

IN THE SUPREME COURT OF OHIO

SHARON WILBORN, et al.,	:	
	:	
Appellants,	:	Case No. 07-0558
	:	
v.	:	
	:	
BANK ONE CORPORATION, et al.,	:	On Appeal from the Mahoning
	:	County Court of Appeals,
	:	Seventh Appellate District
Appellees.	:	(C.A. No. 04-MA-182)

MERIT BRIEF OF APPELLEE WASHINGTON MUTUAL BANK
(SUCCESSOR TO DEFENDANT HOMESIDE LENDING, INC.)

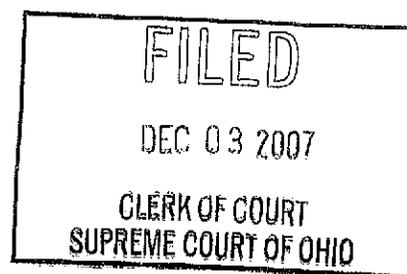
Michael S. Miller (0009398)
Daniel R. Volkema (0012250)
VOLKEMA THOMAS, LLP
140 East Town Street, Suite 1100
Columbus, OH 43215
Tel: (614) 221-4400
Fax: (614) 221-6010
mmiller@vt-law.com

and

Stuart T. Rossman (pro hac vice)
NATIONAL CONSUMER LAW CENTER
77 Summer Street, 10th Floor
Boston, MA 02110
Tel: (617) 542-8010
Fax: (617) 542-8028

John Winship Read (0030827)
VORYS, SATER, SEYMOUR & PEASE LLP
1375 East Ninth Street
2100 One Cleveland Center
Cleveland, OH 44114-1724
Tel: (216) 479-6103
Fax: (216) 937-3737
jwread@vorys.com

Attorneys for Appellee Washington Mutual
Bank (successor to Defendant
Homeside Lending, Inc.)



and

Seth R. Lesser (pro hac vice)
LOCKS LAW FIRM PLLC
110 East 55th Street, 12th Floor
New York, NY 10022
Tel: (212) 838-3333
Fax: (212) 838-3735
slesser@lockslawny.com

Attorneys for Appellants
Wilborn, et al.

Pamela S. Petas (0058627)
Rick D. DeBlasis (0012992)
LERNER, SAMPSON & ROTHFUSS
120 E. 4th Street, Suite 800
Cincinnati, OH 45202
Tel: (513) 241-3100
Fax: (513) 241-4094

Attorneys for Appellee
Lerner, Sampson & Rothfuss

Benson A. Wolman (0040123)
Rachel K. Robinson (0067518)
Paul B. Bellamy (0005314)
Judith B. Goldstein (0069655)
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1590
Columbus, Ohio 43215-3506
Tel: (614) 221-9800
Fax: (614) 221-9810
wolman@equaljusticefoundation.com

Attorneys for Amici Curiae, Equal
Justice Foundation, Ohio State Legal
Services Association, Southeastern
Ohio Legal Services, Northeast Ohio
Legal Services, Legal Aid of Western
Ohio, Advocates for Basic Legal Equality,
Legal Aid Society of Columbus, the Legal
Aid Society of Cleveland, and the
Coalition on Homelessness and Housing
In Ohio

Bobbie L. Flynt (0066909)
COMSTOCK, SPRINGER & WILSON
CO., LPA
100 Federal Plaza East, Suite 926
Youngstown, OH 44503-1811
Tel: (330) 746-5643
Fax: (330) 746-4925
blf@csandw.com

and

Stephen T. Bolton (0010994)
MANCHESTER, BENNETT, POWERS
& ULLMAN
The Commerce Building
201 E. Commerce St., Atrium Level 2
Youngstown, OH 44503-1641
Tel: (330) 743-1171
Fax: (330) 743-1190
SBolton@mbpu.com

and

James C. Martin (pro hac vice)
Perry A. Napolitano (pro hac vice)
Joseph E. Culleiton (pro hac vice)
David J. Bird (pro hac vice)
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
Tel: (412) 288-3131
Fax: (412) 288-3063
jcmartin@reedsmith.com

Attorneys for Appellees Bank One
Corporation, Ameriquest Mortgage Co.,
Principal Residential Mortgage, Inc.,
Wells Fargo Home Mortgage, Inc.,
Washtenaw Mortgage, Mortgage
Electronic Registration System, Inc.
and Chase Manhattan Mortgage Co.

Marc Dann (0039425)
Attorney General of Ohio
William P. Marshall (0038077)
Solicitor General
Robert J. Krummen (0076996)
Deputy Solicitor
Daniel W. Fausey (0079928)
Todd A. Nist (0079436)
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980
Fax: (614) 466-5087
wmarshall@ag.state.oh.us

Attorneys for Amicus Curiae
State of Ohio

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS.....	1
A. The issue presented	1
B. The relevant facts.....	2
C. The proceedings below	3
D. Appellants' Proposition of Law does not encompass the claims of all appellants.	5
ARGUMENT	7
I. This Court should not create a new rule of law that prohibits defaulting borrowers from agreeing to pay their lenders' foreclosure attorney fees in exchange for the opportunity to reinstate their mortgages and avoid foreclosure.....	7
A. There is no Ohio common law rule that prohibits a defaulting borrower from agreeing to pay the lender's foreclosure attorney fees in order to reinstate the mortgage and avoid foreclosure.....	8
B. There is no Ohio statutory rule that prohibits a defaulting borrower from agreeing to pay the lender's foreclosure attorney fees in order to reinstate the mortgage and avoid foreclosure.....	16
II. This Court should also affirm the ruling below as to the other appellants, who avoided foreclosure without reinstating their mortgages, regardless of whether the Court adopts or rejects appellants' Proposition of Law about mortgage reinstatements.	19
CONCLUSION.....	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

