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# AFFIDAVIT OF LOST PROMISSORY NOTE & GUIDE

## **Included:**

Overview

Dos and Don'ts Checklist

Affidavit of Lost Promissory Note Instructions

Sample Affidavit of Lost Promissory Note

## 1. Overview

Individuals and companies often must borrow money to keep businesses afloat, and will provide evidence of this borrowing with promissory notes. Lenders keep these notes in many locations, from organized files in safe-deposit boxes to cardboard boxes in the garage. No matter the system, physical documents easily can be misplaced or destroyed. In such cases, borrowers must execute new documents, a process that starts with the completion of an affidavit of lost promissory note.

It is generally accepted that the lender who loses his or her promissory note can nonetheless enforce the debt it represents by signing an affidavit of lost promissory note. This package contains everything you'll need to customize and complete your affidavit. If you follow the enclosed sample and guidelines, you can resolve the situation quickly, and may prevent the investment loss you would otherwise face if a third party found the note before you had the chance to report it missing. You can also protect the interests of the borrower, who may be a colleague or close friend. In every way, this promotes a solid and satisfactory lending relationship.

## 2. Dos & Don'ts Checklist

- A promissory note is, at its core, the acknowledgment of a debt. It is a written promise to repay that debt in a specific way and can be transferred by the lender to a third party. Because of this easy transferability, losing the document can have dire consequences for the lender. The individual holding the document is oftentimes the only one who can enforce it.
- Review the terms of your loan agreement and, if available, a copy of the note itself. In some cases, there may be procedures in place to address lost or damaged promissory notes. For example, some promissory notes contain provisions like the following:

"If this Promissory Note becomes mutilated or defaced, or is destroyed, lost, or stolen, the Borrower shall execute and deliver a new note of like principal amount in exchange and substitution for the mutilated or defaced note, or in lieu of and in substitution for the destroyed, lost, or stolen note. If a note is mutilated or defaced, the Lender shall surrender such note to the Borrower. If any note becomes destroyed, lost, or stolen, the Lender shall furnish satisfactory evidence of the destruction, loss, or theft of such note to the Borrower."

The language of such provisions require the borrower's cooperation in signing a new promissory note, if the lender provides good evidence that the original was lost or destroyed.

- Most states have laws governing the enforceability of lost, destroyed, or stolen "negotiable instruments" (including promissory notes). These can usually be found in the Uniform Commercial Code (or equivalent) under a title such as "Enforcement of Lost, Destroyed, or Stolen Instrument" or "Enforcement by Person Not in Possession of Instrument." These laws are meant to provide "adequate protection" to a borrower and generally require that the lender both (a) prove the terms of the note and (b) prove the lender's right to enforce the note. In some states, the signing and notarization of the enclosed affidavit will be sufficient to prove both the terms and the lender's right of enforcement. In others, additional steps may be required (e.g., the lender's indemnification of

the borrower against third party demands for money under the note). Review your state's laws for information about additional or supplemental requirements in your area.

- Protect your promissory notes. These are valuable documents and should be treated as such. If you are concerned about the cost and risk of housing the documents yourself, consider getting a safety deposit box. Note that a borrower is not released from its responsibilities when a promissory note is lost or destroyed, but keeping a close eye on the document will prevent disputes and other difficulties in the future.
- The enclosed document should not be used as a matter of course and should not be used as a substitute for searching thoroughly for the note.
- Notify the borrower immediately after you discover the loss or destruction of the promissory note. Draft a new note and execute the enclosed affidavit as quickly as possible. If an innocent purchaser acquires the note you lost, it may be difficult (if not impossible) to cancel it and obtain a replacement. Your investment may be lost permanently and the borrower may be put in a difficult position.
- If you obtain replacement notes, make copies of those documents. This may help in the event that those replacement notes are later lost or destroyed.

### 3. Affidavit of Lost Promissory Note Instructions

The following instructions will help you understand the terms of your affidavit. The numbers below correspond to the paragraph numbers in the form. Please review the entire document before starting the step-by-step process.

1. Describe the note that was lost using as much detail as possible. Insert the holder name (often the last person or company that had possession of the document), its effective date, its full value, the name of the borrower (and, if the borrower is a company, the person who signed the note on its behalf), and the name of the beneficiary.
2. Select the best description of what happened to the note. This is your opportunity to explain the steps that you've taken to find the missing note. Be as specific as possible, showing that you made all reasonable efforts to find the document. If your note was destroyed, delete the first phrase and explain the circumstances of that event.
3. Use this paragraph to provide additional details about the note. Feel free to adapt the details in the sample to suit your arrangement (e.g., payment terms, type of note, etc.).
4. Insert the amount that has not yet been paid under the note.
5. Indicates that the note has not been sold or transferred to any third party. In other words, there is no other person or company that has an interest in or can claim money under the note.
6. States that both parties are in agreement that the note exists and it is a valid debt the borrower owes to the holder. It also indicates that neither party is in default or owes any current obligation under the note (other than the periodic rights to and of payments).

7. If you have a copy of the note, attach it to the affidavit as Exhibit A. If you do not have a copy of the note, this section simply verifies that the description of the note above is true and correct.
8. In cases in which the note is lost and then found again, the borrower could face the problem of double debt. This section constitutes the holder's promise that if it does locate the original note, it will be returned to the borrower and not treated as a separate debt.
9. Explains that the purpose of the affidavit is to get the borrower to sign a substitute note.
10. You must notarize your signature on the affidavit. This requires that you go, in person, to a notary public. A list of notaries can be found in the phone book. Be sure to bring a form of picture identification with you.

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