ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 C/O Wells Fargo Bank, N.A.,	:	Case No. 2011-0218
Plaintiff-Appellant,	:	On Appeal from Cuyahoga Court of Appeals, Eighth Appellate District
v.	:	Court of Appeals Case No. CA-10-094714
Antoine Duvall, et al.,	:	
Defendants-Appellees.	:	

MERIT BRIEF OF AMICI CURIAE ADVOCATES FOR BASIC LEGAL EQUALITY, INC., LEGAL AID SOCIETY OF CLEVELAND, LEGAL AID SOCIETY OF COLUMBUS, COMMUNITY LEGAL AID SERVICES, INC., LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, SOUTHEASTERN OHIO LEGAL SERVICES, PRO SENIORS, LEGAL AID OF WESTERN OHIO and OHIO POVERTY LAW CENTER ON CERTIFIED CONFLICT QUESTION

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INTEREST OF THE AMICI CURIAE

All of Ohio's Civil Legal Services Programs[1] join in submitting this brief supporting an affirmative answer to the certified conflict question before the Court. Amici have been on the forefront of the foreclosure crisis, coordinating litigation and non-litigation efforts to help Ohio's low- and moderate-income citizens retain home ownership. Amici are partners in Save the Dream Ohio, the statewide foreclosure intervention initiative, which is a partnership of state,

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[1] Advocates for Basic Legal Equality (ABLE) and Legal Aid of Western Ohio are a non-profit civil legal service providers with the mission of providing high quality legal assistance to low-income persons in thirty-two counties in northwest and west central Ohio.

The Legal Aid Society of Cleveland in the law firm for low-income families in northeast Ohio. Its mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions that empower those it serves.

The Legal Aid Society of Columbus is similarly committed to assisting low income persons and seniors with legal problems in a variety of areas, including housing, consumer, public benefits, domestic relations, as well as basic life necessities, in a six county area of central Ohio.

Community Legal Aid Services, Inc. (CLAS), provides legal representation to low income and elderly individuals in an eight county area in northeast Ohio. The mission of CLAS is to secure justice for and protect the rights of the poor and to promote measures for their assistance.

The Legal Aid Society of Southwest Ohio, LLC, an affiliate of the Legal Aid Society of Greater Cincinnati, provides a broad range of civil legal services to low income persons in southwest Ohio.

Southeastern Ohio Legal Services is an LSC-funded legal services program whose mission is to act as general counsel to a client community residing throughout thirty rural counties in southeast Ohio and, as such, provide the highest quality of legal services to its clients toward the objective of enabling poor people to assert their rights and interests.

Pro Seniors is a non-profit civil legal service provider with the mission of providing legal assistance to seniors in Southwestern Ohio, as well as legal advice to any senior statewide.

The Ohio Poverty Law Center, a nonprofit limited liability corporation, provides assistance and consulting to the Ohio legal services community through project management, policy advocacy, litigation support, training, specialty assistance and consulting, task forces, publications and other activities.

local, and public interest resources. Since Amici became Save the Dream partners in 2008, the programs have provided direct representation to over 12,000 homeowners statewide at all levels of services.

In addition to direct representation, legal aid lawyers have participated in hundreds of borrower outreach and other public education events to reach out to and educate homeowners about their rights. They have worked closely with local common pleas courts statewide to encourage and support the implementation of mediation in foreclosure cases. They have worked closely with the Ohio Attorney General's Consumer Protection Section to uncover mortgage servicing abuses and issues surrounding the use of fraudulent affidavits in foreclosure filings.

Consequently, the Amici are well situated to provide the Court with information about the adverse impact of the lending industry's businesses practices on Ohio homeowners. In addition, due to the high percentage of default judgments, we are concerned that the lack of proof of ownership by the routine failure to produce these documents with the foreclosure complaints causes a high percentage of incorrect decisions being made every day.

STATEMENT OF FACTS AND CASE

Defendants-Appellees Antoine Duvall and Madinah Samad are husband and wife. On December 26, 2006, Mr. Duvall took out an adjustable rate loan from Wells Fargo Bank, N.A. ("Wells Fargo"). Mr. Duvall signed the promissory note; his wife did not. See Exhibit A to U.S. Bank's Complaint. Both signed the Mortgage, with Wells Fargo as the mortgagee. Exhibit B to Complaint. Plaintiff-Appellant U.S. Bank, N.A., is the Trustee for a securitized trust named Citigroup Mortgage Loan Trust 2007-WFHE2. See Pooling and Servicing Agreement, a portion of which is attached as an exhibit to Plaintiff's Renewed Motion for Summary Judgment on All

Claims and Defenses. The trust contained approximately 6,718 fixed-rate and adjustable-rate mortgage loans secured by first or second liens on residential real properties. Id.

U.S. Bank sued in foreclosure on October 15, 2007, seeking to enforce the Note and Mortgage attached to the Complaint. However, the Note attached was payable to *Wells Fargo* and the mortgage gave *Wells Fargo* the right to foreclose on the Appellees' property. U.S. Bank was not a party to either document. No allonge or mortgage assignment was attached.

On October 18, 2009, U.S. Bank filed its Renewed Motion for Summary Judgment on All Claims and Defenses. The Note attached thereto, however, was endorsed in blank by an alleged Wells Fargo employee. Also attached were the Mortgage and an Assignment of Mortgage purportedly signed by a Wells Fargo employee that assigned the mortgage on February 5, 2008—four months after U.S. Bank filed its Complaint. See Exhibit C to Plaintiff's Renewed Motion for Summary Judgment on All Claims and Defenses. The Assignment of Mortgage stated that Wells Fargo was assigning both the Note and Mortgage on that date.[2]

On December 8, 2009, the Magistrate ordered "Plaintiff to supplement the affidavit of real party in interest with some definitive proof of the acquisition date of the subject note and mortgage within 20 days of this Court's entry. Failure to do so shall result in dismissal." See Magistrate's Order dated December 8, 2009. In response, U.S. Bank filed a five-hundred page pooling and servicing agreement ("PSA") listing the 6,718 mortgage loans without identifying which one was the Duvall loan. U.S. Bank did not support its allegation that Mr. Duvall's mortgage was in the pool.