PAGE

CASES

<i>Balyint v. Arkansas Best Freight System, Inc.</i> (1985), 18 Ohio St.3d 126	19
<i>Davidson v. Weltman, Weinberg & Reis</i> (S.D. Ohio 2003), 285 F.Supp.2d 1093	13, 16
<i>In re Evans</i> (S.D. Ohio 2006), 336 B.R. 749	16
<i>In re Landrum</i> (S.D. Ohio 2001), 267 B.R. 577	15
<i>In re Petroff</i> (6 th Cir. B.A.P. 2001), No. 00-8085, 2001 WL 34041797, at footnote 2	16
<i>In re Tudor</i> (S.D. Ohio 2005), 342 B.R. 540	12, 15, 18
<i>Leavans v. Ohio National Bank</i> (1893), 50 Ohio St. 591	8, 9, 11, 17
<i>Maitland v. Ford Motor Co.</i> , 103 Ohio St.3d 463, 2004-Ohio-5717	19
<i>Miller v. Kyle</i> (1911), 85 Ohio St. 186	passim
<i>New Market Acquisitions, Ltd. v. Powerhouse Gym</i> (S.D. Ohio 2001), 154 F.Supp.2d 1213	18
<i>Sabin v. Ansorge</i> (11 th Dist. 2000), No. 99-L-158, 2000 WL 1774141, appeal denied (2001), 91 Ohio St.3d 1489	15
<i>Washington Mutual Bank v. Mahaffey</i> (2d Dist. 2003), 154 Ohio App.3d 44	passim
<i>Worth v. Aetna Casualty & Surety Co.</i> (1987), 32 Ohio St.3d 238	10, 11

STATUTES

R.C. 1301.21	16, 17, 18, 19
R.C. 1301.21(A)(1)	17
R.C. 1301.21(A)(2)	17, 18
R.C. 1301.21(B)	17, 18
R.C. 1301.21(C)	17

RULES

Civil Rule 12(B)(6)4

OTHER AUTHORITIES

H.B. 292 (1999), Section 3.....18

STATEMENT OF THE CASE AND FACTS

A. The issue presented

Borrowers who fail to make the monthly payments required by a mortgage generally have a contractual right to reinstate the mortgage by paying the overdue amounts and the costs and attorney fees the lender incurred in foreclosure proceedings prior to the reinstatement. The issue in this appeal is whether the Court should create a new rule of law that would override the contractual reinstatement provisions of mortgages and require lenders to pay the foreclosure attorney fees when defaulting borrowers reinstate their mortgages.

As set forth below, there is no common law or statutory rule in Ohio that prohibits borrowers from agreeing to pay their lenders' foreclosure attorney fees in order to reinstate their mortgages and terminate foreclosure proceedings. Appellants and their amici curiae argue that this Court could increase the number of defaulting borrowers who avoid foreclosure by reinstating their mortgages if it relieved them of their contractual obligation to pay the foreclosure attorney fees. The Ohio Constitution does not vest this Court with the legislative power to decide whether the number of foreclosures would or should be reduced by shifting fees from defaulting borrowers onto their lenders.

Even if the Court had that power, it would be unwise to exercise it here. Residential mortgages would become pay-at-will debts in Ohio if this Court excused defaulting borrowers from paying foreclosure attorney fees as a condition of reinstating a mortgage. A borrower could withhold monthly mortgage payments until the lender initiated (and nearly completed) foreclosure proceedings, and then simply reinstate the

mortgage by belatedly paying the overdue amounts – a scenario that will compound the foreclosure burden that Ohio courts already bear. Unless the lender was willing to incur unreimbursed attorney fees to pursue foreclosure proceedings that will ultimately be futile, the borrower would never need to make the monthly mortgage payments.

Appellants' proposed solution to the rising number of foreclosures is oversimplistic: if lenders are forced to pay some of their borrowers' contractual obligations, borrowers will have somewhat more money and thus will be somewhat more likely to avoid foreclosure. Curiously, although appellants and their amici curiae identify sub-prime mortgages as the source of the current high foreclosure rates, their Proposition of Law would rewrite the reinstatement provisions of all mortgages and impose costs on all lenders. This is precisely the type of political decision that the Ohio Constitution assigns to the legislative branch of our state government. As set forth below, neither Ohio common law nor Ohio statutory law prohibit defaulting borrowers from agreeing to pay foreclosure attorney fees in order to reinstate a mortgage and avoid foreclosure.

B. The relevant facts

Each of the eleven appellants in this case entered into a mortgage with one of the appellee lenders or their predecessors in interest. Each appellant subsequently failed to make the monthly payments required by the mortgage, and appellees later filed foreclosure actions to enforce appellants' debt obligations.

The foreclosure proceedings against each appellant were voluntarily dismissed by appellees prior to any final decrees or judicial sales of the mortgaged property. Appellees did not ask the courts to award them anything for the attorney fees they had incurred in the foreclosure proceedings prior to the dismissals. Accordingly, this appeal

does not raise any legal issues about whether a lender can recover foreclosure attorney fees as part of the relief awarded in foreclosure proceedings that enforce a defaulting borrower's debt obligations.

