

IN THE SUPREME COURT OF OHIO  
CASE No.: \_\_\_\_\_

**07 - 0558**

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ON APPEAL FROM THE COURT OF APPEALS  
SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY, OHIO  
CASE No.: 04-MA-182

SHARON WILBORN, ET AL.,  
PLAINTIFFS-APPELLANTS,

v.

BANK ONE CORPORATION, ET AL.,  
DEFENDANTS-APPELLEES.

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**PLAINTIFFS-APPELLANTS' NOTICE OF APPEAL**

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**NOTICE OF APPEAL**

Plaintiffs-Appellants Sharon Wilborn, Todd R. Campbell, Traci Campbell, Delores Huff, Shirley Wright, William J. Wymer, Julie Wymer, Darin Distel, Amy Beth Distel, Bruce D. Beers, and Marianne A. van Gulijk hereby give notice of appeal to the Supreme Court of Ohio from the Opinion and Journal Entry of the Mahoning County Court of Appeals, Seventh Appellate District, entered in favor of the Defendants-Appellees in Court of Appeals Case No. 04-MA-182, on February 12, 2007.

This case is one of public or great general interest.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing *Plaintiffs-Appellants' Notice of Appeal* was served upon the following, by regular first class U.S. mail, postage prepaid, on this 29<sup>th</sup> day of March, 2007:

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**PLAINTIFFS-APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS  
A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves two important legal issues. First, may a residential mortgage provide that a borrower in default must pay the lender's attorney fees incurred in foreclosing the mortgage, and, second, may a residential mortgage provide that a borrower in default, whose mortgage has been made the subject of foreclosure proceedings, may only "reinstate" the mortgage and avoid foreclosure if he or she pays the lender's attorney fees incurred in initiating the foreclosure action. The Trial Court held that borrowers could be required to pay the lender's attorney fees as a condition for reinstating their mortgages, and the Court of Appeals agreed, but both lower courts failed to address the issue whether a lender could recover the attorney fees it incurred in foreclosing a mortgage. It is of public and great general interest that this Court determine that, under Ohio law, lenders may not require borrowers to pay their attorney fees.

Ohio, unfortunately, leads the nation in foreclosure rates, as documented by the investigative reporting conducted by the *Columbus Dispatch*:

[F]oreclosures have skyrocketed across Ohio. Mortgages go bad here more often than any other state.... A record number of houses are falling into foreclosure . . . . Lenders filed more than 5,900 foreclosure notices last year [2004] in Franklin County, and more than 59,060 statewide – both up sharply in recent years.... Of Ohio's home loans, 3.3 percent were in foreclosure in the first half of 2005 . . . . That is more than triple the U.S. average of 1 percent.

*Columbus Dispatch*, "Ohio's Disgrace: No. 1 In Home Foreclosures," September 18, 2005.

Most recently, on March 27, 2007, the *Columbus Dispatch* reported that the problem has not only not gone away, it has gotten worse, and is expected to deteriorate even further:

Overall, Ohio foreclosures increased 23.6 percent in 2006 . . . .

The state is no stranger to housing problems. Ohio has ranked No. 1 in the nation in foreclosures since 2004, according to the Mortgage Bankers Association. The state's foreclosure rate has

quintupled since 1995.... Consumer Credit Counseling saw a 112 percent increase in people with mortgage related problems in 2006.... And the number of homes falling to foreclosure appears to be going up. Foreclosures are “expected to grow faster in the next two years,” Gov. Ted Strickland said this month as he unveiled Ohio’s Foreclosure Prevention Task Force. “This problem demands a comprehensive response.”

*Columbus Dispatch*, “Home Losses Spread in Ohio,” March 27, 2007.

Foreclosures, of course, do not affect only the defaulting borrower – they also affect other homeowners:

The impact of Ohio’s high foreclosure rate doesn’t just hit those who lose their homes, either, said Mike Van Buskirk, president of the Ohio Bankers’ League.

“If you think this won’t affect you, you’re wrong,” he said.

High foreclosure rates lower home values, because the market becomes flooded with underpriced houses. That makes it harder for people who are selling their homes for other reasons to get top dollar.

Each foreclosure in a neighborhood lowers the property value of nearby homes by about 1 percent, according to the Center for Responsible Lending.

*Id.* As noted by Governor Ted Strickland, on March 7, 2007, in announcing the establishment of the “Foreclosure Prevention Task Force”:

“Foreclosures are not only a hardship on the families fighting to save their homes, but they can have a serious impact on our economy,” Strickland said. “Ohio’s foreclosure rate is not only high compared to other states, but it has gradually increased and is expected to grow faster in the next two years. This problem demands a comprehensive response.”

The *Columbus Dispatch* is not the only paper sounding the alarm. The *Dayton Daily News*, in an article entitled “Foreclosures Hitting Record Highs Across Miami Valley,” published on November 26, 2006, and the *Times Gazette*, in Hillsboro, in an article entitled “Foreclosures Rising In Highland County,” published on November 26, 2006, each documented and lamented

the rise in foreclosures in Ohio. In fact, the *Dayton Daily News* reported that, according to the Montgomery County Clerk of Courts, “mortgage foreclosures account for 48% of Montgomery County’s civil court caseload.” In Cleveland, *The Plain Dealer* reported, on March 22, 2007, in an article entitled “Congress Told of Cities Devastated by Lenders,” that, according to James Rokakis, Cuyahoga County Treasurer, “The number of mortgage foreclosures in Cuyahoga County soared from 3,500 in 1995 to 7,500 in 2000 to 13,000 in 2006, ‘with no end in sight.’” Similarly, *The Cincinnati Enquirer*, in an article entitled “Home Mortgage Foreclosures at All-Time High,” published on March 14, 2007, reported that “new foreclosures surged to record levels.”

According to the mortgage industry, it is in everyone’s best interests to make it possible for the borrower to avoid foreclosure. For example, *The Plain Dealer*, in its March 22, 2007 article (“Congress Told of Cities Devastated by Lenders”), quoted William E. Rinehart, vice president of Ocwen Financial Corp., as follows:

“In the vast majority of cases, finding a way to keep a customer in their home and continuing to pay their mortgage is the best economic proposition for the customer, the servicer and the investor.”

The *Enquirer*, in its March 14, 2007 article (“Home Mortgage Foreclosures at All-Time High”), referred to the following comments of Doug Duncan, the chief economist for the Mortgage Bankers Association:

Doug Duncan, the mortgage association’s chief economist, suggested borrowers having difficulties making payments contact their lenders as soon as possible to work together on the problem.

