participate in the activities of the Executive Branch. As the legislation in question explicitly provides for this "mixture" of responsibility and funding between the Executive Branch and the Judicial Branch, it violates this long-standing prohibition and must be stricken by this Court.

b. Violation of the Prohibition of the Use of Fees Charged Litigants for Activities Outside of the Court System. The legislation violates the prohibition on the use of Court fees or fees charged litigants who file matters before the Judicial Branch of the State of Illinois for activities or purposes outside of the court system. The legislation imposes a fee charged litigants for activities which are labeled as and intended to be a Special Fund held and administered by the Treasurer of the State of Illinois for purposes that are explicitly outside of the court system and its maintenance and benefits. As such, the legislation violates the prohibition and must also be stricken by this Court.

c. Violation of the Due Process and Equal Protection Provisions of the Constitution of the State of Illinois. The Illinois Constitution of 1970 prohibits the use of fees charged for a service rendered an individual or entity where those fees are used for and become, by such use, a general tax to be used as a tax. Where a fee is imposed to be paid by a distinct and separate group of individuals within the State of Illinois for the benefit of a class of individuals or entities unrelated to those that pay the fee, this creates an impermissible burden on those charged with the fee that violates the protections guaranteed by the Illinois Constitution of 1970 and violates the protections accorded by the Constitution against the violation of the Due Process and Equal Protection rights of those paying the fee. The legislation in question provides for the creation of a Special Fund which is intended to be paid in part for private consultants and other individual and entities that are to counsel a group of individuals with a portion of that same fund to be retained explicitly for general revenue purposes. The fund, once created, remains within the treasury of the State of Illinois which, based on earlier admissions obtained from the State in other litigation, is kept in a single fund used to benefit general revenue purposes in addition to the explicit provision for general revenue use under this legislation. For this reason as well, the legislation violates the Illinois Constitution and should be stricken by this Court.

d. The Legislation Violates the Uniformity Clause of the Illinois Constitution of 1970. The Illinois Constitution of 1970 requires uniformity in any legislation which creates a tax or fee imposed on one group to the exclusion of all other similarly situated or otherwise obliged to support a certain fund or program. This legislation creates a burden on those involved in the foreclosure process while, at the same time, providing a benefit to a limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality and giving the remainder on an equally non-uniform basis throughout Illinois.

ALLEGATIONS

Plaintiffs

7. Plaintiffs, Reuben D. Walker and M. Steven Diamond (collectively, "Plaintiffs") are citizens and taxpayers of the State of Illinois with their principal residence in Will County and Cook County, Illinois respectively.

8. By virtue of foreclosure actions filed by Plaintiffs before the Circuit Courts of Will and Cook County and as the fees for such filings are taxed against Plaintiffs, Plaintiffs and others similarly situated have been required or will be required to bear the burden of paying the additional fee imposed by the legislation in question in this lawsuit.

Defendants

9. Defendant Andrea Lynn Chasteen is the duly elected Clerk of the Circuit Court of Will County. She is sued not in her individual capacity but solely in her official capacity as Clerk and as a representative of all other Clerks of the Court in each of the other counties of the State of Illinois. Her duties include, according to this legislation, the collection and disbursement of 2% of the $50 fee charged and collected under this statute.

Jurisdiction and Venue

10. The 1970 Constitution of the State of Illinois provides in Article II, Section 1 that the legislature may not impose upon or interfere with the powers of the Judicial Branch. This provision is generally referred to as the "Separation of Powers Doctrine." That provision states as follows: "The Legislative, Executive and Judicial Branches are separate. No branch shall exercise powers properly belonging to another."

11. The Provisions of the legislation before this Court in this case imposes upon the Judicial Branch through the Clerk of the Circuit Court who is a member of the Judicial Branch the obligation to collect and "administer" funds otherwise to be collected and used under the authority

the Executive Branch.

12. This provision violates the Separation of Powers Doctrine set forth in Article II, Section 1 of the Illinois Constitution of 1970. As such, it should be declared to be in violation of the 1970 Constitution and stricken by this Court with all funds previously collected or to be collected during the pendency of this lawsuit, and until final determination to be returned to Plaintiffs and others who paid or will pay this fee.

13. The challenged legislation violates the Uniformity Clause of the Illinois Constitution of 1970 as the fees collected are levied against litigants in all 102 counties of the State of Illinois but given for the benefit of a disproportionate number individuals residing not simply in a single county but within a single municipality, the City of Chicago. This treatment of the funds collected violates not simply the Uniformity Clause, but further provides an impermissible benefit to residents of a single municipality by use of funds collected within both the Judicial System of the State of Illinois and funds collected on behalf of an agency of the Government of the State of Illinois to benefit a municipality in further violation of the Illinois Constitution of 1970.

14. This lawsuit seeks, among other things, declarations that 735 ILCS 5/15-1504.1, 20 ILCS § 3805/7.30 and 7.31violate provisions of the Illinois Constitution and injunctions prohibiting the disbursement of public funds thereon pursuant to the equitable powers of this Court and pursuant to 735 ILCS 5/11-301, *et seq.*, which provides for actions for private citizens to enjoin and restrain the disbursement of public funds. This Court has jurisdiction over the subject matter under Article VI, §9 of the Illinois Constitution. This Court also has jurisdiction over the actual controversy between the parties pursuant to Section 2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701. This Court has personal jurisdiction over Defendants pursuant to the Code of Civil Procedure, 735 ILCS 2-209(a)(1), (b)(2), and (c).

15. Venue is proper under Sections 2-101 and 2-103 of the Code of Civil Procedure, 735 ILCS 5/2-101 and 2-103, because the acts from which this cause of action arose, or a substantial part thereof, took place in Will County, Illinois and because Defendant maintains her office in that venue.

Right To Declaratory And Injunctive Relief

16. There is an actual, existing controversy present in this action in that Defendants will be charged with enforcing, regulating and expending public funds on the unconstitutional laws at issue here.

17. Plaintiffs have clearly ascertainable rights in need of protection. Sections 11-301 and 11-303 of the Illinois Code of Civil Procedure, 735 ILCS 5/11-301, 5/11-303, as well as common-law principles, permit taxpayers to sue to enjoin the unlawful disbursement of public monies by public officials and the imposition of unlawful taxes.

18. Plaintiffs suffer and will continue to suffer irreparable harm as a result of the unlawful and unconstitutional actions set forth above. If left undeterred, there is no adequate remedy at law that will properly compensate Plaintiffs for the injuries they have sustained.

The Challenged Legislation

COUNT I

ILLINOIS CONSTITUTION – SEPARATION OF POWERS

19. Plaintiffs incorporate by reference the allegations of Paragraphs 1-18 above.

20. The "Separation of Powers" provision of the Illinois Constitution of 1970 prohibits the Legislature from enacting legislation that requires any of the three separate and equal branches of Illinois Government from performing activities within the exclusive province of the others. Under the Constitution, the expenditure and management of any funds or activities relating to general revenue rests exclusively within the Executive Branch of Government.

21. 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 require an arm of the Judicial Branch, the Clerk of the Circuit Court to "administer" a portion of the funds collected for use as part of the Foreclosure Prevention Program. As such, it violates the provisions of the Illinois Constitution prohibiting a breach of the Separation of Powers Doctrine, and must be stricken by this Court, and all fees collected or to be collected returned to the plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT II

ILLINOIS CONSTITUTION – EQUAL PROTECTION, DUE PROCESS, AND UNIFORMITY

22. Plaintiffs incorporate by reference the allegations of Paragraphs 1-21 above.

23. The Illinois Constitution of 1970, Article I, Section 2 protects Plaintiffs and others similarly situated their due process and equal protection rights as guaranteed in this provision, as well as unreasonable classification of non-property taxes or fees which fail to provide for a uniform burden of such fees or taxes, as provided for under Article IX, Section 2 of the Illinois Constitution of 1970.

24. 735 ILCS 5/15-1504.1 violates the provisions of the Illinois Constitution of 1970 as set out in the preceding paragraph as it imposes a burden of payment of a fee upon Plaintiffs and other similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden as prohibited by these Constitutional provisions.

25. 20 ILCS 3805/7.30 violates the provisions of the Illinois Constitution of 1970 as it allocates for payment to the residents of as well as the government of a single municipality rather than providing an arguable benefit uniformly to each of the citizens of the 102 counties of the State of Illinois.

26. This statute also violates the above prohibitions as providing for a partial use of the Special Fund created which allows part of the funds to be used explicitly as general revenue rather than ostensibly for the supposed Special Fund as created.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT III

ILLINOIS CONSITUTION – USE OF FEES FOR NON-COURT RELATED PURPOSES

27. Plaintiffs incorporate by reference the allegations of Paragraphs 1-26 above.

28. The Illinois Constitution of 1970, is interpreted by the Illinois Supreme Court, prohibits the imposition of a filing fee upon litigants where the fee is collected for a purpose that is not court–related and which does not remain exclusively within the control of and retained to finance the Court system only. (*Crocker v. Finley*, 99 Ill.2d 444 (1984)).

29. 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 explicitly provide for the imposition of a filing-fee for a non court-related purpose.

30. Because the filing-fee imposed pursuant to this statute is explicitly collected for a court non court-related purpose, and is not retained for the exclusive use and benefit of the Court system, it is in violation of the Illinois Constitution of 1970 as interpreted by the Illinois Supreme Court and must be stricken by this Court.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting them the following relief:

A. A declaratory judgment that 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 7.31 are in violation of the Illinois Constitution;

B. A declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs;

C. A temporary, preliminary, and later a permanent injunction enjoining Defendants from disbursing fees collected pursuant to this statute;

D. An order to return all fees collected pursuant to this statute to Plaintiffs;

E. Such other and further relief as this Court deems necessary and proper.

COUNT IV

CREATION OF A PROTEST FUND

31. Plaintiffs incorporate by reference the allegations of Paragraphs 1-30 above.

32. Illinois law has provided for and approved by the Illinois Supreme Court permits this Court, when legislation creating a fee to be imposed on litigants, ordered that while this lawsuit is pending, all such fees collected or to be collected may be placed into a separate fund under the direction and control of this Court. (See *Crocker v. Finley*, 99 Ill.2d 444, 447-448, where the Illinois Supreme Court reviewed and later approved that the order entered by the trial court where that Court "ordered" the Clerk to segregate all [fees] collected from [litigants] who paid fees pursuant to the challenged statute. The order directed the Clerk to deposit the fees into interest-bearing accounts that [entitled] as a special fund to protest the legislation. The Court appointed a Trustee to supervise the fund, and it temporarily restrained the Clerk and his deputies from transferring the fees to the County Treasurer. (99 Ill. 2d at 448.)

33. Plaintiffs respectfully ask that this Court order the creation of such a fund, direct the Clerk of the Circuit Court of Will County and all other Clerks of Court located throughout the State of Illinois to deposit fees that have been collected and will be collected pursuant to 735 ILCS 5/15-1504.1 into a Protest Fund and placed into an interest-bearing account under the control of this Court and subject to the supervision of a Trustee or a custodian appointed by this Court to supervise and protect this fund pending the conclusion of this litigation.

WHEREFORE, Plaintiffs ask that this Court create a Protest Fund as set forth above and

appoint a Trustee or a custodian of its choosing at its earliest possible convenience.

Dated: April 12, 2018

Respectfully submitted,

REUBEN D. WALKER, et al, Plaintiffs

By: _____
David A. Novoselsky
One of Their Attorneys

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EXHIBIT B

TRANSCRIPT OF AUDIO RECORDING OF

LEGISLATIVE COMMITTEE - May 7, 2010. SB 3739.

MR. CHAIRMAN: The hour of 9:00 o'clock having arrived, the House Civil Judiciary Committee is called to order. Will the clerk please read the roll.

CLERK: Fritchey.

MR. CHAIRMAN: Here.

CLERK: Bradley.

REPRESENTATIVE BRADLEY: Here.

CLERK: Rose.

REPRESENTATIVE ROSE: Yes.

CLERK: Burns. Coladipietro.

REPRESENTATIVE COLADIPIETRO: Here.

CLERK: Connelly.

REPRESENTATIVE CONNELLY: Here.

CLERK: Currie. Gordon. Hoffman.

REPRESENTATIVE HOFFMAN: Here.

CLERK: Lang. Mathias.

REPRESENTATIVE MATHIAS: Present.

CLERK: Nekritz.

REPRESENTATIVE NEKRITZ: Yes.

CLERK: Osmond. Thapedi.

REPRESENTATIVE THAPEDI: Here.

CLERK: Tracy.

REPRESENTATIVE TRACY: Here.

CLERK: Wait. Zalewski.

REPRESENTATIVE ZALEWSKI: Here.

MR. CHAIRMAN: Please let the record reflect that we have a letter from Speaker Madigan substituting Representative Joe Lyons for Representative Barbara Flynn Currie, and Representative Lyons is present.

And we also have a letter from the Speaker's office substituting Representative Bob Rita for Representative Will Burns, and Representative Rita is present.

There being 13 members present, we do have a quorum and prepared to conduct order -- conduct business.

The matter on the agenda today is Leader Lyons with Senate Bill 3739. Joe, before you start, let me read the witness slips into the record so people can have the lay of the land.

We have Joyce Nardulli on behalf of the Illinois Bankers Association neutral on House

Amendment 1.

Keith Sias for the Credit Union League with no position on the merits on House Amendment 1.

Rob Moon on behalf of the Cook County Sheriff's Office as a proponent of House Amendment 1.

Kraig Lounsberry on behalf of the Community Bankers Association, neutral.

And Bill Glunz on behalf of the City of Chicago as a proponent of House Amendment 1.

Leader Lyons.

REPRESENTATIVE LYONS: Thank you, Mr. Chairman, ladies and gentlemen of the Committee.

I'm before you today with Senate Bill 3739, the amendment that we're presenting becomes the bill. It does include the original portion of the bill that was sent over here by Senator Collins which extended the 30/30/30 Program, extended the sunset, which was the original intention of that bill.

Meaning that if a house goes into foreclosure, the financial institution does not act on it for the first 30 days and notifies by mail the individual who has 30 days to get some counseling. And if they agree to do it and can put a package together, give you the final 30 days to get the property back in good graces and on a new payment schedule.

That's the underlying bill which is part of that.

The amendment that popped out yesterday was an agreement language that was given to us by the financial community which makes them neutral on the bill on a funding mechanism that will also, through the Illinois Housing & Development Authority, create a Foreclosure Prevention Program Fund and Abandoned Residential Property Municipal Relief Fund.

So that will be used to fund a funding stream for the approved counseling agencies and for the community-based organizations that also provide the same service that the municipality of Chicago

does.

And the Abandoned Residential Property Relief Fund is helping with the -- with the removal cost and securing the cost of abandoned property. So it's been worked through the system with those who are affected by it. It does establish a revenue stream.

Basically, it's a $50 fee on the actual money being posed here. The plaintiff will file a foreclosure fee of $50. And upon purchase of the property by somebody who does that, they'll be obligated for a dollar for every thousand capped at a total of $300.

So people who are involved in the process will be paying for the -- for the programs that will be run through the City of Chicago, some community organizations and through municipalities and other organizations throughout the state.

So it's a good program to help people who need help with their mortgage situations in our foreclosure-plagued society that we're in. And I certainly would ask for your support and are asking

for your questions. I'll be happy to help you.

MR. CHAIRMAN: Thank you, Leader Lyons. Are there any questions from the Committee?

Please add Representative Ford on the roll. We have a letter substituting Representative Ford on behalf -- in the stead of Representative Lang.

Are there questions from the Committee? Representative Mathias.

REPRESENTATIVE MATHIAS: Thank you, Leader. I have a couple questions. The program's been going on now for -- for a period of time; is that correct?

REPRESENTATIVE LYONS: Over a year. We did this last year, I believe, is when it was implemented. And it's been successful. There's a good success rate on helping some people stay current on their mortgages.

REPRESENTATIVE MATHIAS: Do you know how many people were helped during the last year as --

REPRESENTATIVE LYONS: About 40 percent, I believe.

FEMALE VOICE: Close to a thousand people.

REPRESENTATIVE LYONS: Huh?

FEMALE VOICE: Close to a thousand people.

REPRESENTATIVE LYONS: Close to about a thousand people have benefited from the program.

REPRESENTATIVE MATHIAS: And during that same time, my understanding is there was over 130,000 foreclosures?

REPRESENTATIVE LYONS: I'll take your word for it, Representative.

REPRESENTATIVE MATHIAS: I mean, so it's obviously a very, very small percentage. Is that because people just don't go to the -- for help or that -- whatever reason.

REPRESENTATIVE LYONS: For whatever purpose it's not used, Representative, I don't know. It's a shame that it's not. The purpose -- it's there. I can't answer that question. I don't know.

REPRESENTATIVE MATHIAS: And this $50, where would the money go to then?

REPRESENTATIVE LYONS: Well, it goes into the funds, the -- IHDA would control the operations of

this. So the Housing Development Authority would run this thing.

And seven to -- the actual appropriation would go 25 percent to counseling services in communities other than the City of Chicago. 25 percent to community-based outreach programs other than the City of Chicago. 25 percent in communities --

MR. CHAIRMAN: Joe, if I can just interrupt for one second, I apologize. Representative Bradley moves recommended it be adopted. Asks for leave to open the roll and votes aye. I'm sorry, Joe.

REPRESENTATIVE LYONS: I have breakdown, Sid. The City of Chicago gets about half the money. Half of it they administer through their own programs. Half of it they give to community-based outreach programs.

And the other 50 percent basically goes to areas outside of the City of Chicago, the same place. Either municipalities could run their programs or an approved foreclo -- non-for-profit

organization could run -- could spend -- could use -- plug into the program.

REPRESENTATIVE MATHIAS: So since the program's been going on now, who's been paying the fee for the counseling now?

FEMALE VOICE: This program has not -- is not -- has not been going on. It's been -- (inaudible).

REPRESENTATIVE LYONS: Okay.

FEMALE VOICE: This is a new program.

REPRESENTATIVE LYONS: This is a new program, Sid. What has been existing, what we're extending the sunset on, is the 30/30/30 Program. That has existed. This is in addition to that. This creates additional programs for people in foreclosure problems.

REPRESENTATIVE MATHIAS: Okay. Okay, thank you.

REPRESENTATIVE LYONS: Okay. Thank you.

MR. CHAIRMAN: Are there any questions from the Committee? Chair seeing none, we do have a motion open. Will the clerk please read the roll.

CLERK: Fritchey.

MR. CHAIRMAN: Aye.

CLERK: Rose.

REPRESENTATIVE ROSE: No.

CLERK: Rita.

REPRESENTATIVE RITA: Aye.

CLERK: Coladipietro.

REPRESENTATIVE COLADIPIETRO: No.

CLERK: Connelly.

REPRESENTATIVE CONNELLY: No.

CLERK: Lyons.

REPRESENTATIVE LYONS: Aye.

CLERK: Gordon. Hoffman.

REPRESENTATIVE HOFFMAN: Yes.

CLERK: FORD.

REPRESENTATIVE FORD: Yes.

CLERK: Mathias.

REPRESENTATIVE MATHIAS: No.

CLERK: Nekritz.

REPRESENTATIVE NEKRITZ: Yes.

CLERK: Osmond. Thapedi.

REPRESENTATIVE THAPEDI: Yes.

CLERK: Tracy.

REPRESENTATIVE TRACY: No.

CLERK: Wait. Zalewski.

REPRESENTATIVE ZALEWSKI: Yes.

MR. CHAIRMAN: There being nine members voting in the affirmative, five members voting in the negative, this matter will be favorably reported to the House floor. Thank you, Representative Lyons.

REPRESENTATIVE LYONS: Thank you, Mr. Chairman, ladies and gentlemen of the Committee.

MR. CHAIRMAN: Let me just say just really quickly, after a lot of years, this is my last committee hearing, Joe.

And Chapin, I want to tell you, you know, there's, I think, several dozen committees in this -- in this chamber. I think for several years we've had the best committee, I really do. The members of this chamber, of this committee are great. We've deliberated a lot of bills. We've done it together. It's been an honor to do this, it really has.

So with no further business before us, we'll stand at recess until they call the Chair, unless Representative Rose wants to --

REPRESENTATIVE ROSE: Thanks, John. You did a great job and really appreciate all these years.

MR. CHAIRMAN: Thanks, my friend.

END OF AUDIO RECORDING

CERTIFICATE OF OFFICER

I, AMY K. ZUMBROCK, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I transcribed the audio recording aforesaid, and that the foregoing is as true and complete a transcription as possible from the audio recording under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 4th day of February, 2013.

AMY K. ZUMBROCK,
Certified Shorthand Reporter

C.S.R. Certificate No. 84-4356.

EXHIBIT C

STATE OF ILLINOIS
96th GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE

139th Legislative Day 5/7/2010

Clerk Mahoney: "Senate Bill 3739 has been read a second time, previously. Floor Amendment #1, offered by Representative Lyons, has been approved for consideration."

Speaker Lang: "Mr. Lyons."

Lyons: "Thank you, Mr. Speaker. The original Bill, the underlying Bill this… 3739, as amended, does three things: it creates the Foreclosure Prevention Program; it creates an Abandoned Residential Property Municipality Relief Fund; and, it expands the existing 30/30 Fund that we passed last year for another three years. The Foreclosure Prevention Fund will… this will create a fund that will distribute money to… approved counseling… agencies and approved counseling… for approved housing counseling for both the City of Chicago or outside the City of Chicago be broken up two ways. Twenty-five percent will go to communities outside the City of Chicago for their own municipal fund as well as community-based outreach programs to help do the same counseling and 50 percent of the fund will go to the city, 25 half of it… again, 25 percent to go to the city for their agencies, and 25 for community-based agencies to work with people to help keep people that are having foreclosure problems in their homes. The fund will be funded by a $50 filing fee, filed by the plaintiffs who are putting the house… housing in foreclosure. This $50 fee was language that was given to us by the financial institution. That takes them out of their opposition to this. They're not certainly elated with this, but they are no longer opposing this whole legislation with the funding process with… in the language that they gave us. Secondly,

the Abandoned Residential Property Municipal Relief Fund is a fund that's going to be created on the back end of this foreclosure situation where people who are now purchasing these foreclosed properties at six cents, seven cents, eight cents on a dollar will now be funding this to the tune of a dollar for every thousand dollars that the foreclosures… we're capping it at a maximum of 300. Seventy-five percent of the money shall be distributed to municipali… municipalities other than Chicago, 25 to the City of Chicago. So, this is a program to help people in the State of Illinois going through foreclosure. We started this program last year with 30/30/30 program. We're extending the deadline on that without spending any money of the State of Illinois through the foreclosure process, front-ending it for the counseling, back-ending it for the abandoned building problems and for the building situation that we have where this is a plague. We're looking for your 'aye' vote and try to help move this back over to the Senate for concurrence. So, I'm looking for 'aye' votes. Be happy to answer any question."

Speaker Lang: "The Gentleman moves for the adoption of the Amendment. On that question, the Chair recognizes Representative Yarbrough."

Yarbrough: "Thank you, Mr. Speaker. Will the Gentleman yield?"

Speaker Lang: "Gentleman yields."

Yarbrough: "Representative, I sponsored a Bill last Session that would have required banks to take responsibility for vacant properties. Instead of that, this Bill creates an Abandoned Residential Property Municipality Relief Program

and the program will be funded from a fee on judicial sales. The fee's going to be a dollar for every thousand dollars of property value. Now, in my district a lot of the foreclosed properties sell for $5 thousand or $10 thousand. So, they are only going to generate 5 or 10 dollars for this relief fund. So, my question is are there any projections about how much relief this Bill will provide?"

Lyons: "Well, my understanding would be… no, we don't have a real hard core… hard fast estimate on what this is going to generate, but it will… whatever does come in will help fund the program that you put on the books last year."

Yarbrough: "Doesn't sound like it's enough to me, Representative. Second…"

Lyons: "It's a start, Representative. It is a start."

Yarbrough: "Okay. Secondly, it looks to me like the fee doesn't apply when the bank takes possession of the property they foreclose upon. On page 19, line 4 through 8 it says that 'No fee shall be paid by the mortgagee acquiring the residential real estate pursuant to its credit bid at the sale or by any mortgagee, judgment creditor, or other lien or acquiring the residential real estate whose rights in and to the residential real estate arose prior to the sale.' Does… does that mean that the banks won't have to pay this fee?"

Lyons: "That's correct. On that portion which they have invested in it, they will be exempt."

STATE OF ILLINOIS
96th GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
TRANSCRIPTION DEBATE

139th Legislative Day 5/7/2010

Yarbrough: "Wow. So… so, the fee… the fee is awfully low and it's not going to apply to 95 percent of the cases. Do you know how much the municipal…"

Speaker Lang: "Please bring your remarks to a close."

Yarbrough: "Okay. This is my final question. I want to know, do you know how much the municipalities pay to secure these vacant properties? It's not five or ten bucks. You know, in many cases its thousands and thousands of dollars. To the Bill, Mr. Speaker. This Bill is not good enough. Why is it that when we're dealing with these huge problems we don't really address the real issue? I don't know how I'm going to go home this weekend and once again done nothing for my constituents in my communities that are suffering so terribly with these foreclosures. We've had over 140 thousand foreclosures across the United States and I'm sure there are many more coming. We've go to support programs that help people to save their homes, real programs. A $50 fee on foreclosure filings will help a little, but nowhere near. Representative, I'm going to support this Bill and I hope that you'll work with me and others who are… really want to do something about foreclosures in the future so that we can really get this job done. Thank you."

Speaker Lang: "Representative May."

May: "Will the Sponsor yield?"

Speaker Lang: "Gentleman yields."

May: "Yes. I noticed in part of this that the money's going to Chicago and cities other than Chicago. It's 75 percent to municipalities other than Chicago and 25 to the City of

Chicago. How were those percentages determined? Do they reflect the number of foreclosures around our state?"

Lyons: "Actually, Representative, Chicago gets a little bit cheated out of this thing. It's a more generous… it's a more generous formula to the municipalities outside of the City of Chicago, but it was what… was agreed to in the language that we put together here, so…"

May: "Okay. Are there… does this Bill have any other provisions that would give tools to municipalities. I think that there was some talk around the Capitol of tools to municipalities to address their rights or powers to force the agency, the lending agency that owns the property, to keep it in good repair. Is there anything in this Bill about that?"

Lyons: "The direct answer to your question would be no, there isn't. But, it does give money to municipalities to help Representative Yarbrough's Bill at least get a start of a foundational funding to do that."

May: "Has the Municipal League weighed in on this?"

Lyons: "No."

May: "Okay. Thank you."

Speaker Lang: "Mr. Lyons to close."

Lyons: "Ladies and Gentlemen, this is, again… we put these Amendments on this Bill. It extends the 30-30-30 Program which has helped close to a thousand people in the State of Illinois over the last year since it's been implemented. It extends that program for another 30… 3 years. What the new proposal does here is at least starts the program to have a funding stream for the counseling agencies that are,

of course, going to be monitored by IHDA and, you know, be supported, of course, by HUD initiatives as far as some keeping that philosophical desire to help people who want to find some help, stay in their homes. I would ask for your 'aye' vote."

Speaker Lang: "Those in favor of the adoption of the Amendment shall say 'yes'; opposed 'no'. In the opinion of the Chair, the 'ayes' have it. And the Amendment is adopted. Mr. Clerk."

Clerk Mahoney: "No further Amendments. No Motions filed."

Speaker Lang: "Third Reading. Please read the Bill for the third time."

Clerk Mahoney: "Senate Bill 3739, a Bill for an Act concerning civil law. Third Reading."

Speaker Lang: "Mr. Lyons."

Lyons: "Ask for your 'aye' vote."

Speaker Lang: "Those in favor shall vote 'yes'; opposed 'no'. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Bellock, Gordon, Tryon. Please take the record. On this question, 87 voting 'yes', 26 voting 'no', 3 voting 'present'. And this Bill, having received the Constitutional Majority, is hereby declared passed. Mr. Schmitz, for what reason do you rise, Sir?"

Schmitz: "Thank you, Speaker. I inadvertently voted 'no' on Senate Bill 2612. I'd like the record to reflect that I meant to vote 'aye'."

Speaker Lang: "The record will reflect your intentions. On page 4 of the Calendar, under the Order of Senate Bills-

EXHIBIT D

TRANSCRIPT OF AUDIO RECORDING OF

LEGISLATIVE COMMITTEE - April 4, 2010. SB 3739.

MR. CHAIRMAN: Bill 3739.

REPRESENTATIVE LYONS: Thank you, Mr. Chairman, ladies and gentlemen of the Committee.

3739 is basically an extension of the sunset date. Last year we passed what was called that 30/30/30 Program, which basically allows somebody who comes 30-days delinquent on their mortgage to get the 30-day notice from the mortgage holder and given a final 30 days to get the counseling in order to be able to get their life in order with their mortgage.

So this extends the sunset date to effective instead of closing out on the 6th of April of next year, this would give it a full three years. And it's been highly successful.

I'd be happy to answer any questions. Certainly looking for your favorable support.

MR. CHAIRMAN: Thanks. We have witness slips all in support of this from the Attorney General's Office, the City of Chicago, League of Financial Institutions, Community Bankers, the Illinois

Credit Union League, and IDFPR. There is no opposition. The Chair sees no questions from the Committee.

Representative Ford moves due pass. Is there leave? Also on a vote of 14/0/0, this matter will go to the House floor. Thank you, Representative.

REPRESENTATIVE LYONS: Thank you, Mr. Chairman, ladies and gentlemen of the Committee.

END OF AUDIO RECORDING

CERTIFICATE OF OFFICER

I, AMY K. ZUMBROCK, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I transcribed the audio recording aforesaid, and that the foregoing is as true and complete a transcription as possible from the audio recording under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 4th day of February, 2013.

Amy K. Zumbrock

AMY K. ZUMBROCK,
Certified Shorthand Reporter

C.S.R. Certificate No. 84-4356.

Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 7/26/2018 4:25 PM
Envelope: 1638330
Clerk: KA

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, WILL COUNTY, ILLINOIS

Reuben D. Walker and M. Steven Diamond,	**12 CH 5275**
Plaintiffs,	
v.	
Andrea Lynn Chasteen, *et al.*,	
Defendants.	

CROSS MOTION FOR SUMMARY JUDGMENT OF INTERVENOR-DEFENDANTDOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Intervenor-Defendant Dorothy Brown, in her official capacity as the Clerk of the Circuit Court of Cook County (the "Cook County Circuit Clerk")[1] by her Attorney, KIMBERLY M. FOXX, State's Attorney of Cook County, and through her Assistant State's Attorneys, PAUL A. CASTIGLIONE and MARGARETT S. ZILLIGEN, submits her Section 2-1005 cross motion for summary judgment and states as follows:

1. Plaintiffs Reuben D. Walker and M. Steven Diamond ("Plaintiffs") have filed a second amended complaint for injunctive and declaratory relief. Plaintiffs have brought several constitutional challenges to Section 15-1504.1 of the Illinois Code of Civil Procedure ("Section 15-1504.1") as well as Sections 7.30 and 7.31 of the Illinois Housing Development Act. ("Sections 7.30 and 7.31") *See* 735 ILCS 5/15-1504.1 (2018); 20 ILCS 3805/7.30 (2018) and 20 ILCS 3805/7.31 (2018).

