

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

AUGUST 2020

2019-2020 REAL PROPERTY SECTION OFFICERS

Chair	Andrew Marion
Vice-Chair	Barry Bridgforth
Secretary	Robert Bass
Members at Large	Alan Windham, Ryan Byrne, Lisa Reppeto
Past Chair	Ken Farmer

ARTICLES

**Mississippi Passes “Back-to-Business Liability Assurance and Health Care
Emergency Response Liability Protection Act” In Response To COVID-19**

On July 8, 2020, Governor Reeves signed the “Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act” (Senate Bill No. 3049), which provides broad immunity to businesses, healthcare professionals and manufacturers from lawsuits arising out of any injuries or death resulting from or related to COVID-19.

The Act provides that any person (defined to include for-profit entities), or any agent of that person, who attempts in good faith to follow applicable public health guidance in the performance of its functions or services is immune from suit for damages arising out of any injuries or death resulting from or related to COVID-19. It also grants immunity in the course of performance of functions or services before applicable public health guidance was available.

The Act provides that “[a]n owner, lessee, occupant or any other person in control of a premises, who attempts, in good faith, to follow applicable public health guidance and directly or indirectly invites or permits any person onto a premises shall be immune from suit for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19.”

The Act also grants immunity to healthcare professionals and facilities and any person who designs, manufactures, labels, sells, distributes, or donates a qualified product (defined to include personal protective equipment; medical devices, equipment and supplies; medication; and tests).

The Act does not apply when the plaintiff can show, by clear and convincing evidence, that the defendant acted with actual malice or willful, intentional misconduct. A plaintiff must file suit within two (2) years after the date the cause of action accrues.

The Act took effect as of March 14, 2020 and expires one (1) year after the end of the COVID-19 state of emergency. Any civil liability that occurs during the operation of the Act remains subject to its provisions in perpetuity.

Note 1: This Act should provide some protection to landlords and tenants from COVID-19 claims. However, while the Act grants broad immunity, it only addresses lawsuits for damages related to injury or death. It does not address suits for economic damages.

Note 2: Other states are all over the board on providing protection to business owners and employers. Relative to other states, Mississippi's statute provides very broad protection to owners and employers. Some states, such as Georgia, Iowa and Oklahoma, have enacted statutes that are as broad as Mississippi's statute. Some states have passed statutes that give some protection to owners and employers but the protection is not as broad as Mississippi's statute; for example, some statutes are not retroactive, and some statutes provide protection only for certain types of properties. Approximately one-third of the states have not passed any statutes protecting owners or employers.

The Mississippi Broadband Enabling Act

During the 2019 Regular Session, the Mississippi Legislature passed "The Mississippi Broadband Enabling Act" (Miss. Code Ann. § 77-17-1 *et seq.*), which permits electric cooperatives to establish, acquire, and wholly or partially own one or more broadband affiliates. The Act was designed to permit rural electric cooperatives to provide high-speed internet to their customers. It allows an electric cooperative to grant permission to an affiliate or other broadband operator to use the electric delivery system of the electric cooperative to provide broadband services. The Act basically allows an electric cooperative to grant an easement without the landowner's consent. It states that "[t]he use of the electric cooperative's electric delivery system for the provision of broadband services by the affiliate or other broadband operator shall not be considered an additional burden on the real property upon which the electric cooperative's electric delivery system is located and shall not require the affiliate or other broadband operator to obtain the consent of anyone having an interest in the real property upon which the electric cooperative's electric delivery service is located." The landowner may petition the circuit court of the county in which the property is located for any damages to which the landowner believes it is entitled due to property damage from the use of the electric delivery system.

Note 1: The question has been raised on the Mississippi Bar Real Property Section Listserve as to whether the Act's provision allowing an electric cooperative to grant permission to an affiliate or other broadband operator to use the electric delivery system without the landowner's consent amounts to a taking of the landowner's property without due compensation.