The trial court rejected U.S. Bank's argument for two reasons. "First, the original

[2] Although the appellate court stated in its opinion that U.S. Bank owned the Note at the time the complaint was filed, the trial court in its decision found that U.S. Bank did not own the Note until this date. See Journal Entry dated January 21, 2010. This is further born out by the documents in the record.

complaint did not contain a blank endorsement. The blank endorsement only appeared after the filing of the complaint. Second, the mortgage assignment was also dated and subsequently filed with the recorder after the filing of the complaint." Journal Entry dated January 21, 2010. The trial court also found that the PSA submitted by U.S. Bank did not sufficiently identify the Duvall loan. Id. As a result, the trial court dismissed the case without prejudice for failure to comply with its December 8, 2009 Order.

U.S. Bank appealed. The Eighth District Court of Appeals affirmed. U.S. Bank then moved to certify a conflict and filed a discretionary appeal. The Eighth District certified a conflict. This Court accepted jurisdiction over the certified conflict and declined to hear U.S. Bank's discretionary appeal.

ARGUMENT

I. Question Presented

"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?"

Amici Ohio Legal Services groups submit that both Ohio law and public policy compel the court to answer "Yes."

II. Comment on Mootness

Appellant and Appellee have filed statements with this Court "that this specific case is presently moot." Appellant U.S. Bank did not file its statement until four days prior to the Amici's filing deadline of August 16. Amici are, therefore, submitting their brief in recognition of the possibility that the court will decide not to dismiss the certified conflicts case.

III. Introduction

The question presented actually contains two parts. The first inquiry is whether a plaintiff filing a foreclosure must have ownership rights to the note and mortgage at the time the complaint is filed. The second inquiry is whether the plaintiff must show its ownership interest by producing the note and mortgage at the time it commences the foreclosure action. This brief will explore the justiciability doctrines of constitutional standing and ripeness as they relate to these two questions.

Plaintiffs in a foreclosure lawsuit must be owners of the note and the mortgage prior to commencement of the action by the filing of its foreclosure complaint. Where plaintiffs do not have an ownership interest, the courts have no authority to hear such issues since plaintiffs lack standing to bring the action. Thus, the note, mortgage, and all indorsements and assignments of each must be produced to determine the plaintiff's ownership interest in each document. Further, only in reviewing the terms of the note and mortgage applicable to the case can a court determine the second part of the standing inquiry, namely whether the lender has a cause of action that is ripe for determination.

Unfortunately, ignoring these basic tenets of constitutional standing is rampant in Ohio. In each of the cases cited in the Notice of Certified Conflict of Appellant U.S. Bank National Association, as Trustee for CMLTI 2007-WFHE2, the lender sued to foreclose on a home *before* the lender had a legal ownership interest in both the Note and Mortgage.[3] In each case, the lender claimed it was entitled to seize and sell a home because the homeowner had failed to

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[3] There are two fact situations in the conflict cases. In most cases, the plaintiffs file the complaint when they are neither the original payee on the note nor the original mortgagee on the mortgage: *U.S. Bank Natl. Assn. v. Duvall*, 8th Dist. No. 94714, 2010-Ohio-6478, at ¶8; *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09-CAE-01-004, 2009-Ohio-6115, at ¶5; *Bank of New York v. Stuart*, 9th Dist. No. 06-CA-0008953, 2007-Ohio-1483, at ¶¶3, 11; *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. No. 09AP-819, 2010-Ohio-3018, at ¶7.[3] The second scenario is when the plaintiff holds the note but not the mortgage. This occurred in *U.S. Bank Natl. Assn. v. Marcino* (7th Dist. 2009), 181 Ohio App. 3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, at ¶3 and *U.S. Bank, N.A. v. Perry*, 8th Dist. No. 94757, 2010-Ohio 6171, at ¶19.

make payments that were, in fact, owed to a different bank. The foreclosing bank sought to legitimize its claim by acquiring an ownership interest after having filed the lawsuit. These cases are not unique.

U.S. Bank has asserted that these cases present the Court with the "most important mortgage foreclosure issue that it has been asked to review in more than a century." Case No. 11-0171, Appellant's Memorandum in Support of Jurisdiction. What the certified question really presents is an opportunity for this Court to make clear that lenders neither are entitled to nor deserve unique exemptions to the substantive standing requirements of the Ohio Constitution as well as the requirements of the Ohio Rules of Civil Procedure.

IV. Foreclosure plaintiffs without a demonstrable interest in the note and mortgage fail to present justiciable claims and have no standing to sue.

A. Ohio courts are governed by the doctrines of justiciability as set forth in the Ohio Constitution.

According to Article IV of the Ohio Constitution, courts of common pleas have original jurisdiction over "all justiciable matters." Article IV, §4(B). This notion of justiciability has been further defined to include the doctrines of standing and ripeness. Indeed, Article I, §16 states that entities who have suffered injury shall be afforded standing to seek remedy in Ohio courts. Justiciability includes an analysis of whether a "real controversy" exists which presents "ripe" issues for consideration. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261.

As discussed below, these doctrines of justiciability—standing and ripeness—govern the ~~analysis of cases filed by plaintiffs seeking to foreclose on Ohio homeowners.~~ Based upon such analysis, foreclosing parties who do not own the note and mortgage at the time of filing cannot proceed with their claims. Further, in order for the court to make the appropriate analysis, the note and mortgage must be produced.

B. Standing is a threshold question for a court to decide before entertaining a case.

Standing is a threshold question for a court to decide in order for it to entertain a case. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002; *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 218, 513 N.E.2d 302 citing *United States v. Storer Broadcasting Co.* (1956), 351 U.S. 192, 197, 76 S.Ct. 763, 100 L.Ed. 1081; *Warth v. Seldin* (1975), 422 U.S. 490, 495, 95 S.Ct. 2197, 45 L.Ed.2d 343. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* this Court stated:

> It is well established that *before an Ohio court can consider the merits of a legal claim*, the person seeking relief must establish standing. The concept of standing embodies general concerns about how courts should function in a democratic society.

(1999) 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (emphasis added) (citation omitted).

