

ORIGINAL

IN THE OHIO SUPREME COURT

THE HUNTINGTON NATIONAL BANK,

Plaintiff-Appellant-
Cross-Appellee

vs.

STEVEN WINTER,

Defendant-Appellee-
Cross Appellant

Case No. 2011-0910

Appeal from the Hamilton County Court of Appeals, First Appellate District

Court of Appeals Case No. C090482

**COMBINED MEMORANDUM OF APPELLEE STEVEN WINTER
IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S MEMORANDUM
AND
IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL**

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**APPELLEE’S POSITION REGARDING WHETHER THIS CASE IS A
CASE OF PUBLIC OR GREAT GENERAL INTEREST**

1. With respect to the appeal

Appellee believes the issues raised on the appeal are not of public or great general interest. The common law in Ohio has always had a cause of action for setting aside fraudulent conveyances. *See, e.g., Gem City Acetylene Generator Co. v. Coblenz* (1912), 86 Ohio St. 199, 99 N.E. 302; *Locafrance United States Corp. v. Interstate Distribution Services, Inc.* (1983), 6 Ohio St. 3d 198, 451 N.E.2d 1222.

In 1990, the legislature enacted the current version of most of R.C. Chapter 1336, the Ohio Uniform Fraudulent Transfer Act, updating the codification of the common law practice. In 1992, the legislature also updated R.C. § 3911.10, a long-standing exemption statute, which protects insurance policies, proceeds and avails, which are for the benefit of the spouse or dependents of a insured, from the claims of the insured’s creditors, with the sole exception that any premiums paid in fraud of creditors are payable from the *proceeds* of the policies upon proper notice.

The appellant’s claim that R.C. § 3911.10, and the First District’s interpretation of it, are in frustration of the purpose of R.C. Chapter 1336, are simply, and plainly, incorrect. R.C. § 3911.10 itself clearly speaks about “any premium . . . paid in fraud of creditors.” The language of the statute, as well as an examination of the dates of enactment of R.C. Chapter 1336 and R.C. § 3911.10, leave no room for doubt that the First District’s holding in this regard was correct and in accordance with the intent of the legislature.

Indeed, as long ago as 1939, the Hamilton County Court of Common Pleas held, in *Deal v. Menke* (1939), 1939 Ohio Misc. LEXIS 1021, 14 Ohio Op. 414, 29 Ohio L. Abs. 181, that the term “proceeds or avails” as used in the statute would include the loan or cash surrender value of the

policies. The Court also determined that the legislature had in mind a distinction between “proceeds and avails” and “proceeds” of the policies. The Court concluded that it was the intent of the legislature on life insurance policies to limit the recovery of premiums paid in fraud of creditors to the funds arising upon the maturity of the contract (or by the insured voluntarily accepting the cash surrender value of the policies), and in so doing sought to protect the wife and children of the insured.

Although creditors may wish to see this court set aside the clear intent of the legislature in order to broaden their reach, the clear public policy of the state is not to give creditors free rein. When the legislature clearly excepts the policies, proceeds and avails from the reach of creditors, and specifically mentions “premium . . . paid in fraud of creditors,” in doing so, the general language of Chapter 1336 will not support ignoring the specific language of R.C. § 3911.10. *See* R.C. §§ 1.47, 1.51.

Accordingly, the issues raised on the appeal are not of public or great general interest.

2. With respect to the cross-appeal

However, the issues raised on the cross-appeal are of public or great general interest. In this economic and political climate, when significant problems with banks and their foreclosure processes are coming to light, *see* attached news articles, the procedural protections offered by the rules, which require written motions and specific notices, and by due process, should not be taken lightly by the magistrates and trial judges of this state. This is particularly so when they involve executions, where the power of the state and its courts are being used to take property from its citizens for the benefit of other persons. Trial by ambush was abandoned with the adoption of the

civil rules and the process for discovery. *See, e.g., Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St. 3d 367, 371, 504 N.E.2d 44, 45-48.

It is easy for a magistrate or a trial judge to ignore the requirements of the civil and local rules regarding written motions and notice times, for the sake of expediency. The reality is that, especially in the area of executions and foreclosures, no appeal will ever be taken of the ruling, because the person affected is the one least able to pursue his or her legal remedies. The magistrate and the trial court are often the only hope they have for redress. Thus, it is important for this Court to send a message to the magistrates and judges of this state that the procedural protections be especially adhered to, especially for pro se litigants.

Accordingly, the issues raised by the cross-appeal are of public or great general interest, and this Court should take jurisdiction of this cross-appeal.

