

**IN THE SUPREME COURT OF OHIO**

U.S. BANK, NATIONAL	)	CASE NO.: 2011-0218
ASSOCIATION, AS TRUSTEE FOR	)	
CMLTI 2007-WFHE2	)	ON APPEAL FROM THE
	)	CUYAHOGA COUNTY COURT
APPELLANT,	)	OF APPEALS, EIGHTH
VS.	)	APPELLATE DISTRICT
	)	CASE NO.: CA-10-094714
ANTOINE DUVALL, ET AL	)	
	)	
APPELLEES,	)	

**MERIT BRIEF OF AMICI CURIAE HOMEOWNERS OF THE STATE OF OHIO,  
AND [Ohiofraudclosure.blogspot.com](http://Ohiofraudclosure.blogspot.com)**

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2007-WFHE2*

**FILED**  
AUG 15 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**RECEIVED**  
AUG 15 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## ARGUMENT IN SUPPORT OF AMICUS CURIAE'S POSITION

Proposition of Law No. 1: This Certified Conflict is hereby dismissed as being improvidently granted, as upon closer review there is not a conflict amongst the appellate districts.

*Semenchuk v. Ohio Dept. of Rehab. & Corr.* (Ohio App. 10 Dist.), 2010 -Ohio- 6394, at

¶¶ 2, 3, and 4 sets for the basis for certifying a conflict amongst the appellate districts, stating:

Section 3(B)(4), Article IV, of the Ohio Constitution governs motions seeking an order to certify a conflict. It provides: Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination. See also *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, syllabus, rehearing denied by *Whitelock v. Cleveland Clinic Found.* (1993), 67 Ohio St.3d 1420.

In *Whitelock*, the Supreme Court of Ohio held, pursuant to Section 3(B)(4), Article IV, Ohio Constitution and S.Ct.Prac.R. III, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Id.* at paragraph one of the syllabus. The court further stated: [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.) *Id.* at 596

Additionally, factual distinctions between cases are not a basis upon which to certify a conflict. *Id.* at 599. "For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict." *State v. Hankerson* (1989), 52 Ohio App.3d 73, paragraph two of the syllabus.

In the cases which have been certified to the Ohio Supreme Court, there are broad statements of law that appear to be in conflict. However, the same question is not presented to each of the appellate courts, and the apparent conflict can be resolved by looking at the procedural posture of each case and the evidence, or lack thereof, presented.

The Court of Appeals for the Eighth District certified that its decision in *U.S. Bank, N.A. vs. Duvall*, (Dec. 30, 2010), Cuyahoga App. No. 94714, conflicted with four other appellate decisions. The Court in *Duvall* concluded that Plaintiff had no standing to file a foreclosure action against Defendant because at that time Wells Fargo owned the mortgage. In *Duvall*, Plaintiff provided an affidavit and an assignment of mortgage. The assignment of mortgage was recorded after the complaint was filed. The trial court ordered Plaintiff to supplement the pleadings with evidence of the date when Plaintiff acquired the mortgage. When Plaintiff failed to provide the date it acquired the mortgage the trial court dismissed the complaint. The argument being that Plaintiff U.S. Bank, N.A. could have acquired the mortgage prior to the complaint but did not record the assignment of mortgage until after the complaint was filed.

In *U.S. Bank, N.A. vs. Bayless*, 2009-Ohio-6115, the trial court granted summary judgment in favor of Plaintiff. The motion for summary judgment was supported by an assignment of mortgage that was recorded after the complaint was filed. Defendant did not file a response to the motion for summary judgment. The Court of Appeals affirmed the trial court's decision stating that Defendant did not expressly contradict Plaintiff's evidence of ownership of the mortgage. The issue of when Plaintiff acquired the mortgage was not contested or put at issue by Defendant.

In *U.S. Bank, N.A. vs. Marcino*, 118 Ohio App.3d 328, 2009-Ohio-1178, the trial court granted summary judgment in favor of Plaintiff. The trial court repeatedly advised Defendant that he was required to present affidavits or other evidence to survive the motion for summary judgment. On appeal, the Court of Appeals framed the issue as whether Plaintiff submitted sufficient evidence to meet its initial burden pursuant to Civil Rule 56. The Court of Appeals found that the affidavit in support of the motion for summary judgment averred that Plaintiff was

the holder of the note and the mortgage. The Court of Appeals commented that the affidavit does not mention how, when or whether Plaintiff had been assigned the Note and the Mortgage. The Court of Appeals looked at the limited evidence and determined (1) that the allonge endorsed in blank makes the promissory note bearer paper, (2) that the affidavit establishes that Plaintiff holds the note, and (3) that prior law determines that the mortgage follows the note. Accordingly, the Court of Appeals determined that the Plaintiff had met its initial burden under Civil Rule 56, and in the absence of a response by Defendant, the trial court properly granted summary judgment. Again, the issue of when Plaintiff acquired the mortgage was not contested or put at issue by Defendant.

