ATTORNEYS' TITLE GUARANTY FUND, INC.

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ARTICLES

MORTGAGE INSURANCE PREMIUMS NOW DEDUCTIBLE

Before adjourning for the year, Congress passed a $45 billion tax bill that includes a deduction for mortgage insurance (MI) premiums for the benefit of low- and moderate-income homebuyers in 2007. The MI deduction is limited to homebuyers with incomes of less than $110,000. First-time homebuyers are expected to benefit the most from the deduction, but it is not limited to first-time buyers.

Homebuyers who cannot afford a 20% down payment on conventional conforming loans as well as homebuyers using low down-payment financing guaranteed by the Federal Housing Administration and the Department of Veterans Affairs are required to purchase mortgage insurance (sometimes called "private mortgage insurance" or "PMI") and pay a monthly premium in addition to their principle and interest payment.

The deductibility of this payment may act as further inducement for low- and moderate-income families to purchase their own homes. The projected annual savings is estimated at $200-$400 for eligible homeowners.

The tax deduction is limited to the 2007 tax year and is expected to cost the government $91 million in lost revenues. Congress will have to pass an MI deduction next year so homebuyers can use the deduction in 2008.

SERIES LIMITED LIABILITY COMPANIES

Effective August 16, 2005, a new section of the Limited Liability Company Act (LLC Act), 805 ILCS 180/37-40 (the Series LLC Statute), made Illinois the fifth state to allow series limited liability companies, or Series LLCs. A Series LLC is a corporate limited liability structure in which a traditional LLC serves as the umbrella entity for any number of separate series, or cell, LLCs formed within the traditional LLC. Series LLCs are typically described as "protected cells within one limited liability container," because the assets of each series are protected from the liabilities of the traditional LLC and from other series, and vice versa.[1] As a matter of practical application, the Series LLC Act now provides a less costly way for developers and owners of multiple parcels of real estate to achieve limited liability for each property in their portfolio.

Summary of the Series LLC Statute

Creation. According to subsection (a) of the Series LLC Statute, an operating agreement for a traditional LLC "may establish or provide for the establishment of a designated series of members, managers, or LLC interests" that have separate rights, powers, and duties concerning property and obligations of the LLC as well as any profits or losses associated with these properties or obligations. 805 ILCS 180/37-40(a). Moreover, any named series may have a different business purpose or investment objective from the LLC or any other series.

Limited Liability for Each Series. Under subsection (b) of the Series LLC Statute, for series debts, obligations and liabilities to be enforceable against only that series (i.e., achieve limited liability for the series), the series must meet the following requirements: (1) the series must be created under the traditional LLCs operating agreement; (2) the series must maintain its own records; (3) the series

WEBSITE UPDATES

REMINDER: REQUEST PRIOR POLICIES ON-LINE

ATG members can request a copy of an ATG prior policy issued after 1992. Go to the member section of www.atgf.com and click "Prior Policy Search" under *Tools*. You will need the PIN, the buyer name, or the seller name. Contact Suzy Auteberry, 217.403.0130 or sauteberry@atgf.com for your password access.

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must hold and account for its assets apart from the assets of any other series or the traditional LLC; (4) the series must set forth a notice of the limitation of liability of the series in the operating agreement of the traditional LLC; and (5) the series must file a certificate of designation in the Office of the Secretary of State. The statute goes on to re-iterate that providing notice of the limitation of liabilities for a series in the traditional LLCs operating agreement and filing a certificate of designation for each series constitutes notice of the limited liability of that series. Further, subsection (b) of the Series LLC Statute continues by articulating that each series is to be treated as a separate business entity, and is permitted to conduct the ordinary business and exercise the powers of a limited liability company as provided under the act.

Series Name. Subsection (c) requires the name of any series to contain the entire name of the limited liability company and be distinguishable from the names of other series that are expressed in the articles of organization.

