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ATTEMPTING TO SET ASIDE DEED OF SALE FORECLOSURE BECAUSE OF TRUSTEE'S FIDUCIARY BREACH: MORTGAGOR IN POSITION OF OUTSIDER LOOKING IN

*Boatmen's Bank v. Community Interiors, Inc.*¹

Losing one's property through a foreclosure sale is a traumatic experience. It is even worse if the sale does not bring enough to cover the debts owing against the property. Being sued for a deficiency judgment in addition to losing one's property adds proverbial insult to injury. One way for the mortgagor to fight back is to try to have the foreclosure sale set aside by alleging that the sale was conducted in an unfair manner. This was the scenario behind *Boatmen's Bank v. Community Interiors, Inc.*, decided by the Missouri Court of Appeals for the Eastern District.

Boatmen's Bank (Boatmen's), holder of the second deed of trust, brought an action against the mortgagor, Community Interiors, Inc. (Community), a corporation wholly owned by Ron and Karen Eisenbeis,² for a deficiency which resulted from the foreclosure of the first deed of trust held by Ozark Federal Savings and Loan Association (Ozark).³ Community counterclaimed against Boatmen's and brought in as third-party defendants Ozark, Douglas Draper (the trustee), Mason Investments, Inc. (Draper's corporation), Douglas Land Ltd. (Draper's corporation), Forrest Crump (the purchaser at the sale), Krazo, Inc. (Crump's corporation), and United Missouri Bank.⁴ Community sought to set aside the sale and recover compensatory and punitive damages.⁵

The trial court held in favor of Boatmen's on the deficiency claim and dismissed Community's counterclaims.⁶ Community appealed the decision, alleging that the foreclosure sale should be set aside because Draper had breached his fiduciary duties as trustee and because Draper and Crump, the

1. 721 S.W.2d 72 (Mo. Ct. App. 1986).

2. *Id.* at 74. Also named as defendants were Community's owners, Ron and Karen Eisenbeis, and Paul Harter, all of whom personally guaranteed the Boatmen's Bank note. *Id.* The claims against the guarantors will not be analyzed in this Article. The trial court held against Ron and Karen Eisenbeis on their guaranties of the loan but held for Harter on his guaranty. The appellate court affirmed the trial court's ruling on the liability of the Eisenbeis's but reversed on the issue of Harter's liability. *Id.* For the court's reasoning on the claim against Harter, see *id.* at 78-80.

3. *Id.* at 75.

4. *Id.*

5. *Id.* at 74.

6. *Id.*

purchaser at the sale, had acted in concert in chilling the bidding at the sale.⁷ The appellate court affirmed the decision of the trial court.⁸

A foreclosure sale in Missouri may be conducted by one of two methods—by judicial foreclosure⁹ or by power of sale foreclosure.¹⁰ In both types of foreclosure, the same purposes are achieved.¹¹ All interests that are junior to the mortgage being foreclosed are terminated, and the purchaser at the foreclosure sale obtains the same title that the mortgagor had at the time the foreclosed mortgage was executed.¹²

The power of sale method is used more often than the judicial method because it saves time and money.¹³ Two types of security devices with power of sale are used in Missouri real estate transactions.¹⁴ The most common method is the deed of trust with power of sale in the trustee.¹⁵ The less frequently used method is a mortgage giving the mortgagee the power of sale.¹⁶

Although there are advantages in using the power of sale foreclosure, there is one major disadvantage to its use. Titles obtained by purchasers in a power of sale foreclosure are less stable than those obtained in a judicial sale.¹⁷ Reasons that have been cited for this proposition center primarily around the fact that since the court has not supervised the foreclosure sale through an adversarial proceeding, there is a greater chance of something being amiss.¹⁸

Therein lies the problem. Since there is no court supervision of the foreclosure sale, temptation may exist to conduct the sale in a manner favoring one of the parties. It may be especially tempting for the mortgagee to influ-

7. *Id.* at 76.

8. *Id.* at 74.

9. See MO. REV. STAT. § 443.190 (1986).

10. See *id.* §§ 443.290, 443.410.

11. See G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 7.19, at 536 (2d ed. 1985).

12. *Id.*

13. *Id.*

14. See Dingus, *Mortgages — Redemption After Foreclosure Sale in Missouri*, 25 MO. L. REV. 261, 261 (1960).

15. *Id.*

16. *Id.*

17. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.19, at 537.

18. Real estate scholars Grant Nelson and Dale Whitman suggest the following reasons for the greater stability of title arising from judicial foreclosure:

First, the court supervision involved in judicial foreclosure will prevent many defects from arising. Second, because judicial foreclosure is an adversary proceeding, the presence of other parties who will bring possible defects to the court's attention constitutes added protection against a faulty end product. Finally, the concept of judicial finality provides substantial insulation against subsequent collateral attack even on technically defective judicial foreclosure proceedings. None of these protections are inherent in power of sale foreclosure.

G. NELSON & D. WHITMAN, *supra* note 11, § 7.19, at 537.

ence the sale since the person authorized to conduct the sale, the trustee, is generally chosen by the mortgagee.¹⁹ Thus it has been said that courts will scrutinize foreclosure proceedings held without court order²⁰ and will watch them with jealous solicitude.²¹

To help alleviate problems in the power of sale foreclosure, safeguards are built into the system. One of these safeguards is the holding of the trustee to the status of a fiduciary. It has been consistently held by the courts that the trustee is a fiduciary to both the mortgagee and the mortgagor,²² and as such, must exercise the utmost good faith²³ and impartiality²⁴ in performing his duties. As agent of both parties,²⁵ he has an equal duty of fairness to both.²⁶ "Neither the law nor the parties intend that the trustee shall be a nose of wax,

19. See S. TODD, MISSOURI FORECLOSURES OF DEEDS OF TRUSTS § 2-3 (1983).

20. See, e.g., *Farris v. Hendrichs*, 413 S.W.2d 185, 189 (Mo. 1967); *West v. Axtell*, 322 Mo. 401, 414, 17 S.W.2d 328, 334 (1929); *Stine v. Wilkson*, 10 Mo. 54, 65 (1846).

