
IN THE SUPREME COURT OF OHIO

SHARON WILBORN, *et al.*,
Plaintiff-Appellants,

v.

BANK ONE CORPORATION, *et al.*,
Defendant-Appellees.

On Appeal from the Seventh District Court of Appeals, Mahoning Co., Ohio, Case No. 04-MA-182

**MEMORANDUM OF DEFENDANT-APPELLEES BANK ONE, ET AL. IN OPPOSITION TO
PLAINTIFF-APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS IS
NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST¹**

Notwithstanding Plaintiffs' suggestion of a threat to the public interest, the reasoning and holding of the decision below will not impact either the rate of Ohio mortgage foreclosures or the law applicable to mortgage foreclosures, including established precedents involving the propriety of recovering attorneys' fees after a judgment of foreclosure. This case presents only the single, much narrower question of whether Ohio common law declares void and unenforceable an agreement to pay reasonable attorneys' fees as a condition of a mortgage reinstatement, mortgage modification, or alternate agreement to work out a default *before* a foreclosure judgment actually occurs. These transactions, which take place *outside* of judicial foreclosure proceedings and which are triggered *only at the borrower's option*, allow a borrower and a lender to *halt* a foreclosure and *avoid* adjudication of a default and the forced sale of mortgaged property.

Against that backdrop, the Seventh District Court of Appeals unanimously held that Ohio common law and public policy are not offended by an agreement to pay reasonable attorneys' fees when that agreement is a condition precedent to a mortgage reinstatement, a mortgage modification, or an alternate agreement to work out a default by means other than foreclosure litigation. Rather, the court held that upholding the payment of reasonable fees pursuant to such an agreement is in keeping with clearly established Ohio precedents and public policies. In fact, the only other Ohio appellate court analyzing the issue has reached the exact same conclusion

¹ This Response refers to the Plaintiff-Appellants collectively as "Plaintiffs," and it refers to the Defendant-Appellees collectively as "Defendants." Plaintiffs 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. Defendants 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"). "Am. Compl. ¶ ____" refers to Plaintiffs' First Amended Class Action Complaint.

(see *Washington Mutual Bank v. Mahaffey*, 154 Ohio App. 3d 44, 2003-Ohio-4422), as has the Chief Judge of the U.S. District Court for the Southern District of Ohio in a case applying Ohio law (see *Davidson v. Weltman, Wienberg & Reis* (S.D. Ohio 2003), 285 F. Supp. 2d 1093). Each of these decisions, including the one below, recognizes that these voluntary arrangements provide a borrower with demonstrable benefits in exchange for an agreement to pay reasonable attorneys' fees and that such arrangements therefore cannot rationally be analogized to a one-sided penalty imposed on a judgment debtor who has lost in court. This reasoning is consistent with Ohio precedent and represents sound public policy. Accordingly, there is no need for this Court to exercise its discretionary jurisdiction to review and affirm the decision below.

COUNTERSTATEMENT OF THE CASE AND THE FACTS

I. Plaintiffs Default On Their Mortgage Loans Or Credit Agreements And Then Voluntarily Request Mortgage Reinstatements, Modifications, And Alternate Agreements To Work Out Their Defaults.

Plaintiffs are Ohio borrowers who entered into loan or line-of-credit agreements secured by recorded mortgages on their respective residences. (Am. Compl. ¶¶ 25-61.)² Plaintiffs admit that they defaulted on their mortgage loans by failing to make timely payments to their respective mortgage lenders or service provider—Bank One, Ameriquest, Principal, Wells Fargo, CMMC, Washtenaw, and Homeside (the “mortgagee Defendants”). *Id.* Plaintiffs further allege that the respective mortgagee Defendants eventually instituted foreclosure actions against them in order to collect their unpaid obligations. *Id.*