Filing Requirement. Filing the certificate of designation with the Illinois Secretary of State serves as the starting point for the existence of the particular series, as provided under subsection (d). In addition to the name of a particular series, the certificate of designation for each series must indicate the names of any managers (if the series is manager-managed) or member-managers (if the series is member-managed) of the series if they are different from those managers or member-managers of the traditional LLC.

Classes of Members. According to subsection (g), the operating agreement may provide for classes or groups of members or managers associated with a series who have such relative rights, powers and duties as provided under the operating agreement or provide for future classes or groups having such rights, powers and duties. A way a Series LLC can benefit from this provision of the act is by using classes or groups within each series to divide management duties and company operations in a way the best suits each particular series.[2]

Management. Further, subsection (h) permits management by members or by a manager or managers for each series, and the LLC Act governs management for all LLCs. 805 ILCS 180/15-1. Presumably the membership of a particular series would be determined like any other LLC, which is by financial contribution to the LLC, with the idea that the owners of the LLC interests are the members of the LLC. Accordingly, the LLC Act requires that a list of members, as well as their addresses and amount of financial contribution to the LLC, be kept at the principle place of business of each company and other reasonable locations. 805 ILCS 180/1-40.

Voting Rights. Subsection (i) permits an organizer to articulate in the operating agreement a division of voting rights within each series among individual members or managers or among classes or groups or members or managers, and also permits an organizer to qualify the types of issues that are voted on by particular individuals or classes of members or managers.[3] Moreover, subsection (i) also allows an operating agreement to be structured so that a particular member or class or group of members associated with a series has no voting rights. Therefore, in the case of a series LLC that exercises its right to withhold voting rights from a particular member or group of members, the remaining members, or the manager(s) make decisions for the company.[4]

Authority. Subsection (j) says that the provisions of the LLC Act, which are applicable to LLCs and their members and managers in general, apply to each particular series concerning the operation of that series, except to the extent those rights have been modified by the Series LLC Statute. Under the LLC Act, LLCs may have a continuous life, unless a date of dissolution is otherwise specified in the Articles of Organization. 805 ILCS 180/5-5.

Dissolution. Section (m) of the Series LLC Statute provides that a particular series may be dissolved without causing the LLC or other series to also be dissolved; dissolution of the LLC, however, does dissolve any series.

Amending the Operating Agreement. An important consideration to note is that the number of series that may be spun from the operating agreement of the traditional LLC is not limited; however, under subsection (a) it appears that any subsequent series need be anticipated and named in the operating agreement. Nonetheless, under the LLC Act, a limited liability company has the power to amend its operating agreement. 805 ILCS 180/1-30, subsection (11). Therefore, if the operating agreement did not call for the existence of a particular series when it was originally drafted, it could presumably be amended to include the series. Because the operating agreement is an internal document used to regulate the affairs of the company and govern relations among managers, members and the company, the procedure for amending an operating agreement would be in the hands of the LLC it governs. 805 ILCS 180/15-5. However, note that subsection (c)(1) of Section 15-1 of the LLC Act requires unanimous consent of all of the members to amend the operating agreement of an LLC. 805 ILCS 180/15-1.

Implications for Real Estate Development

Real estate owners will certainly benefit from the enactment of the Series LLC Statute. By allowing the Series LLC form of ownership, individuals who own numerous parcels of real estate may now organize one LLC and achieve limited liability protection for each property that is held as its own separate LLC cell, and do so at a substantial cost savings over the prior method of holding each property as a stand-alone LLC.[5]

