

**ARTICLES**

**WHAT IS A MORTGAGE?**

*Mortgages Defined*

A mortgage is a written instrument that creates a lien on real estate, or reserves or conveys title to real estate to a mortgagee, as security for the payment of a debt or fulfillment of other obligations by the mortgagor. A mortgage is a means by which a creditor, the mortgagee, can obtain a security interest in a debtor/mortgagor's real property. 735 ILCS 5/15-1207; *Harms v Sprague*, 119 Ill App 3d 503, 507, 456 NE2d 976, 75 Ill Dec 155 (4th D 1983). Thus, accurate descriptions of the mortgaged land and the debt are the key elements of any mortgage.

States typically adhere to either a title or lien theory of mortgages. In states following a title theory, a mortgage is a conveyance of real estate by the mortgagor to the mortgagee. In states following a lien theory, a mortgage is not a conveyance, but is an immediate lien against the mortgaged real estate. *Id.* For example, Illinois, Indiana, and Wisconsin adhere to the lien theory of mortgages. 765 ILCS 5/39; IC 32-29-1-2; Wis. Stat. § 708.01. According to both title and lien theories, the mortgagee holds an interest in the land purely as security for the debt, and that interest must be surrendered when the debt has been repaid.

*Notes Defined*

In issuing a mortgage loan, it is necessary to create two documents: the mortgage and the promissory note. *Evans v Berko*, 408 Ill 438, 444, 97 NE2d 316 (Ill. 1951). While the mortgage grants a security interest in the mortgaged

property in case of a failure to repay the debt, the promissory note is evidence of the debt, and sets forth the terms of repayment. *Bedian v Cohn*, 10 Ill App 2d 116, 118, 134 NE2d 532 (4th D 1956). Because the purpose of the note is to create personal liability, a description of the debt is essential to its validity. A promissory note should state the amount of the principal of the loan, the interest rate, the due date, and the number of payments. *Northridge Bank v Lakeshore Comm Fin Corp*, 48 Ill App 3d 82, 86, 365 NE2d 382, 8 Ill Dec 144 (1st D 1977); *Robison v Moorefield*, 347 Ill App 508, 527, 107 NE2d 278, (2d D 1952).

*How Lenders May Enforce Mortgages and Notes*

**Judicial Foreclosure** The mortgagee has two means of collecting the mortgage debt: the mortgagor's personal security, which is set by the note, and the mortgagor's real estate security, which is set by the mortgage. The mortgagee has a right to foreclose on the mortgage when the mortgagor fails to fulfill one or more of the obligations contained in the mortgage, which often incorporates the note's terms by reference. 735 ILCS 5/15-1402. For example, if the mortgage defines default on the note as a default under the mortgage and the note specifies that the mortgagor is to make monthly payments on the debt, then if the mortgagor fails to make the payments, the mortgagee may bring a judicial action in mortgage foreclosure. The mortgagee may also bring a lawsuit based on violation of the terms of the note. *Emerson v La Salle Nat'l Bank*, 40 Ill App 3d 794, 799, 352 NE2d 45 (2d D 1976). However, the mortgagee may receive only one satisfaction on the mortgage debt, either through an action on the note or through mortgage foreclosure. *Id.* at 798-99. After the mortgagee initiates a judicial action to collect the debt, either by an action on the note or by mortgage foreclosure, and receives a judgment on the action, the mortgagee can

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You may be an ATG member, but are you an ATG Trust member? Every residential real estate closing is an opportunity to do at least preliminary estate planning. How to take title, whether or not to use a land trust and what the current will says (assuming your client even has one) are all estate planning issues.

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execute the judgment by ordering the sheriff to seize the personal and real property of the debtor and sell it at a sheriff’s sale. 735 ILCS 5/12-112. In Illinois, foreclosure is the exclusive remedy for mortgages created after July 1, 1987. 735 ILCS 5/15-1106.

### Non-Judicial Power of Sale/Foreclosure by Advertisement

Many states permit non-judicial foreclosure through a power of sale clause in the mortgage instrument. See, for example, Rev. Stat. Mo. § 443.410. A power of sale clause provides for a non-judicial sale after advertising, serving, and posting a notice of sale as specified in the mortgage and relevant state law. Because judicial foreclosure involves the costs and time of a court proceeding, the non-judicial power of sale is often a more appealing enforcement option. Illinois prohibits the sale of real estate pursuant to a power of sale clause. 735 ILCS 5/15-1405.

