

IN THE SUPREME COURT OF OHIO

FLAGSTAR BANK, FSB,

Plaintiff-Appellant,

v.

**AIRLINE UNION'S MORTGAGE
COMPANY, et al.,**

Defendants-Appellees.

**Consolidated Case Nos. 2010-0508,
2010-0511**

On Appeal From Hamilton County Court
of Appeals, First Appellate District

Court of Appeals
Case No. C 0900166

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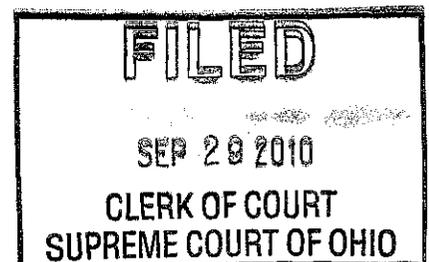
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I. INTRODUCTION

The First District certified and this Court accepted jurisdiction to resolve a question: “Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?” Here, that question requires the Court to determine whether a mortgage lender’s claim against an appraiser of collateral accrues on the date of the issuance of the appraisal, or the date that the lender has to resort to the collateral and it is insufficient to satisfy the balance due.

Plaintiff-Appellant Flagstar Bank, FSB (“Flagstar”) addressed these issues in that order: what should be the law and how does that law apply to the circumstances presented in this case. Flagstar’s position has been opposed by three parties: Defendant-Appellee John Reinhold, Amicus Ohio Association of Realtors (“OAR”), and Amicus Pamela J. Lawrentz (an appraiser involved in identical litigation with Flagstar in a case before the Eleventh District)¹ (collectively, the “Responding Parties”). Each contends that *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206, controls the outcome, that the statute of limitations always begins to run on the date of the negligent act, that the “delayed damages” argument proposed by Flagstar is nothing but a “discovery rule” in different garb, and that there is no constitutional issue.

The most striking aspect of the opposing Briefs is their omissions. This is a certified conflict case—the First District Court of Appeals certified its decision and the rule which it adopted was in conflict with the decisions and rule announced in *JP Morgan Chase Bank NA v. Lanning*, Fifth Dist. No. 2007CA00223, 2008-Ohio-893; *Fritz v. Cox* (2001), 142 Ohio App.3d 664, 756 N.E.2d 740; and *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 768-69, 656 N.E.2d 729. **None** of the Responding Parties address **any** of these cases or the conflict in

¹ That case is stayed pending the Court’s decision in this case.

question. Flagstar pointed out that the resolution of the conflict depended on how the Court would define the word “accrued” in R.C. 2305.09. Once again, **none** of the Responding Parties address this issue. Feigning ignorance of the matters before the Court simply cannot aid in their resolution.

The only real argument that the Responding Parties advance is based on cases in which the courts held that the damages complained of occurred contemporaneously with the negligent act. Because those cases involved instantaneous damages, the courts which decided them never had to wrestle with the meaning of the word “accrued” in R.C. 2305.09, or how to address the policy issues when recoverable damages do not arise at the same moment as the negligence. It is **that question** which the First District certified, **that question** which this case poses, and **that question** with which this Court must grapple, both for this dispute and for future cases.

Flagstar respectfully suggests that the better line of reasoning is contained in its brief: resolution of the case hinges on the meaning of “accrued” in R.C. 2305.09(D); the Court should give that phrase its common law meaning; under the common law, for a claim to “accrue,” the tort must be complete; and for the tort to be complete, there must be actual, recoverable (and not merely theoretical) damages. While *REIT One* confirmed that there is no discovery rule in R.C. 2305.09(D), in *Lanning, Fritz, and Gray* the Fifth and Sixth Districts correctly reasoned that the actual damages requirement is not about discovery, making *REIT One* simply inapposite. Finally, when an appraiser is valuing collateral for a loan, actual damages do not occur until the loan goes into default, the creditor has to resort to the collateral, and the collateral is insufficient to pay off the loan.