Note 2: This issue was a sleeper until the state received federal pandemic money in the spring of 2020 and began steering a substantial chunk of that money into expanding broadband access into

rural areas. S.B. 3046, which became law on July 9, 2020, directed \$65 million into the Mississippi Electric Cooperatives Broadband COVID-19 Grant Program and \$10 million into the COVID-19 Broadband Provider Grant Program. Now that the build-out authorized by the Broadband Enabling Act is underway, more questions about the easement issue are likely to be raised.

Dragnet Clauses, Credithrift and Stewart

Trying to reconcile and apply Mississippi cases regarding future advance and dragnet clauses is a challenge. A 2017 bankruptcy court decision helps to correct one misapprehension that has added to the challenge.

In *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55 (Miss. 1992)(*en banc*), the Mississippi Supreme Court upheld the priority of a future advance over an intervening judgment lien. The court gave a strong endorsement to the enforceability of dragnet clauses generally and future advance clauses in particular. Justice Robertson wrote, in relevant part, that “for priority purposes, the lien securing the future advance takes its date from the recording of the original deed of trust and by operation of law reaches forward to secure the advance made after intervening rights became perfected.” 607 So. 2d at 63.

In *Merchants National Bank v. Stewart*, 608 So. 2d 1120 (Miss. 1992)(*en banc*), the Mississippi Supreme Court held that an existing or antecedent debt was not encompassed by the dragnet clause in a bank’s deed of trust. The court used a four-part test to determine that the dragnet clause did not encompass the other debt: was the dragnet clause “boilerplate”, was the other debt different in kind than the debt in the deed of trust, was the other debt listed in the deed of trust, and was the other debt otherwise fully secured? 608 So. 2d at 1126.

In *In re Crosby*, 185 B. R. 28 (Bankr. S.D. Miss. 1993), Judge Ellington discussed *Credithrift* and *Stewart*, and determined that, since the Mississippi Supreme Court did not mention *Credithrift* in the *Stewart* case, that *Stewart* impliedly limited *Credithrift*. 185 B.R. at 32. In *In re Smink*, 276 B.R. 156 (Bankr. N.D. Miss. 2001), Judge Houston agreed with Judge Ellington that *Credithrift* had been impliedly limited by *Stewart*. 276 B.R. at 158-64.

In *In re Windham*, 568 B.R. 263 (Bankr. N.D. Miss. 2017), Judge Woodard wrote that Judge Ellington’s analysis in *Crosby* was based on the mistaken assumption that *Stewart* was decided after *Credithrift*. In fact, writes Judge Woodard, while *Stewart* was published after *Credithrift*, the Mississippi Supreme Court decided *Credithrift* after it decided the *Stewart* case. *Stewart* was decided on April 1, 1992 but a petition for rehearing was filed, and the *Stewart* opinion was not published until after the petition for rehearing was resolved on November 19, 1992. The *Credithrift* case cites the *Stewart* case for the general proposition that dragnet clauses are valid and enforceable, which couldn’t be the case if *Stewart* was decided after *Credithrift*. 607 So. 2d at 59. *See generally In re Windham*, 568 B.R. 263, 269-70 and n. 3.

The significance of this is that the strong endorsement of future advance clauses in *Credithrift* was not impliedly limited by *Stewart*, as mistakenly assumed by the courts in *Crosby* and *Smink*. This is important because *Stewart* and another case that followed *Stewart*, *Wallace v. United Mississippi Bank*, 726 So. 2d 578 (Miss. 1998), only addressed whether antecedent debt was secured by the dragnet clause, not future advances. *Credithrift* dealt with future advances. Arguably the *Stewart* tests should be applied only in cases involving antecedent debt, and *Credithrift* should be the controlling case as to future advances.

RECENT CASES

No Subrogation of Deed of Trust When Junior Creditor Had Actual Knowledge of Existing Deed of Trust