Further, "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." *Wells Fargo Bank, N.A. v. Byrd* (1st Dist. 2008), 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, at ¶9, citing *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, 298 N.E.2d 515, syllabus. Thus, in a foreclosure action, the lender must have a real and present interest in the foreclosure or the lender does not have standing to bring the foreclosure action. Furthermore, jurisdictional defects cannot be waived. *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, 284, 10 O.O.3d 411, 383 N.E.2d 896. A defect in standing cannot be waived and must be raised whenever it becomes apparent. *U.S. v. AVX Corp.* (C.A.1, 1992), 962 F.2d 108, 116, n. 7 citing *FW/PBS, Inc. v. City of Dallas* (1990), 493 U.S. 215, 230-231, 110 S.Ct. 596, 107 L.Ed.2d 603; see also *Stewart v. Stewart* (4th Dist. 1999), 134 Ohio

App.3d 556, 558, 731 N.E.2d 743 ("The court is required to raise justiciability sua sponte."). Thus, the lender cannot "fix" the problem by acquiring the ownership rights to the note and mortgage after they have filed the action. The only remedy is a dismissal.

C. Constitutional standing requires an actual injury or a "personal stake" in the controversy.

Article I, §16 of the Ohio Constitution states, "All courts shall be open, and every person, for an **injury** done **him** in **his** land, goods, person, or reputation, shall have remedy by due course of law * * *." (Emphasis added.) Thus, in order to seek legal redress in Ohio courts, a plaintiff must have personally suffered harm.

To have standing, this Court has held that a plaintiff "must generally show that he or she has suffered or is threatened with *direct and concrete injury* * * *." *Sheward*, 86 Ohio St.3d 451, 469 (emphasis added). In *Ohio Contractors Assn. v. Bicking*, this Court defined standing to include "actual injury" which is "not simply abstract or suspected." (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088.

This Court further explained "actual injury" in *State ex rel. Dallman* to be "whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" 35 Ohio St.2d at 179 (internal citations omitted). This Court found that the superintendent of a correctional institute did not have standing to sue the court of common pleas to stop the court from reconsidering an inmate's motion for shock probation, because he lacked a "real interest" in the subject matter of the action. Id. In other words, he was a mere stranger to the controversy just as a lender is who does not own the note and mortgage at the time it files its foreclosure action.

This Court recently addressed the concept of having a "personal stake" as a form of "injury" necessary for standing in *Kincaid v. Erie Ins. Co.* To have standing, a "party must have a personal stake in the outcome of a legal controversy with an adversary. This holding is based upon the principle that 'it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect.'" (2010), 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, at ¶9,[4] quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E. 371 (internal citation omitted). Therefore, this Court concluded, "'it has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.'" Id. quoting *Fortner*, 22 Ohio St.2d at 13 and citing, Article IV, §4(B), of the Ohio Constitution.

Ohio's Courts of Appeals have followed this Court by finding the need to have a real interest in the controversy, which is "injury in fact," to establish standing. The Ninth District Court of Appeals recently took a similar stance by finding a "person has standing to sue **only** if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a **specific, judicially redressible injury** as a result of the challenged action. *Fair Hous. Advocates Assn., Inc. v. Chance*, 9th Dist. No. 07CA0016, 2008-Ohio-2603, at ¶ 5 (emphasis added). The Tenth District Court of Appeals also defined standing by stating, "the plaintiff must have suffered an injury in fact, defined as an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or conjectural." *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, at ¶10. As the Second District Court of Appeals noted in *S. Christian Leadership Conference v.*

[4] Opinion modified on reconsideration sub nom. *Kincaid v. Erie Ins. Co.*, 127 Ohio St.3d 1550, 2011-Ohio-647, 941 N.E.2d 805.

Combined Health Dist., the failure to establish standing means that "a party has no right to seek relief in a court of law." 191 Ohio App.3d 405, 946 N.E.2d 282, 2010-Ohio-6550, at ¶16. In order to seek relief in the courts, plaintiffs filing foreclosure complaints, just like all other plaintiffs, are required to meet the standing requirement of injury by showing **they** have suffered **actual** injury entitling **them** to redress in the courts at the time they commence their action.

Whether a plaintiff in foreclosure can show actual injury requires an understanding of the foreclosure process. A foreclosure action involves two separate contracts: a promissory note and a mortgage. In a contract action, the complaining party must be a party to the contract who has suffered loss due to the other contracting party's breach of the agreement. Of course, the complaining party may acquire rights to the contract in question after its origination. Without that acquisition, however, the party asking for redress has suffered no injury due to a breach of a contract to which it is a stranger.

In *Duvall, Bayless, and Thomas*, the plaintiffs' complaints presented notes and mortgages (or in the case of *Thomas,* no note at all) that did not prove that they were holders or owners of the notes and mortgages. The present case is a prime example. U.S. Bank did not attach a note and mortgage to its Complaint that showed Mr. Duvall and Ms. Samad owed *U.S. Bank* any money. See Exhibit A to U.S. Bank's Complaint. If U.S. Bank did not acquire rights to the Note and Mortgage, then U.S. Bank was not injured by the alleged nonpayment. Based on what it submitted with its Complaint, *there was nothing upon which U.S. Bank could sue for money damages.* There was no contractual relationship between U.S. Bank and Duvall. Without any cognizable injury that could be legitimately set forth at the time of filing its complaint, the foreclosure should have been dismissed.

D. **Standing based upon the note and the mortgage must be assessed at the time of filing because of the dual nature of foreclosure actions.**

Since mortgage loans in Ohio involve two main documents—the promissory note and the mortgage contract—foreclosure lawsuits involve the consolidation of two separate actions: one based on alleged breach of the note and another based on alleged breach of the mortgage. "Although they may properly be joined, an action to foreclose a mortgage and an action for personal judgment on the note secured by such mortgage, are **separate and distinct.**" *Carr v. Home Owners Loan Corp.* (1947), 148 Ohio St.3d 533, 540, 36 O.O. 177, 76 N.E.2d 389 (emphasis added).