Appellants were able to obtain dismissal of the foreclosure proceedings and to retain their mortgaged property in various ways. Some appellants chose to avoid foreclosure by exercising a contractual right to reinstate the mortgage; the reinstatement provisions of appellants' mortgages allow a defaulting borrower to stop the foreclosure process by making the lender whole, i.e., by paying the overdue mortgage payments and the costs and attorney fees that the lender incurred in the foreclosure proceedings. Other appellants chose alternative methods to avoid foreclosure without reinstating their mortgages. For example, appellant van Gulijk renegotiated the terms of her mortgage with her lender, a predecessor of appellee Washington Mutual Bank, thereby obtaining a substantially lower interest rate and lower monthly payments, and she then used the proceeds of the new mortgage to pay the balance due on the original mortgage and the costs and attorney fees the lender had incurred in foreclosure proceedings prior to the renegotiation.

C. The proceedings below

After appellees voluntarily dismissed the foreclosure actions, appellants filed this putative class action against them in the Mahoning County Court of Common Pleas. The Complaint asserts claims for "violation of public policy" (First Cause of Action), "unjust enrichment" (Second Cause of Action), and "conspiracy" (Third Cause of Action). Appellants allege for each cause of action that their agreements to pay appellees' attorney fees, and thereby reinstate their mortgages and avoid foreclosure,

are against public policy and unenforceable as a matter of law. (First Amended Class Action Complaint, Oct. 9, 2003, at ¶ 62.)

The trial court granted appellees' motion to dismiss all three causes of action for failure to state a claim pursuant to Civil Rule 12(B)(6). (Judgment Entry, July 21, 2004.) It acknowledged that contracts for the payment of attorneys' fees as a penalty upon foreclosure violate public policy, but it concluded that defaulting borrowers can agree to pay their lenders' attorney fees in order to avoid foreclosure. (Id., at 3; emphasis added.)

The Court of Appeals agreed with the trial court that Ohio law does not allow a lender to recover its attorney fees as part of the relief it is awarded in a foreclosure decree that enforces a loan. (Opinion, Feb. 12, 2007, 2007-Ohio-596, at ¶ 14.) The Court of Appeals also agreed with the trial court that this common law rule does not apply to the present case, in which appellants voluntarily chose to pay their lenders' foreclosure attorney fees in order to obtain dismissal of foreclosure proceedings before any relief was awarded enforcing their debts:

[A]ppellants 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 obligation that arises in connection with the enforcement of the contract.

(Id., at ¶ 35.)

When appellants appealed from that ruling, this Court exercised its discretionary jurisdiction over one of the two propositions of law they had proposed. (Order, 114 Ohio St.3d 1478, 2007-Ohio-3699.) The appeal is therefore limited to the legality of a borrower's agreement to pay a lender's foreclosure attorney fees when the borrower reinstates a mortgage, as described in appellants' sole remaining Proposition of Law.

D. Appellants' Proposition of Law does not encompass the claims of all appellants.

Appellee Washington Mutual Bank is filing its own separate merit brief because the claims that appellant van Gulijk asserts against it arise from unique factual circumstances that fall outside the scope of appellants' Proposition of Law. Most obviously, Ms. van Gulijk did not reinstate her mortgage and thus did not pay foreclosure attorney fees pursuant to its reinstatement provisions. Instead, Ms. van Gulijk renegotiated her loan and entered into an entirely new mortgage with her lender at a lower interest rate (6.75% vs. 8.375%), thereby lowering her monthly mortgage payments, in exchange for her payment of the outstanding balance owed on the original mortgage and the foreclosure costs and attorney fees her lender had incurred prior to the renegotiation of the mortgage.

Accordingly, appellee Washington Mutual separately moved the trial court to dismiss Ms. van Gulijk's claims on the ground that she did not reinstate her mortgage and therefore did not fall within the scope of appellants' legal claims. (Motion to Dismiss, Dec. 12, 2003.) However, the trial court dismissed all claims against all appellees generally, without separately addressing the fact that some appellants did not reinstate their mortgages and did not pay foreclosure attorney fees pursuant to mortgage reinstatement provisions. (Judgment Entry, *supra*.) The Court of Appeals similarly addressed only mortgage reinstatements, not mortgage renegotiations or other work-out arrangements, when it affirmed the trial court's ruling. (Opinion, *supra*.)

Appellants' merit brief once again fails to acknowledge or address the fact that appellant van Gulijk did not reinstate her mortgage and, thus, did not pay her lender's foreclosure attorney fees pursuant to "[a] provision in a residential mortgage to the

effect that a borrower . . . may only reinstate the mortgage . . . upon payment of the attorney fees incurred by the lender” (Appellants’ Proposition of Law.) Because appellants’ Proposition of Law does not affect the outcome of her claims, the Court should affirm the ruling below with respect to Ms. van Gulijk (and other appellants who used alternative methods to avoid foreclosure) regardless of whether it adopts that Proposition of Law. Moreover, the Court should then expressly reject appellants’ Proposition of Law and affirm the ruling below with respect to the appellants who reinstated their mortgages.

