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## Commercial Law

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## Commercial Law

### I. "CONTROLLING PERSONS" DOCTRINE NOT APPLICABLE TO PRIVATE ACTIONS UNDER SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

In *Plowman v. Bagnal*<sup>1</sup> the South Carolina Supreme Court refused to extend the "controlling persons" doctrine to a private action initiated under the South Carolina Unfair Trade Practices Act (SCUTPA).<sup>2</sup> The controlling persons doctrine allows a court to hold an individual director or officer personally liable for corporate acts that violate the SCUTPA.<sup>3</sup> While the doctrine has been recognized by South Carolina courts since 1982,<sup>4</sup> application of the doctrine has been limited to actions brought by the Attorney General under section 39-5-50 of the SCUTPA.<sup>5</sup> *Plowman* represents the first case in which the supreme court was forced to determine whether the doctrine should be applied to private actions. By refusing to extend the doctrine to private actions, the court has made it more difficult for private parties to obtain relief from controlling individuals.

In *Plowman* the plaintiffs, homeowners in Village Pond subdivision, initiated an unfair trade practices action against the corporate developer of the subdivision and two individuals who were founders of the corporation. The plaintiffs alleged that the corporate developer, through its agents, including the two individual defendants, made various misrepresentations about the subdivision in an effort to induce the plaintiffs to buy property in Village Pond. The promised amenities were never realized. The plaintiffs sought to apply the controlling persons doctrine to hold the individual defendants personally liable for the damages resulting from the alleged violation of the SCUTPA.<sup>6</sup>

1. \_\_\_ S.C. \_\_\_, 450 S.E.2d 36 (1994).

2. S.C. CODE ANN. §§ 39-5-10 to -160 (Law. Co-op. 1976).

3. State *ex rel.* McLeod v. C & L Corp., 280 S.C. 519, 531, 313 S.E.2d 334, 341 (Ct. App. 1984). A controlling person has been defined as "one who formulates and directs corporate policy or who is deeply involved in the important business affairs of the corporation." *Id.*

4. In State *ex rel.* McLeod v. Brown, 278 S.C. 281, 294 S.E.2d 781 (1982), the South Carolina Supreme Court reversed summary judgment when an issue of fact existed concerning the defendant's "role as a controlling person." *Id.* at 284, 294 S.E.2d at 782.

5. See *id.* at 281, 294 S.E.2d at 781; State *ex rel.* Medlock v. Nest Egg Soc'y Today, Inc., 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986); State *ex rel.* McLeod v. VIP Enters., 286 S.C. 501, 335 S.E.2d 243 (Ct. App. 1985); *C & L Corp.*, 280 S.C. at 519, 313 S.E.2d at 334. An action based on a violation of the SCUTPA may be initiated either by the Attorney General or by a private individual who has suffered a loss. S.C. CODE ANN. §§ 39-5-50, -110, -140 (Law. Co-op. 1976).

6. *Plowman*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 37.

Although the individual defendants were indeed controlling persons of the corporate defendant, the trial judge denied the plaintiffs' motion for a directed verdict against the individual defendants on the ground that the controlling persons doctrine was not applicable in a private action. The trial judge also refused to charge the jury that controlling persons are personally liable based on their status alone, holding that controlling persons could only be liable in a private action under the SCUTPA if they personally violated the statute. The jury found that only the corporation engaged in unfair and deceptive trade practices that violated the statute. The plaintiffs appealed, arguing that the doctrine should apply in a private action initiated under the SCUTPA to render controlling persons liable as a matter of law for corporate violations.<sup>7</sup>

The court first examined the language of the SCUTPA, which declares that unfair trade practices are illegal,<sup>8</sup> and that persons who violate the act are subject to civil liability.<sup>9</sup> "Person" is defined by SCUTPA as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity."<sup>10</sup> The court determined that the plain language of SCUTPA requires a person to have actually used or employed an illegal method or practice in order to violate SCUTPA, precluding control person liability as a matter of law.<sup>11</sup> The court then applied the settled principle that corporate directors and officers are not liable for torts of a corporation absent personal involvement and concluded that controlling persons must personally violate the SCUTPA to be liable in actions arising under it.<sup>12</sup>

The court also rejected the plaintiffs' argument that a failure to extend control person liability would be inconsistent with the court's acceptance of such liability in actions brought by the Attorney General.<sup>13</sup> The *Plowman* court noted that application of the doctrine in public actions is consistent with the doctrine's application by federal courts in public actions brought by the Federal Trade Commission (FTC) under the Federal Unfair Trade Practices Act. In an FTC action, directors or officers of a corporation who are deemed to be controlling persons may be individually included on cease and desist orders.<sup>14</sup> However, the court noted that because the federal act does not

7. *Id.* at \_\_\_, 450 S.E.2d at 37.