This basic concept of the consolidation of two separate and distinct claims has remained virtually unchanged in Ohio for decades. As this Court explained, in *Simon v. Union Trust Co.*:

> The enactment of section 11306, General Code, authorizes plaintiff to unite several causes of action, whether legal or equitable, or both. Under subdivision 9 of the section a plaintiff may unite 'claims to foreclose a mortgage given to secure the payment of money * * * and to recover a personal judgment for the debt secured by such mortgage.' Authority to combine such causes of action subtracts nothing from the rights formerly possessed under either separate cause of action. They are thus merely brought into one action for enforcement. Their **independent characteristics are retained**. The holder of a note secured by mortgage therefore has the same right he theretofore had by separate cause of action to have a 'personal judgment for the debt,' which is the amount due on his note * * *.

Simon v. Union Trust Co. (1933) 126 Ohio St. 346, 349, 185 N.E. 425 (emphasis added). This Court expanded on this concept in *State ex rel. Squire v. Pejsa*, stating:

> Here, an action for personal judgment on the promissory note * * * was joined with an action to foreclose the mortgage on the real estate given to secure such note. * * * This procedure was authorized and proper. * * * The judgment creditor might have attempted to collect the personal judgment without resort to the mortgaged property, or he might have had such property sold, with the application of the proceeds of sale for the purpose of reducing or satisfying the personal judgment * * *.

State ex rel. Squire v. Pejsa, (1947), 148 Ohio St. 1, 5, 34 O.O. 447, 72 N.E.2d 374 (internal citation omitted).

Because there are two distinct actions being pursued concurrently, parties who wish to sue in foreclosure under both the note and mortgage must establish injury and justiciability *for each action*. In other words, parties choosing to sue on the debt owed *and* to foreclose on the home for purposes of sale must be able to show *separately and individually* that they have been harmed based on their ownership interest in the note and the mortgage. Thus, a party who has an ownership interest in the note can sue on the debt owed. Without an ownership interest in the mortgage, however, it is a mere stranger to the mortgage and has no legal standing to request the court to foreclose that separate contract. Thus, the court in determining standing must determine whether foreclosing entity has ownership rights to both the note and the mortgage.

E. Ownership rights of the note and mortgage prior to filing a foreclosure action

In order to be injured, the complaining party must have an ownership interest in the note and the mortgage. When the complaining party is one of the original signers to the note and mortgage, ownership is evident from the writings. However, the vast majority of foreclosures are brought by lenders who are not one of the original signators. The manner in which a party secondary to the original signers of the contracts must acquire an ownership interest in the note and the mortgage depends on the nature of the instrument.

1. Notes can be either negotiable or non-negotiable instruments.

Notes in foreclosure cases fall into one of two categories: negotiable instruments and non-negotiable instruments. While the vast majority of these notes are negotiable instruments subject to the purview of Article 3 of the Uniform Commercial Code ("U.C.C.") as codified in Revised Code, Chapter 1303, there are many which do not qualify as such because the terms do not fully comply with the criteria for negotiable instruments as set forth in R.C. 1303.03. Because of this, the proper analysis of a party's interest in the documents sufficient to support its right to sue will either take the form of:

1.) An analysis of harm based upon the Uniform Commercial Code governing negotiable instruments (where the note is indeed subject to Revised Code Section 1303, et seq.) coupled with an analysis of the non-negotiable Mortgage based upon basic contract rules; or

2.) Two separate analyses of harm applicable to the non-negotiable note and mortgage based upon contract rules.

Each analysis applies different rules on how ownership is established. Contrary to U.S. Bank's arguments, neither analysis suggests that ownership need not exist prior to filing the complaint. Thus, regardless of which category the loan document falls under, applying the constitutional standards of standing to each category will lead this Court to conclude that the foreclosing party must be owners of the note and mortgage in order to file for foreclosure as discussed below.

2. With respect to a note that is a negotiable instrument, a party who is neither a holder of the note nor a non-holder in possession of the note is not harmed by a default and therefore there is no justiciable controversy conferring jurisdiction.

Under the requirements of Chapter 1303, an ownership interest is described as the lawful party with authority to demand payment upon the Note or the entity "entitled to enforce." R.C. 1303.52(B). According to R.C. 1303.31(A), a "person entitled to enforce" is defined, in relevant part, as: (1) The holder of the instrument [note]; (2) A nonholder in possession of the instrument who has the rights of a holder; or (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 * * * of the Revised Code." Although R.C. 1303.38 allows a nonholder of a promissory note an alternative means by which to establish its right to enforce the note, when it is lost, stolen, or destroyed, there are strict requirements that must be met. The 1961 Official Comment to R.C. 1303.38 indicated, with emphasis added:

> The plaintiff is not a holder as that term is defined in this Act [R.C. Chapter 1301 to Chapter 1309], since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument **and his ownership**, and must account for its absence.

Underlying these three categories of parties entitled to enforce a note is the fact that standing requires proof of ownership or the right to enforce the terms of the note. This proof can take the form of the actual note or, in the case of a lost note, an affidavit attesting to the note's terms *and ownership* and accounting for its absence. Foreclosure plaintiffs who cannot meet such fundamental note requirements do not have an ownership interest in the note and, therefore, lack standing to sue and cannot seek redress from the courts.

If a party does not have an ownership interest creating a right to enforce the terms of the note (including the right to demand payment), it follows that the party has not been harmed by alleged nonpayment or default of the terms of the note. Without ownership of the note, there is no agreement between the parties. Without an agreement, the suing party is not harmed. Without such harm, a party cannot meet the requirement that it is entitled to redress of an "injury in fact." In this light, it is clear that the Fifth District Court of Appeal's decision in *Bayless* and the Tenth District Court of Appeal's decision in *Thomas* were incorrect for allowing the cases to proceed since the notes presented at filing did not have necessary endorsements, either specific or blank.[5] In *Thomas*, no note was available or attached, and the plaintiff did not submit

[5] Indeed, the Fifth District Court of Appeals has incorrectly decided other foreclosure cases by holding that a plaintiff without a properly endorsed note *to itself* and without claim or proof that the note was lost was still entitled to summary judgment based upon the assigned Mortgage. See e.g. *Bank of New York v. Dobbs*, 5th Dist. Case No. 2009-CA-000002, 2009-Ohio-4742; *2010-1 CRE Venture, LLC v. Costanzo*, 5th Dist. Case No. 11-CAE-01-003, 2011-Ohio-3530.

documentation to comply with R.C. 1303.38 to establish the right to enforce the Note it did not possess.

