

Illinois Legal Update

Insights and Developments in the Law

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FAQs About Mortgage Foreclosures

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As the economic crisis deepens, more people are facing foreclosure. Before that day comes, know your rights and responsibilities, and what you may expect should you face foreclosure.

Q: What happens if I cannot make my mortgage payments?

Ultimately, most lenders would rather have your money than your house.

A: Let your lender know as soon as you can, preferably in writing. Although your lender can insist that you make your mortgage payments in full and on time, lenders also know about the economy, and many are willing to work with you. Ultimately, most lenders would rather have your money than your house.

Q: What options do I have if the lender threatens foreclosure?

A: Surprisingly, you may have a number of options. The first is to negotiate with your lender. It is the lender's loan, and the lender can agree to almost any kind of solution that you can imagine, although most will not be willing to suspend payments for a long period of time.

Another option is to refinance with a new lender at a lower rate or for a longer term. Selling your home quickly may be an option, as long as you will get enough to pay your mortgage (or you can make up the difference out of your pocket). Bankruptcy is always an option, as the bankruptcy court may give you time to catch up on your mortgage. Finally, the federal government currently is announcing new programs to help homeowners.

Q: What happens if my lender sues for foreclosure?

A: Just because you have been sued does not mean that the options discussed above are off the table,

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Two Deaths Are Two Occurrences

In a case clarifying an important insurance issue, the Illinois Supreme Court addressed what constitutes an “occurrence” for purposes of an insurance policy.

Many insurance policies contain two separate coverage limits: a “per occurrence” limit, setting a coverage limit for any single occurrence, and an “aggregate” limit, fixing an upper limit the policy will pay, regardless of the number of occurrences. Therefore, more than one occurrence increases the amount of coverage available, up to the aggregate limit.

The case involved two boys who fell into a pit and died of hypothermia when they became trapped and could not get out. The investigation showed that one fell in and got stuck, and the other got caught trying to help his friend. The question was whether this was one occurrence (for which a \$1 million per occurrence limit applied) or two occurrences (in which case the \$2 million aggregate limit applied).

The supreme court ruled that the two deaths were two separate occurrences. An “occurrence” in Illinois is determined by the “cause theory,” which focuses on what caused the damages. Using this standard, the court rejected the insurer’s argument that the “cause” of the deaths was a single failure by the property owner to secure his property.

The court did recognize that when events are close together in time and space, they should be treated as if they are a single event and, therefore, a single occurrence. However, the court found that this did not happen, because the evidence did not show that the boys had become trapped at the same

time, nor did it show how close together in time the two boys died. Because the evidence did not show that the boys’ injuries were so close in time and space that they should be treated as a single event, their injuries were treated as two separate events and, therefore, two separate occurrences.

By clearly defining both what

constitutes an occurrence and what evidence would be required to show that a series of events is a single occurrence because of a close temporal and spatial relationship, the court has hopefully made what can be a complex issue of insurance coverage easier to analyze and apply.

The Value of Pets

So what is the family pet worth? Most of us would not sell the family dog or cat (or turtle or parakeet) for any amount of money, a view recently validated by an Illinois court.

The case involved a dachshund that was badly injured when it was attacked by a neighbor’s husky. The dachshund’s owners incurred almost \$4,800 in vet bills in treating its injuries. However, when they tried to recover these costs, the trial court limited their recovery to just \$200, which is what the evidence showed a pet dachshund was worth.

The court modified the judgment to allow the dachshund owners to recover the full amount of vet bills. In Illinois, pets are treated as property, and the general rule is that when property is damaged, the owner may recover the lesser of the cost of repair to the property or its market value.

However, the court found that this rule should not apply to family pets, because reasonable people know that pet owners “feel compelled to pay considerably more than a nominal amount for veterinary care” and that they “are prepared to make great sacrifices for the well-being and continued existence of their household pets, to which they have become deeply attached.”

Based on this finding, the court held that pets should be treated like heirlooms, photographs, and other kinds of property that have little market value but that have great personal value to the owner. Here, the fact that the dachshund owner was willing to spend \$4,800 to save the dog’s life showed the dog’s value, and so the entire amount was ruled to be recoverable.

Work-Related Injuries in Illinois

The Workers' Compensation Act was designed to enable workers to recover for work-related injuries without going to the hassle and expense of filing and pursuing a lawsuit in court. Under the Act, an employer is required to compensate an employee for injuries that occur in the course of, or arising out of, his or her employment. Compensation includes payment of all medical and hospital expenses, a percentage of lost wages, and an award for temporary and/or permanent disability.

There have been a number of cases that have interpreted or defined the meaning of the phrases "in the course of" or "arising out of" the employment. In order for an injury to be within the course of employment, it must occur within the period of employment at a place where an employee may reasonably be performing his or her duties and while he or she is fulfilling those duties or doing something incidental to those duties. Thus, if an employee is injured running a personal errand while driving to work, that injury will be deemed outside of the course or scope of employment. Or, if an employee is injured while ignoring the explicit rules of the company, the injury is not in the course of employment.