8. S.C. CODE ANN. § 39-5-20(a) (Law. Co-op. 1976).

9. S.C. CODE ANN. § 39-5-110(a) (Law. Co-op. 1976).

10. S.C. CODE ANN. § 39-5-10(a) (Law. Co-op. 1976).

11. *Plowman*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 37.

12. *Id.* at \_\_\_, 450 S.E.2d at 37-38.

13. *See id.* at \_\_\_, 450 S.E.2d at 38.

14. *See* *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 324-25 (8th Cir. 1965). *But see* *Barrett Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n*, 635 F.2d 299, 304 (4th Cir. 1980) (holding that an officer cannot be listed individually on a cease and desist order merely because he is an officer, but must

provide for a private cause of action, it can be distinguished from the SCUTPA. Furthermore, the court found no authority in the SCUTPA indicating that the General Assembly intended to extend the doctrine to private actions.<sup>15</sup>

The court further justified its limitation of the application of the doctrine to public actions only by focusing on the different policy rationales behind public and private actions. The court noted that a government action is designed "to punish or enjoin responsible individuals."<sup>16</sup> Private actions, on the other hand, are designed to compensate parties who suffer injury or loss as a result of a guilty party's violations.<sup>17</sup> Because the rationale underlying each type of action is different, the court reasoned that the same application of the doctrine was not appropriate for both.<sup>18</sup> The court concluded that greater public interests are involved in government actions; therefore, principles of control person liability should be given stronger effect when public, rather than private, interests are at stake.<sup>19</sup> Thus, "in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA."<sup>20</sup>

Justices Toal and Finney dissented, contending that the majority's distinction between public and private actions was unfounded<sup>21</sup> and effectively created two definitions of "person" for purposes of the SCUTPA.<sup>22</sup> According to the dissent, such a distinction is not in accord with South Carolina's statutory scheme, which provides a more expansive unfair trade practices act than the federal version. Furthermore, "if the General Assembly intended for 'person' to mean one thing for a private cause of action and

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have actively participated in the violation, if the violation is not likely to recur). Section 39-5-20(b) instructs state courts to be guided by the FTC in interpreting § 39-5-20(a). S.C. CODE ANN. § 39-5-20(b) (Law. Co-op. 1976).

15. *Plowman*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 38.

16. *Id.* at \_\_\_, 450 S.E.2d at 38.

17. *See id.* at \_\_\_, 450 S.E.2d at 38.

18. *See id.* at \_\_\_, 450 S.E.2d at 38. *But see* S.C. CODE ANN. § 39-5-50(b) (Law. Co-op. 1985) (providing that in SCUTPA actions brought by the Attorney General, courts may order restitution to a party that has suffered an ascertainable loss due to a violation of the SCUTPA, thus providing for a form of private compensation in a public action).

19. *See Plowman*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 38. *But see* *Florence Paper Co. v. Orphan*, 298 S.C. 210, 379 S.E.2d 289 (1989); *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986) (noting that a private plaintiff must show that the alleged unfair or deceptive act or practice has adversely impacted on the public interest).

20. *Plowman*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 38.

21. *See id.* at \_\_\_, 450 S.E.2d at 39-40 (Toal, J., dissenting).

22. *Id.* at \_\_\_, 450 S.E.2d at 40.

another for an action by the Attorney General, it could have so provided.”<sup>23</sup> Because the legislature did not create separate definitions, the dissent argued that the South Carolina courts’ definition of “person” as including “controlling persons” should apply in both public and private actions.<sup>24</sup> The dissent also asserted that whether individuals should be held personally liable as controlling persons should be a jury determination.

The court’s decision in *Plowman v. Bagnal* could have a significant impact on commercial dealings because it lessens consumer protection available under a SCUPTA private cause of action. Individuals will find it more difficult to recover against the directors and officers of corporations that have violated the act because they will need to establish that the director or officer personally violated the statute. After *Plowman*, an individual may have a better chance of obtaining full recovery through the restitutionary measures provided for in an action initiated by the Attorney General than under a private cause of action.