As an alternative argument, Flagstar pointed out that construing the word “accrued” in R.C. 2305.09 to commence the statute before actual damages occurred would place lenders (and

others damaged by professional negligence) in the whipsaw of having to bring their claims before they had recoverable damages or after it was too late to do so, causing R.C. 2305.09(D) to violate the Ohio and United States Constitutions. The Responding Parties address these issues not by denying the whipsaw which they advocate, but by pretending that the Constitution permits them to escape responsibility for the harm that they caused.

The position taken by the Responding Parties (and the First and Third Districts) is bad law, bad policy, and belies this Court's precedent. The rule followed in the Fifth, Sixth, Ninth and Eleventh Districts is consistent with R.C. 2305.09(D), the general statutory scheme, our Constitutions, and with fundamental fairness. The Court should find a cause of action for professional negligence accrues on the date that the negligent act causes actual damages, which, in this case, is the date the lender had to resort to the collateral.

II. ARGUMENT

Certified Conflict Question

Under R.C. 2305.09(D), does a cause of action for professional negligence accrue on the date that the negligent act is committed, or on the date that the negligent act causes actual damages?

Proposition of Law No. 1

A cause of action for negligence under R.C. 2305.09(D) does not accrue until the plaintiff has incurred actual damages.

A. A claim for professional negligence does not “accrue” under R.C. 2305.09(D) until the plaintiff suffers an actual injury.

In its initial brief, Flagstar began the analysis of when the claim “accrues” under R.C. 2305.09(D) by analyzing traditional principles of statutory interpretation. None of the Responding Parties address the meaning of the word “accrued,” either in how it is used in that statute or the meaning given that phrase by the common law. Nor do any of the responding parties address (or even cite) any of the pertinent cases. Perhaps that is not surprising.

The word “accrued” is not defined in R.C. 2305.09, and as such, it is accorded its usual, every day meaning. *Am. Fiber Sys. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶24; quoting *State v. Dorso* (1983), 4 Ohio St.3d 60, 62, 446 N.E.2d 449.

In its precedent, the Court has consistently held that a cause of action “accrues” only after the tort is complete. *Kunz v. Buckeye Union Ins. Co.* (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194. The tort of negligence is not complete until: (1) there was a duty owed by defendant to plaintiff; (2) there was a breach of that duty by defendant; and (3) there is an injury to plaintiff proximately resulting from defendant’s breach. *Chambers v. St. Mary’s Sch.* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (citations omitted).

Kunz made clear that “there must be an injury or harm to [plaintiff] as a consequence of [the defendant’s] negligence to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitation [commences] to run.” *Kunz*, 1 Ohio St.3d at 81 (internal quotation marks and citation omitted). In *Kunz*, an insurance agent negligently procured an insurance policy which failed to cover the plaintiff’s equipment. *Kunz* held that the claim accrued not upon issuance of the policies, but rather upon the damage to the equipment. *Id.* at 81-82. There was no recoverable injury, and therefore no recoverable damages, until the insured had to resort to the insurance policy and found it lacking.

Only Lawrentz addresses *Kunz*, and she misquotes it. Lawrentz Brief, 4-5. Contrary to Lawrentz’ assertion, *Kunz* does not stand for the proposition that delayed damages “is ineffective to delay the accrual,” 1 Ohio St.3d at 81, quoting *Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371, 72 N.E.2d 137. Rather, *Kunz* stands for the fact that there can be a separation between the occurrence of the negligent act and the damages themselves. As this Court reasoned in *Kunz*: “*Squire* is distinguishable from the case at bar in that the misdeeds of the bank directors in

Squire caused immediate harm to the bank even though they were not discovered until much later, whereas in the instant case no actual loss occurred until 1975.” *Kunz*, 1 Ohio St.3d at 81. See, also, *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (“where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs”);² *Point East Condo. Owners’ Ass’n v. Cedar House Assocs. Co.* (1995), 104 Ohio App.3d 704, 713, 663 N.E.2d 343 (“Unless damage is immediate, the cause of action does not accrue until actual injury occurs or damage ensues.”)

