No. 23-1870

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff -Appellee,

and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.,
Defendant,

APPEAL OF: BC57, LLC.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern,
Division Case No. 1:18-cv-05587

The Honorable Manish S. Shah

APPELLANT BC57, LLC'S MOTION FOR STAY OF MANDATE

LOEB & LOEB LLP
Andrew R. DeVooght
COUNSEL OF RECORD
Alexandra J. Schaller
321 N. Clark St., Suite 2300
Chicago, Illinois 60654
Telephone: (312) 464-3100
Facsimile: (312) 464-3111
adevooght@loeb.com
aschaller@loeb.com

Attorneys for Appellant BC57, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In interpreting Illinois state law to provide that a mortgage lien can continue despite repayment of the underlying debt, the Panel's opinion threatens bedrock principles governing tens of thousands of mortgages issued every year in Illinois. Specifically, in concluding that the Illinois Legislature impliedly abrogated the common law governing the securitization of real estate, the Panel erroneously converted a ministerial requirement (with a mere $200 penalty for noncompliance) into a tool security-holders could use to maintain security rights in real estate long after the underlying debt has been fully repaid. The opportunities for errors and malfeasance are manifest, creating needless clouds on titles and potentially disrupting the alienability of real property in Illinois.

Despite the Panel's misstep, this Court denied BC57's petition for rehearing *en banc*, asking this Court to certify to the Illinois Supreme Court the question of whether the Illinois Mortgage Act ("IMA") abrogated the Illinois common law rule that payment of a debt automatically extinguishes any lien securing the debt. BC57 intends to file a petition for a writ of certiorari asking the Supreme Court to certify this same important question to the Illinois Supreme Court. BC57 respectfully requests that this Court stay the issuance of its mandate while BC57 formulates and submits its petition.

A stay is warranted here because BC57 can demonstrate both "'a reasonable probability of succeeding on the merits' and 'irreparable injury absent a stay.'" *Senne v. Vill. of Palatine*, 695 F.3d 617, 619 (7th Cir. 2012).

The Supreme Court has readily acknowledged the importance and utility of certifying questions of state law to States' highest courts for a number of reasons including, of importance here, "increasing the assurance of gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). The Court's endorsement of such certifications is particularly applicable here, where the question BC57 seeks to have certified to the Illinois Supreme Court focuses on a uniquely local matter, the functioning of the Illinois real estate market.

Certification is also necessary to remedy the Panel's flawed analysis. In upending more than a century of Illinois law, the Panel did not employ the analysis the Illinois Supreme Court requires when assessing whether the Act necessitated an "implied repeal of the common law," which "has never been favored." *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, 980 N.E.2d 45, 51 (Ill. 2012). Instead, the Panel looked to two Illinois Appellate Court decisions to forecast what the Illinois Supreme Court would hold if faced with this issue of such enormous consequence to the real estate market. (See Panel Op. at 9-10.) With respect, as explained below, these decisions cannot carry this heavy load. Neither case applied the Illinois Supreme Court's strict analysis for finding the otherwise disfavored implied repeal of the common law. Moreover, both cases are readily distinguishable, and indeed, one of these two courts has since recognized the validity of the common law principle. See *City of Chicago v. Elm State Prop. LLC*, 2016 IL App (1st) 152552, ¶ 21.

Contrary to the Panel's conclusion, a proper application of the Illinois Supreme Court's abrogation analysis demonstrates that the Act's framework is "supplementary, not contradictory" to the common law rule, thus demonstrating the lack of legislative intent to overrule the common law. *See Rush*, 980 N.E.2d at 52. Accordingly, certification to the Illinois Supreme Court is necessary to ensure that its abrogation analysis is fully and faithfully employed.

Certification is similarly warranted to address the uniquely local, adverse consequences the Panel's decision will have on the Illinois real estate market. Indeed, the Illinois Land Title Association ("ILTA") and the Illinois Mortgage Bankers Association ("IMBA"), ***organizations that have operated in the Illinois real estate market for more than a century***, confirmed both the Panel's misstep in discarding the common law pursuant to the Act, and the "serious adverse and unintended consequences for the operation of" the Illinois real estate market, including would-be homeowners involved in the thousands of transactions that take place in Illinois every month. (Amici Mot. for Leave to File Joint Brief ¶11, ECF No. 74 ("Amici Mot.").) Such problems are exactly the kind of uniquely local matters that underscore the Court's promotion and use of certification to States' highest courts.