**Post-Foreclosure Remedies** Frequently, the sale of the mortgaged property after foreclosure does not generate sufficient funds to satisfy the mortgage debt and expenses

related to foreclosure. Consequently, the mortgagee may collect the remaining debt from the mortgagor in the form of a deficiency judgment. 735 ILCS 5/15-1511. In some states, courts award personal judgment against the mortgagor at the same time as foreclosure, whereas in other states, the mortgagee must wait until after the foreclosure sale when the exact amount of the deficiency is known. In Illinois, the deficiency judgment is based on the difference between the sale price and the mortgage debt. *Illini Federal Sav & Loan Ass’n v Doering*, 162 Ill App 3d 768, 771, 516 NE2d 609, 114 Ill Dec 454 (5th D 1987).

### Priority of Mortgages

**Recording Statutes** A mortgage need not be recorded to be valid, however, an unrecorded mortgage gives rights only between the mortgagor and the mortgagee. For the mortgagee to protect itself against others’ rights, and to give the mortgage priority in relation to other creditors, the mortgage must be recorded. Mortgages generally have priority over subsequently recorded and unrecorded land interests from the time they are recorded.

State recording statutes vary in terms of the priority rights given to instruments recorded and unrecorded. Illinois, Indiana, and Wisconsin have race-notice statutes, which provide that interests in real estate receive their priority of right based solely on the time of recording, except when the person who is claiming priority of interest had actual notice of a prior unrecorded interest. 765 ILCS 5/30; IC 32-21-3-3; Wis Stat § 706.08. Race-notice statutes grant no priority of right to the owner of a subsequent interest who had actual knowledge of the prior interest, regardless of which party records first. 765 ILCS 5/30; IC 32-21-3-3; Wis Stat § 706.08. Race-notice statutes protect subsequent bona fide purchasers without notice who record their instrument of conveyance before the prior unrecorded deed is recorded. 765 ILCS 5/30; IC 32-21-3-3; Wis Stat § 706.08.

**Priority of Purchase Money Mortgages** Under a purchase money mortgage, the mortgagor borrows funds to finance the purchase of a property and pledges the property as security for the loan. Most residential home purchases involve purchase money mortgages. The lender obtains a purchase money mortgage, and the buyer borrows the funds to purchase the residence.

In general, purchase money mortgages take priority over any other prior or subsequent claims or liens attaching to the property through the mortgagor. Purchase money mortgages are recognized as senior to claims of earlier judgments and mortgages on after-acquired property. *United States v New Orleans RR*, 79 US 362, 365, 20 L E 434, 12 Wall 362 (1871) (mortgages with after-acquired property clauses); *Wermes v McCowan*, 286 Ill App 381, 386, 3 NE2d 720 (2d D 1936) (prior judgments). Further, purchase money mortgages are superior to homestead rights. 735 ILCS 5/12-903. However, real estate taxes

take priority over purchase money mortgages. 35 ILCS 200/21-75.

**Priority of Later Advances of the Loan** Later advances of the loan proceeds may be incorporated into the mortgage. 735 ILCS 5/15-1302(b)(1). For example, many construction loans are paid out in installments as construction progresses. However, during the construction period, other liens may arise, bringing up the issue of preserving the priority of the construction mortgage and its future advances. If other liens took priority over the future advances, mortgagees would lack incentives to continue the disbursements.

To preserve lien priority, mortgagees must commit to making the future advances. 735 ILCS 5/15-1302(b)(1). When a mortgagee makes the advances pursuant to a commitment that is part of the construction loan mortgage, the future advances have priority from the date of recordation of the mortgage. 735 ILCS 5/15-1302(b)(1). The commitment must specify the amounts of the future advances. *Farm Credit Bank v Biethman*, 262 Ill App 3d 614, 623–24, 634 NE2d 1312, 199 Ill Dec 958 (5th D 1994). When a mortgagee makes the advances without a commitment, the advances constitute a lien from the time that the advance was made. 735 ILCS 5/15-1302(a). Any event that relieves the lender’s legal obligation to advance funds severs the obligatory nature of the advanced funding, and allows intervening liens to take priority over future advance payments.