In *Bank of New York vs. Stuart*, 2007-Ohio-1483, the trial court granted summary judgment to the Plaintiff. The motion for summary judgment was supported by the promissory note from Defendant to the original lender, and the assignment of mortgage from the original lender to Plaintiff. Defendant in opposition to the motion for summary judgment argued, but did not put forth any evidence, that Plaintiff did not have a valid assignment at the time the complaint was filed. Defendant's opposition also argues, but again without any evidence to support the argument, that the assignment was not effective until 5 months after the complaint was filed. Defendant then argues that Plaintiff was required to obtain leave to file and to file a supplemental complaint. The Court of Appeals relies upon federal case law regarding real party in interest and determines that the assignment was not invalid simply because it was filed after the complaint. Accordingly, since the assignment was not invalid the trial court did not err in granting summary judgment. Again, the issue of when Plaintiff acquired the mortgage was not contested or put at issue by Defendant.

In *Countrywide Home Loan Servicing, LP vs. Thomas*, 2010-Ohio-3018, the trial court granted summary judgment to the Plaintiff. The substituted plaintiff, Ocwen Loan Servicing, filed a motion for summary judgment supported by an affidavit stating that it was the current holder of the note and mortgage. Ocwen filed a supplemental affidavit stating that Countrywide had obtained authority to hold the note and mortgage on a date prior to the filing of the complaint. The Defendant filed a memorandum in response to the motion for summary judgment and asserted that MERS did not assign its interest prior to the complaint being filed. The Court of Appeals found that Defendant did not put forth evidence to place a genuine issue of material fact in dispute. The Court of Appeals affirmed the grant of summary judgment. The issue of when Plaintiff acquired the mortgage was not contested or put at issue by Defendant.

All five cases can be read to be compatible with one another. In *Duvall*, Plaintiff failed to establish that it held the mortgage at the time the complaint was filed and the complaint was dismissed. In *Bayless*, Defendant did not respond to the motion for summary judgment and the issue was never presented as to whether Plaintiff owned the mortgage at the time the complaint was filed. In *Marcino*, the Defendant failed to respond to the motion for summary judgment with an affidavit or evidence, even after being warned by the trial court, to create a genuine issue of fact regarding Plaintiff's ownership of the mortgage at the time the complaint was filed. In *Stuart*, the Defendant asserted that Plaintiff did not have a valid assignment of the mortgage as the only evidence of the assignment was recorded after the complaint was filed. The Court of Appeals in *Stuart* could find no support for the proposition that the assignment was invalid, and therefore concluded that the trial court did not err in granting summary judgment to Plaintiff. In *Thomas*, the Plaintiff supported its motion for summary judgment with an affidavit stating that

Plaintiff had obtained authority to possess the note and mortgage prior to the filing of the complaint.

All five cases turn on the evidence, or lack thereof, of Plaintiff's ownership of the mortgage at the time the complaint was filed. These are cases involving various degrees of evidence submitted in support of and in opposition to motions for summary judgment. The language of these five cases appears to create a conflict, but broad statements of the law which are unnecessary to determine the case should not result in a conflict. The rational or reasoning processes of these Court are all in line. In order to obtain summary judgment, Plaintiff must present some evidence that it owned the mortgage at the time the complaint was filed. In order to survive summary judgment, Defendant must put forth some evidence creating a genuine issue of material fact regarding Plaintiff's ownership of the mortgage at the time the complaint was filed.