BC57 can similarly demonstrate that absent a stay of this Court's mandate, BC57 will suffer irreparable injury. Indeed, as the district court explained in granting BC57's motion for stay pending appeal, "[o]nce money goes out the door to victims or investors or lenders, ***it will be effectively impossible to pull that money***

back," and "***that is a harm to BC57***." (Tr. of Oral Argument at 19:7-15, *S.E.C. v. Equitybuild* (July 11, 2006) ("Tr.").)

Accordingly, BC57 respectfully requests that this Court grant its motion to stay the mandate pending BC57's filing of a petition for a writ of certiorari.

BACKGROUND

This matter concerns a mortgage lien priority dispute between two claimants— Appellant BC57 and a collection of more than 160 individual and entity investors (the "Investor-Lenders"). (R.1152, 1201.) Each claims priority to funds liquidated by a receiver's sale of five properties by virtue of their respective mortgage liens. (Id.)

In 2015 and 2016, the Investor-Lenders made loans to Equitybuild, Inc. ("Equitybuild"), which Equitybuild used to purchase five investment properties in Chicago. In exchange, Equitybuild granted five mortgages to the Investor-Lenders to secure their investment. (R. 1147-1-1147-5, the "Investor-Lenders' Mortgages.") For each loan, the Investor-Lenders entered into contracts with a related entity, Equitybuild Finance, LLC ("EBF"), appointing EBF as the collateral agent, trustee, and loan servicer.

In 2017, BC57 made a secured loan to a special purpose limited liability company sponsored by Equitybuild, to allow Equitybuild to refinance the existing debt on the five properties. (R.109.) BC57 conditioned its loan on, among other things, (1) a first mortgage lien position on each of the properties and (2) receipt of

releases of record, evidencing release of the Investor-Lenders' Mortgages, which served as security interests in the five properties. (Id. at 115.)

At closing, BC57's settlement agent received payoff statements from EBF stating the amounts due on the Investor-Lender loan and releases of record for each property signed by EBF. (R.1160 at 225- 228, R.1147-16-20.) Thereafter, BC57's agent wired $4,944,850 to EBF (the total amount required by the payoff statements), the loan closed (R.1160 at 238-257) and BC57's mortgage and releases of record of the Investor-Lender Mortgages were recorded against each of the five properties. (R. 1147-22, 1147-16-20.)

In 2018, the U.S. Securities and Exchange Commission filed a complaint alleging the owners of Equitybuild and EBF had engaged in a scheme to defraud investors in connection with real estate investments in Chicago, including the five properties at issue in this appeal. (R.1.) Thereafter, the district court appointed a receiver "to secure the real estate and other assets obtained with investor proceeds, and to ultimately recompense the defrauded investors," (R.3) and established a claims resolution process organizing properties into groups. (R.941.)

After both BC57 and the Investor-Lenders claimed priority in the five properties constituting "Group 1," the district court held in favor of the Investor-Lender Mortgages. (A01-A30.) To reach that conclusion, the district court held that the releases of record of the Investor-Lenders' Mortgages provided to BC57 were facially defective and that EBF lacked authority to execute them. (Id.) The court further found that BC57's payments were insufficient to extinguish the Investor-

Lenders' mortgage liens as a matter of law, and irrespective of the releases, because the Act "replaced" the common law rule that a lien of a mortgage is extinguished upon payment of the debt secured by the mortgage. (Id. at 28-29.) The court explained that "[t]he Act says a payment (together with a request for a mortgage release) triggers an *obligation* to release the mortgage — it doesn't trigger the release itself." (A29 (original emphasis).)

The Panel affirmed the district court's ruling, holding that the Act impliedly "abrogated the common law rule," such that "there must be payment and delivery of the release to extinguish a mortgage lien." (Panel Op. at 10.) The Panel further held that "[t]he conclusion that the releases were facially invalid is not against the manifest weight of the evidence." (Id. at 12.)