White v. Whitehead, 2020 WL 4436727 (Miss. Ct. App., June 30, 2020)(*en banc*). In 1994, Whitehead executed a deed of trust to Citizens Bank of Philadelphia securing a loan in the amount of \$247,376. Six subsequent deeds of trust from Whitehead to the bank were recorded, each of which stated that it was a renewal and extension of the 1994 deed of trust. In 2001, Whitehead borrowed \$351,978 from White. The loan was secured by a deed of trust on the same land as the bank's deed of trust. White's deed of trust included the following language: "SUBJECT TO EXISTING FIRST DEED OF TRUST." In 2007, Whitehead filed for bankruptcy. During the course of the bankruptcy proceedings White signed an agreed order, to which the bank was not a party, stating that White was the beneficiary of a second-priority deed of trust and that the bank was the beneficiary of the first-priority deed of trust. The bank obtained permission from the bankruptcy court to foreclose on the land. At the foreclosure sale, the bank was the sole bidder with a bid of \$566,938, which was less than Whitehead's debt to the bank. In 2016, White filed an action in the Winston County Chancery Court claiming that her deed of trust had priority over the bank's deed of trust by reason of equitable subrogation and unjust enrichment. The chancery court granted the bank's motion for summary judgment. On appeal by White, the Mississippi Court of Appeals, in an *en banc* opinion by Justice Lawrence, affirmed. On the issue of lien priority, Justice Lawrence wrote, "The law is clear that subsequent deeds of trust that serve as renewals or extensions of prior deeds of trust should be given the same priority date as the original deed of trust. Further, any intervening deeds of trust are subject to the lien of the original deed of trust." White argued because the proceeds of her loan were used to pay down the bank's loan, her deed of trust should have priority over the bank's deed of trust under theories of equitable subrogation and unjust enrichment. On the issue of equitable subrogation, the Court of Appeals affirmed the chancellor's finding that actual knowledge of the competing lien barred the application of equitable subordination. In this case, the language in White's deed of trust showed that White knew that her deed of trust was second in priority. She also signed the order in the bankruptcy proceeding acknowledging the priority of the bank's lien. On the assertion of unjust enrichment, this doctrine only applies when there is no legal contract. Justice Lawrence wrote that the agreed order signed by White in the bankruptcy should be considered a legal contract and barred her claim for unjust enrichment.

Note 1: The editors like this case in part because it clearly restates the existing law regarding the priority of renewals and extensions. It would have been interesting to know what changes in the underlying note or notes prompted these renewals and extensions; were they simply extensions of the maturity date, increases in the amount of the principal, changes in the interest rate or something else? Also, it would have been interesting to know if the bank's original deed of trust had a future advances clause. The original amount of the loan in 1994 was \$247,376. When the bank foreclosed in 2008, the amount of its bid at the sale was \$566,937, which was less than its debt. So unless the note had a very high rate of interest, the bank must have made some additional advances of principal. But the Court of Appeals did not address in its opinion the nature of the changes to the underlying debt, and only looked at the recitation in the subsequent deeds of trust that they were renewals and extensions of the original deed of trust.

Note 2: The part of decision regarding equitable subrogation is clearly correct and consistent with the common law, based on White’s actual knowledge of the bank’s existing first-priority deed of trust. Mississippi law regarding equitable subrogation, however, has not always been in the mainstream. In 2014, the Mississippi Supreme Court held that a second lender who did not have knowledge of the first deed of trust was not entitled to equitable subrogation because the second lender had title insurance to protect it. *Community Trust Bank v. First National Bank*, 150 So. 3d 683 (Miss. 2014), which was discussed extensively in the January 2015 Real Property Section Newsletter.

Note 3: The editors are less sanguine about the chancery court finding, and the Court of Appeals affirming, that White’s unjust enrichment claim failed because the agreed order that White signed in the bankruptcy court was a “legal contract.” The editors’ reading of the law is that unjust enrichment applies when no legal contract exists between the party asserting unjust enrichment (in this case, White) and the party who is asserted to have received the unjust enrichment (in this case, the bank). The bank was not a signatory to the order that the chancery court found was a “legal contract” that barred White’s unjust enrichment claim. There are many solid reasons for finding that White was not entitled to recover under a theory of unjust enrichment, including White’s express acknowledgment in her deed of trust that her deed of trust was second in priority to the bank’s deed of trust. The editors wish that the Court of Appeals had relied on one of these other solid grounds rather than characterizing a bankruptcy court order as a “contract” for purposes of the doctrine of unjust enrichment.

Note 4: This case has not yet been released for publication.