*Cynthia A. Smith*

## II. PURCHASE MONEY MORTGAGE HELD SUPERIOR TO LIENS FOR PAST DUE ASSESSMENTS

In *First Federal Savings & Loan Ass’n v. Bailey*<sup>1</sup> the South Carolina Court of Appeals held that the judgment liens of a homeowners association for unpaid assessments were subordinate to the prior lien of a first mortgagee. The mortgage in question was recorded after the homeowners association’s covenants, but before the association levied the assessments giving rise to its lien.<sup>2</sup> The court rejected the homeowners association’s contention that its lien for unpaid assessments related back to the filing of the covenants.<sup>3</sup>

First Federal Savings and Loan Association of Charleston (First Federal) brought an action to foreclose its mortgage on real property owned by Arthur N. Bailey and James Michael Manney.<sup>4</sup> First Federal included Treeloft Villas

23. *Id.* at \_\_\_\_, 450 S.E.2d at 40.

24. *See id.* at \_\_\_\_, 450 S.E.2d at 40. In addition, the subject matter of the lawsuit was found to be relevant in light of the trend in recent years to expand liability of developers and builders in the area of new residential housing. Further, Justice Toal noted that in *C & L Corp.*, a case in which the facts were remarkably similar, the principals of the developer corporation were subject to personal liability under the SCUTPA as controlling persons. *Id.* at \_\_\_\_, 450 S.E.2d at 40.

1. \_\_\_\_, S.C. \_\_\_\_, 450 S.E.2d 77 (Ct. App. 1994).

2. *Id.* at \_\_\_\_, 450 S.E.2d at 79.

3. *Id.* at \_\_\_\_, 450 S.E.2d at 80-81.

4. *Id.* at \_\_\_\_, 450 S.E.2d at 79.

Homeowners Association (Treeloft) as a defendant because Treeloft held judgment liens against the property for past due assessments. Treeloft maintained that its liens were superior to the mortgage lien. The master held that First Federal had priority, relying on “the principle that ‘a purchase money mortgage will ordinarily be given priority over security interests in realty arising through the mortgagor.’”<sup>5</sup>

Covenants of Treeloft Villas Homeowners Association (Covenants) were recorded in the Charleston county R.M.C. Office on August 24, 1978. First Federal recorded its mortgage there on April 18, 1979. Subsequently, Treeloft secured several judgments against the defendants for unpaid assessments.<sup>6</sup>

The covenants required that maintenance assessments be paid by each owner and that such assessment “shall be a charge and continuing lien on the lots against which each assessment is made.”<sup>7</sup> Assessments were deemed delinquent if not paid within thirty days after becoming due.<sup>8</sup> The covenants also provided that they would “‘run with and bind the land and . . . enure [sic] to the benefit of and be enforceable by the Association.’”<sup>9</sup> First Federal’s mortgage recited that it was taken subject to the provisions of the Covenants.<sup>10</sup>

The court of appeals first determined that Treeloft’s right to a lien on the property did not arise through First Federal’s mortgagors. Rather, the court held that Treeloft’s right was created by the covenants prior to the time the mortgagors received title. The court thus concluded that First Federal’s mortgage was held subject to Treeloft’s right to impose a lien for unpaid assessments, and that the mortgage’s “subject to” language merely recognized this fact.<sup>11</sup> The court then turned to the question of when Treeloft’s charge or lien actually arose. Noting that the assessments were a “‘charge and continuing lien on the lots against which each such assessment is made’ . . . [and] delinquent if not paid within 30 days after becoming due,”<sup>12</sup> the court framed the issue as “whether amounts assessed by the association which became past due 30 days after assessed constitute a lien recognizable at law

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5. *Id.* at \_\_\_, 450 S.E.2d at 79.

6. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 79. Judgments in favor of Treeloft were entered on August 9, 1986, August 30, 1989, December 28, 1990, and June 9, 1992. *Id.* at \_\_\_ n.1, 450 S.E.2d at 79 n.1.

7. *Id.* at \_\_\_, 450 S.E.2d at 79.

8. *Id.* at \_\_\_, 450 S.E.2d at 80.

9. *Id.* at \_\_\_, 450 S.E.2d at 79.

10. *Id.* at \_\_\_ n.3, 450 S.E.2d at 80 n.3.

11. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 80 (citing *South Carolina Fed. Sav. Bank v. San-A-Bel Corp.*, 307 S.C. 76, 413 S.E.2d 852 (Ct. App. 1992)).

