

Locke Lord QuickStudy: Texas Supreme Court Holds Financial Institutions May Be Served Only Through Their Registered Agent

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In an attempt to invalidate mortgage liens without affording lienholders due process, borrowers (and purchasers of real estate subject to a mortgage lien) sometimes pursue quiet title actions premised upon suspect attempts to serve process. Rather than serving a lienholder's registered agent, borrowers or investors sometimes attempt to effectuate service through the Secretary of State's Office. Feigning service in this manner serves a dual purpose. First, it all but assures the financial institution will not timely receive notice of the action. Second, it provides all the indicia of service necessary to obtain a default judgment invalidating the mortgage lien. Once the default judgment is entered, the borrower or investor holds title to the property free and clear of the mortgage lien. When the financial institution learns of the improperly taken default judgment, it must engage in extensive and expensive litigation to set aside the default judgment. Further, restoring its interest in the property also can require additional litigation against various third parties to set aside fraudulent downstream conveyances that followed the default judgment.

Against this backdrop, the Texas Supreme Court was recently asked whether Section 17.028 of the Civil Practice and Remedies Code provides the exclusive method to serve process on a financial institution. In *U.S. Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2005-EFC2 v. Moss*, the Texas Supreme Court answered yes.

Moss sued U.S. Bank seeking to quiet title to his home. Moss purported to serve the bank, which was domiciled in Ohio and acting as a foreign corporate fiduciary in Texas, by serving the Secretary of State, pursuant to chapter 505 of the Estates Code—Section 505.004 provides that a foreign corporate fiduciary must appoint the Secretary of State as the fiduciary's agent for service of process. The bank had not updated its designation of the person to receive process with the Secretary of State and, therefore, did not receive the citation. The bank defaulted and Moss obtained a default judgment.

Upon learning of the judgment, the bank filed a bill of review to set it aside. Both the trial court and court of appeals held that the bank had been properly served. The Texas Supreme Court reversed holding that the exclusive method to serve a financial institution was through section 17.028. Section 17.028 provides:

citation may be served on a financial institution by: (1) serving the registered agent of the financial institution; or (2) if the financial institution does not have a registered agent, serving the president or a branch manager at any office located in this state.

Tex. Civ. Prac. & Rem. Code § 17.028(b).

Section 17.028 defines “financial institution” by reference to section 201.101 of the Finance Code, which broadly defines “financial institution” to include, among other institutions, a bank, “whether chartered under the laws of this state, another state, the United States, or another country, including a state savings bank.” Tex. Fin. Code 201.101(1)(A). The Court rejected the argument that the statute’s use of the term “may” meant that a plaintiff could choose not to serve a financial institution in compliance with that subsection. Instead, the Court held that “may” was used to introduce two alternative methods of service depending on whether the institution has a registered agent.

The Court held that the Secretary of State, as an agent for service of process under Estates Code chapter 505, is not a “registered agent” as required by section 17.028. Thus, the Court held that Moss’s service on the Secretary of State did not satisfy the service requirements of 17.028 and the Bank was not properly served. It therefore reversed the court of appeals’ judgment denying the bill of review.

Moss provides financial institutions confidence that Texas courts will continue to provide them the due process 17.028(b) affords them.

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