STATEMENT OF THE CASE AND FACTS

In October of 2007 Steven Winter and his wife Sarah Winter retained Leo Grote Esq. to form a revocable trust titled "The Winter Family Trust". The trust was funded with approximately \$700,000 that was wired to Leo Grote from loan payoffs (sender of funds unidentified on the record) along with \$650,000 in cashier's checks made payable to Sarah Winter and \$100,000 or \$150,000 that was borrowed by the couple. On November 16, 2007 Leo Grote paid \$144,000 from The Winter Family Trust to the Prudential Life Insurance Company for premiums due on the policies covering all members of the Steven & Sarah Winter family. The policies consisted of 16 total policies of which 14 were cash value policies that had been purchased systematically over the last 15 years. The premium paid on November 16, 2007 was the required amount to be paid, and was paid when due.

On January 9, 2008 Merchants Bank & Trust (MBT) appeared in the Hamilton County

Common Pleas Court and was granted a cognovit judgment against Steven A. Winter and Five Star Financial Corporation. On June 10, 2008 Huntington National Bank (HNB) was granted a judgment against Steven A. Winter and Five Star Financial Corporation. Neither MBT nor HNB have a judgment against Sarah Winter or any other member of the Winter Family.

On December 15, 2008 HNB filed an execution against the insurance policies owned by Steven A. Winter, and MBT joined in the execution on the same day. The writ of execution was issued. Within five days of the receipt of the writ, Steven A. Winter filed a *pro se* request for an exemption hearing. No written motion to set aside a fraudulent transfer had been filed, whether in this case, or any other case, prior to, or after, the writs of execution were filed. The writs of execution issued by HNB and MBT did not state anything about a fraudulent transfer. In other words, prior to the hearing before the magistrate, the issue of fraudulent transfer had never been raised.

On March 25, 2009 an exemption hearing was held in front of Magistrate Michael Bachman. Magistrate Bachman denied Winter's request for an exemption. At the same time, the magistrate granted an oral motion made by HNB and MBT to set aside a fraudulent transfer in the case. On March 26, 2009 an entry was made adopting the Magistrate's decision. Winter was never served a copy of the Magistrate's decision by the Clerk of Courts, as the record clearly shows that service was never sent. On May 6, 2009 Winter filed an objection to the Magistrate's decision and a request for an injunction staying the enforcement of the execution, and HNB filed a motion to strike Winter's objections and, alternatively, a memorandum contra Winter's objections. Subsequently Winter filed an amended objection, and HNB filed a memorandum in opposition to Winter's request for a stay. MBT subsequently joined in HNB's memorandum in opposition to Winter's request for a stay and HNB's motion to strike Winter's objections and alternative memorandum contra Winter's

objections. Winter filed a memorandum contra HNB's memorandum in opposition and a second memorandum in support of his objections on May 20, 2009.

On June 22, 2009 the case was consolidated with A0800266 in front of Judge Robert P. Ruehlman. A hearing was held in front of Judge Ruehlman on July 13, 2009 where Winter's objection was heard and both his request for a stay and his objections were denied.

On July 13, 2009 Winter filed his notice of appeal and the entry from Judge Ruehlman was entered by the Hamilton County Clerk of Courts on July 21, 2009.

Despite the procedural irregularities in the noticing and granting of the motion to set aside a fraudulent transfer, the First District Court of Appeals incorrectly held that Winter had committed fraud on Huntington by transferring monies into the Winter Family Trust and then paying \$144,000 towards premiums on his term and whole life insurance policies with Prudential. However, the Court of Appeals also correctly held that R.C. 3911.10 prevented the trial court from ordering Winter to surrender the cash value of his life insurance policies to satisfy the Banks' judgment against him.

ARGUMENT

Appellant's Proposition of Law No. 1

This matter is of public and great general interest to all creditors because the First District's decision allows a fraudulent conveyance of funds to be out of a creditor's reach.

The First District correctly decided the case. R.C. § 3911.10 is an exemption statute. Like all exemption statutes, it provides exemptions from execution. It provides, in relevant part:

All contracts of life or endowment insurance . . . which may hereafter mature and which have been taken out for the benefit of . . . the spouse or children . . . shall be held, together with the proceeds or avails of such contracts . . . free from all claims of the creditors of such insured.

The statute even addresses the issue of fraudulent conveyances:

[T]he amount of any premium upon such contracts . . . paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract is discharged of all liability thereon by the payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of the claim and the premiums which the creditor alleges have been fraudulently paid.