12. *Id.* at \_\_\_, 450 S.E.2d at 80.

which relates back to the time of the filing of the covenants or whether such lien is prospective only.”<sup>13</sup>

The court focused on the terms of the covenants and found that they did not “purport to subject specific property to a lien or charge as security for payment of a present debt owed by a lot owner.”<sup>14</sup> The court also pointed out that the covenants did not provide a method for enforcing payment of the assessment lien, nor did the lien created have priority over other liens and claims.<sup>15</sup> On the basis of these findings the court stated that Treeloft would have to resort to equity to secure its claim to the foreclosure proceeds, apparently concluding that Treeloft had no lien recognizable at law relating back to the filing of the covenants.<sup>16</sup>

The court briefly considered the nature of a lien or charge in equity and stated that an equitable lien requires “a debt owing from one person to another, specific property to which the debt attaches, and an intent, expressed or implied, that the property will serve as security for the payment of the debt. . . . [A]n equitable lien relates back in time to its creation by the conduct of the parties.”<sup>17</sup> Assuming that the covenants sufficiently identified specific property to which an equitable lien could attach, the court asked “what then is the conduct of the parties that actuates the association’s charge or lien?”<sup>18</sup> The court concluded that the lot owner’s failure to pay assessments when due created the lien. The court thus held that Treeloft’s judgments for assessments constituted “liens against the property only from the time the amounts of the respective assessments represented by the judgments were fixed and became due.”<sup>19</sup> Because the assessments which were the basis for Treeloft’s judgments were fixed subsequent to First Federal’s mortgage, the court held that, even in equity, First Federal’s mortgage lien had priority.<sup>20</sup>

The dissent viewed First Federal’s mortgage as subordinate to Treeloft’s lien, reasoning that because First Federal took its mortgage with full knowledge of Treeloft’s covenants, First Federal was bound by the terms of the covenants.<sup>21</sup> The dissent believed such an outcome would be fair and equitable because assessments for the maintenance of common properties

13. *Id.* at \_\_\_, 450 S.E.2d at 80.

14. *Id.* at \_\_\_, 450 S.E.2d at 80.

15. *Id.* at \_\_\_, 450 S.E.2d at 80.

16. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 80.

17. *Id.* at \_\_\_, 450 S.E.2d at 80-81 (citing *Fibkins v. Fibkins*, 303 S.C. 112, 399 S.E.2d 158 (Ct. App. 1990) and *Perpetual Fed. Sav. & Loan Ass’n v. Willingham*, 296 S.C. 24, 370 S.E.2d 286 (Ct. App. 1988)).

18. *Id.* at \_\_\_, 450 S.E.2d at 81.

19. *Id.* at \_\_\_, 450 S.E.2d at 81 (citing *St. Paul Fed. Bank For Sav. v. Wesby*, 501 N.E.2d 707 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 736 (Ill. 1987)).

20. *Id.* at \_\_\_, 450 S.E.2d at 81.

21. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 82 (Littlejohn, Acting J., dissenting).

increased the value of First Federal's mortgage.<sup>22</sup> Moreover, the dissent emphasized that if the cost of maintaining common properties was not assumed by First Federal it would have to be assumed by other lot owners. This result would be undesirable because a mortgagee is in a superior position to protect itself against the possibility of assumed assessments by adjusting the loan amount to fit the appraisal.<sup>23</sup>

Courts in several other jurisdictions have considered the priority of an assessment lien against a mortgage obtained after the recording of the covenants but before the assessments giving rise to the lien were made. The majority of these cases reach the same conclusion as the *Bailey* court.<sup>24</sup> In all of these cases, the wording of the covenants creating the association's right to make assessments was critical in determining whether the lien for unpaid assessments would relate back to the recording date of the covenants. The *Bailey* court also relied upon the wording of the covenants.<sup>25</sup> Had the covenants been more specific, the court likely would have allowed the relation back.<sup>26</sup>

The court maintained that its decision was "in keeping with the spirit of the law relative to the priority of common property assessment liens vis-a-vis mortgage liens,"<sup>27</sup> citing section 3-115 of the Model Real Estate Cooperative

22. *Id.* at \_\_\_, 450 S.E.2d at 82.

23. *Id.* at \_\_\_, 450 S.E.2d at 82.

24. *E.g.*, Federal Nat'l Mortgage Ass'n v. McKesson, 639 So. 2d 78, 80 (Fla. Dist. Ct. App. 1994), *review granted sub nom.*, Holy Lake Ass'n v. Federal Nat'l Mortgage Ass'n, 650 So. 2d 990 (1995) (declaring that "in the absence of clear language giving a homeowners' association a lien that relates back to previously recorded documents," the rule of "first in time is first in right" applies); St. Paul Fed. Bank For Sav. v. Wesby, 501 N.E.2d 707, 711 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 736 (Ill. 1987) (finding nothing in the declaration that supported the association's relation back argument); First Twinstare Bank v. Hart, 648 A.2d 820, 822 (Vt. 1993) (holding a mortgage lien superior to the landowners' association's assessment lien because the covenants did not contain an express subordination clause). *But see* New York Life Ins. & Annuity Corp. v. Hammocks Community Ass'n, 622 So. 2d 1369 (Fla. Dist. Ct. App. 1993) (*per curiam*) (holding assessment lien had priority over prior mortgage where covenants provided that assessment lien was to have priority over first mortgages amortized over a period less than ten years); American Holidays, Inc. v. Foxtail Owners' Ass'n, 821 P.2d 577, 581 (Wyo. 1991) (giving effect to a subordination clause contained in the covenants in order to allow the assessment lien to relate back to the date of the filing of the covenants).

25. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 80 (noting that the covenants do not "provide that the charge or lien created has priority over other liens and claims").

26. The court stated that, "where the language imposing such covenants is unambiguous, the covenants will be enforced according to their obvious meaning." *Id.* at \_\_\_, 450 S.E.2d at 79 (citing Shipyard Property Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct. App. 1992)) (footnote omitted).

27. *Id.* at \_\_\_, 450 S.E.2d at 81.



Act<sup>28</sup> and section 3-116 of the Uniform Condominium Act<sup>29</sup> for the proposition that liens for unpaid assessments should be subordinate to mortgages recorded prior to the assessment delinquency.<sup>30</sup> Contrary to the court's assertion, the cited Uniform Acts contain a limited statutory preference for assessment liens over mortgages. Under both acts an assessment lien is given priority over all but first mortgages or first security interests. Furthermore, even first mortgages or security interests are subordinate to an assessment lien for up to six months of unpaid assessments.<sup>31</sup>

The Uniform Common Interest Ownership Act incorporates a six month super-priority lien for unpaid assessments similar to those in the Uniform Acts cited in *Bailey*.<sup>32</sup> This super-priority lien reflects the policy of protecting the financial vitality of private associations, which are now performing many traditional government functions such as garbage collection and maintenance of streets and parks.<sup>33</sup> When associations are hampered in their ability to

28. 7B U.L.A. 225 (1981).

29. 7 U.L.A. 421 (1980).

30. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 81. The court also quotes from the Horizontal Property Act, S.C. CODE ANN. § 27-31-210 (Law. Co-op. 1991) ("All sums assessed by the administrator . . . but unpaid . . . shall constitute a lien on such apartment prior to all other liens except only . . . (ii) mortgage and other liens, duly recorded, encumbering the apartment."). *Id.* at \_\_\_, 450 S.E.2d at 81.

31. The Uniform Condominium Act provides:

A lien under this section is prior to all other liens and encumbrances on a unit except . . . (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . . The lien *is also prior to the mortgages and deeds of trust described in clause (ii) above* to the extent of the common expense assessments based on the periodic budget adopted by the association . . . which would have become due in the absence of acceleration *during the 6 months immediately preceding institution of an action to enforce the lien.*

UNIF. CONDOMINIUM ACT § 3-116(b), 7 U.L.A. 527 (1980) (emphasis added); *see also* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116(b), 7 U.L.A. 251 (1994 & Supp. 1995); MODEL REAL ESTATE COOPERATIVE ACT § 3-115(b), 7A U.L.A. 306 (1981) (containing nearly identical provisions regarding the priority of an assessment lien against a first security interest in a cooperative interest).

32. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116(b), 7 U.L.A. 251 (1994 & Supp. 1995). This section provides in part:

A lien under this section is prior to all other liens and encumbrances on a unit except . . . (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent . . . . The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien.

*Id.*

33. James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien*

collect assessments, the provision of important community services is jeopardized and the burden of maintaining the community is placed disproportionately on members who make timely payments.<sup>34</sup>

Naturally, mortgage lenders are concerned about the statutory priority for assessment liens. These concerns are addressed by limiting the super-priority lien to six months of assessments and by requiring associations to make assessments on the basis of an annual budget.<sup>35</sup> Lenders have a variety of other means of protecting themselves, and some added risk does not seem unduly burdensome because assuring maintenance of common properties benefits lenders by protecting the value of their collateral.<sup>36</sup> The Uniform Common Interest Ownership Act thus strikes a compromise between the interests of mortgage lenders and homeowners associations.

In *Bailey* the South Carolina Court of Appeals held that the assessment liens of a homeowners association were subordinate to a first mortgage recorded after the homeowners association's covenants but before the association levied the assessments giving rise to its lien. In refusing to find a relation back, the court noted the covenant's failure to include a mechanism for enforcing the association's lien and the covenant's failure to provide that the association's lien had priority over other liens.<sup>37</sup> Whether the association's lien would have related back absent these omissions remains unclear. The present uncertainty surrounding the priority positions of mortgages vis-a-vis assessment liens could be resolved simply and fairly by legislative enactment of the six month super-priority assessment lien proposed by the Uniform Common Interest Ownership Act.<sup>38</sup>

*Ronald B. Cox*

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*and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 361 (1992).

