

Introduction

The Tennessee Bankers Association and the Tennessee Mortgage Bankers Association (collectively, the “Amici”) submit this *Brief*, pursuant to Tenn. R. App. P. 11, in Support of the *Application for Permission to Appeal* (the “Application”) filed by *Wilmington Trust, N.A., as Trustee for MFRA Trust 2014-2* (the “Petitioner”).

The Amici closely monitor decisions of Tennessee’s trial and appellate courts that impact financial institutions and mortgage lenders in the State of Tennessee. Faced with any decision that presents a risk of substantial and negative impact on the lending industry, the Amici have a duty to both their member financial institutions and to their members’ customers to advocate on their behalf.

The Amici believe that the opinion issued in this matter on June 28, 2022 (the “Opinion”) by the Tennessee Court of Appeals presents such a risk to the banking, mortgage, and title industry. The Opinion evaluates the underlying borrower’s claim for “wrongful foreclosure” in a way that draws its authority from a number of disparate sources of authority and prescribes a remedy—rescission of the underlying sale—that is expressly disfavored under Tennessee’s foreclosure statutory scheme and, as a result, introduces a danger of uncertainty of title for unnumerable past, present, and pending foreclosure sales.

The original Application presents the general issue succinctly: “Tennessee wrongful foreclosure law is in a state of disarray.”

A lender’s authority to foreclose is based on two separate, and not always consistent, sources: Tennessee’s foreclosure statutes (Tenn.

Code Ann. §§ 35-5-101, *et. seq.*); and the terms of the lender's deed of trust. While those two systems are often aligned, lenders and borrowers struggle when presented with the differences. The outcome reached in the Opinion reflects the challenges of navigating the different systems and the variety of directions that the case law interpreting these issues follows.

The specific danger presented by the Opinion is that, in reaching its ultimate result, the Court of Appeals emphasized obscure terms contained in the underlying deed of trust to overcome the express text in the relevant Tennessee statute (Tenn. Code Ann. § 35-5-101(f)). By doing so, the Opinion risks practical abrogation of the Tennessee Legislature's intent in enacting the statute.

As presented in the Petitioner's Application, the confusion created by the Opinion is not limited to the proper application of Tenn. Code Ann. 35-5-101(f). Instead, Tennessee's jurisprudence related to wrongful foreclosure has long vexed litigants and courts about what elements must be established and what remedies are available.

When the Tennessee Legislature has spoken, it has crafted statutes that preserve the sanctity of title and have expressly prohibited attacks on title, even in the face of technically defective sales. *See* Tenn. Code Ann. § 35-5-106; *see also* Tenn. Code Ann. § 35-5-107 (allowing the aggrieved party to recover money damages). These statutes evidence the practical understanding that allowing rescission based on technical defects would disrupt the Tennessee real-estate market by creating undue clouds on title on any foreclosed real property.

In its analysis, however, the Court of Appeals tracks the various and disparate case law on wrongful foreclosure to assemble a line of decisions that—notwithstanding the Tennessee foreclosure statutes—would not only allow for sales to be set aside based on technical defects without any showing of harm, but require it. As a result, Lenders may, now, have to navigate two drastically different regimes—each with its own elements and potential remedies—arising out of a single foreclosure proceeding.

In light of the potential disruption to the banking, mortgage, and title industry, the Amici ask that the Supreme Court carefully and fully consider the risks that the Opinion poses. For the reasons set forth below, the Amici request that the Tennessee Supreme Court grant Petitioner’s Rule 11 Application for Permission to Appeal.

STATEMENT OF INTEREST

The Tennessee Bankers Association is a Tennessee nonprofit corporation serving as the principal trade association of the banking industry in the State of Tennessee. The TBA coordinates advocacy programs on both the state and national levels. It monitors and helps develop legislative and judicial agendas related to the banking industry, provides regulatory updates to members, researches legal questions posed by members, and serves as a liaison between member banks and state and federal governing bodies and regulatory agencies.

In addition, the TBA provides continuing education, disseminates information on all facets of the financial services industry, and promotes the public image of financial institutions.

The Tennessee Mortgage Bankers Association is a Tennessee nonprofit corporation representing the real estate finance industry in Tennessee. Its members include real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrift institutions, life insurance companies, and others in the mortgage lending field. The TNMBA seeks to promote ethical, efficient, and professional business practices in mortgage financing.