One of the biggest advantages provided by the new Series LLC Statute is asset protection. It is now easier for an individual, like the owner of many parcels of real estate, to provide for asset protection and bankruptcy remoteness using the Series LLC Statute. Before the effective date of this statute, to protect safer assets, like real estate, from the potential liability of riskier assets, the owner needed to retain each property as its a separate LLC, with the property as the sole asset of the LLC.[6] Alternatively, an owner could hold multiple properties under one LLC and chance exposing all to the debts and obligations of one risky holding. However, with the advent of the Series LLC Statute, the owner now need only organize one LLC, then, as provided for in the operating agreement, spin off subsequent series. Following the statutory requirements, the liability of each series will be limited to the assets of that series, while the series will still enjoy the full benefits of the traditional LLC form of ownership. Also, owners of real property will be saved the time and frustrations of managing separate and distinct LLCs,[7] because only one operating agreement and perhaps even one tax filing is needed for the entire Series LLC.[8]

Along with negating the necessity to hold each property as its own separate LLC, the Series LLC Statute saves costs for an owner or developer of real estate who would have otherwise held each property as a separate LLC.[9] First, the owner will save the initial costs of organizing each property as its own LLC. Filing the articles of organization for a traditional LLC costs $500, while filing the articles of organization for a Series LLC costs $750, and filing the certificate of designation for each series costs $50. 850 ILCS 180/50-10. Furthermore, not only will the owner save up-front costs of organization, the owner will also save when filing the annual report required of LLCs. It costs $250 to file an annual report for a stand-alone LLC, while a Series LLC incurs the cost $250 for filing an annual report for the traditional LLC and $50 for each series with a certificate of designation on file. *Id.*

An example illustrates the savings: Suppose a property owner had five (5) properties and she would like to hold each as an LLC for asset protection purposes. If this individual organized five separate stand-alone LLCs, it would cost $2,500 (5 * $500) to file the articles of organization for each LLC, while it would cost a mere $950 [$750 + (4 * $50)] to organize a Series LLC as one traditional LLC and four series or cell LLCs. In this respect, the Series LLC form of ownership saves the property owner $1,550 over holding each property as a sole LLC. Further, to file five annual reports for each stand-alone LLC, the property owner would pay $1,250 (5 * $250), while it would cost $450 to file the annual report for the Series LLC [$250 + (4 * $50)], thus saving the owner $800 per year by using the Series LLC form of ownership. Overall, the owner would save $2,350 ($1550 + $800) in holding the properties as a Series LLC instead of five stand-alone LLCs in the first year.

Potential Limitations and Drawbacks

While creating a Series LLC for holding real property will achieve the goal of segregating assets for liability purposes at a substantial costs savings, drawbacks exist.[10] First, there is a lack of case law concerning Series LLCs, so no one can say for certain how an Illinois court will rule on an issue pertaining a Series LLC. Second, the majority of states do not recognize the Series LLC, so no one can be sure of how a Series LLC will be treated with respect to the traditional LLC and other series for taxation and liability purposes in other states.

In particular, one uncertainty regards the federal taxation of Series LLCs. A question exists as to whether a Series LLC should be treated as a single entity for tax purposes, thus aggregating the profits and losses of each series and the traditional LLC onto one federal tax filing, or whether each series may be treated as a stand-alone entity for tax purposes and elect to file its own federal income tax return.

Section (b) of the Series LLC Statute provides that the traditional LLC and any of its series "may elect to consolidate their operations as a single taxpayer to the extent permitted under applicable law." Many consider this provision of the act a benefit of the Series LLC form of ownership, citing the time saved and overall simplification of having to file only one tax document that covers the traditional LLC and each series.[11]

Interestingly, others argue that filing one tax document for the traditional and each series LLC is merely an option and not a requirement under the statute, saying the "tax classification of each series within an Illinois series LLC is independent of that LLC itself."[12] In an article titled, "An Initial Inquiry into the Federal Tax Classification of Series Limited Liability Companies," a University of Illinois Professor of Law and J.D. candidate student aver that each series in a Series LLC should be taxed as a single entity, independent of the traditional LLC or other series. Citing the language of section (b) the Illinois Series LLC act, which provides "a series with a limited liability shall be treated as a separate entity to the extent set forth in the articles of organization," and pointing to the fact that each series must file its own separate certificate of designation (as opposed to amending the certificate associated with the traditional LLC), the duo assert that because each series is treated as a separate business entity, each series should be treated as such for purposes of federal taxation.[13] Finally, the pair also point to additional language in section (b) of the act that says the traditional LLC and any of its series "may elect to consolidate their operations as a single taxpayer," arguing that this language, particularly the word "elect," provides that the default taxation treatment is for the traditional LLC and any series to be taxed as separate entities, and should remain so unless and until the entities choose to be taxed as one.[14]

