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THUMBS DOWN: NEW REQUIREMENTS FOR ILLINOIS NOTARIES.

Major changes are in store for notary publics in Illinois on June 1, 2009. Ready your thumb! For every transfer of residential property in Cook County, the notary public on the deed or other instrument of conveyance must now create a "Notarial Record" on each person whose signature he witnesses. *5 ILCS 312/3-102*. The Notarial Record must include:

- *Each signer's right thumb print.* Yes, when you sell residential property in Cook County after June 1, you are going to be thumb printed by the Notary Public at the closing. For those with no right thumb, the law says a left thumb print will do. We won't bother you with the details in the statute about what the notary is supposed to do if the person has no thumbs.
- *Evidence of the signer's identity.* Presumably, this means a copy of the person's driver's license or state identification card.
- *The date of the notarial act.*
- *A description of the document.*
- *The property's permanent index number.*
- *The signature, printed name, and residence address of each person whose signature is witnessed by the notary, affirming that "The undersigned grantor hereby certifies that the real property identified in this Notarial Record is Residential Real Property as defined in the Illinois Notary Public Act."*
- *The fee charged by the notary.*
- *The notary's name, business address, phone number, residential address, commission expiration date and employer.*

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After he creates the new Notarial Record, the notary public is forbidden to retain the Notarial Record or any copies. Instead, the notary must do one of two things:

- *If the notary public is employed by a title company, bank or attorney, he must give the Notarial Record to his employer. The employer must then keep the Notarial Record for seven long years.*
- *If the notary is not employed by a title company, bank or attorney, then within 14 days of the date of the signature, the notary must send the Notarial Record to the Cook County Recorder of Deeds, along with a check for \$5.00.*

Whether this law is good, bad or indifferent, it's now the law of the land in Cook County. Unquestionably, it adds an additional step to every conveyance of residential real estate in Cook County in what may be a misguided attempt by the legislature to curtail fraud and forgery.

If nothing else, this additional administrative act is certainly another source of revenue for Cook County government, title companies and manufacturers of ink pads.

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THE ECONOMIC STIMULUS PACKAGE: DOES IT DO ANYTHING FOR YOU?

"What's in the stimulus package for you – nothing," Forbes magazine recently proclaimed. Is that correct? Does the massive \$800 billion federal economic stimulus package (officially, the American Recovery and Reinvestment Act of 2009) really provide nothing for individual taxpayers? Judge for yourself. Here are the highlights of what the law gives to individual taxpayers.

Making work pay credit.

Eligible employees are seeing an increase in their take-home pay. The new law provides a credit against income tax in an amount equal to the lesser of 6.2% of an individual's earned income or \$400 (\$800 for married couples filing jointly). The credit phases out for wage earners starting at \$75,000 for individuals and \$150,000 for couples filing jointly. This credit will be applied retroactively to January 1, 2009 and prospectively to December 31, 2010.

Seniors and others.

Individuals receiving Social Security benefits, disabled veterans and others on fixed incomes are receiving a one-time payment of \$250. If the individual also qualifies for the making work pay credit, his or her credit will be reduced by the \$250 payment.

First-time homebuyer tax credit.

In 2008, Congress enacted the first-time homebuyer tax credit. Unlike other credits, this one had to be repaid, making it unattractive to many taxpayers. The new law removes the repayment requirement for homes purchased by first-time buyers between January 1, 2009

and December 1, 2009. The enhanced credit equals 10 percent of the purchase price of a home up to \$8,000. There are income limitations, which preclude higher-income individuals and couples from taking advantage of the credit. Limitations may also apply for married couples filing individually.

New car deduction.

Congress has created an above-the-line deduction for state and local sales taxes or excise taxes paid on qualified purchases of new motor vehicles. This deduction is temporary and is also prospective from the date of enactment of the new law. It will expire at the end of 2009. Income thresholds and other limitations apply.

AMT patch.

The new law increases the alternative minimum tax exemption amounts for 2009 to \$70,950 for married individuals filing jointly and surviving spouses, \$46,700 for unmarried individuals and \$35,475 for married individuals filing separately. In addition, the new law allows taxpayers to take most personal credits to reduce AMT liability for 2009.

Child tax credit.

The current \$1,000 child tax credit is one of the most popular incentives in the tax code. The new law increases the refundable portion of the child tax credit for 2009 and 2010. Taxpayers are eligible for a refundable credit equal to 15 percent of their earned income in excess of \$3,000, subject to certain restrictions and phase-outs.