21. See *Stoffel v. Schroeder*, 62 Mo. 147, 149 (1876).

22. See, e.g., *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974) (en banc); *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959); *Smith v. Haley*, 314 S.W.2d 909, 913 (Mo. 1958); see also *Collins v. Gaskill*, 359 Mo. 171, 221 S.W.2d 181 (1949); *Fried v. Marburger*, 353 Mo. 1146, 186 S.W.2d 584 (1945); *Vannoy v. Duvall Trust Co.*, 29 S.W.2d 692 (Mo. 1930); *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929); *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (1937).

23. See, e.g., *Stone v. Stone*, 176 S.W.2d 464, 467 (Mo. 1944); *Hurst Automatic Switch & Signal Co. v. Trust Co.*, 216 S.W. 954, 958 (Mo. 1919); see also *Long v. Long*, 79 Mo. 644 (1883); *Chesley v. Chesley*, 49 Mo. 540 (1872).

24. See, e.g., *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974) (en banc); *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959); see *Ewing v. McIntosh*, 359 Mo. 625, 222 S.W.2d 738 (1949); *Wooldridge v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945); *Fried v. Marburger*, 353 Mo. 1146, 186 S.W.2d 584 (1945); *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929); *Hurst Automatic Switch & Signal Co. v. Trust Co.*, 216 S.W. 954 (Mo. 1919); *Hanson v. Neal*, 215 Mo. 256, 114 S.W. 1073 (1908); *Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, 196 Mo. 358, 93 S.W. 1111 (1906); *Long v. Long*, 79 Mo. 644 (1883); *Goode v. Comfort*, 39 Mo. 313 (1866); *Stine v. Wilkson*, 10 Mo. 54 (1846); *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (1937).

25. See *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959); see also *Ewing v. McIntosh*, 359 Mo. 625, 222 S.W.2d 738 (1949); *Stone v. Hammons*, 347 Mo. 129, 146 S.W.2d 606 (1940); *Vannoy v. Duvall Trust Co.*, 29 S.W.2d 692 (Mo. 1930); *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929); *Krug v. Bremer*, 316 Mo. 891, 292 S.W. 702 (1927); *Hanson v. Neal*, 215 Mo. 256, 114 S.W. 1073 (1908); *Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, 196 Mo. 358, 93 S.W. 1111 (1906); *Goode v. Comfort*, 39 Mo. 313 (1866).

26. See, e.g., *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974) (en banc); *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1979); see *Ewing v. McIntosh*, 359 Mo. 625, 222 S.W.2d 738 (1949); *Wooldridge v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945); *Fried v. Marburger*, 353 Mo. 1146, 186 S.W.2d 584 (1945); *Stone v. Hammons*, 347 Mo. 129, 146 S.W.2d 606 (1940); *Vannoy v. Duvall Trust Co.*, 29 S.W.2d 692 (Mo. 1930); *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929); *Krug v. Bremer*, 316 Mo. 891, 292 S.W. 702 (1927); *Vail v. Jacobs*, 62 Mo. 130 (1876); *Goode v. Comfort*, 39 Mo. 313 (1866); *Stine v. Wilkson*, 10 Mo. 54 (1846).

a mere figure-head, in the hands of the creditor or of the auctioneer. He is placed in a position to act fairly by all interested"²⁷

The trustee is "entrusted with the important function of transferring one man's property to another, and therefore both reason and justice will exact of [him] the most scrupulous fidelity."²⁸ The mortgagor has the right to expect the sale to be honestly conducted so that the sale will yield the best possible price to be applied to the note securing the deed of trust.²⁹ If the trustee acts unfairly, and there is injury because of this conduct, the trustee has breached his fiduciary duties even if his conduct is unintentional.³⁰

The other safeguard built into the system is that if the trustee has failed to conduct the sale in accordance with his fiduciary duties, the mortgagor may appeal to the court of equity to have the sale set aside.³¹ Where it can be shown that the trustee through fraud,³² unfair dealing,³³ or mistake³⁴ has inhibited the sale proceeding, the court will set aside the sale. "Upon very slight proof of fraud, or unfair conduct, or any departure from the terms of the power, [the sale] will be set aside."³⁵ Even if there is not substantial evidence of actual fraud on the part of the trustee, an unfair sale will be set aside and

27. *Vail v. Jacobs*, 62 Mo. 130, 133 (1876).

28. *Goode v. Comfort*, 39 Mo. 313, 325 (1866).

29. *Dwyer v. Rohan*, 99 Mo. App. 120, 129, 73 S.W. 384, 387 (1903); *see Chesley v. Chesley*, 49 Mo. 540, 542 (1872).

30. *See Krug v. Bremer*, 316 Mo. 891, 900, 292 S.W. 702, 705 (1927).

31. *See, e.g., Spires v. Edgar*, 513 S.W.2d 372 (Mo. 1974) (en banc); *Farris v. Hendrichs*, 413 S.W.2d 185 (Mo. 1967); *Edwards v. Smith*, 322 S.W.2d 770 (Mo. 1959); *Jackson v. Klein*, 320 S.W.2d 553 (Mo. 1959); *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Peterson v. Kansas City Life Ins. Co.*, 339 Mo. 770, 98 S.W.2d 700 (1936); *Stine v. Wilkson*, 10 Mo. 54 (1846); *Gempp v. Teiber*, 173 S.W.2d 651 (Mo. Ct. App. 1943).

A void sale means there has been no sale and legal title has never passed to the purchaser. *S. TODD, supra* note 19, § 4-14. It may be set aside by the mortgagor at any time. *Id.* Most defects, however, render the sale merely voidable. *Id.* The purchaser in a voidable sale receives only legal title with the rights of redemption remaining in the mortgagor or his assignee. *G. NELSON & D. WHITMAN, supra* note 11, § 7.20, at 538. If there has not been a bona fide purchaser in a voidable sale, the court may set aside the sale. *S. TODD, supra* note 19, § 4-17. However, if there has been a bona fide purchaser, the mortgagor's remedy is merely damages for the defective foreclosure. *Id.* § 2-7. This Note will be concerned exclusively with voidable sales where there have not been bona fide purchasers, *i.e.*, those sales which *may* be set aside by the courts.