“It is in everyone’s interest to keep the homeowner in their homes paying their bills on time,” he said.

The problem with keeping a borrower who is in default in his or her home is that, once the borrower falls behind, the entire loan is “accelerated,” *i.e.*, the entire amount becomes due

and payable immediately, such that, to avoid foreclosure, the borrower has to come up with the money to pay off the entire loan. Given that the borrower has already defaulted on his or her monthly payments, he or she will not be able to pay off the entire loan. Accordingly, mortgage contracts contain a provision allowing the borrower to “reinstate” the mortgage and thereby avoid foreclosure, which simply means that, upon the borrower meeting certain conditions, the loan will be “decelerated” and the foreclosure action terminated.

The issue in this case is whether the borrower’s right to “reinstate,” in addition to being conditioned upon the payment of all overdue amounts, may also be conditioned upon the payment of the attorney fees incurred by the lender in initiating and pursuing the foreclosure, as is required by what the Court of Appeals described as a “typical reinstatement provision”:

If Borrower meets certain condition, Borrower shall have the right to have enforcement of this Security Instrument [, i.e., foreclosure proceeding,] discontinued . . . . These conditions are that Borrower: (a) pays Lender all sums which would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, **reasonable attorney fees**, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender’s interest in the property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require . . . . Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no **acceleration** had occurred.

Opinion of Court of Appeals, ¶ 5 (emphasis added).

It is important to note, then, that a “reinstatement” does not represent the termination of one mortgage and the institution of a new one – it merely operates to discontinue the lender’s attempt to terminate, i.e., foreclose, the existing mortgage. Further, the borrower’s right to “reinstate” only arises when the lender has initiated foreclosure proceedings, such that it necessarily relates to, arises out of, and is connected to, the lender’s attempts to foreclose the

mortgage. In this light, it can be seen that a reinstatement simply cannot be accurately described as a new and freely entered into agreement between the borrower and the lender – it is instead part and parcel of the borrower’s default on the mortgage and the lender’s efforts to foreclose the mortgage.

It is respectfully submitted that the issues presented in this case, whether a borrower whose mortgage has been foreclosed may be required to pay the attorney fees incurred by the lender in foreclosing the mortgage, and whether a borrower in default who is trying to keep his or her home, in addition to paying any overdue amounts and late charges, must also pay the attorney fees incurred by the lender in order to reinstate their mortgage, i.e., avoid foreclosure, are of great and general public interest. This Court should hold that lenders may not require borrowers to pay the attorney fees incurred in foreclosing the borrower’s mortgage, and that lenders may not require borrowers in default, who are already in dire financial straits, and who have already had difficulty making their payments on time, to pay the lender’s attorney fees, in addition to the overdue payments, in order to keep their home.

#### **STATEMENT OF THE CASE AND FACTS**

The trial court granted Defendants-Appellees Motions to Dismiss Plaintiffs-Appellants’ Complaint, finding that “[t]he obligation to pay attorney’s fees is a condition of reinstatement of the mortgage,” and that because “reinstatement is not required during foreclosure of the mortgage and the borrower has no obligation to pursue it. . . a provision in a mortgage requiring the payment of attorney’s fees as a condition of reinstatement is permissible under Ohio law.” *See* Judgment Entry, p. 3 (appended hereto). The Court of Appeals agreed, and, therefore, affirmed the trial court’s judgment. *See* Opinion (appended hereto). Neither court addressed the

issue whether a lender may recover from the borrower the attorney fees incurred in foreclosing the borrower's mortgage.

The facts of this case are straightforward. There are eleven Plaintiffs-Appellants, all of who have entered into mortgage contracts with one of the Defendant-Appellee Banks.<sup>1</sup> The mortgage contracts at issue include "reinstatement" provisions that set forth the terms upon which a borrower may reinstate a mortgage in default.<sup>2</sup> These provisions, as noted above, specifically require that, in addition to the amount necessary to cure the default, the borrower must also pay the attorney fees incurred by the lender in filing a foreclosure action.

It is not disputed that each of the Plaintiffs-Appellants fell behind on their mortgage payments, and that the respective Defendant-Appellee bank filed a foreclosure action to enforce the terms of the mortgage. After the foreclosure action was filed, and prior to the sheriff's sale of their property, each of the Plaintiffs-Appellants (except Sharon Wilborn, whose situation will be discussed separately), "reinstated" their mortgage by paying to Defendants-Appellees not only the amount by which they were in default, but also the attorney fees incurred by Defendants-Appellees in filing the foreclosure action.

The amounts of the fees charged for these reinstatements were far from insignificant. For example, the fees paid by the Campbells amounted to almost 40% of the entire sum that they had to pay for reinstatement. Similarly, Ms. Wright, in order to cure an arrearage of \$677.00, had to

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<sup>1</sup> Defendant-Appellee Lerner Sampson and Rothfuss is an Ohio law firm that was hired by some of the Defendant-Appellee Banks to file foreclosure actions and collect attorney fees as part of the amount due to reinstate a mortgage contract. Although neither the trial court nor the court of Appeals specifically indicated why the Complaint against it was dismissed, if those courts were correct that attorney fees may be recovered, then any allegations that the law firm acted improperly in collecting such fees would fail.

<sup>2</sup> It should be noted that Plaintiff-Appellant Sharon Wilborn does not involve a reinstatement provision. Ms Wilborn paid off the accelerated balance, **including attorney fees**, in order to avoid foreclosure. For this reason, Ms. Wilborn's situation will be discussed separately.

pay \$1,775.00 for "foreclosure fees and costs," an amount she was able to raise only by selling her car.

Plaintiff-Appellant Sharon Wilborn, on the other hand, entered into an open-end mortgage agreement with Defendant-Appellee Bank One, which provided as follows:

Mortgagor shall be liable to Mortgagee for all legal costs, including but not limited to reasonable **attorney fees** and costs and charges of any sale in any action to enforce any of its rights hereunder whether or not such action proceeds to judgment. Said costs shall be included in the indebtedness secured hereby and become a lien of the mortgaged premises.

*See Wilborn-Bank One Open End Mortgage Agreement (emphasis added).* Wilborn, like the other Plaintiffs-Appellants, defaulted upon her mortgage payments, and Defendant-Appellee Bank One filed a foreclosure action. Unlike the other Plaintiffs-Appellants, Wilborn, rather than seeking to reinstate the mortgage agreement, refinanced the debt with a different lender, and paid the full amount due and owing to Bank One on the mortgage. Bank One, however, pursuant to the above language, included in the payoff amount the attorney fees it incurred in filing the foreclosure action.