All of the cases that have been certified to the Ohio Supreme Court can also be harmonized regarding their determination of whether Plaintiff was the real party in interest at the time the complaint was filed. In *Duvall*, the mortgage was assigned after the complaint was filed and Plaintiff failed to provide evidence that it held the mortgage prior to the complaint; case dismissed. In *Bayless*, mortgage was assigned after the complaint was filed, but Defendant failed to challenge whether Plaintiff was the real party in interest during summary judgment process; judgment for Plaintiff. In *Marcino*, the mortgage assignment was recorded after complaint was filed; Defendant fails to challenge whether Plaintiff was the real party in interest during summary judgment process, and Court of Appeals infers from the possession of the note that Plaintiff was assigned mortgage prior to complaint being filed. In *Stuart*, the mortgage assignment was recorded after the complaint was filed; Defendant asserts that the assignment

was not effective until recorded; Court of Appeals rejects this unsupported theory and finds Federal case law to support the validity of an assignment of a mortgage after the complaint was filed. In *Thomas*, the mortgage assignment was recorded after the complaint was filed, but Plaintiff filed an affidavit stating that it had obtained the right to possess the mortgage and note prior to the filing of the complaint.

Each of the five cases certified to the Court as being in conflict resolve the issue of whether Plaintiff was the real party in interest the same. When Defendants timely raised the issue of whether Plaintiff was the real party in interest at the time the lawsuit was filed, Plaintiff must demonstrate that it possessed the note and the mortgage prior to the filing of the complaint. Unfortunately, most of the Defendants were not represented by counsel and did not timely raise the issue.

Proposition of Law No. 2:

The Ohio Supreme Court Order Certifying a Conflict dated April 6, 2011 instructed the parties to brief the issue: To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note and the mortgage when the complaint was filed?, and the answer is "yes". However, answering the multiple part question with a single phrase is not appropriate.

Appellant and Amicus Curiae Fannie Mae and Freddie Mac argue that the issue of standing to bring a foreclosure action can be resolved solely by looking at the law of negotiable instruments. The note is enforceable by the holder; the mortgage follows the note. Accordingly, the holder of the note has standing to bring a foreclosure action. Appellant and Amicus Curiae Fannie Mae and Freddie Mac assert that negotiable instrument law has never required ownership of the note, but merely possession of the note. A holder of the note can enforce the note. R.C. 1301.01(T) and R.C. 1303.31(A).

Appellant and Amicus Curiae Fannie Mae and Freddie Mac construe the issue based upon definitions set forth in the Uniform Commercial Code. The U.C.C. has provisions defining

“holder”, “owner”, “persons entitled to enforce the note” and others. Based upon these terms of art, often berated as “legalese”, Foreclosure Plaintiffs can file a complaint; allege that the Foreclosure Plaintiff owns the note or holds the note; and then argue whichever definition suits their purpose. However, Ohio Civil Rule 8(E)(1) requires that each averment shall be simple, concise, and direct. Accordingly, the Foreclosure Plaintiffs should be held to the definition normally associated with owner, own, or holder. If a Foreclosure Plaintiff means that it is a person entitled to enforce the note pursuant to R.C.1301.31, then the complaint should state it. If a Foreclosure Plaintiff means that it is suing as a representative of the note holder, the complaint should state it. If a foreclosure Plaintiff means that it is (1) a loan servicer, (2) who has been given temporary possession of the promissory note, (3) in order to file a complaint in its own name, (4) on behalf of Fannie Mae, (5) pursuant to Fannie Mae guidelines, then the complaint should state it.

Proposition of Law No. 3:

“To have standing as a plaintiff in a mortgage foreclosure action, plaintiff must show that (1) it was a party entitled to enforce the note, (2) it possessed an interest in the mortgage, and (3) both of these requisites existed at the time when the complaint was filed.”

In *Citizens Bank v. Cinema Park L.L.C.*, 2010 WL 420019, at \*3 (N.D. Ohio Jan. 29, 2010), the court stated that [e]stablishing an entitlement to foreclosure, in turn, requires proof of the following elements: (1) execution and delivery of a valid note and mortgage, which instruments are now held by plaintiff; (2) the recorded mortgage is a valid lien on the property at issue; (3) the maker of the note and mortgage has defaulted on its obligation under those instruments; (4) resulting in an established amount due. (internal citation omitted).

*Wells Fargo Bank, N.A., v. Favino*, Case No. 1:10 CV 571, (N.D. Ohio E.D. March 31, 2011).

Every foreclosure action combines two causes of action: (1) a breach of the promissory note, and (2) a foreclosure of the mortgage securing the promissory note. In order to have standing to file suit on the breach of the promissory note, the Plaintiff must be a person entitled to enforce the note. In order to have standing to file suit to foreclose on the mortgage, the

Plaintiff must possess an interest in the mortgage. Appellant wants to ignore the separate and independent nature of the breach of the promissory note and the right to foreclose the mortgage. However, the above clearly demonstrates that two instruments are necessary for a foreclosure to proceed.