32. *See, e.g., Masonic Home of Missouri v. Windsor*, 338 Mo. 877, 92 S.W.2d 713 (1936); *Hewitt v. Price*, 204 Mo. 31, 102 S.W. 647 (1907); *Whelan v. Reilly*, 61 Mo. 565 (1876); *Clarkson v. Creely*, 35 Mo. 95 (1864).

33. *See, e.g., Smith v. Haley*, 314 S.W.2d 909 (Mo. 1958); *Ewing v. McIntosh*, 359 Mo. 625, 222 S.W.2d 738 (1949); *Stone v. Hammons*, 347 Mo. 129, 146 S.W.2d 606 (1940); *Vannoy v. Duvall Trust Co.*, 29 S.W.2d 692 (Mo. 1939); *Whelan v. Reilly*, 61 Mo. 565 (1876); *Goode v. Comfort*, 39 Mo. 313 (1866); *Clarkson v. Creely*, 35 Mo. 95 (1864).

34. *See, e.g., West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929).

35. *Polliham v. Reveley*, 181 Mo. 622, 634, 81 S.W. 182, 185 (1904).

the deed of trust reinstated if one of the parties thereto has been injured.³⁶ If there have been several irregularities in the foreclosure proceeding, there is more likelihood that the court will set aside the sale.³⁷

Courts of equity have always watched [the trustees'] proceedings with a jealous and scrutinizing eye; and where it is clearly shown that they have abused their trust, or combined with one party to the detriment of the other, relief will be granted. Not that a sale made by them will be set aside on slight and frivolous grounds; but where it appears that substantial injury has resulted from their action, where, in pursuance of their powers, they have failed or neglected to exercise a wise and sound discretion, equity will interfere. It is impossible in the very nature of things to lay down any precise rule applicable alike to all cases which may arise, but every case must be decided on the especial facts and circumstances which surround it and upon which it is founded.³⁸

In *Community's* action to set aside the sale, it alleged that Draper had breached his fiduciary duties in several respects.³⁹ He had bid for the second mortgagee at the sale; he had acquired an interest in the outcome of the sale by financing Crump's purchase at the sale; he had not sold the property for cash; he had acquired an interest in the property after the sale; he had acted in concert with the purchaser in chilling the bidding at the sale; and he had sold the property for inadequate consideration. Since the facts and circumstances surrounding a foreclosure sale determine its validity, each of *Community's* allegations will be analyzed separately by applying the facts of *Boatmen's* to the applicable law.

Community alleged that because Draper had bid on behalf of the second mortgagee at the foreclosure sale, he had breached his fiduciary duties.⁴⁰ On the day of the sale, an employee from Boatmen's Bank, holder of the second deed of trust on the property, telephoned Draper's wholly-owned Hillsboro Title Company to request that someone from that office place a bid at the sale on behalf of Boatmen's.⁴¹ A bid for Boatmen's was thereafter entered at the sale.⁴² There was no testimony at the trial regarding who actually entered the bid for Boatmen's, but Draper was the only representative from his title company who was present at the sale.⁴³ It is inferred that Draper actually did place the bid for Boatmen's.

The court relied on two cases⁴⁴ in ruling that there was nothing wrong with a trustee announcing bids of prospective purchasers who are not present

36. See *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929).

37. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 539.

38. *Goode v. Comfort*, 39 Mo. 313, 325 (1866).

39. *Boatmen's*, 721 S.W.2d at 76.

40. *Id.*

41. *Id.* at 75.

42. *Id.*

43. *Id.*

44. See *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622, 49 S.W. 500 (1899); *Allied Mortgage & Dev. Co. v. Pitts*, 272 N.C. 196, 158 S.E.2d 53 (1967).

at the sale.⁴⁵ The only Missouri case that addresses this issue held that a beneficiary in a trust deed may ask the trustee through letter to enter a bid for him at the foreclosure sale.⁴⁶ In the other case cited by the court, the North Carolina Supreme Court held that as long as the trustee was not acting as the note holder's agent, he could place a bid for the note holder at the sale.⁴⁷ There was no evidence that Draper was acting as an agent for Boatmen's Bank. His responsibility was to merely announce the bid that Boatmen's employee had asked his title company to enter. The court found nothing wrong with this procedure and dismissed Community's claim in this regard.⁴⁸

A more convincing allegation of fiduciary misconduct was that Draper had acquired an interest in the outcome of the sale by financing the purchase of the property.⁴⁹ On the day of the sale, Crump telephoned Draper and requested that Draper give him a "short-term" loan so that he could purchase at the foreclosure sale.⁵⁰ Draper agreed. After the foreclosure sale, Crump accompanied Draper to Draper's Hillsboro Title Company where the note was executed in the name of Crump's corporation, Krazo, Inc., to Draper's corporation, Mason Investments, Inc.⁵¹

The court held that the trustee's financing of the purchaser's loan did not constitute a breach of the trustee's fiduciary duties.⁵² Neither the court nor Community cited any authority for their respective positions on this issue. Nor did the court give any explanation as to why it ruled as it did.

Although there are no cases on point, it has been stated that the trustee should avoid placing himself in such a position that his interests are in conflict with the interests of the parties to whom he owes a fiduciary duty.⁵³ "He cannot use the subject of the trust, or his relation to it, for his own personal benefit, advantage, or gain."⁵⁴

In *Krug v. Bremer*,⁵⁵ the trustee cried the sale three times in one day, the first two times without giving the mortgagor/purchaser adequate time to obtain financing although the mortgagor had indicated that he could obtain it. After the third crying of the sale, a different purchaser was not required to

45. *Boatmen's*, 721 S.W.2d at 77.

46. *Springfield Engine & Thresher Co.*, 147 Mo. 622, 49 S.W. 500.

47. *Pitts*, 272 N.C. 196, 158 S.E.2d 53; *see also* *Elks v. Interstate Trustee Corp.*, 209 N.C. 832, 184 S.E. 826 (1936) (bid entered for mortgagee by corporate trustee's attorney after receiving telephone call from mortgagee requesting such bid to be entered held valid).

48. *Boatmen's*, 721 S.W.2d at 75.

49. *Id.* at 76.

50. *Id.* at 75.

51. *Id.*

52. *Id.* at 77.