In one case, the court agreed with the findings of the statewide Industrial Commission, which stated that a worker who was injured while riding as a passenger on a forklift was not acting within the

scope of his employment because, according to a company safety rule, the employee was prohibited from riding double as a passenger on a forklift.

For an injury to arise out of employment, the cause must be some risk connected with, or incidental to, the employment. For example, a housekeeper who was hurt when she baited a trap for a raccoon was

acting within the scope of her employment because her employer knew that she was baiting the trap. However, a police officer who was sitting in a chair in a courthouse and who injured his back when he turned to answer a question did not have an injury arising out of his employment because his injury could have occurred anywhere with any normal activity.

So You're Married: Now What?

For most of us, our last serious step into adulthood is to get married and start a family of our own. People getting married have all kinds of concerns—the ceremony, the honeymoon, setting up a household—but they often forget important legal matters.

Change the Name

Women often choose to change their surnames when they get married. If you do, make sure to change your name on all important documents, such as your Social Security card and your driver's license.

Change the Beneficiaries

Make sure that insurance policies, retirement accounts, bank accounts, and similar documents name your new spouse as your beneficiary in case you die.

Get a Will

A will allows you to specify who gets property when you die, other than property for which you are able to designate a beneficiary, and also allows you to establish trusts for the care of your children.

Know the Law

Your change in status changes your responsibilities. Spouses in Illinois owe each other a duty of support. Earnings during the marriage are treated as being earned by both. Husband and wife may both be liable on a lease, mortgage, or other contract.

Your marriage is a significant change in your life. Recognizing that this is the case, and planning for it, will serve you well in the long run.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Generation-Skipping Trusts

If you have heard of generation-skipping trusts (GSTs) at all, you probably think of them as a way for wealthy families to shield their fortunes from estate taxes. That is true as far as it goes, but GSTs can also have benefits for the less well off by protecting assets from ex-spouses and creditors and by serving as a place for appreciable assets to grow outside of taxable estates.

Although the phrase “generation skipping” sounds like an arrangement which leaves out children altogether in favor of the grandchildren, in fact what a GST “skips” is the taxation of assets put into children’s estates by their parents. In a typical scenario, grandparents who are satisfied that their children are financially secure may decide to set up a GST in favor of all of their descendants as possible beneficiaries. Successive generations eventually receive the assets without the repeated imposition of estate taxes when each preceding generation dies. The assets are taxed only once, at the time of the initial transfer to the trust.

The first generation of children can be made to benefit as well. Although they will not technically own the assets in the trust, they can be given a right to distributions for their reasonable needs, meaning not only their support and maintenance, but also “comforts, conveniences, pleasures, and happiness.” However, discretion over whether trust funds may be used for the benefit of the child must be exercised not by the child but by a “disinterested trustee,” that is, someone who is not a related or subordinated person as defined in the Internal Revenue Code.

There is a limit on the amount that can be transferred into a GST. Currently, the limit is \$2 million for each person setting up the trust. In other words, a married couple could place up to \$4 million in a GST. In 2009, the per-person amount is set to rise to \$3.5 million. Any amount that is transferred in excess of the limit is subject to gift or estate tax when the older generation passes along the assets, and an additional “generation-skipping tax” is imposed when the children die and the property is transferred to the grandchildren. The potential estate tax benefits of a GST are easy to see when it is considered that each dollar over the limit is

taxed at the highest estate tax rate, which currently is 45%.

If there are downsides to a GST for some people, they may be found in the fact that someone outside the family (the trustee) will become intimately involved in the family’s money matters, and that it will be necessary to file an income tax return for the trust each year. Still, under the right circumstances and with proper planning under the guidance of a professional, these and any other drawbacks for a GST could pale next to the bottom-line advantages realized as assets are passed from generation to generation without Uncle Sam taking his cut.

Mortgage Foreclosures

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but you will have to work fast. If you are served with a foreclosure suit, hire a lawyer as soon as you can. Even if you have not retained an attorney, file an appearance and answer so that you will receive notice of what is happening.

Homeowners have 90 days to bring their loan current to avoid foreclosure; do this if you can. Even after foreclosure, you have the right to “redeem” your home by paying off the loan in full within 90 days. If none of this is done, you will have to leave the home after it is sold at auction, but this process can take seven

months or more from start to finish.

Q: I received some mail promising help in working out my foreclosure; should I send money?

A: Unfortunately, as foreclosures rise, so do foreclosure scams. Legitimate nonprofits and legal aid organizations can help, but avoid people demanding money up front to “renegotiate” your loan.

Also, avoid those who offer to buy your house and lease it back to you, giving you the right to repurchase it later. You will discover that the price you have to pay is far more than you will ever be able to pay, and you will probably end up being evicted.