Consent of 85% of Lot Owners Upheld in Restrictive Covenants

Diamondhead County Club and Property Owners Association, Inc. v. Committee for Contractual Covenants Compliance Inc., 298 So. 3d 421 (Miss. Ct. App. 2020). In 1970, Diamondhead Properties Inc. (“Diamondhead”) began the development of a residential, common-interest community in Hancock County, Mississippi. In the initial phase, Diamondhead established a set of use-and-maintenance restrictions through a “Declaration of Restrictions, Conditions, Easements, Covenants, Agreements, Liens and Charges.” The covenants stated that they ran with the land and were binding on all purchasers. They included a number of directives concerning construction approvals, home sizes and specifications, parking rules, traffic regulation, and the payment of assessments by lot purchasers which were levied by the Diamondhead Yacht and Country Club Inc. and/or the Diamondhead County Club and Property Owners Association (“DPOA”). The DPOA was to maintain the common areas with these assessments. The covenants for Phase I extended for a period of 50 years unless annulled, amended or modified. They could only be annulled, amended or modified by the consent of the owner or owners of record of 85% of the lots in Phase I. Diamondhead put into place similar restrictions during Phases II and III of the development. Purcell succeeded Diamondhead and continued the development from the late 1970s through the early 1990s. Most of Purcell’s covenants and restrictions contained the same 85% vote requirement for amendments. In 2018, three DPOA board members (“plaintiffs”) filed suit against the DPOA in Hancock County Chancery Court seeking a declaration that the 85% participation requirement in the amendment provision of the covenants was unreasonable. They requested that the court set the voting requirement at 60%. The DPOA answered, admitted the allegations and joined the prayer for relief. The City of Diamondhead, the Committee for

Contractual Covenants Compliance Inc. (“CCCI”) (a group formed by several Diamondhead property owners), and two individual property owners (“individual interveners”) were allowed to intervene. CCCI challenged the standing of the plaintiffs and argued that the other property owners were indispensable parties. The plaintiffs filed a motion for declaratory judgment claiming that unless the amendment provision was voided or changed, the covenants would expire, and the DPOA would no longer have the authority to enforce them and would be unable to fulfill its purpose. CCCI and the individual interveners argued that there was no ambiguity in the covenants and that they should be enforced as written. The chancery court heard arguments during which the parties stipulated that the covenants were clear and unambiguous. The chancery court found that the covenants were not ambiguous and that the 85% figure did not shock the court’s conscience. The chancery court denied the request to modify the 85% figure. In a decision written by Judge McDonald, the Mississippi Court of Appeals affirmed the chancery court’s ruling, finding that the chancery court had not erred in reaching its decision that the 85% amendment requirement was not unreasonable. In its decision, the Court of Appeals began by noting that a restriction in a covenant expressed in unambiguous language would be enforced. However, even restrictive covenants that are unambiguous must be reasonable. The Court of Appeals noted that the parties had stipulated that the language was unambiguous and that therefore under court precedent, it should be enforced as written. The Court of Appeals then considered the board members’ argument that the 85% vote was unreasonable. The Court of Appeals first rejected the members’ argument that if the amendment provision was not revised, the DPOA would lose its ability to fulfill its purpose, noting that “the interests of the DPOA, a separately incorporated entity, are not those to be considered when considering the reasonableness of the amendment provision.” The Court of Appeals then found that the DPOA had offered nothing to support its claim that the Diamondhead community would be detrimentally affected by the 85% required participation rate. The Court of Appeals agreed with the chancery court’s finding that the amendment provision constituted a substantive, not merely a procedural, right of all members because the members could rely on the 85% provision as insurance that the covenants would not be changed “willy-nilly.” Justice McDonald finally observed in the opinion that the fact that the 85% amendment provision had gone unchallenged for over 40 years and that the DPOA had not previously asked its members to consider the matter undermined the DPOA’s argument that lower attendance at prior meetings required court intervention.

Note 1: The Court of Appeals did not strike down the 85% consent requirement under the facts of this case. This case involved a lot of legal maneuvering by the homeowners’ association. The case leaves open the question of whether under other circumstances, the court might strike such a level of required consent. Is there an even higher level of required consent that as a matter of law would be unreasonable – say 95%?