ARGUMENT

- I. **This Court should not create a new rule of law that prohibits defaulting borrowers from agreeing to pay their lenders' foreclosure attorney fees in exchange for the opportunity to reinstate their mortgages and avoid foreclosure.**

Appellants' Proposition of Law proclaims the purported illegality of mortgage provisions that require a defaulting borrower to pay the attorney fees its lender incurred in foreclosure proceedings in exchange for dismissal of the foreclosure proceedings and reinstatement of the mortgage. This Proposition of Law is irrelevant to the claims of appellants like Ms. van Gulijk, who did not reinstate their mortgages, and this Court should affirm the ruling below in their cases regardless of whether it endorses or rejects appellants' contention as to reinstated mortgages.

This Court also should affirm the ruling of the Court of Appeals with respect to appellants who, unlike Ms. van Gulijk, reinstated their mortgages and paid their lenders' foreclosure attorney fees pursuant to the mortgage reinstatement provisions. As set forth below, these appellants rely upon a common law rule that prohibits a lender from obtaining an award of attorney fees in a successful foreclosure action that enforces the debt. But every Ohio court that has addressed the issue has concluded that this rule does not prohibit a borrower from agreeing to pay the lender's foreclosure attorney fees in order to obtain a dismissal of the foreclosure action and prevent enforcement of the debt. In addition, there is no Ohio statute that prohibits agreements to pay lenders' foreclosure attorney fees in connection with mortgage reinstatements. Accordingly, this Court should affirm the ruling of the Court of Appeals as to the claims of all appellants.

A. There is no Ohio common law rule that prohibits a defaulting borrower from agreeing to pay the lender's foreclosure attorney fees in order to reinstate the mortgage and avoid foreclosure.

Appellants' primary argument is that the common law of Ohio prohibits mortgage provisions that allow defaulting borrowers to reinstate a loan, and avoid foreclosure, if they make the lender whole by paying the overdue amounts on the mortgage and the attorney fees the lender incurred in foreclosure proceedings prior to reinstatement. (See Brief of Plaintiffs-Appellants, at 8-22.) There is no such common law rule. Every Ohio judicial decision that has addressed the issue – including the decision by the Court of Appeals in this case – has reached the opposite conclusion and has upheld attorney fee agreements in mortgage reinstatement provisions.

Appellants rely instead upon a line of cases addressing a fundamentally different issue: whether a lender can collect its attorney fees as part of the relief it obtains from a court in a successful foreclosure action. For example, appellants quote *Leavans v. Ohio National Bank* (1893), 50 Ohio St. 591 syllabus, as holding 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.” (Brief of Plaintiffs-Appellants, at 14; bracketed text and ellipsis in original.) But the *Leavans* syllabus actually states that foreclosure attorney fees cannot be awarded by the court in a foreclosure decree enforcing the debt:

A stipulation in a mortgage that, in case an action shall be brought to foreclose it, a reasonable attorney fee, to be fixed by the court, for the services of plaintiff's attorney in the action, should be included in the decree, and paid out of the proceeds of the sale, is against public policy, and void.

(Id.; emphasis added.)

The common law rule discussed in *Leavans* prevents a lender from recovering its foreclosure attorney fees in a decree of foreclosure, from the proceeds of the judicial sale of the property, because this would effectively increase the interest rate, in violation of usury laws, and because it would constitute a penalty on the defaulting borrower. That rule has nothing to do with the facts of the present case, where the courts did not award attorney fees in the foreclosure actions; those actions were dismissed by appellees before relief was granted and the mortgaged property was sold. Unlike the borrowers in *Leavans*, the appellants in this case were not required to pay lenders' foreclosure attorney fees. Each appellant had the option of either (1) presenting their defenses in the foreclosure proceedings, with no obligation to pay the lenders' attorney fees even if the court ordered foreclosure, or (2) reinstating their mortgages by paying the overdue amounts and the lenders' foreclosure attorney fees, thereby obtaining dismissal of the foreclosure actions and preventing the sale of their mortgaged property.

All of the cases that appellants rely upon involve the common law rule that bars judicial awards of attorney fees in foreclosure decrees that enforce the borrower's debt. These cases do not endorse – or even address – the rule that appellants ask this Court to adopt, which would bar payments of attorney fees by borrowers who voluntarily choose to reinstate a mortgage to avoid a foreclosure decree enforcing the debt. See, e.g., *Miller v. Kyle* (1911), 85 Ohio St. 186, 192, cited on eleven different pages of appellants' Brief, where the Court held that a lender could not enforce a contractual provision that allowed the lender to obtain an award of attorney fees in a decree of foreclosure enforcing the loan:

In this state . . . contracts for the payment of counsel fees upon default in payment of a debt will not be enforced.

(Emphasis added.) Similarly, appellants repeatedly invoke the “American rule” that courts ordinarily do not award relief for attorney fees that a successful litigant incurred to prosecute its claims to judgment. That rule has no relevance here because the courts in the foreclosure proceedings did not award attorney fees to appellees; the foreclosure proceedings were voluntarily dismissed by appellees.

This Court already has discussed the limited scope of the common law rule described in *Miller*, supra, that bars awards of attorney fees in judgments enforcing a debt. In *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St.3d 238, cited in Brief of Plaintiffs-Appellants, at 6, 13, 14, 16, 17, 18, the Court upheld a provision of an employment contract that required one party to indemnify the other party for attorney fees it incurred to enforce the contract:

Ohio’s public policy forbids contracts for the payment of counsel fees upon default in payment of a debt obligation. Appellees claim that the enforcement clause provision in the instant case is equivalent to a contract to pay attorney fees upon default of a debt obligation. We do not agree with appellees’ characterization

[I]n the event of a breach or other default on the underlying [debt] 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.