Unemployment compensation.

Many individuals are surprised to learn that unemployment benefits are taxable. The new law excludes up to \$2,400 in unemployment compensation from a recipient's gross income in 2009.

Education.

There are currently a number of tax incentives in effect to help bring down the cost of education. The new law expands the Hope education credit (now the American Opportunity Tax Credit). More individuals will be able to take advantage of this credit because of expanded income phase-outs. The new law also raises the maximum credit, extends it over four years of post-secondary school education, and makes 40% of the credit refundable. The new law also permits beneficiaries of qualified tuition plans (known as "529" plans) to use tax-free distributions to pay for computers and computer technology.

Transit benefits.

Individuals who take public transportation to work or van pool may benefit from enhanced transit incentives in the new law. Congress increased the income exclusion amount for transit passes and van pooling from \$120 per month to \$230 per month starting in March 2009 through 2010, with an inflation adjustment. However, these benefits must be offered by your employer to take advantage of them.

EITC.

The earned income tax credit (EITC) is a refundable tax credit targeted to lower and middle income wage earners and families. When the EITC exceeds the amount of taxes owed, it generates a refund. The new law enhances the EITC for taxpayers with three or more qualifying children and helps eliminate an existing marriage penalty across the board.

Energy Incentives.

The new law enhances several energy tax incentives that reward taxpayers for installing energy-efficient property and alternative sources of energy in their homes. Among the types of energy-efficient property that may qualify for a tax break are certain heat pumps, furnaces, windows and doors. There is also a tax break for purchasers of plug-in electric vehicles.

What's the conclusion? Does this statute, that gives mega-billions to banks, Wall Street, auto manufacturers, local governments, construction companies and others, benefit the so-called small taxpayer, or does it just throw him a few crumbs? Our bet is on the crumbs.

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EQUITABLE SUBROGATION: DO YOU LIKE THE SHOES YOU'RE STANDING IN?

The priority of a secured lender's mortgage directly affects the likelihood of the loan being repaid when the borrower is having financial troubles. The general rule is first in time; first in right. Therefore, the first lender to record its mortgage *usually* will have the first right to any proceeds to repay its loan if the real estate is sold. If there is anything left, the lender with the second mortgage receives any proceeds after the first mortgage holder has been paid in full. That can be a lot less than full payment. However, there are creative ways for a second mortgagee to change its position in the priority of lien holders.

The doctrine of equitable subrogation allows a lower priority mortgage holder to pay off a prior mortgage and to step into the shoes of that superior mortgage. This allows a third party who repays a mortgage to

assume the original mortgagee's right to the security interest against the debtor and against any other third party lien claimants asserting an interest in the property. As the name implies, the doctrine is based upon the principles of general equity and fairness, to encourage parties to repay loans. In so doing, equity dictates that those who repay loans should be afforded the right to assume the lien priority position of the mortgage holder whose loan is being repaid.

However, equitable subrogation is not absolute. When a court considers implementing equitable subrogation for a party who has repaid a mortgage, the court must consider doing justice and equity among all of the parties before the court, including the owner of the property, the current

mortgage holders, any lien claimants and any other parties making a claim against the property. As a result, the application of the doctrine is very fact-intensive. That often leads to varying results. That makes predictability of success in implementing equitable subrogation difficult.

Conventional Subrogation: Taking the Equity Out.

The sister to equitable subrogation is conventional subrogation. For conventional subrogation, the refinancing lender and the borrower enter into an agreement that allows the refinancing lender to pay a debt on behalf of a prior mortgagee. In return, the refinancing lender can assert the rights of the original mortgagee. Illinois courts reviewing conventional subrogation have noted that there is no general rule regarding equitable subrogation, which depends on the equities of each particular instance. As conventional subrogation is based not in equity but on contractual obligations between the parties, contracted-for subrogation, by its nature, is much more certain and much more predictable than its equitable subrogation brethren. When applying conventional subrogation, Illinois courts have not recognized the subrogated party; if either harm will come to an innocent party if priority is granted to the lender; or if there has been gross negligence.

In a recent federal bankruptcy case, *In re Berg*, 387 B.R. 524, the court found that conventional subrogation was not applicable for two reasons. First, the non-debtor's spouse did not sign any of the refinance documents and therefore did not release her rights of homestead on the property in question. In the court's eyes, she was an innocent party that could have been harmed by the subrogation. Second, the new lender who refinanced the loan and sought subrogation failed to record its mortgage for over sixteen months. This delay, according to the court, was negligence sufficient to void any claim for subrogation.