53. *See* 59 C.J.S. *Mortgages* § 299, at 377 (1949); *see also* *Holman v. Ryon*, 56 F.2d 307, 310 (D.C. Cir. 1932).

54. 59 C.J.S. *Mortgages* § 299, at 377 (1949); *see also* *Hadley Bros.—Uhl Co. v. Scott*, 227 Mo. App. 354, 363, 53 S.W.2d 1070, 1074 (1932).

55. 316 Mo. 891, 292 S.W. 702 (1927).

give cash at that time. Instead, two days later the trustee negotiated a loan to the purchaser to finance the sale. The court held that the sale had been conducted unfairly.

We infer that he had a secret understanding, either before or during the cryings of the sale, with [the purchaser] to furnish funds to finance a sale to [him]. His undoubted interest was to obtain a commission for negotiating the loan. This information he failed to disclose to [the mortgagor/purchaser]. While one may choose the persons to whom he lends money, yet, where the lending of money to one party gives that party a material advantage over the other party, the act will be held partiality.⁵⁶

The *Boatmen's* court did not discuss whether Draper's opportunity to hold the note and to obtain interest payments therefrom made him partial to purchasers. Nor did the court discuss whether this situation would be to Draper's benefit, advantage, or gain. Surely those were considerations that warranted a closer analysis than that engaged in by the *Boatmen's* court.

Related to Draper's financing of Crump's purchase was the complaint that Draper had not sold the property at the sale "for cash."⁵⁷ Draper had announced prior to the sale that according to the terms of the deed of trust and of the notice of the sale, the purchaser of the property would be required to pay ten percent of the purchase price at the time of the sale and the remaining amount in cash at Draper's title company office within one hour of the sale.⁵⁸

The reason for a mortgage or deed of trust's requirement of a cash bid at a foreclosure sale is to prevent the debtor from frustrating the sale by making an unreliable bid.⁵⁹ If a foreclosing mortgagee makes arrangements for a method of payment other than what is typically thought of as cash, the mortgagor cannot complain.⁶⁰ Thus, where the foreclosing mortgagee was willing to finance a third party's bid by taking a new note and deed of trust, the sale met the "for cash" requirement.⁶¹

It is within the discretion of the trustee to question whether a particular bidder has the means available to purchase at the sale.⁶² He may require the bidder to prove his ability to pay the amount as long as the bidder is not asked to reveal to any other bidder his assets or intentions as to future bidding.⁶³

When Crump purchased at the sale, he did not pay any cash at that

56. *Id.* at 901-02, 292 S.W. at 706.

57. *Boatmen's*, 721 S.W.2d at 76.

58. *Id.* at 75.

59. *See* Davis v. Hess, 103 Mo. 31, 37, 15 S.W. 324, 325 (1891); Roark v. Plaza Sav. Ass'n, 570 S.W.2d 825, 829 (Mo. Ct. App. 1978).

60. *See* S. TODD, MISSOURI FORECLOSURES OF DEEDS OF TRUSTS § 4-10 (Supp. 1986).

61. *See* Snyder v. Chicago, S.F. & C. Ry., 131 Mo. 568, 579, 33 S.W. 67, 70 (1895).

62. *See* Roark v. Plaza Sav. Ass'n, 570 S.W.2d 825, 830 (Mo. Ct. App. 1978).

63. *Id.*

time.⁶⁴ Instead, Crump and Draper went to Draper's title company office where Crump signed a note for the entire purchase price, followed by a Mason Investments check being deposited into the title company's escrow account.⁶⁵

A trustee should substantially comply with a provision that the sale is to be in cash.⁶⁶ However, it is not necessary that the terms be given a literal meaning.⁶⁷ Thus it has been held that where the purchaser was granted a few hours⁶⁸ or a few days⁶⁹ to pay the balance of the purchase money, the sale was "for cash."

Crump executed the note, and the funds were transferred from the investment company account to the title company account within one hour of sale.⁷⁰ Therefore, there was a short time span between the sale and the time of payment. In addition, Draper knew that because of his agreement to finance Crump's purchase, Crump had available to him any money needed to make his bid good. Both the trial court and the appellate court agreed that the sale had essentially been "for cash" and no fiduciary duty had been breached.⁷¹

The most serious allegation was that Draper, as trustee, acquired an interest in the property after the sale.⁷² Three or four days after the foreclosure sale, Draper agreed to tear up the note Crump had executed to Draper's investment company in return for a one-half interest in the property purchased by Crump at the foreclosure sale.⁷³ Draper through his company, Douglas Land Ltd., and Crump through his company, Krazo, Inc., borrowed money from United Missouri Bank of Jefferson County to pay off Krazo's note owed to Draper's Mason Investments, Inc.⁷⁴ Both Draper and Crump personally guaranteed the note given to United Missouri.⁷⁵ After the loan was renewed several times, Draper purchased the note and was holder of the note at the time of trial.⁷⁶ At all times after the foreclosure sale, the property was titled in Krazo's name, and Draper and Crump shared equally all income and expenses of the property.⁷⁷

64. *Boatmen's*, 721 S.W.2d at 75.

65. *Id.*

66. *See* Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co., 196 Mo. 358, 370, 93 S.W. 1111, 1114 (1906).

67. *See* 59 C.J.S. *Mortgages* § 576, at 972 (1949).

68. *See, e.g.,* Davis v. Hess, 103 Mo. 31, 15 S.W. 324 (1891) (thirty minutes).

69. *See, e.g.,* Long v. Manning, 455 S.W.2d 496 (Mo. 1970) (six days); Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co., 196 Mo. 358, 93 S.W. 1111 (1906) (fifteen days); Snyder v. Chicago, S.F. & C. Ry., 131 Mo. 568, 33 S.W. 67 (1895) (approximately two months).

70. *Boatmen's*, 721 S.W.2d at 77.

71. *Id.*

72. *Id.* at 76.

73. *Id.* at 75.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

Missouri law clearly prohibits a trustee from purchasing the property himself at his own foreclosure sale.⁷⁸ This doctrine appears to apply whether the trustee purchases directly or whether he purchases indirectly through a straw party.⁷⁹ The reason for not allowing the trustee to purchase "stands upon our great moral obligation, to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."⁸⁰ Therefore, even if the sale has been made in good faith,⁸¹ or results in no injury,⁸² it may still be set aside.