Note 2: In the editors’ experience, a requirement of obtaining consent from even 60% of owners of all lots in a subdivision is difficult to meet as a practical matter. In addition to good-faith differences of opinion, some lots are always owned by people from out of state who aren’t responsive, tied up in estates or bankruptcies, sold for unpaid ad valorem taxes, or owned or about to be owned by lenders. And some people are just contrary. Recent experience suggests that the COVID-19 pandemic has made property owners even more reticent about making any changes. Getting 85% of all owners to agree on anything likely would be impossible absent extraordinary circumstances.

Property Owner Association Fees Not Automatically Conveyed in Foreclosure Sale

Diamondhead County Club and Property Owners Association, Inc. v. The Peoples Bank, Biloxi, Mississippi, 296 So.3d 651 (Miss. 2020)(*en banc*). Purcell, a developer, acquired property in Diamondhead, Mississippi and began developing the property. In August 2004, Purcell borrowed money from Peoples Bank to purchase an aircraft. The loan was initially secured by the aircraft, but additional collateral was added to secure the loan including some of Purcell's properties in Diamondhead. In September 2004, Purcell borrowed additional money from Peoples Bank which was secured by additional property in Diamondhead. All of the lots were subject to covenants requiring subsequent purchasers to pay Property Owner Association (POA) fees and assessments. In 1981, Purcell and the Diamondhead Country Club and Property Owner's Association (DPOA) entered into a "Supplemental Agreement" which exempted Purcell from payment of POA fees and assessments while it owned the lots. The agreement also stated that the lots would be subject to POA fees and assessments upon conveyance to third parties. In April 2012, Purcell and Peoples Bank entered into a "Workout Agreement" in which Purcell agreed to provide additional collateral in the form of additional lots and to execute deeds of trust in favor of Peoples Bank. Purcell executed two deeds of trust in favor of Peoples Bank, one in 2008 and one in 2012. Purcell defaulted on its loans, and Peoples Bank purchased the encumbered lots at a foreclosure sale. The DPOA started billing Peoples Bank for the POA dues and fees associated with the lots. Peoples Bank filed suit against the DPOA seeking a declaration that it was exempt from the payment of fees and assessments. The DPOA counterclaimed for the unpaid fees and for a declaratory judgment that the lots were subject to assessment upon transfer of title to Peoples Bank. The chancery court entered an order granting summary judgment to Peoples Bank, finding that Purcell's rights were assigned to Peoples Bank at foreclosure and that Peoples Bank was exempt from paying assessments on the property. On appeal, the Mississippi Supreme Court, in an *en banc* opinion written by Justice Ishee, reversed and remanded, finding that the POA exemptions were personal rights that had been conveyed in the 2008 deed of trust but not in the 2012 deed of trust. The Supreme Court stated that no Mississippi cases directly address whether an exemption from paying POA assessments is a right or interest to which a purchaser out of foreclosure is automatically entitled. A distinction exists between real property rights or interests that travel with title to the property, on the one hand, and personal rights that do not travel with title but may be assigned, on the other hand. Justice Ishee wrote that "an exemption from POA assessments is a personal right that would not automatically pass with title out of foreclosure. Rather it must be conveyed through the deed of trust." The opinion then analyzed the contracts at issue, including the deeds of trust, to determine whether the exemption rights had been conveyed. The Supreme Court determined that Peoples Bank was entitled to the exemption from paying assessments on the lots connected with the 2008 deed of trust based on the language of the 2008 deed of trust which conveyed all personal property connected with the property. Because the 2012 deed of trust did not contain similar language, the Supreme Court found that Peoples Bank was not entitled to the exemption in connection with the lots associated with the 2012 deed of trust. Justice Ishee concluded "[w]e do not hold that personal contract rights, such as developer's exemptions from POA assessments, are not assignable. Rather, these rights must actually be assigned. Lenders such as Peoples must ensure that they are properly collateralized."