Thus, the issues before the Court are whether a provision that requires a borrower to pay the attorney fees incurred by a bank (1) in foreclosing a mortgage, and (2) as part of the amount necessary to reinstate the mortgage, is enforceable under Ohio law. The Plaintiffs-Appellants will demonstrate that under Ohio law such provisions are against public policy and unenforceable, such that this Court should reverse the judgment rendered in the lower courts and remand this case for further proceedings.

## ARGUMENT

### Proposition of Law No. 1:

**A provision in a residential mortgage to the effect that a borrower in default is liable for the attorney fees incurred by the lender in foreclosing the mortgage is against public policy and void. *Miller v. Kyle* (1911), 85 Ohio St. 186, followed. R.C. 1301.21, applied.**

This Court has long held that a “stipulation in a mortgage [requiring the borrower to pay the lender’s] attorney fee in [a] foreclosure action . . . is against public policy and void.” *Leavans v. Ohio National Bank*, (1893), 50 Ohio St. 591 (syllabus). In 1911, this Court applied this law to a commercial mortgage and found it to be “firmly established, and long and consistently maintained,” that “contracts for the payment of counsel fees upon default in payment of a debt will not be enforced,” and found the rule to be “well sustained” by the “obvious tendency of such contracts to encourage suits.” *Miller v. Kyle* (1911), 85 Ohio St. 186, 192. More recently, in *Worth v. Aetna Cas. & Surety Co.* (1987), 32 Ohio St. 3d 238, 258-59, this Court, in a unanimous decision, reaffirmed that rationale for disallowing the recovery of attorney fees—that such provisions are invariably adhesive, *i.e.*, are “not arrived at through free and understanding negotiation.” Ohio common law, therefore, as established by this Court, has long invalidated contractual provisions calling for the payment of attorney fees in the event of a default upon a contract of indebtedness, especially in the context of a residential mortgage.

The Defendants-Appellees nonetheless argued in the lower courts that this Court’s decision, just six weeks after its decision in *Worth*, in *Nottingdale Homeowners’ Assoc. Inc. v. Darby* (1987), 33 Ohio St. 3d 32, abrogated Ohio’s long-standing common law rule that contractual provisions requiring the payment of attorney fees in connection with a residential mortgage violate Ohio’s public policy. The decision in *Nottingdale*, however, was based upon the specific facts of that case, and its rationale has no application in the instant case. In

*Nottingdale*, this Court enforced an attorney fee provision contained in a condominium agreement providing for the recovery of attorney fees should the condominium association be forced to file suit against a member to recover unpaid assessments. Importantly, this Court went to great lengths to make clear that its decision was based upon the specific facts of that case, including the facts (1) that the provision was “freely agreed to,” (2) the fact that, because the amount owed by the condominium association member was small, it would be uneconomical to pursue the debt if the condominium association could not also recover its attorney fees, which would lead to an inequitable result. *See Nottingdale*, 33 Ohio St. 3d 32, 36-37.

In the instant case, on the other hand, no such considerations exist: the parties do not have equal bargaining power; the amount owed by the Plaintiffs-Appellants is more than the amount of attorney fees which would be incurred in foreclosing the mortgage; and, the Defendants-Appellees, unlike a condominium association, are not only engaged in the business of lending money—they are also engaged in the business of bringing suit when those loans are not repaid. Further, unlike the condominium association, the bank has all of the leverage it needs to compel its borrowers to repay their loans – otherwise, they will lose their homes!

It is for this reason that this Court expressly indicated that its holding in *Nottingdale* should not be interpreted to overrule any of its prior holdings invalidating attorney fee provisions, including, specifically, its holding in *Miller*, because, in cases like *Miller*, it simply cannot be said that a lender and a borrower have equal bargaining position:

Thus, *Miller* is **factually a far cry from the case now before us** which involves a specific contractual provision that was assented to in a non-commercial setting by competent parties with equal bargaining positions and under neither compulsion nor duress....

\* \* \*

A rule of law which prevents parties from agreeing to pay the other's attorney fees, **absent a statute or prior declaration of this court to the contrary**, n7 is outmoded, unjustified and paternalistic.

\* \* \*

7. A contract of adhesion, where the party with little or no bargaining power has no realistic choice as to terms, would likewise not be supportable.

*Nottingdale*, 33 Ohio St. 3d 32, 35 and 37, n. 7 (emphasis added).

In the instant litigation, each of the three situations set forth by this Court in *Nottingdale* in which attorney fee provisions would not be enforced exist: (1) there are prior decisions of the Court on point which have never been overruled (*Miller*); (2) the contracts at issue are standardized mortgage contracts propounded by major lending institutions on a take-it-or-leave-it basis to consumers – the very definition of an adhesion contract; and (3) as will be discussed below, the Ohio legislature, in 1999, twelve years after *Nottingdale* was decided, enacted R.C. § 1301.21, which only permits parties to “commercial...contract[s] of indebtedness” for amounts in excess of \$100,000 to include attorney fees provisions upon default, and which specifically disallows such provisions in contracts involving “indebtedness incurred for purposes that are primarily personal, family, or household.” *Id.*

Not surprisingly, then, almost every court which has considered the issue has determined that *Nottingdale* did not overrule or jettison the “firmly established and long and consistently maintained” prohibition described in the prior Ohio jurisprudence. *See, e.g., In re Petroff*, 2001 Bankr. LEXIS 1594 (6th Cir. Bankruptcy Appeal Panel) (post-*Nottingdale* decision stating that “[t]he rule applies specifically to mortgages”); *In re Landrum*, 267 B.R. at 582 (“Although *Miller* has encountered increasing scrutiny in recent years, this Court is unaware of any case law questioning the continuing validity of *Miller* within the context of a non-commercial promissory

note between parties of unequal bargaining power”). *See also The Colonel’s, Inc. v. Cincinnati Milacron Mktg. Co.*, 149 F. 3d 1182 (Table), 1998 WL 321061 at \*4 (6<sup>th</sup> Cir. 1998) (“While we agree that the rule of *Taylor and Miller* has been revisited by the Ohio Supreme Court, we do not agree that the rule has been eviscerated by these subsequent decisions”).

Any doubt as to Ohio’s public policy vis-à-vis attorney fees in residential mortgages is resolved by reference to the enactment of R.C. § 1301.21 in 2000, which, as noted above, makes clear that attorney fee clauses are only enforceable in commercial mortgages, not residential mortgages, and then only if the commercial mortgage exceeds \$100,000:

§ 1301.21. Enforcement of commitment to pay attorneys' fees in commercial contract of indebtedness

(A) As used in this section:

(1) "Contract of indebtedness" means a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, **other than indebtedness incurred for purposes that are primarily personal, family, or household.**

(2) "Commitment to pay attorneys' fees" means an obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness.