The disability is intended to lift the trustee above temptation; to induce him—to compel him, rather—as far as possible, instead of planning sales to benefit himself, instead of to that end arranging them either as to time or the circumstances surrounding them, instead of studying to conceal material facts, to look only to the interests of the person for whom he acts.⁸³

Actual fraud need not be shown when the trustee purchases at his own sale.⁸⁴

This rule is adhered to, not because there is, but because there may be, fraud. It is the duty of the trustee in making a sale to obtain the high dollar. It is the duty of a person representing a purchaser to acquire the land at as reasonable a price as possible. When the same person is both the seller and the buyer, there is a conflicting, antagonistic interest and duty which the law condemns. This practice . . . opens the door for fraud and oppression. At all times the trustee selling under the power of sale . . . should be and remain at arm's length to the buyer.⁸⁵

78. See, e.g., *Starr v. Mitchell*, 361 Mo. 908, 237 S.W.2d 123 (1951); *Wooldrige v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945); *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 342 Mo. 991, 119 S.W.2d 274 (1938); *Northcutt v. Fine*, 44 S.W.2d 125 (Mo. 1931); *Miles v. Popp*, 192 S.W. 424 (Mo. 1917); *Duncan v. Home Coop. Co.*, 221 Mo. 315, 120 S.W. 733 (1909); *Lass v. Sternberg*, 50 Mo. 124 (1872); *Thornton v. Irwin*, 43 Mo. 153 (1869); *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S.W. 384 (1903).

79. See, e.g., *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Giralain v. Howard*, 103 Mo. 40, 15 S.W. 383 (1891); *Thornton v. Irwin*, 43 Mo. 153 (1869); *Gemp v. Teiber*, 173 S.W.2d 651 (Mo. Ct. App. 1943); see also *Dingus*, *supra* note 14, at 281.

80. *Thornton v. Irwin*, 43 Mo. 153, 164 (1869) (quoting *Michaud v. Girod*, 45 U.S. (4 How.) 188 (1845)).

81. See, e.g., *Wooldridge v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945); *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Thornton v. Irwin*, 43 Mo. 153 (1869).

82. See, e.g., *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942).

83. *Thornton v. Irwin*, 43 Mo. 153, 165 (1869).

84. See, e.g., *Wooldridge v. Dittmeier*, 190 S.W.2d 926, 930 (Mo. 1945).

85. *Davis v. Doggett*, 212 N.C. 589, 593, 194 S.E. 288, 290 (1937). The Missouri Supreme Court, in *Thornton v. Irwin*, similarly stated:

However innocent the purchase may be in the given case, it is poisonous in its consequence. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud . . . and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que*

Such a purchase by the trustee renders the sale voidable.⁸⁶ However, the debtor may consent to the trustee's purchase prior to the sale or ratify the sale as long as the debtor has full knowledge of all the facts.⁸⁷ If the debtor has not consented either before or after the purchase by the trustee, "a trustee purchasing at his own sale, directly or indirectly, takes the property subject to redemption by the grantor in the deed of trust. The trust is not advanced."⁸⁸

One case upon which Community relied was *Miles v. Popp*,⁸⁹ in which the Missouri Supreme Court affirmed the trial court's ruling that the trustee had acquired a one-half interest in the property at the foreclosure sale. The trustee and the second mortgagee in *Miles* had an insurance, real estate, and investment partnership.⁹⁰ They testified at trial that by the time of the foreclosure sale, they had dissolved the real estate and investment portions of their partnership.⁹¹ The second mortgagee purchased at the sale.⁹² The court held that the trustee was a secret purchaser at the sale of a one-half interest in the land.⁹³ Therefore, he had breached his fiduciary duties and the sale was set aside.⁹⁴

Testimony of Draper and Crump in *Boatmen's* indicated that Crump, through Krazo, Inc., had often borrowed money from Draper's Mason Investments to finance real estate purchases.⁹⁵ The real estate acquired was titled in Krazo's name, with profits and losses shared equally by Draper and Crump.⁹⁶ In the past ten-year period they had been partners in such real estate ventures approximately twenty-five times.⁹⁷ Often Draper and Crump personally guaranteed the financing.⁹⁸

This information regarding Draper and Crump's past business dealings was significant to Community because it was trying to imply that the *Boat-*

trust to come, at his own option and without showing actual injury, and insist upon having the experiment of another sale.

Thornton v. Irwin, 43 Mo. 153, 163 (1869).

86. See, e.g., *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Giraldin v. Howard*, 103 Mo. 40, 15 S.W. 383 (1891); *Landrum v. Union Bank*, 63 Mo. 48 (1876). *But cf.* *Northcutt v. Fine*, 44 S.W.2d 125 (Mo. 1931) (sale was *void*); *Stark v. Love*, 128 Mo. App. 24, 106 S.W. 87 (1907) (sale was *void*).

87. See *Holman v. Ryon*, 56 F.2d 307, 310 (D.C. Cir. 1932); *Jackson v. Klein*, 320 S.W.2d 553, 556 (Mo. 1959); *Stark v. Love*, 128 Mo. App. 24, 106 S.W. 87 (1907); *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S.W. 384 (1903).

88. *Jodd v. Lee*, 256 Mo. 536, 540, 165 S.W. 991, 992 (1914).

89. 192 S.W. 424 (Mo. 1917).

90. *Id.* at 424.

91. *Id.*

92. *Id.* at 425.

93. *Id.* at 426.

94. *Id.*

95. *Boatmen's*, 721 S.W.2d at 76.