In contrast, the indemnity agreements at issue in the instant case present a circumstance in which it is in the interest of both [parties] to enforce the terms of their Employment Agreements This is not a situation of a one-sided attorney fees provision or one of imbalance

32 Ohio St.3d at 242-43 (emphasis added).

The mortgage reinstatement provisions at issue in the present case, which give borrowers the option to voluntarily pay attorney fees incurred by their lenders in order to avoid foreclosure and keep their homes, are indisputably “in the interest” of debtors; if they were not, appellants would not have chosen to exercise their rights under those provisions and to pay the attorney fees. See Merit Brief of Amicus Curiae State of Ohio, at 14 (“both parties benefit from reinstating the mortgage”). Apart from their contracts with lenders, borrowers have no legal right to reinstate their mortgages, and there is no reason to believe that lenders would be willing to reinstate mortgages at below-cost rates that do not reimburse them for the attorney fees they had to incur to preserve their security interests in the mortgaged property. Most importantly, no borrowers are required to pay these attorney fees; they can choose to litigate their legal rights and defenses in the foreclosure proceedings instead of reinstating their mortgages. In the present case, appellants decided that it was in their interests to pay the attorney fees and reinstate their mortgages.

Appellants’ Proposition of Law ultimately depends upon their ability to blur the distinction between the common law rule prohibiting payment of attorney fees in a judicial decree that enforces foreclosure, as discussed in *Leavans*, *Miller*, and *Worth*, *supra*, and the rule described in appellants’ Proposition of Law in this case, which would prohibit payment of attorney fees to reinstate a mortgage and avoid foreclosure. See, e.g., Brief of Plaintiffs-Appellants, at 17 (“Ohio common law . . . has long invalidated – and still invalidates – contractual provisions calling for the payment of attorney fees in a contract of indebtedness”) (emphasis added); and 27 (“[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") (emphasis added). This is manifestly incorrect; the mortgage reinstatement provisions at issue here contain a voluntary option to pay attorney fees to prevent enforcement of the debt.

Appellants' amici curiae make the same error. See Merit Brief of the State of Ohio, *supra*, at 6 (claiming that "[the fact] that the attorney-fees-shifting-provision attaches to reinstatement rather than default . . . is a distinction without a difference" under the common law rule discussed in *Miller*, *supra*). There is a significant difference between a contract provision that allows defaulting borrowers to choose to pay attorney fees to retain property that they used to secure a loan, and a contract provision that requires defaulting borrowers to pay attorney fees when they lose that property in foreclosure proceedings. See *In re Tudor* (S.D. Ohio 2005), 342 B.R. 540, 542, recognizing that "attorney fee stipulations conditioning payment on the exercise of a contractual right of reinstatement . . . do not automatically penalize a borrower's default, but instead impose a charge for exercising a noncompulsory contractual right."

Appellants' contention – that the common law rule prohibiting agreements to pay attorney fees to enforce foreclosure also extends to agreements to pay attorney fees to avoid foreclosure – is especially audacious inasmuch as Ohio already has a separate common law rule that expressly allows attorney fee agreements in the latter situation. Appellants acknowledge this case law but do not attempt to distinguish it from the present case, arguing instead that these courts were "simply wrong." (Brief of Plaintiffs-Appellants, at 28.) As set forth below, those courts directly considered – and properly rejected – the same arguments that appellants make in the instant appeal.

In *Washington Mutual Bank v. Mahaffey* (2d Dist. 2003), 154 Ohio App.3d 44, the Court of Appeals specifically addressed the issue presented here: whether a contractual provision violated Ohio law by requiring borrowers to pay the lender's foreclosure attorney fees if they chose to reinstate their mortgages and avoid foreclosure. The Court first discussed the common law rule "that provisions in a mortgage instrument for the payment of attorney fees, as part of the borrower's obligations upon foreclosure, are against public policy and void." 154 Ohio App.3d at 51 (emphasis added). It then held:

[A]ll these cases are distinguishable. 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 [H]e is not entitled by law to reinstate a mortgage loan once it is in default The bank chose to provide in its contract . . . that the loan might be reinstated . . . upon certain conditions. One of these is the payment of attorney fees. We see nothing against public policy 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 Mahaffey was not, and is not, obliged to seek reinstatement of the loan.

154 Ohio App.3d at 51-52 (emphasis added).

Similarly, in *Davidson v. Weltman, Weinberg & Reis* (S.D. Ohio 2003), 285 F.Supp.2d 1093, the Court directly addressed this issue and upheld a mortgage provision that conditioned reinstatement of the mortgage upon the borrower's payment of the lender's foreclosure attorney fees. The Court discussed the common law rule prohibiting attorney fees that are paid upon foreclosure and held that it does not prohibit attorney fees that are paid to avoid foreclosure:

At the heart of Plaintiff's argument is the premise that payment of attorney's fees due to default is synonymous

with the payment of attorney's fees in the context of reinstatement [H]owever . . . the requirement of the payment fees as a condition of reinstatement does not arise in connection with the enforcement of the mortgage contract, *i.e.*, the default itself.