The “proceeds of the contracts” are not payable unless the contract matures, the insured dies, or the insured voluntarily elects to take the cash value of the policies. *Deal v. Menke* (1939), 1939 Ohio Misc. LEXIS 1021, 14 Ohio Op. 414, 29 Ohio L. Abs. 181; *Doethlaff v. Penn Mut. Life Ins. Co.* (6th Cir. 1941), 117 F.2d 582.

This is the language of the statute, one that not only has been in existence long before the enactment of the Ohio's Uniform Fraudulent Transfer Act (OUFTA), but also one that was amended after the enactment of the current version of OUFTA. OUFTA is a general statute, while RC § 3911.10 is a specific one. The specific one controls over the general. R.C. § 1.51. The obvious public policy of the legislature is that the spouse, children and dependents of the debtor be protected by the insurance policies on the life of the insured, so that they do not become wards of the state merely because some creditor wants its money now. The creditor is still protected against any fraudulent conveyance, because the creditor is entitled to receive the amount of the conveyance, plus interest, from the proceeds, when those proceeds are payable, but not before.

Accordingly, the First District correctly decided the case, and the proposed proposition of law should be denied.

Appellant's Proposition of Law No. 2

This matter is of public and great general interest to all creditors because the First District's decision nullifies the effectiveness of Ohio's Uniform Fraudulent Transfer Act.

The appellant is incorrect, and the First District correctly decided and applied the law in this matter. There is a specific remedy already provided in RC § 3911.10 for creditors who have been subjected to a fraudulent conveyance with respect to the payment of insurance premiums. Since RC § 3911.10 is the specific provision, and OUFTA is the general statute, the specific one controls. R.C. § 1.51. In addition, the latest changes to RC § 3911.10 also postdate by two years the enactment of OUFTA, further destroying the appellant's argument.

To be a bit redundant, the obvious public policy of the legislature is that the specific exemption given to life insurance policies controls over the general application of OUFTA, and for good reason: that the spouse, children and dependents of the debtor be protected by exempting from execution insurance policies on the life of the debtor, so that they do not become wards of the state merely because some creditor wants its money now. The creditor is still protected against any fraudulent conveyance, because the creditor is entitled to receive the amount of the conveyance, plus interest, from the proceeds, when those proceeds are payable, but not before.

Accordingly, the First District correctly decided the case, and the proposed proposition of law should be denied.

Cross-Appellant's Proposition of Law No. 1

This matter is of public and great general interest because the First District's decision ignores the protections afforded by the procedural rules to prevent error and fraud and to mitigate unfair dealings against individual debtors by stronger and better funded banks.

As this Court stated in *City of Youngstown v. Traylor*, 123 Ohio St. 3d 132, 134, 2009-Ohio-4184 ¶ 8, 914 N.E.2d 1026, 1028:

The right to procedural due process is found in the Fourteenth Amendment to the

United States Constitution and Section 16, Article I of the Ohio Constitution. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶ 6. “Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right.” *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8, citing *Boddie v. Connecticut* (1971), 401 U.S. 371, 377.

In granting an execution against property, the state is using its power to deprive a person of his or her property interest. “Before the state may deprive a person of a property interest, it must provide procedural due process consisting of notice and a meaningful opportunity to be heard.” *Ohio Ass’n of Pub. Sch. Employees, AFSCME v. Lakewood City Sch. Dist. Bd. of Educ.*, 68 Ohio St. 3d 175, 176, 1994-Ohio-354, 624 N.E.2d 1043, 1045. As Chief Justice Moyer stated in his concurring opinion in *State v. Hollingsworth*, 118 Ohio St. 3d 1204, 1205, 2008-Ohio-1967, ¶ 4, 886 N.E.2d 863;

The most basic requirement of due process is that individuals receive notice and a meaningful opportunity to be heard. *Ohio Assn. of Pub. School Emps., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.* (1994), 68 Ohio St.3d 175, 176, 1994-Ohio-354, 624 N.E.2d 1043.

The Rules of Civil Procedure and the Hamilton County Common Pleas Local Rules provide for this:

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court.

Civ.R. 6(D). The local rule provides even more detail:

(A) ALL motions shall be accompanied by a memorandum in support of the motion which shall be a brief statement of the grounds for the same, with citations of authorities relied upon, and (except in the case of an ex parte motion) proof of service in accordance with Civil Rule 5. All memoranda filed with a motion or in response thereto shall include page and document references for all factual assertions.