As a member of the National Mortgage Bankers Association, which boasts more than 2,200 members nationwide, the TNMBA also provides the Tennessee real estate finance community with a voice in both state and federal government. As an advocate, the TNMBA supports the enactment of legislation and judicial decisions that enable mortgage lenders to best serve the needs of individuals and businesses seeking mortgage financing in Tennessee.

Both Amici have an educated, on-the-ground perspective as to how the Opinion could adversely impact Tennessee financial institutions and the customers those institutions serve.

The Amici submit this brief in order to emphasize the importance of the issues raised in this case and believe that their perspective will be useful to the Court.

BRIEF IN SUPPORT OF APPLICATION

If allowed to stand, the Opinion would substantially and negatively change Tennessee's foreclosure process, result in continued confusion about the finality of foreclosure sales, and call into question the status of title of thousands of properties conveyed at past, pending, and future foreclosure sales.

I. The Court of Appeals applied Tenn. Code Ann. § 35-5-101(f) in a way that could render the statute's text meaningless and will apply beyond the narrow dispute in this case.

A. By the enactment of Tenn. Code Ann. § 35-5-101(f), the Legislature expressly provided lenders rights to postpone foreclosure sales that were not, otherwise, provided under deeds of trust.

Tenn. Code Ann. § 35-5-101(f) was enacted in 2011 to provide a much-needed clarification on a critical foreclosure issue. Specifically, this statute provides the terms by which a foreclosing trustee may postpone a pending foreclosure sale, even when the relevant deed of trust is silent on the trustee's ability to postpone or adjourn the sale. *Id.*

Prior to its enactment, unless the relevant deed of trust contained language *expressly* allowing a continuance, Tennessee lenders and foreclosure practitioners were unsure about their legal ability to postpone sales and unsure about the process by which a sale could be postponed. Lenders agonized over how long such sales could be

continued, whether a new newspaper advertisement must be published, and what types of notice must be provided to a borrower.

This uncertainty led to a general reluctance to postponements of pending sales, and this rigidity cut short lenders' and borrowers' ability to fully negotiate resolutions of pending sales or complete other consensual work-outs of the defaulted debts. Generally, prior to Tenn. Code Ann. § 35-5-101(f)'s enactment, once a sale date was set, the foreclosure proceeded on that original date unless cancelled by the lender or by the automatic stay resulting from a bankruptcy filing. During the Great Recession, this forced countless properties into foreclosure that, with more time, might have been avoided.

The Tennessee Legislature's amendment to add Tenn. Code Ann. § 35-5-101(f) provided clarity about a lender's ability to postpone sales, even in situations where the deed of trust was otherwise silent on this ability. This statute provides the exact terms to be followed to lawfully postpone a pending foreclosure sale. Among other provisions, Tenn. Code Ann. § 35-5-101(f)(3) allows a foreclosing trustee to continue a sale without written notice sent to the debtor where the postponement is for less than 30 days.

- B. The Court of Appeal's application of Tenn. Code Ann. § 35-5-101(f)(3) disregards the plain text of the statute and will create confusion.

In this action, postponement or adjournment of a foreclosure sale is not "contractually prohibited" under the operative deed of trust. Instead, this deed of trust is silent as to postponements of pending

foreclosure sales. As a result, there is no question that Tenn. Code Ann. § 35-5-101(f) applied to the foreclosure trustee's sale in this matter.

Despite this clear statutory text, the Court of Appeals nevertheless denied the trustee's ability to postpone the sale without written notice. The Court of Appeals based its logic on a general provision under the deed of trust that requires any notices to the borrower to be made "in writing." This provision is a provision in virtually any deed of trust that requires "[a]ll notices" from any party related to the deed of trust to be in writing. In light of this general provision, the Court of Appeals found that, while an oral announcement of "short" continuances may be allowed under Tenn. Code Ann. § 35-5-101(f)(3), such an oral announcement did not satisfy the "writing" requirement in the deed of trust.

Under this reasoning, then, any deed of trust with a "written notice" provision would prevent the application of Tenn. Code Ann. § 35-5-101(f)(3), even though this statute was crafted to apply where deeds of trust were otherwise silent. This strained interpretation of the "written notice" provision of this deed of trust would, in essence, subvert the purpose of the Legislature in enacting the postponement statute.

The Amici raise this concern because if not addressed, the question will cause confusion and potential needless litigation and return Tennessee lenders to the precise state of uncertainty that Tenn. Code Ann. § 35-5-101(f)(3) was enacted to eliminate. The Opinion imposes obligations on foreclosure trustees that exceed those clearly stated in the operative statute, which governs situations where the deed of trust is otherwise silent. By focusing its analysis on a close and

nuanced reading of the general “written notice” provision, the Court of Appeals has created an outcome where the exception swallows the rule.

