

## **Helpful “mortgage foreclosure-rescue fraud” case law re physical possession of property.**

Under the doctrine of equitable conversion, at the time an owner of land enters into a valid and enforceable purchase contract concerning the property, he continues to hold legal title to the property in trust for the buyer, while the buyer becomes the equitable owner of the property and holds the purchase money in trust for the seller. *Shay v. Penrose*, 25 Ill.2d 447, 449, 185 N.E.2d 218 (1962); *Life Savings & Loan Ass'n of America v. Bryant*, 125 Ill.App.3d 1012, 1016, 81 Ill.Dec. 577, 467 N.E.2d 277 (1984) (quoting *Shay*).

According to *LaSalle, Lopez'* contract with *Brandess*, the beneficiary of the land trust in which the subject premises was held, could not give rise to a lien on the real property. In an Illinois land trust, both legal and equitable title to real property rest in the trustee, while the interest of the beneficiary of the trust is personal property. *Parkway Bank & Trust Co. v. Northern Trust Co.*, 213 Ill.App.3d 444, 448-49, 157 Ill.Dec. 591, 572 N.E.2d 1055 (1991). *First National Bank of Barrington, Trust No. 11-1317 v. Oldenburg*, 101 Ill.App.3d 283, 286-87, 56 Ill.Dec. 766, 427 N.E.2d 1312 (1981). Thus, the trustee is the absolute owner of the real estate. *Oldenburg*, 101 Ill.App.3d at 287, 56 Ill.Dec. 766, 427 N.E.2d 1312.

Cf. *LaSALLE BANK, N.I. v. FIRST AMERICAN BANK* 736 N.E.2d 619, 626—627 (2000), 316 Ill. App.3d 515, 249 Ill.Dec. 425

Any attempt by the financially strapped homeowner to successfully void her unwitting title transfer, as well as the subsequent title transfers (and any mortgage liens created incident thereto) to subsequent purchasers and encumbrancers could turn on whether the subsequent purchasers and encumbrancers can be charged with inquiry notice of the alleged fraud and/or any other unrecorded rights (ie. equitable mortgage) the scammed homeowners can establish that they had at the time of the relevant conveyances.

**Under Illinois law, the continued open and visible possession of the home by the scammed homeowners after being duped by the foreclosure rescue operator may be sufficient to charge those subsequently acquiring title and security interests in the home with notice of the fraud, and thereby disqualifying them from bona fide purchaser status.** An Illinois appeals court ruling in *Life Savings & Loan Association v. Bryant*, 125 Ill. App. 3d 1012, 81 Ill. Dec. 577, 467 N.E.2d 277 (1st Dist. 1984) addresses this point:

Illinois courts have uniformly held that the actual occupation of land is equivalent to the recording of the instrument under which the occupant claims interest in the property. (*Bullard v. Turner* (1934), 357 Ill. 279, 192 N.E. 223; *Beals v. Cryer* (1981), 99 Ill. App. 3d 842, 426 N.E.2d 253). The open and visible possession of land by the equitable owner is sufficient to charge a mortgagee with notice of the rights of such owner, and the mortgagee will take subject to the rights of the person in possession. *Williams v. Spitzer* (1903), 203 Ill. 505, 68 N.E. 49.

Likewise, citing heavily to the Illinois state case law, [a Federal bankruptcy court](#) in *In re Cutty's-Gurnee, Inc.*, 133 B.R. 934 (Bankr. N.D. Ill. 1991) made this observation on the effect of continued possession on subsequent purchasers and encumbrancers:

It is clear that where a physical inspection of the property would reveal an adverse interest or where there is a party in possession other than the record title owner, the subsequent lien claimant has a duty to inquire of the possessor as to his interest and is charged with knowledge of the facts discoverable from such an inquiry or inspection. *Miller [v. Bullington]*, 381 Ill. [238] at 244, 44 N.E.2d [850] at 853; *Burnex Oil Co. v. Floyd*, 106 Ill. App. 2d 16, 23, 245 N.E.2d 539, 544 (1st Dist. 1969); *In re Ehrlich*, 59 Bankr. 646, 650 (Bankr. N.D. Ill. 1986).