**How Mortgage Extensions Affect Priority** When a lender agrees to extend the loan repayment period, the extension may be a change to the original document or a substitution of a new mortgage for the old mortgage. The general rule for extensions is that the holder of a senior mortgage with first priority, who simultaneously discharges the old mortgage and takes on a new mortgage, does not lose priority to intervening liens unless the circumstances of the transaction indicate that the parties’ intent was to modify priority. *Roberts v Doan*, 180 Ill 187, 189–90, 54 NE 207 (1899). First priority remains even when the original mortgage is cancelled, released, marked as paid, or satisfied of record. *State Life Ins Co v Freeman*, 308 Ill App 127, 143, 31 NE2d 375 (1st D 1941). The underlying rationale for this rule is that the transaction is merely a substitution of security instruments. *Roberts*, 180 Ill at 189. Thus, almost all courts hold that a mere extension of time of payment does not impair the priority of the extended mortgage. *State Life Ins Co*, 308 Ill App at 143.

**How Mortgage Modifications Affect Priority** Unlike mere time extensions, modifications to the terms of a mortgage may result in some loss of priority if the modification will cause harm to junior lienors. For example, modifications such as increases to the interest rate or principal amount may negatively affect other lienors. If a modification to a senior mortgage “prejudices the rights of the junior lienors or impairs the security,” the borrower must get consent

from the junior lienors. *Marriott Family Restaurants v Lunan Family Restaurants*, 194 BR 429, 444 (Bankr N D Ill 1996) (citing *Shultis v Woodstock Land Dev Assoc*, 188 AD2d 234, 236–37, 594 NYS2d 890 (NY Sup Ct 1993)). Without consent, the senior mortgage may lose priority with respect to the modified terms. In some cases, a court may decide that a total loss of priority is necessary to preserve a junior lienor’s position.

### Conclusion

Mortgage loans involve two documents: the mortgage and the promissory note. A mortgagee may enforce the debt through an action on the note or through mortgage foreclosure. If the proceeds of the foreclosure sale are not sufficient, the mortgagee may seek a deficiency judgment against the mortgagor. Recording statutes, the type of mortgage, and modifications to a mortgage may affect the priority of the mortgage.



## CASENOTES

*Casenotes* includes short case summaries broken down by state and topic. In this manner, we hope to report recent developments more fully and more promptly. A summary marked with ☞ designates a case of particular importance.

### ILLINOIS:

#### Wills

*In re the Estate of Lea J. Erickson*, 363 Ill App 3d 279, 841 NE2d 1104, 299 Ill Dec 372 (4th D 2006).

**Facts:** Charles and Lea Erickson, husband and wife, executed a joint and mutual will providing the entire estate of each to pass to the survivor, “as the survivor’s property absolutely” during the survivor’s remaining life, then to pass to their children in equal shares upon the death of the surviving spouse. Charles Erickson was the first spouse to die. Five days prior to Lea’s death, she conveyed three tracts of land to two of her daughters, Julie Schackmann and Sandra McDougal, and a grandson, Sean Doggett, (hereafter “the defendants”) in exchange for \$10 from each. After Lea’s death, William Erickson, a son of Charles and Lea, filed a complaint seeking the return of the three parcels of real property to the estate, asserting that a joint and mutual will prohibited Lea from distributing property in a manner that would contradict the dispositive scheme of the will.

The trial court agreed with William, reasoning that because the will was joint and mutual, his mother’s actions in deeding the property away were improper because they violated the terms of the joint and mutual will. The defendants appealed. The issue on appeal was whether the term “absolutely,” found in the phrase “as the survivor’s

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## ATG® PRESIDENT CELEBRATES 25TH YEAR

On October 19, 2006, ATG held an open house in its new Chicago office at One South Wacker, conducted its 42nd annual shareholders' meeting, and celebrated Peter Birnbaum's 25th ATG Anniversary. More than 200 members and other guests attended—many of whom knew Peter when he started at ATG as a law clerk in 1981. Since that time Peter (who was named President in 1991) has provided vision and leadership for ATG, become a highly regarded author and speaker on significant topics affecting the profession, and established himself in Springfield and Washington, D.C., as a valuable resource. Congratulations, Peter!



ATG officers conducted the Annual Shareholders' meeting prior to the Open House. Shown here is Bill Austin, ATG Board Chairman (Effingham, Ill.), congratulating Peter Birnbaum, ATG President (Chicago, Ill.) on his 25 years of service to ATG.



