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March 2013

Recent Amendment Addresses In re Crane

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In reaction to the holding in a controversial case, on February 8th, 2013, the State of Illinois passed a law amending the Illinois Conveyances Act (ICA) clarifying well-established Illinois real estate practice affected by the 2012 bankruptcy court decision.

The decision of the court in *In re Crane*, stated that a mortgage in Illinois could be avoided as a result of the mortgagee's failure to expressly state the interest rate of the underlying debt on the face of the mortgage (2012 WL 669595 (Bkrtcy. C.D. Ill)). *Crane* interpreted Section 11 of the ICA strictly to require an Illinois mortgagee to state the maturity date of the debt, the amount of the debt, and the interest rate of the debt secured by the mortgage in order to provide sufficient constructive notice to the bankruptcy trustee. In *Crane*, the court held that the mortgagee's failure to do so resulted in the loss of the mortgagee's secured position and the avoidance of the mortgage in bankruptcy.

Traditionally, Illinois mortgages include the maturity date and the amount of the underlying debt secured by the mortgage. In lieu of expressly setting forth the interest rate of the underlying debt, Illinois mortgages have customarily referenced the interest rate through a cross-reference to the applicable promissory note or credit agreement. Typically, the credit agreement or promissory note does not become public record. However, the cross-reference, combined with a means to contact the parties to the mortgage, was traditionally understood to be sufficient notice under Illinois law. The historical justification for this practice has been that the relevant section of the ICA was viewed as permissive for giving notice, rather than mandatory. The *Crane* decision held the opposite to be true.

The effect of *Crane* on real estate lending practice in Illinois has been substantial. It has become best practice for Illinois real estate lawyers to include a statement of the interest rate of the underlying debt in a mortgage, as opposed to the traditional cross-reference. As a result, the pricing of debt, a historically confidential transactional detail, has been disclosed in the public records to ensure enforceability of a secured position.

Fortunately for Illinois real estate practitioners and lenders, the recent amendment ends this period of uncertainty and additional disclosure. The amendment adds a new paragraph – Paragraph (b) – to Section 11 of the ICA, which includes the following language:

> [T]he provisions of [Section 11 of the ICA] … regarding the form of a mortgage are, and have always been, permissive and not mandatory. Accordingly, the failure of an otherwise lawful executed and recorded mortgage to be in the form described … 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.

The new law's official effective date is June 1, 2013. Some commentators have argued that the amendment to the ICA is immediately effective because it confirms existing law. Such commentators point to the language in the amendment that the requirements of the statute have "always" been permissive. We believe that, until June 1, 2013, the best practice will be to continue complying with the holding of *Crane*. Relying on the text of the bill prior to its effective date presents possibilities for a challenge to the applicable mortgage's enforceability.

Paul Hastings will continue to provide updates regarding the *Crane* case and other topics related to its impact. If you have any questions concerning this developing issue, please do not hesitate to contact any of the following Paul Hastings lawyers.

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