1 By order of court on June 7, 2018, the Cook County Circuit Clerk was granted leave to intervene in this lawsuit as an Intervenor-Defendant.

2. Plaintiffs here have brought challenges to Section 15-1504.1, Section 7.30 and Section 7.31 under the uniformity (article IX, section 2), free access to justice (article II, section 12), due process (article I, section 2), and equal protection (article I, section 2) clauses of the 1970 Illinois Constitution.

3. The voluntary payment doctrine bars Plaintiffs' constitutional claims.

4. Even if this Court reached the merits of Plaintiffs' constitutional claims, they fail on the merits.

5. The Cook County Circuit Clerk has contemporaneously submitted a memorandum of law in support of her cross motion for summary judgment.

WHEREFORE, this Honorable Court should grant intervenor-defendant Dorothy Brown's cross motion for summary judgment, deny plaintiffs' cross motion for summary judgment and enter judgment in favor of all defendants and against Plaintiffs

Respectfully submitted,

Kimberly M. Foxx
State's Attorney of Cook County

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Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 7/26/2018 4:25 PM
Envelope: 1638330
Clerk: KA

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, WILL COUNTY, ILLINOIS

Reuben D. Walker and M. Steven Diamond,	**12 CH 5275**
Plaintiffs,	
v.	
Andrea Lynn Chasteen, *et al.*,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF THE CROSS MOTION FOR SUMMARY JUDGMENT OF INTERVENOR-DEFENDANT DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Intervenor-Defendant Dorothy Brown, in her official capacity as the Clerk of the Circuit Court of Cook County (the "Cook County Circuit Clerk")[1] by her Attorney, KIMBERLY M. FOXX, State's Attorney of Cook County, and through her Assistant State's Attorneys, PAUL A. CASTIGLIONE and MARGARETT S. ZILLIGEN, submits the following memorandum of law in support of her Section 2-1005 cross motion for summary judgment.

INTRODUCTION

Plaintiffs Reuben D. Walker and M. Steven Diamond ("Plaintiffs") have filed a second amended complaint for injunctive and declaratory relief. Plaintiffs have brought several constitutional challenges to Section 15-1504.1 of the Illinois Code of Civil Procedure ("Section 15-1504.1") as well as Sections 7.30 and 7.31 of the Illinois Housing Development Act. ("Sections 7.30 and 7.31") *See* 735 ILCS 5/15-1504.1 (2018); 20 ILCS 3805/7.30 (2018) and 20 ILCS 3805/7.31 (2018).

1 By order of court on June 7, 2018, the Cook County Circuit Clerk was granted leave to intervene in this lawsuit as an Intervenor-Defendant.

These statutes are part of a statutory scheme in which the General Assembly sought to protect mortgagees and homeowners, provide mortgage counseling and foreclosure prevention services and, ultimately, the court system by preventing residential mortgage foreclosures in the States. In this regard, the General Assembly enacted Section 15-1502.5 of the Illinois Code of Civil Procedure, a statute that requires mortgagees to notify, at least 30 days prior to filing a residential mortgage foreclosure action, the mortgagor of available housing counseling services. *See* 735 ILCS 5/15-1502.5 (2018). Recognizing that such counseling services lacked funding, the General Assembly next enacted Section 15-1504.1. This established the Mortgage Foreclosure Prevention Program Fund (the "Fund") and set a $50 filing fee (the "Fee') on residential mortgage foreclosures. *See* 735 ILCS 5/15-1504.1 (2018). The clerks of the circuit court collect the Fee, retain 2% and send the rest into the Fund, which the Illinois Housing Development Authority administers. *Id. See also* 20 ILCS 3805/7.30 (2018) and 20 ILCS 3805/7.31 (2018).

Plaintiffs previously filed a claim alleging that Section 15-1504.1 was unconstitutional on the grounds that it impermissibly created a fee office in the judiciary. The Illinois Supreme Court rejected that argument and held that Section 15-1504.1 did not create an impermissible fee office (*i.e.*, an office where circuit clerks collected fees and were compensated for their services through the payment of fees taxed to the litigants). *See Walker v. McGuire*, 2015 IL 117138, ¶¶27-30.

For two reasons, Plaintiffs' current constitutional challenges to Section 15-1504 likewise fail. First, the voluntary payment doctrine bars Plaintiffs' claims. Second, Plaintiffs' latest constitutional claims challenging Section 15-1504.1fail on the merits.

LEGAL STANDARD TO BE APPLIED IN SECTION 2-1005 MOTIONS

A motion for summary judgment under Section 2-1005 of the Illinois Code of Civil Procedure should be granted where there is no genuine issue as to any material fact. *Carruthers*

v. B.C. Christopher & Co., 57 Ill. 2d 376, 380 (1974). Here, the parties have filed cross motions for summary judgment. When "the parties file cross-motions for summary judgment, they agree that only questions of law are involved and invite the court to decide the issues based on the record." *Bremer v. City of Rockford*, 2016 IL 119889, ¶20, *citing Nationwide Fin., LP v. Pobuda*, 2014 IL 116717, ¶24.

Here, no genuine issue of material fact exists with regard to any of Plaintiffs' constitutional claims and this Court should decide these claims as a matter of law. Brown and the other circuit clerks in this lawsuit are entitled to judgment in their favor, As Plaintiffs' claims fail as a matter of law.

I. The Voluntary Payment Doctrine Bars Any Claims For Fees That Plaintiff Or The Putative Plaintiff Class Members Have Advanced In This Case.

It is axiomatic in Illinois that when "a putative class representative has no valid claim in his own right, he cannot bring such a claim on behalf of a putative class." *Bunting v. Progressive Corp.*, 348 Ill. App. 3d 575, 581 (1st Dist. 2004), *citing Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 467, n. 1 (1998) and *Landesman v. General Motors Corp.*, 72 Ill. 2d 44 (1978). That is exactly the case here, as the voluntary payment doctrine bars all of Plaintiffs' claims.[2]

A. The Voluntary Payment Doctrine

The voluntary payment doctrine bars Plaintiffs' claims to recover the Fee. On this basis alone, defendants are entitled to summary judgment.

Illinois courts have held that an allegation of involuntary payment is a part of the *prima*

2 Illinois courts long recognized that if a matter can be decided on non-constitutional grounds, then the court should reach that matter first before considering constitutional issues. *See Coram v. State*, 2013 IL 113867, ¶ 56 (2013). Pursuant to the voluntary payment doctrine, this Honorable Court should dismiss Plaintiffs' claims for fees paid to Section 15-1504.1 and, thus, this Court need not consider Plaintiffs' constitutional challenges to Section 15-1504.1.

facie case of any taxpayer seeking to recover taxes that they have paid. *See, e.g. Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 183 (1st Dist. 1987) (stating that "[i]n a claim for a refund of taxes, involuntary payment is an element of the taxpayer's *prima facie* case, and if a complaint fails to plead a sufficient factual basis to support this element, the action is subject to dismissal"); *Russell v. Hertz Corp.*, 139 Ill. App. 3d 11, 16 (1st Dist. 1985) (same).

To establish involuntary payment of a fee, the person paying the fee must show that he or she paid the fee under protest. *See, e.g., United Private Detective & Security Ass'n v. City of Chicago*, 56 Ill. App. 3d 242, 244 (1st Dist. 1977). *See also Crocker v. Finley*, 99 Ill. 2d 444, 447 (1984) (the plaintiff, who filed a constitutional challenge to a civil filing fee, paid the fee under protest.) Absent a protest, a plaintiff can establish the payment of a fee was "involuntary in only two situations: (1) if he or she lacked knowledge of the facts upon which to protest the taxes [or fees] at the time they were paid or (2) the taxpayer [or fee payor] paid the taxes [or fees] under duress. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004) *citing Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989).

Here, Plaintiffs did not pay the Fee under protest or otherwise involuntarily paid the Fee. Plaintiffs, therefore, have not established involuntary payment (*i.e.*, that they paid the Fee under protest). In addition, Plaintiffs did not establish that any of the exceptions to the voluntary payment doctrine apply. Consequently, even if the Fee violated some provision of the Illinois Constitution (which it does not), Plaintiffs cannot recover anything they paid because they did not pay the Fee involuntarily. On this basis alone, all of Plaintiffs' claims for declaratory and injunctive relief and for a protest fund -- for the ostensible purpose of returning such fees to putative plaintiff class members -- should be dismissed.

Because the voluntary payment doctrine bars all of Plaintiffs' claims here, they cannot

represent a plaintiff class pursuing refund claims. *See Freund v. Avis Rent-A-Car System, Inc.*, 114 Ill. 2d 73, 83-84 (1986) (holding that the trial court properly dismissed a putative class action for a refund of taxes assessed under the Automobile Renting Occupation and Use Tax Act because the named representatives did not pay the taxes involuntarily or under protest). *Freund* shows that Plaintiffs' class claims should be dismissed.

Illinois courts have routinely required plaintiffs seeking refunds to comply with the voluntary payment doctrine. *See, e.g., Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶1 (2013) (plaintiffs seeking a refund of retail occupation taxes paid such taxes under protest); *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 68 (2008) (plaintiffs seeking the return of a statutory surcharge on the adjusted gross receipts of several riverboat casinos paid the challenged taxes under protest); and *Lusinski v. Dominick's Finer Foods, Inc.*, 136 Ill. App. 3d 640 (1st Dist. 1985) (the voluntary payment doctrine barred action to recover allegedly incorrect amounts of use tax that defendant retailers charged on non-reimbursable store coupons).

This Court should follow *Freund* and *Lusinski* and enter judgment in favor of Brown and the other circuit clerks on the grounds that the voluntary payment doctrine bars Plaintiffs' refund claims. Even if this Court were to reach the merits of Plaintiffs' remaining constitutional challenges to Section 15-1504.1, Section 7.30 and Section 7.31, Plaintiffs' claims fail as a matter of law.

II. Applicable Legal Standards

A. The Appropriate Level of Review For Plaintiffs' Constitutional Claims.

The Illinois Supreme Court has recognized that "[w]hen the statute under consideration does not affect a fundamental constitutional right, the appropriate level of scrutiny is the rational-basis test." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 368 (1986). Plaintiffs'

constitutional challenges to the Fee do not implicate a fundamental right. *See Mellon v. Coffelt*, 313 Ill. App. 3d 619, 625 (2nd Dist.2000). In *Mellon*, the plaintiff challenged the constitutionality of Section 2-1009A of the Illinois Code of Civil Procedure, a provision which imposed a surcharge on the filing fee in civil litigation to fund court-annexed mandatory arbitration. *Id.* at 622. Just as Plaintiffs here have brought challenges under the uniformity (article IX, section 2), free access to justice (article II, section 12), due process (article I, section 2), and equal protection (article I, section 2) clauses of the 1970 Illinois Constitution, the plaintiff in *Mellon* brought the exact same challenges to Section 2-1009A. *Id.* at 623.

The Second District then attempted to determine the appropriate level of review to apply to the plaintiff's constitutional claims:

> The plaintiff appears to argue that the fee impedes the plaintiff's ability to litigate her guardianship proceeding and, therefore, should be subject to strict scrutiny. The premise of the plaintiff's argument is that a proceeding concerning the guardianship of a minor necessarily involves a fundamental right. It is in this faulty premise that the plaintiff's quest for the application of strict scrutiny fails.

Id. at 624. The Court then states that "we have found nothing in any constitutional jurisprudence to suggest that a proceeding involving the guardianship of a minor *per se* implicates a fundamental right." *Id.* at 625. Consequently, the Court held that "the appropriate level of scrutiny is the rational relation test." *Id.*, *citing Harris*, 111 Ill. 2d at 368.

If a proceeding involving the guardianship of a minor does not implicate a fundamental right, then the Plaintiffs filing mortgage foreclosure complaints likewise does not implicate a fundamental right. And while there is a fundamental right to access to the courts, there is not a fundamental right to such access without expense. *Crocker*, 99 Ill. 2d at 454-55. *See also People v. Carter*, 377 Ill. App. 3d 91, 99 (1st Dist. 2007) (collecting cases).

Without citing any legal authority to establish the existence of a fundamental right,

Plaintiffs merely assume that the underlying lawsuits they filed implicate a fundamental right. (Plaintiffs' Motion for Summary Judgment at 6.) As a result, Plaintiffs erroneously argue that this Court should apply a "strict scrutiny" standard when considering their challenges to Section 15-1504. *Mellon*, however, shows that the appropriate level of review applicable to Plaintiffs' facial constitutional challenges Section 15-1504.1 is the rational basis test.

B. Legal Standards Regarding Facial Constitutional Challenges.

Plaintiffs' constitutional challenges to Section 15-1504.1 are all facial challenges. As a result, Plaintiffs must show that in all possible applications, the challenged provision violates the Illinois Constitution. *See, e.g., Bartlow v. Costigan*, 2014 IL 115152, ¶18, n.2, *citing Davis v. Brown*, 221 Ill. 2d 435, 442-443 (2006) (noting that a facial constitutional challenge "requires a showing that under no circumstances would the challenged act be valid").

In *Davis*, the plaintiffs alleged that Section 4-510 of the Illinois Highway Code ("Section 4-510") was facially invalid under the takings clause of the federal constitution and the separation of powers and due process clauses of the Illinois Constitution. *Davis*, 221 Ill. 2d at 442. The Illinois Supreme Court denied plaintiffs' facial challenge because they could not establish that Section 4-510 violated these three constitutional provisions under all circumstances and possible interpretations of the statute. *Id.* at 453.

Under Illinois law, the "the challenging party has the burden to prove the statute is unconstitutional" and that "this burden is particularly heavy when, as here, a facial constitutional challenge is presented." *Bartlow*, 2014 IL 115152 at ¶18, *citing Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶33 (2013). In this case, Plaintiffs cannot not meet this heavy burden.

III. Plaintiffs' Access To Justice And Due Process Claims Fail As A Matter Of Law.

Section 15-1504.1 does not unconstitutionally infringe on access to the courts of Illinois.

Plaintiffs, however, argue that the Fee is "for use outside the judicial system [and] violate[s] the fundamental right of access to the courts protected under the Constitution of the State of Illinois as well as the Constitution of the United States of America." (Plaintiffs' Motion for Summary Judgment at 6.) In advancing this argument, Plaintiffs rely heavily on the Supreme Court's decision in *Crocker* and *Boynton v. Kusper*, 112 Ill. 2d 356 (1986). Plaintiffs' reliance on *Crocker* and *Boynton* is misplaced.

Both *Crocker* and *Boynton* involve constitutional challenges to the Domestic Violence Shelter Act (formerly *Ill. Rev. Stat.* 1983, ch.40 par 2401 *et. seq.*). That Act directed circuit clerks to collect certain filing fees from county litigants who filed for divorce (*Crocker*) or secure a marriage license (*Boynton*). The Act then directed the fees to be transmitted to the State Treasurer for use in the Domestic Violence Shelter and Service Fund, a statewide program. The statute was invalidated as constitutionally infirm as the program, while worthwhile, was not related to the operation of the court system and, thus, violated the Free Access to Justice Clause. *See* Ill. Const. art. I, § 12 (1970).

Crocker is distinguishable not only from the instant lawsuit but from two cases that are controlling -- *Zamarron v. Pucinski,* 282 Ill. App. 3d 354, 359 (1st Dist. 1996) and *Rose v. Pucinski*, 321 Ill. App. 3d 92, 98 (1st Dist. 2001). *Zamarron* teaches that civil filing fees paid to the Circuit Clerk to finance the operation of the court system. As a result, Plaintiffs' claim that the County unlawfully spends such fees for general purposes is without merit. *See Id.* at 359-360. *Zamarron* noted that in *Crocker*, the Illinois Supreme Court held "that court filing fees may be imposed 'for purposes relating to the operation and maintenance of the courts.'" *Id., citing Crocker*, 99 Ill.2d at 454. *Zamarron* concluded that:

> The existence and proper functioning of the criminal courts benefit the overall administration of justice. Even assuming that criminal cases generate more costs

> than the civil cases, the plaintiffs have failed to offer statutory, constitutional or precedential authority which supports a finding that the scheme of funding the court system is unconstitutional. Notably, the concept of a unified court system embodied by our State constitution further weakens the plaintiffs' fragmented view of our system of justice. . . Our constitution, taken with the pronouncements of our supreme court in *Crocker,* lead us to the conclusion that the plaintiffs have failed to establish that a constitutional violation occurs when funds collected through the civil justice system are used to finance the court system as a whole.

Id. Plaintiffs urge the same fragmented view of the justice system that the appellate court rejected in *Zamarron*.

Zamarron establishes that the Illinois and Federal Constitutions allow the County to use filing fees and court automation fees to finance the court system as a whole. *Id. Accord Mellon*, 313 Ill. App. 3d at 629-630 (the statutory surcharge on the filing fee in civil litigation to fund the court-annexed mandatory arbitration system did not violate the Free Access to Justice, Uniformity or Due Process Clauses); *Rose v. Pucinski*, 321 Ill. App. 3d 92 (1st Dist. 2001). In *Rose*, the Court observed that "[b]oth *Zamarron* and *Crocker* stand for the proposition that within the parameters of the Illinois Constitution, funds obtained via the civil justice system may be used to pay for expenses incurred by the court system as a whole." *Rose*, 321 Ill. App. 3d at 98.

Crocker itself recognized that "[s]tatutes imposing litigation taxes . . . do not necessarily offend our State constitution" and noted that in *Ali v. Danaher*, 47 Ill. 2d 231 (1970), it held that the statute establishing the county law-library tax did not violate the Illinois Constitution. The Illinois Supreme Court found that the institution of a county law library furthered the justice system and did not amount to a "purchase of justice." *Id.* at 237-238.

Like *Ali*, *Mellon* is instructive here. In *Mellon*, the Second District noted that in a First District case, "a surcharge to a court filing fee used to fund alternative dispute resolution was upheld as constitutional." *Mellon*, 313 Ill. App. 3d at 630, *citing Wenger v. Finley*, 185 Ill. App.

3d 907 (1st Dist. 1989). *Mellon* noted that in *Wegner*, the appellate court:

> deferred to the legislature, which had specifically found that there was a compelling need for the dispute resolution centers and that the centers could make a substantial contribution to the operation and maintenance of the courts (Ill. Rev. Stat. 1987, ch. 37, par. 851). The court held that the fee was imposed for a court-related purpose and that there was a reasonable, non-arbitrary relationship between the purpose of the fee, improving the administration of the courts, and the means adopted to achieve that purpose, imposing a $ 1 fee on parties initiating litigation.

Mellon, 313 Ill. App. 3d at 631, *citing Wenger*, 185 Ill. App. 3d at 914. The Second District followed Wegner, stating:

> [we] similarly defer to the legislature's judgment in determining that the [Mandatory Arbitration] System may operate to expedite cases within the court system. We accept this unrebutted rationale for the fee. We hold that, because the System functions as part of a unified court system, the legislature may impose a fee on any, or all, litigants in the circuit courts to fund the System.

Mellon, 313 Ill. App. 3d at 631.

Here, the charging of the Fee and distributions from the Fund collectively provide services to prevent foreclosure actions. Just as the mandatory arbitration system expedites the adjudication of cases within the court system and facilitates the functioning of that court system, the Fee and the Fund reduce the number of mortgage foreclosures clogging our courts and, in that way, facilitate the smooth functioning of that court system. Section 15-1502.5, to be sure, requires mortgagees to notify, at least 30 days prior to filing a residential mortgage foreclosure action, the mortgagor of available housing counseling services. *See* 735 ILCS 5/15-1502.5 (2018); *see also Aurora Loan Servs., LLC v. Pajor*, 2012 IL App (2d) 110899, ¶24 (stating that "[t]he purpose of Section 15-1502.5 is clear from its language: to encourage workouts for mortgages in default"). The payment of the Fee and distributions from the Fund encourage workouts of mortgages in default that obviate the need for foreclosure actions in the court system. That regulatory scheme is analogous to the statutory regime in *Wegner* and *Mellon*: the

imposition of a fee to fund mandatory arbitration and work out disputes in lieu of litigation.

Mellon and *Wegner* show that *Crocker* and *Boynton* are inapposite and that Plaintiffs' Free Access to Justice and due process claims fail as a matter of law.[3]

IV. Plaintiffs' Separation of Powers Claim Under Article II, Section 1 of the Illinois Constitution Fails As A Matter Of Law.

The Illinois Housing Development Agency (the "IHDA") administers the Fund. 20 ILCS 3805/7.30 (2018). The IHDA is part of the executive branch. *See* 20 ILCS 3805/4 (2018) (creating the IHDA). Plaintiffs claim that:

> 735 ILCS 5/15-1504.1 and 20 ILCS 3805/7.30 and 3805/7.31 require an arm of the Judicial Branch, the Clerk of the Circuit Court to "administer" a portion of the funds collected for use as part of the Foreclosure Prevention Program.

(Plaintiffs' Motion for Summary Judgment at 13.) This argument is legally untenable because it presumes, without authority, that circuit clerks administer the Housing Foreclosure Prevention Program and the Fund. Plaintiffs are mistaken. As Section 15-1504.1 and 20 ILCS 3805/7.30 show, the IHDA administers this program and the Fund. Plaintiffs' separation of powers claim has no merit.

Moreover, as Wegner shows, even if circuit clerks administered the program and the Fund, as Plaintiffs erroneously argue, such conduct would not violate the separation of powers clause in the Illinois Constitution. *See Wegner*, 185 Ill App. 3d at 916-920 (finding that the chief judge's administration of a dispute resolution fund did not violate the separation of powers provision of the Illinois Constitution).

V. Plaintiffs' Uniformity Clause And Equal Protection Claims Fail As A Matter Of Law.

The due process and equal protection clauses in Article I, Section 2 of the Illinois

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3 Because the Fee passes muster under the Free Access to Justice Clause, it also survives a due process analysis. *See Rose*, 321 Ill. App. 3d at 99.

Constitution guarantee that:

> No person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws.

Ill. Const. art. I, §2 (1970).

When assessing the constitutional validity of a legislative act, Illinois courts start with the presumption that the enactment is constitutional. *See Hope Clinic for Women, Ltd.,* 2013 IL 112673 at ¶33, *citing Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 351 (1999). The burden of rebutting this presumption is on the party challenging the statute and any doubts must be resolved in favor of finding the law valid. *Id. citing In re R.C.*, 195 Ill. 2d 291, 296 (2001). *See also People v. Inghram*, 118 Ill. 2d 140, 146 (1987).

Here, Plaintiffs have filed a facial challenge to Section 15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. The presumption of validity is hardest to overcome when a facial challenge is raised, because the challenger must establish that under no circumstances would the challenged act be valid. *Hope Clinic*, 2013 IL 112673 at ¶33, *citing Davis v. Brown*, 221 Ill. 2d 435, 442 (2006). A statute is not facially invalid if it may operate constitutionally under some conceivable set of facts. *Id.*

Under the Uniformity Clause, the rational basis test is again two-prong, a non-property tax or fee classification must: (1) be based on a real and substantial difference between the people taxed and those not taxed; and (2) bear some reasonable relationship to the object of the legislation or to public policy. *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1107 (2nd Dist. 2010), *quoting Valstad v. Cipriano*, 357 Ill. App. 3d 905, 914 (4th Dist. 2005).

The Second District has recognized that "[w]hen a party challenges a classification under the uniformity clause, the taxing body has the initial burden of producing a justification for the classification." *Friedman v. White*, 2015 IL App (2d) 140942, ¶31, *citing Jacobsen v. King*,

2012 IL App (2d) 110721, ¶15. "The inquiry is narrow, and we will uphold a taxing classification if a set of facts can be reasonably conceived that would sustain it." *Id.* Moreover, as *Friedman* observed;

> Plaintiffs appear to take the position that the State must begin with the legislative record in support of the classification. This approach is not supported by case law. Rather, the government does not have an evidentiary burden and does not have to produce facts in support of its justification for the statute. *Marks v. Vanderventer*, 2015 IL 116226, ¶23. "Instead, once the governmental entity has offered a reason for its classification, the plaintiff has the burden to show that the defendant's explanation is insufficient as a matter of law or unsupported by the facts." *Id.*; *see also Arangold Corp.*, 204 Ill. 2d at 156 (the taxing body need only assert a justification for the classification, and it has no evidentiary burden in justifying the tax). Thus, while plaintiffs may rely on the legislative debates to argue that the State's position is insufficient or unsupported, this does not mean that the State is not free to articulate an independent rationale in the first place. Indeed, the appellate court has explicitly stated that the taxing entity may create an "after-the-fact justification" for the classification.

Here, Plaintiffs have failed to show that the Legislature's justification for the imposition of the Fee is not supported by facts or in insufficient as a matter of law. Significantly, courts are "not required to have proof of perfect rationality as to each and every taxpayer. The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers." *Rajterowski*, 405 Ill. App. 3d at 1107, *quoting* Geja's Cafe v. Metropolitan Pier & Exposition Authority, 153 Ill. 2d 239, 252 (1992). The classification in Section 15-1504.1 separates two groups: (1) those who file mortgage foreclosure actions and (2) those plaintiffs who do not. This is a real and substantial difference between the people taxed and the people not tax and the first prong of the *Rajterowski* inquiry is satisfied.

The second question then is whether or not there is some reasonable relationship to the object of the legislation or the public policy and the chosen classifications. Such a relationship exists. As previously discussed, the Fee and the Fund reduce the number of mortgage

foreclosures and thereby facilitate the functioning of the court system. The purpose of Section 15-1502.5 is to encourage workouts for mortgages in default. *See Aurora Loan Servs., LLC*, 2012 IL App (2d) 110899 at ¶24.

The payment of the Fee and distributions from the Fund encourage workouts of mortgages in default that obviate the need for foreclosure actions. That satisfies the second prong of the *Rajterowski* inquiry.

Plaintiffs also argue that Section 7.30 of the Housing Act, 20 ILCS 3805/7.30, separately violates the Uniformity Clause because it "creates a burden on those involved in the foreclosure process while, at the same time, providing a benefit to a limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality and giving the remainder on an equally non-uniform basis throughout Illinois." (Plaintiffs' Motion for Summary Judgment at 5-6.) This argument lacks all merit. The fee is imposed equally upon all foreclosure filers statewide and, consequently, the imposition of the fee under Section 15-1504.1 cannot, as a matter of law, be local or special legislation. Plaintiffs seem instead to challenge the distribution of the Fund under 20 ILCS 3805/7.30, suggesting that only Chicago benefits from the Fund. That is categorically not the case.[4] The Fee was established for reasons related to a legitimate State purpose: the reduction of foreclosures in the wake of a mortgage foreclosure crisis. The IDHA distributes funds throughout the entire State and not just Chicago. While Chicago receives a substantial portion of the Fund, Chicago faced a substantial portion of the foreclosure crisis in 2008. It is well within the General Assembly's discretion to distribute the Fund according to greatest need arising from this crisis. Such a statutory regime is fair, reasonable and is rationally related to a worthy governmental interest:

4 Illinois courts have held that the special legislation clause in the Illinois Constitution does not prohibit all classifications that apply only to a limited area of the State.

the reduction of mortgage foreclosure cases in the Illinois court system, which benefits all members of society.[5]

Neither the Fee nor the Fund violate the Uniformity and Equal Protection Clause.[6]

VI. Plaintiffs' Request For the Creation of a Protest Fund Should Be Denied.

Where the challenged statute is constitutional, issues regarding the creation of a special protest fund are immaterial. *Lee v. Pucinski*, 267 Ill. App. 3d 489, 496 (1st Dist. 1994). Plaintiffs' constitutional challenges to 735 ILCS 5/15-1504.1 (2018); 20 ILCS 3805/7.30 (2018) and 20 ILCS 3805/7.31 (2018) lack all merit and, as a result, this Court should not create a protest fund.

CONCLUSION

For the foregoing reasons, this Court should grant intervenor-defendant Dorothy Brown's cross motion for summary judgment, deny plaintiffs' cross motion for summary judgment and enter judgment in favor of all defendants and against Plaintiffs.

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5 The Foreclosure Prevention Program Fund indeed benefits the five principles of the report published by the Statutory Court Fee Task Force which Plaintiffs cite in their Motion for Summary Judgment. (Plaintiffs' Motion for Summary Judgment at 9-11.)

6 Under Illinois law, "[i]f a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause." *See Mellon*, 313 Ill. App. 3d at 627. Plaintiffs' equal protection claim fails as a matter of law.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

Reuben D. Walker and M. Steven Diamond, individually and on behalf of themselves and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Case No. 12-CH-5275
Plaintiffs,	)	
v.	)	
Andrea Lynn Chasteen in her official Capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	John C. Anderson Circuit Judge
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Under Illinois law, mortgage foreclosure cases include an "add on" filing fee. The amount of the fee varies depending on how many foreclosure cases the plaintiff has filed. Some of these collected fees are used for mortgage counseling services. Another portion of the fees are distributed as grants to various governmental entities, and those entities may use the grant money for beautification and maintenance projects such as tree trimming, grass cutting, garbage removal, installing fencing, and demolition.

This case involves the constitutionality of the three statutes that, collectively, impose the fee and govern how it is used. The case is before the Court on cross-motions for summary judgment. Having reviewed the parties' briefs, the applicable statutes, and the cases cited, the Court agrees that the statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970. (Ill. Const. 1970).[1]

[1] All references herein to the "Constitution" are to the Illinois Constitution of 1970 (Ill Const 1970) unless otherwise specified. In their briefs, Plaintiffs also claim violations of the United States Constitution, but they fail to present arguments and authorities in support of federal claims. Further, they did not adequately plead federal constitutional claims Regardless, the Court's decision today makes it unnecessary to reach federal constitutional questions

I. BACKGROUND

A. The Statutes

Plaintiffs challenge the constitutionality of section 15-1504.1 of the Code of Civil Procedure (735 ILCS 5/15-1504.1), and also sections 7.30 and 7.31 of the Illinois Housing Development Act (20 ILCS 3805/7.30 and 20 ILCS 3805/7.31). These statutes are part of a package of laws called the "Save Our Neighborhoods Act" enacted in response to the mortgage foreclosure crisis that gripped Illinois, and the United States, roughly a decade ago. The General Assembly enacted these statutes to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16, 4:16 to 6:1; 6:19-21.)

1. 735 ILCS 5/15-1504.1

Section 15-1504.1 (735 ILCS 5/15-1504.1) requires mortgage foreclosure plaintiffs to pay to the Clerk of the Circuit Court an additional fee for the Foreclosure Prevention Program Fund ("FPP"). Further, section 15-1504.1(a-5) (735 ILCS 15-1504.1(a-5)), requires a portion of fees to be deposited into the Abandoned Residential Property Municipality Relief Fund ("APF") The Clerk of the Court retains 2% and remits the remainder to the State Treasurer for the FPP and APF, which are both administered by the Illinois Housing Development Authority (the "Housing Authority"). 20 ILCS 3805/7.30; 735 ILCS 5/1504.1(a-5)(2).

2. 20 ILCS 3805/7.30

Under 20 ILCS 3805/7.30 of the Housing Development Act, the Housing Authority must grant 25% of the FPP to approved housing counseling agencies outside Chicago, based in part upon the number of foreclosures; 25% to approved counseling agencies inside Chicago for housing counseling or foreclosure prevention services; 25% to approved community-based organizations outside Chicago for approved foreclosure prevention outreach; and 25% for such programs inside Chicago. See 20 ILCS 3805/7.30(b).