Prior Lien Holders: Ignorance Is Not Bliss

A lender claiming either conventional or equitable subrogation may not assert ignorance of other lien holders it should have known about, and expect to be subrogated to a prior secured position. This requirement includes lien holders actually known by the new lender as well as any lien holders that could be found reviewing the chain of title to the property. Illinois courts view the first in time, first in right doctrine as paramount.

As a result, a lender seeking to assert conventional or equitable subrogation should be aware of any prior superseding lien holders.

Does Title Insurance Help or Hinder Equitable Subrogation?

Sometimes, lawsuits claiming equitable subrogation arise from a title insurance company's failure to raise a lien of record. In the case of *First Federal Savings Bank of Wabash v. United States*, 118 F.3d 532, a lender refinanced a loan. In issuing title insurance on First Federal's lien, the title insurance company failed to raise an Internal Revenue Service tax lien on the property. When the IRS sought to foreclose on its lien, the bank claimed equitable subrogation and argued that it should stand in the shoes of the prior mortgage it repaid. The court concluded that the title insurer was the real party-in-interest and that equitable subrogation was not appropriate because it would relieve the title insurance company of its contractual obligation.

Proactive Strategies for Refinancing Lenders to Assert Equitable Subrogation.

What should a lender who refinances do? First, the loan documents should clearly state that the refinancing lender is to receive the priority of that existing first mortgage. This should create a conventional subrogation situation and hopefully avoid any court balancing the equities of the new lender's claim under the equitable subrogation doctrine.

Second, regardless of the outcome in the *First Federal Savings Bank of Wabash* case, title insurance should be obtained. Ideally, the title insurer will insure the new mortgagee's interest as a primary valid and enforceable first mortgage lien on the property. This may require some effort to convince the title insurer of the equitable subrogation claim, but is certainly possible. Also, the title commitment and policy should reveal any third parties that should be adversely affected and void either equitable or conventional subrogation.

Third, if on friendly terms, the new lender should request that the first mortgagee's mortgage be assigned to the new lender and not released upon payment to the current first mortgagee. This will buttress the new lender's equitable subrogation argument with retention of the assigned first mortgagee's rights.

Finally, the new lender should approach the current cooperative lien holders to discuss the possibility of entering into a subordination or intercreditor agreement so that the current lienholders would consent to the new mortgage and confirm that their liens are subordinate to the new.

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ESTATE PLANNING IN 2009 IN A DOWN ECONOMY: THE BENEFITS OF A LIVING TRUST.

The current recession has substantially decreased the value of assets in many potential decedents' estates. At the same time, the federal estate tax exemption has substantially increased – to \$3,500,000. These two events have created a false belief among some folks that they do not need a traditional estate plan. That's incorrect. Most individuals of any means still need to prepare an estate plan.

Everyone, whether they realize it or not, already has an estate plan. For anyone who has not signed his or her own estate plan documents, the State has an estate plan for you. It's called the law of intestacy, and it may not be what you want for yourself and your family.

Let's examine the factors you should consider in determining how you want your assets to be owned during your lifetime, especially if you become incapacitated, and how you want them distributed at your death. Taxes are only one factor.

Consider a husband and wife who are getting along in years and who have two adult children and two grandchildren. The husband and wife probably would want all their assets to be distributed to the survivor of the two of them, and then when that survivor dies, to the children or perhaps the grandchildren. Even in this simple scenario, if there are no estate planning documents in place, the State's estate plan would provide for a disposition of the property other than as desired. If the husband dies first, the law of intestacy mandates that the wife would receive only 50% of the assets and the balance would be distributed immediately to the two children.

If one of the children is already deceased, his share would go immediately to his children, i.e. to the grandchildren, who might be too young to be receiving substantial amounts of money.

Anything owned in joint tenancy by the husband and wife, and insurance policies and 401(k) and IRA proceeds in which the wife is the only named beneficiary, will be distributed directly to her. But, if ownership of the assets were in the husband's name, a probate proceeding would be required.

If the husband became disabled during his lifetime, a guardianship in court might be required to provide for the use of the assets for the husband and wife during the husband's lifetime.