The *Kunz* rule – that a cause of action does not accrue until an actual injury occurs – was followed by all of the Certified Conflict cases. In *Fritz and Barry*, damages did not occur at the time the accountant negligently prepared the tax return, but only when the IRS later assessed damages. In *Lanning*, damages did not occur on preparation of the negligent survey, but only when a mortgagee instituted foreclosure proceedings. The same analysis has been applied by a number of other courts, both Ohio and federal. *Schnorf v. Society Bank* (6th Dist. Apr. 14, 1995), Case No. L-94-120, 1995 Ohio App. LEXIS 1538; *Sladky v. Lomax* (1988), 43 Ohio App.3d 4, 538 N.E.2d 1089; *Portage Cty. Bd. of Comm’rs v. City of Akron*, 156 Ohio App.3d 657, 2004-Ohio-1665, 808 N.E.2d 444, *rev’d in part on other grounds*, 109 Ohio St.3d 106; *Casden v. Burns* (N.D. Ohio 2007), 504 F. Supp.2d 272, 281; *Cheetwood v. Roberts* (N.D. Ohio July 18, 1991), Case No. 90-CV-7432, 1991 U.S. Dist. LEXIS 21709, at *68-69. The acknowledgement of the proper application of R.C. 2305.09(D) by the Fifth, Sixth, Ninth, and Eleventh Districts is further evidence of the error in this case.

² This Court reinforced and readopted this analysis in the tax refund statute of limitations context under R.C. 5733.12(B). *Nestle R&D Ctr., Inc. v. Levin*, 122 Ohio St.3d 22, 2009-Ohio-1929, 907 N.E.2d 714, ¶21.

As this Court held in *Kunz* (and as all these other courts have concluded), a claim does not “accrue” until the tort is complete, which requires actual damages. That is and should be the law.

B. *REIT One* simply does not apply.

Despite the *Kunz* rule and the legion of cases from other appellate districts applying it, the Responding Parties, as well as the First District, still believe that both this Court’s decision in *REIT One*, and the First District’s prior decision in *Hater v. Gradison Div. of McDonald & Co., Sec., Inc.* (1995), 101 Ohio App.3d 99, 655 N.E.2d 189, preclude an actual damages rule.

As discussed in Flagstar’s initial brief, in *REIT One*, this Court evaluated whether the four-year statute of limitation set forth in R.C. 2305.09(D) should be tolled until the time that the plaintiff “discovered” he had a professional negligence claim against his accountant. The Court appropriately noted that while R.C. 2305.09 includes a discovery rule for fraud and some claims for bodily injury, no such provision was made for professional negligence claims. As a result, the Court found that the statute of limitations began to run “when the allegedly negligent act was committed” and not at the time that the injury was discovered. *REIT One*, 46 Ohio St.3d at 181.

But in *REIT One* and *Squire* (as discussed in *Kunz*), actual damages occurred *concurrently* with the negligent act, and the delay that was at issue was the *discovery* of the negligence. In *REIT One*, the allegations were that the trustee of two trusts undertook actions benefitting himself at the expense of the trusts, and that the accounting firms failed to properly audit the trusts and prepared financial statements that were false and misleading. *Id.* In that instance, the harm from the accountants’ action resulted in immediate damage—the money was gone as of the date of the audit, and the accountants simply failed to report it. Because the onset

of damages was immediate, the only issue was whether R.C. 2305.09 tolled accrual until the plaintiffs discovered the negligence. *REIT One* held that it did not.