Section 7.30(a) directs the Housing Authority to award grants of FPP funds to "approved counseling agencies for approved housing counseling" and to "approved community-based organizations for approved foreclosure prevention outreach programs." 20 ILCS 3805/7 30(a)(i) and (ii). An "approved community-based organization" means a "not-for-profit entity that provides educational and financial information to residents of a community through in-person contact" but excludes organizations providing legal services. 20 ILCS 3805/7.30(b-5). An "approved foreclosure prevention outreach program" includes pre-purchase and post-purchase home counseling, and education regarding the foreclosure process. 20 ILCS 3805/7.30(b-5).

3. 20 ILCS 3805/7.31

Section 7.31 of the Housing Development Act (20 ILCS 3805/7.31), requires the Housing Authority to distribute proceeds from the APF in the following manner: (1) 30% of monies in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County; (2) 25% of the monies in the Fund shall be used to make grants to the City of Chicago; (3) 30% of the monies in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry, and Will Counties, and to those counties; and (4) 15% of the monies in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will. 20 ILCS 3805/7.31(b).

Under section 7.31(a) (20 ILCS 3805/7.31), the monetary grants may be used for things such as cutting the grass at abandoned properties; trimming trees and bushes; extermination of pests; removing garbage and graffiti; installing fencing; and demolition. Further, section 7.31(a) has a "catchall" provision which further widens permissible expenditures to include general "repair or rehabilitation of abandoned residential property."

B. PROCEDURAL HISTORY

The case involves two underlying mortgage foreclosure lawsuits. On April 18, 2012, Plaintiff Reuben Walker filed a complaint in Will County Case No. 12-CH-2010. On August 11, 2015, Plaintiff M. Steven Diamond filed a complaint in Cook County Case No. 15-CH-12027. In filing those cases, they each paid $50 fees they now claim were unlawful.

Mr. Walker originally filed this case on October 2, 2012. On November 9, 2012, Judge Bobbi Petrungaro certified a class consisting of "all plaintiffs who paid the 735 ILCS 5/1504.1 fee." On November 8, 2013, Judge Petrungaro (a) granted partial summary judgment in favor of Mr. Walker; (b) found that circuit court clerks fall within the judicial fee officer prohibition in Article VI, section 14, of the Illinois Constitution, and that the provision in section 15–1504.1 authorizing 2% of the filing fee to be retained by the clerk for administrative expenses creates an impermissible fee office; and (c) found section 15-1504.1 unconstitutional on its face. The scope of her ruling was limited to the version of section 15-1504.1 that existed on the date this case was filed.

On September 24, 2015, the Illinois Supreme Court reversed and remanded, holding that circuit court clerks did not fall within state constitutional provision prohibiting fee officers in judicial system. *See Walker v. McGuire*, 2015 IL 117138. The Illinois Supreme Court did not address the other constitutional claims raised by Plaintiffs.

On June 9, 2016, following remand, Plaintiffs' counsel amended their complaint to add Mr. Diamond as an additional named party. On December 4, 2018, Plaintiffs filed

their Second Amended Complaint. Also, the parties agreed to substitute Andrea Lynn Chasteen as the named representative defendant instead of Pamela McGuire, given that Ms. Chasteen succeeded Ms. McGuire as the Will County Circuit Clerk in December 2016. Plaintiffs filed a summary judgment motion which was fully briefed.

In 2018, even though the parties previously gave notice to the Illinois Attorney General and all the circuit clerks in the State of Illinois, the Court was somewhat puzzled that only the Will County State's Attorney was defending the case. For example, the Illinois Attorney General had been involved in the litigation in its early phases and before the Illinois Supreme Court, but was no longer actively involved in the case following remand. In an abundance of caution, the Court directed the parties to give additional notice to entities such as the Illinois Attorney General and the Cook County State's Attorney. Eventually, the Court permitted the Illinois Attorney General and the Cook County Circuit Clerk, Dorothy Brown, to participate in the case. They both filed additional summary judgment briefs.

Following oral argument, the Court took the case under advisement. The Court eventually determined that one issue (application of the voluntary payment doctrine) required an evidentiary hearing. Following that evidentiary hearing, the Court again took the case under advisement.

C. Allegations and Claims in the Second Amended Complaint

In general terms, the Second Amended Complaint asserts a putative class action against the clerks of circuit court in the State of Illinois. Plaintiffs seek, among other things, a permanent injunction prohibiting the enforcement of the statutes at issue. Plaintiffs also seek return of monies collected. The State[2] contends that the statutes are constitutional.

Plaintiffs' Second Amended Complaint contains four counts, the first three being based on the Illinois Constitution: Count I – violation of separation of powers under Article II, section 1; Count II – violation of due process and equal protection guarantees in Article I, section 2, as well as violation of the "Uniformity Clause" in Article I, section 2; Count III – violation of the right to obtain justice freely (often called the "Free Access" Clause) under Article I, section 12; and Count IV – creation of a protest fund.

[2] The Will County and Cook County State's Attorneys represent Ms Chasteen and Ms Brown, respectively The Court references these individual clerks, their respective attorneys, and the Illinois Attorney General, collectively as "the State" where possible.

II. ANALYSIS

A. Standards for a Summary Judgment Motion

Summary judgment is proper where the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007); *see also* 735 ILCS 5/2–1005(c). Summary judgment should be granted only if the movant's right to judgment is clear and free from doubt. *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 993 (2007). When parties file cross-motions for summary judgment, they mutually concede that there are no genuine issues of material fact and that only questions of law exist. *See Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 432 (2010).

B. Statute Version and Standing

These statutes have been amended several times over the years, and the Court has sought to identify the specific versions of the statutes which Plaintiffs claim, and actually have, standing to attack. This was an issue in the earlier stages of the litigation too, where Judge Petrungaro ordered additional briefing on this issue and ultimately limited her findings to the version of the statutes that existed when Mr. Walker filed his initial complaint on October 2, 2012. The Illinois Supreme Court later rejected Mr. Walker's effort to broaden the scope of his claims to include later versions.

This Court's difficulty in getting Plaintiffs to adequately identify the statutes they are attacking (and can attack) mirrors that of Judge Petrungaro. And, while Judge Petrungaro focused on the date ***this*** case was filed, the undersigned judge concludes that focus ought to be on the dates the ***underlying*** cases were filed (*i.e.*, the dates on which the challenged fees were paid, since that is when Plaintiffs were allegedly harmed). It does not really make a difference, though, since the public act in effect on those dates is the same.

Perhaps Judge Petrungaro's approach was the correct one, since the Illinois Supreme Court found no fault in it. However, that court's discussion was primarily in the context of pleading rather than standing. *See Walker v. McGuire*, 2015 IL 117138, ¶¶36-42.

As a pleading matter, the Second Amended Complaint is not as clear as it ought to be regarding the specific versions of the statutes Plaintiffs attack. Indeed, it is rather vague.

As identified in the table, the applicable version of the statutes could (but would not necessarily) change depending on whether the appropriate focus is on the date of the

original complaint in this case (October 2, 2012), the dates the underlying foreclosure cases were filed (April 18, 2012, and August 11, 2015), the date Stephen Diamond was added as a plaintiff (June 9, 2006), or the date of the current complaint (December 4, 2018).[3] However, the Court identifies other amendments that have occurred. Indeed, 735 ILCS was also amended by P.A. 101-396 (eff. August 16, 2019). Likewise, 20 ILCS 3805.7.30 was amended by P.A. 97-1164, (eff. June 1, 2013), and again by P.A. 99-581 (eff. January 1, 2017). Finally, 20 ILCS 3508/7.31 was amended by P.A. 97-1164 (eff. June 1, 2013).

The Court tried to seek clarification by directing Plaintiffs to file an amended Rule 19 statement, and then a second amended Rule 19 statement. Based on the second amended Rule 19 Statement, Plaintiff Rueben Walker claims standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 82-280, § 15-1504.1, added by P.A. 96-1419, §15, eff. Oct. 1, 2010. Amended by P.A. 97-333, § 575, eff. Aug. 12, 2011; P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, § 15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017.)

2. 20 ILCS 3805/7.30 (P.A. Laws 1967, p. 1931, § 7.30, added by P.A. 96-1419, § 5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Laws 1967, p. 1931, § 7.31, added by P.A. 96-1419, §5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

[3] Statute versions that could arguably impact the Court's analysis relative to the referenced dates include.

Statute	4/18/2012	10/2/2012	8/11/2015	6/9/2016	12/4/2018
735 ILCS 5/15-1504 1	P A 97-333, eff. 8/12/2011	P.A 97-333, eff. 8/12/2011	P.A 98-20, eff. 6/11/2013	P A 98-20, eff 6/11/2013	P A. 100-407, eff. 8/25/2017
20 ILCS 3805/7 30	Added by P A 96-1419, eff. 10/1/2010	Added by P A 96-1419, eff 10/1/2010	P A. 98-20, eff 6/11/2013	P A. 98-20, eff. 6/11/2013	P A 100-513, eff 1/1/2018
20 ILCS 3805/7.31	Added by P.A 96-1419, eff. 10/1/2010	Added by P A 96-1419, eff 10/1/2010	P A 98-20, eff 6/11/2013	P A. 98-20, eff. 6/11/2013	P A. 98-20, eff 6/11/2013

Plaintiff M. Steven Diamond claims in his second amended Rule 19 statement standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, §15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017).

2. 20 ILCS 3805/7.30 (Amended by P.A 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P.A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

Ultimately, however, the Court need not distinguish between the iterations of the statutes. At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). They further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. (See February 13, 2020 hearing tr. at 18-22.)

C. Non-Constitutional Issues.

There are two questions in the case that do not directly require constitutional analysis, or which could make it unnecessary to reach the constitutional issues. The Court will address those issues first. *See Coram v. State*, 2013 IL 113867, ¶56 (a court must "consider nonconstitutional issues first and consider constitutional issues only if necessary to the resolution of this case"). These are (1) duress and the voluntary payment doctrine; and (2) the propriety of Count IV.

1. Duress and the Voluntary Payment Doctrine

Ms. Brown argues that Plaintiffs' constitutional claims fail under the voluntary payment doctrine because Plaintiffs did not pay the $50 filing fee "under protest." Specifically, Ms. Brown argues Plaintiffs cannot be class representatives when they themselves do not have a proper claim.[4] *See Perlman v. Time, Inc.*, 133 Ill. App. 3d 348,

[4] Interestingly, these determinations are often, if not usually, made prior to class certification *See, e.g., De Bouse v. Bayer*, 235 Ill 2d 544, 560 (2009) (where named plaintiff's claim failed, she was not an appropriate representative of the putative class and class certification was not appropriate), *Landesman v. General Motors Corp.*, 72 Ill 2d 44, 48-49 (1978) (holding that "[t]he requirement that the named representatives of the putative class possess a valid cause of action is subsumed" in the class certification requirements) In this case, Judge Petrungaro certified the class in November 2012 To this Court's knowledge, that finding was not raised during the prior appeal. To be clear, the Court does not hold that a named plaintiff's suitability as class representative cannot be challenged eight years after class certification Rather, the Court merely observes that the Illinois Supreme Court might reach that conclusion

354 (1985) (holding that if the named plaintiff's personal cause of action fails, the entire class action must fail). Plaintiffs counter that the payment was made under duress, and therefore the voluntary payment doctrine does not apply.

"The common-law voluntary payment doctrine embodies the ancient and 'universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal.'" *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶22, *citing Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541 (1908). Generally, "involuntary payment" is a required component to a claim to recover paid taxes or fees. *See Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 183 (1987); *United Private Detective & Security Ass'n v. City of Chicago*, 56 Ill. App. 3d 242, 244 (1977). Absent a payment made under express protest, a person can establish that the fee was paid involuntarily by showing (1) he lacked knowledge of the facts upon which to protest the taxes or fees at the time they were paid (*i.e.*, a mistake of fact); (2) that the taxes or fees were paid under duress; or (3) fraud *See McIntosh* at ¶22-25, 39; *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004); *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). Plaintiffs primarily rely on the duress exception.

The "kind of duress necessary to establish payment under compulsion has been expanded over the years."[5] *Midwest Medical Records Assoc., Inc. v. Brown*, 2018 IL App (1st) 163230 ¶24, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 848 (1995). As the appellate court in *Midwest Medical Records* observes, duress may be implied, and has included duress of property, and compulsion of business. *Id.* at ¶¶25, 28. "In determining whether payment is made under duress, the main consideration is whether the party had a choice of option, *i.e.*, whether there was 'some actual or threatened power wielded over the payor from which he has no immediate relief and from which no adequate opportunity is afforded the payor to effectively resist the demand for payment.'" *Id.* at ¶28, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 849 (1995). Indeed, "duress exists where the taxpayer's refusal to pay the tax would result in loss of reasonable access to a good or service considered essential." *Wexler*, 211 Ill. 2d at 24, *citing Geary*, 129 Ill. 2d at 396-400.

In *Midwest Medical Records*, the court concluded that duress existed because the litigants would have forfeited the ability to assert his legal rights if he had not paid the fee. *Midwest Medical Records* at ¶32. Indeed, the court stated, "plaintiffs could not avail themselves of the judicial process without payment. Plaintiff's refusal to pay the fee

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[5] Indeed, a lengthy line of appellate court cases has steadily chipped away at the doctrine, in a variety of contexts, to the point that the rule has been arguably swallowed by application of its exceptions. The Court also notes that, in ***other*** contexts, it appears the legislature has sought to override the existence of the voluntary payment doctrine See 35 ILCS 220/23-5 ("whenever taxes are paid *** and a tax objection complaint is filed *** 100% of the taxes shall be deemed paid under protest")

would have immediately resulted in loss of access to the courts ***. This is a[n] *** immediate threat ***."

The Court finds that the duress exception applies in this case for two independently sufficient reasons.[6] The first follows the reasoning of *Midwest Medical Records*. The Court finds that Plaintiffs in this case would have been restricted from reasonably accessing the court system (*i.e.*, they would have lost a substantial right) had the fee not been paid. The Court notes that, at the January 2020 hearing, the Illinois Attorney General (but not the attorneys for Ms. Brown and Ms. Chasteen) conceded that, in court-fee cases like this one, duress necessarily and inherently exists. (See January 24, 2020 hearing tr. at 10-13.)

The second reason has less to do with case law; it is based on Reuben Walker's live testimony. Mr. Walker testified that he was anxious to get his foreclosure case on file and exercise his rights as a mortgagee due to concerns of fraud and other complications to the underlying case. His understanding was that he was required to pay the fee in order to file the lawsuit. He was not aware that he could pay the fees under protest, and believed he was ineligible for a fee waiver. He further testified that if the Will County Circuit Clerk informed him that the filing fee was voluntary and not required, he would not have paid the fee. The Court finds Mr. Walker's testimony was both compelling and credible. The Court finds that Mr. Walker's established they he was under duress (as that term has been used in connection with the voluntary payment doctrine) when he paid the filing fee.

Accordingly, the voluntary payment doctrine does not defeat Plaintiffs' claims.

2. <u>Count IV: Protest Fund</u>

Count IV seeks creation of a protest fund. This Court is unaware of an Illinois reviewing-court case recognizing "protest fund" as a cause of action. Further, the Court see no reason why it ought to be. Creation of a protest fund is a remedy. Plaintiffs' counsel acknowledged as much during the January 2020 hearing. The Court also notes that a protest fund was indeed already created in this case (at least with regard to foreclosure cases filed in Will County) by Judge Petrungaro shortly after this case was filed.

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[6] Generally, for an exception to apply, facts supporting application of the exception must be pled. *See McIntosh v. Walgreens Boots All., Inc* , 2019 IL 123626 at ¶34 Here, Ms. Brown raised the voluntary payment doctrine in her ***summary judgment*** motion, but she actually asked for ***dismissal*** She sought dismissal because, among other reasons, Plaintiffs failed to plead in the Second Amended Complaint that the filing fee was paid involuntarily or under duress At the January 2020 hearing, Ms Brown agreed to waive her arguments regarding the need to plead duress, and further agreed that the Court should consider the issue on the substantive merits within the context of summary judgment (and not as a request for dismissal for failure to plead).

Because creation of a protest fund is not a cause of action in Illinois, summary judgment is granted for the State on Count IV.

D. Constitutionality of the Statutes

1. Standards for Constitutional Review

The Court begins with the strong presumption that the statutes are constitutional. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). To overcome this presumption, the parties challenging the statutes must clearly establish their invalidity. *People v. Melongo*, 2014 IL 114852, ¶20. The Court has a duty to construe a statute in a manner that upholds its constitutionality, if reasonably possible. *Id.*

The Court directed Plaintiffs' to clarify whether they were waging an "as applied" or "facial" constitutional attack on the statutes. In their supplemental brief, filed April 22, 2019, they stated their claims were based "primarily on a 'facial' basis" but that they were also making an "as applied" argument relative to their due process and equal protection claims.

"A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully [citation], because an enactment is facially invalid only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008). "Successfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under ***any*** imaginable set of circumstances." *In re M.T.*, 221 Ill. 2d 517, 536 (2006) (emphasis in original). Because a successful facial attack effectively voids a statute for all parties in all contexts, findings of facial invalidity are made only as a last resort. *See Pooh-Bah Enterprises, Inc. v. Cty. of Cook*, 232 Ill. 2d 463, 473 (2009).

The test of a law's constitutionality depends largely on the nature of the right that is claimed. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). As a threshold matter, the parties dispute whether the Court is to apply "rational basis" or "strict" scrutiny. The rational-basis test is limited and highly deferential. *Id.* Under the rational-basis test, a court will uphold a statute if it bears a rational relationship to a legitimate legislative purpose and is not arbitrary or unreasonable. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004).

Plaintiffs counter that this case involves an infringement on fundamental rights, and therefore the strict-scrutiny standard applies. "To withstand the strict scrutiny standard, a statute must serve a compelling state interest, and be narrowly tailored to serve the compelling interest, *i.e.*, the legislature must use the least restrictive means to serve the compelling interest." *Lulay v. Lulay*, 193 Ill. 2d 455, 470 (2000).

Identifying the appropriate standard of review is not always easy. The State is indeed correct that, ordinarily, a statute's constitutionality is weighed on a rational-basis test. *Tully v. Edgar*, 171 Ill. 2d 297, 304 (1996); *Lipe v. O'Connor*, 2014 IL App (3d) 130345. But the question often turns on whether the statute implicates an infringement on fundamental rights Not every right secured by the State or Federal constitutions is fundamental, though. *Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 509 (1984) In the context of constitutional review, fundamental rights are limited to "those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *People ex rel. Tucker v. Kotsos,* 68 Ill. 2d 88, 97 (1977). Fundamental rights include the expression of ideas (*i.e.,* speech), participation in the political process, interstate travel, and intimate personal privacy interests, among other things. *Id.* at 97. Plaintiffs' argument for strict-scrutiny analysis is unpersuasive.

Regardless, the Court need not wade too deeply into this "level of analysis" thicket. This case is largely controlled by *Crocker v. Finley*, 99 Ill. 2d 444 (1984). There, the Illinois Supreme Court examined the constitutionality of court filing fees and employed a rational-basis analysis. *See id.* at 457 ("We can find no rational basis for imposing this tax on only those petitioners filing for dissolution of marriage"). As the Court will explain, since the statutes cannot survive the rational-basis analysis employed in *Crocker*, it is unnecessary to consider whether they can withstand strict scrutiny.

2. Count I: Separation of Powers (Article II, section 1)

Under the Illinois Constitution, the "legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another." Ill. Const. 1970, art II, § 1. The separation of powers doctrine is designed to "ensure that the whole power of two or more branches of government shall not reside in the same hands." *Morawicz v. Hynes*, 401 Ill. App. 3d 142-149-50 (2010). But the separation of powers clause "does not seek to achieve a complete divorce among the three branches of government" with a division of "rigid, mutually exclusive components." *Id.* Rather, the separation of powers doctrine "allows for the three branches of government to share certain functions. *Id.*

Plaintiffs contend that the statutes violate separation of powers principles because they "require an arm of the judicial branch, the Clerk of the Circuit Court, to 'administer' a portion of the funds collected for use as part of the [FPP]." The Court rejects this argument for three reasons.

First, Plaintiffs' arguments are sparse to say the least. Parties have the obligation to present the Court with a sufficient basis to rule in their favor. *See Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010) (undeveloped arguments, or contentions with some argument but no authority, are forfeited). In particular, at the summary judgment stage, the parties must "put up or shut up." *Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶14. Plaintiffs have put up almost nothing by way of factual and legal support.

Second, as far as the Court can tell based on the practically nonexistent factual record presented, the Housing Authority administers the FPP. Not the clerk

Third, Plaintiffs' arguments are contrary to the holding in *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989). In that case, the chief judge's administration of a dispute resolution fund was found to be compatible with the separation of powers clause.

Given the statutes' presumptive validity and Plaintiffs' heavy burden to show otherwise, the Court finds that Plaintiffs have failed to establish that the statutes violate Article II, section 1.

3. Count III: The Free Access Clause (Article I, section 12)

The Court next examines Plaintiffs' claim under the Free Access Clause because it is most directly dispositive of the case. But the Court must first add some context to Plaintiffs' Free Access Clause claim. Plaintiff's Second Amended Complaint and Rule 19 statement do not expressly reference the access to justice protections of Article I, section 12. Instead, Count III alleges that:

> [T]he Illinois Constitution of 1970, [as] interpreted by the Illinois Supreme Court [in *Crocker v. Finley*, 99 Ill. 2d 444 (1984)] prohibits the imposition of a filing fee upon litigants where the fee is collected for a purpose that is not court-related and which does not remain exclusively within the control of and retained to finance the Court system only "

Further, the Seconded Amended Rule 19 statement reflects Plaintiffs' constitutional challenge on "the prohibition on the use of Court fees *** as established by decisions of the Supreme Court of Illinois."

Thus, at first blush, it appears Plaintiffs do not base their constitutional claim on any enumerated part of the Illinois Constitution. Rather, they base it directly on *Crocker* (and specifically, as their arguments suggest, *Crocker* at 451-56). But *Crocker* does not conjure state constitutional protections from thin air. The Illinois Supreme Court's discussion in *Crocker* at 451-56 is clearly based on the Free Access Clause. *See Crocker* at 451 (stating "[w]e first address *** the Illinois constitutional right to obtain justice by law freely"); *see also Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 156 (2003) ("*Crocker* was decided under the free access clause and, to a lesser extent, under the due process clause").

The Court is thus left to analyze a constitutional claim that Plaintiffs barely made, or at least did not make well. Still, "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c). Further, a pleading should be considered on its character rather than its label. *In re Haley D.*, 2011 IL 110886, ¶67; *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). There appears

to be no disagreement by the State that Plaintiffs are in fact asserting a Free Access Clause claim. Accordingly, the Court will consider the statutes' constitutionality in that context.

The Constitution's Free Access Clause appears in Article I, section 12, and states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Ill. Const. 1970, art. I, §12.

The Free Access Clause protect parties from the imposition of fees that unreasonably interfere with their rights to a remedy in the law or unreasonably impede the administration of justice. *See Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (2001). As Plaintiffs observe, *Crocker* is the leading case on the Free Access Clause. In *Crocker*, the Court considered the validity of a statute that required the clerk to collect a special $5 fee from petitioners filing dissolution of marriage cases. The fee, paid on top of ordinary filing fees, was collected to fund domestic violence shelters and related services.

In its analysis, the *Crocker* Court deemed the $5 charge a litigation "tax" rather than a fee, and then considered the purposes for which a fee or tax may be imposed. Even though the court declared the $5 charge a "tax" rather than a fee, its ultimate determination makes little distinction between the two. The court was unequivocal, stating, "we now conclude that court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts. We consider this requirement to be inherent in our Illinois Constitutional right to obtain justice freely." *Crocker*, 99 Ill. 2d at 454. The court also stated that litigants "should not be required, as a condition of their filing, to support a general welfare program that relates neither to their litigation nor to the court system." *Id.* at 455.

The *Crocker* court relied, in part, on *Ali v. Danaher*. That case was decided under the Free Access provisions of the 1870 Illinois Constitution. But the *Crocker* court found it instructive, and quoted the *Ali* court's determination that the fee to support a law library had a relationship to the court system that was "clear." *See Crocker*, 99 Ill 2d at 453-54, citing *Ali*, 47 Ill. 2d at 237.

In *Boynton v. Kusper*, 112 Ill. 2d 356 (1986), the challenged statute required county clerks to place part of the marriage license fee into a domestic abuse fund. The court found that the relationship between those who were being taxed and those who were benefitting from that tax was too remote. *Boynton*, 112 Ill. 2d at 367-68.

The Court has reviewed additional Free Access Clause cases cited by the parties, including *Gatz v. Brown*, 2017 IL App (1st) 160579 (children's waiting room in courthouses); *Zamarron v. Pucinski*, 282 Ill. App. 3d 354 (1996) (fee to fund court

automation); *Rose v. Pucinski*, 321 Ill. App. 3d 92 (2001) (mandatory arbitration fee); *Mellon v. Coffelt*, 313 Ill. App. 3d 619 (2000) (arbitration fee); and *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989) (fee to fund dispute centers).

The analytical theme that runs (sometimes expressly, sometimes implicitly) through *Crocker*, *Ali*, *Boynton*, *Gatz*, *Zamarron*, *Rose*, *Mellon*, and *Wenger* is that the relationship between the fee and its impact on "the operation and maintenance of the courts" cannot be too attenuated. Rather, it must be relatively direct, clear, and ascertainable. Indeed, the *Crocker* court rejected arguments that the $5 litigation tax would improve the overall administration of justice. The Court found that the asserted relationship was "too remote" and concluded that the service-funding scheme, if permitted, would open the door to "countless other social welfare programs." *See Crocker*, 99 Ill. 2d at 455-56.

The State argues that section 7.30 and the FPP "funds a service that counsels those who are in danger of foreclosure" and that a "direct link exists between those who file for foreclosure and the important governmental interest in the decreasing of foreclosure filings which burden the court system." Further, the State argues that the FPP benefits all civil litigants by providing a "more efficient and expeditious administration of justice by avoiding the extra burden the mass filings of foreclosure put upon the court system." Finally, the State argues that the FPP benefits the court system by decreasing the court system's time and resources spent on foreclosure. However, the State narrows the scope of the available counseling and forgets that these services are available to people ***who don't even have mortgages***. Further, the Court acknowledges that counseling might benefit the court system, but those benefits are indirect at best. Rather, these are precisely the sort of benefits the *Crocker* court deemed "too remote" to pass muster under the Free Access Clause. This fee[7] represent the social welfare program *Crocker* warned about, and that the Free Access Clause prohibits.

The State further argues that section 7.31 and the rest of the statutory framework is designed to care for property that is often poorly maintained. The State further argues that foreclosed properties are often abandoned and constitute a nuisance. The statutes fund municipalities and counties with subsidies derived from filing fees to minimize the problems associated with foreclosed properties. That is all well and good, but the APF's grass cutting, tree trimming, graffiti removing, and general "repair or rehabilitation" are

[7] The Court uses the term "fee" loosely. To be clear, it appears to the Court that the "fee" is in fact a litigation tax, as was the case in *Crocker*. This is evident because the collected monies have little direct relation to what the litigant is getting for his paid fee. *See Crocker*, 99 Ill. 2d at 452. *See also Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1391-92 (7th Cir. 1992) (explaining that a fee is meant to offset costs imposed on the party granting a privilege, while a tax is a revenue generating mechanism). However, this distinction is perhaps of little relevance since, as previously noted, the *Crocker* court required that "court filing fees ***and*** taxes may be imposed only for purposes relating to the operation and maintenance of the courts." (Emphasis added.) *See Crocker*, 99 Ill. 2d at 454.

"benefits" even ***more*** removed from "operation and maintenance of the courts" than is the counseling benefit. The statutory scheme is tantamount to a litigation-tax funded neighborhood beautification plan.

In short, the Court agrees with Plaintiffs that the statutes in this case collectively impose a fee on a certain class of litigants, and that fee is used for things other than operation and maintenance of the courts. Indeed, when a foreclosure plaintiff in (for example) Will County has to pay a filing fee that is used to cut the grass, pick up trash, and "repair and rehabilitate" (whatever that entails) abandoned properties in Chicago, and those properties are owned by private individuals or entities (presumably, in most instances, banks), the fee is not at all associated with "operation and maintenance of the courts."[8] Likewise, when a filing fee is collected and then ultimately used to pay private counselors and organizations, who render counseling services to private individuals who are not necessarily involved in litigation (and in some cases do not—and never did—own mortgaged property), that fee, again, is not directly related to "operation and maintenance of the courts." It has little meaningful distinction to, hypothetically, a fee imposed in divorce cases that would fund private marriage counseling for persons who are not yet even married. The Court finds that the statutes violate the Free Access Clause.[9] The fee imposes an unreasonable burden on Plaintiffs' access to the court system. *See Crocker*, 99 Ill. 2d at 455.

4. Count II: Due Process and Equal Protection (Article I, section 2)

Even though the Court's ruling as to the Free Access clause is determinative, the Court sees value in rendering as complete a ruling as possible, given the case's age and procedural history. Therefore, it will address the remaining issues.

Count II of the Second Amended Complaint alleges that the statutes violate the Due Process and Equal Protection guarantees of the Illinois Constitution. Given the Court's finding that *Crocker* controls this case, and *Crocker*'s finding that the filing fees in that case violated the due process and equal protection clauses (*see Crocker*, 99 Ill. 2d at

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[8] Given that the fees collected from the various circuit clerks are essentially pooled then reallocated, the Court has pondered whether *Crocker*'s reference to "operation and maintenance of the courts" means the ***Illinois court system*** as a whole, or the judicial maintenance and operational needs of the ***county*** where the fee is collected. In other words, if a special fee is paid to the Will County Clerk as a component of Will County filing costs, must the fee be used to operate and maintain the Will County court system? Or, may it be used to operate and it be used to fund Cook County courthouse operations? It seems to this Court that the spirit of *Crocker* requires that a fee paid in Will County, for a case that places an incremental strain on the Will County judiciary and the Will County Circuit Clerk, ought to be used to pay for operations of the ***Will County Court system only***. Given the conclusions the Court has already reached relative to the Free Access Clause, this Court need not resolve this question, but guidance from the Illinois Supreme Court would be welcome.

[9] In reaching this determination, the Court did not rely on the report of the Statutory Court Fee Task Force, which was submitted by Plaintiffs

456-57), the Court must find that the statutes also violate Article I, section 2 for the same reasons as those expressed in *Crocker*.

5. Count II: Uniformity Clause (Article IX, section 2)

The Court has already determined, pursuant to *Crocker*, that the fee violates the Due Process and Equal Protection clause of the Illinois Constitution. Our supreme court has repeatedly said that "[i]f a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause." *See Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill 2d 239, 247 (1992); *Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill 2d 243, 250 (1996). This Court is unaware of a case expressly declaring the opposite to be true (*i.e.*, that if a tax is unconstitutional under the equal protection clause, than it inherently violates the Uniformity Clause too). But this would make sense since the Uniformity Clause was "intended to be a broader limitation on legislative power to classify for nonproperty-tax purposes than the limitation of the equal protection clause. *See Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003); *see also Milwaukee Safeguard Ins. Co. v. Selke*, 179 Ill. 2d 95, 102 (1997); *see also Federated Distributors, Inc. v. Johnson*, 125 Ill. 2d 1, 9–10 (1988) ("Although the due process clauses of the Federal and State Constitutions and the equal protection clause of the Federal Constitution had previously served as limitations upon unreasonable classifications *** the Committee believed that the taxpayers of Illinois should receive additional protection"). Nonetheless, the Court acknowledges that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill. 2d at 156),[10] and so it will analyze the Uniformity Clause challenge relatively independent from its *Crocker*-based findings.