Note 1: The Mississippi Supreme Court relied on its decision in *Henderson v. Copper Ridge Homes, LLC*, 273 So.3d 750 (Miss. 2016), discussed in the June 2020 Real Property Section

Newsletter. In *Henderson*, the Supreme Court concluded that claims for construction defects were personal rights and were not conveyed in a foreclosure sale. The Supreme Court has been on somewhat of a roll in recognizing personal rights that are not automatically conveyed through foreclosure.

Note 2: The Supreme Court noted that there was no evidence that Purcell intended to create a developer's exemption that would run with the land. The Court cited the Supplemental Agreement which specifically stated that third parties would be subject to assessments and fees. Which raises the question – if Purcell and the DPOA had entered into an agreement that stated third parties would receive the exemption, would the bank have been entitled to such exemption even if not conveyed in the deed of trust? The case suggests that banks will be better protected by including the assignment in the deed of trust regardless.

Note 3: As in the *Henderson v. Copper Ridge* case, the court seems to suggest that all the lender needed to do was to add a few words to the description of property conveyed in the deed of trust to cover the borrower's personal rights. But isn't it more complicated than that? Since these are personal rights and not real property, doesn't the Uniform Commercial Code govern attachment, perfection and enforcement of the lender's security interest in personal rights? The UCC also brings with it non-waivable obligations of good faith and commercial reasonableness that are not otherwise present in a pure real estate transaction.

Creditor Required to Convey Land Back to Judgment Debtor
Because of Unconscionably Low Purchase Price at Execution Sale

Dedeaux v. Coastal Developments Inc., 295 So. 3d 476 (Miss. Ct. App. 2019). Ruth Dedeaux obtained a judgment against Coastal Development for \$33,419 plus interest and costs. After four years, the amount of the judgment with accrued interest was \$44,113. Dedeaux obtained a writ of execution directing the sheriff to sell four parcels of land owned by Coastal. At the sale Dedeaux purchased all four parcels for a total of \$20,000. She later sold three of the properties to third parties for \$76,000. Coastal filed an action in the Chancery Court of Harrison County to set aside the sale on the basis that the price for which Dedeaux purchased the properties at the execution sale was unconscionably low. The chancery court found that the price that Dedeaux paid was unconscionably low but was reluctant to aside the foreclosure sale because that would affect the interests of the third parties that had bought the three parcels of land from Dedeaux. The chancery court instead required Dedeaux to pay Coastal \$32,386, the difference between the \$76,500 for which she had sold the three lots and the amount of her judgment with accrued interest, and to convey to Coastal the fourth parcel which she had not yet sold. On appeal by Dedeaux, the Mississippi Court of Appeals, in an opinion by Justice Tindell, affirmed in part and reversed and rendered in part. The Court of Appeals affirmed the portion of the chancery court's opinion that required Dedeaux to pay Coastal the difference between the amount for which she had sold the three lots and the amount of her judgment, and to convey the fourth lot to Coastal. The Court of Appeals found that the chancery court's calculation of the amount of the surplus owed by Dedeaux did not take into account Dedeaux's costs of selling the three lots, \$9,458, and that these costs should be subtracted from the amount of the surplus that Dedeaux paid to Coastal. So the Court of Appeals reversed on the amount owed to Coastal and reduced the amount for Dedeaux to pay to Coastal from \$32,386 to \$23,928.

Note 1: One reason that this case is interesting is that it identifies and ratifies a new remedy for an inadequate sales price. The chancery court had the option to set the execution sale aside, which would have been the traditional remedy for an inadequate bid price by the creditor. But applying this traditional remedy would have extinguished the interests of the third parties to whom Dedeaux had sold three of the four properties. Instead the court required that Dedeaux pay the amount in excess of her debt to the borrower and convey the unsold property back to the judgment debtor. In a prior case, the Mississippi Supreme Court required the purchaser at the foreclosure sale to pay to the borrower the difference between the amount of the debt and the amount for which the purchaser at the foreclosure sale subsequently sold the property, when the price which the purchaser purchased the property at the foreclosure sale was inadequate, rather than overturning the sale to the third party. *Central Financial Services, Inc. v. Spears*, 425 So. 2d 403, 405 (Miss. 1983). But this is the first case in which a Mississippi court has ordered the purchaser at the sale to convey the unsold portion of the land purchased back to the borrower because of an inadequate sales price.