(3) "Maturity of the debt" includes maturity upon default or otherwise.

(B) If a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.

(C) A commitment to pay attorneys' fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into **exceeds one hundred thousand dollars.**

As held in *New Mkt. Acquisitions, Ltd. v. Powerhouse Gym* (D. Ohio 2001), 154 F. Supp. 2d 1213, 1224-27, this statute, which only allows attorney fee clauses in commercial mortgages in excess of \$100,000, supersedes any contrary prior case law:

The Court notes that . . . a recently enacted statute [R.C. 1301.21,] supersedes the holdings in all of these cases. On May 11, 2000, the Ohio General Assembly passed a bill concerning enforcement of commitments to pay attorneys' fees; this new bill is controlling in this case . . . .

The Court of Appeals in the instant case, however, held that this statute did not apply for the same incorrect reason that it held that this Court's holdings in *Miller* did not apply – that the reinstatement has nothing to do with the mortgage default. See ¶¶ 33-35.

In sum, the lower courts erred in allowing the Defendant-Appellee BankOhio to recover the attorney fees it incurred in seeking to foreclose the Plaintiff-Appellant Wilborn's mortgage.

**Proposition of Law No. 2:**

**A provision in a residential mortgage to the effect that a borrower in default whose mortgage has been made the subject of a foreclosure action may only reinstate the mortgage, and thereby avoid foreclosure, upon payment of the attorney fees incurred by the lender in initiating the foreclosure action, is against public policy and void. *Miller v. Kyle* (1911), 85 Ohio St. 186, construed and applied. R.C. 1301.21, construed and applied.**

As noted above, the other Plaintiffs-Appellants alleged that they were illegally required to pay the attorney fees incurred by the Defendants-Appellees in initiating the foreclosure actions in order to reinstate their mortgages, but the lower courts disagreed, and relied upon the holdings in two decisions, neither of which gave full force and effect to the prior holdings of this Court: *Washington Mut. Bank v. Mahaffey*, 2003-Ohio-4422, 154 Ohio App. 3d 44, and *Davidson v. Weltman, Weinberg & Reis* (S.D. Ohio 2003), 285 F. Supp. 2d 1093. The Court of Appeals in the instant case held that these two decisions represent “the evolution of Ohio common law” by this Court to expand the situations where attorney fee provisions are enforceable:

In this case, the evolution of Ohio common law in this area seems to support the trial court's conclusion [that the fee provisions at issue herein are valid].

Opinion of Court of Appeals, ¶ 31.

Each of these decisions, however, was based upon the incorrect assumption that the payment of attorney fees when a mortgage is “reinstated” is somehow a new transaction between the parties that is entirely separate and distinct from the mortgage, such that the holdings of this Court in cases like *Miller* simply did not apply, and the Court of Appeals (¶ 32) in the instant case agreed:

The payment of attorney fees is only a condition for reinstatement, not an obligation that arises in connection with the enforcement of the loan contract.

In fact, of course, as discussed above, the right to reinstate is a contractual right set forth in the mortgage itself, such that the default on the mortgage and the reinstatement thereof are inseparable. Moreover, the right to reinstate only arises in the context of a foreclosure action filed by the lender to enforce the mortgage. Thus, it defies common sense and reality to assert that the reinstatement is somehow unrelated to the borrower's default on the mortgage, and the lender's enforcement thereof.

*Mahaffey* and *Davidson* are also wrong in their formalistic assumption that a reinstatement is a freely entered-into independent act separate and apart from the mortgage foreclosure. In reality, of course, a reinstatement is offered on an adhesive basis – that is, on a take-it-or-leave-it basis – by the party with a grossly disparate bargaining position, namely, a bank threatening to deprive a person of his or her home when the person is in the most dire of economic straits. Thus, even, assuming, *arguendo*, that a “reinstatement” agreement is somehow completely separate from the mortgage, it is nonetheless adhesive. Accordingly, it would be inequitable and against long standing Ohio public policy, as announced by this Court, to enforce

provisions requiring the borrower to pay the legal fees incurred by the lender in seeking to foreclose on the mortgage in order to “reinstate” the mortgage.

This is the reality that the Bankruptcy Court in *In re Lake* recognized: an attorney fee provision in a note or mortgage is not reached “through free and understanding negotiation” and, therefore, is not enforceable in Ohio. *In re Lake*, 245 B.R. at 287. Perhaps it is because of the Bankruptcy courts’ appreciation that the only alternative to foreclosure (besides “reinstatement”) for many financially strapped individuals is a petition in bankruptcy (which stays the foreclosure), that the Bankruptcy courts in *Lake* and *Landrum* have recognized that “reinstatements” are not separate from the mortgage and, therefore, are enforceable.

It should also be noted that a “reinstatement” does not somehow replace a mortgage that has been terminated. No new mortgage is taken out – the original one remains in force. Thus, a “reinstatement” simply means that the lender has withdrawn the foreclosure action, leaving the mortgage contract in effect. Given that the attorney fees that the borrower has to pay are the very fees incurred by the bank in attempting to foreclose its mortgage, those attorney fees are undeniably incurred “in connection with” the foreclosure of the mortgage contract.

This point is underlined by the fact that, as noted above, the reinstatement clause is contained in the mortgage contract itself and, by its own terms, provides the borrower with the contractual right to “reinstatement” only when the lender initiates foreclosure proceedings. How can it possibly be said, therefore, that a “reinstatement” does not arise in connection with a foreclosure, when a foreclosure is a condition precedent to a “reinstatement”? A “reinstatement” provision in a mortgage contract that requires the payment of attorney fees, therefore, is nothing more than a stipulation to pay attorney fees in the event of a default, which has long been prohibited under Ohio law.

**CONCLUSION**

For the foregoing reasons, Plaintiffs-Appellants respectfully request this Court to accept jurisdiction in this case and reject the holdings of the lower courts to the effect that the long-standing Ohio law, as announced by this Court, invalidating attorney fee provisions in residential mortgages, has evolved and is no longer valid.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing *Plaintiffs-Appellants' Memorandum in Support of Jurisdiction* was served upon the following, by regular first class U.S. mail, postage prepaid, on this 29<sup>th</sup> day of March, 2007:

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IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

SHARON WILBORN, et al.,

Plaintiffs,

vs.