Transfer of assets in this common situation would be much easier if there were a living trust. The husband's assets are transferred to the trust while he is living and competent. The husband would declare himself to be his own trustee and make all decisions concerning the trust. If the husband becomes disabled, the wife would be the successor trustee and make decisions on behalf of the husband. If the wife also became disabled, the children or others named in the trust would become the successor trustees. This eliminates the need for a court intervention.

Upon the death of the survivor of the husband and wife, the assets of each of their trusts would also be distributed without a court proceeding. Thus, assets could be distributed to the children, grandchildren, charities and others according to the wishes of the husband and wife, quickly and inexpensively.

Most individuals would benefit from the use of living trusts. The trust takes into account things like unequal distributions to children; distributions to very young children or grandchildren for whom a bequest should not be immediately paid; and distributions dependent upon survival. In none of these illustrations are estate taxes considered to be a factor. The trust is used as a more efficient way of owning and distributing assets.

In addition to a living trust, nearly everyone should have a healthcare power of attorney and a property power of attorney. These documents permit you to appoint an agent to act for you and make your health care decisions when you are physically or mentally unable to act for yourself. This could include the "pull the plug" decision. In a wife's healthcare power of attorney, she might appoint her husband to act as agent when she is unable to make healthcare decisions for herself. If the husband were also unable to make such decisions, a successor agent would be named. Without this, a court is going to have to appoint a guardian to make these decisions.

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GREAT URBAN LEGENDS OF THE LAW

Fact or Fiction?

No contract is legal unless it's in writing.

A: Mostly fiction.

While it is true that some kinds of contracts have to be in writing to be valid, most contracts are valid and enforceable even if not written. Whether a particular contract is the type that has to be in writing bears little relationship to the importance of the contract. Mostly, it has to do with historical accident.

The first law that required any kind of contract to be in writing was enacted in England in 1677. The law was named the Statute of Frauds and Perjuries because it was an attempt to curtail what Parliament saw as widespread fraud and perjured testimony in court by unscrupulous people who were falsely claiming that they had made verbal contracts when they had not. Parliament could have required every contract to be in writing, but for reasons long forgotten it did not. Instead, it created a list of five kinds of contracts and required only those contracts to be in writing.

Beginning with the original 13 colonies, every state in America enacted a law patterned after this English statute, requiring that some contracts must be in writing. Most states, including Illinois, have enacted the English Statute of Frauds and Perjuries of 1677 almost verbatim. Officially, in Illinois it's called the Frauds Act, but no one ever calls it that. It's always referred to as the Statute of Frauds.

Thus, what contracts have to be in writing in 21st century America is more related to conditions prevailing in 17th century England than to the importance or lack of importance of the contract today.

Over the years, Illinois has expanded the original five kinds of contracts to include several others that must now be written to be valid. However, even today, most contracts still need not be in

writing. To make life miserable for law students, young lawyers and non-attorneys, our legislature has chosen not to list in one place all the contracts that must be in writing. Instead, the list is fragmented and scattered throughout the multiple volumes of the Illinois Compiled Statutes.

Lawyers and judges – who love to speak legalese, not plain English – will often refer to each of these statutes that require certain kinds of contracts to be in writing as a “statute of frauds.” Most non-lawyers have no idea what they are talking about. You now do. When a lawyer or a judge says “statute of frauds” he's really saying, “a law that requires a particular type of contract to be in writing to be enforceable in court.” And when he means to say that it's one of the original five, he might say, “the English Statute of Frauds,” to distinguish it from the other johnny-come-latelies.

Having said all this about the legality of most verbal contracts, we must hasten to caution that proving in court that a verbal contract was actually made, or even worse, the precise terms of the verbal contract, can sometimes be a nightmare. In the immortal words of the late movie producer Samuel Goldwyn (of Metro-Goldwyn-Mayer fame): “A verbal contract ain't worth the paper it's written on.” Get it in writing.

NEW RSP SHAREHOLDERS

Andres Gallegos, Crystal Kontny, and Andrew Lapin have become shareholders (partners) in Robbins, Salomon & Patt, Ltd. Our sincerest congratulations to each of them.

RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

Richard Stavins, Eric Patt and Tracy Stevenson were successful in obtaining a favorable ruling in the Supreme Court of Illinois in a landmark case on police immunity from civil liability.

Kymn Harp spoke before the Chicago Chapter of the Institute for Real Estate Management where he signed copies of his new book, *Intent to Prosper – Commercial Real Estate*.

Crystal Kontny spoke at a Chicago Bar Association seminar for attorneys on negotiating office leases.

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