As recognized in *Mahaffey*, upon default, the mortgagor has no obligation to seek reinstatement of the 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, [it] does not implicate the public policy concern in *Miller* [supra] regarding the imposition of a penalty against the debtor upon default Defendant has made the payment of its reasonable attorney fees a condition of reinstatement, not of default. Thus, those fees are permissible under Ohio law.

285 F.Supp.2d at 1102-1103 (original emphasis).

In the present case, the Court of Appeals properly followed the Ohio common law rule allowing attorney fees as part of a reinstatement, rather than the Ohio common law rule prohibiting attorney fees as part of a foreclosure decree, and held that:

[A] provision [for attorney fees upon reinstatement] is not in the sole interest of the lender. The provision allows a borrower to work out an agreement with the lender and retain their [sic] home. Additionally, it is unlike the situation in *Miller* [supra] 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.

Second, the distinction highlighted in *Mahaffey* [supra] 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.

2007-Ohio-596, ¶¶ 31-32.

No court has ever held that a provision requiring payment of attorney fees to avoid foreclosure and reinstate a mortgage violates Ohio public policy. Although Ohio

courts have continued to apply the common law rule prohibiting an award of attorney fees by a court upon foreclosure, when reinstatement is not involved, see, e.g., *Sabin v. Ansoorge* (11th Dist. 2000), No. 99-L-158, 2000 WL 1774141, appeal denied (2001), 91 Ohio St.3d 1489, no Ohio court has agreed with appellants' contention that this common law rule also applies to contractual agreements to pay attorney fees upon reinstatement. Compare Merit Brief of Amicus Curiae State of Ohio, at 5, representing that the "established law" of Ohio prohibits mortgage provisions that require the borrowers to pay lenders' foreclosure attorney fees "whether as a consequence of foreclosure or as a prerequisite to reinstating the mortgage." This is simply inaccurate, as set forth above.

Appellants' proof of this "established law" consists of "one court" that purportedly "recognized the artificiality of the distinction between charging a borrower attorney fees in the context of a foreclosure and charging a borrower attorney fees in the context of a reinstatement," citing *In re Landrum* (S.D. Ohio 2001), 267 B.R. 577. (Id.) This is also incorrect. The Court in *Landrum* refused to require the borrower to pay the lender's attorney fees when the borrower cured the mortgage default pursuant to bankruptcy statutes; the mortgage was not reinstated, and the reinstatement provisions of the mortgage were not at issue. The holding in *Landrum* – that federal bankruptcy law does not authorize bankruptcy courts to include attorney fees when they calculate statutory cure amounts – is irrelevant to appellants' Proposition of Law in the present case. See *In re Tudor* (S.D. Ohio 2005), 342 B.R. 540, 558, 563, in which the Court explained that a statutory "cure" is not equivalent to a contractual "reinstatement" in this context:

[C]ourts have drawn a distinction between default-based attorney fee provisions and contractual stipulations requiring

the payment of fees as a condition of mortgage reinstatement, holding that the latter are not contrary to public policy and are enforceable. See *Davidson* [supra]; *Mahaffey* [supra].

* * *

At the heart of this contested matter is the question of whether the Debtor's cure of his mortgage arrearage through his Chapter 13 plan is essentially equivalent to a contractual mortgage reinstatement [T]here are essential differences

See also *In re Evans* (S.D. Ohio 2006), 336 B.R. 749, 756, refusing to include the lender's attorney fees in the amount of the cure in a bankruptcy proceeding, even though the contractual reinstatement provisions of the mortgage required payment of attorney fees, because "[c]uring of a default through a Chapter 13 plan and petition is not the equivalent of a 'reinstatement' There is nothing in the Bankruptcy Code that permits [a lender] to include its [foreclosure] attorney fees in the cure amount in this context." See also *In re Petroff* (6th Cir. B.A.P. 2001), No. 00-8085, 2001 WL 34041797, at footnote 2 ("the concept of 'cure' in Chapter 13 is not the same thing as 'reinstatement' "). No Ohio court has ever endorsed the purported "established law" described in appellants' Proposition of Law.

In short, the Court of Appeals correctly held that the common law of Ohio does not prohibit a defaulting borrower from agreeing to pay a lender's attorney fees in order to reinstate a mortgage and avoid foreclosure. This Court should affirm its ruling.

B. There is no Ohio statutory rule that prohibits a defaulting borrower from agreeing to pay the lender's foreclosure attorney fees in order to reinstate the mortgage and avoid foreclosure.

Appellants' secondary argument is that an Ohio statute, R.C. 1301.21, invalidates mortgage provisions that allow defaulting borrowers to reinstate their loans and avoid foreclosure by paying the attorney fees the lenders incurred in foreclosure

proceedings prior to reinstatement. (See Brief of Plaintiffs-Appellants, at 22-25.) This statute does not prohibit – or even mention – a borrower’s payment of attorney fees to reinstate a mortgage; it authorizes attorney fee provisions in large commercial loan agreements. Every Ohio court that has addressed R.C. 1301.21, including the Court of Appeals in this case, has concluded that it does not prohibit non-commercial mortgage reinstatement provisions that require borrowers to pay attorney fees.

