Texas Further Distinguishes Ethridge by Scott Mueller and Kristin Steinkamp

The 2007 landmark Missouri Supreme Court case of Ethridge v. Tier One Bank established that to validly impact property owned by tenants by the entirety, the face of a security instrument (deed of trust) must facially reflect both spouses as “grantors” or “borrowers” and both must execute the document in that capacity. This holding seems unremarkable except when viewed in the context of the underlying facts. In Ethridge, the non-borrowing spouse did in fact execute the Deed of Trust at issue. But the Supreme Court relied on a technicality inherent in many spousal borrowing documents: the non-borrowing spouse was not specifically designated as a grantor under the security instrument. Thus, on June 26, 2007, the Missouri Supreme Court effectively rendered thousands of residential mortgages compromised based on a prior industry practice of describing non-spousal borrowers as something other than “grantor” or “borrower.” This harsh effect led to an avalanche of litigation in Missouri over the true intentions of parties who had executed security instruments and received the benefit of the loan funds but had either inadvertently or consciously executed security instruments in such a way as to deviate from the unforgiving holding of Ethridge.

The United States Bankruptcy Court for the Eastern District of Missouri took a softened approach to the Ethridge holding in its 2009 opinion In re Suhrheinrich. In Suhrheinrich, a bankruptcy trustee intended to exploit Ethridge to take an interest in marital property free of a Deed of Trust which, similar to Ethridge, did not expressly designate the non-borrowing spouse as a “grantor.” More precisely, the Deed of Trust at issue in Suhrheinrich did not define the non-borrowing spouse as a borrower. But her name did appear under a pre-printed borrower designation on the signature page, and the Deed of Trust’s cover page listed her as a “grantor”.

The Suhrheinrich court held the cover page of a Deed of Trust plays a vital role in the security instrument and the additional designation of the non-borrowing spouse’s name as a borrower on the pre-printed signature line distinguished the factual circumstances from Ethridge and allowed for the lender’s interest to attach to the full fee interest of the property owned by both the borrowing and non-borrowing spouse as tenants by the entirety. The court opined that the execution by the non-borrowing spouse on a line listed as a borrower pre-printed on the signature page denoted that the non-borrowing spouse intended to encumber her interest in the property and removed it from the mere acquiescence noted by the Ethridge court.

This distinction in Suhrheinrich was recently used successfully by a lender in Texas in the 2012 matter of McIntyre v. New Century Mortgage. The Eastern District of Texas compared the McIntyre facts to those of both Ethridge and Suhrheinrich. In McIntyre, a husband and wife owned property as tenants by the entirety and both benefited from a refinance loan

secured by a mortgage. Similar to Suhrheinrich, both husband and wife signed the signature page with a pre-printed borrower designation, but Mr. McIntyre, the non-borrowing spouse, was not identified on the first page of the instrument as a borrower. The McIntyre court noted the facts at issue aligned more closely with Suhrheinrich and distinguished Ethridge to hold that Mr. McIntyre's execution of the borrower signature page offered the introduction of other evidence as to how he intended to sign the Deed of Trust at issue and thus affect his marital property.

Interestingly, despite Mr. McIntyre's claims that the mortgage at issue did not impact his property based on the inaccurate designation of the borrowers, he did in fact subsequently sign a modification of the mortgage individually in connection to the borrowers' divorce. The Court took interest in the fact that Mr. McIntyre's inconsistent behavior stood at odds with his convenient, self-serving and after-the-fact call to Ethridge and found his intention all along to be bound by the terms of the mortgage and impact his property accordingly.

Galloway, Johnson, Tompkins, Burr & Smith's St. Louis office recently prevailed at trial in a St. Louis County, Missouri Circuit Court matter which facts aligned closely with both McIntyre and Suhrheinrich, but involved the same opportunistic claims of a borrower citing Ethridge. In ArchBay Holdings v. Aiken, the court ordered that a Deed of Trust executed by a non-borrowing husband erroneously qualified to denote that he signed only to waive his marital interest as non-effective based on the parties' actual intent to encumber the property owned as husband and wife. The court, similar to McIntyre, noted the non-borrowing spouse's behavior before, during, and after closing evidenced his intention to be bound by the Deed of Trust and ordered the instrument reformed consistent with that intent.

Thus, the above-mentioned cases highlight the significance of understanding the subtle, but important, distinctions in how a deed of trust's signatories are described and how those signatories behave before, during, and after the closing of a secured loan. These behaviors, whether documented or elicited through testimony, can often demonstrate the actual intent of the borrowers and thus distinguish the facts from the problematic Ethridge holding.