

Illinois Legislature Supersedes Effects of *In re Crane* with Section 11 Amendment

On February 8, 2013, the governor of the State of Illinois signed into law legislation amending the Illinois Conveyances Act providing that the provisions regarding the form of a mortgage are, and have always been, permissive. Specifically, the legislation provides that failure to state the interest rate or the maturity date, or both, shall not affect the validity or priority of a mortgage, nor shall its recordation be ineffective for notice purposes regardless of when the mortgage was recorded. While the amendment does not take effect until June 1, 2013, this legislation is welcome relief to mortgage holders and title companies that insured their mortgages after the *In re Crane* bankruptcy decision that set aside a recorded mortgage as invalid after construing the statute's provisions as mandatory.

765 ILCS 5/11 Amendment

Section 11 of The Conveyances Act provides the form that “mortgages of lands *may* be substantially in.”ⁱ The form includes the mortgagor and mortgagee names, the nature and amount of indebtedness (including the due date, interest rate, and whether secured by note or otherwise), and a description of the real estate.ⁱⁱ Public Act 97-1164 serves to amend the Illinois Conveyances Act by providing that the provisions “regarding the form of a mortgage are, and have always been, permissive and not mandatory.”ⁱⁱⁱ It also makes clear that “the failure of an otherwise lawfully executed and recorded mortgage to be in [that form] in one or more respects, including the failure to state the interest rate or the maturity date, or both, shall not affect the validity or priority of the mortgage, nor shall its recordation be ineffective for notice purposes regardless of when the mortgage was recorded.”^{iv} This amendment was enacted in response to a 2012 decision of the U.S. Bankruptcy Court for the Central District of Illinois, *Richardson v. The Gifford State Bank (“In re Crane”)*, that left a number of lenders and title insurance companies, and their lawyers, formulating a response to this adverse court decision.

In re Crane and its Implications

On February 29, 2012, the U.S. Bankruptcy Court for the Central District of Illinois allowed a bankruptcy trustee to avoid an Illinois mortgage because the mortgage failed to expressly state the interest rate on and maturity date of the underlying debt.^v A secured lender had mortgages on two parcels of land that were properly executed and recorded. However, after the debtors filed for relief under Chapter 7 of the Bankruptcy Code, the trustee sought to have the mortgages found defective and subject to avoidance. The trustee claimed that the mortgages did not state the interest rate and maturity date as mandated in 765 ILCS 5/11 and thus failed to provide constructive notice to subsequent bona fide purchasers. The court held that the mortgage form provisions in Section 11 of the Illinois Conveyances Act are not permissive guidelines. The court held that the amount of the debt, maturity date and underlying interest rate are required to be expressly set forth in the mortgage, and including these provisions in the mortgage by reference to the promissory note or other loan documents is not sufficient. As a result, the mortgage lender was treated as an unsecured creditor, and the property was made available to satisfy the claims of all creditors.^{vi}

The *In re Crane* decision was alarming because its strict reading of the statute was squarely at odds with the permissive language of the Illinois Conveyances Act as well as standard practice in the Illinois mortgage industry. Illinois mortgages, including certain Illinois Fannie Mae residential mortgage forms, often did not expressly reference the interest rate of the underlying obligation. Instead, Illinois mortgages often merely indicated they were interest-bearing obligations and cross-referenced the promissory note or loan agreement as setting forth the express interest terms. In some transactions, interest rate calculations fluctuate or are subject to elaborate formulas, making inclusion in a mortgage impractical. Also, some parties to a mortgage transaction might prefer not to have the details of their loan pricing in the public record. As a result of the *In re Crane* decision, many lenders began practicing strict compliance with the requirements of Section 11 of the Illinois Conveyance Act as interpreted by the court in *In re Crane* at great expense.

In January 2013, shortly after the amendment's passage in the Illinois legislature, another Illinois bankruptcy court disagreed with *In re Crane*. *In re Klasi Properties, LLC v. Bruegge* reasoned that Section 11 was not meant to be a requirements "checklist."^{vii} In reaching its decision, the court focused on well-established Illinois case law allowing incorporation of terms by reference and the goal of the Illinois Conveyances Act to provide adequate notice. The court explained that Section 11 is best read as creating a "safe harbor" for mortgage holders to know when they are giving sufficient notice, not an opportunity for others to benefit from "minor non-compliance."^{viii}

Conclusion

The enactment of Public Act 97-1164 serves to correct the adverse effects of the *In re Crane* decision by re-aligning the statute with Illinois's common practices. The form provisions are, once again, only permissive guidelines, and specifically, the failure to state the interest rate or the maturity date, or both, shall not affect the validity or priority of a mortgage.

ⁱ 765 ILCS 5/11 (emphasis added).

ⁱⁱ *Id.*

ⁱⁱⁱ 2013 Ill. Laws [page #].

^{iv} *Id.*

^v *Richardson v. The Gifford State Bank (In re Crane)*, Case 11-90592, U.S. Dist Ct, C.D. IL, February 20, 2012.

^{vi} *Id.*

^{vii} *In re Klasi Properties, LLC v. Bruegge*, Case 12-6028, U.S. Dist Ct, S.D. IL, January 18, 2013.

^{viii} *Id.*

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