This Court denied BC57's petition for rehearing *en banc.*

GROUNDS FOR RELIEF

I. BC57's Motion to Stay the Court's Mandate Should be Granted

"When a party asks this court to stay its mandate pending the filing of a petition for a writ of certiorari, that party must show that the petition will present a substantial question and that there is good cause for a stay." *Senne v. Vill. of Palatine*, 695 F.3d 617, 619 (7th Cir. 2012) (Ripple, J., in chambers). BC57 recognizes that "[t]he grant of a motion to stay the mandate 'is far from a foregone conclusion.'" *Id.* (citation omitted). Instead, BC57 must demonstrate both "'a reasonable probability of succeeding on the merits' and 'irreparable injury absent a stay.'" *Id.* BC57 respectfully submits that it can satisfy both of these requirements such that a stay of this Court's mandate is warranted.

A. BC57 can Demonstrate a Reasonable Probability of Succeeding on the Merits

"In order to demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari petition, a party must demonstrate a reasonable probability that four Justices will vote to grant certiorari and that five Justices will vote to reverse the judgment of this court." *Senne*, 695 F.3d at 619 (citing California v. American Stores Co., 492 U.S. 1301, 1307 (1989); *United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam), 50 F.3d at 1360)). "In applying this standard, [this Court] must consider carefully the issues that the applicant plans to raise in its certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Id.*

BC57 plans to file a petition for a writ of certiorari asking the Supreme Court to certify to the Illinois Supreme Court the question of whether the Act abrogated the long-established Illinois common law rule that payment of a debt automatically extinguishes any lien securing the debt. A number of factors demonstrate that there is "a reasonable probability that four Justices will vote to grant certiorari and that five Justices will vote to" certify this question to the Illinois Supreme Court. *Senne*, 695 F.3d at 619.

1. The Supreme Court Recognizes the Importance and Utility of the Certification of Questions of State Law to States' Highest Courts.

The Supreme Court has readily acknowledged the importance and utility of the federal courts, including the Court itself, certifying questions of state law to States' highest courts. For example, the Court has long recognized that certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and, [importantly here,] ***increasing the assurance of gaining an authoritative response***." A*rizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (emphasis added). Indeed, the Court has candidly acknowledged that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation." *Id.* at 48.

Moreover, the Court has explained that "in the long run," certification not only "save[s] time, energy, and resources," it also "helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). "[P]rinciples of federalism and comity" are "powerful considerations" that "favor giving a State's high court the opportunity to answer important questions of state law, ***particularly when those questions implicate uniquely local matters*** . . . ***and might well require the weighing of policy considerations*** for their correct resolution." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 777 (2005) (Stevens, J., dissenting) (emphasis added) (citing *Elkins v. Moreno*, 435 U.S. 647, 662, n. 16 (1978) (sua sponte certifying a question of state law because it is "***one in which state governments have the highest interest***") (emphasis added).

Notably, this court and other members of the federal judiciary have similarly identified problems underscoring the importance of certification in a case like this. *See, e.g., Lexington Ins. Co v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1092-93 (7th Cir. 1999) ("'Moreover, federal court pronouncements on the content of state law ***inherently involve a significant intrusion on the prerogative of the state courts to control that development***.'") (emphasis added) (*quoting Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1416 (7th Cir. 1994) (Ripple, J., dissenting on other grounds)); *see also* Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism, 78 Va. L. Rev. 1671, 1681 (1992) (Former Chief Judge of the United States Court of Appeals for the Third Circuit acknowledging that ***"[a]ll of the circuits have similar problems in predicting state law accurately***," and "[u]ntil corrected by the state supreme court," such decisions "inevitably skew the decisions of persons and businesses who rely on them and ***inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court***.") (emphasis added).

Thus, the Court has recognized the importance of the kind of relief BC57 will seek in its petition.

2. Certification is Necessary to Correct the Panel's Flawed Abrogation Analysis

The Panel acknowledged that "[u]nder Illinois common law, the payment of a debt underlying a mortgage automatically extinguishes the security interest belonging to the holder of that debt." (Panel Op. at 7.) Pursuant to this well-established rule, BC57's payment of the debt underlying the Investor-Lender

Mortgages in accordance with payoff statements issued by EBF extinguished those prior mortgage liens, leaving BC57 with the only enforceable mortgage against the five properties. This is how the real estate market in Illinois has worked for more than a century. (Amici Mot. ¶11.) The Panel upended this fundamental principle of Illinois law by concluding the Act impliedly abrogated the common law rule, replacing it with a new rule that a mortgage lien remains effective absent delivery and recording of a signed release of record. (See Panel Op. at 10.)