Logically, the way in which a Series LLC elects to be taxed at the federal level, either as one aggregated entity or as separate entities, is how the Series LLC would be taxed at the state level as well, but that issue also remains to be seen.

Conclusion

The Series LLC form of ownership has great potential to be an ideal ownership vehicle for individuals or groups who own multiple properties or entities. Series LLCs manage to have all of the characteristics of the customary LLC form of ownership, in particular the flow-through taxation of a partnership and the limited liability of a corporation, but offer these benefits at relatively less cost. Therefore, despite any uncertainties, the advantages of a Series LLC are likely to entice many people to venture into the Series LLC realm of ownership and reap its benefits.

NOTES

1. Ted M. Niemann and Melinda S. Madison, *The Series LLC: New Illinois Law Provides Avenue for Asset Protection*, Ill. State Bar Assn. Real Prop. Newsletter, Nov. 2005, available at http://www.isba.org/Sections/RealEstate/11-05.html.
2. Scott Sissel, *A Major Advancement for LLCs in Illinois*, Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C. Law Firm Web-Site, Recent News, http://www.snsfe-law.com/docs/illinois_series_llc.clnt. (last visited June 26, 2006).
3. Scott A. Sissel, "The Next Generation LLC," *Insight Magazine*, May-June 2006, available at http://insight-mag.com/insight/06/05-06/col-1-pt-1-TakeStock.asp. (*Insight Magazine* is the magazine of the Illinois CPA Society).
4. See 805 ILCS 180/37-40(i) and 805 ILCS 180/15-1, which provide guidelines for the management of both manager-managed and member-managed LLCs.
5. *Supra*, note 1.
6. *Supra*, note 2.
7. *Id.*
8. Sissel, *supra*, note 3.
9. *Supra*, note 2.
10. AxiusGroup.com, The Series LLC, http://www.axiusgroup.com/sllc.htm (last visited June 16, 2006).
11. Sissel, *supra*, note 4.
12. Charles T. Terry and Derek D. Samz, *An Initial Inquiry Into the Federal Tax Classification of Series Limited Liability Companies*, Tax Notes, March 6, 2006, at 1093, 1098, available at http://taxprof.typepad.com/taxprof_blog/files/2006-3770-1.pdf.
13. *Id.* at 1097.
14. *Id.* at 1097.

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:

Real Estate Contracts

Hoxha v LaSalle Nat'l Bank, 365 Ill App 3d 80, 847 NE2d 725, 301 Ill Dec 715 (1st D 2006).

Facts: Roger Hoxha (Roger) and James Hoxha (James) filed a complaint for specific performance of an alleged contract to sell real estate held in a land trust. The Hoxhas asserted that the former beneficiary of the trust, Doris Robbert (Robbert) agreed to sell the property to them after her death. However, Donna Forrest (Forrest) was the successor beneficiary and was not aware of the alleged contract.

The Hoxhas owned property next to the desired real estate. The Hoxhas made repairs to Robbert's property and paid for costs, which Robbert reimbursed. The Hoxhas also collected the rent from the property and remitted the money to Robbert. The Hoxhas were not aware that Robbert's property was held in a land trust until after her death.