## ANNUAL HOLIDAY RECEPTION

### ATG® HOLIDAY RECEPTION A SUCCESS

On Thursday, December 7, 2006, ATG held its annual Holiday Reception at another Chicago landmark, the Chicago Cultural Center. Nearly 500 members, guests, and staff gathered in the Preston Bradley Hall under its magnificent Tiffany dome. The night included cocktails, a buffet dinner, and the music of the *Bill Pollack Orchestra*.



From left: Mike Moore, Manager, ATG Regional Company Venture (Chicago, Ill.); Deanna Jackson, guest; Jesse White, Illinois Secretary of State; Peter Birnbaum, ATG President and CEO (Chicago, Ill.); Janet Hassakis, guest; and Mark Hassakis, ATG member (Mt. Vernon, Ill.).



From left: Wally O'Brien, ATG Director and past Ch Brook, Ill.); his wife Sharon O'Brien; daughter Kelly Event Planner (Lombard, Ill.); son JJ O'Brien, guest; and Steve Anderson, ISBA Communications Manager; and Sally Anderson, guest.

From left: Dave Rolewick, ATG and ATG Trust member; Suzy Rolewick, guest; Steve Anderson, ISBA Communications Manager; and Sally Anderson, guest.

From left: Diana Meek, guest; David Dunn, new ATG board member (Bloomington, Ill.); Susan McLane, ATG Clerical Manager and Meetings Director (Champaign, Ill.); Jane Austin, guest; and Bill Austin, ATG Board Chairman (Effingham, Ill.).



From left: David Andrews, new ATG board member (Plymouth, Wis.); Tamie Andrews, guest; Jerry Gorman, ATG Senior Vice President – Downstate Operations (Champaign, Ill.); Tom Cullen, ATG Managing Attorney – Wisconsin Operations (Madison); and Michelle Cullen, guest.

From left: P. guest; Justice f (Arlington He Bernie Kash

# WINTER EVENTS



Steve Norgaard, ATG member (Glen Ellyn, Ill.); Jesse White, Illinois Secretary of State; Remedios (Mimi) Runo, ATG member (Chicago, Ill.); and Peter Birnbaum.



Dr. Jerome Austriaco, guest; Aurora Austriaco, ATG Board Member (Chicago, Ill.); Barbara Levine, guest; Heather Horeled, guest; and John Horeled, ATG member (Crystal Lake, Ill.).



From left: ATG Board Chairman Bill Austin; and ATG Sr. Vice Presidents Hank Shulruff (Chicago, Ill.) and Jerry Gorman (Champaign, Ill.).

Stan Balbach, ATG Founder, past Chairman, and retired Board Member (Urbana, Ill.), listens while current ATG Chairman announces the naming of the "Stanley B. Balbach Board Room" at the new Chicago office.



From left: Hank Shulruff, ATG Senior Vice President – Business Development, with Nicholas and Jerry Jakubco, ATG members (Chicago, Ill.).

Chairman (Oak Brook, Ill.), and ATG Sr. Vice President (Chicago, Ill.); and Bob O'Brien, ATG Sr. Vice President (Chicago, Ill.).

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Patricia Buckley, Robert Buckley (Chicago, Ill.); and August Butera, ATG member (Chicago, Ill.).



From left: Kevin McCarthy, ATG member, (Tinley Park, Ill.) and Marybeth McCarthy, guest.



From left: Christine Sparks, ATG Staff Attorney (Chicago, Ill.); Deborah Cole, ATG and ATG Trust member (Chicago, Ill.); Arden Miner, ATG Senior Manager, Escrow and Legal – Underwriting (Chicago, Ill.); and August Butera, ATG Senior Vice President and General Counsel (Chicago, Ill.).



The crowd went wild when ATG President Peter Birnbaum took to the drums!

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property absolutely,” permits Lea to dispose of property belonging to the estate in a way that is in disharmony with the estate planning scheme provided for in the joint and mutual will she and her husband executed prior to the husband’s death.

**Holding:** Affirmed. The term “absolutely” does not give Lea the power to disrupt the scheme provided under a joint and mutual will; therefore, the conveyances are void and the judgment of the circuit court was affirmed. The parties each conceded that the will was joint and mutual, meaning that it was executed jointly by two or more persons with reciprocal provisions and showed on its face that the bequests were made one in consideration of the other. Joint and mutual wills are testamentary as well as contractual, meaning that a joint and mutual will serves as a contract between the testators. As a result, the joint and mutual requires the survivor to dispose of the property as provided under the will and estops the survivor from disposing of the property in any different manner.