² With respect to the individual Plaintiffs: Sharon Wilborn obtained a line of credit from Bank One secured by a mortgage; Shirley Wright obtained a residential mortgage loan from Bank One; Todd and Traci Campbell obtained a residential mortgage loan insured by the Federal Housing Authority (“FHA”) from Principal; Delores Huff obtained a residential mortgage loan from Ameriquest; William and Julie Wymer obtained a residential mortgage loan serviced by CMMC; Darin and Amy Beth Distel obtained a residential mortgage loan assigned to Washtenaw; Bruce Beers obtained a residential mortgage loan guaranteed by the Department of Veterans Affairs (“VA”) from Wells Fargo; and Marianne A. van Gulijk obtained a residential mortgage loan assigned to Homeside. *Id.* MERS is named in this case in its capacity as Washtenaw’s nominee.

Plaintiffs admit that each borrower voluntarily contacted his or her mortgage lender or service provider in order to resolve the dispute over each borrower's default by means other than foreclosure litigation. (Am. Compl. ¶¶ 25-61.) Plaintiffs allege that they each paid some amount for attorneys' fees in connection with arrangements to work out the default. *Id.*

In most cases, the particular Plaintiff elected to exercise a contractual right to "reinstate" his or her mortgage loan, according to the terms and conditions of the mortgage contract. These reinstatement provisions provide borrowers with a right to halt the acceleration of their mortgage loan obligations and have enforcement of their mortgages discontinued in the event of default. (*E.g.*, Am. Compl. Ex. 6, ¶ 19 (Wymers Mortgage Agreement).) Under these provisions, to reinstate a mortgage after a default, a borrower need only pay the principal and interest that would be due in the absence of any debt acceleration, cure any other default related to the mortgage, and pay the expenses incurred by the lender, including the lender's reasonable attorneys' fees. *Id.* In exchange, a lender is required to waive the alleged default, discontinue the pending foreclosure action, and allow the borrower to resume making regular payments on the loan, as if no default or acceleration of debt obligations had occurred. *Id.*

In other cases, a particular Plaintiff and mortgagee Defendant entered into a mortgage modification or an alternate agreement to work out a default by means other than foreclosure litigation. For example, Plaintiff van Gulijk entered into a mortgage modification agreement with Homeside that allowed van Gulijk to settle her payment dispute and modify her mortgage loan agreement to provide a lower interest rate over an extended term. (Homeside Mot. to Dismiss Mem. 2-3 and Ex. 1 (mortgage modification agreement).) Similarly, Plaintiff Beers entered into a loan modification agreement that allowed him to refinance the outstanding amounts due on his mortgage loan, as well as reasonable attorneys' fees and other expenses incurred by Wells Fargo, prior to Plaintiff Beers' decision to cure his default. (Am. Compl. ¶ 53; Wells Fargo Mot. to Dismiss Mem. 3.) Plaintiff Huff entered into a forbearance agreement with Ameriquest that allowed her to reinstate her mortgage loan immediately, while paying off her

default over time. And Plaintiff Wilborn resolved her payment dispute and foreclosure action, pursuant to an agreement with Bank One whereby Wilborn elected to refinance her debt with another lender and paid her outstanding debt and Bank One's reasonable attorneys' fees and, in turn, Bank One discontinued its foreclosure action against her without seeking adjudication of Wilborn's default and outstanding mortgage debt. (Bank One Mot. to Dismiss Mem. 3-4.)

Each Plaintiff, therefore, was able to work out his or her default, settle a pending foreclosure action, and keep the mortgaged property without adjudication of the default or forced sale of the mortgaged property. Moreover, in each case, the particular Plaintiff and mortgagee Defendant expressly agreed that Plaintiff would pay all reasonable expenses incurred (including reasonable attorneys' fees) in exchange for the discontinuance of the foreclosure proceeding and (in most cases) the reinstatement and/or modification of Plaintiffs' mortgage loan. Perhaps most importantly given the tenor of Plaintiffs' arguments to this Court, in *none* of the above cases did the mortgagee Defendant seek an award of attorneys' fees in a foreclosure action after entry of a judgment on the debt and a foreclosure order requiring the forced sale of the mortgaged property. While foreclosure actions were initiated, none were concluded by actual foreclosure, and, in each instance, the borrower retained the property.³

II. Plaintiffs File This Action To Recover Attorneys' Fees Paid As A Condition Of Mortgage Reinstatements And Alternate Agreements To Work Out A Default And Their Complaint Is Rejected By The Trial Court And The Court of Appeals For Failure To State A Claim.