(B) Any memorandum contra to said motion shall be served upon movant's trial attorney within ten days from the date the memorandum in support of the motion and

proof of service thereof, was served. Failure to serve and file a memorandum contra may be cause for the Court to grant the motion as served and filed. A reply memorandum may be served and filed within seven days of the service of the memorandum contra. The time periods set forth in this Paragraph B may be extended by the Court, for good cause shown, upon application therefor.

Loc.R. 14. It is also important to rec

The First District ignored the fact that the trial court's ruling on the oral motion was not accompanied by a written memorandum in support of the motion as required by Loc. R. 14(A). In addition the motion was granted the same day that it was made depriving Winter of the seven day notice required under Civ. R. 6(D) and the ten day period for a response under Loc. R. 14(B). The purpose of these rules is to create a level playing field where a movant files a motion and the party against whom the motion is made is notified of the grounds for the motion and authorities relied upon so that he may be in a position to rebut those grounds and authorities. This is particularly important when the individual is proceeding *pro se*, as Winter was here.

The First District attempted to move the burden to Winter by saying he "failed to specify on the hearing-request form which property was exempt and why it was exempt." ¶ 7. Yet there is nothing in the rules that require such notice: the only requirements is that a hearing on exemptions be requested within the proper time frame, which it was. To impose a procedural requirement on a litigant, much less a *pro se* litigant, without notice is to deprive him of the due process he is entitled under the U.S. and Ohio Constitutions. It also cannot be emphasized enough that this kind of deprivation is exactly the kind that most such litigants do not have the resources or the ability to bring before the appropriate appellate court for review, so errors made by a magistrate or trial judge are rarely, if ever, reviewed.

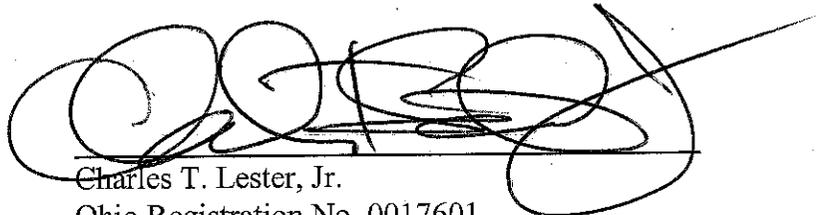
The First District compounded its error in denying Winter the procedural due process to

which he was entitled by finding there was sufficient evidence of a fraudulent conveyance under OUFTA in the record. However, Winter stated at the March 25 hearing where the oral motion was made that, had he known they would move to set the transfers aside under OUFTA, he would have brought witnesses and evidence regarding that issue.

This Court needs to send a message to the magistrates and judges of this state that the procedural safeguards of the rules are there to protect the rights of litigants from oppressive and vastly better funded parties, such as the banks in this case.

CONCLUSION

For the foregoing reasons, the appeal by HNB in this case does not involve matters of public and great general interest, and should be dismissed. However, the foregoing also demonstrates that the cross-appeal involves matters of public and great general interest, and the cross appellant respectfully requests that this Court grant jurisdiction for the cross appeal and allow this case to be heard and reviewed on the merits.

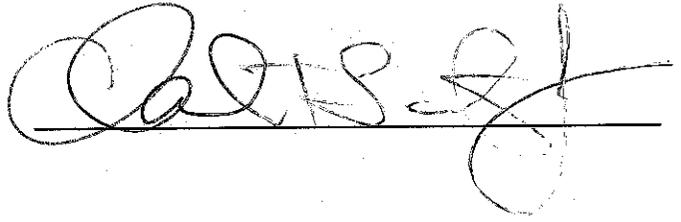


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the persons named below by U.S. Mail

on June 24, 2011.

A handwritten signature in black ink, appearing to be "C. Schneider", written over a horizontal line. The signature is stylized and cursive.

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APPENDIX

News Articles

[Consumer](#) > [Blog](#) > Finding problems with foreclosures

BLOG

Finding problems with foreclosures

10/28/2010

Information has recently come to light about how foreclosures are being processed across the country. It appears that, on a mass scale, many homeowners may be being deprived of their private property rights based on phony affidavits and without the due and proper processes of law.

The Ohio Attorney General's Office filed the first lawsuit in the nation against a mortgage servicer over fraudulent affidavits filed in foreclosure cases. The lawsuit charged GMAC Mortgage, LLC and its parent, Ally Financial Inc., of filing fraudulent affidavits to mislead courts in hundreds of Ohio foreclosures.