The Uniformity Clause of the Illinois Constitution provides as follows:

> "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable."

Ill. Const. 1970, art. IX, §2.

The Uniformity Clause makes two basic demands. *See Primeco Pers. Commc'ns, L.P. v. I.C.C.*, 196 Ill. 2d 70, 84 (2001). The first requires the General Assembly to classify the subjects or objects of nonproperty taxes reasonably. *Id.* As to this first requirement, a classification may be considered reasonable if it (A) is based on a real and substantial difference between those who are taxed and those who are not taxed; and (B) bears some

[10] While it is true that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill 2d at 156), the Court must nonetheless be mindful of *Crocker*'s caution that "[i]f the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts." *Arangold*, 204 Ill 2d at 149, *quoting Crocker*, 99 Ill 2d at 455.

reasonable relationship to the object of the legislation or to public policy. *See id.* Once a reasonable classification has been established, the second requirement is that the members of that class must be taxed uniformly. *Id.*

In the context of a uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. *See Arangold*, 204 Ill. 2d at 153. The challenging party must then persuade the court that the taxing body's explanation is legally or factually insufficient. *See id.* Despite the more stringent standard under the uniformity clause, the court's inquiry is relatively narrow. *Id.* The court need not have proof of perfect rationality as to each and every taxpayer. *Id* Rather, there must be minimum standards of reasonableness and fairness as between groups of taxpayers. *See id.*

Turning to the first requirement, the Court first "determine[s] the object (or purpose) of the taxing provision at issue." *Primeco*, 196 Ill. 2d at 85. (Emphasis omitted.) The Court finds that the purpose of 735 ILCS 5/15-1504.1 is to fund the legislative aims of 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. Legislative findings relative to the Housing Development Act (which includes sections 7.30 and 7.31) are codified at 20 ILCS 3805/3, but are too voluminous to quote here. Those findings are accurately characterized by the previously-referenced transcript as being intended to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16, 4:16 to 6:1; 6:19-21.) These purposes are carried out, in part, by the imposition of filing fees used for mortgage counseling, and for property beautification and maintenance.

The Court next considers whether the statutes' object is reasonably related to the class of entities taxed. *Primeco*, 196 Ill. 2d at 85. Plaintiffs argue the statutes impose a "burden of payment of a fee upon Plaintiffs and others similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden." They further argue that the statutes violate the Uniformity Clause by creating a "burden on those involved in the foreclosure process while, at the same time, providing a benefit to limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality [*i.e.*, Chicago] and giving the remainder on an equally non-uniform basis throughout Illinois."

The Court finds that there is no real and substantial difference between plaintiffs seeking access to the court system in mortgage foreclosure cases, and those seeking access to the courts in non-foreclosure contexts. Indeed, the statutes' taxing classification (burdening only those persons or entities filing mortgage foreclosure

cases[11]) does not bear a reasonable relationship to the purpose of the tax. Accordingly, the Court finds that the statutes violate the Uniformity Clause (Ill. Const. 1970, art. IX, §2).

III. CONCLUSION

In light of the foregoing, the Court FINDS and ORDERS the following:

A. No one has suggested that the class needs to be recertified given the amendments to the original complaint and the amendments to the statutes. To the extent necessary, the Court reaffirms the conclusions and directives of the November 2012 class certification order. Further, the Court finds that both named plaintiffs are suitable class representatives.

B. Summary judgment is granted in favor of Plaintiffs, and against the State, on Counts II and III.

C. Summary judgment is granted in favor of the State, and against Plaintiffs, on Counts I and IV.

D. The Court finds that 735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31, in all of their various iterations from the date the underlying mortgage cases were filed through today, are facially unconstitutional. These statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970.

E. The Court finds that the statutes are not severable.

F. The Court's findings of unconstitutionality are necessary, and cannot rest on alternative non-constitutional grounds.

G. The Court finds that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statutes at issue.

H. The Court finds Plaintiffs have established that they have no adequate remedy at law, that they possess a clearly ascertainable right, and that they will suffer irreparable harm if no relief is granted. The Court enters a permanent injunction enjoining the Circuit Clerks of the State of Illinois from enforcing and following 735 ILCS

[11] The Court notes that the statutes also distinguish the amount of the fee based on the number of foreclosure cases filed The more cases filed, the higher the per-case fee The likely import of this disparity is that large banks and mortgage lenders will pay higher per-case filing fees, while individuals and smaller lenders will pay less. This distinction seems to raise Uniformity Clause questions on its own However, the Plaintiffs have not adequately raised this issue and so the Court does not rely on it in making its decision.

5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31 as they are currently enacted. Specifically, the Circuit Clerks are not to impose, collect, hold, or disburse the filing fees at issue.

I. On the Court's motion, the effect and enforcement of the injunction (discussed in the preceding paragraph) is stayed until further order. A stay is appropriate to provide the Illinois Supreme Court a meaningful opportunity to review the case.

J. There are still remaining issues in this case, such as Plaintiffs' request for the return of collected fees. The case is set for further hearing and status regarding remaining issues on March 11, 2020, at 1p.m. On that date, the Court will also consider the propriety of a Rule 304(a) finding relative to this Order.

K. The Will County Circuit Clerk is directed to mail a copy of this Order to all counsel of record.

ENTERED:

Dated: March 2, 2020

John C. Anderson
Circuit Judge

2020 MAR -2 AM 8:45

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

Reuben D. Walker and M. Steven Diamond, individually and on behalf of themselves and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Case No. 12-CH-5275
Plaintiffs,	)	
v.	)	
Andrea Lynn Chasteen in her official Capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	John C. Anderson Circuit Judge
Defendants.	)	

ORDER

On March 2, 2020, the Court issued a Memorandum Opinion and Order declaring three statutes (735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31) unconstitutional, and enjoining their enforcement.

In entering the March 2, 2020 ruling, and for a substantial period of time before issuing the ruling, the Court has grappled with Plaintiffs' standing to attack the various iterations of the statutes that existed after plaintiffs incurred the filing fees that are at issue in the case.

To be sure, Plaintiffs have standing to attack those versions of the statutes (*i.e.*, those Public Acts) that existed at the time they filed their underlying foreclosure actions. Further, the Court finds Plaintiffs may seek a refund of fees collected under those versions.

Reuben Walker filed his mortgage foreclosure case on April 18, 2012. Steve Diamond filed his foreclosure case on August 11, 2015. The public acts that existed on those dates are as follows:

05/27/20 08:46:01 CH

Statute\Plaintiff	Walker 4/18/2012	Diamond 8/11/2015
735 ILCS 5/15-1504.1	P.A. 97-333, eff. 8/12/2011	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.30	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.31	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013

The Court is unclear, however, whether Plaintiffs have standing to seek relief in the form of (a) return of fees collected under ***subsequent*** versions of the statutes (including the ***current*** version); and (b) injunctive relief regarding the ***current*** version of the statutes. Should the Court's focus be the constitutionality of the public acts, or alternatively, the statutes? Put another way, can the amendment of the statutes destroy or limit class-action plaintiffs' standing?

At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). All counsel further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. Indeed, the Court directed the following question to the Will County State's Attorney, Cook County State's Attorney, and Illinois Attorney General (collectively, the "State"):

> Let's say hypothetically that I find that the statute that existed at the time Mr. Walker filed his mortgage foreclosure case was unconstitutional for whatever reason, can I find that the subsequent amended versions are unconstitutional? Must I find that they are unconstitutional? Because they really haven't changed in any meaningful way....
>
> The attorneys for the State took a moment to confer and answered:
>
> We think the Court can declare that a certain provision that has followed through the various enactments, if the Court found that to be unconstitutional and if the Court found that it is so intertwined into the whole statute, I think you could strike down the current statute and you could enter a declaratory—you could enter a declaration that the prior versions were unconstitutional at the time they were in effect because that language that was there brought them down. I don't think—I agree you can't strike down a statute that isn't there anymore, but I still think you can declare it was unconstitutional at the time because of the infirmity that you find.

All other attorneys representing the State agreed verbally or nodded their head affirmatively; none expressed disagreement. (See February 13, 2020 tr. at 18-22.) Plaintiffs' counsel also essentially agreed.

The Court, still not quite convinced of the parties' collective position and still struggling with the question, emailed all counsel on March 4, 2020, asking them to be prepared to discuss this issue when they next appeared in Court. The parties were in Court again on March 11, 2020, where the Court asked a number of standing-related questions, including whether anyone wanted to consider the necessity of adding other named parties and amending the complaint.[1] No one actively argued that standing was lacking. Counsel eventually left the courthouse with the agreed understanding that they would confer and seek to enter into a more formal stipulation, if possible, as it relates to standing. The Court scheduled another status conference to discuss standing, and the case as a whole, on March 25, 2020. However, that was cancelled due to COVID-19. Instead, the Court and parties emailed back and forth in an effort to bring the case to a conclusion. One email from plaintiffs' counsel, dated April 22, 2020, advises in pertinent part:

> A conference was held yesterday afternoon among attorneys for the parties who wished to discuss plaintiffs' previously tendered case stipulations and proposed order. At the conference, defense counsel from Cook County State's Attorney's Office and the Illinois Attorney General's Office informed plaintiffs' counsel that their respective offices are not allowed to enter into any stipulations in this case. Thereafter, plaintiffs' counsel informed defense counsel that it is plaintiffs' position that it can see no logical reason for adding more class representatives to challenge statutes (and their iterations) which all have the same infirmities and where all money collected is placed in a common fund to be distributed.

The parties have collectively advised the Court that they do not wish to brief the standing issue (which, again, was raised by the Court), that they would like a final ruling on it, and they agree that a Rule 304(a) finding is appropriate.

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[1] On May 11, 2020, the Court sought to obtain a copy of the March 11, 2020 transcript and was told by the court reporter that the audio recording system, for unknown reasons, was not functioning that day. No transcript is available. The Court then asked all counsel of record, via email, whether they wished to submit an agreed statement of facts, bystander's report, or something else to preserve the record due to the absence of a transcript. Counsel from the Cook County State's Attorney and Illinois Attorney General expressly declined *via* email. Counsel from the Will County State's Attorney did not respond within the requested period. Plaintiffs' counsel advised the Court *via* email that he not only wished to submit a bystander's report, but he ***included one*** in his communication. However, there is a procedure for submitting a bystander's report, and it was not followed. Plaintiffs may, if they choose, file their proposed bystander's report, with notice and a proposed hearing date, if they wish. All parties will have an opportunity to either agree or object. Or, if Plaintiffs feel this Order adequately and accurately reflects what was said on March 11, 2020, they are free to forego the necessity of the bystander's report. It's the parties' record to protect. Information regarding the procedure for the bystander's report is available at: https://courts.illinois.gov/forms/approved/appellate/Appellate_Bystander/Appellate_Instructions_BR_%20ASF.pdf

The Court has no interest in complicating the procedural posture of this case. Still, trial courts have the authority and ***obligation*** to consider their own jurisdiction. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 507 (2006). Generally, the "Circuit Courts shall have original jurisdiction of all justiciable matters." *See* ILL. CONST. 1970, ART. VI, § 9. Standing is an element of justiciability. *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989).

Under a traditional standing analysis, the Court is limited to deciding "actual, specific controversies, and not abstract questions or moot issues." *In re M.I.*, 2013 IL 113776, ¶32. A person seeking to challenge a statute's constitutionality must be within the class aggrieved by the alleged constitutionality. *Id.* Indeed, the general rule is that "if there is no constitutional defect in the application of the statute to a litigant, that person does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Id.* Further, a "party may not raise a constitutional challenge to a provision of a statute that does not affect him or her." *Id.* at ¶34.

The Court is not aware of any Illinois state-court cases involving a plaintiff's standing to bring a class action challenging the enforcement of a frequently-amended statute. Nor is the Court aware of Illinois class action cases where a named-plaintiff's standing was impacted by statutory amendment after the class is certified. The Court is aware, however, of loosely analogous United States Supreme Court cases holding that, for a standing inquiry, a court must focus on the standing of the certified class to seek equitable relief. For example, in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 557, 42 L.Ed.2d 532 (1975), the Court held that "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." This Court is also aware of the ruling in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 1210, 63 L.Ed.2d 479 (1980), where the Court held that the "personal-stake requirement relat[ing] to the first purpose of the case-or-controversy doctrine" is met in class actions simply by class certification notwithstanding the subsequent loss of a "personal stake" by the class representative. Certification will preserve a class's standing even after the named individual representatives have lost the required "personal stake" in the claim. *See id.* at 399, 95 S.Ct. at 557.

In this case, on November 9, 2012, Judge Bobbi Petrungaro certified the class (without objection), and she defined the class in terms of a statute and not a public act. Still, that does not mean Illinois courts are "to follow federal law on issues of standing" and, in fact, the Illinois Supreme Court has "expressly rejected federal principles of standing." *See Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 254 n.4 (2010).

At bottom, however, this Court concludes that it need not answer the substantive question of whether plaintiffs have standing to attack the latest iteration of the statutes because that issue has been implicitly and expressly waived.

The Illinois Supreme Court has applied waiver in the context of standing. *See, e.g., Lebron*, 237 Ill. 2d at 253; *Flynn v. Ryan*, 199 Ill. 2d 430, 439 (2002) ("Because lack of standing is an

affirmative defense *** it could be argued that defendants have waived the standing issue");[2] *see also Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988) (lack of standing is an affirmative defense; it is a defendant's burden to plead and prove lack of standing).

The Illinois Appellate Court has similarly held that standing can be waived. In *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102 n.5 (2001), *aff'd*, 201 Ill. 2d 529 (2002), the appellate court explained:

> The standing issue here is both jurisdictional and constitutional in nature. This court, in ruling that a party has waived the issue of standing, has occasionally stated that standing is not jurisdictional, but is an affirmative defense. E.*g.*, *Contract Development Corp. v. Beck*, 255 Ill. App. 3d 660, 664 [] (1994) (citation omitted). However, the fact that standing is an affirmative defense under section 2–619 does not preclude it from being jurisdictional. After all, lack of subject matter jurisdiction is a ground for dismissal under section 2–619. 735 ILCS 5/2–619(a)(1) (West 1998).
>
> Nevertheless, the ruling in Beck (and similar cases) that standing can be waived is correct. Parties cannot waive an issue of subject matter jurisdiction. *Segers v. Industrial Com'n*, 191 Ill. 2d 421, 427 [] (2000). However, other jurisdictional issues can be waived. *Segers*, 191 Ill. 2d at 427 [] (primary jurisdiction); *Volkmar v. State Farm Mutual Automobile Ins. Co.*, 104 Ill. App. 3d 149, 151 [] (1982) (personal jurisdiction). Standing is one such issue. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 [] (1988). Presumably, this is because the essence of the standing inquiry is not the subject matter per se, but whether a litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a particular dispute or issue. *See In re Estate of Wellman*, 174 Ill. 2d 335, 345 [] (1996).

Regarding subject matter jurisdiction, "the ***only*** consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine," and "[i]f it does, then subject matter jurisdiction is present." (Emphasis in original.) *In re Luis R.*, 239 Ill. 2d 295, 301 (2010).

The Court finds that any challenges the State might have made to the named plaintiffs' standing could be, and were, waived. First, there is a constructive waiver, or forfeiture. Quite simply, the State has not seriously contended, before this Court, that plaintiffs lack standing to challenge, or seek relief in connection with, the subsequent iterations of the statute. Indeed, even after the March 11, 2020 status, the Court expressly asked the State whether it wished to submit briefs on the issue of standing, and the State declined. Second, the State's February 13,

[2] In *Flynn*, the Illinois Supreme Court decided that its powers are not limited by waiver. *See Flynn*, 199 Ill. 2d at 439 ("waiver is an admonition to the parties, not a limitation on the powers of this court").

2020 comments amount to an express waiver of standing. Therefore, the Court finds that the named plaintiffs have standing to seek injunctive relief as to the current version of the statutes, and restitution as to all versions of the statutes that existed from the time they filed their underlying claims through the present versions.

Based on the foregoing, it is ORDERED that: (a) the Court's reaffirms its findings set forth in the March 2, 2020 in their entirety; (b) to the extent plaintiffs lack standing to seek relief under subsequent iterations of the statutes, that lack of standing has been implicitly and expressly waived; (c) the stay of enforcement of the injunction, contained in the March 2, 2020 order, remains in force until further order; (d) there is no stay on discovery relating to remaining issues of monetary damages and remedies; (e) pursuant to Rule 304(a), regarding the March 2, 2020 order, the Court finds on its own motion (and the parties have expressed agreement) that there is no just reason for delaying either enforcement or appeal or both; (f) status is set for discussion of all remaining issues to be decided regarding remedies (such as return of filing fees collected or imposition of attorneys' fees) on November 2, 2020, at 9AM. Counsel of record are provided copies of this Order both via email and U.S. Mail.

Dated: May 14, 2020

ENTERED:

John C. Anderson
Circuit Judge

Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
Electronically Filed
12CH5275
Filed Date: 6/12/2020 1:52 PM
Envelope: 9469879
Clerk: MZ

APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT,
WILL COUNTY, ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois, Plaintiffs-Appellees, v. ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois, Defendant-Appellant, PEOPLE OF THE STATE OF ILLINOIS *ex rel.* KWAME RAOUL, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, Intervenor-Defendant-Appellant, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County, Intervenor-Defendant-Appellant.	No. 12-CH-5275 The Honorable JOHN C. ANDERSON, Judge Presiding.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Illinois Supreme Court Rules 302(a)(1) and

304(a), Intervenor-Defendant Dorothy Brown, in her official capacity as the Clerk of the Circuit Court of Cook County (the "Cook County Circuit Clerk"), appeals to the Illinois Supreme Court from a final order entered by the Honorable Judge John C. Anderson of the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois on May 14, 2020. In addition, the Cook County Circuit Clerk appeals from prior orders of the circuit court, including but not limited to a March 2, 2020 order invalidating three statutes as unconstitutional under the Illinois Constitution — 735 ILCS 5/15-1504.1 (2018), 20 ILCS 3805/7.30 (2018), and 20 ILCS 3805/7.31 (2018). Copies of the March 2 and May 14, 2020 orders are attached.

By this appeal, the Cook County Circuit Clerk requests that the Illinois Supreme Court reverse and vacate such orders, and grant any other appropriate relief.

June 12, 2020

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

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Of counsel

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

2020 MAR -2 AM 8:45

WILL COUNTY, ILLINOIS
CIRCUIT COURT ANNEX

Reuben D. Walker and M. Steven Diamond, individually and on behalf of themselves and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Case No. 12-CH-5275
Plaintiffs,	)	
v.	)	
Andrea Lynn Chasteen in her official Capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	John C. Anderson Circuit Judge
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Under Illinois law, mortgage foreclosure cases include an "add on" filing fee. The amount of the fee varies depending on how many foreclosure cases the plaintiff has filed. Some of these collected fees are used for mortgage counseling services. Another portion of the fees are distributed as grants to various governmental entities, and those entities may use the grant money for beautification and maintenance projects such as tree trimming, grass cutting, garbage removal, installing fencing, and demolition.

This case involves the constitutionality of the three statutes that, collectively, impose the fee and govern how it is used. The case is before the Court on cross-motions for summary judgment. Having reviewed the parties' briefs, the applicable statutes, and the cases cited, the Court agrees that the statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970. (Ill. Const. 1970).[1]

[1] All references herein to the "Constitution" are to the Illinois Constitution of 1970 (Ill. Const. 1970) unless otherwise specified. In their briefs, Plaintiffs also claim violations of the United States Constitution, but they fail to present arguments and authorities in support of federal claims. Further, they did not adequately plead federal constitutional claims. Regardless, the Court's decision today makes it unnecessary to reach federal constitutional questions.

I. BACKGROUND

A. The Statutes

Plaintiffs challenge the constitutionality of section 15-1504.1 of the Code of Civil Procedure (735 ILCS 5/15-1504.1), and also sections 7.30 and 7.31 of the Illinois Housing Development Act (20 ILCS 3805/7.30 and 20 ILCS 3805/7.31). These statutes are part of a package of laws called the "Save Our Neighborhoods Act" enacted in response to the mortgage foreclosure crisis that gripped Illinois, and the United States, roughly a decade ago. The General Assembly enacted these statutes to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16, 4:16 to 6:1; 6:19-21.)

1. 735 ILCS 5/15-1504.1

Section 15-1504.1 (735 ILCS 5/15-1504.1) requires mortgage foreclosure plaintiffs to pay to the Clerk of the Circuit Court an additional fee for the Foreclosure Prevention Program Fund ("FPP"). Further, section 15-1504.1(a-5) (735 ILCS 15-1504.1(a-5)), requires a portion of fees to be deposited into the Abandoned Residential Property Municipality Relief Fund ("APF"). The Clerk of the Court retains 2% and remits the remainder to the State Treasurer for the FPP and APF, which are both administered by the Illinois Housing Development Authority (the "Housing Authority"). 20 ILCS 3805/7.30; 735 ILCS 5/1504.1(a-5)(2).

2. 20 ILCS 3805/7.30

Under 20 ILCS 3805/7.30 of the Housing Development Act, the Housing Authority must grant 25% of the FPP to approved housing counseling agencies outside Chicago, based in part upon the number of foreclosures; 25% to approved counseling agencies inside Chicago for housing counseling or foreclosure prevention services; 25% to approved community-based organizations outside Chicago for approved foreclosure prevention outreach; and 25% for such programs inside Chicago. See 20 ILCS 3805/7.30(b).

Section 7.30(a) directs the Housing Authority to award grants of FPP funds to "approved counseling agencies for approved housing counseling" and to "approved community-based organizations for approved foreclosure prevention outreach programs." 20 ILCS 3805/7.30(a)(I) and (II). An "approved community-based organization" means a "not-for-profit entity that provides educational and financial information to residents of a community through in-person contact" but excludes organizations providing legal services. 20 ILCS 3805/7.30(b-5). An "approved foreclosure prevention outreach program" includes pre-purchase and post-purchase home counseling, and education regarding the foreclosure process. 20 ILCS 3805/7.30(b-5).

3. 20 ILCS 3805/7.31

Section 7.31 of the Housing Development Act (20 ILCS 3805/7.31), requires the Housing Authority to distribute proceeds from the APF in the following manner: (1) 30% of monies in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County; (2) 25% of the monies in the Fund shall be used to make grants to the City of Chicago; (3) 30% of the monies in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry, and Will Counties, and to those counties; and (4) 15% of the monies in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will. 20 ILCS 3805/7.31(b).

Under section 7.31(a) (20 ILCS 3805/7.31), the monetary grants may be used for things such as cutting the grass at abandoned properties; trimming trees and bushes; extermination of pests; removing garbage and graffiti; installing fencing; and demolition. Further, section 7.31(a) has a "catchall" provision which further widens permissible expenditures to include general "repair or rehabilitation of abandoned residential property."

B. PROCEDURAL HISTORY

The case involves two underlying mortgage foreclosure lawsuits. On April 18, 2012, Plaintiff Reuben Walker filed a complaint in Will County Case No. 12-CH-2010. On August 11, 2015, Plaintiff M. Steven Diamond filed a complaint in Cook County Case No. 15-CH-12027. In filing those cases, they each paid $50 fees they now claim were unlawful.

Mr. Walker originally filed this case on October 2, 2012. On November 9, 2012, Judge Bobbi Petrungaro certified a class consisting of "all plaintiffs who paid the 735 ILCS 5/1504.1 fee." On November 8, 2013, Judge Petrungaro (a) granted partial summary judgment in favor of Mr. Walker; (b) found that circuit court clerks fall within the judicial fee officer prohibition in Article VI, section 14, of the Illinois Constitution, and that the provision in section 15–1504.1 authorizing 2% of the filing fee to be retained by the clerk for administrative expenses creates an impermissible fee office; and (c) found section 15-1504.1 unconstitutional on its face. The scope of her ruling was limited to the version of section 15-1504.1 that existed on the date this case was filed.

On September 24, 2015, the Illinois Supreme Court reversed and remanded, holding that circuit court clerks did not fall within state constitutional provision prohibiting fee officers in judicial system. *See Walker v. McGuire*, 2015 IL 117138. The Illinois Supreme Court did not address the other constitutional claims raised by Plaintiffs.

On June 9, 2016, following remand, Plaintiffs' counsel amended their complaint to add Mr. Diamond as an additional named party. On December 4, 2018, Plaintiffs filed

their Second Amended Complaint. Also, the parties agreed to substitute Andrea Lynn Chasteen as the named representative defendant instead of Pamela McGuire, given that Ms. Chasteen succeeded Ms. McGuire as the Will County Circuit Clerk in December 2016. Plaintiffs filed a summary judgment motion which was fully briefed.

In 2018, even though the parties previously gave notice to the Illinois Attorney General and all the circuit clerks in the State of Illinois, the Court was somewhat puzzled that only the Will County State's Attorney was defending the case. For example, the Illinois Attorney General had been involved in the litigation in its early phases and before the Illinois Supreme Court, but was no longer actively involved in the case following remand. In an abundance of caution, the Court directed the parties to give additional notice to entities such as the Illinois Attorney General and the Cook County State's Attorney. Eventually, the Court permitted the Illinois Attorney General and the Cook County Circuit Clerk, Dorothy Brown, to participate in the case. They both filed additional summary judgment briefs.

Following oral argument, the Court took the case under advisement. The Court eventually determined that one issue (application of the voluntary payment doctrine) required an evidentiary hearing. Following that evidentiary hearing, the Court again took the case under advisement.

C. Allegations and Claims in the Second Amended Complaint

In general terms, the Second Amended Complaint asserts a putative class action against the clerks of circuit court in the State of Illinois. Plaintiffs seek, among other things, a permanent injunction prohibiting the enforcement of the statutes at issue. Plaintiffs also seek return of monies collected. The State[2] contends that the statutes are constitutional.

Plaintiffs' Second Amended Complaint contains four counts, the first three being based on the Illinois Constitution: Count I – violation of separation of powers under Article II, section 1; Count II – violation of due process and equal protection guarantees in Article I, section 2, as well as violation of the "Uniformity Clause" in Article I, section 2; Count III – violation of the right to obtain justice freely (often called the "Free Access" Clause) under Article I, section 12; and Count IV – creation of a protest fund.

[2] The Will County and Cook County State's Attorneys represent Ms. Chasteen and Ms. Brown, respectively. The Court references these individual clerks, their respective attorneys, and the Illinois Attorney General, collectively as "the State" where possible.

II. ANALYSIS

A. Standards for a Summary Judgment Motion

Summary judgment is proper where the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007); *see also* 735 ILCS 5/2–1005(c). Summary judgment should be granted only if the movant's right to judgment is clear and free from doubt. *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 993 (2007). When parties file cross-motions for summary judgment, they mutually concede that there are no genuine issues of material fact and that only questions of law exist. *See Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 432 (2010).

B. Statute Version and Standing

These statutes have been amended several times over the years, and the Court has sought to identify the specific versions of the statutes which Plaintiffs claim, and actually have, standing to attack. This was an issue in the earlier stages of the litigation too, where Judge Petrungaro ordered additional briefing on this issue and ultimately limited her findings to the version of the statutes that existed when Mr. Walker filed his initial complaint on October 2, 2012. The Illinois Supreme Court later rejected Mr. Walker's effort to broaden the scope of his claims to include later versions.

This Court's difficulty in getting Plaintiffs to adequately identify the statutes they are attacking (and can attack) mirrors that of Judge Petrungaro. And, while Judge Petrungaro focused on the date ***this*** case was filed, the undersigned judge concludes that focus ought to be on the dates the ***underlying*** cases were filed (*i.e.*, the dates on which the challenged fees were paid, since that is when Plaintiffs were allegedly harmed). It does not really make a difference, though, since the public act in effect on those dates is the same.

Perhaps Judge Petrungaro's approach was the correct one, since the Illinois Supreme Court found no fault in it. However, that court's discussion was primarily in the context of pleading rather than standing. *See Walker v. McGuire*, 2015 IL 117138, ¶¶36-42.

As a pleading matter, the Second Amended Complaint is not as clear as it ought to be regarding the specific versions of the statutes Plaintiffs attack. Indeed, it is rather vague.

As identified in the table, the applicable version of the statutes could (but would not necessarily) change depending on whether the appropriate focus is on the date of the

original complaint in this case (October 2, 2012), the dates the underlying foreclosure cases were filed (April 18, 2012, and August 11, 2015), the date Stephen Diamond was added as a plaintiff (June 9, 2006), or the date of the current complaint (December 4, 2018).[3] However, the Court identifies other amendments that have occurred. Indeed, 735 ILCS was also amended by P.A. 101-396 (eff. August 16, 2019). Likewise, 20 ILCS 3805.7.30 was amended by P.A. 97-1164, (eff. June 1, 2013), and again by P.A. 99-581 (eff. January 1, 2017). Finally, 20 ILCS 3508/7.31 was amended by P.A. 97-1164 (eff. June 1, 2013).

The Court tried to seek clarification by directing Plaintiffs to file an amended Rule 19 statement, and then a second amended Rule 19 statement. Based on the second amended Rule 19 Statement, Plaintiff Rueben Walker claims standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 82-280, § 15-1504.1, added by P.A. 96-1419, §15, eff. Oct. 1, 2010. Amended by P.A. 97-333, § 575, eff. Aug. 12, 2011; P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, § 15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017.)

2. 20 ILCS 3805/7.30 (P.A. Laws 1967, p. 1931, § 7.30, added by P.A. 96-1419, § 5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P.A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Laws 1967, p. 1931, § 7.31, added by P.A. 96-1419, §5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

[3] Statute versions that could arguably impact the Court's analysis relative to the referenced dates include:

Statute	4/18/2012	10/2/2012	8/11/2015	6/9/2016	12/4/2018
735 ILCS 5/15-1504.1	P.A. 97-333, eff. 8/12/2011	P.A. 97-333, eff. 8/12/2011	P.A. 98-20, eff. 6/11/2013	P.A. 98-20, eff. 6/11/2013	P.A. 100-407, eff. 8/25/2017
20 ILCS 3805/7.30	Added by P.A. 96-1419, eff. 10/1/2010	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013	P.A. 98-20, eff. 6/11/2013	P.A. 100-513, eff. 1/1/2018
20 ILCS 3805/7.31	Added by P.A. 96-1419, eff. 10/1/2010	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013	P.A. 98-20, eff. 6/11/2013	P.A. 98-20, eff. 6/11/2013

Plaintiff M. Steven Diamond claims in his second amended Rule 19 statement standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, §15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017).

2. 20 ILCS 3805/7.30 (Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P.A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

Ultimately, however, the Court need not distinguish between the iterations of the statutes. At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). They further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. (See February 13, 2020 hearing tr. at 18-22.)

C. Non-Constitutional Issues.

There are two questions in the case that do not directly require constitutional analysis, or which could make it unnecessary to reach the constitutional issues. The Court will address those issues first. *See Coram v. State*, 2013 IL 113867, ¶56 (a court must "consider nonconstitutional issues first and consider constitutional issues only if necessary to the resolution of this case"). These are (1) duress and the voluntary payment doctrine; and (2) the propriety of Count IV.