Despite acknowledging Illinois' exacting standard regarding implied abrogation, the Panel did not conduct the required analysis to determine whether the Act did, in fact, create "an irreconcilable repugnancy" with the common law. Importantly, a review of the Act and the common law demonstrates that they are "supplementary, not contradictory," and that there is no "irreconcilable repugnancy" between them. *See Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, 980 N.E.2d 45, 51-52 (Ill. 2012). Therefore, Illinois courts properly applying the *Rush* standard would not recognize implied abrogation of the common law in this case. As such, certification to the Illinois Supreme Court is necessary to remedy the Panel's flawed analysis and "increase[s] the assurance of gaining an authoritative response" to this critically important question. A*rizonans for Official English*, 520 U.S. at 76.

a. The Common Law Established Criteria for Extinguishing The Lien, While The Act Provides A Mechanism For Recording Evidence Of That Extinguishment

The Illinois common law created the standard by which courts could determine whether a mortgage lien had been extinguished: by operation of law, the repayment of the debt extinguished the lien. *Bradley v. Lightcap*, 66 N.E. 546, 548

(Ill. 1903). By contrast, the Act addresses whether the public record accurately reflects the status of the mortgage lien.

The Act states: "Mortgages of real property and deeds of trust in the nature of a mortgage shall be released ***of record*** only in the manner provided herein." 765 ILCS 905/2 (emphasis added). Prior to its enactment in 1961, a release would be "recorded" by writing it into the margin of the record. *See id.* Post-Act, rather than writing a release into the margins, a release must be a separate "instrument in writing," which itself must be recorded. *Id.*

In requiring a mortgagee to execute a release of record upon payment, the Act "protects the free alienability of land," guarding against forever clouding title. *In re Gluth Bros. Constr. Inc.*, 451 B.R. 447, 451 (Bankr. N.D. Ill. 2011). The Act is thus designed not to change the security relationship between the parties; instead, it is designed to ensure that the public record accurately reflects the reality that the security relationship between the parties has ended.

Without this filing in the public record, the chain of title would still include notice of a mortgage that had been, in fact, extinguished as a matter of law by repayment of the debt. The only mechanism for removing this cloud on title would be to obtain an order of removal by a court of equity. *See Allensworth v. First Galesburg Nat'l Bank & Trust Co.*, 7 Ill. App. 2d 1, 4 (2d Dist. 1955) ("Any instrument or proceedings in writing which appears of record and casts doubt upon the validity of the record title constitutes a cloud on the title . . . equity has jurisdiction to quiet the title [and] remove said clouds"). To avoid this issue and

promote alienability of real estate, a recorded release clarifies the chain of title, evidencing what has already occurred—that the prior mortgage debt has been discharged and the lien securing that debt has been extinguished. *See Gluth Bros.*, 451 B.R. at 451; (see also Amicus Br. of ILTA at 8-9, ECF No 20 ("ILTA Br.")

The common law thus addressed extinguishment of the secured debt, while the Act addressed the public record of that extinguishment. The two systems are therefore "supplementary, not contradictory" and Illinois courts would not find implied abrogation. *See Rush,* 980 N.E.2d at 52.

Under the common law, the debtor who satisfies the debt would have full peace knowing that the lien securing the debt had been extinguished by operation of law. Once the repayment funds were accepted by the lienholder, the debtor's property would be freed from its encumbrance without need for further cooperation from the lienholder. This was an important protection for the debtor because once payment had been made, the lienholder would have little incentive to take any additional steps to assist the borrower. (*See* ILTA Br. at 6-7.)

Under the Panel's opinion, repayment of the debt is no longer enough; the fully-satisfied lienholder now keeps a security in the property until a record of release is filed. (See Panel Op. at 10.) Yet the highly permissive terms of the Act belie such a sweeping transfer of power from the borrower under the common law to the lienholder under the Act. Specifically, the Act allows a mortgagee thirty days from when the debt is paid to record the release document, and it imposes a mere

$200 penalty, as well as the cost of attorney's fees, for failure to record the release or meet that timeframe. 765 ILCS 905/4.