Plaintiffs filed this action in the Court of Common Pleas of Mahoning County, Ohio, on August 6, 2003, based on the legally erroneous contention that Defendants violated "well-

³ Under Ohio law, the initiation of a foreclosure proceeding is the only vehicle by which a lender can declare a default and adequately preserve its security interest in the mortgaged property. See Patrick J. Rohan, *Real Estate Financing Text, Forms, Tax Analysis, Real Estate Financing* § 10.01-03. Thus, there is no basis for condemning the mortgagee Defendants in these cases for availing themselves of the remedy that the law provides. And there certainly is no basis for condemning them for offering to settle defaults and discontinue foreclosure litigation based on terms that include the payment of reasonable expenses (including reasonable attorneys' fees).

established” Ohio common law and public policy when they assessed and received attorneys’ fees from the Plaintiffs as a condition of their mortgage reinstatements, mortgage modifications, and alternate workout agreements. (Am. Compl. ¶¶ 62-67, 77-90.) Pursuant to Ohio Civ. R. 12(B)(6), Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. (E.g., Ameriquest Mot. to Dismiss Mem. 1-20.) Among other things, Defendants argued that Ohio common law did not prohibit them from collecting attorneys’ fees pursuant to the terms of the parties’ respective agreements to settle and discontinue the pending foreclosure actions. *Id.* (citing *Davidson*, 285 F. Supp. 2d at 1101-03; *Mahaffey*, 154 Ohio App. 3d at 51-52, 2003-Ohio-4422, ¶¶ 36-40). In response, Plaintiffs relied primarily on *State v. Taylor* (1841), 10 Ohio 378, *Leavans v. Ohio National Bank* (1893), 50 Ohio St. 591, and *Miller v. Kyle* (1911), 85 Ohio St. 186—three cases which Plaintiffs argued established an absolute prohibition on “stipulations for attorneys’ fees in the event of default upon a contract of indebtedness, at least in the context of a residential mortgage.” (Pls. Resp. to Defs.’ Mots. to Dismiss 7-8.)

In an opinion tracking controlling law, the trial court granted Defendants’ Motions to Dismiss with prejudice. (Judgment Entry 3-4.) Plaintiffs then appealed to the Seventh District Court of Appeals, which unanimously affirmed the trial court’s judgment. The Seventh District agreed with the decisions in *Davidson* and *Mahaffey* and noted that this case, unlike *Miller* and the other Ohio cases cited by Plaintiffs, involved agreements that did not create any *obligation* to pay attorneys’ fees on foreclosure and adjudication of a default; rather, they simply provided Plaintiffs with an optional right—*i.e.*, a way to settle and discontinue a foreclosure action and work out a default by means other than adjudication of a default and forced sale of the home. Because such agreements serve the overall interests of both the borrower and the lender, the Seventh District found the terms and conditions enforceable as a matter of law.

ARGUMENT OPPOSING PLAINTIFFS' PROPOSITIONS OF LAW

Plaintiffs ask this Court to grant jurisdiction to address two propositions of Ohio common law. First, Plaintiffs ask this Court to address whether a number of older common law cases must be read to declare void, as against public policy, any provision in a residential mortgage that requires a borrower to pay attorneys' fees in connection with a foreclosure action on the mortgage. Pls. Mem. at 8. Second, Plaintiffs ask the Court to address whether common law declares void, as against public policy, an agreement to pay attorneys' fees as a condition of a mortgage reinstatement, mortgage modification, or alternate agreement to work out a default and settle a dispute by means other than litigation. The gist of both legal propositions is the same: Plaintiffs contend that attorneys' fee provisions in mortgage reinstatements, mortgage modifications, or alternate workout agreements are indistinguishable from the kinds of contractual provisions addressed in *Miller* and found to be contrary to Ohio public policy. As shown more fully below, the agreements involved here are readily distinguishable from *Miller* and do not trigger its public policy concerns. Neither proposition thus warrants discretionary review by this Court under the circumstances.