Note 2: This case re-affirms the standard for determining when a sales price at a foreclosure or execution sale is unconscionable. In *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 120-21 (Miss. 1992), the Mississippi Supreme Court noted that a survey of Mississippi cases concluded that the threshold of unconscionability is forty percent of fair market value. The Court of Appeals in *Dedeaux* quoted this language from *Allied Steel* as the basis for “the generally accepted threshold of 40%.”

Note 3: Dedeaux did not file an action to confirm her title to the land after the execution sale. In order for the title to land purchased at an execution sale to be insurable and marketable, the purchaser must bring an action to confirm its title. Shouldn't this lack of marketability have raised questions about the amounts paid by the third parties to Dedeaux, and whether the third parties were really innocent purchasers for value?

Filing Foreign Judgment in Mississippi Did Not Renew Judgement for Purposes of Mississippi Statute of Limitations on Enforcing Judgments

Will Realty, LLC v. Isaacs, 296 So. 3d 80 (Miss. 2020). In 2009, Mainsource Bank obtained a judgment against Mark and Sarah Isaacs in Kentucky. The bank assigned the judgment to Will Realty, LLC in 2010. In 2019, Will Realty enrolled the judgment in Hancock County and filed writs of garnishment against banks and employers of Sarah Isaacs. The Isaacses filed an action in the Hancock County Circuit Court asserting that the 2009 judgment was void. The circuit court held that the judgment was barred by Mississippi's seven-year statute on enforcing judgements in Miss. Code Ann. Section 15-1-45. On appeal by Will Realty, the Mississippi Supreme Court, in an opinion by Chief Justice Randolph, affirmed. The seven-year statute on enforcing foreign judgments can be extended if the foreign judgment is renewed in the other state. Will Realty argued that under Kentucky law, the statute of limitations on enforcing judgments is calculated from the last act of the judgment creditor enforcing the judgment, including garnishment proceedings; and that the filing of the judgment in Hancock County and the issuance of the garnishments served to extend the statute of limitations for enforcing the judgments. Chief Justice Randolph wrote that

extending the statute of limitations for enforcing the judgment under Kentucky law had nothing to do with renewal of the judgment.

Note 1: Based on the opinion, the judgment creditor was conflating two different concepts, the statute of limitations for enforcing a judgment and renewing the judgment.

Note 2: The Mississippi Supreme Court relied in part on a decision of the Court of Appeals in *White v. Taylor*, 281 So. 3d 1188 (Miss. 2019), which was discussed in the June 2020 edition of the Newsletter. In *White*, the judgment creditor argued that a hearing on Florida about a judgment rendered in Florida and filed in Mississippi served to renew the Florida judgment, but the Court of Appeals found that the hearing was only a post-judgment proceeding and not a renewal of the judgment in Florida. These cases and other cases discussed in these cases suggest that Mississippi courts are inclined to strictly enforce the seven-year statute of limitations on enforcing foreign judgments and are not receptive to creative and nuanced arguments about why the statute does not apply.

Lack of Authority to Assign Deed of Trust Does Not Support Wrongful Foreclosure Claim