34. *Id.* at 359-60.

35. *Id.* at 361-62 (citing UNIF. COMMON INTEREST OWNERSHIP ACT §§ 3-115(a), 3-116(b), 7 U.L.A. 349, 351 (1982) (amended 1994)).

36. *See id.* at 361-62 (suggesting that lenders can protect themselves by reducing the size of the loan relative to the value of the collateral, requiring escrows, or obtaining mortgage insurance). *Cf. supra* notes 21-23 and accompanying text (discussing the dissent in *Bailey*).

37. *Bailey*, \_\_\_ S.C. at \_\_\_, 450 S.E.2d at 80.

38. For an excellent discussion of the UCIOA, see Winokur, *supra* note 33.

### III. COURT ALLOWS EQUITABLE SUBROGATION FOR COTENANT PRIMARILY LIABLE AT LAW

In *United Carolina Bank v. Caroprop, Ltd.*<sup>1</sup> the South Carolina Supreme Court held that when two cotenants are jointly and severally liable on a mortgage debt, either cotenant's conveyance of the shared property shifts primary liability to the property and the remaining cotenant becomes only secondarily liable.<sup>2</sup> This shift of primary liability becomes crucial in an action for equitable subrogation, where secondary liability is a necessary element.<sup>3</sup>

*Caroprop* arose from a partition action instituted by United Carolina Bank, as trustee under the individual retirement account of Lloyd D. Auten (Auten IRA). Auten IRA sued Caroprop, its cotenant, and First South Savings Bank, Inc. (First South), the second mortgagee of Caroprop's undivided interest in the property.<sup>4</sup> Auten IRA and Atlantic Properties, Ltd. (Atlantic) originally purchased the land from Interstate Investment Associates, III (Interstate) as tenants in common<sup>5</sup> and gave Interstate a note secured by a first mortgage on a portion of the property as part of the purchase price.<sup>6</sup>

Atlantic eventually conveyed its undivided interest in the property to Caroprop. Caroprop did not assume liability on the Interstate note, but took subject to Interstate's first mortgage. Caroprop then gave a second mortgage to First South. When Caroprop failed to make payments on the Interstate note, Interstate began foreclosure proceedings. To avoid foreclosure, Auten IRA paid both its and Caroprop's share of the Interstate mortgage debt.<sup>7</sup>

Auten IRA subsequently instituted a partition action against Caroprop and First South. Auten IRA argued that it was "entitled to be equitably subrogated

1. \_\_\_ S.C. \_\_\_, 446 S.E.2d 415 (1994).

2. *Id.* at \_\_\_, 446 S.E.2d at 417.

3. In South Carolina, the elements necessary to establish a cause of action for equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity. *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992) (citing *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 236, 367 S.E.2d 708, 712-13 (Ct. App. 1988)). The court in *Dedes* also noted that "the party asserting equitable subrogation must not have had actual notice of the prior mortgage." *Id.*

4. *United Carolina Bank v. Caroprop*, \_\_\_ S.C. \_\_\_, 429 S.E.2d 197 (Ct. App. 1993), *rev'd*, \_\_\_ S.C. \_\_\_, 446 S.E.2d 415 (1994).

5. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 416.

6. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 198. Auten IRA and Atlantic purchased a total of 45.91 acres. The mortgage was secured by approximately 31 acres. *Id.* at \_\_\_, 429 S.E.2d at 198.

7. In addition, Auten IRA paid Caroprop's share of some past-due property taxes to prevent the land from being sold at a tax sale. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 416.

to the rights of Interstate as the first mortgagee” because it had paid the entire Interstate mortgage debt.<sup>8</sup> Caroprop defaulted on the complaint; First South counterclaimed, seeking foreclosure of its mortgage on the property.<sup>9</sup>

In order to obtain equitable subrogation a party must be only secondarily liable on a debt, must have paid the debt, and payment of the debt must have been made as a party with a direct interest in its discharge and not as a volunteer.<sup>10</sup> Furthermore, equitable subrogation will not be granted if injustice to the other party might result.<sup>11</sup> The parties conceded that Auten IRA met two of these elements; payment of the debt and a direct interest in the discharge of the debt.<sup>12</sup> The master-in-equity, however, held that equitable subrogation did not lie because Auten IRA was primarily, not secondarily, liable on the first mortgage.<sup>13</sup>