Appellant would prefer this Court to ignore any analysis beyond the fact that the Plaintiff “holds” the note. In their arguments, Appellant and Amicus Curiae gloss over the definition of a negotiable instrument and presume that a promissory note secured by a residential mortgage is a negotiable instrument. R.C. 1303.03 defines a negotiable instrument, as follows:

(A) \*\*\*, “negotiable instrument” means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it meets all of the following requirements:

- (1) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
- (2) It is payable on demand or at a definite time.
- (3) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:
  - (a) An undertaking or power to give, maintain, or protect collateral to secure payment;
  - (b) An authorization or power to the holder to confess judgment or realize on or dispose of collateral;
  - (c) A waiver of the benefit of any law intended for the advantage or protection of an obligor.

A promissory note secured by a residential mortgage meets many of the above requirements: it is an unconditional promise to pay, a fixed amount of money, to the order of the Lender, at definite time. R.C. 1303.03(A)(1) and R.C. 1303.03(A)(2). However, R.C. 1303.03(A)(3) states that the promise or order may not contain any other undertaking or promise, except for limited situations.

Given the numerous legal documents and relationships that have become attached to the transaction, a promissory note referring to a residential mortgage may no longer be an exception to R.C. 1303.03(A)(3). The majority of mortgages will often identify some entity other than the

lender as the mortgagee. The majority of mortgages will then be transferred through a number of entities and will eventually be transferred to a trust. The trust will be governed by a pooling and servicing agreement. The pooling and servicing agreement will designate numerous other entities that have authority to take certain actions related to the mortgage. Accordingly, a promissory note that makes reference to a residential mortgage may no longer comply with R.C. 1303.03(A)(3). Even the Permanent Editorial Board for The Uniform Commercial Code considered a “proposal to amend the UCC to render real estate mortgage notes nonnegotiable” at its October 4, 2009 meeting. See, a copy of the October 4, 2009 agenda attached hereto. If a “mortgage note” is not a negotiable instrument, then a plaintiff does not have standing to file a complaint based solely upon plaintiff’s possession of the promissory note. A blank endorsement would not create bearer paper.

In continuing to gloss over the details and to further buttress its “Note Holder” distraction, Appellant relies heavily upon a draft report authored by the Permanent Editorial Board for The Uniform Commercial Code, which is a part of the American Law Institute, “The UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them, Draft Report (March 29, 2011)”. The purpose of the article is stated as “[a]though the UCC provisions have been settled law for a number of years, it has become apparent that not all courts and attorneys are familiar with them.” The article discusses the Permanent Editorial Board’s opinion on the effect of the sale of a promissory note secured by a mortgage, stating:

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note? UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the

security interest, mortgage, or other lien.” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

Thus, while this matter has engendered some confusion, the law is clear, and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note.

The application of UCC Section 9-203(g) would have a similar effect in Ohio as R.C.

1309.203(g) has the identical language:

The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

Appellant, Amicus Curiae Fannie Mae and Freddie Mac, and the Permanent Editorial Board all assert that this is a rather simple issue that has been needlessly confused by the courts. A mortgage note is a negotiable instrument and the mortgage follows the note. However, UCC Section 9-203(g) and R.C. 1309.203(g) do not specifically address the issue of mortgage backed securities and the conduct of the Lender that immediately takes steps to separate the mortgage from the note in the process of creating a mortgage backed security. Appellant, Amicus Curiae Fannie Mae and Freddie Mac, and the Permanent Editorial Board all ignore the fact that the UCC sets forth the default provisions **in the absence of an agreement between the parties**. R.C. 1309.201 provides that a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. A security agreement, i.e. mortgage, which immediately names an entity other than the Lender as mortgagee should not be subject to the default provisions of the UCC.

Appellant and Amicus Curiae Fannie Mae and Freddie Mac argue that the law of negotiable instruments and real property law have for centuries recognized that the promissory note is the evidence of the debt and that the mortgage is merely security for the debt. As a mere “incident of the debt” the mortgage necessarily follows the debt. Appellant provides the Court

with a long list of cases to support its position that the mortgage follows the note. Seven of those citations are from the 1800's; six are prior to 1938; and the majority of the cases pre-date the modern day practice of mortgage backed securities. While the traditional law of negotiable instruments and real property may support the proposition that the mortgage necessarily follows the note, there is nothing traditional about the manner in which mortgages are transferred in mortgage backed securities. The list of citations does not involve cases in which the agreement of the parties or the conduct of a party to the transaction rebuts the presumption that the mortgage follows the note.