The Illinois legislature could not have intended, ***without so much as a comment in the Act or its legislative history***, to repeal the longstanding common law rule that protects a lender who has paid the debt underlying a mortgage and usher in a new rule, pursuant to which that same lender is completely vulnerable as a matter of law and at the whim of the mortgagee for such an extended period of time.

By any measure, the common law rule unquestionably provides the borrower "greater protection than the statute at issue." *See Rush*, 980 N.E. 2d at 51. In such a situation, the Illinois Supreme Court has made clear that "'it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law rather than to say that it is repugnant to that rule.'" *Id.*

Each of these points demonstrates there is no "irreconcilable repugnancy" between the Illinois common law and the Act. *See id.* Unfortunately, the Panel did not engage in ***any such analysis*** of the interplay between the Act and the common law as the Illinois Supreme Court requires.

Instead the Panel read two Illinois Appellate Court decisions, *Federal Nat'l Mortg. Ass'n v. Kuipers*, 732 N.E. 2d 723, 728 (Ill. App. Ct. 2000) and *North Shore Comty. Bank & Tr. Co. v. Sheffield Wellington, LLC*, 20 N.E. 3d 104, 117-19 (Ill. App. Ct. 2014), "to mean that the Act abrogated the common law rule: there must be payment and delivery of the release to extinguish a mortgage lien." (Panel Op. at

10.) Respectfully, the Panel erred in relying on these decisions, and there are "persuasive indications that the Illinois Supreme Court would decide the issue differently." (See id. at 8-9 (citing *Nationwide Agribusiness Ins. Co. v. Dugan*, 810 F.3d 446, 450 (7th Cir. 2015).)

Critically, neither *Kuipers* nor *North Shore* even mentions the common law rule of extinguishment upon payoff, much less its relationship with the Act, or that the Act implicitly replaced or repealed the common law. Moreover, neither court engaged in any aspect of the statutory analysis required to effectuate implicit repeal of the common law. Thus, interpreting *Kuipers* or *North Shore* as repealing the common law flatly conflicts with Illinois law. *See Rush*, 980 N.E. 2d at 51.

Similarly, both decisions are readily distinguishable. Importantly, *Kuipers* examined the impact of an unrecorded assignment of a debt, not an unrecorded payoff release. 732 N.E.2d at 729. Specifically, the issue in *Kuipers* was whether assignment of a mortgage must be recorded in order for the assignee to obtain the priority position of the assignor. *Id.* at 725. The court rejected that assertion, holding that "assignment did not result in the creation of either a new lien that required recording or a new priority position." *Id.* at 728-29. "Rather, the original lien and priority position remained, and FNMA received the right to enforce the lien via the assignment." *Id.* at 728.

North Shore is also distinguishable. In *North Shore*, which primarily concerned the Illinois Mechanics Lien Act, the court rejected a party's argument, in the context of a preliminary standing analysis, that the Act, *in and of itself*,

provided support for "its contention that, once a mortgagee receives full payment for the mortgage, the mortgage is deemed released." 20 N.E. 3d at 117-18. While *North Shore* analyzes the Act, the question was whether payment of a debt underlying the mortgage triggered the release of record itself, where that release was not delivered, but was instead held in escrow, leaving the mortgage intact and of record by agreement. *Id.* The court concluded it did not, holding that "even if there was full payment, the plain language of the Mortgage Act indicates that delivery is necessary before a mortgage is released." *Id.* at 118-19. This is accurate. Payment alone does not release a mortgage of record—a mortgagee must comply with the conditions set out in the Act to release a mortgage of record. Payment alone does, however, extinguish the lien secured by the mortgage, per the common law rule. *See Bradley*, 66 N.E. at 548. Thus, any attempt to rely on *North Shore*, which never mentions the common law rule, ignores the functional interplay between the Act and the common law.

Critically, later precedent by the same Illinois Appellate Court that issued *North Shore* further undermines the Panel's interpretation. In *City of Chicago v. Elm State Property LLC*, the Illinois Appellate Court that issued the North Shore decision two years earlier explained that in Illinois, a mortgage "only creates a lien on the property" and "[i]t conveys a security interest that may be extinguished by the mortgagor paying in full any time prior to foreclosure." 2016 IL App (1st) 152552, ¶ 21 (citing Restatement (Third) of Prop. Mortgages § 3.1 (1997)). If the appellate court believed the Act abrogated the common law rule, its statement in

Elm State Property would make no sense. Instead, that case recognized the continued validity of the common law, and it made no mention of any purported abrogation by the Act. *See id.*

Accordingly, the Panel's reliance on *Kuipers* and *North Shore* to conclude "the Act abrogated the common law rule: there must be payment *and* delivery of the release to extinguish a mortgage lien," is misplaced. (See Panel Op. at 10 (original emphasis).)