Article 3 of the U.C.C. and Ohio's codified version are clear as to who is entitled to enforce the negotiable instrument at issue. If a party is not the original payee on the note and is not a holder, nonholder in possession, or even a legitimate nonholder not in possession, the party is not entitled to enforce the note. R.C. 1303.31. In other words, a party that is not entitled to enforce a negotiable instrument at the time the complaint is filed is a mere stranger to the negotiable instrument. Thus, that party has not established the existence of a justiciable controversy between **itself** and the obligor on the instrument.

3. A party that does not own a non-negotiable note or the accompanying mortgage is not harmed by a default upon the note or mortgage.

Contract rules govern non-negotiable instruments. *Edgar v. Haines* (1923), 109 Ohio St. 159, 163-164, 141 N.E. 837. Notes that do not qualify as "negotiable" under the U.C.C. and mortgages are two kinds of non-negotiable instruments and, therefore, subject to contract rules. As a result, foreclosures based upon non-negotiable notes and/or mortgages must be analyzed as breach of contract claims.

In a breach of contract claim, a plaintiff must show "the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Doner v. Snapp* (2nd Dist. 1994), 98 Ohio App 3d 597, 600, 649 N.E 2d 42. In Ohio, a non-party may not enforce a contract unless it is a third-party beneficiary. *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St. 3d 158, 161, 566 N.E.2d 1220. In *Grant Thornton*, this Court stated, "Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio." Id.[6] As an alternative, contracts can be assigned or sold to a new party. *Edgar*, 109 Ohio St. at 162. In order to be valid, an "assignment must comply with fundamental requisites for contracts generally, as respects the legality of object, capacity of parties, consideration, and consent, but any language, however informal, which shows the intention of the owner of a chose in action to transfer it is sufficient." 6 Ohio Jur. 3d, Assignments, § 25. In other words, there must be a written document transferring the contract to the third party. Even more importantly, this Court has held:

> [A] naked right of action, for a breach of an executory contract, cannot be assigned to another, whilst the assignor remains the absolute owner of the entire contract, and is still entitled to retain for himself, or transfer to a third party, the full benefit of all its stipulations, and it is just as clear, that one can not transfer to another the full benefit of all the stipulations of an executory contract which he holds, and afterwards maintain an action to recover damages for the breach of any of such stipulations.

Denney v. Cleveland & P.R. Co. (1875), 28 Ohio St. 108, 115. Without a written transfer or assignment of the contract along with its included rights of action to a third-party, an assignee has no right to sue based upon the contract.

In all of the cases named as part of this Court's conflict certification, the plaintiffs were not the original named parties to the mortgages upon which they sued and, instead, claimed to be subsequent owners and/or assignees. Given this Court's precedent and the need to determine whether said "third-party" foreclosure plaintiffs have the right to sue upon contracts in which they are not named as a beneficiary or party, courts must determine the legal status of foreclosure

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[6] The third-party beneficiary exception is clearly not applicable to lenders in a foreclosure action. In order to qualify for third-party beneficiary status, the plaintiff must show "that the contract was entered into with the intent to benefit" him or her. *Chitlik v. Allstate Ins. Co.* (8th Dist. 1973), 34 Ohio App.2d 193, 196, 299 N.E.2d 295; see also *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St. 3d 36, 40-42, 521 N.E.2d 780 (a plaintiff who is only indirectly and incidentally benefited by a contract has no right of action).

plaintiffs with regard to the mortgages (and any non-negotiable notes) upon which they sue at the time of filing.

Without *a writing from the original owners that* they are assignees of the mortgages at the time of filing their complaints, foreclosure plaintiffs have no legal right to enforce the mortgages and, as such, cannot legitimately claim to be harmed due to breach of the terms of the mortgages as they have no "personal stake" in the mortgages so as to have standing.

F. *Duvall* is an instructive example of the application of these ownership principles to a typical foreclosure case.

As noted previously, U.S. Bank in Duvall has argued it should be allowed to bring its foreclosure so long as it acquires the ownership rights to the note and mortgage any time prior to judgment. Applying the previously discussed principles to *Duvall* will show how there is no justification that such a special waiver for financial institutions to constitutional standing requirements should be granted.

1. Under Article 3 of the U.C.C., U.S. Bank cannot claim standing at the time of filing.

As set forth in its recitation of the facts contained in its Brief, U.S. Bank alleged in its Complaint filed on October 15, 2007, that it was the "holder and owner" of the Note and Mortgage. See U.S. Bank's Complaint at 3-4. U.S. Bank has also claimed that Wells Fargo, the servicer of the loan, "has physical possession of the note." Appellant's Brief at 2. U.S. Bank then claimed that the Note in question was previously transferred to the Trust in accordance with the Pooling & Servicing Agreement ("PSA") that governs the Trust. Id. However, **it was not until February 5, 2008** that Wells Fargo executed an Assignment of Mortgage to U.S. Bank. See Exhibit C to Plaintiff's Renewed Motion for Summary Judgment. It is important to note that the language in the Assignment states that *both the Note and Mortgage were being assigned to*

U.S. Bank ***as of February 5, 2008***. Id. Thus, the record reflects that U.S. Bank did not acquire ownership of the Note and Mortgage until **four months after** the Complaint was filed.

Therefore, despite its claim in its Brief, U.S. Bank was not a holder at the time of filing and, by its own argument, did not have standing to sue since it could not legitimately claim "injury" by Mr. Duvall and Ms. Samad.[7]

2. The Pooling & Servicing Agreement governing the Plaintiff Trust in *Duvall* required transfer of the chain of title on the Mortgage over a year before U.S. Bank filed this case.