[T]he law is clear, and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note. PEB, Draft Report, March 29, 2011.

The corollary statement must also be clear. The sale of a mortgage note accompanied by a separate conveyance of the mortgage securing the note **does** result in a separation of the mortgage from the note. When (1) the Lender retains possession of the note or transfers the note by endorsing the note, and (2) the Lender identifies a separate entity as the mortgagee or transfers the mortgage to a different entity, then the mortgage does not follow the note. This precise issue was addressed by the court in *CitiMortgage, Inc. v. Bischoff*, Vermont Superior Court of Rutland Case No. 255-4-09 Rdcv (Cohen, J., Oct. 28, 2009), which states at page 3 of the opinion:

Regarding the mortgage deed, “[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Restatement (Third) of Property, Mortgages § 5.4(a). The objective of this rule is to keep the obligation and the mortgage in the same hands unless the parties wish to separate them. *Id.* at cmt. b. Here, the parties split the Note and Mortgage Deed; Flagstar Bank retained the Note, which it later indorsed to CitiMortgage, while MERS held the mortgage deed, becoming the mortgagee of record.

If Plaintiff's standing to file a foreclosure complaint is put at issue, Plaintiff must do more than assert that it holds the promissory note which is secured by a mortgage. Plaintiff must

demonstrate that the mortgage note is a negotiable instrument; that the note has been properly endorsed payable to Plaintiff or endorsed in blank; and that plaintiff holds the note or is a person entitled to enforce the note. Plaintiff must also demonstrate that the mortgage was never split from the promissory note and therefore the mortgage follows the note. Alternatively, Plaintiff must demonstrate that the mortgage once split from the promissory note has been reunited by Plaintiff's simultaneous possession of both the note and the mortgage. Accordingly, an action to foreclose upon a promissory note secured by a mortgage against real property requires (1) the person or entity filing the complaint to be a person entitled to enforce the note, (2) and the person or entity filing the complaint must be owner of the mortgage.

In order to be the real party in interest, the person or entity filing the complaint must fulfill the two above requirements at the time the complaint is filed. The two requirements must be fulfilled at the time the complaint is filed because Civil Rule 17(a) was not designed to allow an improper Plaintiff to repeatedly file complaints and then correct the problem, when, if at all, the issue is brought to the Court's attention.

The issue of real party in interest and Civil Rule 17(a) has been thoroughly addressed in *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, at ¶8, as follows:

Civ.R. 17(A) says that “[e]very action shall be prosecuted in the name of the real party in interest. \* \* \* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action. The Eleventh Appellate District has held that “Civ.R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.” The court also noted that “Civ.R. 17(A) was not applicable ‘unless the plaintiff had standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the

subject matter.' Civ.R. 17 only applies if the action is commenced by one who is sui juris or the proper party to bring the action."

The Twelfth Appellate District agrees. In 2007, the court held that "[t]he 'real party in interest is generally considered to be the person who can discharge the claim on which the suit is brought \* \* \* [or] is the party who, by substantive law, possesses the right to be enforced.'"<sup>4</sup> Unless a party has some real interest in the subject matter of the action, that party will lack standing to invoke the jurisdiction of the court. The court concluded that "[i]n a breach of contract claim, only a party to the contract or an intended third-party beneficiary of the contract may bring an action on a contract in Ohio."

Such a rule would seem to be in the spirit of Civ.R. 17, which only allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest. Since WMC was not joined or substituted in this case, the only argument Wells Fargo could have made was that WMC had ratified its actions. Ratification is a way that an agent can bind a principal. But ratification will not apply when the actor is not acting as the agent of the principal.

Civil Rule 17(A) has been used throughout foreclosure actions as a means to justify a Plaintiff acquiring an interest in the action after the complaint has been filed. Typically, a complaint is filed and sometime thereafter Plaintiff is assigned the promissory note and mortgage. Plaintiffs then assert that they are now the real party in interest. In support of this position, Plaintiffs argue that Civil Rule 17(A) states merely that every action shall be **prosecuted** in the name of the real party in interest. Foreclosure Plaintiffs argue that Civil Rule 17(A) does not require the action be **commenced** by the real party in interest.