I. The Court Should Decline To Grant Jurisdiction To Address Plaintiffs' First Proposition Of Law Because *Miller v. Kyle* And Other Ohio Cases Do Not Prohibit The Attorneys' Fee Agreements At Issue Here.

The Court should decline to grant jurisdiction to address this first proposition of law because none of Plaintiffs' cases purport to prohibit the payment of reasonable attorneys' fees in a factual context like the one before this Court. Pls. Mem. at 8-11 (citing *Leavans*, 50 Ohio St. 591 (syllabus) and *Miller*, 85 Ohio St. at 192). In *Taylor*, *Leavans*, and *Miller*, the Court was concerned primarily with the enforcement of attorneys' fee provisions that would "result in the evasion of the Ohio laws of usury" and the imposition of one-sided penalties in cases where a court had adjudged that "principal and interest [were] not paid at maturity." *Miller*, 85 Ohio St. at paragraph one of syllabus, 198; *Leavans*, 50 Ohio St. at 592; *Taylor*, 10 Ohio at 380-81. Thus, *Taylor* involved an agreement to pay a fixed percentage of the loan amount in addition to the

legal rate of interest, as nominal “attorneys’ fees.” *Taylor*, 10 Ohio at 380-81 (characterizing such an agreement as “a mere shift or device” to evade state usury laws). Furthermore, *Leavans* and *Miller* both involved stipulations in a mortgage and a note that would have required a court to include attorneys’ fees automatically upon judgment of default in addition to the amount outstanding on the mortgage debt, in a situation in which a debtor has lost in court. *Leavans*, 50 Ohio St. at 592; *Miller*, 85 Ohio St. at 192. None of those circumstances is alleged to exist in this case.

Here, no attorneys’ fee provision was enforced against Plaintiffs automatically upon a judgment of default by a court in a foreclosure action, and no Plaintiff was ordered to pay attorneys’ fees by a court in a foreclosure action in addition to the entire principal and interest due at maturity. To the contrary, as the Seventh District noted and as Plaintiffs’ effectively concede, Plaintiffs alleged that each borrower voluntarily contacted his or her mortgage lender or service provider in order to resolve a dispute over a default by means other than foreclosure litigation. *See pp. 3-4, supra*. In some instances, borrowers elected to exercise conditional reinstatement rights included in their mortgage contracts—conditional rights which gave borrowers the option to halt acceleration of the loan by paying the principal and interest due in the absence of acceleration, curing any other default, and paying reasonable expenses incurred by the lender related to the default (including any reasonable attorneys’ fees). *Id.* In other cases, borrowers agreed to pay attorneys’ fees after arms’ length negotiations about how to work out a default on a mortgage loan obligation under specific and unique circumstances. *Id.* In all cases, the borrowers were able to obtain contractual rights and benefits from the mortgagee Defendants not otherwise available under Ohio law, settle their dispute, and avoid litigation.⁴ Moreover, in all cases, the attorneys’ fee conditions arose in agreements that served both parties’ interests.