Despite Reinhold's protestations that Flagstar is somehow attempting to overturn *REIT One* without undergoing the analysis required by *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, Flagstar has no quarrel with that rule or with *REIT One*. The problem is that *REIT One* was addressing an entirely different issue. *REIT One* addressed whether the statute is tolled until the plaintiff discovers that the negligence has caused him damages; here, the issue is whether the statute commences to run until the plaintiff has actual damages at all.

All of the conflict cases, *Fritz*, *Lanning*, and *Gray*, addressed *REIT One*, and held that it did not apply for this very reason. The failure of the Responding Parties to attempt to distinguish—**or even cite**—these cases is astounding.

The feigned ignorance went beyond the conflict cases. Flagstar detailed the list of cases **from this Court** holding that the statute of limitations does not begin to run until an actual injury occurs. *State ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200, 204, 364 N.E.2d 18 (“when one’s conduct is not presently injurious a statute of limitations begins to run against an action for consequential injuries resulting from such act only from the time that actual damage ensues.”); *Kunz*, 1 Ohio St.3d at 81 (“there must be an injury or harm . . . to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitations [commences] to run”); *Velotta*, 69 Ohio St.2d at 379 (“where the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs.”) This list does not even include the decisions of the appellate districts applying similar

rules (many of which are cited in the preceding section). The Responding Parties fail to distinguish these cases as well.

REIT One complements and is not contrary to the actual damages rule. Less than five months after *REIT One* was announced, this Court continued to follow the actual damages rule. *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 198, 551 N.E.2d 938. The Court in *Sedar* acknowledged that actual damages are required and quoted *Palsgraf v. Long Island R. Co.* (1928), 248 N.Y. 339, 162 N.E. 99: “[p]roof of negligence in the air, so to speak, will not do.” The Court reaffirmed its prior holding from *Velotta* that “where wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs.” *Id.* (citing *Velotta*, 69 Ohio St.2d at 379); *see also NCR Corp. v. United States Mineral Prods. Co.* (1995), 72 Ohio St.3d 269, 649 N.E.2d 175 (again holding that a potential claim is not sufficient to trigger the running of the statute of limitations).

In this case, the Responding Parties and the First District (as in *Hater*) tried to characterize the actual damages rule in *Kunz* and its progeny as “discovery rule” in different garb. *Hater*, 101 Ohio App.3d at 110. With respect, that is simply wrong. As this Court stated in *Sedar*: The rule that the statute does not commence until there are actual damages “is not a discovery rule.” *Sedar*, 49 Ohio St.3d at 198, citing in *Velotta, supra*. The actual damages rule of *Velotta* and *Kunz* does not toll accrual until damages are discovered, but rather holds that there is no claim to accrue until actual damages occur. Put another way, the discovery tolls the statute for a completed cause of action; the actual damages rule recognizes that there is no need for tolling because a cause of action is not complete without actual damages.

The Fifth and Sixth Districts are correct. The First District has simply erred in its analysis of *REIT One*.

C. When the General Assembly intends to base a time bar on the defendant's conduct, it specifically says so.

Finally, were there any doubt as to the meaning of the word "accrued" in R.C. 2305.09 (and there is not), any issue of interpretation is resolved by the General Assembly's crafting of statutes of repose. As detailed in Flagstar's initial brief, statutes of repose can bar a cause of action before it comes into existence. *Sedar*, 49 Ohio St.3d at 195. When the General Assembly wants to create a statute of repose, it bases the commencement of the limitations period on the defendants' conduct. *See, e.g.*, R.C. 2305.10(C)(1) (governing product liability for asbestos claims) and R.C. 2305.13 (governing overcharge claims against common carriers); R.C. 2305.131(A)(1) (governing claims against defects in improvements to real estate). By refusing to give the word "accrued" in R.C. 2305.09 its common law meaning, and by instead treating the word as pointing to the defendant's conduct, the First District turned R.C. 2305.09(D) into a statute of repose by judicial fiat.

None of the Responding Parties even address this problem. None of the Responding Parties mention statutes of repose, how they differ from statutes of limitations, or how courts distinguish between the two. The silence is deafening.