The Ohio Rules of Civil Procedure do address the issue of an interest in the litigation being transferred. Ohio Civil Rule 25(C) provides:

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (A) of this rule.

However, the transfer contemplated by the Civil Rules is out of the hands of the original party. Accordingly, there is no provision in the Ohio Civil Rules for the Plaintiff to become the real party in interest after the complaint has been filed and the action has been commenced.

*Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 2009-Ohio-3238, at ¶¶ 39 and 40, relying upon interpretation of the Federal Civil Rules, warns against Civil Rule 17(A) being distorted, stating:

“Many federal courts have held that ratification is still not an appropriate alternative to naming the real party in interest because Rule 17(a) authorizes ratification only “to avoid forfeiture and injustice when an understandable mistake has been made in selecting the parties in whose name the action should be brought.” Agri-Mark, 190 F.R.D. at 296, quoting 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, \*827 Federal Practice and Procedure (1990), Section 1555, 412; Hobbs v. Police Jury of Morehouse Parish (E.D.La. 1970), 49 F.R.D. 176, 180; Del Re v. Prudential Lines, Inc. (C.A.2, 1982), 669 F.2d 93, 96.

The Fed.R.Civ.P. 17 advisory committee's note accompanying the 1966 amendment stated, “Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. \* \* \* The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.” FN6

FN6. Professor Entman notes that “[r]atification is an anomaly that slipped into Rule 17(a) in 1966 when admiralty actions were brought under the Federal Rules of Civil Procedure. Prior to the 1966 amendments, courts \* \* \* had taken a lax approach to the naming of parties plaintiff because of the difficulty of identifying, at least prior to the expiration of applicable statutes of limitation, the numerous parties who may have enforceable claims arising from the loss of a ship's cargo. \* \* \* So long as the proper plaintiff or plaintiffs ratified the action before judgment, the action could be saved and judgment entered in the name of the plaintiff on the basis of the unnamed parties' claims. \* \* \* In 1964 the Advisory Committee on Admiralty Rules proposed the merger of civil and admiralty practice under the Federal Rules of Civil Procedure. The Committee \* \* \* recommended several amendments to the Federal Rules of Civil Procedure to preserve, after the merger, certain distinct admiralty practices. Among the recommendations by the committee was an amendment to Rule 17(a) that would have preserved the practice of relation-back of claims through the formerly unnamed parties' ratification, joinder or substitution. \* \* \* What apparently passed unnoticed, however, was that the provision for ratification, as an alternative to joinder or substitution, introduced into Rule 17(a) a practice that was fundamentally at odds with the rule's basic proposition that every action shall be prosecuted in the name of the real party in interest. The device of ratification \* \* \* was the very practice, however, that the real party in interest rule was intended to abolish.” (Citations omitted.)

Entman, Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law, 45 Case W.Res.L.Rev. at 62-64.

If an understandable mistake has occurred in naming the proper party as the Plaintiff, then Civil Rule 17(A) can be used to either substitute the real party in interest or join the real party in interest as a plaintiff. A complaint should not be dismissed for failure to bring the complaint in the name of the real party in interest until sufficient time has been given to allow for such substitution or joinder. Accordingly, when the issue whether Plaintiff is the real party in interest is raised, the Court should allow sufficient time to substitute or join the proper party. However, before joinder or substitution should be allowed, the Plaintiff should be required to demonstrate that an understandable mistake occurred.

The rationale or reasoning behind Foreclosure Plaintiff's choosing to assign an interest to a person or entity who improperly filed a complaint may never be fully understood. However, Foreclosure Plaintiffs who repeatedly file complaints when they do not own an interest in either the promissory note or mortgage should understand that that acquiring the note, the mortgage or both after the complaint is filed will not cure the problem they created.

Similarly, this Court should not allow Foreclosure Plaintiffs to further confuse the issue by using one or more definitions of standing. Plaintiffs will assert that dismissing an action for lack of a real party in interest will raise standing to a jurisdictional level. Foreclosure Plaintiffs will undoubtedly cite decisions from this Court similar to *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, which states:

Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. *Houser v. Ohio Historical Soc.* (1980), 62 Ohio St.2d 77, 16 O.O.3d 67, 403 N.E.2d 965. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Smith v. Smith* (1996), 75 Ohio St.3d 418, 420, 662 N.E.2d 366, 369; *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 251, 594 N.E.2d 616, 621. *State ex rel. Tubbs Jones*, at page 79.