⁴ Some states have adopted a statutory right to reinstate a mortgage loan after default on payment of reasonable attorneys’ fees, *e.g.*, N.J.S.A. 2A:50-57 (providing a right to cure conditioned on payment of reasonable attorneys’ fees, among other things); 41 Pa. Stat. §§ 404(c), 406 (2) (same), but Ohio has not adopted any statutory right to reinstate a mortgage. Under Ohio law, borrowers have a right to reinstate only if the mortgage contract or another

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The Seventh District thus correctly recognized that *Miller* and its predecessor cases simply do not address or condemn an agreement to pay attorneys' fees under such unique circumstances—*i.e.*, where the payment of attorneys' fees is an express condition of a mortgage reinstatement, mortgage modification, or alternate workout agreement that is triggered at the option of the borrower and that further provides the borrower with unique and valuable legal rights and options not otherwise available under Ohio law.⁵

Given the narrow impact of the holding below, there is no reason for this Court to grant jurisdiction to revisit *Miller* or its predecessors. The Seventh District, the Second District, and the Chief Judge of the U.S. District Court for the Southern District of Ohio all have examined *Miller* and its predecessors and distinguished the enforcement of punitive attorneys' fee provisions on a judgment of foreclosure from the payment of reasonable attorneys' fees on the voluntary workout of a default without a foreclosure judgment. This distinction is meaningful and does not raise a conflict with any holding of this Court. To the contrary, the Seventh District's reading of *Miller* is consistent with this Court's prior decisions upholding the enforcement of various attorneys' fee provisions that are neither punitive in their purpose or their effect. *See Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St. 3d 238 (distinguishing *Miller* and its predecessors and upholding the enforcement of an attorneys' fee provision in an

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agreement provides such an option, and they may exercise that right or option only according to the terms and conditions of the parties' agreement.

⁵ In the Seventh District and in their Memorandum in Support of Jurisdiction at 10-14, Plaintiffs have relied on several bankruptcy court decisions, including *In re Petroff* (6th Cir. Bankr. July 25, 2001), No. 00-8085, 2001 WL 34041797, *In re Landrum* (S.D. Ohio Bankr. 2001), 267 B.R. 577, and *In re Lake* (N.D. Bankr. Ohio 2000), 245 B.R. 282, that applied *Miller* to workout plans in federal bankruptcy proceedings conducted under the Chapter 13 of the Bankruptcy Code. However, these bankruptcy cases do not support the exercise of discretionary jurisdiction in this case, particularly given the unanimity of Ohio appellate courts on this issue. This case does not involve any attempt by a borrower to use the statutory cure mechanism set forth in Chapter 13 of the Bankruptcy Code, and it does not involve any attempt by a mortgagee to collect attorneys' fees by submitting a proof of claim in a Chapter 13 federal bankruptcy proceeding. That factual difference impacts the legal result in several material respects. *See In re Tudor* (S.D. Ohio Bankr. 2001), 342 B.R. 540, 549-50, 563-66 (“there are fundamental differences between a contractual mortgage reinstatement and the statutory right of cure afforded a Chapter 13 debtor”).

indemnification agreement) and *Nottingdale Homeowners' Association, Inc. v. Darby* (1987), 33 Ohio St. 3d 32, 35-37 (distinguishing *Miller* and its predecessors and upholding the enforcement of an attorneys' fee provision in a condominium agreement in the context of a foreclosure action against residential property).⁶

II. The Court Should Decline To Grant Jurisdiction To Address Plaintiffs' Second Proposition Of Law Because Public Policy Favors Enforcing Attorneys' Fee Conditions In Mortgage Reinstatements And Alternate Workout Agreements.

While Plaintiffs would have it otherwise, the Seventh District, the Second District, and the Chief Judge of the U.S. District Court for the Southern District of Ohio all have recognized that mortgage reinstatements, mortgage modifications, and alternate workout agreements conditioned on the payment of reasonable attorneys' fees serve the interests of all parties and are consistent with important state and federal public policies favoring freedom of contract, compromise and settlement, and home ownership retention.

