"Forcible Entry and Detainer" Goes the Way of the Dodo

By: Michael G. Cortina

Many new laws will take effect on January 1, 2018. Public Act 100-0173 amends the Illinois Code of Civil Procedure, as well as multiple other laws, to replace the phrase "forcible entry and detainer" with the much simpler term, "eviction." While that seemingly innocuous change moves the language of eviction law out of the Dark Ages and into the 21st Century, failure to note the change in language could be problematic for some practitioners.

One of the statutes that was changed is a subsection in the Illinois Mortgage Foreclosure Law ("IMFL"). Specifically, 735 ILCS 5/15-1504.5, which requires certain information be attached to foreclosure summonses for residential foreclosure actions, changes the phrase on the notice from "The lawful occupants of a home have the right to live in the home until a judge enters an order for possession[,]" to "The lawful occupants of a home have the right to live in the home until a judge enters an eviction order." The form that contains this language must be attached to all residential foreclosure summons in English and in Spanish.

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This minor change in language does not substantively alter the information provided, and also ensures that the information given comports with the current law that uses the term "eviction" rather than "forcible entry and detainer." An argument could be made, however, if a mortgagee fails to change its form to use the term "eviction" rather than "order for possession," that the form does not comply with the IMFL and thereby subjecting the entire foreclosure filing to attack.

The statute that requires the form specifically states that the information provided in the notice can be substantially similar to the Spanish translation that is to be provided by the Illinois Attorney General's Office, but the substantially similar qualification is not mentioned for the English version of the form. The IMFL in general, and subsection 1504.5 in particular, is a statute in derogation of the common law, and must be strictly construed. The only logical extension is that the Spanish version can waiver a little from the Attorney General's form, but the English version must be an exact duplicate of the information required by statute.

Failure to adhere to this small change from "forcible entry and detainer" to "eviction" could have other consequences as well. Many evictions are residential, or "consumer" evictions, which therefore could trigger the Fair Debt Collection Practices Act. It is possible that attorneys representing plaintiffs in eviction cases could find themselves being named as defendants in federal Fair Debt Collection Practices Act cases for using the confusing and improper term "forcible entry and detainer" instead of "eviction" with consumers. Whether such a case would be successful is an article for another day, but successfully defending such a suit is no substitution for avoiding the suit in the first place.

Any attorney that practices in foreclosure or evictions needs to know about this change in the law, and make the necessary changes to any form documents that they possess. While this is a minor change, and one that is easily made to forms, failure to make the change could have negative consequences down the road.