

Servicers routinely execute documents on behalf of investors needed to complete the foreclosure process, such as assignments and substitutions of trustee. However, Mississippi had long adhered to the rule that substituting a trustee is a personal power that may not be delegated unless specifically authorized by the deed of trust [*Webb v. Biles*, 6 So. 2d 117 (Miss. 1942)].

Unfortunately, the vast majority of form deeds of trust have failed to allow appointments of substitute trustee by representatives, such as attorneys-in-fact. A foreclosure conducted by a trustee appointed by an unauthorized attorney-in-fact is void [*Allen v. Alliance Trust Company*, 84 Miss. 319, 36 So. 285 (1903)]. Consequently, substitutions of trustee were sent directly to the holder of the deed of trust for execution, a process that often added months to the foreclosure process.

The leading title insurers in Mississippi became increasingly alarmed as the number of claims resulting from invalid substitutions of trustee increased. Several of these companies, aligned by their membership in the Dixie Land Title Association, resolved to sponsor new legislation to permit representative capacity substitutions of trustee. As a vocal representative of the mortgage banking community, favoring liberalization of the substitution of trustee process, I was asked to draft an amendment to existing legislation to correct these shortcomings. Ultimately the following amendment to Miss. Code Ann. Section 89-1-63 was presented as House Bill 1006: “(3) The beneficiary or holder of any deed of trust, including his agents, employees, successors, assigns, attorneys-in-fact or other legal representatives, may appoint a trustee or substitute a trustee, with or without the permission of the mortgagor or mortgagors. The trustee or substitute trustee so appointed may be a natural person, partnership, corporation, limited liability company, professional association or any other legal entity.”

The bill passed both houses of the legislature and became effective after being signed by Governor Barbour on March 15. Not only are representative capacity substitutions permitted, but appointments of trustees *ab initio* are also allowed, helping to overcome the problem of a trustee inadvertently omitted from the deed of trust. This bill also resolves the concerns of some as to whether or not a trustee must be a natural person, as opposed to a corporation, limited liability company, or other legal entity.

Although this new law will greatly expedite and simplify the document execution process, it is not retroactive. Any substitutions of trustee executed under a power of attorney prior to March 15, 2007 (unless authorized by the deed of trust) will remain invalid, subject to a 10-year statute of limitations. Further, it remains necessary that the substitution of trustee be actually recorded or spread-at-large on the records prior to the first publication of the notice of sale (Miss. Code Ann. Section 89-5-45). Also, a copy of the power of attorney must be recorded on the land records prior to execution of the substitution of trustee by the attorney-in-fact. [Miss. Code Ann. Section 87-3-3; *Kountouris v. Varvaris*, 476 So.2d 599 (Miss. 1985)].