Respectfully, after two federal courts did not follow the Illinois Supreme Court's mandatory abrogation analysis in deciding to discard more than a century's worth of common law, the necessary next step is for the Court to certify the question to the Illinois Supreme Court. Such certification will ensure that the Illinois Supreme Court's abrogation analysis is fully and faithfully employed, thereby "increasing the assurance of gaining an authoritative response" to this critical question. A*rizonans for Official English*, 520 U.S. at 76.

3. Certification is Warranted Given the "Uniquely Local" Nature of the Subject Matter and the "Serious Adverse and Unintended Consequences" the Panel's Decision will have on the Illinois Real Estate Market.

The question of whether the Act abrogated the Illinois common law unquestionably "implicate[s] [a] uniquely local matter[]" that "require[s] the weighing of policy considerations for their correct resolution" by the Illinois Supreme Court. *Town of Castle Rock,* 545 U.S at 777 (Stephens, J., dissenting) (citing *Elkins v. Moreno*, 435 U.S. 647, 662, n.16 (1978)). Indeed, as the ILTA and the IMBA explained, the Panel's "decision is in effect a directive that the ***real estate,***

mortgage lender, and title industries in Illinois have been doing it all wrong." (Amici Br. at 5, ECF No. 76 (emphasis added).) This striking observation mandates the local scrutiny of the Illinois Supreme Court.

Just as importantly, as the ILTA and IMBA explained based on their involvement in the Illinois real estate market for more than a century, the Panel's decision will cause "serious adverse and unintended consequences for the operation of the title insurance industry and the lending industry with which it is associated, as well as for the efficient working of the real estate market." (Amici Mot. ¶11.) For example, the panel's decision "will upend the industries' model for closing real estate transactions, making it more expensive for Illinois consumers to buy or get a mortgage. Not only that, but the state of title of countless properties in Illinois will now be called into question. This may result in Illinois mortgages becoming subject to repurchase demand or even becoming unsellable in the secondary market." (Amici Br. at 2.)

These ramifications are exactly the kind of uniquely local matters that underscore the Court's use of certification to States' highest courts.

4. The Timing of BC57's Request for Certification to the Illinois Supreme Court is Irrelevant to BC57's Reasonable Probability for Success on the Merits.

The timing of BC57's request for certification to the Illinois Supreme Court does not undermine BC57's probability of succeeding on the merits. Respectfully, BC57 did not ask this Court, in the first instance, for certification because BC57 shared the view of the ILTA and the IMBA that the common law rule was supplemented by the Act, not silently abrogated by it. (See Amici Br. 8.) That said,

after receiving the Panel's ruling, BC57 requested certification in its petition for rehearing *en banc*. (Petition for Rehearing *En Banc* at 14-15, ECF 71.)

Importantly, "certification is not an argument subject to forfeiture by the parties. It is a tool of the federal courts that serves to avoid 'friction-generating error' where a federal court attempts to construe a statute 'not yet reviewed by the State's highest court.'" *Minn. Voters All. v. Mansky*, 585 U.S. 1, 29 (2018) (Sotomayor, J. dissenting) (quoting *Arizonans for Official English*, 520 U. S., at 79). The Court has "certified questions to a state court 'sua sponte, even though the parties had not sought such relief and even though the district court and the court of appeals previously had resolved the disputed point of state law.'" *Id.* (citing S. Shapiro, K. Geller, T. Bishop, et al, Supreme Court Practice §9.4, p. 611 (10th ed. 2013) (citing *Elkins v. Moreno*, 435 U. S. 647, 660-663, 668-669 (1978)). Thus, any perceived "delay" in the timing of BC57's "asking for certification does nothing to alter th[e] Court's responsibility as a matter of state-federal comity to give due deference to the state courts in interpreting their own laws." *Id.*

For all of these reasons, BC57 has demonstrated a reasonable probability of succeeding on the merits.