1. Duress and the Voluntary Payment Doctrine

Ms. Brown argues that Plaintiffs' constitutional claims fail under the voluntary payment doctrine because Plaintiffs did not pay the $50 filing fee "under protest." Specifically, Ms. Brown argues Plaintiffs cannot be class representatives when they themselves do not have a proper claim.[4] *See Perlman v. Time, Inc.*, 133 Ill. App. 3d 348,

[4] Interestingly, these determinations are often, if not usually, made prior to class certification. *See, e.g., De Bouse v. Bayer*, 235 Ill. 2d 544, 560 (2009) (where named plaintiff's claim failed, she was not an appropriate representative of the putative class and class certification was not appropriate); *Landesman v. General Motors Corp.*, 72 Ill. 2d 44, 48-49 (1978) (holding that "[t]he requirement that the named representatives of the putative class possess a valid cause of action is subsumed" in the class certification requirements). In this case, Judge Petrungaro certified the class in November 2012. To this Court's knowledge, that finding was not raised during the prior appeal. To be clear, the Court does not hold that a named plaintiff's suitability as class representative cannot be challenged eight years after class certification. Rather, the Court merely observes that the Illinois Supreme Court might reach that conclusion.

354 (1985) (holding that if the named plaintiff's personal cause of action fails, the entire class action must fail). Plaintiffs counter that the payment was made under duress, and therefore the voluntary payment doctrine does not apply.

"The common-law voluntary payment doctrine embodies the ancient and 'universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal.'" *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶22, *citing Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541 (1908). Generally, "involuntary payment" is a required component to a claim to recover paid taxes or fees. *See Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 183 (1987); *United Private Detective & Security Ass'n v. City of Chicago*, 56 Ill. App. 3d 242, 244 (1977). Absent a payment made under express protest, a person can establish that the fee was paid involuntarily by showing (1) he lacked knowledge of the facts upon which to protest the taxes or fees at the time they were paid (*i.e.*, a mistake of fact); (2) that the taxes or fees were paid under duress; or (3) fraud. *See McIntosh* at ¶22-25, 39; *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004); *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). Plaintiffs primarily rely on the duress exception.

The "kind of duress necessary to establish payment under compulsion has been expanded over the years."[5] *Midwest Medical Records Assoc., Inc. v. Brown*, 2018 IL App (1st) 163230 ¶24, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 848 (1995). As the appellate court in *Midwest Medical Records* observes, duress may be implied, and has included duress of property, and compulsion of business. *Id.* at ¶¶25, 28. "In determining whether payment is made under duress, the main consideration is whether the party had a choice of option, *i.e.*, whether there was 'some actual or threatened power wielded over the payor from which he has no immediate relief and from which no adequate opportunity is afforded the payor to effectively resist the demand for payment.'" *Id.* at ¶28, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 849 (1995). Indeed, "duress exists where the taxpayer's refusal to pay the tax would result in loss of reasonable access to a good or service considered essential." *Wexler*, 211 Ill. 2d at 24, *citing Geary*, 129 Ill. 2d at 396-400.

In *Midwest Medical Records*, the court concluded that duress existed because the litigants would have forfeited the ability to assert his legal rights if he had not paid the fee. *Midwest Medical Records* at ¶32. Indeed, the court stated, "plaintiffs could not avail themselves of the judicial process without payment. Plaintiff's refusal to pay the fee

[5] Indeed, a lengthy line of appellate court cases has steadily chipped away at the doctrine, in a variety of contexts, to the point that the rule has been arguably swallowed by application of its exceptions. The Court also notes that, in *other* contexts, it appears the legislature has sought to override the existence of the voluntary payment doctrine. See 35 ILCS 220/23-5 ("whenever taxes are paid *** and a tax objection complaint is filed *** 100% of the taxes shall be deemed paid under protest").

would have immediately resulted in loss of access to the courts ***. This is a[n] *** immediate threat ***."

The Court finds that the duress exception applies in this case for two independently sufficient reasons.[6] The first follows the reasoning of *Midwest Medical Records*. The Court finds that Plaintiffs in this case would have been restricted from reasonably accessing the court system (*i.e.*, they would have lost a substantial right) had the fee not been paid. The Court notes that, at the January 2020 hearing, the Illinois Attorney General (but not the attorneys for Ms. Brown and Ms. Chasteen) conceded that, in court-fee cases like this one, duress necessarily and inherently exists. (See January 24, 2020 hearing tr. at 10-13.)

The second reason has less to do with case law; it is based on Reuben Walker's live testimony. Mr. Walker testified that he was anxious to get his foreclosure case on file and exercise his rights as a mortgagee due to concerns of fraud and other complications to the underlying case. His understanding was that he was required to pay the fee in order to file the lawsuit. He was not aware that he could pay the fees under protest, and believed he was ineligible for a fee waiver. He further testified that if the Will County Circuit Clerk informed him that the filing fee was voluntary and not required, he would not have paid the fee. The Court finds Mr. Walker's testimony was both compelling and credible. The Court finds that Mr. Walker's established they he was under duress (as that term has been used in connection with the voluntary payment doctrine) when he paid the filing fee.

Accordingly, the voluntary payment doctrine does not defeat Plaintiffs' claims.

2. **Count IV: Protest Fund**

Count IV seeks creation of a protest fund. This Court is unaware of an Illinois reviewing-court case recognizing "protest fund" as a cause of action. Further, the Court see no reason why it ought to be. Creation of a protest fund is a remedy. Plaintiffs' counsel acknowledged as much during the January 2020 hearing. The Court also notes that a protest fund was indeed already created in this case (at least with regard to foreclosure cases filed in Will County) by Judge Petrungaro shortly after this case was filed.

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[6] Generally, for an exception to apply, facts supporting application of the exception must be pled. *See McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626 at ¶34. Here, Ms. Brown raised the voluntary payment doctrine in her ***summary judgment*** motion, but she actually asked for ***dismissal***. She sought dismissal because, among other reasons, Plaintiffs failed to plead in the Second Amended Complaint that the filing fee was paid involuntarily or under duress. At the January 2020 hearing, Ms. Brown agreed to waive her arguments regarding the need to plead duress, and further agreed that the Court should consider the issue on the substantive merits within the context of summary judgment (and not as a request for dismissal for failure to plead).

Because creation of a protest fund is not a cause of action in Illinois, summary judgment is granted for the State on Count IV.

D. Constitutionality of the Statutes

1. Standards for Constitutional Review

The Court begins with the strong presumption that the statutes are constitutional. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). To overcome this presumption, the parties challenging the statutes must clearly establish their invalidity. *People v. Melongo*, 2014 IL 114852, ¶20. The Court has a duty to construe a statute in a manner that upholds its constitutionality, if reasonably possible. *Id.*

The Court directed Plaintiffs' to clarify whether they were waging an "as applied" or "facial" constitutional attack on the statutes. In their supplemental brief, filed April 22, 2019, they stated their claims were based "primarily on a 'facial' basis" but that they were also making an "as applied" argument relative to their due process and equal protection claims.

"A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully [citation], because an enactment is facially invalid only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008). "Successfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under *any* imaginable set of circumstances." *In re M.T.*, 221 Ill. 2d 517, 536 (2006) (emphasis in original). Because a successful facial attack effectively voids a statute for all parties in all contexts, findings of facial invalidity are made only as a last resort. *See Pooh-Bah Enterprises, Inc. v. Cty. of Cook*, 232 Ill. 2d 463, 473 (2009).

The test of a law's constitutionality depends largely on the nature of the right that is claimed. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). As a threshold matter, the parties dispute whether the Court is to apply "rational basis" or "strict" scrutiny. The rational-basis test is limited and highly deferential. *Id.* Under the rational-basis test, a court will uphold a statute if it bears a rational relationship to a legitimate legislative purpose and is not arbitrary or unreasonable. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004).

Plaintiffs counter that this case involves an infringement on fundamental rights, and therefore the strict-scrutiny standard applies. "To withstand the strict scrutiny standard, a statute must serve a compelling state interest, and be narrowly tailored to serve the compelling interest, *i.e.*, the legislature must use the least restrictive means to serve the compelling interest." *Lulay v. Lulay*, 193 Ill. 2d 455, 470 (2000).

Identifying the appropriate standard of review is not always easy. The State is indeed correct that, ordinarily, a statute's constitutionality is weighed on a rational-basis test. *Tully v. Edgar*, 171 Ill. 2d 297, 304 (1996); *Lipe v. O'Connor*, 2014 IL App (3d) 130345. But the question often turns on whether the statute implicates an infringement on fundamental rights. Not every right secured by the State or Federal constitutions is fundamental, though. *Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 509 (1984). In the context of constitutional review, fundamental rights are limited to "those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977). Fundamental rights include the expression of ideas (*i.e.*, speech), participation in the political process, interstate travel, and intimate personal privacy interests, among other things. *Id.* at 97. Plaintiffs' argument for strict-scrutiny analysis is unpersuasive.

Regardless, the Court need not wade too deeply into this "level of analysis" thicket. This case is largely controlled by *Crocker v. Finley*, 99 Ill. 2d 444 (1984). There, the Illinois Supreme Court examined the constitutionality of court filing fees and employed a rational-basis analysis. *See id.* at 457 ("We can find no rational basis for imposing this tax on only those petitioners filing for dissolution of marriage"). As the Court will explain, since the statutes cannot survive the rational-basis analysis employed in *Crocker*, it is unnecessary to consider whether they can withstand strict scrutiny.

2. **Count I: Separation of Powers (Article II, section 1)**

Under the Illinois Constitution, the "legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another." Ill. Const. 1970, art II, § 1. The separation of powers doctrine is designed to "ensure that the whole power of two or more branches of government shall not reside in the same hands." *Morawicz v. Hynes*, 401 Ill. App. 3d 142-149-50 (2010). But the separation of powers clause "does not seek to achieve a complete divorce among the three branches of government" with a division of "rigid, mutually exclusive components." *Id.* Rather, the separation of powers doctrine "allows for the three branches of government to share certain functions. *Id.*

Plaintiffs contend that the statutes violate separation of powers principles because they "require an arm of the judicial branch, the Clerk of the Circuit Court, to 'administer' a portion of the funds collected for use as part of the [FPP]." The Court rejects this argument for three reasons.

First, Plaintiffs' arguments are sparse to say the least. Parties have the obligation to present the Court with a sufficient basis to rule in their favor. *See Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010) (undeveloped arguments, or contentions with some argument but no authority, are forfeited). In particular, at the summary judgment stage, the parties must "put up or shut up." *Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶14. Plaintiffs have put up almost nothing by way of factual and legal support.

Second, as far as the Court can tell based on the practically nonexistent factual record presented, the Housing Authority administers the FPP. Not the clerk.

Third, Plaintiffs' arguments are contrary to the holding in *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989). In that case, the chief judge's administration of a dispute resolution fund was found to be compatible with the separation of powers clause.

Given the statutes' presumptive validity and Plaintiffs' heavy burden to show otherwise, the Court finds that Plaintiffs have failed to establish that the statutes violate Article II, section 1.

3. Count III: The Free Access Clause (Article I, section 12)

The Court next examines Plaintiffs' claim under the Free Access Clause because it is most directly dispositive of the case. But the Court must first add some context to Plaintiffs' Free Access Clause claim. Plaintiff's Second Amended Complaint and Rule 19 statement do not expressly reference the access to justice protections of Article I, section 12. Instead, Count III alleges that:

> [T]he Illinois Constitution of 1970, [as] interpreted by the Illinois Supreme Court [in *Crocker v. Finley*, 99 Ill. 2d 444 (1984)] prohibits the imposition of a filing fee upon litigants where the fee is collected for a purpose that is not court-related and which does not remain exclusively within the control of and retained to finance the Court system only."

Further, the Seconded Amended Rule 19 statement reflects Plaintiffs' constitutional challenge on "the prohibition on the use of Court fees *** as established by decisions of the Supreme Court of Illinois."

Thus, at first blush, it appears Plaintiffs do not base their constitutional claim on any enumerated part of the Illinois Constitution. Rather, they base it directly on *Crocker* (and specifically, as their arguments suggest, *Crocker* at 451-56). But *Crocker* does not conjure state constitutional protections from thin air. The Illinois Supreme Court's discussion in *Crocker* at 451-56 is clearly based on the Free Access Clause. *See Crocker* at 451 (stating "[w]e first address *** the Illinois constitutional right to obtain justice by law freely"); *see also Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 156 (2003) ("*Crocker* was decided under the free access clause and, to a lesser extent, under the due process clause").

The Court is thus left to analyze a constitutional claim that Plaintiffs barely made, or at least did not make well. Still, "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c). Further, a pleading should be considered on its character rather than its label. *In re Haley D.*, 2011 IL 110886, ¶67; *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). There appears

to be no disagreement by the State that Plaintiffs are in fact asserting a Free Access Clause claim. Accordingly, the Court will consider the statutes' constitutionality in that context.

The Constitution's Free Access Clause appears in Article I, section 12, and states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Ill. Const. 1970, art. I, §12.

The Free Access Clause protect parties from the imposition of fees that unreasonably interfere with their rights to a remedy in the law or unreasonably impede the administration of justice. *See Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (2001). As Plaintiffs observe, *Crocker* is the leading case on the Free Access Clause. In *Crocker*, the Court considered the validity of a statute that required the clerk to collect a special $5 fee from petitioners filing dissolution of marriage cases. The fee, paid on top of ordinary filing fees, was collected to fund domestic violence shelters and related services.

In its analysis, the *Crocker* Court deemed the $5 charge a litigation "tax" rather than a fee, and then considered the purposes for which a fee or tax may be imposed. Even though the court declared the $5 charge a "tax" rather than a fee, its ultimate determination makes little distinction between the two. The court was unequivocal, stating, "we now conclude that court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts. We consider this requirement to be inherent in our Illinois Constitutional right to obtain justice freely." *Crocker*, 99 Ill. 2d at 454. The court also stated that litigants "should not be required, as a condition of their filing, to support a general welfare program that relates neither to their litigation nor to the court system." *Id.* at 455.

The *Crocker* court relied, in part, on *All v. Danaher*. That case was decided under the Free Access provisions of the 1870 Illinois Constitution. But the *Crocker* court found it instructive, and quoted the *All* court's determination that the fee to support a law library had a relationship to the court system that was "clear." *See Crocker*, 99 Ill. 2d at 453-54, citing *All*, 47 Ill. 2d at 237.

In *Boynton v. Kusper*, 112 Ill. 2d 356 (1986), the challenged statute required county clerks to place part of the marriage license fee into a domestic abuse fund. The court found that the relationship between those who were being taxed and those who were benefitting from that tax was too remote. *Boynton*, 112 Ill. 2d at 367-68.

The Court has reviewed additional Free Access Clause cases cited by the parties, including *Gatz v. Brown*, 2017 IL App (1st) 160579 (children's waiting room in courthouses); *Zamarron v. Pucinski*, 282 Ill. App. 3d 354 (1996) (fee to fund court

automation); *Rose v. Pucinski*, 321 Ill. App. 3d 92 (2001) (mandatory arbitration fee); *Mellon v. Coffelt*, 313 Ill. App. 3d 619 (2000) (arbitration fee); and *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989) (fee to fund dispute centers).

The analytical theme that runs (sometimes expressly, sometimes implicitly) through *Crocker*, *All*, *Boynton*, *Gatz*, *Zamarron*, *Rose*, *Mellon*, and *Wenger* is that the relationship between the fee and its impact on "the operation and maintenance of the courts" cannot be too attenuated. Rather, it must be relatively direct, clear, and ascertainable. Indeed, the *Crocker* court rejected arguments that the $5 litigation tax would improve the overall administration of justice. The Court found that the asserted relationship was "too remote" and concluded that the service-funding scheme, if permitted, would open the door to "countless other social welfare programs." *See Crocker*, 99 Ill. 2d at 455-56.

The State argues that section 7.30 and the FPP "funds a service that counsels those who are in danger of foreclosure" and that a "direct link exists between those who file for foreclosure and the important governmental interest in the decreasing of foreclosure filings which burden the court system." Further, the State argues that the FPP benefits all civil litigants by providing a "more efficient and expeditious administration of justice by avoiding the extra burden the mass filings of foreclosure put upon the court system." Finally, the State argues that the FPP benefits the court system by decreasing the court system's time and resources spent on foreclosure. However, the State narrows the scope of the available counseling and forgets that these services are available to people ***who don't even have mortgages***. Further, the Court acknowledges that counseling might benefit the court system, but those benefits are indirect at best. Rather, these are precisely the sort of benefits the *Crocker* court deemed "too remote" to pass muster under the Free Access Clause. This fee[7] represent the social welfare program *Crocker* warned about, and that the Free Access Clause prohibits.

The State further argues that section 7.31 and the rest of the statutory framework is designed to care for property that is often poorly maintained. The State further argues that foreclosed properties are often abandoned and constitute a nuisance. The statutes fund municipalities and counties with subsidies derived from filing fees to minimize the problems associated with foreclosed properties. That is all well and good, but the APF's grass cutting, tree trimming, graffiti removing, and general "repair or rehabilitation" are

[7] The Court uses the term "fee" loosely. To be clear, it appears to the Court that the "fee" is in fact a litigation tax, as was the case in *Crocker*. This is evident because the collected monies have little direct relation to what the litigant is getting for his paid fee. *See Crocker*, 99 Ill. 2d at 452. *See also Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1391-92 (7th Cir. 1992) (explaining that a fee is meant to offset costs imposed on the party granting a privilege, while a tax is a revenue generating mechanism). However, this distinction is perhaps of little relevance since, as previously noted, the *Crocker* court required that "court filing fees *and* taxes may be imposed only for purposes relating to the operation and maintenance of the courts." (Emphasis added.) *See Crocker*, 99 Ill. 2d at 454.

"benefits" even *more* removed from "operation and maintenance of the courts" than is the counseling benefit. The statutory scheme is tantamount to a litigation-tax funded neighborhood beautification plan.

In short, the Court agrees with Plaintiffs that the statutes in this case collectively impose a fee on a certain class of litigants, and that fee is used for things other than operation and maintenance of the courts. Indeed, when a foreclosure plaintiff in (for example) Will County has to pay a filing fee that is used to cut the grass, pick up trash, and "repair and rehabilitate" (whatever that entails) abandoned properties in Chicago, and those properties are owned by private individuals or entities (presumably, in most instances, banks), the fee is not at all associated with "operation and maintenance of the courts."[8] Likewise, when a filing fee is collected and then ultimately used to pay private counselors and organizations, who render counseling services to private individuals who are not necessarily involved in litigation (and in some cases do not—and never did—own mortgaged property), that fee, again, is not directly related to "operation and maintenance of the courts." It has little meaningful distinction to, hypothetically, a fee imposed in divorce cases that would fund private marriage counseling for persons who are not yet even married. The Court finds that the statutes violate the Free Access Clause.[9] The fee imposes an unreasonable burden on Plaintiffs' access to the court system. *See Crocker*, 99 Ill. 2d at 455.

4. Count II: Due Process and Equal Protection (Article I, section 2)

Even though the Court's ruling as to the Free Access clause is determinative, the Court sees value in rendering as complete a ruling as possible, given the case's age and procedural history. Therefore, it will address the remaining issues.

Count II of the Second Amended Complaint alleges that the statutes violate the Due Process and Equal Protection guarantees of the Illinois Constitution. Given the Court's finding that *Crocker* controls this case, and *Crocker*'s finding that the filing fees in that case violated the due process and equal protection clauses (*see Crocker*, 99 Ill. 2d at

[8] Given that the fees collected from the various circuit clerks are essentially pooled then reallocated, the Court has pondered whether *Crocker*'s reference to "operation and maintenance of the courts" means the ***Illinois court system*** as a whole, or the judicial maintenance and operational needs of the ***county*** where the fee is collected. In other words, if a special fee is paid to the Will County Clerk as a component of Will County filing costs, must the fee be used to operate and maintain the Will County court system? Or, may it be used to operate and it be used to fund Cook County courthouse operations? It seems to this Court that the spirit of *Crocker* requires that a fee paid in Will County, for a case that places an incremental strain on the Will County judiciary and the Will County Circuit Clerk, ought to be used to pay for operations of the ***Will County Court system only***. Given the conclusions the Court has already reached relative to the Free Access Clause, this Court need not resolve this question, but guidance from the Illinois Supreme Court would be welcome.

[9] In reaching this determination, the Court did not rely on the report of the Statutory Court Fee Task Force, which was submitted by Plaintiffs.

456-57), the Court must find that the statutes also violate Article I, section 2 for the same reasons as those expressed in *Crocker*.

5. Count II: Uniformity Clause (Article IX, section 2)

The Court has already determined, pursuant to *Crocker*, that the fee violates the Due Process and Equal Protection clause of the Illinois Constitution. Our supreme court has repeatedly said that "[i]f a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause." *See Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 247 (1992); *Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill. 2d 243, 250 (1996). This Court is unaware of a case expressly declaring the opposite to be true (*i.e.*, that if a tax is unconstitutional under the equal protection clause, than it inherently violates the Uniformity Clause too). But this would make sense since the Uniformity Clause was "intended to be a broader limitation on legislative power to classify for nonproperty-tax purposes than the limitation of the equal protection clause. *See Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003); *see also Milwaukee Safeguard Ins. Co. v. Selke*, 179 Ill. 2d 95, 102 (1997); *see also Federated Distributors, Inc. v. Johnson*, 125 Ill. 2d 1, 9–10 (1988) ("Although the due process clauses of the Federal and State Constitutions and the equal protection clause of the Federal Constitution had previously served as limitations upon unreasonable classifications *** the Committee believed that the taxpayers of Illinois should receive additional protection"). Nonetheless, the Court acknowledges that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill. 2d at 156),[10] and so it will analyze the Uniformity Clause challenge relatively independent from its *Crocker*-based findings:

The Uniformity Clause of the Illinois Constitution provides as follows:

> "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable."

Ill. Const. 1970, art. IX, §2.

The Uniformity Clause makes two basic demands. *See Primeco Pers. Commc'ns, L.P. v. I.C.C.*, 196 Ill. 2d 70, 84 (2001). The first requires the General Assembly to classify the subjects or objects of nonproperty taxes reasonably. *Id.* As to this first requirement, a classification may be considered reasonable if it (A) is based on a real and substantial difference between those who are taxed and those who are not taxed; and (B) bears some

[10] While it is true that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill. 2d at 156), the Court must nonetheless be mindful of *Crocker*'s caution that "[i]f the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts." *Arangold*, 204 Ill. 2d at 149, *quoting Crocker*, 99 Ill.2d at 455.

reasonable relationship to the object of the legislation or to public policy. *See id.* Once a reasonable classification has been established, the second requirement is that the members of that class must be taxed uniformly. *Id.*

In the context of a uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. *See Arangold*, 204 Ill. 2d at 153. The challenging party must then persuade the court that the taxing body's explanation is legally or factually insufficient. *See id.* Despite the more stringent standard under the uniformity clause, the court's inquiry is relatively narrow. *Id.* The court need not have proof of perfect rationality as to each and every taxpayer. *Id.* Rather, there must be minimum standards of reasonableness and fairness as between groups of taxpayers. *See id.*

Turning to the first requirement, the Court first "determine[s] the object (or purpose) of the taxing provision at issue." *Primeco*, 196 Ill. 2d at 85. (Emphasis omitted.) The Court finds that the purpose of 735 ILCS 5/15-1504.1 is to fund the legislative aims of 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. Legislative findings relative to the Housing Development Act (which includes sections 7.30 and 7.31) are codified at 20 ILCS 3805/3, but are too voluminous to quote here. Those findings are accurately characterized by the previously-referenced transcript as being intended to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16; 4:16 to 6:1; 6:19-21.) These purposes are carried out, in part, by the imposition of filing fees used for mortgage counseling, and for property beautification and maintenance.

The Court next considers whether the statutes' object is reasonably related to the class of entities taxed. *Primeco*, 196 Ill. 2d at 85. Plaintiffs argue the statutes impose a "burden of payment of a fee upon Plaintiffs and others similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden." They further argue that the statutes violate the Uniformity Clause by creating a "burden on those involved in the foreclosure process while, at the same time, providing a benefit to limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality [*i.e.*, Chicago] and giving the remainder on an equally non-uniform basis throughout Illinois."

The Court finds that there is no real and substantial difference between plaintiffs seeking access to the court system in mortgage foreclosure cases, and those seeking access to the courts in non-foreclosure contexts. Indeed, the statutes' taxing classification (burdening only those persons or entities filing mortgage foreclosure

cases[11]) does not bear a reasonable relationship to the purpose of the tax. Accordingly, the Court finds that the statutes violate the Uniformity Clause (Ill. Const. 1970, art. IX, §2).

III. CONCLUSION

In light of the foregoing, the Court FINDS and ORDERS the following:

A. No one has suggested that the class needs to be recertified given the amendments to the original complaint and the amendments to the statutes. To the extent necessary, the Court reaffirms the conclusions and directives of the November 2012 class certification order. Further, the Court finds that both named plaintiffs are suitable class representatives.

B. Summary judgment is granted in favor of Plaintiffs, and against the State, on Counts II and III.

C. Summary judgment is granted in favor of the State, and against Plaintiffs, on Counts I and IV.

D. The Court finds that 735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31, in all of their various iterations from the date the underlying mortgage cases were filed through today, are facially unconstitutional. These statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970.

E. The Court finds that the statutes are not severable.

F. The Court's findings of unconstitutionality are necessary, and cannot rest on alternative non-constitutional grounds.

G. The Court finds that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statutes at issue.

H. The Court finds Plaintiffs have established that they have no adequate remedy at law, that they possess a clearly ascertainable right, and that they will suffer irreparable harm if no relief is granted. The Court enters a permanent injunction enjoining the Circuit Clerks of the State of Illinois from enforcing and following 735 ILCS

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[11] The Court notes that the statutes also distinguish the amount of the fee based on the number of foreclosure cases filed. The more cases filed, the higher the per-case fee. The likely import of this disparity is that large banks and mortgage lenders will pay higher per-case filing fees, while individuals and smaller lenders will pay less. This distinction seems to raise Uniformity Clause questions on its own. However, the Plaintiffs have not adequately raised this issue and so the Court does not rely on it in making its decision.

5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31 as they are currently enacted. Specifically, the Circuit Clerks are not to impose, collect, hold, or disburse the filing fees at issue.

I. On the Court's motion, the effect and enforcement of the injunction (discussed in the preceding paragraph) is stayed until further order. A stay is appropriate to provide the Illinois Supreme Court a meaningful opportunity to review the case.

J. There are still remaining issues in this case, such as Plaintiffs' request for the return of collected fees. The case is set for further hearing and status regarding remaining issues on March 11, 2020, at 1p.m. On that date, the Court will also consider the propriety of a Rule 304(a) finding relative to this Order.

K. The Will County Circuit Clerk is directed to mail a copy of this Order to all counsel of record.

ENTERED:

Dated: March 2, 2020

John C. Anderson
Circuit Judge

2020 MAR -2 AM 8:45

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

Reuben D. Walker and M. Steven Diamond, individually and on behalf of themselves and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	**Case No. 12-CH-5275**
Plaintiffs,	)	
v.	)	
Andrea Lynn Chasteen in her official Capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	**John C. Anderson Circuit Judge**
Defendants.	)	

ORDER

On March 2, 2020, the Court issued a Memorandum Opinion and Order declaring three statutes (735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31) unconstitutional, and enjoining their enforcement.

In entering the March 2, 2020 ruling, and for a substantial period of time before issuing the ruling, the Court has grappled with Plaintiffs' standing to attack the various iterations of the statutes that existed after plaintiffs incurred the filing fees that are at issue in the case.

To be sure, Plaintiffs have standing to attack those versions of the statutes (*i.e.*, those Public Acts) that existed at the time they filed their underlying foreclosure actions. Further, the Court finds Plaintiffs may seek a refund of fees collected under those versions.

Reuben Walker filed his mortgage foreclosure case on April 18, 2012. Steve Diamond filed his foreclosure case on August 11, 2015. The public acts that existed on those dates are as follows:

Statute\Plaintiff	Walker 4/18/2012	Diamond 8/11/2015
735 ILCS 5/15-1504.1	P.A. 97-333, eff. 8/12/2011	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.30	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.31	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013

The Court is unclear, however, whether Plaintiffs have standing to seek relief in the form of (a) return of fees collected under ***subsequent*** versions of the statutes (including the ***current*** version); and (b) injunctive relief regarding the ***current*** version of the statutes. Should the Court's focus be the constitutionality of the public acts, or alternatively, the statutes? Put another way, can the amendment of the statutes destroy or limit class-action plaintiffs' standing?

At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). All counsel further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. Indeed, the Court directed the following question to the Will County State's Attorney, Cook County State's Attorney, and Illinois Attorney General (collectively, the "State"):

> Let's say hypothetically that I find that the statute that existed at the time Mr. Walker filed his mortgage foreclosure case was unconstitutional for whatever reason, can I find that the subsequent amended versions are unconstitutional? Must I find that they are unconstitutional? Because they really haven't changed in any meaningful way....
>
> The attorneys for the State took a moment to confer and answered:
>
> We think the Court can declare that a certain provision that has followed through the various enactments, if the Court found that to be unconstitutional and if the Court found that it is so intertwined into the whole statute, I think you could strike down the current statute and you could enter a declaratory—you could enter a declaration that the prior versions were unconstitutional at the time they were in effect because that language that was there brought them down. I don't think—I agree you can't strike down a statute that isn't there anymore, but I still think you can declare it was unconstitutional at the time because of the infirmity that you find.

All other attorneys representing the State agreed verbally or nodded their head affirmatively; none expressed disagreement. (See February 13, 2020 tr. at 18-22.) Plaintiffs' counsel also essentially agreed.

The Court, still not quite convinced of the parties' collective position and still struggling with the question, emailed all counsel on March 4, 2020, asking them to be prepared to discuss this issue when they next appeared in Court. The parties were in Court again on March 11, 2020, where the Court asked a number of standing-related questions, including whether anyone wanted to consider the necessity of adding other named parties and amending the complaint.[1] No one actively argued that standing was lacking. Counsel eventually left the courthouse with the agreed understanding that they would confer and seek to enter into a more formal stipulation, if possible, as it relates to standing. The Court scheduled another status conference to discuss standing, and the case as a whole, on March 25, 2020. However, that was cancelled due to COVID-19. Instead, the Court and parties emailed back and forth in an effort to bring the case to a conclusion. One email from plaintiffs' counsel, dated April 22, 2020, advises in pertinent part:

> A conference was held yesterday afternoon among attorneys for the parties who wished to discuss plaintiffs' previously tendered case stipulations and proposed order. At the conference, defense counsel from Cook County State's Attorney's Office and the Illinois Attorney General's Office informed plaintiffs' counsel that their respective offices are not allowed to enter into any stipulations in this case. Thereafter, plaintiffs' counsel informed defense counsel that it is plaintiffs' position that it can see no logical reason for adding more class representatives to challenge statutes (and their iterations) which all have the same infirmities and where all money collected is placed in a common fund to be distributed.

The parties have collectively advised the Court that they do not wish to brief the standing issue (which, again, was raised by the Court), that they would like a final ruling on it, and they agree that a Rule 304(a) finding is appropriate.