The Hoxhas alleged that Robbert agreed to sell her property to them at fifteen percent off the fair market price. Roger had the property appraised and thought the appraised price was much too high and told Robbert that he could not afford this price. Roger alleged that Robbert then offered to sell him the property for $400,000 and he accepted. It was further alleged that Robbert told him to deduct any future expenses for repairs from the purchase price. The Hoxhas contended that this agreement was memorialized in a document, dated November 1, 2000, the legal effect of which was at issue. The document was signed by Robbert and notarized later by Theresa Wong (Wong). After he received the signed document back from Robbert, Roger paid for several repairs to Robbert's property and did not ask to be reimbursed.

James alleged that he saw this document in November 2000 but had it notarized in 2001. When James saw Wong in early 2001, she said she would have to verify that Robbert signed it. In the summer of 2001, James and Wong went to see Robbert. Wong asked Robbert if she had signed the document and if she knew what it was. Robbert allegedly answered yes to both questions. At Robbert's, request, Wong wrote the date as "November 1, 2000" on the document.

Forrest was the executor of Robbert's will as well as the successor beneficiary of the land trust that owned the property. She had known Robbert for several years and managed her finances. Forrest was not aware of the November 2000 document until the Hoxhas sent it to her after Robbert's death. However, a forensic document examiner concluded that the signature on the document was Robbert's.

The trial court held that specific performance was unavailable to the Hoxhas because they did not sign the document and as such, there was no mutuality of obligation. Further, the alleged contract contained no closing date, no reference to financing, prorations, default provisions, form conveyance, warranties, the tenant, or form notices. It was held that the document was a testamentary document because it allowed Robbert to retain an asset during her life and dispose of it upon her death. However, it did not meet the strict requirements regulating the making of wills. The court ordered the Hoxhas to be paid for the maintenance and repair of the property.

Holding: Affirmed. The remedy of specific performance rests within the discretion of the trial court, based on all the facts and circumstances in evidence. To state a cause of action for specific performance, the following elements must be satisfied: (1) the existence of a valid and enforceable contract; (2) compliance by the plaintiff with the terms of the contract or proof that the plaintiff is willing to perform the contract; and (3) the failure of the defendant to perform his or her part of the contract.

Here, the plaintiffs did not meet their burden of proving a valid contract with Robbert, much less a contract that would support specific performance. The contract was addressed "to whom it may concern" and the document did not state the name or title of the person who was to sell the property to the Hoxhas. Further, the successor beneficiary was not mentioned by name or title. Finally, the Hoxhas did not sign the document and there was no mention of any consideration. Before a court can grant specific performance, the terms of the contract must be clear and unequivocal. This was not the case here.

The Hoxhas further asserted that the document was an enforceable contract between the Hoxhas and Robbert because she sold the property within her lifetime when she committed to selling it. The court held that even if this document were construed as a contract rather than a testamentary instrument, the Hoxhas's arguments would still fail because the document was not a valid contract to convey property held in an Illinois land trust.

A land trust beneficiary may contract to sell property, which is the subject of a land trust, as long as the trust agreement vests the beneficiary with the sole right to direct the trustee to convey title. However, the beneficiary must either explicitly or constructively exercise her power to direct the trustee to sell. The beneficiary cannot contract to convey title as if she were the owner of the property. If she does so, the contract is void as being beyond the beneficiary's power to act. Because Robbert had no authority to sell the land, there was no enforceable contract.

INDIANA:

Judgment Liens

ABN AMRO Mortgage Group, Inc v American Residential Serv, LLC, 845 NE2d 209 (Ind Ct App 2006).

Facts: Allure Homes (Allure) executed a mortgage in favor of ABN AMRO Mortgage Group, Inc. (ABN), which was secured by property Allure owned in Indianapolis. In February 2002, Allure defaulted and executed a quitclaim deed in lieu of foreclosure, which transferred title to ABN. In March 2002, American Residential Services, LLC (American) obtained a judgment against Allure for outstanding debts. In May 2002, ABN recorded the quitclaim deed.

In January 2003, ABN filed a "Complaint for Strict Foreclosure of Mortgage" and asked the court to find that it held the property free and clear of any liens. In February 2003, while the action was pending, ABN sold the property to the Braughtons.

