FACTS' "take" on the Mid South Bankruptcy hearing on June 23, 2015, at the US Bankruptcy Court in Raleigh, NC, Chief Judge Stephani W. Humrickhouse, Presiding.

Disclaimer: Your FACTS reporter is no lawyer, but has used numerous sources to clarify legal terms and citations exchanged between attorneys and Chief Judge Humrickhouse. These are cited, below, and provide sources for further reading.

Essentially, Mid South maintained that its "new plan" offered several improvements over its first plan, rejected by Judge Doub in Greenville, 2014 December. The first plan, proposed by Mid South, allowed them, as the debtor, to maintain their interest in, and keep the property. The new amended plan being proposed by Mid South, offers the property for sale at auction, giving outsiders, as well as the POA, an opportunity to purchase the amenity property. The first plan allowed the debtor to retain stock in the company; the new plan doesn't (but they can buy it back at auction). The first plan contained a question of feasibility since the plan was not fair and equitable [to the POA] because it contained no evidence to support, or guarantee, the viability of the business known as Mid South Golf ; the new plan removes any question of feasibility because liquidation requires no guarantee of business viability. Actually, even the new plan is not feasible unless the covenant (Exhibit E) is modified. The judge has reserved her opinion/ruling until she can determine if there is case law to support the Bankruptcy Court's authority to modify an established covenant on business real property. Like the first plan, the new plan seeks the removal of the liens, most importantly, Exhibit E and all obligation on the buyer/owner to maintain the property.

The attorney for the POA reminded the judge that the POA cannot buy property using dues; therefore, this was not a "fair and equitable" plan. It discriminates against the POA since the POA would, by necessity, be excluded from the bidding. Removing the protective covenants would eliminate Mid South's obligation to maintain its property – the ponds and drainage, for one, the neglect of which imperils the properties of the community if the community encounters another storm. It would remove Mid South's obligation to maintain its parking lots, its buildings, and its lands. It would strip the authority of the POA to protect the community and enter in to do what Mid South refused to do, and charge Mid South for the cost. In other words, it would strip FHPOA, Inc. of its rights. The POA maintains that because our covenants "run with the land," they cannot be set aside by a court. Mr. Shipman reminded the judge that not one bankruptcy court has ever changed any covenants.

Mr. Shipman went on to insist that the POA had the right to perpetual easement over and through Mid South property, that if Mid South continues to refuse to maintain, and when that refusal impacts the lives and safety of other property owners, the POA has the right to make those repairs and charge Mid South. Mid South has to obey the same rules that every other property owner has to obey. The judge

claimed that every property owner could sue Mid South, implying, perhaps, that our covenants weren't our only protection.

Mr. Shipman argued that Mid South LLC was never properly capitalized, that its members invested only money borrowed from others, that it bought the property with full knowledge of the restrictive covenants, but assumed it was a "turn around" operation, that their business was real-estate development, not golf, and that they never invested the time and effort to make it successful. He reminded the judge that property owners had been paying annual amenity fees to Mid South, and would have continued, if Mid South hadn't "poked the tiger" by demanding five times the amenity fee, retroactively, from the Timeshare owners. He told the judge that the other homeowners continued paying their amenities fees – until Mid South closed all the amenities, essentially ceasing operations. Mid South now wants to be free and clear of ANY obligation to maintain its property. Mid South, he argued, doesn't have "fee-simple" title to its land. Obligations to pay can be modified by the court, but covenants run with the land and cannot be modified by the court.

The judge stated that she couldn't strike the covenants because, in the FHPOA vs. Mid South Golf case, the State found no evidence for Mid South's claims (frustration of purpose, etc.), but believes if she can strike "deeds of trust" in a bankruptcy court, she can modify covenants. Mr. Shipman, she said, cited *state* rulings; this is *federal* court. (Mr. Shipman insisted she is bound by the state's rulings. She said that she could not strike the covenants based on Rooker Feldman). Judge Humrickhouse stated that under 522F "bankruptcy courts have the power to set aside other rulings if they impede a settlement." She made reference to 1141(c) of the bankruptcy code: "Generally, liens pass through bankruptcy unaffected, but under certain circumstances, a property dealt with by a (Chapter 11) plan is free and clear of all claims and interests of creditors."
http://www.jonesday.com/files/Publication/5a66f92f-9fec-4e1d-b7be-82f10978dc91/Presentation/PublicationAttachment/bb3757f9-ef04-43a4-8278-32384c11b7b7/Section 1141(c) BRR September_October 2013.pdf

Mr. Shipman asked the judge to contemplate the far reaching effect of modifying the covenants. "If the rules can be used in this fashion, where does it stop? " He maintained that confirmation of a plan can't be used to strip the covenants. Only an adversarial petition (sort of a trial before a disinterested body) could do that. If it came to that, he said, the POA would seek to "pierce the corporate veil" (make the members of Mid South LLC personally financially responsible for the debts and obligations of its LLC.)

The Mid South attorney assured the judge that Mid South was not trying to build condos and such, but

wanted only to deal with the affirmative financial obligations, and didn't want anyone else doing its repairs. It wanted no restrictions on the use of the property, however.

At the conclusion, the judge invited members of the audience to ask questions or make statements, asking them to be brief because of the late hour. Several members did, generally pleading with her to honor the covenants that, they had been assured, guaranteed protection of their homes and investments (two with reservations about property owner participation in any reclamation plan) and to be fair and equitable to the property owners, as well. One asked whether, after putting the properties up at auction, Mid South members could form another LLC and purchase, this time without the bothersome liens and restrictions. The judge acknowledged this was possible, unless the agreement were carefully worded to prevent that.

Judge Humrickhouse ended the session saying that she needed to read Judge Doub's extensive notes to try to determine his opinion (Judge Doub died unexpectedly before he could render any decision.) She also wanted to study whether a plan could modify a restriction. She needs to discover whether 1141C which allows property to transfer "free and clear" *if the court believes is fair and equitable* pertains to covenants as well as liens. And, just what is "fair and equitable?"

She needed more time, she said, and complimented both lawyers on their professional abilities. She would stop the hearing, for now, and would reschedule when she has completed her research.

This will not be over quickly.

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References were made by members of the court to the following items in the bankruptcy code:

1. **1129(a), (b) "cram down"** (emphasis mine)

While acceptance of a Chapter 11 plan by each class of impaired claims or equity interests is required under Section 1129(a)(8) in order for the plan to be consensually confirmed under Section 1129(a), Section 1129(b)(1) provides that a plan that satisfies all of the other applicable provisions of Section 1129(a) may be confirmed despite the rejection of the plan by a class or classes.
In order for such a plan to be confirmed under Section 1129(b), the plan must meet two criteria: The plan (1) must not unfairly discriminate and (2) must be fair and equitable.

These tests only apply to a class as a whole and not to individual creditors. *Thus, the court need not*

consider whether the plan discriminates unfairly against a class or is not fair and equitable with respect to a class if such class accepts the plan, even if an individual creditor or interest holder within the class rejects the plan.
http://www.law360.com/articles/468678/understanding-the-rules-of-bankruptcy-cramdown

2. **Rule 363(f)** http://www.hollandhart.com/articles/sellingfreeandclear.p

3. The **Rooker-Feldman** doctrine holds that lower United State federal courts — i.e., federal courts other than the Supreme Court should not sit in direct review of state court decisions unless Congress has specifically authorized such relief. https://en.wikipedia.org/wiki/Rooker%E2%80%93Feldman_doctrine

4. **Rule 522(f)** http://phillipsandthomas.com/2014/09/23/avoiding-liens-in-bankruptcy-under-section-522f/