U.S. Bank, N.A., is the Trustee for a securitized trust named Citigroup Mortgage Loan Trust 2007-WFHE2. The Trust issued securities and had to file public disclosures with the Securities and Exchange Commission ("SEC"). These documents are made public on the SEC's EDGAR website. Potential investors rely on companies doing what they say they will do in these disclosures. It is beyond dispute that a company must comply with documents it submits to the SEC.

A key disclosure was the PSA, which U.S. Bank filed with the trial court. Those agreements set strict guidelines for immediately transferring notes and assignments of purchased mortgages to a Trustee. According to the terms of the PSA, the rules for conveying loan documents into the Trust are set forth in Section 2.01, which states:

> SECTION 2.01 Conveyance of Mortgage Loans.
>
> The Depositor, concurrently with the execution and delivery hereof, does hereby *transfer, assign, set over and otherwise convey* to the Trustee without recourse for the benefit of the Certificate holders all the right, title and interest of the Depositor, including any security interest therein for the benefit of the Depositor, in and to the Mortgage Loans identified on the Mortgage Loan Schedule, the

[7] Since U.S. Bank's discretionary appeal was denied, the dispute in the factual determinations in Duvall are not at issue. However, the actual facts in the record are illustrative of both the need for actual ownership of the note and mortgage and proof of the same at the time the complaint was filed.

rights of the Depositor under the Assignment Agreement, payments made to the Trust Administrator by the Cap Administrator under the Cap Administration Agreement and the Cap Account and all other assets included or to be included in REMIC I.

Exhibit to Affidavit in Support of Plaintiff's Motion for Summary Judgment at 43 (emphasis added). The PSA further provides:

> In connection with such transfer and assignment, the Depositor does hereby *deliver to, and deposit with,* the Trustee or the Custodian on its behalf, the following documents or instruments (a "Mortgage File") with respect to each Mortgage Loan so transferred and assigned:
>
> (i) The Mortgage Note, endorsed by manual or facsimile signature without recourse by the Originator or an Affiliate of the Originator in blank or to the Trustee showing a complete chain of endorsements from the named payee to the Trustee or from the named payee to the Affiliate of the Originator and from such Affiliate to the Trustee;
>
> **(ii) The original recorded Mortgage * * * with evidence of recording thereon or a copy of the Mortgage certified by the public recording office in those jurisdictions where the public recording office retains the original;**
>
> **(iii)** Unless the Mortgage Loan is registered on the MERS® System, **an assignment from the Originator or an Affiliate of the Originator to the Trustee in recordable form of the Mortgage * * * including any intervening assignments and showing a complete chain of title from the original mortgagee named under the Mortgage to the Person assigning the Mortgage Loan to the Trustee * * *.**

Id. (emphasis added).

Based on the above, it is clear that the PSA governing the Trust not only had strict indorsement requirements for the notes being deposited in the Trust, it also had strict documentation requirements for the mortgages showing a complete chain of title from the original mortgagee to the "Person assigning the Mortgage Loan to the Trustee." Additionally, it required an Assignment of Mortgage from the originator of the loan to the Trustee in recordable form *at the time of deposit to the Trust*. However, despite the PSA requirements, no Assignment was done until four months after the Complaint was filed.

Clearly, in its PSA, the Trust recognized the necessity of proper endorsements and assignments to **transfer ownership** of its mortgage loans. Foreclosure plaintiffs whose internal agreements require proper transfer of ownership are being disingenuous to claim now that the U.C.C. treats such matters as merely procedural barriers to "liquidity" and allows such deficiencies to be ignored as merely a matter of paperwork. To the contrary, these internal agreements substantiate the only legal requirements for transfer of ownership and the necessity for courts to be able to review the proof of these transfers.

V. In addition to standing, the ripeness doctrine bars cases by plaintiffs, such as in *Duvall* and *Bayless*, who cannot show they have ownership interests in the note and mortgage when they file their complaint.

Article IV, §4(B) of the Ohio Constitution states: "[T]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." For "a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." *Burger Brewing Co.*, 34 Ohio St.2d at 97-98.

The ripeness doctrine "derive[s] from the conclusion that 'judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.'" *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89, 694 N.E.2d 459 quoting Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum. L.Rev. 867, 876. Ripeness prevents the courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements * * *." *Elyria Foundry Co.*, 82 Ohio St.3d at 89, quoting *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681. Ripeness prevents the court from adjudicating the hypothetical situation. Id. These premature claims are not "justiciable," and trial courts lack jurisdiction to review them. *Stewart*, 134 Ohio App.3d at 558, quoting Article IV, §4(B), Ohio Constitution. In a foreclosure case, it is imperative that the actual contracts, namely the applicable note and mortgage, with the accompanying indorsements and assignments be reviewed in order to determine ripeness of the plaintiff's claims.

Amici Fannie Mae and Freddie Mac (hereafter Fannie and Freddie) and U.S. Bank claim that this Court should overlook the fact that financial institutions suing in foreclosure do not yet own the note and mortgage at the time they file their complaint because they can acquire the rights to them before judgment. Even assuming this was sufficient for standing, plaintiffs who claim standing based on the promise of acquiring ownership rights to the note and mortgage prior to judgment do not have a present claim which is ripe for adjudication because they rest upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Stewart*, 134 Ohio App.3d at 558-59, citing *Texas v. United States* (1998), 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406.

In addition, before courts can assume jurisdiction to adjudicate each controversy, parties must be able to establish that their claims with respect to the note and the mortgage, separately and individually, are present—not future—controversies at the time of filing. Thus, the owner of a note may seek redress against the obligor by requesting a personal judgment against the obligor. The owner of a mortgage, however, is the party who can seek redress on the mortgage contract—that is, foreclosure and the forced sale of the home.

The ripeness doctrine also highlights the necessity for a court to review the actual note and mortgage, i.e. the documents that purport to give the foreclosing entity the ownership rights. *Until* foreclosure plaintiffs who are not original parties to the mortgages have *actual, reliable, and admissible* evidence that they were assignees of the mortgages at the time they filed their complaint, any and all claims alleging the right to sue based upon breach of the mortgages are not ripe for adjudication and therefore, must be dismissed for lack of standing. Because of the high default rate with foreclosures, it falls on the courts as the gatekeepers to assure the foreclosing entity's claim is ripe for adjudication.