The Ohio Attorney General's Office is seeking a preliminary injunction that, if granted, would prevent GMAC Mortgage from completing foreclosure sales in Ohio based on fraudulent affidavits and stop GMAC from using faulty affidavit practices in other foreclosure cases in Ohio.

In addition to GMAC, similar concerns have arisen about the accuracy of affidavits filed by others, including Bank of America, JPMorgan Chase, PNC and OneWest Bank.

To investigate this problem, Cordray has joined a multi-state working group made up of attorneys general from all 50 states and banking and mortgage regulators from more than 30 states, including the Ohio Department of Commerce's Division of Financial Institutions.

Together, the group will investigate whether individual mortgage servicers have improperly submitted documents in support of foreclosures and whether other servicing irregularities or abuses have occurred.

Ohio homeowners who have knowledge of foreclosure fraud or questions about the litigation against GMAC/Ally or investigations into other foreclosure fraud can contact the Ohio Attorney General's Office at ForeclosureFraud@OhioAttorneyGeneral.gov.

Tags: [mortgage servicer](#), [Foreclosure](#), [fraud](#), [mortgages](#), [Consumer Advocate](#)



Banks Said to Offer \$5 Billion to Resolve State, U.S. Foreclosures Probe

By David McLaughlin and Dakin Campbell - May 11, 2011

Bank of America Corp. (BAC) and JPMorgan Chase & Co. (JPM), along with three other U.S. mortgage servicers, proposed paying \$5 billion to settle a probe of their foreclosure practices by state and federal officials, two people familiar with the matter said.

The proposal made by banks yesterday during settlement talks in Washington came after state attorneys general and federal officials offered revised settlement terms and a proposal for banks to fund principal writedowns for homeowners.

The probe by all 50 states was triggered by claims of faulty foreclosure practices after the housing collapse, which state officials said may violate their laws. The original settlement proposal offered by states and federal agencies drew criticism from banks and Republican attorneys general opposed to a deal that would reduce principal amounts for borrowers.

In a new proposal, officials called for a fund, administered by state and federal officials, that would in part pay for principal writedowns, said Geoff Greenwood, a spokesman for Iowa Attorney General Tom Miller. Miller, a Democrat, is leading negotiations for the states. Attorneys general haven't made a proposal for a payment by banks, Greenwood said.

The \$5 billion payment proposed by the banks was reported earlier by the Wall Street Journal.

"An amount in that range would be viewed as a positive for the banks, given larger numbers have been referenced previously," Brian Foran, an analyst with Nomura Securities International Inc. in New York, wrote in a report today. Regulators had previously suggested a \$20 billion penalty.

Citigroup, Wells Fargo

State and federal officials have been negotiating with the mortgage servicers, a group that also includes Citigroup Inc. (C), Wells Fargo & Co. (WFC) and Ally Financial Inc. Miller has said the five companies service 59 percent of U.S. home loans.

Rick Simon, a spokesman for Charlotte, North Carolina-based Bank of America, and Teri Schrettenbrunner of San Francisco-based Wells Fargo didn't return calls for comment after regular

business hours yesterday.

Gina Proia, a spokeswoman for Detroit-based Ally Financial, New York-based JPMorgan Chase's Thomas Kelly and Mark Rodgers, a spokesman for New York-based Citigroup, declined to comment.

The fund for principal reductions could pay for restitution to borrowers whose homes were improperly foreclosed on, Greenwood said.

Loans, Foreclosures

State and federal officials yesterday also revised provisions of their original March term sheet offered to mortgage servicers. That term sheet included requirements for how banks service loans and conduct home foreclosures. The changes aren't substantially different from the original proposal and incorporate negotiations with the banks, Greenwood said. Those talks continue in Washington this week, he said.

Republican attorneys general criticized the original settlement proposal, saying the plan for principal reductions would encourage borrowers to default on loans to reduce payments. Some of those attorneys general met yesterday in Atlanta to discuss the issue, said Adam Temple of the Republican State Leadership Committee.

Bob Davis, an executive vice president with the American Bankers Association, spoke to the group in Atlanta, telling them principal reductions don't work, he said in an interview. Loan balances must be reduced so much for borrowers struggling to make payments that it's a better deal for lenders to foreclose instead, he said.

"Principal reductions don't substantially improve the cash-flow problem," Davis said. "You can't lower principal enough to make it an attractive tool."

Encouraging Defaults

During a conference call between state officials and the banks, some lenders said they opposed any settlement terms that would reduce loan balances, according to one of the people familiar with the talks. The banks argued a writedown plan would encourage homeowners to default, a notion some attorneys general on the call disputed, the person said.