D. A lender's claim against an appraiser of collateral for a loan does not accrue until the lender resorts to the collateral and it is insufficient to satisfy the balance.

The answer to the question that the First District certified is plain: a claim for professional negligence under R.C. 2305.09(D) only accrues upon the occurrence of actual damages. What is left is for the Court to apply that rule in this case. On that score, a lender's claim against an appraiser of collateral for a loan does not accrue until the lender resorts to the collateral and it is insufficient to satisfy the balance.

The *Kunz* court articulated the rationale:

A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Appellant's interest was in being protected against earthquake loss. There was no invasion, or infringement upon or impairment of such interest until there had been a loss by earthquake, because until that event occurred, such protection could avail appellant nothing. His interest, which is legally protected, was in having such protection when it was needed, at the time of the loss and not before. Thus, in a case like this there must be an injury or harm to appellant as a consequence of appellees' negligence to serve as a basis for recovery of damages before the tort became actionable and before the period of limitation commenced to run.

Kunz, 1 Ohio St. 3d at 81, quoting *Austin v. Fulton Ins. Co.* (Alas. 1968), 444 P.2d 536.

The same rationale applies here. The purpose of collateral for a loan is to protect the lender in the event the borrower defaults. The collateral effectively acts as insurance for payment of the loan. The appraiser's overvaluation of the collateral does not harm the lender until there is a default and the collateral is insufficient. To put it in the language of *Kunz*, the invasion of the "protected interest"—the harm caused by the negligent appraisal—does not occur until the lender needs to resort to the collateral.

As discussed in Flagstar's initial brief, if a lender sued an appraiser of collateral prior to the borrowers' default, the appraiser would correctly argue that the lender had not suffered an injury yet, as the borrower could pay the loan in full and there would never be a need to resort to the collateral. The appraiser could correctly argue that as long as the borrower is paying, any injury which the lender may suffer in the future is necessarily speculative, and therefore premature.

The lender fares no better by waiting for a default. If a lender waited to sue the appraiser on the date that the foreclosure action was commenced, the appraiser could contend that the borrowers may exercise their equity of redemption, pay off the loan, again making any damages entirely speculative. The appraiser would argue that even if there were no redemption, the

property could sell at foreclosure for an amount equal to or in excess of the loan balance, again leaving the lender with no damages.

It was precisely these reasons that courts in other states have held that a claim against the appraiser of collateral does not accrue until the foreclosure sale results in a deficiency balance. *Slavin v. Trout* (Cal. App. 2d Dist. 1993), 18 Cal. App. 4th 1536, 1542. See, also, *Tuthill Fin. v. Greenlaw* (2000), 762 A.2d 494, 498, 61 Conn. App. 1; citing *First Fed. S&L Ass'n v. Charter Appraisal Co.* (1999), 724 A.2d 497, 247 Conn. 597 (“damages should be measured and determined from the time that title vested as determined in the foreclosure proceeding.”)

The Responding Parties address this issue by citing cases in which damages come into existence contemporaneously with the negligent act. For example, *Accelerated Sys. Integration, Inc. v. Hausser & Taylor L.L.P.*, Eighth Dist. App. 88207, 2007-Ohio-2113, involved a party that knew it was due a bonus in 2000, but did not file suit until 2005.

In *Chandler v. Schriml*, Tenth Dist. App. No. 99AP-1006, 2009-Ohio-5563, (a surveyor case), the court stated: “In this case, we find that the distinction between the ‘delayed damage’ theory and the ‘discovery rule’ is irrelevant because Chandler did not suffer delayed damages. Rather, Chandler suffered damages at the time he purchased his home, and his cause of action arose at the time of [the] allegedly negligent acts.”