BANK ONE CORPORATION, et al.,

Defendants.

) Case No. 03 CV 02674

) JUDGMENT ENTRY

CLERK OF COURTS  
MAHONING COUNTY, OH  
2004 JUL 21 P 3:22  
ANTHONY VIVO, CLERK

The First Amended Class Action Complaint herein alleges that each of the named parties fell behind on their mortgage payments and foreclosure proceedings were begun by one of the defendant banks or financial institutions. In order to reinstate the mortgage, the defendant financial institutions provided the terms to be complied with by the plaintiff borrowers among which were payment of a definite, expressed sum of money for the financial institutions' attorney's fees incurred for enforcement of the financial institutions' rights in the foreclosure action.

The First Amended Complaint contains three causes of action as follows:

First: The assessment of fees against the borrowers that the mortgagors had to pay for their attorney's fees is against the public policy of Ohio and is illegal.

Second: Unjust Enrichment of all defendants by the collection of those attorney's fees.

Third: Civil Conspiracy alleging that the one law firm named as a party defendant conspired with the other defendants "to obtain attorneys' fees from Ohio residential mortgage holders whose mortgages these financial institutions hold." This cause of action also alleges deliberate and malicious acts.

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As to the First and Second causes of action, the most recent cases in Ohio, although not Supreme Court cases, are *Davidson v. Welman, Weinberg & Reis*, 285 F. Supp. 2d 1093 decided on September 11, 2003, and *Washington Mutual Bank v. Mahaffey*, 154 Ohio App. 3d 44 decided August 22, 2003. These two cases reflect the present law in Ohio to the effect that the requirement of the payment of attorney's fees expended in foreclosure proceedings as a condition of reinstatement of a mortgage loan is not unlawful. See *Mahaffey*. Furthermore, a provision in a mortgage which requires the payment of attorney's fees as a condition of reinstatement is allowed under Ohio law. See *Davidson*.

In *Miller v. Kyle*, the Supreme Court of Ohio held that contracts for the payment of attorney's fees upon default in payment of a debt are not enforceable. *Miller v. Kyle*, 85 Ohio St. 186 (1911). *Miller* includes any stipulation in a note for attorney's fees upon the default of the debtor, regardless of whether the fees are fixed by contract. *Davidson v. Weltman, Weinberg, and Reis*, 285 f. Supp. 2d 1093, 1100-1101 (S.D. Ohio 2003). However, *Miller* has been narrowed by subsequent decisions of the Supreme Court of Ohio. In *Worth v. Aetna Casualty and Surety Co.*, the Court found that a stipulation incorporated into a contract, lease, note, or other debt instrument is ordinarily included by the party to whom the debt is owed and is in the sole interest of that party. "An indemnitor's express agreement to indemnify an indemnitee for qualified legal expenses incurred is enforceable and is not contrary to Ohio's public policy." *Worth v. Aetna Casualty and Surety Co.*, 32 Ohio St. 3d 238, 257 (1987). In *Nottingdale Homeowners' Association, Inc. v. Darby*, the Court refused to establish a rule of law preventing parties from agreeing to pay each other's attorney's fees, calling such a rule "outmoded, unjustified and paternalistic." *Nottingdale Homeowners' Association, Inc. v. Darby*, 33 Ohio St. 3d 32, 37 (1987). In *Nottingdale*, Appellees, in purchasing a condominium, freely agreed to be

bound by the terms of the condominium declaration, which contained a provision for the payment of reasonable attorney fees incurred by the homeowner's association upon an action in foreclosure. *Id.* at 36. The Court in *Nottingdale* recognized that contracts of adhesion, where a party has both no realistic bargaining power and no choice in the terms of the contract, remain against public policy. *Id.* at n.7. Therefore, parties are free to consent to attorney's fees so long as the indemnification agreement is arrived at through free and understanding negotiation. *Worth*, 32 Ohio St. 3d at 257-258. *See also Davidson*, 285 F. Supp. 2d at 1098.

Though some Ohio courts have refused to enforce a provision in a note or mortgage requiring one party to pay the other's attorney's fees as void against public policy, the rationales used in both *Washington Mut. Bank v. Mahaffey* and *Davidson* are proper. As the courts in those cases have recognized, payment of attorney's fees in the context of a reinstatement of a mortgage is not synonymous with the payment of attorney's fees in the context of default on a note or mortgage. *See id.* at 1102; *Washington Mutual Bank v. Mahaffey*, 154 Ohio App. 3d 44, 51-52 (2003). Foreclosure of a mortgage entitles the borrower to all legal protections of the foreclosure process; the borrower is not required by law to seek reinstatement of the mortgage once it is in default. *Mahaffey*, 154 Ohio App. 3d at 52. Thus, "the requirement of the payment of attorney's fees as a condition of reinstatement does not arise in connection with the enforcement of the mortgage contract, i.e., the default itself." *Davidson*, 285 F. Supp. 2d at 1102. The obligation to pay attorney's fees is a condition of reinstatement of the mortgage; reinstatement is not required during foreclosure of the mortgage and the borrower has no obligation to pursue it. *See Mahaffey*, 154 Ohio App. 3d at 52. Therefore, a provision in a mortgage requiring the payment of attorney's fees as a condition of reinstatement is permissible under Ohio law.

There being no just reason for delay, the motions to dismiss the First and Second causes of action pursuant to Ohio Civil Rule 12(B)(6) are sustained. There being no underlying unlawful act, Plaintiffs' Third cause of action cannot succeed and Defendants' motion to dismiss as to the Third cause of action is sustained. See *Williams v. Aema Finance Co.*, 83 Ohio St. 3d 464 (1983).

Said causes of action are dismissed.

July 21, 2004  
DATE:

Charles J. Bannon  
JUDGE CHARLES J. BANNON

THE CLERK SHALL SERVE NOTICE  
OF THIS ORDER UPON ALL PARTIES  
WITHIN THREE(3) DAYS PER CIVIL R.5.





[Cite as *Wilborn v. Bank One Corp.*, 2007-Ohio-596.]

APPEARANCES:

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{Cite as *Wilborn v. Bank One Corp.*, 2007-Ohio-596.}  
DONOFRIO, J.

{¶1} Plaintiffs-appellants, Sharon Wilborn, et al., appeal the decision of the Mahoning County Common Pleas Court dismissing their claims against defendants-appellees, Bank One Corporation, et al.