Bank representatives said they were open to other types of loan modifications, including changing interest payments, said the person. Mortgage servicers have reached agreements with U.S. banking regulators to improve procedures for modifying loans and seizing homes.

Oklahoma Attorney General Scott Pruitt, a Republican, said last month that he may negotiate an

alternative accord with the banks if the national settlement turns out to be “inconsistent with our conviction.”

‘Some’ Changes

Pruitt said in a letter to Miller in March that forcing lenders to reduce mortgage balances would take away incentives for banks to loan money and “destroy an already devastated housing market.”

Diane Clay, Pruitt’s spokeswoman, said in an interview that the latest settlement proposal incorporates “some” of the changes sought by the attorney general. She said she hadn’t seen the new terms.

“General Pruitt’s letter certainly helped move the negotiations along,” said Clay, who previously said several “industry representatives” had contacted with her office.

Other state attorneys general who have criticized the proposal to reduce principal balances include those from Florida, Texas, South Carolina, Virginia, Alabama, Nebraska and Georgia. Attorneys general for Florida, Georgia and Alabama were among the officials meeting in Atlanta yesterday, Temple said.

Lauren Kane, a spokeswoman for Georgia Attorney General Sam Olens, has said a bank, which she declined to identify, discussed with her office the federal regulator settlement. Adam Piper, a spokesman for South Carolina Attorney General Alan Wilson, said last month that two banking representatives “shared research” with his office and “pointed out some concerns with certain provisions” of the original proposal.

Jennifer Meale, a spokeswoman for Florida Attorney General Pam Bondi, said last month that her office has “had general discussions with banks about how the matter might be resolved.”

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Banks Will Be Sued If Foreclosure Practices Talks Collapse, Two States Say

By David McLaughlin - Jun 22, 2011

Banks negotiating with state attorneys general over foreclosure practices would be sued if a settlement isn't reached, two of the state officials leading the talks said.

Illinois Attorney General Lisa Madigan and North Carolina Attorney General Roy Cooper threatened litigation if settlement talks with largest mortgage servicers, including Bank of America Corp. (BAC) and JPMorgan Chase & Co. (JPM), break down. The deadline for an agreement has been pushed back a month, according to a person with knowledge of the talks.

"If we don't get an agreement, we're prepared to go to court," Cooper told homeowner advocates at a meeting of state attorneys general in Chicago yesterday.

Cooper and Madigan are members of the executive committee of attorneys general which, along with officials from federal agencies, is negotiating with the banks. State and federal officials are seeking to set standards for the way the banks service loans and conduct foreclosures. They also want monetary relief for homeowners.

The attorneys general from all 50 states began investigating banks' procedures last year.

State and federal officials in March proposed settlement terms that called for "a substantial portion" of monetary relief from the banks to fund loan modifications, including principal reductions.

Making Progress

Iowa Attorney General Tom Miller, the Democrat leading negotiations for the states, told the group of homeowner advocates yesterday that officials are making progress in the talks. He declined to provide any details.

"We don't want a settlement around the margins, around the edges," Miller said. "The settlement has to be fundamental, has to make some changes that are worth it, that are constructive."

Oklahoma Attorney General Scott Pruitt said in an interview yesterday that his office is investigating dual tracking in Oklahoma, in which servicers foreclose on homes while negotiating with borrowers

about lower payments. The office has found about 75 instances of what it believes is wrongful conduct, mostly related to dual tracking, he said.

“The dual-track foreclosure problem is something we see as being most problematic in Oklahoma, and we are continuing to investigate,” he said in Chicago.

Not Enough

The offer from banks to pay \$5 billion to reach a settlement isn't enough, Madigan said yesterday at a press conference.

“We're going to try to get as much as we can because there are billions and billions of dollars of harm they have done to our entire economy, to our communities and to individual families,” she said.

In an interview afterward, when asked if a deal with the companies is likely to be reached, Madigan said she is “not positive.”

“If that's what we have to do, that's what we'll do,” she said of the possibility of suing the banks. “We have the resources to do that.”

Dan Frahm, a spokesman for Charlotte, North Carolina-based Bank of America, and Christine Holevas, a spokeswoman for New York-based JPMorgan, declined comment. State and federal officials are also negotiating with Wells Fargo & Co. (WFC), Citigroup Inc. (C) and Ally Financial Inc.