The statute does not apply to appellants’ residential mortgages because it is limited by its express terms to commercial indebtedness that exceeds \$100,000. R.C. 1301.21(A)(1) and (C). Moreover, R.C. 1301.21 is expressly limited to attorney fees that are awarded “in connection with the enforcement of a contract of indebtedness,” R.C. 1301.21(A)(2), and thus does not address attorney fees that are voluntarily paid to reinstate a mortgage and terminate foreclosure proceedings. *Washington Mutual Bank v. Mahaffey* (2d Dist. 2003), 154 Ohio App.3d 44, 2003-Ohio-4422, at ¶¶ 40-41. In other words, the statute addresses the same type of attorney fee awards as the common law rule discussed in *Leavans*, *supra*, and *Miller*, *supra*, and it does not apply to attorney fees paid to reinstate a mortgage and prevent enforcement of a debt for the same reasons that the common law rule does not apply to such fees. See R.C. 1301.21(B) (“[i]f a contract of indebtedness [for a commercial debt exceeding \$100,000] includes a commitment to pay attorneys’ fees, and if the contract is enforced . . . a person that has the right to recover attorneys’ fees . . . may recover attorneys’ fees”). Appellants chose to pay their lenders’ attorney fees in the present case so that their debt obligations would not be enforced and their mortgages would be reinstated.

In *Washington Mutual Bank v. Mahaffey*, supra, the Court of Appeals for the Second District of Ohio refused for that reason to apply R.C. 1301.21 to prohibit an agreement to pay attorney fees to reinstate a mortgage:

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.

* * *

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." In our view, 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" Therefore, we find R.C. 1301.21(B) inapplicable.

154 Ohio St.3d at 47, 2003-Ohio-4422, at ¶¶ 40-41. Section 3 of 1999 H. 292, the bill that enacted R.C. 1301.21, confirms that conclusion:

Section 1301.21 of the Revised Code applies only to commitments to pay attorney fees that are included in contracts of indebtedness that are enforced, through judicial proceedings or otherwise

Quoted in *New Market Acquisitions, Ltd. v. Powerhouse Gym* (S.D. Ohio 2001), 154 F.Supp.2d 1213, 1226 (original emphasis).

Appellants nevertheless argue that R.C. 1301.21 should be interpreted to prohibit attorney fees in non-commercial residential mortgages because it expressly authorizes attorney fees in a commercial context but is silent as to non-commercial loans. The same argument was rejected by the Court in *In re Tudor* (S.D. Ohio 2005), 342 B.R. 540, 544, which held that "the statute's limitation on the enforceability of attorney fee provisions . . . is not applicable" to a residential mortgage, and that "[borrower's] assertion that there is a statutory basis for disallowance of the [attorney] fees is

incorrect"). A newly enacted statute that overlaps with existing common law does not overrule other aspects of the common law that are not covered by the statute. *Balyint v. Arkansas Best Freight System, Inc.* (1985), 18 Ohio St.3d 126. See also *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717 (the silence of the Ohio Lemon Law as to mileage setoffs in awards and settlements does not constitute a prohibition on such setoffs).

The Court of Appeals in the present case properly followed Ohio law when it held that R.C. 1301.21 does not prohibit attorney fees that are paid to reinstate a residential mortgage and avoid foreclosure. There is no Ohio statute that prohibits appellants from agreeing to pay appellees' attorney fees to halt the enforcement of their debt obligations, and this Court should affirm the ruling below as a matter of law.

II. This Court should also affirm the ruling below as to the other appellants, who avoided foreclosure without reinstating their mortgages, regardless of whether the Court adopts or rejects appellants' Proposition of Law about mortgage reinstatements.

Appellants' Proposition of Law is expressly limited to attorney fees that are paid to reinstate a mortgage: "A provision in a residential mortgage to the effect that a borrower in default . . . may only reinstate the mortgage, and thereby avoid foreclosure, upon payment of the attorney fees . . . is against public policy and void." (Brief of Plaintiffs-Appellants, at iii.) However, the present case includes some appellants who did not reinstate their mortgages and, thus, did not pay attorney fees pursuant to the mortgage reinstatement provisions that appellants challenge in this appeal. Accordingly, even if the Court adopted appellants' Proposition of Law, it should affirm the judgments against the appellants who did not reinstate their mortgages.

For example, appellants' arguments about attorney fees that are paid to reinstate mortgages are completely irrelevant to the claims brought against appellee Washington Mutual Bank by appellant van Gulijk, who did not reinstate her mortgage. Instead, Ms. van Gulijk renegotiated her mortgage with her lender and entered into an entirely new mortgage at a lower interest rate that lowered her monthly payments and enabled her to keep her home.

Appellants themselves emphasize the differences between a borrower's payment of attorney fees in order to reinstate an existing mortgage – which is addressed by their Proposition of Law – and a borrower's payment of attorney fees in order to negotiate a new mortgage – which is what happened in Ms. van Gulijk's case. Indeed, they complain that the Court of Appeals reached the wrong result below because it purportedly treated appellants' mortgages as if they had been "terminated" and assumed "that a reinstatement constitutes a new agreement." (Brief of Plaintiffs-Appellants, at 8.) In the cases of Ms. van Gulijk and other appellants who made alternative arrangements to avoid foreclosure, the mortgages indisputably were "terminated" and there were "new agreements." Appellants thus tacitly concede that the Court of Appeals ruled correctly in those cases.