B. BC57 Will Suffer an Irreparable Injury Absent a Stay of this Court's Mandate.

Absent a stay of this Court's mandate pending the filing of a certiorari petition, BC57 will suffer irreparable injury. Specifically, once this Court issues its mandate, the district court will instruct the Receiver to disburse $3,760,615.08 from the Group 1 property proceeds to the Investor-Lenders pursuant to the district

court's Disbursement Order, in response to some 160 different claims. Such a distribution would render any future attempt by BC57 to recover these funds from more than 160 claimants, if it were to prevail on appeal, completely futile. Importantly, the district court specifically recognized as much in granting BC57's motion for stay, without security, of any distribution of the proceeds from the sale of the Group 1 properties pending appeal:

> Once money goes out the door to victims or investors or lenders, ***it will be effectively impossible to pull that money back***. . . . I do have a concern that erroneous distributions to investors or claimants will be too difficult to unwind, ***and that is a harm to BC57***.

(See Tr. at 19:7-15 (emphasis added).[1])

Consistent with the district court's determination, other courts in the Seventh Circuit and across the country regularly order stays in similar circumstances involving pools of funds for distribution to avoid the irreparable harm BC57 faces in this case absent a stay. *See, e.g., United States SEC v. ISC, Inc.*, No. 15-cv-45-jdp, 2017 U.S. Dist. LEXIS 139258, at *19 (W.D. Wis. Aug. 30, 2017) (authorizing receiver's distribution plan but ordering "the distribution will have to wait at least until the dispute over the APA [on appeal] is resolved, because that will affect the funds available for distribution."); *Life Ins. Co. of N. Am. v. Camm*, No. 4:02-cv-0106-DFH-WGH, 2007 U.S. Dist. LEXIS 64454, at *4 (S.D. Ind.

[1] Given the district court's observation that it will be "effectively impossible" for BC57 to recoup these funds if they are distributed, absent a stay of the mandate, BC57 may have to determine whether it is practically reasonable to continue with the process of seeking a petition for a writ of certiorari.

Aug. 30, 2007) (accord); *In re Wolf*, 558 B.R. 140, 144 n.5 (Bankr. E.D. Pa. 2016) (collecting district court and circuit authority from across the country "suggest[ing] that when an existing fund has been dedicated to satisfaction of competing claims, distribution of the fund before the court's determination is final and no longer subject to modification or reversal on appeal may constitute irreparable harm to the appellant.").

CONCLUSION

For all the foregoing reasons, BC57 respectfully requests that this Court grant BC57's motion to stay the mandate pending its filing of a petition for a writ of certiorari.

Dated: June 13, 2024

/s/ *Andrew R. DeVooght*

Andrew R. DeVooght
COUNSEL OF RECORD
Alexandra J. Schaller
LOEB & LOEB LLP
321 N. Clark St., Suite 2300
Chicago, Illinois 60654
Telephone: (312) 464-3100
Facsimile: (312) 464-3111
adevooght@loeb.com
aschaller@loeb.com

Attorneys for Appellant BC57, LLC

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 27(d) and 32(g), that this motion contains 5,109 words, excluding Fed. R. App. P. 32(f)'s exclusions. I also certify, pursuant to Fed. R. App. P. 32(a)(5), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century.

Dated: June 13, 2024

/s/ *Andrew R. DeVooght*

Andrew R. DeVooght
COUNSEL OF RECORD
Alexandra J. Schaller
LOEB & LOEB LLP
321 N. Clark St., Suite 2300
Chicago, Illinois 60654
Telephone: (312) 464-3100
Facsimile: (312) 464-3111
adevooght@loeb.com
aschaller@loeb.com

Attorneys for Appellant BC57, LLC

CERTIFICATE OF COMPLIANCE

I certify that, on June 13, 2024, I filed the foregoing via the Court's ECF system, which will send notice to all users registered with that system.

Dated: June 13, 2024

/s/ *Andrew R. DeVooght*

Andrew R. DeVooght
COUNSEL OF RECORD
Alexandra J. Schaller
LOEB & LOEB LLP
321 N. Clark St., Suite 2300
Chicago, Illinois 60654
Telephone: (312) 464-3100
Facsimile: (312) 464-3111
adevooght@loeb.com
aschaller@loeb.com

Attorneys for Appellant BC57, LLC