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[1] On May 11, 2020, the Court sought to obtain a copy of the March 11, 2020 transcript and was told by the court reporter that the audio recording system, for unknown reasons, was not functioning that day. No transcript is available. The Court then asked all counsel of record, via email, whether they wished to submit an agreed statement of facts, bystander's report, or something else to preserve the record due to the absence of a transcript. Counsel from the Cook County State's Attorney and Illinois Attorney General expressly declined *via* email. Counsel from the Will County State's Attorney did not respond within the requested period. Plaintiffs' counsel advised the Court *via* email that he not only wished to submit a bystander's report, but he ***included one*** in his communication. However, there is a procedure for submitting a bystander's report, and it was not followed. Plaintiffs may, if they choose, file their proposed bystander's report, with notice and a proposed hearing date, if they wish. All parties will have an opportunity to either agree or object. Or, if Plaintiffs feel this Order adequately and accurately reflects what was said on March 11, 2020, they are free to forego the necessity of the bystander's report. It's the parties' record to protect. Information regarding the procedure for the bystander's report is available at: https://courts.illinois.gov/forms/approved/appellate/Appellate_Bystander/Appellate_Instructions_BR_%20ASF.pdf

The Court has no interest in complicating the procedural posture of this case. Still, trial courts have the authority and ***obligation*** to consider their own jurisdiction. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 507 (2006). Generally, the "Circuit Courts shall have original jurisdiction of all justiciable matters." *See* ILL. CONST. 1970, ART. VI, § 9. Standing is an element of justiciability. *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989).

Under a traditional standing analysis, the Court is limited to deciding "actual, specific controversies, and not abstract questions or moot issues." *In re M.I.*, 2013 IL 113776, ¶32. A person seeking to challenge a statute's constitutionality must be within the class aggrieved by the alleged constitutionality. *Id.* Indeed, the general rule is that "if there is no constitutional defect in the application of the statute to a litigant, that person does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Id.* Further, a "party may not raise a constitutional challenge to a provision of a statute that does not affect him or her." *Id.* at ¶34.

The Court is not aware of any Illinois state-court cases involving a plaintiff's standing to bring a class action challenging the enforcement of a frequently-amended statute. Nor is the Court aware of Illinois class action cases where a named-plaintiff's standing was impacted by statutory amendment after the class is certified. The Court is aware, however, of loosely analogous United States Supreme Court cases holding that, for a standing inquiry, a court must focus on the standing of the certified class to seek equitable relief. For example, in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 557, 42 L.Ed.2d 532 (1975), the Court held that "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." This Court is also aware of the ruling in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 1210, 63 L.Ed.2d 479 (1980), where the Court held that the "personal-stake requirement relat[ing] to the first purpose of the case-or-controversy doctrine" is met in class actions simply by class certification notwithstanding the subsequent loss of a "personal stake" by the class representative. Certification will preserve a class's standing even after the named individual representatives have lost the required "personal stake" in the claim. *See id.* at 399, 95 S.Ct. at 557.

In this case, on November 9, 2012, Judge Bobbi Petrungaro certified the class (without objection), and she defined the class in terms of a statute and not a public act. Still, that does not mean Illinois courts are "to follow federal law on issues of standing" and, in fact, the Illinois Supreme Court has "expressly rejected federal principles of standing." *See Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 254 n.4 (2010).

At bottom, however, this Court concludes that it need not answer the substantive question of whether plaintiffs have standing to attack the latest iteration of the statutes because that issue has been implicitly and expressly waived.

The Illinois Supreme Court has applied waiver in the context of standing. *See, e.g., Lebron*, 237 Ill. 2d at 253; *Flynn v. Ryan*, 199 Ill. 2d 430, 439 (2002) ("Because lack of standing is an

affirmative defense *** it could be argued that defendants have waived the standing issue");[2] *see also Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988) (lack of standing is an affirmative defense; it is a defendant's burden to plead and prove lack of standing).

The Illinois Appellate Court has similarly held that standing can be waived. In *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102 n.5 (2001), *aff'd*, 201 Ill. 2d 529 (2002), the appellate court explained:

> The standing issue here is both jurisdictional and constitutional in nature. This court, in ruling that a party has waived the issue of standing, has occasionally stated that standing is not jurisdictional, but is an affirmative defense. E.g., *Contract Development Corp. v. Beck*, 255 Ill. App. 3d 660, 664 [] (1994) (citation omitted). However, the fact that standing is an affirmative defense under section 2–619 does not preclude it from being jurisdictional. After all, lack of subject matter jurisdiction is a ground for dismissal under section 2–619. 735 ILCS 5/2–619(a)(1) (West 1998).
>
> Nevertheless, the ruling in Beck (and similar cases) that standing can be waived is correct. Parties cannot waive an issue of subject matter jurisdiction. *Segers v. Industrial Com'n*, 191 Ill. 2d 421, 427 [] (2000). However, other jurisdictional issues can be waived. *Segers*, 191 Ill. 2d at 427 [] (primary jurisdiction); *Volkmar v. State Farm Mutual Automobile Ins. Co.*, 104 Ill. App. 3d 149, 151 [] (1982) (personal jurisdiction). Standing is one such issue. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 [] (1988). Presumably, this is because the essence of the standing inquiry is not the subject matter per se, but whether a litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a particular dispute or issue. *See In re Estate of Wellman*, 174 Ill. 2d 335, 345 [] (1996).

Regarding subject matter jurisdiction, "the ***only*** consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine," and "[i]f it does, then subject matter jurisdiction is present." (Emphasis in original.) *In re Luis R.*, 239 Ill. 2d 295, 301 (2010).

The Court finds that any challenges the State might have made to the named plaintiffs' standing could be, and were, waived. First, there is a constructive waiver, or forfeiture. Quite simply, the State has not seriously contended, before this Court, that plaintiffs lack standing to challenge, or seek relief in connection with, the subsequent iterations of the statute. Indeed, even after the March 11, 2020 status, the Court expressly asked the State whether it wished to submit briefs on the issue of standing, and the State declined. Second, the State's February 13,

[2] In *Flynn*, the Illinois Supreme Court decided that its powers are not limited by waiver. *See Flynn*, 199 Ill. 2d at 439 ("waiver is an admonition to the parties, not a limitation on the powers of this court").

2020 comments amount to an express waiver of standing. Therefore, the Court finds that the named plaintiffs have standing to seek injunctive relief as to the current version of the statutes, and restitution as to all versions of the statutes that existed from the time they filed their underlying claims through the present versions.

Based on the foregoing, it is ORDERED that: (a) the Court's reaffirms its findings set forth in the March 2, 2020 in their entirety; (b) to the extent plaintiffs lack standing to seek relief under subsequent iterations of the statutes, that lack of standing has been implicitly and expressly waived; (c) the stay of enforcement of the injunction, contained in the March 2, 2020 order, remains in force until further order; (d) there is no stay on discovery relating to remaining issues of monetary damages and remedies; (e) pursuant to Rule 304(a), regarding the March 2, 2020 order, the Court finds on its own motion (and the parties have expressed agreement) that there is no just reason for delaying either enforcement or appeal or both; (f) status is set for discussion of all remaining issues to be decided regarding remedies (such as return of filing fees collected or imposition of attorneys' fees) on November 2, 2020, at 9AM. Counsel of record are provided copies of this Order both via email and U.S. Mail.

ENTERED:

Dated: May 14, 2020

John C. Anderson
Circuit Judge

CERTIFICATE OF FILING AND SERVICE

I certify that on June 12, 2020, I electronically filed the foregoing **Notice of Appeal** with the Clerk of the Court for the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Paul L. Fangman
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735 ILCS 5/15-1504.1

Statutes current with legislation through P.A. 101-651 of the 2020 Session of the 101st Legislature.

735 ILCS 5/15-1504.1 Filing fee for Foreclosure Prevention Program Fund, Foreclosure Prevention Program Graduated Fund, and Abandoned Residential Property Municipality Relief Fund.

(a) Fee paid by all plaintiffs with respect to residential real estate. With respect to residential real estate, at the time of the filing of a foreclosure complaint, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee of $50 for deposit into the Foreclosure Prevention Program Fund, a special fund created in the State treasury. The clerk shall remit the fee collected pursuant to this subsection (a) to the State Treasurer to be expended for the purposes set forth in Section 7.30 of the Illinois Housing Development Act [20 ILCS 3805/7.30 et seq.]. All fees paid by plaintiffs to the clerk of the court as provided in this subsection (a) shall be disbursed within 60 days after receipt by the clerk of the court as follows: (i) 98% to the State Treasurer for deposit into the Foreclosure Prevention Program Fund, and (ii) 2% to the clerk of the court to be retained by the clerk for deposit into the Circuit Court Clerk Operation and Administrative Fund to defray administrative expenses related to implementation of this subsection (a). Notwithstanding any other law to the contrary, the Foreclosure Prevention Program Fund is not subject to sweeps, administrative charge-backs, or any other fiscal maneuver that would in any way transfer any amounts from the Foreclosure Prevention Program Fund into any other fund of the State.

(a-5) Additional fee paid by plaintiffs with respect to residential real estate.

(1) Until January 1, 2023, with respect to residential real estate, at the time of the filing of a foreclosure complaint and in addition to the fee set forth in subsection (a) of this Section, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee for the Foreclosure Prevention Program Graduated Fund and the Abandoned Residential Property Municipality Relief Fund as follows:

(A) The fee shall be $500 if:

(i) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category and is filing the complaint on its own behalf as the holder of the indebtedness; or

(ii) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a

sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category; or

(iii) the plaintiff is not a depository institution and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category.

(B) The fee shall be $250 if:

(i) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the second tier foreclosure filing category and is filing the complaint on its own behalf as the holder of the indebtedness; or

(ii) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first or second tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the second tier foreclosure filing category; or

(iii) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the second tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category; or

(iv) the plaintiff is not a depository institution and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the second tier foreclosure filing category.

(C) The fee shall be $50 if:

(i) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the third tier foreclosure filing category and is filing the complaint on its own behalf as the holder of the indebtedness; or

(ii) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first, second, or third tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the third tier foreclosure filing category; or

(iii) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the third tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category; or

(iv) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the third tier foreclosure filing category and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the second tier foreclosure filing category; or

(v) the plaintiff is not a depository institution and is filing the complaint on behalf of a mortgagee that, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the third tier foreclosure filing category.

(2) The clerk shall remit the fee collected pursuant to paragraph (1) of this subsection (a-5) to the State Treasurer to be expended for the purposes set forth in Sections 7.30 and 7.31 of the Illinois Housing Development Act [20 ILCS 3805/7.30 and 20 ILCS 3805/7.31] and for administrative expenses. All fees paid by plaintiffs to the clerk of the court as provided in paragraph (1) shall be disbursed within 60 days after receipt by the clerk of the court as follows:

(A) 28% to the State Treasurer for deposit into the Foreclosure Prevention Program Graduated Fund;

(B) 70% to the State Treasurer for deposit into the Abandoned Residential Property Municipality Relief Fund; and

(C) 2% to the clerk of the court to be retained by the clerk for deposit into the Circuit Court Clerk Operation and Administrative Fund to defray administrative expenses related to implementation of this subsection (a-5).

(3) Until January 1, 2023, with respect to residential real estate, at the time of the filing of a foreclosure complaint, the plaintiff or plaintiff's representative shall file a verified statement that states which additional fee is due under paragraph (1) of this subsection (a-5), unless the court has established another process for a plaintiff or plaintiff's representative to certify which additional fee is due under paragraph (1) of this subsection (a-5).

(4) If a plaintiff fails to provide the clerk of the court with a true and correct statement of the additional fee due under paragraph (1) of this subsection (a-5), and the mortgagor reimburses the plaintiff for any erroneous additional fee that was paid by the plaintiff to the clerk of the court, the mortgagor may seek a refund of any overpayment of the fee in an amount that shall not exceed the difference between the higher additional fee paid under paragraph (1) of this subsection (a-5) and the actual fee due thereunder. The mortgagor must petition the judge within the foreclosure action for the award of any fee overpayment pursuant to this paragraph (4) of this subsection (a-5), and the award shall be determined by the judge and paid by the clerk of the court out of the fund account into which the clerk of the court deposits fees to be remitted to the State Treasurer under paragraph (2) of this subsection (a-5), the timing of which refund payment shall be determined by the clerk of the court based upon the availability of funds in the subject fund account. This refund shall be the mortgagor's sole remedy and a mortgagor shall have no private right of action against the plaintiff or plaintiff's representatives if the additional fee paid by the plaintiff was erroneous.

(5) This subsection (a-5) is inoperative on and after January 1, 2023.

(b) Not later than March 1 of each year, the clerk of the court shall submit to the Illinois Housing Development Authority a report of the funds collected and remitted pursuant to this Section during the preceding year.

(c) As used in this Section:

"Affiliate" means any company that controls, is controlled by, or is under common control with another company.

"Approved counseling agency" and "approved housing counseling" have the meanings ascribed to those terms in Section 7.30 of the Illinois Housing Development Act [20 ILCS 3805/7.30].

"Depository institution" means a bank, savings bank, savings and loan association, or credit union chartered, organized, or holding a certificate of authority to do business under the laws of this State, another state, or the United States.

"First tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed 175 or more foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

"Second tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed at least 50, but no more than 174, foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

"Third tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed no more than 49 foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

(d) In no instance shall the fee set forth in subsection (a-5) be assessed for any foreclosure complaint filed before the effective date of this amendatory Act of the 97th General Assembly [P.A. 97-1164].

(e) Notwithstanding any other law to the contrary, the Abandoned Residential Property Municipality Relief Fund is not subject to sweeps, administrative charge-backs, or any other fiscal maneuver that would in any way transfer any amounts from the Abandoned Residential Property Municipality Relief Fund into any other fund of the State.

History

P.A. 96-1419, § 15; 97-333, § 575; 97-1164, § 15; 98-20, § 15; 2017 P.A. 100-407, § 5, effective August 25, 2017; 2019 P.A. 101-10, § 50-25, effective June 5, 2019.

End of Document

Statutes current with legislation through P.A. 101-651 of the 2020 Session of the 101st Legislature.

20 ILCS 3805/7.30 Foreclosure Prevention Program.

(a) The Authority shall establish and administer a Foreclosure Prevention Program. The Authority shall use moneys in the Foreclosure Prevention Program Fund, and any other funds appropriated for this purpose, to make grants to (i) approved counseling agencies for approved housing counseling and (ii) approved community-based organizations for approved foreclosure prevention outreach programs. The Authority shall promulgate rules to implement this Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Foreclosure Prevention Program Fund derived from fees paid as specified in subsection (a) of Section 15-1504.1 of the Code of Civil Procedure [735 ILCS 5/15-1504.1] as follows:

(1) 25% of the moneys in the Fund shall be used to make grants to approved counseling agencies that provide services in Illinois outside of the City of Chicago. Grants shall be based upon the number of foreclosures filed in an approved counseling agency's service area, the capacity of the agency to provide foreclosure counseling services, and any other factors that the Authority deems appropriate.

(2) 25% of the moneys in the Fund shall be distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for approved housing counseling or to support foreclosure prevention counseling programs administered by the City of Chicago.

(3) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located outside of the City of Chicago for approved foreclosure prevention outreach programs.

(4) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs, with priority given to programs that provide door-to-door outreach.

(b-1) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Foreclosure Prevention Program Graduated Fund derived from fees paid as specified in paragraph (1) of subsection (a-5) of Section 15-1504.1 of the Code of Civil Procedure, as follows:

(1) 30% shall be used to make grants for approved housing counseling in Cook County outside of the City of Chicago;

(2) 25% shall be used to make grants for approved housing counseling in the City of Chicago;

(3) 30% shall be used to make grants for approved housing counseling in DuPage, Kane, Lake, McHenry, and Will Counties; and

(4) 15% shall be used to make grants for approved housing counseling in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties provided that grants to provide approved housing counseling to borrowers residing within these counties shall be based, to the extent practicable, (i) proportionately on the amount of fees paid to the respective clerks of the courts within these counties and (ii) on any other factors that the Authority deems appropriate.

The percentages set forth in this subsection (b-1) shall be calculated after deduction of reimbursable administrative expenses incurred by the Authority, but shall not be greater than 4% of the annual appropriated amount.

(b-5) As used in this Section:

"Approved community-based organization" means a not-for-profit entity that provides educational and financial information to residents of a community through in-person contact. "Approved community-based organization" does not include a not-for-profit corporation or other entity or person that provides legal representation or advice in a civil proceeding or court-sponsored mediation services, or a governmental agency.

"Approved foreclosure prevention outreach program" means a program developed by an approved community-based organization that includes in-person contact with residents to provide (i) pre-purchase and post-purchase home ownership counseling, (ii) education about the foreclosure process and the options of a mortgagor in a foreclosure proceeding, and (iii) programs developed by an approved community-based organization in conjunction with a State or federally chartered financial institution.

"Approved counseling agency" means a housing counseling agency approved by the U.S. Department of Housing and Urban Development.

"Approved housing counseling" means in-person counseling provided by a counselor employed by an approved counseling agency to all borrowers, or documented telephone counseling where a hardship would be imposed on one or more borrowers. A hardship shall exist in instances in which the borrower is confined to his or her home due to a medical condition, as verified in writing by a physician, advanced practice registered nurse, or physician assistant, or the borrower resides 50 miles or more from the nearest approved counseling agency. In instances of telephone counseling, the borrower must supply all necessary documents to the counselor at least 72 hours prior to the scheduled telephone counseling session.

(c) (Blank).

(c-5) Where the jurisdiction of an approved counseling agency is included within more than one of the geographic areas set forth in this Section, the Authority may elect to fully fund the applicant from one of the relevant geographic areas.

History

P.A. 96-1419, § 5; 97-1164, § 5; 98-20, § 5; 99-581, § 65; 2017 P.A. 100-513, § 65, effective January 1, 2018.

End of Document

Statutes current with legislation through P.A. 101-651 of the 2020 Session of the 101st Legislature.

20 ILCS 3805/7.31 Abandoned Residential Property Municipality Relief Program

(a) The Authority shall establish and administer an Abandoned Residential Property Municipality Relief Program. The Authority shall use moneys in the Abandoned Residential Property Municipality Relief Fund, and any other funds appropriated for this purpose, to make grants to municipalities and to counties to assist with costs incurred by the municipality or county for: cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public; demolition of abandoned residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority under the Program. For purposes of this subsection (a), "pests" has the meaning ascribed to that term in subsection (c) of Section 11-20-8 of the Illinois Municipal Code [65 ILCS 5/11-20-8]. The Authority shall promulgate rules for the administration, operation, and maintenance of the Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation, the Authority shall make grants from the Abandoned Residential Property Municipality Relief Fund derived from fees paid as specified in paragraph (1) of subsection (a-5) of Section 15-1504.1 of the Code of Civil Procedure [735 ILCS 5/15-1504.1] as follows:

(1) 30% of the moneys in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County;

(2) 25% of the moneys in the Fund shall be used to make grants to the City of Chicago;

(3) 30% of the moneys in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry and Will Counties, and to those counties; and

(4) 15% of the moneys in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties. Grants distributed to the municipalities and counties identified in this paragraph (4) shall be based (i) proportionately on

the amount of fees paid to the respective clerks of the courts within these counties and (ii) on any other factors that the Authority deems appropriate.

History

P.A. 96-1419, § 5; 97-1164, § 5; 98-20, § 5.

End of Document

Midwest Med. Records Ass'n v. Brown

Appellate Court of Illinois, First District, Fourth Division

February 1, 2018, Decided

No. 1-16-3230

Reporter
2018 IL App (1st) 163230 *; 97 N.E.3d 125 **; 2018 Ill. App. LEXIS 42 ***; 420 Ill. Dec. 551 ****

MIDWEST MEDICAL RECORDS ASSOCIATION, INC.; RENX GROUP, LLC, f/k/a Big Blue Capital Partners, LLC; and TOMICA PREMOVIC, Individually, and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois; MARIA PAPPAS, Treasurer of Cook County, Illinois; and COOK COUNTY, ILLINOIS, a Body Politic and Corporate, Defendants-Appellees.

Prior History: Appeal from the Circuit Court of Cook County. Nos. 15 CH 16986, 15 CH 18832, 16 CH 193 **[***1]** . The Honorable Sophia H. Hall, Judge, presiding.

Disposition: Affirmed in part, reversed in part, and remanded.

Counsel: For APPELLANT: MYRON M. CHERRY & ASSOCIATES, LLC, of Chicago (Myron M. Cherry and Jacie C. Zolna, of counsel), ZIMMERMAN LAW OFFICES, P.C., of Chicago (Thomas A. Zimmerman, Jr., of counsel), LARRY D. DRURY, LTD., of Chicago (Larry D. Drury, of counsel), and JOHN H. ALEXANDER & ASSOCIATES, P.C., of Chicago (John H. Alexander, of counsel).

For APPELLEE: Kimberly M. Foxx, State's Attorney, of Chicago (Chaka M. Patterson, Paul A. Castiglione, and James S. Beligratis, Assistant State's Attorneys, of counsel).

Judges: JUSTICE BURKE delivered the judgment of the court, with opinion. Justices McBride and Ellis concurred in the judgment and opinion.

Opinion

[128] [****554]** JUSTICE BURKE delivered the judgment of the court, with opinion.

Justices McBride and Ellis concurred in the judgment and opinion.

[*P1] Plaintiffs, Midwest Medical Records Association, Inc., Renx Group, LLC, and Tomica Premovic, appeal following the circuit court's dismissal of their consolidated class action complaint challenging the practice of defendant, Dorothy Brown, Clerk of the Circuit Court of Cook County (Clerk), charging a fee for filing a petition or motion to reconsider, vacate, or modify interlocutory judgments or orders in the circuit court. In granting defendants' motion to dismiss the complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), the circuit court held that plaintiffs' claims were barred by the voluntary payment doctrine and that no private right of action existed under section 27.2a(g) of the Clerks of Courts Act (or Act) (705 ILCS 105/1 *et seq*. (West 2014)).

[*P2] I. BACKGROUND

[*P3] Section 27.2a(g) of the Clerks of Courts Act **[***2]** imposes a fee for filing a petition to vacate or modify "any final judgment or order of court." 705 ILCS 105/27.2a(g) (West 2014). Under this section, plaintiffs were each charged a $60 filing fee for filing motions to reconsider interlocutory orders in their separate underlying cases pending in the circuit court of Cook County. Plaintiffs paid these fees but not under protest. Plaintiffs then individually instituted lawsuits against defendants.[1] The lawsuits were subsequently all transferred as related to the same docket.

[*P4] Plaintiffs filed a consolidated amended class action complaint against defendants **[**129] [****555]** on May 5, 2016, for equitable and monetary relief. Plaintiffs alleged that they brought suit on behalf of themselves and all others similarly situated who paid a fee for filing a motion to reconsider an interlocutory order in the circuit court of Cook County under section 27.2a(g)(1) and (2) of the Act from November 19, 2010, to the present. Plaintiffs asserted that the filing fee was unauthorized under section 27.2a(g), but they paid the fees involuntarily and under duress because they would have been denied their constitutional right to challenge the interlocutory orders and suffered detrimental consequences and adverse judgments against them **[***3]** if they had not paid the fees.

[*P5] In count I, plaintiffs sought a declaratory judgment that the practice of collecting the filing fee for motions or petitions to reconsider, vacate, or modify interlocutory orders was unlawful under section 27.2a(g), and requested equitable and monetary relief and reasonable attorney fees and expenses. Count II alleged that plaintiffs had an implied private cause of action under the Clerks of Courts Act based on the Clerk's violation of section 27.2a(g), and requested equitable and monetary relief, restitution of the unlawful fees they paid, and reasonable attorney fees and expenses. Count III alleged unjust enrichment based on the unlawful imposition of filing fees. Count IV prayed for injunctive relief prohibiting charging or collection of the fees.

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[1] Midwest Medical Records Ass'n, Inc. v. Brown, No. 15 CH 16986 (Cir. Ct. Cook County) (motion to reconsider interlocutory order); Renx Group, LLC v. Brown, No. 15 CH 18832 (Cir. Ct. Cook County) (motion to vacate default judgment); Premovic v. Brown, No. 16 CH 193 (Cir. Ct. Cook County) (motion to vacate or modify an interlocutory order).

[*P6] Defendants moved to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2014). Defendants argued that (1) the claim was barred by the involuntary payment doctrine, (2) the filing fees were appropriately charged as section 27.2a(g) applies to nonfinal orders, (3) count II should be dismissed on grounds that the Clerks of Courts Act does not provide for a private right of action, and (4) the claim was collaterally stopped. Defendants also argued **[***4]** that although plaintiffs requested attorney fees in all four counts, there was no legal basis for such relief, as a court cannot order the government to pay plaintiffs' attorney fees absent statutory authority or an agreement to create a common fund where a plaintiff advances a legal theory in tort or contract.

[*P7] On September 15, 2016, the circuit court granted the motion to dismiss under section 2-615 but denied the motion as to section 2-619. Concerning count I, the circuit court rejected plaintiffs' claim that they paid the filing fees under duress because they would have lost the opportunity to contest the rulings of the court unless they paid the fees. The circuit court concluded that plaintiffs failed to adequately plead duress, they did not sufficiently show that they were denied access to a service that was necessary or essential, and plaintiffs were represented by counsel when they paid the fees. With respect to count II, the circuit court held that there was no implied private cause of action under section 27.2a(g) as plaintiffs were not members of the class intended to be benefited by the statute and plaintiffs failed to show that a private right of action was necessary to provide an adequate remedy, as plaintiffs **[***5]** could have simply paid the fees under protest and then pursued their remedies. The circuit court also dismissed counts III and IV as they depended on counts I and II. The court dismissed the consolidated amended class action complaint without prejudice.

[*P8] Plaintiffs filed a motion to reconsider, which the circuit court denied. Plaintiffs then filed a second amended consolidated class action complaint. Defendants made an oral motion to dismiss. The parties agreed to rely on their prior briefs submitted in defendants' motion to dismiss **[**130]** **[****556]** the amended consolidated class action complaint and plaintiffs' motion to reconsider.

[*P9] On November 23, 2016, the circuit court granted defendants' motion "on grounds of voluntary payment and other reasons set forth in" the court's September 15, 2016, order, and it dismissed the complaint with prejudice. Plaintiffs timely appealed the circuit court's September 15 and November 23, 2016, orders.

[*P10] II. ANALYSIS

[*P11] A. Standard of Review

[*P12] This court reviews motions to dismiss under section 2-615 of the Code *de novo. Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361, 919 N.E.2d 926, 336 Ill. Dec. 1 (2009). The question presented by a section 2-615 motion is "whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient **[***6]** to state a cause of action upon which relief can be granted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499, 911 N.E.2d 369, 331 Ill. Dec. 548 (2009). We consider only those facts apparent from the face of the pleadings, matters of which this court may take judicial notice, and judicial admissions in the record. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 328 Ill. Dec. 892 (2009). Any exhibits attached to the

complaint "are considered part of the pleading for every purpose." *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 14, 996 N.E.2d 1151, 375 Ill. Dec. 95. "Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss." *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9, 988 N.E.2d 964, 370 Ill. Dec. 608.

[*P13] Additionally, this case involves the construction of statutory language, which presents an issue of law we review *de novo. People v. Perez*, 2014 IL 115927, ¶ 9, 385 Ill. Dec. 41, 18 N.E.3d 41. In construing statutory language, this court's "primary objective is to ascertain and give effect to the legislature's intent, keeping in mind that the best and most reliable indicator of that intent is the statutory language itself, given its plain and ordinary meaning." *Id.* We consider a statute as a whole and construe its language in light of other statutory provisions. *Id.*

[*P14] On appeal, "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's **[***7]** reasoning was correct." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24, 984 N.E.2d 132, 368 Ill. Dec. 407.

[*P15] B. Section 27.2a(g)

[*P16] Section 27.2a(g) of the Clerks of Courts Act provides, in pertinent part:

> "The fees of the clerks of the circuit court in all counties having a population of 3,000,000 or more inhabitants in the instances described in this Section shall be as provided in this Section. In those instances where a minimum and maximum fee is stated, the clerk of the circuit court must charge the minimum fee listed and may charge up to the maximum fee if the county board has by resolution increased the fee. The fees shall be paid in advance and shall be as follows:
> * * *
>
> (g) Petition to Vacate or Modify.
>
> (1) Petition to vacate or modify any final judgment or order of court, except in forcible entry and detainer cases and **[**131]** **[****557]** small claims cases or a petition to reopen an estate, to modify, terminate, or enforce a judgment or order for child or spousal support, or to modify, suspend, or terminate an order for withholding, if filed before 30 days after the entry of the judgment or order, a minimum of $50 and a maximum of $60.
>
> (2) Petition to vacate or modify any final judgment or order of court, except a petition to modify, terminate, or enforce a judgment or order for child or spousal support or to modify, **[***8]** suspend, or terminate an order for withholding, if filed later than 30 days after the entry of the judgment or order, a minimum of $75 and a maximum of $90." 705 ILCS 105/27.2a(g) (West 2014).

[*P17] On appeal, plaintiffs dispute defendants' contention in the circuit court that section 27.2a(g) authorized the Clerk to charge a fee for filing a motion contesting an interlocutory order. Plaintiffs note that this court recently interpreted this section in accord with plaintiffs' argument in *Gassman v. Clerk of the Circuit Court*, 2017 IL App (1st) 151738, 410 Ill. Dec. 787, 71 N.E.3d 783. In *Gassman*, this court held that the word "final" in section 27.2a(g) modifies both of the terms "judgment" and "order" in the

statute. *Id.* ¶ 18. Thus, the court held that this court fee statute does not authorize the Clerk to charge a fee to file a petition to vacate a nonfinal order. *Id.*

[*P18] Defendants concede on appeal that *Gassman* controls here. Defendants do not dispute that the fees paid by plaintiffs to file their motions to reconsider interlocutory orders in the underlying lawsuits were unlawful. As such, we find that the fees for the motions to reconsider interlocutory orders that were charged in the underlying cases here were not authorized under section 27.2a(g).

[*P19] C. Collateral Estoppel

[*P20] We note that plaintiffs also contend on appeal that the circuit court properly rejected **[***9]** defendants' collateral estoppel argument below. They assert that the circuit court correctly held that the present case is distinguishable from the case relied on below by defendants (*Illinois Department of Healthcare & Family Services v. Ikechukwu*, 2011 IL App (1st) 102650-U (where the defendant challenged amount of fee imposed when he filed a motion to vacate all prior orders in paternity case, court upheld the amount of the fee as some orders were entered in excess of 30 days before motion to vacate was filed and thus the higher fee amount was authorized)). Plaintiffs also contend that this court's decision in *Gassman* would operate against defendants as it addressed the same issue presented here against the same defendants. Defendants concede that their collateral estoppel argument is now of no moment on appeal in light of this court's recent decision in *Gassman*, and they do not advance this argument on appeal. See *Gassman*, 2017 IL App (1st) 151738, ¶¶ 29, 35 (rejecting the Clerk's argument that the plaintiff's suit was barred by *res judicata* because the plaintiff's counsel previously brought two unsuccessful lawsuits challenging the same fee on behalf of different parties, where the court found there was no privity between the plaintiffs). We therefore do not address this issue.