Duvall illustrates the necessity of reviewing the documents to determine ripeness. In *Duvall,* U.S. Bank sought to enforce the Note and Mortgage attached to the Complaint, but the Note attached to its Complaint was payable to *Wells Fargo*. See Exhibit A to U.S. Bank's Complaint. In addition, the Mortgage gave Wells Fargo the right to terminate Duvall and Samad's right to their property only if Duvall did not pay *Wells Fargo* on the Note. U.S. Bank was not a party to either document at the time of filing, nor was there an allonge or mortgage assignment attached to the Complaint. U.S. Bank is essentially arguing that it has the right to file its claims when it deems appropriate with its claim that it will *at a later time* acquire essential ownership rights to support its claims—which is simple speculation. A creditor without the note and mortgage has no legal claim against the debtor and no legally recognizable interest in the contracts. It is a mere stranger to the case.

U.S. Bank's case was not ripe. When U.S. Bank sued Mr. Duvall and Ms. Samad, U.S. Bank still needed Wells Fargo to transfer the Note and Mortgage. In other words, U.S. Bank sought judgment on "contingent future events, that may not occur as anticipated, or indeed may not occur at all." *Stewart*, 134 Ohio App.3d at 558-59. Any plaintiff filing without the note or the mortgage raise a hypothetical problem, a type of problem this Court deemed unripe. *Elyria Foundry Co.*, 82 Ohio St.3d at 89.

The fact that a plaintiff may own the note, but not the mortgage, does not change the analysis. By owning the note, the plaintiff's claims for relief on that note in a foreclosure action may now be ripe, but without ownership of the mortgage, its claims for redress on the mortgage contract are not. Therefore, Amici ask this Court to find that a plaintiff must show that it owns the note and the mortgage at the time of the filing of its foreclosure complaint.

VI. Notes and mortgages are separate and distinct contracts requiring the foreclosing entity to meet standing requirements under each contract prior to filing the complaint.

U.S. Bank devotes the majority of its brief arguing "the security follows the debt" rule confers standing for a party that has the note but not the mortgage before filing a lawsuit. This argument has surface appeal. Many courts have cited it. It is pithy. However, such a "rule" only applies in the most basic mortgage that merely references the note and does not include terms separate from the note. It also does not apply where the originating lender has purposefully separated the note from the mortgage.

U.S. Bank wants this Court to accept the argument in the abstract. Contract law does not exist in the abstract. It resides in the contract language. Thus, only upon review of the mortgage can a court determine if it is separate and distinct from the Note.

A. As an example, the form mortgages from Fannie and Freddie contain a condition precedent not included in the note.

U.S. Bank and Amici Fannie and Freddie argue that the mortgage is a mere incident to the promissory note and, thus, ownership of the mortgage prior to filing the complaint is not necessary. As discussed previously, such a "rule" does not exist. In fact, a review of Fannie and Freddie's standard mortgage form reveals that the opposite is true: the mortgage has terms separate and distinct from the note, thereby establishing its status as a contract separate from the note. For example, Fannie and Freddie placed a thirty-day notice provision in Paragraph 22 of their standard mortgage form "Ohio – Single Family – Fannie/Freddie Mac UNIFORM INSTRUMENT." The paragraph states, which emphasis added:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) **a date, not less than 30 days from the date the notice is given to Borrower**, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, **foreclosure by judicial proceeding** and sale of the Property * * *. **If the default is not cured on or before the date specified in the notice**, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and **may foreclose this Security Instrument by judicial proceeding** * * *.

Since the requirement of a thirty-day notice before foreclosure in the standard mortgage form do not exist in the note, the mortgage cannot follow the note. "The construction of written contracts and instruments of conveyance is a matter of law." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus.[8] "When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶11. The "intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, at paragraph one of the syllabus. When the contract terms "are clear and unambiguous, [a] court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander*, 53 Ohio St.2d at 246.

Applying these rules to the standard mortgage contract leads to the conclusion that a foreclosing entity must have the mortgage at least thirty-one days before filing a lawsuit if it wants to foreclose on the security interest. Because Paragraph 22 is "clear and unambiguous, [a]

[8] Westlaw's Keycite service mistakenly notes that this Court, in *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, said *Alexander v. Buckeye Pipe* was superseded by statute. This Court in *Lager* actually stated that *State Farm Auto Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397, 583 N.E.2d 309 was superseded by statute. *Alexander v. Buckeye Pipe* remains a widely-cited case on contract interpretation.

court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander*, 53 Ohio St.2d at 246.

U.S. Bank's argues the security "follows" the debt to justify foreclosures by plaintiff's that have the note, but not the mortgage when they file the complaint. But this argument eliminates Paragraph 22 in the standard mortgage. This would violate the basic rule that the "intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly*, 31 Ohio St.3d 130, at paragraph one of the syllabus.

B. U.S. Bank's security follows the debt argument runs afoul of this Court's decision in *Wilborn v. Bank One Corp.*

This Court recently addressed Fannie Mae and Freddie Mac mortgage forms in *Wilborn v. Bank One Corp.* The *Wilborn* Court held that financial institutions could recover attorneys' fees from borrowers who reinstate their loans. *Wilborn v. Bank One Corp.* (2009), 121 Ohio St. 3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶45. The attorneys' fees provision, like other provisions in the uniform mortgage forms, was "the result of sophisticated parties, all with competing interests and wielding significant bargaining power, freely entering discussions, compromises, and negotiations for the purpose of creating "what the law of mortgages will be in 50 States in most of the home buying transactions for the next several decades."" Id. at ¶37 (internal citations removed). Paragraph 22 was the result of the same process.

U.S. Bank must take the good with the bad. In *Wilborn*, banks were "the beneficiaries of the negotiations that culminated in the inclusion of the mortgage-reinstatement or alternate-workout provision in the uniform mortgage forms." Id. at ¶37. In this case, the borrowers are the beneficiaries of negotiations that culminated in the inclusion of the thirty-day notice provision as a condition precedent in the **mortgage** and only the mortgage.