In *James v. Partin*, Twelfth Dist. Case No. CA2001-11-086, 2002-Ohio-2062, another surveyor case, the Court stated: “the injury occurred when the allegedly negligent surveys were completed.” *Bell v. Holden Surveying*, Seventh Dist. Case No. 01-AP-0766, 2002-Ohio-5018, similarly involved claims brought by the purchaser of property against a surveyor as a result of a negligently performed survey resulting in immediate damage. In *Bell*, the plaintiff was injured the day the survey was completed and the property was improperly transferred.

Even *Hater*, the First District's prior decision, is inapposite. In *Hater*, the appraiser was valuing assets—not for the purpose of serving as collateral for a loan—but rather for their purchase by the plaintiff. When the appraiser overvalued those assets, the purchaser was damaged the moment he paid the monies for the overvalued asset.

This case is different. Accrual requires actual—that is recoverable—damages. When a lender obtains an appraisal for the purpose of evaluating whether to extend credit secured by collateral, damages do not come into existence until the lender is obligated to resort to the collateral and it is found to be insufficient. Like *Kunz*, the injury in this case is contingent – if there was no insurance claim, or the borrower made the required payments, there would never be damages.

That leaves Reinhold's suggestions that he appraised the *loan* that Flagstar was purchasing from AUM, or that the loan which Flagstar purchased was less valuable because the collateral was worth less than he said it was. The former suggestion is not factually correct. Reinhold was not appraising the loan, but only the collateral that was to secure its payment if the borrower defaulted. Reinhold was not valuing the creditworthiness of the borrower or the marketability of the loan, but rather only the value of the property serving as collateral. Reinhold's limited role meant that Flagstar would have no viable claim against Reinhold unless and until it had to resort to the collateral, and the collateral was not as valuable as what Reinhold appraised.

The latter suggestion—that the loan itself was less valuable because the collateral was less valuable—simply ignores the interest that is at issue. First, as noted above, Reinhold was not appraising the loan, but collateral. Flagstar had no claim if the overall loan was less valuable, but only if the collateral itself was less valuable.

Second, because Reinhold is examining the wrong interest, he focuses on the wrong measure of recovery. If an appraiser who only valued collateral were liable for the difference in “value of the loan,” then the lender could sue the appraiser for that supposed difference, pocket the money, and then *continue to collect* the balance due on the loan. This would be true even if the lender never had to resort to the collateral.³

Third, that “logic” would effectively overrule *Kunz*. In *Kunz*, the insurance policy which the agent obtained was theoretically “less valuable” than a policy which provided coverage for all of the insured’s equipment. *Kunz*, however, recognized that this type of theoretical damage did not qualify as actual damage sufficient to give rise to a claim. Rather, the agent was only liable for “actual damages” that occurred when the insured had to resort to the policy.

Fourth, if Reinhold were correct, then lenders would be suing appraisers prematurely, even when there had been no default, simply to preserve their rights. Compare *Slavin*, 18 Cal. App. 4th at 1542 (holding that even before foreclosure, “circumstances can change so as to render unnecessary the lender’s resort to the property or to moot any issue about a prior overappraisal of the property”). In the words of *Kunz*, Reinhold “would in essence require [a lender] to consult legal counsel whenever [it received an appraisal] so as to avoid statute of limitation problems when a claim ever arose.” *Kunz*, 1 Ohio St. 3d at 82.

Fifth, and finally, this argument would leave lenders in a whipsaw of being too early or too late. If a lender sued an appraiser prior to resorting to the collateral, the appraiser would contend that there are no recoverable damages until the lender had to resort to the collateral and

³ The same rule would apply for insurance agents and accountants. Insurance agents could be sued for the diminution in value of the policy, even though there was never a claim. Accountants could be sued for penalties which the IRS never assessed.

it was insufficient.⁴ If the lender waits until it completes the foreclosure sale and has actual damages, the appraiser (as it has done here) completes the whipsaw by arguing that it is now too late for the lender to bring the claim.