Washington Mutual repeatedly pointed out in the trial court and in the Court of Appeals that it does not belong in this case because Ms. van Gulijk did not pay attorney fees under the reinstatement provisions challenged by appellants. (See, e.g., Motion to Dismiss, Dec. 12, 2003.) The lower courts dismissed all claims against all appellees generally, without separately addressing the claims by appellants who did not reinstate their mortgages. Now, in this Court, appellants continue to pretend that Ms. van Gulijk

paid attorney fees to her lender pursuant to the reinstatement provisions of her mortgage contract. She did not, and the ruling below in her case should be affirmed regardless of whether the Court accepts or rejects appellants' Proposition of Law.

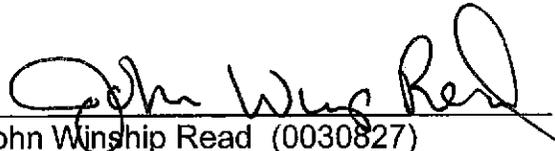
CONCLUSION

The reinstatement provisions of appellants' mortgages offer them an opportunity to terminate foreclosure proceedings and halt judicial enforcement of their debt obligations as long as they make the lender whole by paying the overdue mortgage payments and the foreclosure attorney fees the lender incurred prior to reinstatement.

Appellants fail to recognize that there will be even more residential foreclosures if this Court prohibits lenders from reinstating mortgages for defaulting borrowers in exchange for payment of the lenders' foreclosure attorney fees. Conversion to a pay-at-will system for existing mortgage debt obligations would almost certainly increase delinquencies, and future borrowers would face the prospect of mortgage loans without a reinstatement option. Appellants assume that lenders will continue to include reinstatement provisions in mortgages even if their attorney fees are not reimbursed, but nothing in Ohio law requires them to do so. If this Court adopted appellants' Proposition of Law, lenders would have a financial incentive to omit reinstatement provisions from their mortgages, and defaulting borrowers like appellants would lose their homes in foreclosure proceedings. Appellants' "solution" to the problem of rising foreclosure rates would only make it worse.

As set forth above, the statutes and common law of Ohio do not prohibit lenders from requiring reimbursement of their attorney fees when defaulting borrowers choose to reinstate their mortgages. The wisdom of such provisions, and their effect on foreclosure rates, are legislative matters. This Court should affirm the decision of the Court of Appeals in all respects.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Winship Read". The signature is written in a cursive style with a large, looping initial "J".

John Winship Read (0030827)
VORYS, SATER, SEYMOUR AND PEASE LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114-1724
Tel: (216) 479-6103
Fax: (216) 937-3737

Attorneys for Appellee Washington Mutual
Bank (successor to Defendant
Homeside Lending, Inc.)

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of December, 2007, the below-signed attorney served the above Merit Brief of Appellee Washington Mutual Bank (successor to Defendant Homeside Lending, Inc.) via first-class U.S. mail, postage prepaid, upon:

Michael S. Miller
Daniel R. Volkema
VOLKEMA THOMAS, LPA
140 East Town Street, Suite 1100
Columbus, OH 43215

Stuart T. Rossman
NATIONAL CONSUMER LAW CENTER
77 Summer Street, 10th Floor
Boston, MA 02210

Seth R. Lesser
LOCKS LAW FIRM PLLC
110 East 55th Street, 12th Floor
New York, NY 10022

Attorneys for Appellants Sharon Wilborn, et al.

Bobbie L. Flynt
COMSTOCK, SPRINGER & WILSON CO., LPA
100 Federal Plaza East, Suite 926
Youngstown, OH 44503-1811,
and

Stephen T. Bolton
MANCHESTER, BENNETT, POWERS
& ULLMAN
The Commerce Building
201 E. Commerce St., Atrium Level 2
Youngstown, OH 44503-1641,
and

James C. Martin
Perry A. Napolitano
Joseph E. Culleiton
David J. Bird
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Attorneys for Appellees Bank One
Corporation, Ameriquest Mortgage Co.,
Principal Residential Mortgage, Inc.,
Wells Fargo Home Mortgage, Inc.,
Washtenaw Mortgage, Mortgage
Electronic Registration System, Inc.,
and Chase Manhattan Mortgage Co.,

Pamela S. Petas
Rick D. DeBlasis
LERNER, SAMPSON & ROTHFUSS
120 E. Fourth Street, Suite 800
Cincinnati, Ohio 45202

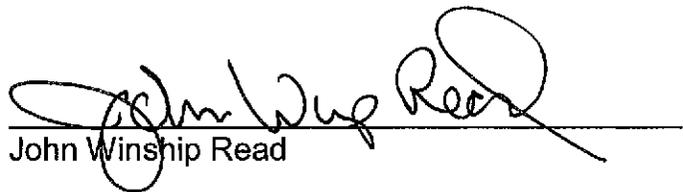
Attorneys for Appellee,
Lerner, Sampson & Rothfuss

Marc Dann
Attorney General of Ohio
William P. Marshall
Solicitor General
Robert J. Krummen
Deputy Solicitor
Daniel W. Fausey
Todd A. Nist
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Attorneys for Amicus Curiae State of Ohio

Benson A. Wolman
Rachel K. Robinson
Paul B. Bellamy
Judith B. Goldstein
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1590
Columbus, Ohio 43215-3506

Attorneys for Amici Curiae, Equal Justice
Foundation, Ohio State Legal Services Association,
Southeastern Ohio Legal Services, Northeast Ohio
Legal Services, Legal Aid of Western Ohio, Advocates
for Basic Legal Equality, Legal Aid Society of Columbus,
the Legal Aid Society of Cleveland, and the Coalition on
Homelessness and Housing in Ohio



John Winship Read