{¶2} Each of the appellants is a borrower who entered into a mortgage agreement with one of the appellee banks. Appellants include: Sharon L. Wilborn; Shirley Wright; Todd and Traci Campbell; Delores Huff, William and Julie Wymer; Darin and Amy Beth Distel; Bruce D. Beers; and Marianne A. van Gulijk. Appellees include Bank One, N.A. (Ohio) (Bank One) (incorrectly named as Bank One Corp.); Ameriquest Mortgage Company (Ameriquest); Principal Residential Mortgage, Inc. (Principal); Wells Fargo Home Mortgage, Inc. f/k/a Norwest Mortgage, Inc. (Wells Fargo); Washtenaw Mortgage Company (Washtenaw); Mortgage Electronic Registration Systems, Inc. (MERS); Chase Manhattan Mortgage Corporation (CMMC); Washington Mutual Bank, FA, successor in interest to Homeside Lending, Inc. f/k/a BancBoston Mortgage Corporation (Homeside); and the law firm Lerner Sampson and Rothfuss (Lerner Sampson)<sup>1</sup>.

{¶3} The mortgage agreements contained a reinstatement provision which allowed the borrower to settle a payment dispute, discontinue foreclosure litigation, and reinstate the mortgage loan. The provision also allowed for the lender to recover reasonable attorney fees incurred due to the borrower's default.

{¶4} It is undisputed that each of the appellants defaulted on their loans and the respective appellee bank instituted foreclosure proceedings. After the foreclosure proceedings were commenced and before a sheriff's sale of their property, appellants utilized the reinstatement provision of the mortgage agreement. They paid the appellee banks the amount they were in default in addition to costs, including some attorney fees. A typical example of a reinstatement provision reads as follows:

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<sup>1</sup> Lerner Sampson has filed an appellate brief in this matter. As their brief acknowledges, the trial court's decision dismissing them really did not address appellants' specific claims against Lerner Sampson. Lerner Sampson represented Bank One, Principal, and CMMC in certain foreclosure actions involving some of the appellants. However, Lerner Sampson collected its fees from the banks

{15} "19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18."

{16} On August 6, 2003, appellants filed this class action lawsuit. They asserted three claims for: (1) violation of public policy and the common law of Ohio; (2) unjust enrichment; and (3) civil conspiracy. Appellants contended that appellees violated Ohio common law and public policy when they assessed and received

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it represented, not from the individual appellants.

attorney fees in connection with the mortgage loan agreements.

{¶7} Appellees filed Civ.R. 12(B)(6) motions to dismiss appellants' complaint for failure to state a claim upon which relief could be granted. On July 21, 2005, the trial court granted appellees' respective motions. The court concluded that Ohio common law did not prevent the parties from agreeing to pay reasonable attorney fees in connection with a mortgage reinstatement provision or alternate workout agreement. Relying on *Washington Mut. Bank v. Mahaffey*, 154 Ohio App.3d 44, 2003-Ohio-4422, 796 N.E.2d 39, and *Davidson v. Weltman, Weinberg & Reis* (S.D. Ohio 2003), 285 F. Supp.2d 1093, the trial court reasoned that the "payment of attorney's fees in the context of a reinstatement of a mortgage is not synonymous with the payment of attorney's fees in the context of default on a note or mortgage."

{¶8} This appeal followed. In addition to the appellate briefs filed by appellants and appellees, amicus curiae Ohio Mortgage Association and Federal Home Loan Mortgage Corporation have filed a joint appellate brief in support of appellees' position.

{¶9} Appellants' sole assignment of error states:

{¶10} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS-APPELLANTS IN GRANTING DEFENDANTS-APPELLEES' MOTION TO DISMISS."

#### STANDARD OF REVIEW

{¶11} The standard of review for a Civ.R. 12(B)(6) motion to dismiss requires the appellate court to independently review the complaint to determine if the dismissal was appropriate. *Ferreri v. The Plain Dealer Publishing Co.* (2001), 142 Ohio App.3d 629, 639, 756 N.E.2d 712. Additionally, since this case presents the Court with only a question of law, we apply a de novo standard of review. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶4.

{¶12} A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of the complaint. *State ex*

*rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must find beyond doubt that appellant can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true, and construes all reasonable inferences in appellant's favor. *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128.

#### OHIO COMMON LAW

{¶13} Appellants argue that attorney fee provisions included in a contract in indebtedness are unenforceable as against public policy. Appellants rely on various case law and Ohio Revised Code provisions. Appellees argue that the attorney fee provisions contained in the reinstatement provisions or alternate workout agreements in the mortgage contracts are consistent with Ohio common law and public policy.

{¶14} In 1893, the Ohio Supreme Court found that a stipulation in a mortgage contract providing for the payment of reasonable attorney fees in a foreclosure action was void as against public policy. *Leavens v. Ohio Natl. Bank* (1893), 50 Ohio St. 591, 34 N.E. 1089. In *Miller v. Kyle* (1911), 85 Ohio St. 186, 97 N.E. 372, syllabus, the Court held that "[i]t is the settled law of this state that stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void."

{¶15} While the Ohio Supreme Court's pronouncements in this regard may have seemed to be "settled law," new situations presented themselves years later that tested that rule. In *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, 513 N.E.2d 253, syllabus, the Court held that "[a]n indemnitor's express agreement to indemnify an indemnitee for qualified legal expenses incurred is enforceable and is not contrary to Ohio's public policy." The Court distinguished indemnity agreements from a debt instrument observing:

{¶16} "When a stipulation to pay attorney fees is incorporated into an ordinary contract, lease, note or other debt instrument, it is ordinarily included by the creditor or a similar party to whom the debt is owed and is in the sole interest of such party.

In the event of a breach or other default on the underlying obligation, the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation. In those circumstances, the promise to pay counsel fees is not arrived at through free and understanding negotiation.

{¶17} "In contrast, the indemnity agreements at issue in the instant case present a circumstance in which it is in the interest of both the executives and the employer for the executives to enforce the terms of their Employment Agreements. It was in the executives' interest to have the means to enforce their employment contracts. It was in Union Commerce's interest to retain qualified personnel during and following a change of control and to provide its executives with security by giving them the means to vindicate their rights under the contracts. Through free and understanding negotiation, both the executives and the employer were able to protect their respective interests. The fact that this indemnity agreement was assented to in this context distinguishes this case from the ordinary stipulation to pay attorney fees for breach of a debt obligation. This is not a situation of a one-sided attorney fees provision or one of imbalance, but one of making the indemnified parties whole. Consequently, our decision today leaves undisturbed our holding in *Miller v. Kyle*, *supra*, and like cases." *Id.* 242-243, 513 N.E.2d 253.