On appeal from the master, the court of appeals held that Auten IRA was not entitled to equitable subrogation because Auten IRA’s liability was primary in that it was absolutely required to pay the entire Interstate debt regardless of whether its cotenant made payments.<sup>14</sup> The note signed by Auten IRA and Atlantic provided that each “promise[d] to pay . . . Interstate . . . the sum of [\$966,042.00], together with interest . . . .”<sup>15</sup> Furthermore, as noted by the court, South Carolina law provides that “[u]nless the instrument otherwise specifies two or more persons who sign as maker, . . . and as a part of the same transaction are jointly and severally liable . . . .”<sup>16</sup> Therefore, the court of appeals held that Auten IRA could not satisfy the element of secondary liability.<sup>17</sup>

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8. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 198. Auten IRA argued that in the alternative, it was entitled to an equitable lien superior to First South’s second mortgage. The basis of Auten IRA’s argument was that it acquired an inchoate lien when Atlantic and Auten IRA secured their note to Interstate with a mortgage on the property but that the inchoate equitable lien became complete when it paid the mortgage debt and taxes. The court of appeals held that the equitable lien arose when Auten IRA paid the debt and was thus second in time behind First South’s second mortgage. The court would not consider whether Auten IRA was entitled to an equitable lien for tax payments because it had not properly preserved the issue for appeal. *Id.* at \_\_\_, 429 S.E.2d at 199-200. The supreme court did not address this contention because it found Auten IRA was entitled to equitable subrogation. *See Caroprop*, \_\_\_ S.C. \_\_\_, 446 S.E.2d 415.

9. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 416.

10. *Dedes*, 307 S.C. at 158, 414 S.E.2d at 136.

11. *Id.*

12. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 417.

13. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 198.

14. *Id.* at \_\_\_, 429 S.E.2d at 198-99.

15. *Id.* at \_\_\_, 429 S.E.2d at 198.

16. S.C. CODE ANN. § 36-3-118(e) (Law. Co-op. 1976).

17. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 199.

On appeal to the supreme court, Auten IRA did not dispute that it was liable at law for the balance of the Interstate debt,<sup>18</sup> but instead argued that in equity it should be only secondarily liable.<sup>19</sup> The thrust of Auten IRA's argument was that the application of legal rules imposing primary liability on Auten IRA would preclude all South Carolina codebtors from satisfying the elements of equitable subrogation. Auten IRA asserted that the "degree of liability" in equity is determined by the relationship between the parties, not by the exact words of the instrument.<sup>20</sup>

The South Carolina Supreme Court relied primarily on *Dunn v. Chapman*<sup>21</sup> where the plaintiff, also a mortgagor, conveyed mortgaged premises in exchange for the grantee's assumption of the mortgage. In *Dunn* the court relied on *Walker v. Queen Insurance Co.*<sup>22</sup> for the proposition that, upon a mortgagor's conveyance, "the premises become[s] the primary fund out of which the mortgage is collectible . . . and 'the mortgagor (Dunn) then becomes secondarily liable for the mortgage debt.'"<sup>23</sup> The supreme court applied the holding of *Dunn* to conclude that "the dispositive issue is not *who* conveys the property, but that upon *conveyance*, it is the property itself, and not the mortgagor, which becomes primarily liable."<sup>24</sup> Thus, upon the conveyance of the property by Atlantic to Caroprop, Auten IRA became only secondarily liable for payment of the note.<sup>25</sup> The supreme court then quickly disposed of the fourth element, stating that First South knowingly took a second mortgage from Caroprop and was in no way disadvantaged because it did nothing to advance its priority.<sup>26</sup> Finding that all the necessary elements of equitable subrogation were met, the supreme court reversed the decision of the court of appeals.<sup>27</sup>

In reaching its conclusion, the supreme court overruled two earlier court of appeals decisions, *Pee Dee State Bank v. Prosser*<sup>28</sup> and *Jeffcoat v.*

18. *Id.* at \_\_\_, 429 S.E.2d at 198-99.

19. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 417.

20. Brief of Petitioner at 7. Auten IRA's argument was based on the following presumption: Equity presupposed that each borrower, Auten and Atlantic, would repay its own equal share of the Interstate debt. To the extent that either has repaid the debt share of the other, the paying borrower has paid the share of "one who, in equity, justice, and good conscience should pay" — or, in modern shorthand, the share for which the paying borrower was only secondarily liable.

*Id.* at 9-10 (quoting *Surasky v. Weintraub*, 90 S.C. 522, 535, 73 S.E. 1029, 1032 (1912)).