96. *Id.*

97. *Id.*

98. *Id.*

men's situation was a repeat of what the two partners had done in the past.⁹⁹ If this were true, Draper would have in effect purchased a one-half interest from himself, as did the trustee in *Miles*. However, the *Boatmen's* court made light of this evidence. It distinguished *Miles* from the situation in *Boatmen's* because the trial court in *Miles* had found that the trustee was a secret purchaser of a one-half interest in the land at the time of sale.¹⁰⁰ This was in contrast to the trial court's finding in *Boatmen's* that Draper had not agreed to take a one-half interest in the property until four days after the sale.¹⁰¹

The distinguishing of the two cases seems to be more conclusory than explanatory. What the court apparently did not consider was how difficult it would be for a mortgagor to prove an agreement made between the trustee and purchaser prior to the foreclosure sale. Generally, all information regarding any agreement they might have had would be in the hands of the trustee and the purchaser. Unless there were a written agreement produced or either of them testified to such an agreement, proving the agreement would be next to impossible. The mortgagor would have to resort to implication by showing what the parties had done in the past. Showing past conduct of the parties in situations similar to the one at bar would be the only practical way in most cases for the mortgagor to show what was probably intended by the parties under the present circumstances.

The situation in *Boatmen's* was very similar to what Draper and Crump had done many times previously. Draper had often financed real estate purchases by Crump. They had purchased land together as partners twenty-five times in the past ten years, sharing profits and losses equally. The title to the land was always in Krazo, Inc. They often personally guaranteed the notes they used to finance the acquisitions. Surely it can be argued that this evidence should carry as much or more weight than any denials by Crump and Draper to the agreement. Taking into consideration the experience and expertise Draper and Crump had in the real estate business, it cannot be expected that any agreement for Draper to obtain an interest in the property would be blatantly exposed for all to see. In fact, due to the past relationship of the parties, an implied agreement could be inferred. If this were a contract action where there was no express contract, a contract could be implied by determining the intent of the parties through the words and actions of the parties and the surrounding circumstances.¹⁰² The agreement could be shown through "the ordinary course of dealing and the common understanding of men"¹⁰³

Another way of attacking Draper's having obtained an interest in the property is that even if there was no agreement prior to the sale, Draper still should not have purchased an interest in the foreclosure sale property after the

99. *Id.*

100. *Id.* at 77.

101. *Id.*

102. See *Follman Properties Co. v. Henty Constr. Co.*, 664 S.W.2d 248 (Mo. Ct. App. 1983); *Muegler v. Crosthwait*, 179 S.W.2d 761 (Mo. Ct. App. 1944).

103. *Follman*, 664 S.W.2d at 250.

sale. The law in Missouri is that the trustee may purchase the property subsequent to the foreclosure sale if there has been no evidence of an unfair foreclosure.¹⁰⁴ However, courts view a repurchase by the trustee "with a suspicious eye and will jealously scrutinize the transaction."¹⁰⁵ Whether the courts will hold that the repurchase by the trustee renders the foreclosure sale voidable depends upon the circumstances of the case.¹⁰⁶

In *Jodd v. Lee*,¹⁰⁷ the court upheld a repurchase of the foreclosure property by the trustee four years after the foreclosure sale. The court determined that there was no evidence that the foreclosure sale had been unfair, and thus no reason why the trustee should be forever barred from owning the property.¹⁰⁸

However, in *Smith v. Haley*,¹⁰⁹ a repurchase by the trustee thirty minutes after the foreclosure sale was held to warrant setting aside the sale. The Missouri Supreme Court in *Smith* stated that the purchase thirty minutes after the sale "exact[ed] greater fidelity on [the trustee's] part as a fiduciary than a transaction involving strangers alone whenever this harsh method of depriving a debtor of his property is to be upheld."¹¹⁰ Other evidence of unfairness in the sale, the *Smith* court reasoned,¹¹¹ was such that it "stamped the trustee's repurchase as accomplishing by indirection ('as the fox runs') what the law prohibits him from doing directly ('as the bee flies') without the consent of the debtor."¹¹²

The *Boatmen's* court distinguished *Smith* from the case at bar. The court said that the *Smith* court had found other irregularities in the foreclosure sale which rendered the sale unfair.¹¹³ The trial court in *Boatmen's*, however, had found that Draper had not used his fiduciary powers to facilitate his acquisition of an interest in the property and had not breached his fiduciary duties.¹¹⁴ Therefore, the court reasoned, the repurchase by him was valid.¹¹⁵

Related to the assumption that Draper and Crump had planned prior to the sale to be partners in the ownership of the foreclosure property was the allegation that Crump and Draper had conspired and, in effect, chilled the bidding at the foreclosure sale.¹¹⁶ The allegation stems from a statement Crump made to Ron Eisenbeis on the morning of the foreclosure sale. Crump

104. See *Smith v. Haley*, 314 S.W.2d 909 (Mo. 1958); *Mueller v. Becker*, 263 Mo. 165, 172 S.W. 322 (1914); *Jodd v. Lee*, 256 Mo. 536, 165 S.W. 991 (1914).

105. *Haley*, 314 S.W.2d at 914.

106. See *Thornton v. Irwin*, 43 Mo. 153, 165 (1869).

107. 256 Mo. 536, 165 S.W. 991 (1914).

108. *Id.* at 540, 165 S.W. at 992.

109. 314 S.W.2d 909 (Mo. 1958).

110. *Id.* at 914.

111. See *id.* at 913-14.

112. *Id.* at 914.

113. *Boatmen's*, 721 S.W.2d at 77.

114. *Id.*

115. *Id.*

116. *Id.* at 76.

had gone to Community Interiors to inspect the property and informed Eisenbeis that he intended to bid at the sale.¹¹⁷ Crump asked how much money was owed on the property and Eisenbeis said he owed about \$142,000.¹¹⁸ Crump then made the statement that there "should be no problem bidding that much to cover that amount with some left over."¹¹⁹ Eisenbeis told Crump that he would not bid at the sale.¹²⁰

Later that day, Paul Harter, a friend of Ron Eisenbeis, offered to help Eisenbeis obtain financing to enable him to bid at the sale.¹²¹ Eisenbeis refused the assistance because he said Crump was going to bid enough to cover the debt.¹²² Harter told Eisenbeis that he did not believe that Crump would pay any more than was necessary to purchase at the sale.¹²³ Three bids were entered at the sale: \$76,000 by Ozark, the first mortgagee; \$93,000 by Boatmen's; and \$93,050 by Crump.¹²⁴ Crump's bid, therefore, was almost \$50,000 less than the amount he had indicated to Eisenbeis.