Emphasizing the term “absolutely” in describing the gift to the surviving spouse, the defendants argued that Lea was allowed to transfer the property under the will, while William called a construction of this sort an illogical attempt to upset the common dispositive scheme of the will. The court began by acknowledging the settled law that in interpreting a will, it is proper to focus not just on one provision, but to consider the will in its entirety, thus giving effect to the intent of the testator. Accordingly, the court held that the inclusion of the term “absolute” neither gave Lea complete power over the property nor the freedom to disrupt the agreed-upon scheme. As a result, the court said that when a scheme under a will has provided for equal treatment of family, as it did here, it would be illogical to interpret the will as giving the surviving spouse the power to disrupt the settled scheme.

Moreover, the court also noted that permitting Lea to transfer the property in contravention of the scheme provided for in the will would breach the duty of good faith, part of every contract.

#### INDIANA:

##### *Adverse Possession*

*Sims v Town of New Chicago*, 842 NE2d 830 (Ind Ct App 2006).

**Facts:** A trust company owned real estate abutting a city street. The city placed guardrails on the street near the trust company’s building. The trustees believed that the erected barriers interfered with their right to use part of the city street by prescriptive easement. The trustees asserted that they had a prescriptive easement because they enjoyed continuous and notorious possession for over twenty years of part of the street.

The trustees argued that the city was encroaching on its

prescriptive easement and brought a quiet title action for injunctive relief. Relying on precedent, the trial court held that a prescriptive easement could not be acquired against the government unless a statute explicitly allows for it.

**Holding:** Affirmed. The court of appeals recognized that under common law a prescriptive easement could not be acquired against the King. Further, the court reaffirmed the general rule that prescriptive rights cannot be obtained against property that is dedicated for a public interest.

Hence, because legislative action had not changed the general common law rule, the trustees’ claim of a prescriptive easement against the city could not stand. The only time a prescriptive easement can be obtained against the government is if there is a statute that explicitly allows for one.

#### WISCONSIN:

##### *Escrow Agreements*

*Black v Metro Title, Inc*, 2006 Wis App 52, 712 NW2d 395 (Wis Ct App 2006).

**Facts:** Pursuant to a marital settlement agreement and divorce judgment, the wife was to convey her interest in the property to the husband and receive half of the equity. When the husband refinanced the property, the wife provided a quitclaim deed for her interest in the property but the escrow agent for the closing refused to pay her half the proceeds and instead paid the husband the full proceeds. The wife was not a party to the escrow agreement for the closing.

The wife sued the escrow agent for negligence in its duties as escrow agent. On summary judgment, she argued that the escrow agent owed fiduciary duties to her as a beneficiary of the escrow. The lower court ruled in favor of the escrow agent because the wife was not a party to the escrow. The wife subsequently received a judgment against the husband for her share of the equity, but the husband had already spent the funds. The wife appealed the order of summary judgment.

**Holding:** Affirmed. An escrow agent owes fiduciary duties only to the parties to an escrow. When a beneficiary is a party to the escrow, the agent will owe fiduciary duties to the beneficiary. When a beneficiary is not a party to the escrow, the agent does not owe fiduciary duties to the beneficiary. However, an escrow agent may owe fiduciary duties to a beneficiary when evidence of fraud, self-dealing, or conflict of interest exists.

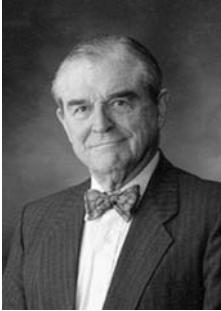
Because the wife did not show that she was a party to the escrow or any evidence of fraud, self-dealing, or conflict of interest, the court applied the general rule. The wife’s presence at the transaction and her expected payout were not sufficient to make her a party to the escrow. The court concluded that the escrow agent owed no fiduciary duties to the wife.



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## NEWS FOR THE NEW YEAR

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- Continuing CLE and MCLE credits in Illinois, Indiana, and Wisconsin.
- Real-time web classes and on-line materials.
- Instant on-line registration.

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Monday	Tuesday	Wednesday
5	6	7
12	13	14
19	20	21

## CALENDAR

Visit [www.atgf.com](http://www.atgf.com) for event details.

### JANUARY

- 1 New Year's Day - *all ATG offices closed*
- 10 CFC Educational Program: Advanced Loan Origination; CFC Office, Lombard, Ill.

### MAY

- 27 Memorial Day - *all ATG offices closed*

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