21. 149 S.C. 163, 146 S.E. 818 (1929).

22. 136 S.C. 144, 134 S.E. 263 (1926).

23. *Dunn*, 149 S.C. at 170-71, 146 S.E. at 821 (quoting *Walker v. Queen*, 136 S.C. 144, 158-59, 134 S.E. 263, 268 (1926) (italics omitted)).

24. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 417.

25. *Id.* at \_\_\_, 446 S.E.2d at 417.

26. *Id.* at \_\_\_, 446 S.E.2d at 417.

27. *Id.* at \_\_\_, 446 S.E.2d at 417.

28. 295 S.C. 229, 238-39, 367 S.E.2d 708, 714 (Ct. App. 1988) (stating that "[a] mortgagor

*Morris*,<sup>29</sup> to the extent that they were inconsistent with its current opinion.<sup>30</sup> The court of appeals had relied on *Prosser* to find Auten IRA primarily liable, and hence, not entitled to equitable subrogation.<sup>31</sup> The court of appeals had also referred to *Jeffcoat* as authority for finding no basis for equitable subrogation.<sup>32</sup>

The supreme court's reliance on *Dunn* is surprising. Neither party, nor the court of appeals, had considered *Dunn* to be dispositive of the issues. In fact, Auten IRA cited *Dunn* only to illustrate that equity determines whether a party is primarily or secondarily liable by the relationship between the debtors, not by the terms of the note or statute.<sup>33</sup> First South also tried to distinguish *Dunn*, arguing that because *Dunn* was not a cotenant, *Dunn*'s situation was not analogous to that of Auten IRA.<sup>34</sup> First South also noted that while *Dunn* conveyed away his land, Auten IRA enjoyed possession of the entire parcel as a tenant in common with Caroprop.<sup>35</sup> The court of appeals used *Dunn* to deny Auten IRA the right to equitable subrogation on the premise that "equity will deny the right of subrogation to one who pays or has paid a debt for which it was *at the time* primarily liable."<sup>36</sup>

The disparity between the supreme court and the court of appeals opinions may lie in their method of interpreting *Dunn*. The court of appeals applied a strict interpretation that required Auten IRA to actually convey the premises to become secondarily liable. In other words, Caroprop's conveyance of its share did not cause Auten IRA to become secondarily liable, because in *Dunn*,

who pays off a prior mortgage may not keep it alive against later mortgagees . . . by asking for subrogation"), *overruled by Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 415.

29. 300 S.C. 526, 529, 389 S.E.2d 159, 161 (Ct. App. 1989) (stating that "[p]ayment of a note by a maker . . . operates to extinguish the note, discharging the liability of any co-makers on the note"), *overruled by Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 415.

30. *Caroprop*, \_\_\_ S.C. at \_\_\_, 446 S.E.2d at 417.

31. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 198.

32. *Id.* at \_\_\_, 429 S.E.2d at 199.

33. *See* Brief of Petitioner at 7-8. Auten IRA interpreted *Dunn* as meaning that "in equity, the degree of liability, primary or secondary, can change with the circumstances and events . . ." *Id.* at 13. Auten IRA did not, however, identify *Dunn* as the solution to its problem. In fact, Auten IRA denied that "a conveyance generate[s] the secondary liability condition." *Id.* at 9 n.7. Rather, Auten IRA argued that treatment of the purchase price, not the conveyance of land, causes equity to "re-align[] the debt priorities of the parties to reflect fairness in the substance of their dealings . . ." *Id.* at 9.

34. *See* Brief of Respondent at 18.

35. *Id.* at 19. The point of this distinction, according to First South, was that *Dunn*'s secondary liability resulted from his exchange of possession of the property for the assumption of his mortgage debt. *Id.* Such consideration was arguably lacking in Auten IRA's case because it was able to enjoy use of the entire undivided parcel. The supreme court did not, however, recognize consideration as crucial to a mortgagor becoming secondarily liable.

36. *Caroprop*, \_\_\_ S.C. at \_\_\_, 429 S.E.2d at 199 (quoting *Dunn v. Chapman*, 149 S.C. 163, 169, 146 S.E. 818, 820 (1929)).

the mortgagor who became secondarily liable was also the conveyer of the premises. The supreme court interpreted *Dunn* more broadly and held that the conveyance itself caused the premises to become primarily liable, imposing only secondary liability on Auten IRA. By relying on *Dunn* and focusing on the conveyance as the vehicle for resolving the tension between a cotenant relationship and the rights of third parties, the court may have disregarded the extent to which the relationship between cotenants affects degrees of liability and, thus, the right to equitable subrogation.

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