The trial court held that Eisenbeis should have known that Crump would not bid any more than was necessary and pointed out that Harter had known not to rely on Crump's statement.¹²⁵ The appellate court quoted the trial court's reasoning:

A reasonable person would not believe that anyone would bid more than was necessary to be the highest and last bidder at a foreclosure sale, and a reasonable person would not rely on a representation that a person would bid more than was necessary to be the highest and last bidder at a foreclosure sale.¹²⁶

The court did not cite any authority in its analysis of the chilled bidding allegation.

"Chilling a sale, generally speaking, is any combination or conspiracy among bidders or others to suppress fair competition at such sale for the purpose of acquiring the property at less than its fair value."¹²⁷ Chilled bidding is of two types.¹²⁸ One type concerns an abuse of discretion by the trustee or mortgagee which results in suppressed bidding.¹²⁹ The second type of chilled bidding involves either efforts by the mortgagee or trustee to suppress bidding, or collusion between the mortgagee or trustee with the purchaser to suppress

117. *Id.* at 75.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 78.

126. *Id.*

127. *Vette v. Hackman*, 292 Mo. 138, 148, 237 S.W. 802, 805 (1922).

128. *See G. NELSON & D. WHITMAN, supra* note 11, § 7.21, at 546.

129. *Id.*; *see also Dingus, supra* note 14, at 275.

bidding.¹³⁰ Community alleged that Draper and Crump engaged in conduct of the latter type.

Evidence normally required to show suppressed bidding is an inadequate sale price.¹³¹ In *Boatmen's*, Crump purchased at the sale for \$93,050. The market value of the property had been estimated around \$300,000 to \$400,000 at the time of the sale.¹³² Although there may be other reasons for the low sale price, it has been suggested that in chilled bidding situations, "public policy, even in the absence of clearly established injury, dictates a presumption in favor of setting aside the sale as a deterrent to such intentional or collusive behavior."¹³³

It has been said that bidding encourages others to bid.¹³⁴ If this is true, certainly Crump's statement had the effect of chilling the bids and contributing to the inadequate sale price. Eisenbeis, who testified that he could have gotten financing through Harter's efforts, chose not to bid at the sale in reliance on Crump's statement. Had Eisenbeis bid more than \$93,050 at the sale, Crump would have had no choice but to bid a higher amount if he wanted to purchase the property. Therefore, whether Eisenbeis chose not to bid at the sale because of Crump's statement or whether he chose not to bid for another reason was an important issue for the court to resolve.

The *Boatmen's* court made two assumptions in its analysis: "that a reasonable person would not believe . . .," and "that a reasonable person would not rely . . ." on such a statement. Implicit in this analysis is the court's belief that the mortgagor is to be held to the standard of a reasonable person. Yet, Missouri courts have indicated that the irregularity which causes the chilled bidding must create uncertainty in the minds of the bidders.¹³⁵ This seems to indicate a subjective uncertainty, not an objective reasonable person test. Certainly if the facts and circumstances surrounding a foreclosure sale are to be analyzed in determining a sale's validity,¹³⁶ then holding the mortgagor to a reasonable person standard results in an elimination of some of the facts necessary in the determination of what really happened.

Any statements or representations as to the property or state of the title, or other circumstances which have a tendency to chill bidders or *mislead or confuse* them, or to discourage competition or depress the price of the property, resulting in its sale for less than it would have brought at an auction fairly conducted, will be cause for setting aside the sale.¹³⁷

130. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 548; see also Dingus, *supra* note 14, at 274.

131. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 548.

132. See *infra* notes 146-50 and accompanying text.

133. G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 548.

134. See *Vannoy v. Duvall Trust Co.*, 29 S.W.2d 692, 695 (Mo. 1930).

135. See S. TODD, *supra* note 19, § 4-10.

136. See *supra* note 38 and accompanying text.

137. *Stone v. Hammons*, 347 Mo. 129, 132, 146 S.W.2d 606, 608 (1940) (quoting 42 C.J.S. *Mortgages* § 1875 (1949)) (emphasis added).

The Missouri Supreme Court was definitely not using an objective standard in *Miles v. Popp*.¹³⁸ The second mortgagee had informed a prospective bidder several times before the foreclosure sale that he intended to make the sale bring enough to cover both the first and second notes (a total of \$1450 plus interest).¹³⁹ In holding that the trustee and second mortgagee had conspired to prevent competition, one of the items the court pointed out was that the prospective bidder attended the sale but did not enter a bid. "He evidently saw [the second mortgagee] standing there, and thought, 'It's no use.'"¹⁴⁰ The court did not analyze whether the prospective bidder should have believed or should have relied on the statement. It was inferred by his actions that he had believed the statement and relied upon it.

Another issue arises concerning the *Boatmen's* court's use of the objective standard. If the mortgagor is held to the reasonable person test, does that eliminate all information regarding his sophistication in real estate matters? And if so, does this mean the sophistication of the trustee and the other parties involved in the foreclosure action is irrelevant? Surely the sophistication of Draper and Crump should be considered. Draper was a trustee, owner of a title company, owner of an investment company, and owner of a land company.¹⁴¹ Crump was a real estate broker who often invested in real estate transactions.¹⁴² During the past ten-year period, Draper and Crump had been partners in twenty-five real estate ventures.¹⁴³ Conversely, there was no evidence that Ron Eisenbeis had any experience or knowledge in real estate other than being the owner of Community Interiors. There was no indication that he was well-versed in the procedures of foreclosure sales or that he knew what bids individual parties logically should make.

To follow the *Boatmen's* court's analysis to its logical conclusion, if it was unreasonable for the mortgagor to believe or rely on such a statement, was it not equally unreasonable for a prospective purchaser to make such a statement? And if sophistication in the field is to be considered, doesn't the statement become all the more unreasonable when one considers the extensive background Crump had in real estate matters? If it was an unreasonable statement, the relevant question then becomes what his purpose was in making it. The court found that such a statement had been made although Crump denied making it.¹⁴⁴ It is interesting to note here that Crump, who bid only

138. 192 S.W. 424 (Mo. 1917).

139. *Id.* at 425.