Community Leader

Robert Bushey, a community leader with Illinois People's Action, said after the meeting with some attorneys general yesterday that he supported lawsuits against the banks if necessary. Any settlement should require principal reductions, he said.

“I'd rather they go to litigation than sign a weak agreement,” he said. “If they have to go to court to battle it out, so be it.”

The attorneys general and federal agencies involved in the negotiations have extended by 30 days a self-imposed mid-June deadline to reach an agreement, according to the person with knowledge of the talks.

Geoff Greenwood, a spokesman for Iowa's Miller, said the attorneys general don't have a deadline for reaching a deal.

“We're going to take the time we feel we need to reach a settlement,” he said.

Georgia Attorney General Sam Olens said June 20 that a settlement may allow states to individually choose how to use any money, including whether to apply funds toward principal reductions for borrowers.

Opposing Writedowns

Including those choices may broaden support for any accord among the attorneys general who oppose requiring banks to fund principal writedowns, Olens said in an interview. He estimated that as many as 20 of his colleagues oppose forcing writedowns.

At least eight attorneys general, including Olens, Texas Attorney General Greg Abbott and Florida's Pam Bondi, have publicly opposed principal writedowns as part of any deal. Olens, Abbott and Bondi are Republicans.

Greenwood, Miller's spokesman, declined to comment on whether officials had discussed a structure that would give states the option of using money to fund principal writedowns.

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Class action lawsuit filed against Bank of America goes national

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Las Vegas, NV (KTNV) - Nevada homeowners fighting Bank of America have a new weapon: a class action lawsuit that's gone national.

Contact 13 Chief Investigator Darcy Spears has been exposing allegations of misconduct against B of A for more than a year. Tuesday she spoke to folks who finally feel there may be hope to save their homes.



"I tried to work with them every way I could," says homeowner Leon Gauthier.

"They've been real disappointing. Very disappointing." adds homeowner Boyd Bulloch.

Both men were on the verge of losing their family's homes after fighting losing battles with B of A.

"I want to keep the house if I can. I'm 71 years old," says Gauthier. "I just had never lost a house in my entire life, for 35 years, and it looks like I would have lost this one."

77-year-old Boyd Bullock's North Las Vegas home was on the brink of foreclosure before he joined the class action lawsuit. Now his foreclosure is frozen.

That's an option that's still open to any B of A homeowner in Nevada who wants to join the case.

The lawsuit, filed just a few weeks ago in Nevada, was based on allegations that B of A is in violation of Nevada's Deceptive Trade Practices Act.

It's now part of the sole nationwide case against Bank of America alleging wrongful acts while negotiating loan modifications.

"B of A, who we've sued amongst others, are still not complying with the federal law that they agreed to comply with when they took the \$75 billion that was set aside as part of TARP for home modifications to save the homeowner," explains Attorney Matthew Callister.

More than two dozen Nevada homeowners are already part of the now-nationwide class action suit.

B of A is accused of misleading consumers, stranding them without answers, making false promises to stop foreclosures, and falsely impacting consumers' credit.

Darcy Spears: What do you think they need to be accountable for?

"For telling the truth the first time and then going ahead and following through with the documentation and close the loan and get your payments where you can live with them," says Bulloch, the lead plaintiff in Nevada.

B of A tells Action News they won't comment on specifics of this pending litigation. They have filed a motion to dismiss the national case.

To inquire about joining the class action lawsuit in Nevada, contact Callister and Associates at (702) 385-3343.



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Las Vegas

Feds accuse Deutsche Bank of mortgage fraud

By MARK DeCAMBRE

Last Updated: 10:06 AM, May 4, 2011

Posted: 11:38 PM, May 3, 2011

Achtung, Uncle Sam!

The Justice Department accused German financial giant Deutsche Bank of duping a US government-backed mortgage insurance program -- and fleecing hardworking taxpayers out of hundreds of millions of dollars in the process.

The hard-charging civil suit, brought by US Attorney Preet Bharara in Manhattan federal court yesterday, blasted Deutsche Bank and its mortgage subsidiary, MortgageIT, claiming they methodically selected mortgages they knew were toxic and bound to implode in a decade-long fraud.

The scheme saddled US taxpayers with a whopping \$386 million bill, based on claims paid out so far by the US Department of Housing and Urban Development, or HUD, insurance program, according to the complaint. Bharara is seeking treble damages, or about \$1 billion.

"As alleged, MortgageIT and Deutsche Bank ignored every type of red flag and breached every duty of due diligence before underwriting thousands of federally insured mortgages," Bharara said.