II. Recission of sales is a remedy that is disfavored by the Tennessee Legislature, and the Opinion’s unequivocal application of that remedy upon such an unclearly defined claim creates a risk to the lending and title industry.

As stated in the Application (as well as in the Opinion), a borrower’s allegation of “wrongful foreclosure” means different things in different contexts. Sometimes, it’s a defense to an eviction action. Sometimes, it’s a breach of contract allegation based on the terms of the deed of trust instrument. Sometimes, it’s an allegation that the foreclosing party failed to follow Tennessee foreclosure statutes.

In each of these contexts, a party asserting “wrongful foreclosure” draws from disparate lines of authority for the elements of the claim it is presenting. The law on “wrongful foreclosure” is confusing to courts and litigants because it has evolved in piece-meal fashion, drawing some aspects from breach of contract theories based on mortgage instruments and others from statutory construction based on Tennessee’s foreclosure statutes. The claim can have different elements—and drastically different remedies—depending on which of Tennessee’s two non-judicial foreclosure systems is at issue. Because the two systems are so closely intertwined with only subtle differences, a litigant can cobble together an argument from the amorphous case law in nearly any direction.

The Tennessee General Assembly has clearly expressed its disfavor with the remedy of rescission. In fact, it has enacted statutes to limit the remedies resulting from a foreclosure sale that does not follow the foreclosure process contained in Tennessee statutes. For instance, Tenn. Code Ann. § 35-5-106 expressly precludes rescission as a remedy for statutory foreclosure violations (providing that “[s]hould the officer, or other person making the sale, proceed to sell without pursuing the provisions of this chapter, the sale shall not, on that account, be either void or voidable.”). Instead, under Tenn. Code Ann. § 35-5-107, a borrower’s recovery for defects under the statutes is limited to monetary damages (providing that “[a]ny officer, or other person, referenced in § 35-5-106 who fails to comply with this chapter commits a Class C misdemeanor and is, moreover, liable to the party injured by the noncompliance, for all damages resulting from the failure.”). In a July 2022 opinion, the Tennessee Court of Appeals wrote “it is clear that in enacting [§ 35-5-106], the General Assembly intended to eliminate the uncertainty with land titles resulting from foreclosure sales.” See *Daniels v. Trotter*, No. E202001452COAR3CV, 2022 WL 2826848, at *4 (Tenn. Ct. App. July 20, 2022); see also *Doty v. Fed. Land Bank of Louisville*, 169 Tenn. 496, 89 S.W.2d 337, 339 (1936).

The Amici share the concerns of the Petitioner regarding a borrower’s ability to obtain the remedy of rescission of a sale where that borrower fails to show any harm or prejudice. The majority of other states that have considered this issue hold that the extraordinary remedy of rescission is only warranted, if at all, where the challenged defect prejudiced or otherwise harmed the defaulting borrower. Current

Tennessee case law on this issue is not uniform regarding the elements of the claim for wrongful foreclosure, nor is it uniform in the remedies resulting for a successful showing of the claim. For such a drastic and far-reaching remedy, clarification of the elements is absolutely needed.

The Supreme Court's review is warranted to secure uniformity of decision on this important issue of law. As the banking and mortgage industries begin to grapple with the post-COVID economy, definitive guidance on this issue of law will benefit both lenders and borrowers in navigating these issues in the coming years.

CONCLUSION

The Court of Appeals Opinion in this case subverts powers that the legislature expressly provided to trustees and creditors under Tenn. Code Ann. § 35-5-101(f). Further, if allowed to stand, the confusion resulting from the Opinion, including the potential for rescission of sales, will cause substantial harm to lenders and unnecessarily create clouds on title that will, effectively, impair the transfer of foreclosed homes for up to 6 years under Tennessee law.

Based on the foregoing, the Amici request that the Supreme Court grant the Application in order to secure the settlement of these important questions of law and public interest discussed above, to secure uniformity of decision given the conflicts between the various Court of Appeals decisions considering these issues, and to exercise the Court's supervisory authority.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, I certify that this Brief complies with the requirements of Section 3.02 of Rule 46.

According to the word count in Microsoft Word, there are 2,404 words in this Brief.

/s/ David M. Anthony
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following via **the ECF filing system, electronic mail, and U.S. mail, postage prepaid**, to:

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