140. *Id.* at 426; see also *Sullivan v. Federal Farm Mortgage Corp.*, 62 Ga. App. 402, 8 S.E.2d 126 (1940) (conduct of mortgagee in circulating report that mortgagee would buy mortgagor's property for at least the amount of the debt, then purchasing for a much smaller amount than the debt, where mortgagor believed and relied and therefore did not attend the sale, rendered sale invalid and fraudulent).

141. *Boatmen's*, 721 S.W.2d at 75-76.

142. *Id.*

143. *Id.* at 76.

144. Although the court did not discuss Crump's denial in making the statement, implicit in the court's reasoning is that it believed the statement had been made; for if

\$50.00 more than Boatmen's Bank, the next highest bidder, was a member of the board of directors for Boatmen's at the time of the foreclosure sale.¹⁴⁵

Community also alleged that the property was sold for "grossly inadequate consideration."¹⁴⁶ A real estate appraiser at the trial testified that the property was worth between \$310,000 and \$400,000 in 1979.¹⁴⁷ Eisenbeis testified that the property was worth \$300,000 at the time of the sale in September, 1981.¹⁴⁸ There was also testimony at trial that land values were beginning to fall in the spring of 1980 and that interest rates were around twenty percent at the time of the sale.¹⁴⁹ Crump purchased the property for \$93,050,¹⁵⁰ which represented a sales price of one-third to one-fourth of the property's reasonable value.

Missouri follows the doctrine that mere inadequacy of the sale price is not enough to justify setting aside the sale, unless there has been fraud, unfairness, or irregularity.¹⁵¹ Reasons courts have given for not setting aside sales because of mere inadequate consideration have been that selling property through a forced sale at the courthouse steps does not produce the best sales price, and setting aside the sale for inadequacy of price would frustrate power of sale foreclosures and render them worthless.¹⁵²

If the price is so gross and manifest as to "shock the conscience," it may be evidence of fraud or imposition.¹⁵³ "When the conscience is shocked, the ear of the chancellor opens."¹⁵⁴ However, Missouri courts will go to great lengths to keep from overturning a sale even if the price seems grossly inadequate.¹⁵⁵ Sales have been upheld when the price has been as little as one-twentieth of the value of the property.¹⁵⁶

Inadequacy of sales price has had most of its impact when there have been circumstances involved in the sale which indicate mistake, unfair dealing,

no statement had been made to Ron, no chilled bidding could have occurred. Instead, the court's analysis centered around Ron's unreasonableness in believing and relying on the statement. *Id.* at 78.

145. *Id.* at 75.

146. *Id.* at 76.

147. *Id.* at 77.

148. *Id.*

149. *Id.*

150. *Id.*

151. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 540; S. TODD, *supra* note 19, § 4-13; Dingus, *supra* note 14, at 262-64; Recent Decisions, *Bargains at Sales Under Power in Deeds of Trust*, 8 UMKC L. REV. 255 (1940); Annotation, *Sale Under Power in Mortgage or Trust Deed as Affected by Inadequacy of Price*, 8 A.L.R. 1001 (1920).

152. See S. TODD, *supra* note 19, § 4-13.

153. See Dingus, *supra* note 14, at 262-64.

154. *Hanson v. Neal*, 215 Mo. 256, 275, 114 S.W. 1073, 1079 (1908).

155. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 540; Dingus, *supra* note 14, at 263.

156. See Dingus, *supra* note 14, at 264.

or fraud.¹⁵⁷ Inadequacy of price is the most important factor in those cases where sales have been set aside. This is because without an inadequate price, there has been no prejudice and therefore no need to set aside the sale.¹⁵⁸ Few sales have been attacked unless there has been an allegation of inadequate consideration.¹⁵⁹

The *Boatmen's* court gave two reasons why the sales price did not warrant setting aside the sale. First, since the court had previously ruled that there had not been any violations of the trustee's fiduciary duties at the sale, an inadequate price alone did not warrant setting aside the sale.¹⁶⁰ Second, the selling price was not so "grossly inadequate" as to justify the court's overturning the sale on that fact alone.¹⁶¹

If the decision as to whether or not a foreclosure sale should be overturned depends on the facts and circumstances of the case,¹⁶² it is important for the court to analyze the situation carefully. After all, the trustee's fiduciary role¹⁶³ requires a standard of him that should not be taken lightly.

The safeguards built into the power of sale foreclosure system have been established to protect the parties from unfair conduct at the sale.¹⁶⁴ However, a mortgagor could find himself in the position of knowing something was wrong with the sale but not being able to produce the kind of evidence that the *Boatmen's* court seems to be requiring. The trustee is in the position of knowing how the particular mortgagor's foreclosure sale was conducted. The mortgagor whose property was taken, however, has to try to obtain that information from the very person he is trying to use it against. This handicap is especially relevant in *Boatmen's* because the trustee was involved in so many aspects of the sale.

Draper was the trustee for the first mortgagee; he bid at the sale for the second mortgagee; he provided the financing for his long-time business associate's purchase; he obtained a one-half interest in the foreclosed property four days after the sale; he and the purchaser had engaged in similar real estate transactions approximately twenty-five times before; his business associate had made a statement to the mortgagor on the day of the sale that arguably may have convinced the mortgagor not to bid; the property was sold to his business associate for one-third to one-fourth of its reasonable value; his business associate who purchased at the sale was currently on the board of directors for the second mortgagee. Yet the court held that no fiduciary duties had been breached.

157. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 540; Dingus, *supra* note 14, at 265-66.

158. See G. NELSON & D. WHITMAN, *supra* note 11, § 7.21, at 540.

159. See Annotation, *supra* note 151, at 1007.

160. *Boatmen's*, 721 S.W.2d at 78.

161. *Id.*

162. See *supra* note 38 and accompanying text.

163. See *supra* notes 22-30 and accompanying text.

164. See *supra* notes 22-38 and accompanying text.

Not being privy to much of the information needed to prove the trustee's breach may force the mortgagor to prove his case by means of implication as Community resorted to doing.¹⁶⁵ If the court disregards this type of argument, the end result will be that the more knowledgeable trustee will be able to engage in unfair conduct that the mortgagor will have difficulty proving. When one considers the price a mortgagor pays by not being able to set aside the sale even though it may have been conducted unfairly, the courts of equity begin not to seem so equitable.

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165. *See supra* notes 95-103 and accompanying text.