This Court should define “accrual” for lenders suing appraisers of collateral in a way that affords the lenders the opportunity to recoup the losses that the appraisers caused. Those damages only become actual (and therefore recoverable) when the collateral is sold, and it brings an amount less than the balance due on the loan whose payment it secured. That is the interest which the collateral was meant to protect; it is only when that interest is invaded that a lender’s claim accrues.

E. The First District’s interpretation of R.C. 2305.09 would cause it to violate the Ohio and United States Constitutions.

Article I, Section XVI of the Ohio Constitution denies the General Assembly the authority to pass a statute that bars recovery for a cause of action before the action has accrued. *See Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 512 N.E.2d 626, *cert. denied*, 484 U.S. 1066 (1988); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 609 N.E.2d 140; *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425. Flagstar contends that a construction of R.C. 2305.09(D) that defines accrual to occur simultaneously with the negligent act would violate this provision because it makes the claim either too early or too late.

Reinhold cites *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, for the proposition that eliminating a remedy before a claim accrues does not violate the Ohio Constitution because the claim never comes into existence. *Groch* is distinguishable for two reasons.

⁴ This is not speculation; Reinhold’s present counsel made this exact argument in *Flagstar Bank, FSB v. Credit Fin. Serv., LLC, et al.*, Case No. A0204910 (Hamilton Cty.). T.d. 60, Ex. D.

First, as Flagstar discussed above, the General Assembly has the power to create a statute of repose, commencing the limitations period based on the defendant's conduct. *Groch*, ¶ 112. The General Assembly, however, did not do so here.

Second, and in any event, the interpretation of R.C. 2305.09(D) urged by Reinhold and adopted by the First District would place mortgage lenders in a Morton's fork of bringing a claim before there were actual damages – and thereby have its claim dismissed – or bringing a claim after actual damages occurred, only to have the statute of limitations expire. In many circumstances, the foreclosure may not even be completed until more than four years after the completion of the appraisal – thereby eliminating any window in which the lender could bring a claim. That situation is precisely what the Right-to-Remedy Clause forbids. *Burgess*, 66 Ohio St.3d at 62; *Groch*, ¶ 153.

It is for the same reason that such a construction would violate due process. *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hospital Asso.* (1986), 28 Ohio St.3d 118, 502 N.E.2d 599; *Mathews v. Eldridge* (1976), 424 U.S. 319, 332; *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846. Procedural due process imposes constraints on governmental decisions that deprive individuals of property interests. *Mathews*, 424 U.S. at 332. The fundamental requirements of due process are notice and a meaningful opportunity to be heard. *Id.* at 333.

Here, Flagstar purchased the loans at issue in reliance on the Appraisals. The Appraisals showed that the properties appraised had sufficient value to pay the loans in the event the borrower defaulted. These Appraisals were negligently completed, causing injury when resort to the collateral was necessary. By holding that Flagstar's claims accrued prior to that time, the

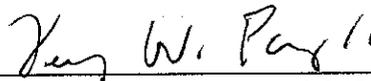
First District deprived Flagstar of its procedural due process rights of notice and an opportunity to be heard.

As noted in Flagstar's brief, there is no need for the Court to even address these constitutional issues. "A statute will be given a constitutional interpretation if one is reasonably available." *State. v. Thompson* (2001), 92 Ohio St.3d 584, 586, 752 N.E.2d 276. Here, the Court can avoid any constitutional question by defining "accrued" to require actual damages, just as it is defined by the common law, just as the Court has previously done, and just as the statutory scheme requires. That interpretation is not only dictated by precedent, it entirely avoids the constitutional thicket.

III. CONCLUSION

The issues presented in this case are straightforward, but their impact is far-reaching. The overvaluation of collateral is one of the reasons for the mortgage foreclosure crisis with which this State is struggling. The appraisers who participated in that misconduct should be called to answer for their actions as supported by the law and precedent of this State. This Court should reverse the First District, and remand this case for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 29th day of September, 2010.

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