American then filed a motion to replace ABN with the Braughtons as plaintiffs. The trial court granted the motion without waiting for ABN's response. The court concluded that American's judgment was first in right and time to any interest of ABN and the Braughtons. The court also ordered the sale of the property to satisfy American's lien.

Holding: Reversed. First, the court of appeals addressed whether ABN's cause of action was proper against American. In particular, there was an issue as to whether the remedy of strict foreclosure was available to ABN, even though it accepted a quitclaim deed in lieu of foreclosure. Indiana law defines strict foreclosure as applying to a situation in which a mortgagee has acquired legal title but a junior creditor's right of redemption has not yet been barred. Because it already held legal title to the property and was only trying to cut off the interests of a junior lien holder, the court found that the remedy of strict foreclosure was available to ABN. Additionally, the court held ABN's action was also recognizable as an ordinary quiet title action. Thus, because ABN was a fee holder of the property, it also had the equitable right to quiet title. Therefore, ABN's suit against American was proper.

The court then went on to consider the dispositive issue of whether American's judgment against Allure allowed a judgment lien to attach to the property. The court considered two recording statutes: Section 32-21-3-3 and Section 32-21-4-1 of the Indiana Code. Remarkably, Indiana's Supreme Court had previously decided a case under similarly worded recording statutes and with a parallel fact pattern. *Runyan et al. v McClellan et al.*, 24 Ind 156 (1865). *Runyan* held that when an original landowner sells his property, he no longer has any interest in it. Thus, the landowner's former property cannot be subject to a judgment lien. The court held that *Runyan* was still good law. When American obtained a judgment, Allure no longer possessed title to the property at issue. Thus, American's judgment against Allure did not attach to the property because ABN owned it.

Further, the court noted that American did not pay valuable consideration to obtain the property and was in a different position from that of a purchaser, mortgagee or lessee who wants to verify the recorded ownership of the title before paying to obtain an interest in it. As such, the recording statutes do not apply here and American does not have a valid lien against the property.

Title Insurance

➲ *Walton v First American Title Ins Co*, 844 NE2d 143 (Ind Ct App 2006).

Facts: Deborah Walton (Walton) purchased property that consisted of two parcels of land, Parcel A and Lot 107. Walton had title insurance with First American Title Insurance Company (First American) that promised coverage against both easements and restrictive covenants. However, there were exceptions to these covered risks, which included the declaration of any covenants, conditions, and restrictions that were recorded by the Claybridge Homeowners Associations (Claybridge). Under the declaration, Claybridge was allowed to maintain the entryways and landscaping easements.

A year later, a dispute arose over whether Claybridge had an easement over Lot 107 of Walton's property. Walton believed that First American's coverage exception applied only to Parcel A, not to Lot 107. In response, First American wrote two exceptions into the policy to exclude both Parcel A and Lot 107 from coverage.

Claybridge filed suit against Walton seeking an injunction to allow it use and maintain easements on both Lot 107 and Parcel A. Walton informed First American that she had been sued and submitted a claim for defense under the policy. The trial court entered a permanent injunction against Walton, finding that Claybridge had the right to an easement over both parcels of land.

First American then informed Walton that her claim was denied. As such, Walton filed suit against First American alleging that it had breached the policy by refusing to defend her in the lawsuit against Claybridge. The trial court found in favor of First American.

Holding: Affirmed. An insurance company's duty to defend is broader than its duty to indemnify. However, an insurer can refuse to defend and instead protect its interest either by means of a declaratory judgment action for a determination of its obligations or by defending the insured under a reservation of rights. Here First American did neither and the court had to determine whether there was a duty to defend.

To determine the insurer's duty to defend, the court looks at the allegations contained within the complaint and the facts that are known or ascertainable by the insurer after reasonable investigation. If it is ultimately revealed that there is no coverage available under the policy, then there is no duty to defend.