Helmert v. Cenlar FSB, 802 Fed. Appx. 125 (5th Cir. 2020). Helmert refinanced his home in Lafayette County, Mississippi with Merchants & Farmers Bank and granted a deed of trust to Merchants & Farmers Bank, which assigned the deed of trust to Taylor, Bean & Whitaker Mortgage Corporation. Taylor, Bean & Whitaker subsequently assigned the deed of trust to Cenlar, but the person who signed the assignment lacked the authority to sign on behalf of Taylor, Bean & Whitaker, making the assignment ineffective. Cenlar then assigned the deed of trust to Nationstar. Nationstar appointed a substituted trustee who foreclosed on the house after Helmert defaulted on the loan. More than a year after the foreclosure, Taylor, Bean & Whitaker and Cenlar executed a corrected deed of trust, and Cenlar assigned the corrected deed of trust to Nationstar. The substituted trustee for Nationstar rescinded the initial foreclosure sale and conducted another sale. Helmert filed suit against Cenlar and Nationstar in Mississippi state court for wrongful foreclosure, negligence, fraud and improperly issuing two 1099-A tax forms. The case was removed to federal court. Helmert claimed that Cenlar negligently and/or fraudulently assigned the deed of trust to Nationstar and that Nationstar wrongfully foreclosed without authority. Cenlar and Nationstar both filed motions to dismiss for failure to state a claim, which the district court granted. The district court held that Helmert lacked standing on his wrongful foreclosure claim because he was a non-party to the assignment. The court found that Helmert failed to state a claim against Nationstar for negligence and wrongful foreclosure because Helmert conceded that he was in default and therefore Nationstar had the right to foreclose. The district court also dismissed Helmert's fraud claim. Helmert appealed the dismissal of his wrongful foreclosure and negligence claims. On appeal, the Fifth Circuit Court of Appeals agreed that Helmert failed to state a claim against Cenlar for negligent conveyance because Mississippi law does not recognize a claim for negligent conveyance. The Fifth Circuit also found that Helmert lacked standing to bring claims against Nationstar for negligence and wrongful foreclosure because he had defaulted on the loan. The Fifth Circuit wrote that "Mississippi case law holds that when an obligor defaults, the trustee of a deed may foreclose, and the obligor lacks standing to pursue a wrongful-foreclosure claim."

Note: This opinion was not selected for publication and does not have any precedential value except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Trustee in Deed of Trust is Nominal Party for Diversity Jurisdiction

Anderson v. Wells Fargo Bank, N.A., 953 F.3d 311 (5th Cir. 2020) – Pro se plaintiff Anderson filed multiple lawsuits alleging that her lender improperly enforced an adjustable-rate rider in her deed of trust and that an assignment of the deed of trust was invalid. The parties settled the first lawsuit, and as part of the settlement, Anderson signed a release on any claims that were or could have been asserted. The courts dismissed Anderson’s subsequently filed lawsuits. This case addressed Anderson’s sixth lawsuit. Defendants removed the case to federal court and then moved to dismiss on *res judicata* grounds. The district court found that Anderson’s claims were barred by her previous lawsuits. On appeal, Anderson made the additional argument that the district court lacked diversity jurisdiction because Anderson and the trustee for the deed of trust, who had been named as a defendant, were both Mississippi residents. The Fifth Circuit Court of Appeals disagreed, finding that the trustee was merely a nominal party whose presence did not defeat diversity. The Fifth Circuit explained that a trustee is not necessarily a nominal party when a plaintiff alleges that the trustee misadministered the trust or committed other similar misconduct. However, a trustee should be disregarded as nominal for jurisdictional purposes if there are no “meaningful” allegations against the trustee or the trustee lacks a “special stake” in the litigation. In this case, the Fifth Circuit found that Anderson’s complaint made no claim of the trustee being actively involved in any events which formed the basis of Anderson’s claims, and therefore the trustee was a nominal party.

Note 1: This case raises the question of how “meaningful” the allegations against the trustee must be for the trustee not to be considered a nominal party. Can a plaintiff simply state in his complaint that a non-diverse trustee “misadministered” the trust and avoid removal? A plaintiff would likely need to include more than a conclusory allegation of misadministration or other misconduct to avoid removal to federal court.

Note 2: This holding is clearly correct. While trustees in deeds of trust in other states have broader roles, the only obligation of a trustee in a deed of trust in Mississippi is to conduct a non-judicial foreclosure of the real estate if the beneficiary requests the trustee to do so. This narrow scope of responsibility is one reason why the trustee is protected from personal liability.

DISCLAIMER

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of Section’s members. Members are welcomed and encouraged to send their corrections, comments, articles and news to the editors, Rod Clement at rclement@bradley.com, and Lindy Brown at lbrown@bradley.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases and statutes are intended only to bring current issues to the attention of the Section’s members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their clients’ legal matters; rather, readers should review the cases and statutes and draw their own conclusions. All commentary reflects only the personal opinions of the editors, which is subject to change, and does not reflect a position of the Real Property Section, The Mississippi Bar or the editors’ law firm.