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## FACING THE ISSUES®

Legal Briefs from the Attorneys of  
Mackall, Crouse & Moore, PLC

### Creditors' Corner

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#### **Correct Address but Wrong Legal Description Avoids Mortgage in Bankruptcy**

Stradtman v. Ameriquest Mortgage Co., No. 07-6056, (B.A.P. 8th Cir. June 30, 2008)

Identifying the wrong parcel in a legal description on a mortgage allows a bankruptcy trustee to avoid the mortgage in bankruptcy, and eliminate the lender's secured claim. In Stradtman, the creditor identified the correct address of the secured property on the mortgage, which it then recorded in Stearns County. Unfortunately, the legal description identified an entirely different parcel.

The Bankruptcy Appellate Panel held that constructive or inquiry notices arises only when a mistake in the legal description is apparent on its face unless the property can be determined with reasonable certainty. An example of a defect on the face would be if the property described would not "close". There was no apparent defect in the legal description in this case. It simply described another parcel of property, which is a defect that is not apparent by examining the legal description alone.

The court held that under Minnesota law, the correct address would not provide a bona fide purchaser with constructive or inquiry notice, which is necessary to preserve an erroneous mortgage from the avoidance powers of the trustee. Similarly, while a bona fide purchaser could have found the mortgage by searching the grantor-grantee or tract indices, this would also not trigger constructive notice.

#### **Typographical Error on Promissory Note Invalidates Mortgage**

Overman v. Minnwest Bank South, No. A07-1147 (Minn. Ct. App., July 1, 2008)

A typographical error in a promissory note invalidated a mortgage where both spouses signed the mortgage, but one spouse did not sign the promissory note containing the error. In Overman, husband owed approximately \$185,000 to Minnwest Bank for a series of business loans for his farm. In 2001, Minnwest agreed to refinance the loan, subject to the husband granting a mortgage on his homestead. Since the homestead was jointly owned, his wife also had to sign the mortgage.

The mortgage stated that it secured a note that would become due in 2020. The actual note, executed only by husband, contained a typographical error stating that the note would become due in 2002. If the husband had been the only signatory on the mortgage, the court could have upheld the mortgage because the husband would have knowledge of the clerical error in the note. The court did not reform the error in this case because the wife did not sign the note, and did not have knowledge that the note intended the debt to become due in 2020. Instead, the wife signed a mortgage that stated the debt was due 18 years later than the note, and the court held it would be unfair for her to grant a mortgage on an erroneous instrument. Because her signature on the mortgage was not valid, the bank did not have both signatures on the mortgage for husband and wife's homestead, and therefore had no mortgage.

## **Store Closings**

According to the International Council of Shopping Centers up to 144,000 stores will close in 2008, an increase of 7% from last year. These would include both independent and privately-held retailers. The second quarter 2008 vacancy rate for malls and shopping centers was 7.8% according to Reis, Inc., a market research firm. To keep this in context, there are 1.1 million retail establishments in the U.S. and store opening figures are not calculated until year end. Last year 123,000 new stores opened and 139,000 closed.

*If you have any questions, please call one of the following in our MCM Creditors' Remedies group:*

**Timothy D. Moratzka**  
(612) 305-1456  
[tdm@mcmlaw.com](mailto:tdm@mcmlaw.com)

**Allen E. Christy, Jr.**  
(612) 305-1490  
[aec@mcmlaw.com](mailto:aec@mcmlaw.com)

**Patrick C. Summers**  
(612) 305-1473  
[pcs@mcmlaw.com](mailto:pcs@mcmlaw.com)

**Robert S. Lee**  
(612) 305-1448  
[rsl@mcmlaw.com](mailto:rsl@mcmlaw.com)

**Stacy A. Woods**  
(612) 305-1409  
[saw@mcmlaw.com](mailto:saw@mcmlaw.com)

**Matthew A. Anderson**  
(612) 305-1401  
[maa@mcmlaw.com](mailto:maa@mcmlaw.com)

**Andrew P. Moratzka**  
(612) 305-1418  
[apm@mcmlaw.com](mailto:apm@mcmlaw.com)

**Mychal A. Bruggeman**  
(612) 305-1478  
[mab@mcmlaw.com](mailto:mab@mcmlaw.com)

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1400 AT&T Tower · 901 Marquette Avenue · Minneapolis, MN 55402

Telephone: 612.305.1400 · Fax: 612.305.1414

E-mail: [mcm@mcmlaw.com](mailto:mcm@mcmlaw.com) · Web: [www.mcmlaw.com](http://www.mcmlaw.com)