In construing Walton's title insurance policy, the court held that although covenants, conditions, and restrictions were generally excepted from coverage, nothing specifically addressed or excluded Claybridge's claims. Thus, under the plain meaning of the policy, Claybridge's declaration was not excluded from coverage.

However, the court also took into account the facts known or ascertainable by First American after reasonable investigation to determine whether there was a duty to defend. Here, it was clear that First American was aware of Claybridge's declaration prior to executing the title insurance policy with Walton. Thus, according to its independent investigation of the known and ascertainable facts regarding Walton's property, First American was correct to conclude that Lot 107 was subject to the rights and obligations of Claybridge's declaration. This brought the property directly within the coverage exceptions of the policy. As such, First American was right to refuse to defend Walton.

WISCONSIN:

Environmental Issues

Warnecke v Warnecke, 2006 Wis App 62, 713 NW2d 109 (Wis Ct App 2006).

Facts: Bert Warnecke, Sr. (Warnecke) and his wife quit-claimed a parcel of 32 acres of unimproved real estate to their son, Bert Warnecke II (Bert II), retaining a life estate in the property. The quitclaim deed contained a contingency requiring Bert II to continue the enrollment of the land in the Managed Forest Lands (MFL) Program, pursuant to Wisconsin Statutes § 77.80-77.91. Bert II subsequently died intestate. The personal representative for his estate filed a Notice of Land Conveyance and Petition for Transfer with the Wisconsin Department of Natural Resources (DNR). Warnecke then filed a Petition for Return of Real Property, claiming that Bert II did not satisfy the contingency in the quitclaim deed in failing to take the necessary steps to keep the property enrolled in the MFL Program.

The circuit court held that although there had been a transfer for purposes of prompting compliance with the MFL Statutes, the DNR was nonetheless able to accept certification of a transfer more than thirty days after the transfer, and the use of the term "shall" was discretionary, not mandatory. Warnecke appealed.

Holding: Affirmed. The term "shall" is directive and not mandatory, and the DNR is not required to withdraw the subject property from the MFL due to a failure to meet a technical requirement.

The purpose of the MFL statute is the preservation of forestlands. Under part (e), transferred land *shall* remain managed forest land, if within 30 days of the transfer, the transferee certifies to the DNR an intent to comply with the existing management plan, and part (f) provides that if the transferee does not provide the DNR with certification as required by part (e), the DNR shall issue an order withdrawing the land. Warnecke argued "shall" provided a mandatory directive, thus warranting an order from the DNR for a mandatory withdrawal from the MFL Program. For purposes of analysis, the court proceeded as if the 30-day requirement in Part (e) was incorporated into the "certification required" under part (f). While the term "shall" is generally construed as mandatory, it may be held discretionary as necessary to carry out the legislature's intent. In considering whether the legislature intended "shall" to be a mandatory or discretionary directive, the factors to consider are: the omission of a penalty, the consequences of each construction, the general object sought to be accomplished by the legislature, and whether the failure to act within the time limit works a wrong.

In this case, the latter three factors indicated the legislature's intent for "shall" to be construed as discretionary, and the court held as such, reasoning in large part that a discretionary construction furthered the overall purpose of the MFL program. Here, the court did not want to allow a failure to meet a technical requirement calling for withdrawal of the land from the MFL program, achieved through a mandatory construction of "shall," to trump the purpose of the statute and the intent of the legislature to provide for the preservation of forestlands.

NEWSMAKERS

ATG® MEMBER LYNN BERSCHE HONORED BY CHAMBER OF COMMERCE


Virginia and Lynn Bersche (ATG member) of Real Title, Waterloo, Illinois.

ATG member **Lynn J. Bersche** (Columbia, Illinois) was unanimously selected to receive the 2006 Community Service Award by the Waterloo Chamber of Commerce. The award was presented at the Chamber's annual dinner meeting earlier this year at Fireside South.