{¶18} Just six weeks later, the Court decided *Nottingdale Homeowners' Assn. v. Darby* (1987), 33 Ohio St.3d 32, 514 N.E.2d 702. In *Nottingdale*, the Court held that a provision in a declaration of condominium ownership or condominium by-laws requiring the payment of attorney fees incurred by a condominium owner's association in either a collection or foreclosure action for unpaid assessments is enforceable. Defendants-appellees, Keith and Ollie Darby (the Darbys), bought a Nottingdale Condominium. After several years of paying their monthly assessments, the Darbys intentionally stopped paying them. They contended that the plaintiff-appellant's, Nottingdale Homeowners Association, Inc., board of trustees was illegally elected by less than a quorum of unit owners as was required by the

condominium by-laws, and, additionally, because they felt that the persons who assumed the trustees' responsibilities invalidly increased the monthly assessments above those amounts permitted by the condominium declaration. Since the Darbys failed to pay the assessments, the homeowners association filed a lien against the property and subsequently filed a foreclosure action.

{¶19} The homeowner's association sought approximately \$2,500 in unpaid monthly assessments and attorney fees of over \$12,000. The association sought attorney fees based upon certain provisions within the declaration of condominium ownership and condominium by-laws. The trial court found the lien to be valid and also awarded attorney fees. The appeals court overturned the award of attorney fees on the basis that attorney fees in Ohio are recoverable only where statutorily mandated or where the opponent acts in bad faith.

{¶20} The Ohio Supreme Court reversed the appellate court finding that, in this situation, attorney fees were recoverable. The Court reasoned:

{¶21} "By refusing to enforce the provision which would require appellees to pay appellant's reasonable attorney fees, this court would make it virtually impossible for condominium unit owners' associations to recoup unpaid assessments from recalcitrant unit owners. The expense of collection would render the effort useless. The result would be that a unit owner, who for any reason does not wish to pay his monthly service assessment, can enjoy the benefits of such services and refuse to pay for them, secure in the knowledge that collection by the association will be prohibitively expensive. Under such circumstances, what incentive would exist for the unscrupulous unit owner to pay his assessments? Obviously, very little.

{¶22} "As can be seen, the fee-shifting agreement in this case protects the fund of the unit owners' association from potential bankruptcy, and the conscientious contributors thereto from the burden of paying for the delinquency of others. Without such fee-shifting agreements, unit owners' associations may have to abandon claims against debtors, such as appellees, as too costly to pursue. With such agreements, the debtor will be encouraged to pay to avoid litigation, and if litigation becomes

necessary, the association's resources will be protected if its suit proves meritorious. A more ideal arrangement can scarcely be imagined." *Nottingdale*, 33 Ohio St.3d at 36-37, 514 N.E.2d 702.

{¶23} Appellants maintain that in their case, the concerns that were present in *Nottingdale* do not exist here such that another exception is necessary. Appellants assert that if the attorney fees were not paid by a borrower, the bank would not be forced to forego enforcement of the mortgage contract. Additionally, appellants argue, unlike condominium associations, banks can and do manage the risk of default. According to appellants, banks accomplish this by assessing the particular risk associated with each loan at the time of inception, and adjust the interest rate associated with the loan to correspond with that risk.

{¶24} Appellants have cited an Ohio appellate court case that has refused to enforce an attorney fee provision in a note or mortgage. That case noted that *Miller* held that such an attorney fee provision was void as against public policy. See *Sabin v. Anson* (Dec. 1, 2000), 11th Dist. No. 99-L-158 (provision requiring debtor to pay attorney fees incurred in enforcing the note was unenforceable). Additionally, appellants cite some federal bankruptcy court cases that have denied claims for attorney's fees in the context of reinstatement, again based on the holding in *Miller*. See *In re Petroff* (6th Cir.BAP, 2001); *In re Lake* (N.D.Ohio 2000), 245 B.R. 282; *In re Landrum* (S.D.Ohio 2001), 267 B.R. 577.

{¶25} As did the trial court, appellees rely on *Washington Mut. Bank v. Mahaffey*, 154 Ohio App.3d 44, 2003-Ohio-4422, 796 N.E.2d 39, and *Davidson v. Weltman, Weinberg & Reis* (S.D.Ohio 2003), 285 F. Supp.2d 1093. In *Mahaffey*, the Second District Court of Appeals addressed the issue of whether a mortgagee could require, as a condition of reinstatement of a mortgage loan, the payment of attorney's fees. The mortgage at issue contained a provision very similar to the ones at issue in this case. The Court distinguished those cases which held that such a provision is against public policy and void. The Court reasoned:

{¶26} "Mahaffey's obligation to pay attorney fees is not provided in the

mortgage instrument in this case as an obligation upon foreclosure but as a condition of reinstatement of the loan. While Mahaffey is entitled to all of the legal protections afforded under the laws pertaining to the foreclosure of mortgage liens, including the right of redemption, he is not entitled by law to reinstate a mortgage loan, once it is in default. Once a borrower defaults upon a mortgage loan, the lender is entitled, even if the borrower should exercise his right of redemption, to be paid in full and sever its relationship with the borrower. The bank chose to provide in its contract with Mahaffey for the possibility that the loan might be reinstated, preserving the relationship between borrower and lender, upon certain conditions. One of these is the payment of attorney fees. We see nothing against public policy in imposing the requirement of the payment of attorney fees expended in foreclosure proceedings as a condition of reinstatement of a mortgage loan. If the loan were not reinstated, the borrower would be entitled to its remedies in foreclosure, and it has expended attorney fees toward that end. It is reasonable that the mortgagee should require, as a condition of abandoning the foreclosure action and reinstating the loan, that it recover its attorney fees expended in the foreclosure action that it is abandoning." *Id.* at ¶39.

{¶27} The Court then went on to hold that the payment of attorney's fees was permitted because it was "merely a condition for reinstatement, not an obligation that arises in connection with the enforcement of the contract." *Id.* at ¶40.

{¶28} Like the Second District Court of Appeals in *Mahaffey*, the United States District Court for the Southern District of Ohio reached a similar conclusion in *Davidson v. Weltman, Weinberg & Reis* (S.D.Ohio 2003), 285 F. Supp.2d 1093. Like the present case, *Davidson* involved a putative class action challenging the collection of attorneys' fees as a condition of a mortgage reinstatement. After reviewing all the key precedents applying Ohio common law to a contractual agreement to pay attorneys' fees, including *Miller, Worth, Nottingdale*, and *Mahaffey*, the Court ultimately agreed with the reasoning in *Mahaffey* and dismissed the class action. The Court explained:

{¶29} “[U]pon default, the mortgagor has no obligation to seek reinstatement of his mortgage. To the contrary, she may, inter alia, decide to allow the foreclosure proceedings to continue and to avail herself of the remedies available through that proceeding. Thus, the reinstatement provision in the mortgage creates no obligation to pay attorney’s fees upon default. Consequently, the payment of attorney’s fees as a condition of reinstatement does not implicate the public policy concern in *Miller* regarding the imposition of a penalty against the debtor upon default and its concern with usury.” *Id.* at 1103.