[*P21] D. Involuntary Payment Doctrine

[*P22] Defendants **[***10]** contend that the only issues which remain on appeal are (1) whether the plaintiffs adequately pleaded involuntary payment, *i.e.*, whether the voluntary payment doctrine bars plaintiffs' claims, and (2) whether an implied private right of action exists under section 27.2a(g) **[**132]** **[****558]** of the Clerks of Courts Act. We first address the voluntary payment issue.

[*P23] Our supreme court long ago recognized that "money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion." *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541, 85 N.E. 200 (1908) (affirming dismissal of complaint to recover amounts paid for telephone service in excess of legal rates because the amounts were voluntarily paid without fraud or mistake of fact).

[*P24] Notably, "[t]he kind of duress necessary to establish payment under compulsion has been expanded over the years." *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 848, 658 N.E.2d 1325, 213 Ill. Dec. 304 (1995). "'The doctrine [has] gradually extended *** to recognize duress of property'" and **[***11]** "'extended so as to admit of compulsion of business and circumstances.'" *Id.* (quoting *Illinois*

Merchants Trust Co. v. Harvey, 335 Ill. 284, 289, 167 N.E. 69 (1929), *overruled in part by Kanter & Eisenberg v. Madison Associates*, 116 Ill. 2d 506, 508 N.E.2d 1053, 108 Ill. Dec. 476 (1987)); see *Getto v. City of Chicago*, 86 Ill. 2d 39, 48-51, 426 N.E.2d 844, 55 Ill. Dec. 519 (1981) (although the plaintiffs failed to pay under protest an illegal tax on their telephone bills, the threat of telephone service shut off for nonpayment "amounted to compulsion that would forbid application of the voluntary-payment doctrine").

[*P25] Accordingly, a payment is considered involuntary where "(1) the payor lacked knowledge of the facts upon which to protest the payment at the time of payment, or (2) the payor paid under duress." *Dreyfus v. Ameritech Mobile Communications, Inc.*, 298 Ill. App. 3d 933, 938, 700 N.E.2d 162, 233 Ill. Dec. 61 (1998) (citing *Getto*, 86 Ill. 2d at 48-49). Duress is generally an issue of fact, but may be decided on a motion to dismiss where the facts are not in dispute. *Smith*, 276 Ill. App. 3d at 850.

[*P26] Here, as stated, there is no dispute that payment of the fees was unlawful under *Gassman*. In addition, plaintiffs do not dispute that they failed to note any protest on the written instruments with which they paid the fees.[2] Plaintiffs also do not allege that they lacked knowledge of the facts upon which to protest payment of the fees. Instead, they contend that their payment of the filing fees was involuntary and under duress as failure to pay would have denied them access to the courts and the right to a hearing, **[***12]** subjecting them to adverse judgments and their lawyers to legal malpractice claims. To that end, plaintiffs assert that the circuit court erred in concluding that nonpayment would not have resulted in loss of access to necessary goods or services. Plaintiffs urge that the modern trend is against harsh application of the voluntary payment doctrine and a plaintiff need not show that the product or **[**133]** **[****559]** service is a "necessity" in order to establish duress.

[*P27] Defendants contend that plaintiffs' concept of duress is overbroad and argue that duress requires a showing of fraud or coercion, and the threat of being denied access to the courts is insufficient.

[*P28] In determining whether payment is made under duress, the main consideration is whether the party had a choice or option, *i.e.*, whether there was "some actual or threatened power wielded over the payor from which he has no immediate relief and from which no adequate opportunity is afforded the payor to effectively resist the demand for payment." *Id.* at 849. Duress may be implied. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 24, 809 N.E.2d 1240, 284 Ill. Dec. 294 (2004); *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 802, 863 N.E.2d 800, 309 Ill. Dec. 168 (2007).

[*P29] Plaintiffs cite *Keating v. City of Chicago*, 2013 IL App (1st) 112559-U, in support of their assertion that they paid the filing fees under duress. Defendants criticize plaintiffs' reliance on an unpublished order of this court. **[***13]** "[O]ur supreme court restricts parties from citing unpublished orders of Illinois appellate courts" as binding authority, although parties may use "the reasoning and logic that an Illinois appellate court used in its unpublished decision." *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374, 833 N.E.2d 1011, 295 Ill. Dec. 805 (2005). While plaintiffs acknowledge that *Keating* is nonprecedential, they assert that *Keating* merely followed existing law and relied on published, binding cases. Indeed, the *Keating* court relied on several supreme court and appellate court cases, namely, *Illinois Glass, Getto, Smith, Norton v. City of Chicago*, 293 Ill. App. 3d 620, 690 N.E.2d 119, 228 Ill. Dec. 810

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[2] We note that defendants argue on appeal that plaintiffs failed to pay under protest. However, plaintiffs conceded this point and instead argue that while protest is evidence of compulsion, "compulsion may appear from the circumstances without a protest against payment" (*Smith*, 276 Ill. App. 3d at 849), and that they paid under duress.

(1997), and *Raintree Homes, Inc. v. Village of Long Grove*, 389 Ill. App. 3d 836, 906 N.E.2d 751, 329 Ill. Dec. 553 (2009).[3] Of these, plaintiffs rely particularly on *Norton* and *Raintree*, which we discuss in turn.

[*P30] In *Norton*, the plaintiffs challenged a $3 penalty fee they paid on parking fines. *Norton*, 293 Ill. App. 3d at 623. This court found the voluntary payment doctrine did not bar their claims, despite failure to pay under protest, because the demand notices sent by the defendant city were coercive in that they threatened further legal action, entry of a default judgment plus court costs, and action to recover further amounts or demand the maximum fine allowed by law. *Id.* at 627. In addition, the notice directed, without any legal basis, that the plaintiffs were not to contact the traffic court and misinformed them that "[n]o information **[***14]** will be given or payment accepted at" the court. *Id.* The appellate court thus reversed the grant of summary judgment against the plaintiffs. *Id.*

[*P31] [134] [****560]** Next, in *Raintree*, the trial court found in favor of the plaintiff developer in its declaratory judgment action challenging a village ordinance that required payment of impact fees as a condition of obtaining building permits. *Raintree Homes*, 389 Ill. App. 3d 836, 906 N.E.2d 751, 329 Ill. Dec. 553. The appellate court agreed that the developer paid the fees under duress. *Id.* at 866. The majority held that necessity and protest were not the only bases for recoupment; it disagreed with the notion advanced by the dissenting justice that "recoupment of payments made under duress has been either limited to items or services that constitute necessities or allowed only when there has been a protest." *Id.* at 863-64.[4] The court also rejected the argument that recovery was barred because the plaintiff paid the impact fees for years before it sued. *Id.* at 864 (citing *Getto*, 86 Ill. 2d at 51, and *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 407, 544 N.E.2d 344, 135 Ill. Dec. 848 (1989)). It found there was a business compulsion to continue doing business in the village and pay the impact fees because the plaintiff would have gone out of business, breached its contracts with third-party customers, it had "substantial commitments" in land there, and without the permits **[***15]** it could not have legally built homes in the village. *Id.* at 864-65. That the plaintiff's business was profitable did not render the payment of fees voluntary. *Id.* at 865.

[*P32] We find *Norton* and *Raintree* instructive in the present case. Although plaintiffs here did not pay under protest, it is indisputable that they would have forfeited the ability to challenge the interlocutory

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[3] In *Keating*, the plaintiffs received red light violation citations from the City of Chicago and paid their fines. *Keating*, 2013 IL App (1st) 112559-U, ¶ 4. The plaintiffs asserted that the circuit court erred in dismissing their subsequent lawsuit challenging the fines based on the voluntary payment doctrine where the notices of citation from the City of Chicago stated that they could pay or contest the fine, but city ordinances provided that, unless a stay was obtained in court, the fine would become a judgment even if they exhausted their administrative remedies and the city could impose a lien, collection actions would be taken, they would be liable for attorney fees and costs, and could have their vehicles immobilized. *Id.* ¶¶ 69, 71. The court held that the ordinances created "both a threat to the plaintiffs' property (in the form of a judgment lien) and a threat of penalties." *Id.* ¶ 75. The *Keating* court likened the ordinances to the notices at issue in *Norton*, 293 Ill. App. 3d 620, 690 N.E.2d 119, 228 Ill. Dec. 810, in finding they had a coercive effect.

[4] The *Raintree* court cited *DeBruyn v. Elrod*, 84 Ill. 2d 128, 136, 418 N.E.2d 413, 49 Ill. Dec. 559 (1981) (duress established where plaintiffs had to pay sheriff's fees or sheriff would refuse to effectuate requested sale), *People ex rel. Carpentier v. Treloar Trucking Co.*, 13 Ill. 2d 596, 600, 150 N.E.2d 624 (1958) (payment for higher classification of truck license plates, without protest, was under duress where Secretary of State refused to file any other classification and economic necessity demanded that trucking company pay for such license plates in order to carry on business and avoid statutory penalties), *Norton*, 293 Ill. App. 3d 620, 690 N.E.2d 119, 228 Ill. Dec. 810, *Ball v. Village of Streamwood*, 281 Ill. App. 3d 679, 688, 665 N.E.2d 311, 216 Ill. Dec. 251 (1996) (duress existed despite taxpayers' failure to pay tax under protest where their residences were subject to contracts to sell to third parties and taxpayers would be subject to civil penalties for failure to pay the tax), and *Terra-Nova Investments v. Rosewell*, 235 Ill. App. 3d 330, 337, 601 N.E.2d 1109, 176 Ill. Dec. 411 (1992) (claim not barred by voluntary payment doctrine and duress was shown where certificate of purchase would not have been issued to plaintiff absent payment of the fee).

orders if they had not paid the filing fee as the Clerk would have refused to accept their motions. We observe that, in attempting to distinguish *Raintree*, defendants rely on the dissenting opinion in that case, which is not binding on this court. Defendants argue that *Norton* is distinguishable because the Clerk here did not make any misrepresentations regarding legal rights or threaten entry of a judgment. However, *Norton* did not hold that a plaintiff must show fraud or coercive misrepresentations. Rather, the court simply followed precedent in holding that a plaintiff could show that a payment was "made under duress or compulsion" if he demonstrated that "the payee exert[s] some actual or threatened power over the payor from which the payor has no immediate relief except by paying." (Internal quotation marks omitted.) *Norton*, 293 Ill. App. 3d at 627. **[**135]** **[****561]** As such, **[***16]** the notices were "coercive enough to render plaintiffs' payment involuntary" where they "discouraged use of the judicial process or coerced payment." *Id.* at 628. Similarly, here, plaintiffs could not avail themselves of the judicial process without payment. Plaintiffs' refusal to pay the fee would have immediately resulted in loss of access to the courts to challenge orders entered against them. This is a more immediate threat than the possibility of a judgment being entered against the plaintiffs in *Norton*.

[*P33] On appeal, defendant relies primarily on two cases: *Alvarez v. Pappas*, 229 Ill. 2d 217, 890 N.E.2d 434, 321 Ill. Dec. 712 (2008), and *Wexler*, 211 Ill. 2d 18, 809 N.E.2d 1240, 284 Ill. Dec. 294, neither of which we find persuasive. In *Alvarez*, the plaintiff property owners claimed they were entitled to a refund of real estate taxes where, unbeknownst to the property owners, the taxes were twice paid—by the property owners and their lenders. The issue was whether their requests for a refund were barred by the five-year statute of limitations in the Property Tax Code (35 ILCS 200/20-175 (West 2006)), *i.e.*, whether they constituted "tax payments" which were "overpaid" under the statute. *Alvarez*, 229 Ill. 2d at 221-22. The court held that the payments were for taxes and constituted overpayment for purposes of the five-year limitations statute; the refund claims were thus **[***17]** barred because they were made more than five years after the overpayments. *Id.* at 226.

[*P34] We find *Alvarez* to be inapposite. The *Alvarez* court noted that the statute of limitations created an exception to the voluntary payment doctrine, which would otherwise bar repayment in that case. *Id.* at 221-22. Voluntary payment and duress were not at issue; rather, the issue was whether the refund requests were barred under the specific statute of limitations.

[*P35] Defendant also asserts that the circuit court properly relied on *Wexler*, 211 Ill. 2d 18, 809 N.E.2d 1240, 284 Ill. Dec. 294, in ruling against plaintiffs. In *Wexler*, the plaintiff, who purchased liquor as a retail customer at a liquor store, challenged the constitutionality of a statute increasing taxes on manufacturers and importers of alcoholic beverages. *Id.* at 20-21. Our supreme court held that the plaintiff's payment of the taxes was voluntary and not under duress. *Id.* at 23-24. The court held:

> "duress exists where the taxpayer's refusal to pay the tax would result in loss of reasonable access to a good or service considered essential. [Citation.] Goods or services deemed to be necessities have included telephone and electrical service and, for women, sanitary napkins and tampons. [Citation.]
>
> Alcoholic beverages do not fall within the category **[***18]** of necessary goods or services." *Id.* at 24.

[*P36] The *Wexler* court concluded that alcoholic beverages were "not essential, in any objective sense, to consumers such as [the plaintiff]." *Id.*; see *Geary*, 129 Ill. 2d at 397-98 (implied duress where the nature of the product—sanitary napkins and tampons—was a necessity and the consequence of nonpayment of the taxes on the product was significant, *i.e.*, the plaintiffs could not obtain the product

unless they paid the taxes); *Ross v. City of Geneva*, 71 Ill. 2d 27, 33-34, 373 N.E.2d 1342, 15 Ill. Dec. 658 (1978) (implied duress where the defendant had a policy of terminating electric service if a customer failed to pay their **[**136]** **[****562]** bills, electrical service was a necessity, and there was no reasonable alternative provider of electrical service). The plaintiff was aware of the tax and purchased the alcohol anyway and, in fact, did so in order to establish a basis upon which to bring his legal challenge. *Wexler*, 211 Ill. 2d at 24.

[*P37] Defendants argue that the payment of the fee to file a motion to challenge an interlocutory order here is more like the purchase of alcoholic beverages in *Wexler* and different from the necessary products or services at issue in the cases *Wexler* discussed, *i.e.*, the sanity napkins and tampons at issue in *Geary*, the electrical service at issue in *Ross*, or the telephone service **[***19]** at issue in *Getto*. However, *Wexler* is readily distinguishable from the present circumstances. Access to the courts to challenge an order entered against a party is an entirely different consideration than the plaintiff's purchase of alcoholic beverages in *Wexler*. And, unlike in *Wexler*, there is no indication that plaintiffs here filed the interlocutory motions and paid the filing fees solely to form a legal basis upon which to challenge the fee statute.

[*P38] In addition, we are not persuaded by defendants' argument that the approximately $60 fee could not be impliedly coercive because it is a small amount compared to one hour of reasonable attorney fees in the Chicago market. Defendants do not cite to any authority holding that the amount of the unlawful fee is a relevant consideration. Indeed, case law points in the opposite direction. See *Norton*, 293 Ill. App. 3d 620, 690 N.E.2d 119, 228 Ill. Dec. 810 (finding that a $3 charge was compulsory).

[*P39] Accordingly, we find that the trial court erred in holding that plaintiffs' claims were insufficient to plead duress and failed to show they were denied access to a service that was necessary to them. Plaintiffs alleged that they paid the fees under duress because nonpayment would have resulted in loss of access **[***20]** to a necessary good or service, *i.e.*, access to the courts to challenge adverse judgments entered against them. At a minimum, the circuit court should not have resolved the issue of duress as a matter of law on the pleadings, as it is generally a question of fact. *Smith*, 276 Ill. App. 3d at 850.

[*P40] E. Implied Cause of Action Under the Clerks of Courts Act

[*P41] We next examine whether the circuit court erred in dismissing count II of the complaint upon concluding that no implied private right of action existed under the Clerks of Courts Act.

[*P42] "When a plaintiff seeks to use a statutory enactment as a predicate for a tort action seeking damages, he must demonstrate that a private right of action is either expressly granted or implied in the statute." *Gassman*, 2017 IL App (1st) 151738, ¶ 25 (citing *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 129-31, 688 N.E.2d 81, 227 Ill. Dec. 744 (1997)). Our supreme court has outlined a four-part test to determine whether a statute implies a private right of action:

> "(1) the plaintiff belongs to the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for the statute's violation." *Marshall v. County of Cook*, 2016 IL App (1st) 142864, ¶ 12, 401 Ill. Dec. 834, 51 N.E.3d 27 (citing **[***21]** *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d

455, 460, 722 N.E.2d 1115, 243 Ill. **[**137]** **[****563]** Dec. 46 (1999), and *Givot v. Orr*, 321 Ill. App. 3d 78, 87, 746 N.E.2d 810, 254 Ill. Dec. 53 (2001)).

[*P43] In count II, plaintiffs alleged that defendants violated section 27.2a(g) by imposing and collecting the filing fees and that plaintiffs were overcharged or paid fees they did not owe and suffered monetary damages as a result. Plaintiffs requested a declaration that charging the fees was unlawful and also sought a return of the fees collected pursuant to section 27.2a(g), in addition to attorney fees and other costs. Defendants asserted in their motion to dismiss that count II should be dismissed under *Marshall*, 2016 IL App (1st) 142864, 401 Ill. Dec. 834, 51 N.E.3d 27, because there is no implied private cause of action for an alleged violation of section 27.2a(g). Defendants argued that plaintiffs have an adequate remedy in the form of a restitution claim. The circuit court agreed.

[*P44] On appeal, plaintiffs attempt to distinguish *Marshall* in asserting that litigants are the intended beneficiaries of the statute, as demonstrated by statements by a legislator in opposition to a proposal to increase court fees and the Act's detailed categories of fees and maximum amounts that the Clerk may charge. Plaintiff contends that payment of the unlawful fee is the type of injury intended to be prevented, considering the legislature amended the Act to add the adjective "final," and an implied cause of action **[***22]** would be consistent with the underlying purpose of the statute. Plaintiffs dispute that a restitution claim would provide an adequate remedy, as plaintiffs seek damages caused by defendants' imposition of unlawful fees, which includes the amount paid in unlawful fees and their attorney fees and costs.

[*P45] Defendants maintain on appeal that *Marshall* is controlling. Defendants also assert that plaintiffs are not entitled to attorney fees absent a statutory or contractual basis. Defendants reiterate that plaintiffs have an adequate remedy in the form of a claim for restitution.

[*P46] In *Marshall*, 2016 IL App (1st) 142864, ¶ 4, the plaintiff asserted that he paid statutory filings fees under different provisions of the Clerks of Courts Act—section 27.3a (to establish record keeping systems) and section 27.3c (for document storage systems) (705 ILCS 105/27.3a, 27.3c (West 2012))—in addition to a fee under section 5-1103 (55 ILCS 5/5-1103 (West 2012)) (to defray costs of court security), but the county allegedly refused to use the fees for the specific purposes set forth in the enabling statutes. The plaintiff requested that the county be compelled to use the fees for their statutory purposes or be returned to him. *Marshall*, 2016 IL App (1st) 142864, ¶ 5. The circuit court granted the county's motion to dismiss, finding no implied private cause of action **[***23]** under the statutes and that the plaintiff lacked standing. *Id.* ¶ 7. On appeal, this court held that the circuit court correctly found no private cause of action existed under the statutes because the plaintiff was "not a member of the class intended to be benefited by the statutes—the statutes are intended to benefit counties that want to reduce court security costs or establish and maintain document storage or automated recordkeeping systems." *Id.* ¶ 13. The *Marshall* court further held that implying a private cause of action was "inconsistent with that underlying purpose and not necessary to provide an adequate remedy, as the circuit court noted, since the Cook County State's Attorney can bring an action for any alleged violations." *Id.*

[*P47] The holding in *Marshall* demonstrates that the fees imposed by section 27.2a(g) are intended to compensate for **[**138]** **[****564]** the financial costs of operating the Clerk's office in handling litigants' pleadings and motions. It is not meant to benefit litigants such as plaintiffs. As the *Marshall* court specifically held, the Clerks of Courts Act is intended to "benefit counties that want to reduce court security costs or establish and maintain document storage or automated recordkeeping **[***24]** systems"

and a private right of action is inconsistent with this underlying purpose of the Act and not necessary to provide an adequate remedy. *Id.* The same reasoning is applicable here.[5] Thus, we are not persuaded by plaintiffs' arguments that one legislator's comment regarding a proposed fee increase in 1991 demonstrates that the Act was meant to protect litigants as a class. Similarly, we are not persuaded that the fee structure of the Act shows that it was intended to primarily protect litigants and prohibit the Clerk from charging "exorbitant fees for access to the courts" or that plaintiffs' injuries were of the type intended to be prevented by the statute. The fees correspond with different types of filings and the administrative costs associated with each type of filing. *Id.* Implying a private cause of action here is not necessary to effectuate the purpose of the statute.

[*P48] We also examine whether "implying a private right of action is necessary to provide an adequate remedy for the statute's violation." *Id.* ¶ 12. Plaintiffs complain that equitable relief would not fully compensate them because they are seeking damages—*i.e.*, attorney fees and other expenses costs incurred.

[*P49] We note **[***25]** that in *Gassman*, the Clerk argued, as it does here, that there was no implied private right of action under section 27.2a(g). *Gassman*, 2017 IL App (1st) 151738, ¶ 24. The plaintiff in *Gassman* sought a writ of *mandamus* to compel the Clerk to cease collecting the unauthorized fees, to return all fees previously collected, and for an accounting of all fees collected. *Id.* ¶ 7. This court held that it was not necessary to infer a private right of action because the plaintiff was not seeking tort-like relief or damages, but instead the plaintiff's suit for *mandamus* was the proper vehicle. *Id.* ¶ 24. The plaintiff was not attempting to impose tort liability on the Clerk, but to compel public officials to comply with the language of the statute, and therefore the plaintiff was "entitled to pursue a *mandamus* action to compel the officials' compliance with the law, and no private right of action is necessary." *Id.* ¶ 25.

[*P50] Indeed, a *mandamus* action is "an extraordinary remedy to enforce the performance of official duties by a public **[**139]** **[****565]** officer where no exercise of discretion on his part is involved." *Wilson v. Quinn*, 2013 IL App (5th) 120337, ¶ 18, 376 Ill. Dec. 874, 1 N.E.3d 586 (citing *Noyola*, 179 Ill. 2d at 133). See also *Noyola*, 179 Ill. 2d at 124, 132-35 (where the plaintiffs brought suit to force public officials to comply with statutory requirements, and were not using statute as a predicate **[***26]** for tort action, a court may compel public officials' compliance by means of a writ of *mandamus*). We note that the circuit court here ruled on defendants' motion to dismiss in the present case before *Gassman* was decided. To the extent that plaintiffs here are requesting a declaration that imposition of the filing fees is unlawful and seek a return of the fees collected pursuant to section 27.2a(g), plaintiffs' claim can be construed as one for restitution, and not attempting to impose tort liability or damages on the Clerk.

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[5] That the purpose of section 27.2a(g) of the Clerks of Courts Act is intended to benefit the clerks' offices to cover the expenses associated with filing a petition to vacate a final order or judgment is buttressed by other cases examining the purpose behind similar fee provisions in the Clerks of Courts Act. See *Pick v. Pucinski*, 247 Ill. App. 3d 1068, 1073, 618 N.E.2d 657, 188 Ill. Dec. 87 (1993) (statute requiring payment of a second filing fee after remand had a reasonable basis of compensating clerks for services rendered to case on remand; upheld statutory fee based on purpose related to operating and maintaining court system); *People v. Tolliver*, 363 Ill. App. 3d 94, 97, 842 N.E.2d 1173, 299 Ill. Dec. 821 (2006) (circuit clerks' fee for automation and document storage constituted a fee, and not a fine, as it compensates clerks for costs associated with a defendant's conviction); *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74, 410 Ill. Dec. 834, 71 N.E.3d 1113 (same); *Lee v. Pucinski*, 267 Ill. App. 3d 489, 642 N.E.2d 769, 204 Ill. Dec. 868 (1994) (statutory fees charged under Clerks of Courts Act for reproduction of records did not violate constitutional right to free access to courts as they constituted charge to compensate clerks for expenses in providing copying services, and statutory fees were reasonably related to statute's purpose of defraying copying expenses).

[*P51] As our supreme court has explained, restitution is available in both cases of law and equity and "'[t]he concepts of restitution and damages are quite distinct, but sometimes courts use the term damages when they mean restitution.'" *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257, 807 N.E.2d 439, 282 Ill. Dec. 815 (2004) (quoting 1 Dan B. Dobbs, Law of Remedies § 3.1, at 280 (2d ed. 1993)). "'Damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain.'" *Id.* (quoting Dobbs, *supra*, at 278). In *Raintree*, the plaintiffs sought a declaration that the ordinance at issue was unlawful and the return of the impact fees collected under the same. *Id.* at 256. The court rejected the defendant's characterization of the plaintiffs' claim **[***27]** as one for "damages," holding instead that plaintiffs sought a refund or restitution of the money they had paid which was not owed. *Id.* at 257. " '[I]f the plaintiff has *no* substantive claim grounded in tort, contract, or statute, then if the plaintiff's claim is viable at all, it *must* be one for restitution to prevent unjust enrichment.' " (Emphases in original.) *Id.* at 258 (quoting Dobbs, *supra* § 4.1(1), at 556). The plaintiffs sought only return of the money paid, not compensation for lost capital which could have been invested elsewhere, and they did not allege that the defendant breached a duty as a predicate for imposing liability. *Id.* at 257.

[*P52] Here, we find that plaintiffs do not have a basis to pursue a private action to impose tort liability on defendants under *Marshall*, and consequently, they do not have a basis upon which to seek damages to compensate for costs and expenses beyond restitution. However, plaintiffs can proceed with a declaratory action, similar to the *mandamus* action pursued by the plaintiffs in *Gassman*. Much like the *mandamus* action by the plaintiffs in *Gassman*, plaintiffs here need not pursue a private right of action under the Clerks of Courts Act in seeking the equitable relief of a declaratory judgment **[***28]** and return of the fees unlawfully imposed in the form of restitution.

[*P53] Moreover, to the extent that plaintiffs argue that they are seeking attorney fees, we note that "Illinois has long adhered to the general American rule that the prevailing party in a lawsuit must bear the costs of litigation, unless a statutory provision or an agreement between the parties allows the successful litigant to recover attorney fees and the expenses of suit." *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 238, 659 N.E.2d 909, 213 Ill. Dec. 563 (1995) (citing *Saltiel v. Olsen*, 85 Ill. 2d 484, 488, 426 N.E.2d 1204, 55 Ill. Dec. 830 (1981), and *Hamer v. Kirk*, 64 Ill. 2d 434, 437, 356 N.E.2d 524, 1 **[**140]** **[****566]** Ill. Dec. 336 (1976)).[6] Here, plaintiffs have shown no statutory provision or agreement authorizing such fees.

[*P54] III. CONCLUSION

[*P55] We find the circuit court erred in dismissing plaintiffs' count I claim on the basis that it was barred by the voluntary payment doctrine. As to count II, we find that no private right of action is implied in the Clerks of Courts Act. However, plaintiffs may proceed on their declaratory action to prevent the Clerk from charging filing fees under section 27.2a(g) for interlocutory motions and to recover such fees paid by plaintiffs as restitution.

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[6] We note that "where the outcome of the litigation has created a common fund, this court has adopted the 'common fund doctrine.' " *Brundidge*, 168 Ill. 2d at 238. "The general rule requiring litigants to bear their own costs and attorney fees does not interfere, however, with the power of courts of equity to permit a litigant or lawyer who recovers a common fund for the benefit of others to recover costs and reasonable fees from the fund as a whole." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 921, 654 N.E.2d 483, 211 Ill. Dec. 21 (1995).

[*P56] Affirmed in part, reversed in part, and remanded.

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McIntosh v. Walgreens Boots Alliance, Inc.

Supreme Court of Illinois

June 20, 2019, Opinion Filed

Docket No. 123626

Reporter
2019 IL 123626 *; 135 N.E.3d 73 **; 2019 Ill. LEXIS 670 ***; 434 Ill. Dec. 189 ****

DESTIN McINTOSH, Appellee, v. WALGREENS BOOTS ALLIANCE, INC., Appellant.

Prior History: McIntosh v. Walgreens Boots All., Inc., 2018 IL App (1st) 170362, 2018 Ill. App. LEXIS 233, 424 Ill. Dec. 633, 109 N.E.3d 747 (Apr. 23, 2018)

Disposition: Appellate court judgment reversed. Circuit court judgment affirmed.

Judges: [*1]** JUSTICE NEVILLE delivered the judgment of the court, with opinion. Chief Justice Karmeier and Justices Thomas, Garman, Burke, Theis, and Neville concurred in the judgment and opinion. Justice Kilbride dissented, with opinion.

Opinion by: NEVILLE

Opinion

[*P1] [**192] [**76]** Plaintiff Destin McIntosh filed a class action complaint against defendant Walgreens Boots Alliance, Inc. (Walgreens). The complaint alleged that Walgreens violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* **[****193] [**77]** (West 2014)) by unlawfully collecting a municipal tax imposed by the City of Chicago (City) on purchases of bottled water that were exempt from taxation under the City ordinance.

[*P2] The circuit court of Cook County dismissed the action under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)), on the ground that McIntosh's claim was precluded under the voluntary payment doctrine, which provides that money voluntarily paid with full knowledge of the facts cannot be recovered on the ground that the claim for payment was illegal. The

appellate court reversed, holding that the voluntary payment doctrine did not bar McIntosh's claim because he had pleaded that the unlawful collection of the bottled water tax was a deceptive **[***2]** act under the Consumer Fraud Act. 2018 IL App (1st) 170362, 424 Ill. Dec. 633, 109 N.E.3d 747. We allowed Walgreens' petition for leave to appeal (Ill. S. Ct. R. 315(a) (eff. Apr. 1, 2018)). For the reasons that follow, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

[*P3] I. BACKGROUND

[*P4] Since 2008, the City has levied a five-cent tax on the purchase of bottled water. Chicago Municipal Code § 3-43-030 (added Nov. 13, 2007). Under the ordinance, the buyer is ultimately liable to the City for payment of the bottled water tax. *Id.* § 3-43-040 (added Nov. 13, 2007). The retail seller is required to include the bottled water tax in the sale price. *Id.* § 3-43-050 (added Nov. 13, 2007). The bottled water wholesaler collects the tax from the retailer and remits the tax to the City. *Id.*

[*P5] The ordinance defines the term "bottled water" as "all water which is sealed in bottles offered for sale for human consumption" but excludes any beverage that is defined as a "soft drink" under a separate City ordinance imposing a tax on soft drinks. *Id.* § 3-43-020 (added Nov. 13, 2007). Under that ordinance, the term "soft drink" has the meaning set forth in section 2-10 of the Illinois Retailers' Occupation Tax Act (*id.* § 3-45-020 (amended Nov. 16, 2011)), which in turn states that "soft drinks" are defined as "non-alcoholic beverages that contain natural **[***3]** or artificial sweeteners" (35 ILCS 120/2-10 (West 2014)).