However, legal maxims and axioms should not be relied upon to avoid the reality that is occurring in foreclosure actions on a regular basis. Foreclosure Plaintiffs who do not own an interest in the promissory note, who do not own an interest in the mortgage are filing complaints. When and if the Foreclosure Plaintiff's interest in the action is questioned the note, the mortgage or both will be assigned to the Foreclosure Plaintiff. Civil Rule 17 is distorted and argued as an acceptable means to correct the problem. The problem is created by the entities seeking to collect the payments on the promissory note and seeking to foreclose on the mortgage securing those payments. The problem can be easily corrected by those same entities. File the complaint in the name of the entity who holds the promissory note and who owns an interest in the mortgage.

## CONCLUSION

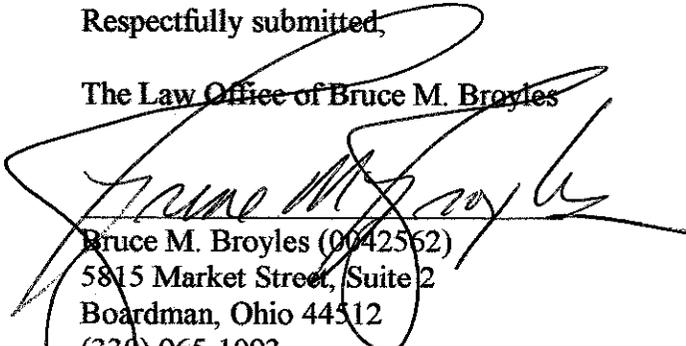
The certified conflict should be dismissed as there really is no conflict between the appellate districts. The determination of each of the certified cases turns upon the evidence presented and the procedural posture of each case. Each of the certified cases determine the issue of the real party in interest the same.

Mortgage notes or promissory notes secured by mortgages on real property may not be properly characterized as negotiable instruments. It may not be sufficient to say that the Plaintiff possesses the promissory note. Plaintiffs should not be allowed to rotely state that the mortgage follows the note. Trial courts should not assume that the mortgage is a mere incident of the debt and would never be separated from the instrument establishing the debt. An assignment of an interest after the complaint has been filed will not correct the problem.

Foreclosure Plaintiffs must be the holder of the promissory note, or a person entitled to possess the note at the time the complaint is filed. Foreclosure Plaintiffs must be the owner of an interest in the mortgage at the time the complaint is filed. Foreclosure Plaintiffs who want to correct the problem pursuant to Civil Rule 17(A) must join or substitute the real party in interest. Foreclosure Plaintiffs must demonstrate that an understandable mistake occurred at the time the complaint was filed in order to avail themselves of Civil Rule 17(A). This is not about giving someone a free house or allowing mortgages to go unpaid. This is about the judicial system requiring rules to be followed rather than making the rules fit the expediency of business.

Respectfully submitted,

The Law Office of Bruce M. Broyles

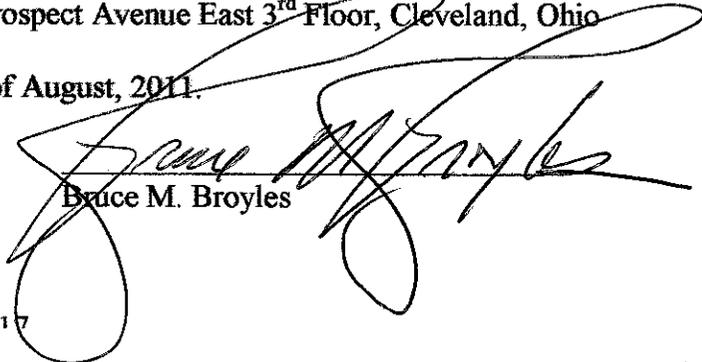


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#### CERTIFICATE OF SERVICE

A copy of the amicus brief was served upon Scott A. King, Attorney for Appellant, of Thompson Hine LLP, 2000 Courthouse Plaza, NE, P.O. Box 8801, Dayton, Ohio 45401-8801, and Gary Cook, Attorney for Appellee, 3655 Prospect Avenue East 3<sup>rd</sup> Floor, Cleveland, Ohio 44115, by regular U.S. Mail, on this 12<sup>th</sup> day of August, 2011.



Bruce M. Broyles