{¶30} Appellants argue that *Mahaffey* and *Davidson* offer no reasonable basis for the distinction with regard to the public policy considerations that have led the Ohio Supreme Court and the Ohio General Assembly to preclude the enforcement of attorney fee provisions in non-commercial contracts of indebtedness. First, appellants argue that the distinction made between a reinstatement and foreclosure is illusory. Second, appellants argue that the real issue is the borrower had no choice as to the inclusion of the attorney provision in the mortgage agreement. Third, appellants scoff at the notion that the reinstatement provision, with its attendant attorney fees, was somehow included out of the goodness of the bank’s hearts to protect Ohio residents.

{¶31} In this case, the evolution of Ohio common law in this area seems to support the trial court’s conclusion. First, here, the attorney fee provision was incorporated into the mortgage by the lender. However, like the situation in *Worth*, such a provision is not in the sole interest of the lender. The provision allows the borrower to work out an agreement with the lender and retain their home. Additionally, it is unlike the situation in *Miller* where it was clear that the attorney fee provision was one-sided in favor of the lender and acted as a penalty upon the borrower.

{¶32} Second, the distinction highlighted in *Mahaffey* is persuasive. The payment of attorney fees is only a condition for reinstatement, not an obligation that arises in connection with the enforcement of the loan contract.

R.C. CHAPTER 1301

{¶33} Turning to legislative support for their position that such attorney fee provisions are unenforceable, appellants next rely on certain provisions of the Ohio Revised Code. First, appellants point to R.C. 1301.21.<sup>2</sup> That section allows a provision to pay attorneys' fees upon default in a commercial debt contract in excess of \$100,000. There, appellants maintain, the General Assembly made it clear that, by allowing attorney fees in commercial contracts of indebtedness, stipulations to pay attorney fees on contracts of indebtedness for purposes that are personal, family, or household are not enforceable.

{¶34} In response, appellees argue that R.C. 1301.21 extends the principles of freedom of contract articulated in *Worth* and *Nottingdale*, thereby further limiting the scope of *Miller* and other cases upon which appellants rely.

{¶35} R.C. 1301.21(A)(2) defines "commitment to pay attorneys' fees" as "an obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness." A requirement to pay attorney fees as a condition of reinstatement of a contract of indebtedness does not constitute an obligation to pay attorney fees "that aris[e] in connection with the enforcement of a contract of indebtedness." *Washington Mut. Bank v. Mahaffey*, 154 Ohio App.3d 44, 2003-Ohio-4422, 796 N.E.2d 39, at ¶40. Like *Mahaffey*, appellants were not, and are not, obliged to seek reinstatement of the loan. If appellants seek reinstatement of the loan, the payment of attorney fees is merely a condition for reinstatement, not an

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<sup>2</sup> {¶a} R.C. 1301.21 provides:

{¶b} "A) As used in this section:

{¶c} "(1) 'Contract of indebtedness' means a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, other than indebtedness incurred for purposes that are primarily personal, family, or household.

{¶d} "(2) 'Commitment to pay attorneys' fees' means an obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness.

{¶e} "(3) 'Maturity of the debt' includes maturity upon default or otherwise.

{¶f} "(B) If a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.

obligation that arises in connection with the enforcement of the contract. Therefore, R.C. 1301.21 is inapplicable to the case at hand.

R.C. CHAPTER 1321

{¶36} Next, appellants cite to R.C. Chapter 1321 which permits lenders, in specific situations, to recover attorney fees incurred in foreclosure of a mortgage. However, appellants highlight that the statute is limited to mortgages for less than \$5,000 and does not apply to organizations such as appellees herein including banks, trust companies, savings and loan associations, or credit unions.

{¶37} R.C. 1321.57(H)(1), which gives a lender authority to recover attorney fees it incurred in the enforcement of a mortgage contract, states, in part:

{¶38} "In addition to the interest and charges provided for by this section, no further or other amount, whether in the form of broker fees, placement fees, or any other fees whatsoever, shall be charged or received by the registrant, except costs and disbursements in connection with any suit to collect a loan or any lawful activity to realize on a security interest or mortgage after default, including reasonable attorney fees incurred by the registrant as a result of the suit or activity and to which the registrant becomes entitled by law \* \* \*["

{¶39} Additionally, R.C. 1321.53(D)(1) provides:

{¶40} "Sections 1321.51 to 1321.60 of the Revised Code do not apply to any of the following:

{¶41} "(1) Persons lawfully doing business under the authority of any law of this state, another state, or the United States relating to banks, savings banks, trust companies, savings and loan associations, or credit unions[.]"

{¶42} As OMBA and Freddie Mac correctly note in the amicus brief, appellants fail to explain why the General Assembly chose to make the attorney fee provision found in R.C. 1321.57(H)(1) inapplicable to organizations similar to appellees. OMBA and Freddie Mac assert that legislative history indicates that the General Assembly believed that attorney fees already may be collected by banks, and that therefore their inclusion was unnecessary. In an amendment to delete the

authority to collect attorney fees, the Senate Committee affirmed the attorney fee authority instead.

#### CONCLUSION

{¶43} In this case, the evolution of Ohio common law in this area seems to support the trial court's conclusion. First, here, the attorney fee provision was incorporated into the mortgage by the lender. However, like the situation in *Worth*, such a provision is not in the sole interest of the lender. The provision allows the borrower to work out an agreement with the lender and retain their home. Additionally, it is unlike the situation in *Miller* where it was clear that the attorney fee provision was one-sided in favor of the lender and acted as a penalty upon the borrower.

{¶44} Second, the distinction highlighted in *Mahaffey* is persuasive. The payment of attorney fees is only a condition for reinstatement, not an obligation that arises in connection with the enforcement of the loan contract.

{¶45} Third, as explained above, the Ohio Revised Code sections relied upon by appellants really fail to support their position.

{¶46} Accordingly, appellants' sole assignment of error is without merit.

{¶47} The judgment of the trial court is hereby affirmed.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.