[*P6] A guide to the bottled water tax, published by the City's department of revenue, provides examples of the types of bottled water that are excluded from the tax, including (1) any beverage that qualifies as a "soft drink" under the Chicago Soft Drink Tax Ordinance; (2) Pedialyte; (3) Gatorade; (4) Vitamin Water; (5) Sobe Life Water; (6) Propel Fitness Water; (7) Water Joe; (8) Perrier, seltzer water, club soda, or tonic water; (9) mineral water as defined by the Food and Drug Administration; (10) distilled water; (11) other similar products that have carbonation, flavoring, vitamins, caffeine, or nutritional additives; and (12) water provided by delivery services that is in a reusable container not sold with the water. See Chicago Department of Revenue, *Chicago Bottled Water Tax Guide*, https://www.chicago.gov/content/dam/city/depts/rev/supp_info/TaxSupportingInformation/BottledWaterTaxGuide.pdf (last visited Apr. 25, 2019) [https://perma.cc/99AY-WWFN].

[*P7] In 2016, McIntosh filed a class action complaint, asserting that Walgreens had violated the Consumer Fraud Act by collecting the bottled water tax on exempt purchases. The complaint alleged that **[***4]** McIntosh had purchased bottled sparkling water on multiple occasions from several specific Walgreens locations in the city during 2015, and he believed that he was **[****194]** **[**78]** charged the bottled water tax on those occasions. According to the complaint, McIntosh did not know that he had been improperly charged for the bottled water tax until November 2015, when several Chicago news outlets reported that Walgreens was charging the bottled water tax on sparkling water sales that should have been exempt. The complaint further alleged that those reports quoted a Walgreens spokesperson as saying that the company had corrected the issue and that their stores were charging the correct tax on these items.

[*P8] McIntosh's complaint asserted a claim under the Consumer Fraud Act on behalf of himself and all other similarly situated individuals who were charged the bottled water tax on exempt purchases from a Walgreens store in the city. In particular, the complaint alleged that Walgreens represented to buyers of bottled water that the total price "included the tax that was required and allowable by law." According to

the complaint, Walgreens knowingly overcharged taxes to McIntosh and other class members by improperly **[***5]** charging the bottled water tax on retail sales of carbonated, flavored, and mineral water. The complaint further asserted that the overcharge was inconspicuous because only a close inspection and investigation of the applicable tax rates and the specific tax charged by Walgreens would reveal the overcharge. In addition, the complaint alleged that Walgreens' conduct constituted a deceptive and unfair practice under the Consumer Fraud Act, which took place in the course of trade or commerce, and that Walgreens intended that the purchasers of bottled water rely on its deceptive and unfair practice, which proximately caused them to suffer actual damages.

[*P9] Walgreens moved to dismiss the complaint under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), asserting that the claim was barred by the voluntary payment doctrine. The motion was supported by the affidavit of Michelle Vartanian, Walgreens' manager for sales and use tax compliance. Vartanian's affidavit averred that, in 2015, Walgreens customer receipts listed the bottled water tax as a separate line item, along with the amount of the tax, for purchases upon which the bottled water tax was charged. Vartanian further averred that Walgreens remitted the bottled **[***6]** water tax to the City in one of two ways: either by making monthly payments to the City for water shipped from a central Walgreens warehouse or by paying the tax to a vendor for water shipped from the vendor, which was responsible for remitting the tax to the City.

[*P10] McIntosh opposed the motion to dismiss, claiming only that the voluntary payment doctrine did not apply to claims brought under the Consumer Fraud Act. He did not file an affidavit or other evidentiary matter to contradict the averments in Vartanian's affidavit. The circuit court granted Walgreens' motion and dismissed the action with prejudice.

[*P11] McIntosh appealed. The appellate court initially determined that the voluntary payment doctrine does not bar a Consumer Fraud Act claim that is predicated on a deceptive act. 2018 IL App (1st) 170362, ¶ 17, 424 Ill. Dec. 633, 109 N.E.3d 747. The appellate court further held that McIntosh had sufficiently alleged that Walgreens engaged in deceptive conduct in violation of the Consumer Fraud Act by collecting the bottled water tax on purchases that were exempt from the tax. *Id.* ¶¶ 19-20. Accordingly, the appellate court reversed the dismissal of McIntosh's complaint. *Id.* ¶ 20.

[*P12] Walgreens appeals to this court. We also allowed the Taxpayers' Federation **[***7]** of Illinois, the Illinois Retail Merchants Association, **[****195]** **[**79]** and the Chicagoland Chamber of Commerce to file a brief as *amici curiae* in support of Walgreens' position. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

[*P13] II. ANALYSIS

[*P14] Walgreens argues that the appellate court erred in reversing the dismissal of McIntosh's complaint under section 2-619(a)(9) of the Code. Specifically, Walgreens contends that the appellate court's decision effectively nullifies the voluntary payment doctrine. Walgreens further contends that the policy underlying the voluntary payment doctrine applies to this case and that the facts alleged in the complaint are insufficient to invoke the fraud exception to the doctrine.

[*P15] McIntosh urges that the appellate court's judgment be affirmed, asserting that the voluntary payment doctrine does not apply to claims brought under the Consumer Fraud Act. McIntosh alternatively

contends that the circuit court's dismissal of his complaint was erroneous because he sufficiently pleaded that his claim falls within the doctrine's exception for fraud.

[*P16] Section 2-619(a)(9) of the Code permits dismissal of an action where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." **[***8]** 735 ILCS 5/2-619(a)(9) (West 2014). The phrase "affirmative matter" refers to a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Glisson v. City of Marion*, 188 Ill. 2d 211, 220, 720 N.E.2d 1034, 242 Ill. Dec. 79 (1999) (citing *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486, 639 N.E.2d 1282, 203 Ill. Dec. 463 (1994)). A motion to dismiss under section 2-619 admits well-pleaded facts but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts alleged in the complaint. *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 2017 IL 121124, ¶ 21, 417 Ill. Dec. 728, 89 N.E.3d 376. In addition, a defendant does not admit the truth of any allegations in the complaint that may touch on the affirmative matters raised in the section 2-619(a)(9) motion to dismiss. *Barber Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073, 603 N.E.2d 1215, 177 Ill. Dec. 841 (1992). Where a defendant presents affidavits or other evidentiary matter supporting the asserted defense, the burden shifts to the plaintiff to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. See *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 189 Ill. Dec. 31 (1993).

[*P17] In reviewing a dismissal under section 2-619(a)(9), this court determines whether there exists a genuine issue of material fact that should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Better Government Ass'n*, 2017 IL 121124, ¶ 21. The propriety of a dismissal under section 2-619(a)(9) of the Code presents a question of law that we review *de novo* ***[***9]*** . *Id.*

[*P18] A. The Voluntary Payment Doctrine in Consumer Fraud Cases

[*P19] We begin by considering McIntosh's assertion that the voluntary payment doctrine does not apply to cases brought under the Consumer Fraud Act. In essence, McIntosh contends that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine. We do not agree.

[*P20] **[****196]** **[**80]** The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17, 775 N.E.2d 951, 266 Ill. Dec. 879 (2002). Section 2 of the statute provides that it is unlawful to engage in

> "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact *** in the conduct of any trade or commerce." 815 ILCS 505/2 (West 2014).

[*P21] To sufficiently plead a cause of action based on a violation of section 2, a plaintiff must allege the following: (1) a deceptive act or practice by the defendant, (2) the defendant's intent **[***10]** that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade

or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception. *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550, 922 N.E.2d 309, 337 Ill. Dec. 186 (2009); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149, 776 N.E.2d 151, 267 Ill. Dec. 14 (2002). The plaintiff need not allege an intent to deceive on the part of the defendant, and an innocent misrepresentation may be actionable under the Consumer Fraud Act. *Cripe v. Leiter*, 184 Ill. 2d 185, 191, 703 N.E.2d 100, 234 Ill. Dec. 488 (1998). Section 2 requires, however, that the misrepresentation must relate to a material fact. 815 ILCS 505/2 (West 2014).

[*P22] The common-law voluntary payment doctrine embodies the ancient and "universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal." *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541, 85 N.E. 200 (1908); see also *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 298, 856 N.E.2d 422, 305 Ill. Dec. 617 (2006); *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 27-28, 828 N.E.2d 1155, 293 Ill. Dec. 657 (2005); *Illinois Graphics*, 159 Ill. 2d at 497; *Kanter & Eisenberg v. Madison Associates*, 116 Ill. 2d 506, 512, 508 N.E.2d 1053, 108 Ill. Dec. 476 (1987); *Freund v. Avis Rent-A-Car System, Inc.*, 114 Ill. 2d 73, 79, 499 N.E.2d 473, 101 Ill. Dec. 885 (1986); *Getto v. City of Chicago*, 86 Ill. 2d 39, 48-49, 426 N.E.2d 844, 55 Ill. Dec. 519 (1981); *Yates v. Royal Insurance Co.*, 200 Ill. 202, 206-07, 65 N.E. 726 (1902); *Elston v. City of Chicago*, 40 Ill. 514, 518-19 (1866).

[*P23] To avoid application of this long-standing doctrine, it is necessary to show not only that the claim asserted was unlawful but also that the payment was not voluntary, such as where there was some necessity that amounted to compulsion and payment was made under the influence of that compulsion. *King*, 215 Ill. 2d at 28, 30; *Illinois Graphics*, 159 Ill. 2d at 497; *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393-94, 544 N.E.2d 344, 135 Ill. Dec. 848 (1989); *Freund*, 114 Ill. 2d at 79; *Getto*, 86 Ill. 2d at 49; *Illinois Glass Co.*, 234 Ill. at 541; *Yates*, 200 Ill. at 207.

[*P24] In addition to compulsion or duress, other recognized exceptions to the **[****197]** **[**81]** voluntary payment doctrine **[***11]** include fraud or misrepresentation or mistake of a material fact. *Vine Street Clinic*, 222 Ill. 2d at 298; *King*, 215 Ill. 2d at 30; *Illinois Graphics*, 159 Ill. 2d at 497; *Freund*, 114 Ill. 2d at 79; *Getto*, 86 Ill. 2d at 49; *Illinois Glass Co.*, 234 Ill. at 541; *Yates*, 200 Ill. at 207.

[*P25] The voluntary payment doctrine is a common-law rule of general application, including cases involving the erroneous collection of a tax. *Yates*, 200 Ill. at 206; see also *Freund*, 114 Ill. 2d at 79-84; *Getto*, 86 Ill. 2d at 48-53; *Adams v. Jewel Cos.*, 63 Ill. 2d 336, 343-44, 348 N.E.2d 161 (1976); *Hagerty v. General Motors Corp.*, 59 Ill. 2d 52, 59-60, 319 N.E.2d 5 (1974). Generally, taxes paid voluntarily though erroneously may not be recovered without statutory authorization. *Freund*, 114 Ill. 2d at 79; *Getto*, 86 Ill. 2d at 48; *Adams*, 63 Ill. 2d at 343-44; *Hagerty*, 59 Ill. 2d at 59. This rule also applies to tax payments made to an intermediary such as a retailer. *Freund*, 114 Ill. 2d at 79; *Adams*, 63 Ill. 2d at 343-44; *Hagerty*, 59 Ill. 2d at 59-60.

[*P26] In support of his assertion that the voluntary payment doctrine does not apply to claims brought under the Consumer Fraud Act, McIntosh relies primarily on the appellate court's decisions in *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, 995 N.E.2d 303, 374 Ill. Dec. 164, *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 863 N.E.2d 800, 309 Ill. Dec. 168 (2007), and *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 814 N.E.2d 585, 286 Ill. Dec. 597 (2004). We find, however, that these cases do not establish a categorical exemption from the voluntary payment doctrine for claims brought under the Consumer Fraud Act.

[*P27] In *Flournoy*, the plaintiff brought an action under the Consumer Fraud Act against the defendant, a provider of telephone service to prison inmates. *Flournoy*, 351 Ill. App. 3d at 584-85. The plaintiff alleged that the defendant engaged in a deceptive course of conduct by offering telephone service under a specified rate structure and then fraudulently collecting multiple fees and surcharges to reinitiate calls that had been prematurely **[***12]** and deliberately terminated by the defendant. *Id.* at 586-87. The gravamen of the plaintiff's claim was that the defendant had misrepresented the true rate of the telephone service by terminating calls prematurely and imposing duplicate fees when the plaintiff placed the same call again. The appellate court held that the plaintiff's claim was not barred by the voluntary payment doctrine because he had alleged a deceptive practice under the Consumer Fraud Act that was "in the nature of fraud." *Id.* at 587. The decision in *Flournoy* is a straightforward application of the fraud exception to the voluntary payment doctrine. As such, it does not support the assertion that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine.

[*P28] In *Nava*, the plaintiff brought suit under the Consumer Fraud Act, alleging that the defendant had improperly assessed state sales taxes on the entire retail sale price of digital television converter boxes despite the fact that a portion of the **[****198]** **[**82]** sale price was subsidized by a federal consumer voucher program. *Nava*, 2013 IL App (1st) 122063, ¶ 1. In opposing the plaintiff's claim, the defendant asserted that the plaintiff's claim was barred by the voluntary payment doctrine. *Id.* ¶ 2. The **[***13]** appellate court rejected the defendant's argument that the plaintiff's claim was barred by the voluntary payment doctrine, noting that the doctrine is inapplicable if the payment was procured by fraud or deception. *Id.* ¶ 24. The appellate court further observed that the voluntary payment doctrine could not be applied as a defense in "causes of action based on statutorily defined public policy" and "should not apply to claims brought under the [Consumer Fraud] Act." *Id.* As support for this proposition, the *Nava* court cited only *dicta* contained in a footnote in the *Ramirez* decision. *Id.* In that footnote, the *Ramirez* court concluded that the voluntary payment doctrine could not be applied to the plaintiff's claims for excessive copying charges because to do so "would violate the fairness requirements of the Consumer Fraud Act." *Ramirez*, 371 Ill. App. 3d at 805 n.2.[1]

[*P29] We find nothing in either *Nava* or *Ramirez* that lends support to McIntosh's argument that claims brought under the Consumer Fraud Act are categorically exempt from the voluntary payment doctrine. The "public policy" referenced by *Nava* amounts to nothing more than recognition that a payment charged and collected in contravention of the Consumer **[***14]** Fraud Act is unlawful. Merely characterizing an act or practice as illegal is insufficient to defeat application of the doctrine. *King*, 215 Ill. 2d at 33. Indeed, the voluntary payment doctrine specifically applies where the payment sought to be recovered was obtained illegally. *Id.* This court has repeatedly rejected an argument that the voluntary payment doctrine cannot be used to defeat public policy in circumstances where the payment was not the result of fraud or a misrepresentation of fact. *Id.* at 34-35; see also *Vine Street Clinic*, 222 Ill. 2d at 298-99.

[*P30] Moreover, McIntosh's assertion that Consumer Fraud Act claims are exempt from the voluntary payment doctrine is in direct conflict with well-established principles that govern a legislative abrogation of a common-law rule. Common-law rights and remedies remain in full force in this state unless expressly repealed by the legislature or modified by court decision. *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL

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[1] As the appellate court in this case recognized, the footnote in *Ramirez* does not accurately reflect the law. 2018 IL App (1st) 170362, ¶ 17, 424 Ill. Dec. 633, 109 N.E.3d 747. A claim premised on an unfair practice is not the equivalent of a claim based on fraud or deception. See *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 677, 802 N.E.2d 1270, 280 Ill. Dec. 749 (2003), *aff'd sub nom. King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 828 N.E.2d 1155, 293 Ill. Dec. 657 (2005).

112906, ¶ 16, 980 N.E.2d 45, 366 Ill. Dec. 245. A legislative intent to alter or abrogate the common law must be plainly and clearly stated. *Id.* As a consequence, "Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least—rather than the most—alteration in the common law." *Id.* (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 69, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004) (collecting cases)).

[*P31] [*15]** Nothing in the language of the Consumer Fraud Act reflects a legislative intent to alter the voluntary payment doctrine or its applicability to claims brought **[****199] [**83]** under the statute. Therefore, it cannot be said that the Consumer Fraud Act abrogates the voluntary payment doctrine. To the extent that *Nava* and *Ramirez* suggest otherwise, they are overruled. Accordingly, we reject McIntosh's assertion that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine.

[*P32] B. Application of the Voluntary Payment Doctrine

[*P33] Having determined that the voluntary payment doctrine applies to statutory consumer fraud claims, we next consider whether McIntosh's complaint pled sufficient facts to defeat its application. In doing so, we initially reject McIntosh's assertion that Walgreens has forfeited any pleading challenges to his allegations of fraud. This argument is without merit because a motion to dismiss under section 2-619(a)(9) does not admit conclusions of law or conclusory factual allegations (*Better Government Ass'n*, 2017 IL 121124, ¶ 21), nor does it admit the truth of allegations that relate to the affirmative matters asserted as a defense to the claim (*Barber Colman Co.*, 236 Ill. App. 3d at 1073-74).

[*P34] In tax cases, the voluntary payment doctrine precludes recovery of an erroneous **[***16]** tax that was paid voluntarily and remitted by the retailer to the taxing authority. *Freund*, 114 Ill. 2d at 79; *Adams*, 63 Ill. 2d at 343-44; *Hagerty*, 59 Ill. 2d at 59-60; *Yates*, 200 Ill. at 207; see also *Lusinski v. Dominick's Finer Foods, Inc.*, 136 Ill. App. 3d 640, 643, 483 N.E.2d 587, 91 Ill. Dec. 241 (1985); *Isberian v. Village of Gurnee*, 116 Ill. App. 3d 146, 150-51, 452 N.E.2d 10, 72 Ill. Dec. 78 (1983). In the absence of a statute or unjust enrichment by a seller who retains an erroneously collected tax, a plaintiff may not recover against the seller for the overpayment of taxes that have been remitted to the taxing authority. *Freund*, 114 Ill. 2d at 79; *Adams*, 63 Ill. 2d at 343-44; *Hagerty*, 59 Ill. 2d at 60. To avoid application of the doctrine, a plaintiff must allege facts that bring the claim within one of the recognized exceptions such as necessity or compulsion, fraud, or misrepresentation or mistake of fact. *Geary*, 129 Ill. 2d at 393-94; *Freund*, 114 Ill. 2d at 79; *Adams*, 63 Ill. 2d at 343-44 (1976); *Hagerty*, 59 Ill. 2d at 59-60.

[*P35] McIntosh does not argue that he was compelled to pay the bottled water tax because the purchase of carbonated or flavored water was a necessity and could not have been obtained from any other source without paying the municipal tax. See *Geary*, 129 Ill. 2d at 402-03 (applying the necessity exception to the purchase of tampons and sanitary napkins); *Getto*, 86 Ill. 2d at 49-51 (same with regard to telephone service); *Ross v. City of Geneva*, 71 Ill. 2d 27, 34-35, 373 N.E.2d 1342, 15 Ill. Dec. 658 (1978) (same with regard to electrical service). Instead, he contends that his claim falls within the exception for fraud. McIntosh argues that Walgreens knowingly overcharged him by misrepresenting the legality of the bottled water tax that was charged on exempt purchases. He predicates **[***17]** this argument on the contention that the receipt issued by Walgreens for such an exempt purchase constitutes a representation that the tax was required by the ordinance. We do not agree.

[*P36] Under Illinois law, a receipt constitutes *prima facie* evidence as **[****200]** **[**84]** to payment of the amount reflected in the receipt. *Mendelson v. Flaxman*, 32 Ill. App. 3d 644, 648, 336 N.E.2d 316 (1975). As such, a receipt documents the fact of the transaction and raises a rebuttable presumption that the specified payment was made. See *id.* It is recognized that an accurate receipt is one of the factors that indicates there was no deception by the retailer. *Lusinski*, 136 Ill. App. 3d at 644; *Isberian*, 116 Ill. App. 3d at 151; *Tudor v. Jewel Food Stores, Inc.*, 288 Ill. App. 3d 207, 210, 681 N.E.2d 6, 224 Ill. Dec. 24 (1997). Where the nature and amount of a charge is fully disclosed, the plaintiff cannot successfully assert that he or she was operating under a mistake of fact with regard to the charge. See *King*, 215 Ill. 2d at 32; *Freund*, 114 Ill. 2d at 82; *Lusinski*, 136 Ill. App. 3d at 644; *Isberian*, 116 Ill. App. 3d at 151; *Tudor*, 288 Ill. App. 3d at 210.

[*P37] In this case, Vartanian's affidavit averred that the bottled water tax and the amount of the tax was specifically listed on Walgreens receipts and that the bottled water tax it collected was remitted to the City. McIntosh does not dispute that the Walgreens receipts accurately reflected that the bottled water tax was charged on exempt purchases, nor does he contend that Walgreens did not remit the bottled water tax it collected on those **[***18]** purchases to the City or was unjustly enriched by the erroneous collection of the tax. McIntosh has not pointed to any information set forth on the receipt that was factually inaccurate. As a consequence, McIntosh has not alleged any misrepresentation of a material fact as the basis for his claim under section 2 of the Consumer Fraud Act. See 815 ILCS 505/2 (West 2014).

[*P38] Rather, McIntosh concedes that the bottled water tax was disclosed on the receipts issued for exempt purchases. He argues, however, that the disclosure of the tax on the receipt operates as a representation as to the legality of its collection of the bottled water tax. Specifically, McIntosh asserts that the disclosure on the receipt constituted a representation that "the total price [of the purchase] included the tax required and allowable by law." This allegation, however, is insufficient to sufficiently plead a statutory consumer fraud claim.

[*P39] It is understood that misrepresentations or mistakes of law cannot form the basis of a claim for fraud. *Yates*, 200 Ill. at 206; *Elston*, 40 Ill. at 518-19; *Kupper v. Powers*, 2017 IL App (3d) 160141, ¶ 53, 410 Ill. Dec. 759, 71 N.E.3d 347; *McCarthy v. Pointer*, 2013 IL App (1st) 121688, ¶ 17, 378 Ill. Dec. 287, 3 N.E.3d 852; *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 933, 791 N.E.2d 553, 274 Ill. Dec. 461 (2003). An erroneous conclusion of the legal effect of known facts constitutes a mistake of law and not of fact. *Purvines v. Harrison*, 151 Ill. 219, 223, 37 N.E. 705 (1894); *The Hartford v. Doubler*, 105 Ill. App. 3d 999, 1001, 434 N.E.2d 1189, 61 Ill. Dec. 592 (1982). Because all persons are presumed to know the law, a mistake or misrepresentation **[***19]** of law will not avoid application of the voluntary payment doctrine. *Illinois Graphics*, 159 Ill. 2d at 491; *Commercial National Bank of Peoria v. Bruno*, 75 Ill. 2d 343, 350-51, 389 N.E.2d 163, 27 Ill. Dec. 351 (1979); *Groves v. Farmers State Bank of Woodlawn*, 368 Ill. 35, 47, 12 N.E.2d 618 (1937); *Illinois Glass Co.*, 234 Ill. at 546; *Yates*, 200 Ill. at 206; *Elston*, 40 Ill. at 518-19. Where a misrepresentation of law is discoverable by the **[****201]** **[**85]** plaintiff in the exercise of ordinary prudence, it cannot form the basis of an action for fraud. See *Kupper*, 2017 IL App (3d) 160141, ¶ 53; *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 805, 612 N.E.2d 984, 184 Ill. Dec. 108 (1993); see also *Capiccioni*, 339 Ill. App. 3d at 933; *Stichauf v. Cermak Road Realty*, 236 Ill. App. 3d 557, 568, 603 N.E.2d 828, 177 Ill. Dec. 758 (1992).

[*P40] As noted above, McIntosh asserts that the disclosure of the bottled water tax on the receipt constituted a representation that "the total price [of the purchase] included the tax required and allowable by law." Such a representation would be one of law, constituting Walgreens' understanding and

interpretation of what the bottled water tax ordinance required. See *Purvines*, 151 Ill. at 223; *The Hartford*, 105 Ill. App. 3d at 1001. Because McIntosh is charged with knowledge of the law, he cannot claim to have been deceived by the information disclosed on the receipt. McIntosh had the ability to investigate the ordinance to determine if the bottled water tax applied to his purchases of carbonated or flavored water. He has not alleged that Walgreens had superior access to the information set forth in the bottled water tax ordinance or that he could not have discovered what the ordinance required through the exercise of ordinary prudence. See *Kupper*, 2017 IL App (3d) 160141, ¶ 53; *Randels*, 243 Ill. App. 3d at 805; *Capiccioni*, 339 Ill. App. 3d at 933; *Stichauf*, 236 Ill. App. 3d at 568. Therefore, the alleged misrepresentation asserted **[***20]** by McIntosh cannot form the basis of a claim for statutory consumer fraud.

[*P41] Because McIntosh's complaint failed to allege sufficient facts to assert the fraud exception to the voluntary payment doctrine, the circuit court properly dismissed his complaint. The appellate court erred in holding otherwise.

[*P42] III. CONCLUSION

[*P43] In sum, the voluntary payment doctrine applies to claims brought pursuant to the Consumer Fraud Act, and McIntosh's complaint failed to allege sufficient facts to establish the fraud exception to the doctrine. For the foregoing reasons, the judgment of the appellate court is reversed, and the judgment of the circuit court of Cook County is affirmed.

[*P44] Appellate court judgment reversed.

[*P45] Circuit court judgment affirmed.

Dissent by: KILBRIDE

Dissent

[*P46] JUSTICE KILBRIDE, dissenting:

[*P47] This court is tasked with determining whether the voluntary payment doctrine applies as an affirmative defense to claims alleging violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2014)). I agree with the majority that, generally, "taxes paid voluntarily though erroneously may not be recovered without statutory authorization" and that the voluntary payment rule "also applies **[***21]** to tax payments made to an intermediary such as a retailer," where taxes were mistakenly collected and remitted to the taxing body. *Supra* ¶ 25 (citing *Yates v. Royal Insurance Co.*, 200 Ill. 202, 206, 65 N.E. 726 (1902), *Freund v. Avis Rent-A-Car System, Inc.*, 114 Ill. 2d 73, 79, 499 N.E.2d 473, 101 Ill. Dec. 885 (1986), *Getto* ***[****202]*** ***[**86]*** *v. City of Chicago*, 86 Ill. 2d 39, 48, 426 N.E.2d 844, 55 Ill. Dec. 519 (1981), *Adams v. Jewel Cos.*, 63 Ill. 2d 336, 343-44, 348 N.E.2d 161 (1976), and *Hagerty v. General Motors Corp.*, 59 Ill. 2d 52, 59-60, 319 N.E.2d 5 (1974)). None of those cases, however, involved claims brought under the Consumer

Fraud Act. I believe that the voluntary payment doctrine should not be applied to impede causes of action based on statutorily defined public policy and, therefore, should not apply to claims brought under the Consumer Fraud Act.

[*P48] This court has expressly recognized that "[t]he Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. It is to be liberally construed to effectuate its purpose." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17, 775 N.E.2d 951, 266 Ill. Dec. 879 (2002). This public policy was established by the legislature in enacting the Consumer Fraud Act. The voluntary payment doctrine affirmative defense is wholly incompatible with the broad protections the legislature intended to provide by enacting the Consumer Fraud Act.

[*P49] While the ancient voluntary payment doctrine has been described by this court as a "'universally recognized rule'" (*supra* ¶ 22 (quoting *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541, 85 N.E. 200 (1908))), other **[***22]** courts have described it as a "harsh" doctrine (*Getty Oil Co. v. United States*, 767 F.2d 886, 889 (Fed. Cir. 1985)). The common-law voluntary payment doctrine was established in England in the early 1800s (see *Bilbie v. Lumley* (1802) 102 Eng. Rep. 448; 2 East 469) and, as acknowledged by the majority, has long been recognized in Illinois (*supra* ¶ 22).

[*P50] More recently, however, the once well-settled voluntary payment doctrine has become somewhat unsettled, commensurate with the rise of consumer protection statutes. See, *e.g.*, Colin E. Flora, *Practitioner's Guide to the Voluntary Payment Doctrine*, 37 S. Ill. U. L.J. 91 (2012); John E. Campbell & Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 Val. U. L. Rev. 501, 518-19 (2012) (noting that over 60% of common-law countries have abolished the voluntary payment doctrine, including the United Kingdom, Germany, France, Italy, Canada, Australia, South Africa, Scotland, and New Zealand).

[*P51] Indeed, both state and federal courts have held that the voluntary payment doctrine is not applicable as an affirmative defense barring claims based on violation of consumer protection statutes. See *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10, 23 (Wash. 2007) (*en banc*) ("the voluntary payment doctrine is inappropriate as an affirmative defense in the [consumer protection statute] **[***23]** context, as a matter of law, because we construe the [consumer protection statute] liberally in favor of plaintiffs"); *Huch v. Charter Communs., Inc.*, 290 S.W.3d 721, 727 (Mo. 2009) (*en banc*) ("In light of the legislative purpose of the merchandising practices act [protecting consumers], the voluntary payment doctrine is not available as a defense to a violation of the act."); *Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218, 1224 (D. Nev. 2010) (as a matter of law the voluntary payment doctrine cannot be used as a defense to violation of the Nevada Deceptive Trade Practices Act), *rev'd on other grounds*, 674 Fed. App'x 663 (9th Cir. 2017); *MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc.*, 2012 WI 15, ¶ 4, 338 Wis. 2d 647, 809 N.W.2d 857 **[****203]** **[**87]** (the conflict between allowing the voluntary payment doctrine to apply to the deceptive telecommunications billing statute and "the statute's manifest purpose *** leaves no doubt that the legislature intended that the common law defense should not be applied to bar claims under the statute"); *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 32 (Iowa 2013) (voluntary payment doctrine does not apply to preclude actions alleging violations of consumer protection statutes, and application of the doctrine in consumer protection actions would have the effect of judicially vitiating consumer protection legislation). In the context of the Illinois Consumer Fraud Act, the court noted in *Brown v. SBC*

Communs., Inc., No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, 2007 WL 684133, at *9 n.3 (S.D. Ill. Mar. 1, 2007):

> "[This] Court also expresses some skepticism **[***24]** about the applicability of the voluntary payment doctrine to Brown's claim under the [Consumer Fraud Act]. The [Consumer Fraud Act] is of course remedial legislation that is construed broadly to effect its purpose, namely, to eradicate all forms of deceptive and unfair business practices and to grant appropriate remedies to defrauded consumers."

[*P52] Other courts have similarly held that the voluntary payment doctrine affirmative defense is not available if application of the doctrine would violate public policy. See, *e.g.*, *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997) (voluntary payment doctrine does not come into play in situations involving a transaction that violates public policy); *U-Haul Co. of Alabama, Inc. v. Johnson*, 893 So. 2d 307, 313 n.3 (Ala. 2004) (voluntary payment doctrine does not apply in a situation that involves a transaction that violates public policy); *MacDonell v. PHH Mortgage Corp.*, 45 A.D.3d 537, 846 N.Y.S.2d 223, 224 (App. Div. 2007) (barring application of the voluntary payment doctrine when plaintiffs assert a statutory cause of action).

[*P53] In my view, application of the voluntary payment doctrine to claims brought under the Consumer Fraud Act is not only in direct conflict with the public policy underlying that Act, but its application as an affirmative defense to Consumer Fraud Act claims undermines the legislature's intent in enacting the consumer protection statute. **[***25]** Use of the doctrine thus poses a threat to the effectiveness of the Consumer Fraud Act.

[*P54] For these reasons, I believe it is inappropriate to apply the voluntary payment doctrine affirmative defense to claims brought under the Consumer Fraud Act. I would therefore affirm the judgment of the appellate court and remand the cause to the trial court for further proceedings.

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WILL COUNTY, ILLINOIS

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Plaintiff/Petitioner

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Trial Judge: JOHN C. ANDERSON

v.

ANDREA LYNN CHASTEEN
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