Thus, as this Court frequently has recognized, the State's common law strongly protects Ohioans' "fundamental" right to contract freely and "highly" favors agreements to compromise and settle disputes by means other than litigation.⁷ Consistent with both of these public policies,

⁶ Contrary to the Plaintiffs' Memorandum at 8-9, Defendants did *not* argue to the Seventh District that *Nottingdale* "abrogated" *Miller* or any other Ohio case. More importantly, nothing in the Seventh District's opinion construes either *Worth* or *Nottingdale* as overruling *Miller*. Plaintiffs' arguments concerning the holdings and scope of *Worth* and *Nottingdale*, therefore, are wide of the mark. The decisions in *Davidson*, *Mahaffey* and this case also indicate that there is no confusion or disagreement about *Miller*, *Worth*, or *Nottingdale* that might warrant discretionary review of the narrow issue in this case. Unlike the circumstances presented in *Miller*, the provisions in dispute here do not require that a borrower pay attorneys' fees on adjudication of a default in a foreclosure action on the mortgage. The Court's review of that question can await a case squarely presenting that issue.

Plaintiffs' reliance on R.C. 13021.21 and 1321.57 also is misplaced for all the reasons identified by the Seventh District's opinion, 2007-Ohio-596 ¶¶ 33-42. Both statutes expressly authorize the recovery of attorneys' fees in certain situations not applicable here, but neither of them expresses any policy that would prohibit attorneys' fee agreements in mortgage reinstatements, mortgage modifications, or alternate workout agreements.

⁷ See, e.g., *Blount v. Smith* (1967), 12 Ohio St. 2d 41, 46-47; *Continental West Condominium Unit Owners Ass'n v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St. 3d 501, 502; *Ziegler v. Wendel Poultry Services, Inc.* (1993), 67 Ohio St. 3d 10, 17.

this Court and other Ohio courts have upheld and enforced settlement agreements that provided for the payment of attorneys' fees. *See Bittner v. Tri-County Toyota* (1991), 58 Ohio St. 3d 143; *Kennecorp Mortgage Brokers, Inc. v. Huron Shores Ltd. Partnership* (Aug. 23, 1991), 6th Dist. No. L-90-174, 1991 WL 163494, at *3.

These same well-recognized public policies affirming the freedom of contract and promoting the settlement of litigation clearly support the recognition of attorneys' fee conditions in mortgage reinstatements, mortgage modifications, and alternate workout agreements. Such agreements are—*by definition*—contractual agreements to settle a default by means other than litigation and adjudication of the borrower's mortgage debt. The terms and conditions of a mortgage reinstatement provision are expressly offered by a lender and accepted and invoked by a borrower in order to resolve a dispute by means other than litigation and adjudication of a debt. *See Davidson*, 285 F. Supp. 2d at 1103. Likewise, mortgage modifications and alternate workout agreements are offered, accepted, and invoked in order to resolve a dispute by means other than litigation and adjudication of a debt.⁸

Moreover, these terms and conditions make it economically feasible for a lender to settle a payment dispute and, in most cases, continue a relationship with a borrower. In this way, attorneys' fee conditions in mortgage reinstatements, mortgage modifications, and alternate workout agreements clearly support important public policies promoting "home ownership retention" and mortgage "loss mitigation"—the very public policies cited by the Plaintiffs in their Memorandum at 3. *See HUD, Mortgagee Letter 00-05* (Jan. 19, 2000), 2000 WL 33970595 (discussing these policy goals and explaining that "lenders must become proactive early in the

⁸ Contrary to Plaintiffs' Memorandum in Support of Jurisdiction at 13-14, it makes no difference whether such terms are written into a mortgage loan contract in advance of a default (as in the case of a mortgage reinstatement per the terms of a typical mortgage contract) or whether they are set after a default as part of a transaction that is separate and distinct from the mortgage contract (as in the case of a mortgage modification or alternate workout agreement). In both cases, the terms and conditions are invoked only *after* a default, *outside* of foreclosure proceedings, at the *option* of the borrower, in order to *obtain benefits* otherwise unavailable under Ohio law and settle the parties' dispute by means other than litigation.