Deutsche Bank could wind up getting whacked for as much as \$3 billion in damages, according to Mark Rifkin, an attorney with Wolf Haldenstein.

"Defaulted loans are not like wine -- they don't get better with time," Rifkin said. "There could be some real damages here for [Deutsche Bank and MortgageIT] and given that it's a civil suit, the burden of proof is really on the bank."

Sources said Bharara is investigating mortgage practices at other big banks, including Bank of America and JPMorgan Chase.

The suit alleges that Deutsche Bank submitted some 39,000 unsavory mortgage loans under the HUD program, of which a third are currently in default.

Rifkin said Deutsche Bank's legal liabilities will likely spike as the rest of the mortgages insured by the HUD program sour.

A Deutsche Bank spokeswoman described the civil suit as "unfair and unreasonable" and said that the firm would fight the claims.

MortgageIT had been a public company for just two years when Deutsche Bank bought it in January 2007 at the height of the housing boom. MortgageIT had expanded aggressively into subprime mortgage origination as early 2004, according to regulatory documents.

"Close to 90 percent of the activity covered by the [DOJ] allegations happened prior to Deutsche Bank's acquisition of MortgageIT," the bank said.

Bharara's suit comes as state attorneys general are locking horns over an industry-wide mortgage settlement that could total as much as \$30 billion. mark.decambre@nypost.com

MAY 24, 2011, 1:56 PM ET

Maine High Court Overturns Foreclosure, Cites 'Untrustworthy' Paperwork

The Maine Supreme Judicial Court overturned the foreclosure of a Maine homeowner after concluding that the supporting documentation filed by the foreclosing bank was "inherently untrustworthy."

The decision, handed down Friday, underscores the potential for more delays in foreclosures as banks are unable to foreclose on borrowers after being challenged in court for using questionable paperwork. ([Read the decision.](#))

The issues raised in the case are separate from the robo-signing scandal that first erupted last fall, where bank employees were accused of signing paperwork without reviewing their contents. Instead, Dana and Robin Murphy challenged irregularities in the foreclosure documents that suggested potential fabrications or other shortcuts.

HSBC says that they took out a \$149,000 loan in March 2005 on an Auburn, Maine, residence and that they stopped making payments nearly 15 months later. Maine is one of 23 states that require banks to foreclose on borrowers through the court system.

The case turned on several affidavits filed by HSBC Mortgage Services Inc. that were designed to establish the facts of the case. The court ruled that affidavits used by HSBC were not "of a quality that would be admissible at trial."

A trial court had initially ruled that HSBC failed to demonstrate standing to foreclose and that it improperly notified the Murphys about the foreclosure. HSBC then filed a new affidavit, and the trial court blessed the foreclosure.

But the Murphys appealed and spotlighted "serious irregularities" in those affidavits that, the Supreme Court said, made them "inherently untrustworthy." For example, the initial affidavit in the case was dated and notarized on Sept. 10, 2008, even though it included the balance and late fees as of Jan. 29, 2009—or for four months that hadn't yet happened.

The court said it didn't have enough information to conclude that a fraud had been committed on the court, as the Murphys had implied, but it did rule that the loan paperwork submitted in the cases was unsatisfactory. It returned the case back to the trial court and HSBC won't be able to foreclose until the issues raised on the appeal are addressed.

"It is a really clear statement by the Maine Supreme Court about the quality" of foreclosure affidavits "that is going to be required," said Thomas Cox, one of their attorneys. "That quality has been singularly absent in Maine and throughout the country."

An HSBC spokesman declined to comment on pending litigation.

It's not clear how the trial court will rule when it takes up the case. When a court deems that business records aren't trustworthy, it can require future testimony to come from witnesses who were intimately involved in business operations and that have first-hand knowledge of the records, says Cox.

If that becomes the new standard for certain foreclosures in Maine, foreclosures could become even more time-consuming and expensive for any institution that has to meet them. That's precisely why the case "has the potential to have a really significant impact," says Cox.

Cox, a retired lawyer who volunteers at Pine Tree Legal Assistance, a nonprofit group, is well known within foreclosure

legal-defense circles because he took one of the depositions of the GMAC employee who was dubbed a "robo-signer" for approving foreclosure paperwork without verifying their contents. That testimony prompted much more scrutiny of banks' foreclosure practices last September.

Cox says the ruling is also noteworthy because the Maine Supreme Court appeared to tell the borrowers to seek sanctions, including the payment of legal expenses. "They're telling us to pursue those motions. It's the first time I've seen a high court do so," says Cox.

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