Mr. Bersche has been an ATG member since 1977. He is active in the Waterloo Lions Club and holds leadership positions within several area organizations, including the American Legion and the Monroe County Historical Society. "Lynn's lifelong dedication to the numerous local organizations that he is a member in make him stellar in the community," said Debbie Ruggeri, Chamber Executive Director.

Congratulations, Lynn!

ATG® MEMBERS AND DIRECTORS NAMED ISBA SENIOR COUNSELLORS

Every year, the Illinois State Bar Association (ISBA) celebrates attorneys who have achieved 50 years of service to the profession by naming them Senior Counsellors. Congratulations to the following ATG directors and members who were among the 124 who achieved the ISBA honor in 2006:

ATG Board of Directors (Retired):
James E. Buchmiller (Greenville)
Edward C. Moehle (Pekin)

ATG Members:
Harry B. Bainbridge (Flossmoor)
Robert M. Culbertson (Delavan)
John C. Feirich (Carbondale)
Kenneth J. Glick (Libertyville)
Ronald J. Guild (Chicago)
Solomon Gutstein (Chicago)
Thomas J. Logue (Mattoon)
Ralph E. Lowe (Aurora)
John R. Luedtke (Bloomington)
Donald G. Musick (Mt. Vernon)
Robert J. Oliver (Rockford)
Roy I. Peregrine (Wheaton)

CALENDAR

Check www.atgf.com for event details.

APRIL

4 ATG Legal Education Program: Advanced Loan Origination (a Capital Funding program); ATG Office Board Room, Chicago, Ill.

4 ATG Legal Education Program: Basic Section 1031 "Starker" Tax-Deferred Exchanges (an ATG Trust program); Holiday Inn City Centre, Peoria, Ill.

5 ATG Legal Education Program: Real Estate Fundamentals - Session 3: The Closing Process; Hilton Northbrook, Northbrook, Ill.

11 ATG Legal Ed *Connect* On-Line Program: The Title Commitment, Extended Coverage, and Survey Issues

21 ATG Legal Education Program: Navigating a Real Estate Transaction - A Seminar for Law Students and New Attorneys; Marquette University Law School, Milwaukee, Wis.

25 ATG Legal Education Program: A Short Course in Drafting Estate Planning Instruments (an ATG Trust program); Hilton Oak Lawn, Oak Lawn, Ill.

MAY

2 ATG Legal Education Program: Basic Loan Origination (a Capital Funding program); Capital Funding Office, Lombard, Ill.

2 ATG Legal Education Program: Basic Section 1031 "Starker" Tax-Deferred Exchanges (an ATG Trust program); Hilton Garden Inn, Effingham, Ill.

3 ATG Legal Education Program: Real Estate Fundamentals - Session 3: The Closing Process; Holiday Inn City Centre, Peoria, Ill.

8 ATG Legal Education Program: Real Estate Fundamentals - Session 3: The Closing Process; Radisson Hotel of Greater Milwaukee, Pewaukee, Wis.

9 ATG Legal Ed *Connect* On-Line Program: Basic Title Clearance

16 ATG Legal Education Program: A Short Course in Drafting Estate Planning Instruments (an ATG Trust program); Hilton Northbrook, Northbrook, Ill.

16 ATG Legal Education Program: Real Estate Fundamentals - Session 3: The Closing Process; Madison Marriott West, Middleton, Wis.

17 ATG Legal Education Program: A Short Course in Drafting Estate Planning Instruments (an ATG Trust program); Four Points by Sheraton Fairview Heights, Fairview Heights, Ill.

27 Memorial Day - *all ATG offices closed*

JUNE

6 ATG Legal Ed *Connect* On-Line Program: Estates and Entities

ATG Legal Education Program: Advanced Loan Origination (a Capital Funding program); Capital Funding Office, Lombard, Ill.

Basic Section 1031 "Starker" Tax-Deferred Exchanges (an ATG Trust program); Petterino's, Chicago, Ill.

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