default” to help cure defaults and reduce claims). Indeed, regulations promulgated by federal agencies charged with promoting home ownership and mortgage loss mitigation, such as the U.S. Department of Housing and Urban Development (“HUD”) for the Federal Housing Administration (“FHA”) and the Department of Veterans Affairs (“VA”), specifically provide for reinstatement provisions that contain attorneys’ fee conditions in *any* mortgage loan that is guaranteed by the FHA or the VA. *See* 24 C.F.R. § 203.608 (HUD reinstatement regulations governing FHA guaranteed loans); 38 C.F.R. § 36.4308(h) (regulations governing VA-insured loans).⁹

Finally, the Seventh District correctly rejected Plaintiffs’ unsubstantiated assertion that Plaintiffs had no realistic choice as to the terms and conditions of their mortgage reinstatements, mortgage modifications, or alternate workout agreements. Pls. Mem. at 9, 13-14. To begin with, as Defendants argued in the Seventh District, Plaintiffs did not allege any facts which suggested that they lacked any meaningful choice or were victims of an abuse of grossly unequal bargaining power. (Am. Compl. ¶¶ 25-61.)

Nor could Plaintiffs allege such facts in any event. Plaintiffs never had any obligation to exercise their conditional rights to reinstate their mortgage loan agreements or enter into any mortgage modification or alternate workout agreement, conditioned on the payment of attorneys’ fees. Plaintiffs’ own complaint likewise expressly alleged that it was the Plaintiffs who initially contacted Defendants, outside of formal foreclosure proceedings, in order to work out their defaults by means other than litigation. By voluntarily exercising the conditional reinstatement rights included in their mortgage contracts and/or entering into mortgage modifications and alternate workout agreements, conditioned on the payment of attorneys’ fees, each Plaintiff

⁹ Plaintiffs’ co-counsel, the National Consumer Law Center, has commissioned an “anti-predatory” “model state statute” that also provides for the payment of reasonable attorneys’ fees incurred by a lender in a foreclosure as a condition of reinstating a mortgage in default. Mike Calhoun, et al., *Home Loan Protection Act: A Model State Statute* at 5-6, 25-26 (“Section 5. Right to Cure”) (commissioned by NCLC and AARP) *available at* http://assets.aarp.org/rgcenter/consume/d17346_loan.pdf.

received valuable rights and options not otherwise available under Ohio law, including the right to:

- Compel the lender to discontinue foreclosure and work out a default by means other than foreclosure and adjudication of borrower's outstanding default and mortgage;
- Retain ownership and possession of the mortgaged property;
- Avoid repayment of the entire outstanding mortgage debt;
- Resume making regular payments on the loan, as if no default or acceleration of debt obligations had occurred.

Plaintiffs who entered into mortgage modifications and alternate workout agreements bargained for, and obtained, other benefits, depending on the circumstances, including lower interest rates and extended loan terms. *See pp. 3-4, supra.* In each case, mortgage reinstatements, mortgage modifications, and alternate workout agreements also were conditioned on the payment only of *reasonable expenses* (including *reasonable attorneys' fees*). A judicial remedy, of course, would be available to contest the reasonableness of the expenses and fees. *See, e.g., Mahaffey*, 154 Ohio App. 3d at 52-53, 2003-Ohio-4422, ¶¶ 41-51. Plaintiffs did not seek that remedy here.

In sum, because the Seventh District's decision is correct as a matter of law, consistent with the decisions in *Mahaffey* and *Davidson*, and based on well-settled principles of law and public policy previously established by this Court, there is no reason for this Court to exercise its discretionary jurisdiction to review the Seventh District's opinion in this case.

CONCLUSION

This Court's scarce resources should be applied where Ohio law is in actual conflict on a recurring issue of paramount importance to Ohio litigants and courts. These circumstances are not present in this case. The Court should decline to exercise jurisdiction over this case.

Respectfully submitted,



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April 27, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 27, 2007, a true and correct copy of the foregoing Memorandum Of Defendant-Appellees Bank One, Et Al. In Opposition To Plaintiff-Appellants' Memorandum In Support Of Jurisdiction was served on the following counsel of record by overnight courier:

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