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Newly Enacted Legislation Prohibits Certain Amendments to Mortgages

In a relatively unnoticed enactment of the Kentucky General Assembly, KRS § 382.290 and KRS § 382.297 were amended by Senate Bill 148, effective July 1, 2015. The amendment to § 382.290 merely codifies a generally accepted practice to include source deed descriptions within a mortgage. But the amendment to § 382.297 could have unintended consequences, as it prohibits an amended mortgage from altering the parties or the collateral of a recorded mortgage.

Under the amended KRS § 382.297, “[a]n amendment shall not alter the parties or the collateral of a recorded mortgage.” In context, and with the new change underlined and in bold, the statute as amended now reads:

A recorded mortgage may be amended by an affidavit of amendment prepared by an attorney to correct clerical errors or omitted information. An amendment may not change any term, dollar amount, or interest rate in the mortgage, unless signed by the mortgagor and secured party. **An amendment shall not alter the parties or the collateral of a recorded mortgage.** The attorney preparing the affidavit shall certify in the affidavit that notice of filing the amendment has been given to the mortgagor by mailing a copy of the amendment to the mortgagor at the address shown on the original mortgage. A subsequent release of the mortgage releases any amendments to the original mortgage.

The statute so amended creates more questions than it seems to resolve. For example, how broadly does the statute apply? The title of the statute, “Amendment of recorded mortgage by affidavit of amendment” indicates that it only applies to amendments by affidavit, placing another limit on the amendments a preparing attorney may unilaterally accomplish by affidavit. But the title of a statute is not used as an aid in its interpretation. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 613, n. 4 (Ky. 2004). And the Attorney General has opined that KRS 382.297 contemplates that amended mortgages may change more than

clerical errors or omitted information. Ky. OAG 09-002 (March 20, 2009). Do the statute's permissions and prohibitions apply, then, to all amended mortgages or just amendments by affidavit?

If the statute applies to all amended mortgages, the Commonwealth appears to have created three tiers of mortgage amendments: (1) amendments permitted via KRS 382.297 by an attorney's affidavit of amendment without signature of the mortgagor and secured party; (2) amendments prohibited unless signed by the mortgagor and secured party; and (3) amendments prohibited regardless whether an affidavit or the signatures of the mortgagor and secured party are present.

A risk for all parties is that this third tier affects the validity of an amended mortgage, which may not be discovered by a mortgagee until it is too late. County clerks do not have the authority to refuse to record amended mortgages, and the legitimacy of a recorded amended mortgage is for a court of law to decide. See Ky. OAG 09-002 (March 20, 2009). Thus, an unsuspecting filer may not learn until the issue is before a court, or a master commissioner, that its mortgage improperly "alters" the parties or collateral—despite the assent and signature of the mortgagor and secured party. And if so, it is unknown how the law will treat such an unauthorized prohibited amendment—is it void for all purposes or will it be given some effect as a filed mortgage, albeit not an "amendment" to a prior mortgage?

Other gray areas are also present. If a "clerical error" or "omitted information" involves the parties or collateral (for example, misdescription or an unintended failure to include certain collateral), can an amended mortgage correct such errors, even assuming the amendment was signed by the mortgagor and secured party? Probably not under the plain language of the statute *if* the correction "alters" the parties or collateral. Would a reformation action then be necessary? If presented, those issues require consideration.

It is also possible that some common practices may require reexamination. Loan assumption agreements, mortgage spreader agreements, omnibus loan modification agreements—these and other similar arrangements involve collateral and/or the parties. The

possible effect of amended KRS § 382.297 on any such arrangement should receive attention, particularly if a recorded document in a specific situation might arguably be an amended mortgage that “alters” the parties or the collateral.

Senate Bill 148 also amended KRS § 382.290. This amendment prohibits a county clerk from accepting a mortgage (or deed in which liens are retained) unless it includes a plain, specific reference to the source deed. For many, referencing the source of title within a mortgage is already a “best practice,” so the new requirement may have little effect on day-to-day practice. However, some localized practice habits or customs may need to change now that this former “best practice” is a statutory requirement applicable in all our Commonwealth’s counties.

Prudent lending institutions will revisit with counsel their practices and procedures to ensure implementation of the new mortgage requirements and to understand the effect of this new legislation on any agreements, amendments, modifications, or corrections involving the parties or collateral of a recorded mortgage.

For additional questions regarding mortgage practices or enforcement, please contact the authors or any of Frost Brown Todd’s members of the Financial Services Litigation Group.

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