As a result, the standard mortgage form is not a mere incident to the note, but is in fact a separate contract, with its own terms and conditions that must be met to foreclose. Thus, only the owner of this form of mortgage can request the court to foreclose. In addition, in order to determine the ripeness of the claim, the foreclosing entity must produce the mortgage so that the court can review its terms.

C. A "mortgage follows the note" argument fails when parties separate the note from the mortgage.

Although U.S. Bank cites this Court's decisions in *Edgar v. Haines* (1923), 109 Ohio St. 159, 141 N.E. 837 and *Kernohan v. Manss* (1895), 53 Ohio St. 118, 41 N.E. 258, neither supports its position because the facts of those cases differ from the facts in the certified conflict cases. Both *Edgar* and *Kernohan* arose from fraud committed by a non-party. *Edgar*, 109 Ohio St. at 166; *Kernohan*, 53 Ohio St. at 118. In both cases, the party holding all or part of the actual mortgage claimed a superior interest in the security over the party holding the actual note. *Edgar*, 109 Ohio St. at 164; *Kernohan*, 53 Ohio St. at 134. In each case, this Court decided in favor of the party holding the note because they had an **equitable** ownership of the mortgage. *Edgar*, at syllabus; *Kernohan*, at paragraph 2 of the syllabus.

The general rule that a security follows the debt rests on the **idea** that a note and mortgage are inseparable and the mortgage only provided security. *In re Agard* (Bkrtcy. E.D.N.Y., 2011), 444 B.R. 231, 247, citing *Carpenter v. Longan* (1872), 83 U.S. 271, 274, 21 L.Ed. 313. This idea no longer matches reality. Most lenders now separate the note from the mortgage and place a thirty-day notice to enforce the security agreement **only in the mortgage.**

Of relevance here, the *Edgar* Court held "the mortgage security is an incident of the debt which it is given to secure, and, **in the absence of a specific agreement to the contrary**, passes to the assignee or transferee of such debt." *Edgar*, 109 Ohio St. at 164 (emphasis added). An agreement to the contrary exists here. As noted above, U.S. Bank and other plaintiffs using the Fannie Mae and Freddie Mac "Ohio – Single Family – Fannie/Freddie Mac UNIFORM INSTRUMENT" agreed to specifically place a condition precedent in only the mortgage. Paragraph 22 limits the right to file until the plaintiff gives a thirty-day notice.

The parties could have placed Paragraph 22's thirty-day notice as a condition precedent in the note. They chose otherwise. This was their intent. To hold otherwise "would create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander*, 53 Ohio St.2d at 246. Thus, if the foreclosing entity does not own the mortgage prior to filing its complaint, and the mortgage contains terms such as a notice of default, the foreclosing entity cannot even demand the entire balance on the note. In addition, even if the plaintiff has acquired the mortgage prior to filing the foreclosure, an additional inquiry must be made to determine, if in fact the conditions precedent in the mortgage have been met. If not, the foreclosing entity's claim is not ripe for adjudication.

It is evident, therefore, that foreclosing entities must both own the note and mortgage prior to filing the complaint, and show the documents supporting their ownership interests so that the court can make the necessary analysis of both standing and ripeness of their claims.

VII. Plaintiffs cannot utilize Civ.R. 17 to recreate their lack of standing into a merely procedural problem. Similarly, Civ.R. 17 cannot cure a lack of standing.

The Courts of Appeals have split on whether a plaintiff can use Civ.R. 17 to cure obvious defects in the pleadings. When presented with a foreclosure case, a court must first consider whether the plaintiff has standing. Upon a challenge by the defendant, the court must then decide whether the plaintiff is the real party in interest. As noted on page six, standing is a threshold question for a court to decide in order for it to entertain a case. The constitutional mandate of standing and the Ohio real party in interest procedural rule delve into the plaintiff's personal interest in a case. That, however, is the extent of the connection between the doctrine and the rule. The two should not be confused as interchangeable and the rule must not be used as an antidote to "cure" a plaintiff's lack of standing.

Even considering the procedural requirements of Civ.R. 17, however, will lead this Court to determine that Civ.R. 17 cannot be used to fix a faulty foreclosure for three reasons. First, requiring plaintiffs to be the proper party when they file will protect debtors from the risk of incurring double damages. Second, Civ.R. 17(A) applies only when determining the right party is difficult or when a plaintiff makes an honest and understandable mistake; it does not apply here because the plaintiffs have all the means necessary to determine the real party in interest by looking at their own exhibits to their complaints. Finally, Civ.R. 17(A) should not provide plaintiff with an escape hatch when they are caught cheating the system. Allowing this escape hatch enables plaintiffs to continue with this sloppy business practice.

A. Distorting Civ.R. 17 exposes homeowners to the potential for double liability on the same note.

A "real party" for purposes of the Civ.R. 17(A) is the person who possesses the substantive right sought to be enforced. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24, 485 N.E.2d 701; Klein & Darling, Baldwin's Ohio Civil Practice (2d Ed. 2004), 927, Section 17:4. The real party in interest rule enables a "defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." *Shealy*, 20 Ohio St.3d at 24-25 (internal citations omitted).

The purpose of Civ.R. 17 is to prevent the defendant's exposure to unnecessary expenditure or time and expense and the risk of double payment. *Adams v. Madison Realty and*

Development, Inc. (C.A.3, 1988), 853 F.2d 163, 168.[9] This risk is a real one for obligors on a negotiable note governed by the UCC.

Under the U.C.C., the obligation to pay the entity entitled to enforce the negotiable instrument is not discharged if the wrong entity is somehow paid. Pursuant to R.C. 1303.67(A), "[a]n instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument and to a person entitled to enforce the instrument." See also U.C.C. 3-602. In addition, "the obligation of a party to pay is discharged as stated in this chapter or by an act or agreement with the party that would discharge an obligation to pay money under a simple contract." R.C. 1303.66(A); U.C.C. 3-601. Looking at these two provisions, it follows that in addition to losing their homes, borrowers are exposed to a second lawsuit from the party "entitled to enforce the instrument" if the wrong parties were awarded judgment.

In other words, under the U.C.C. and the Revised Code, all of the homeowners in the conflict cases where courts granted summary judgment despite plaintiffs' lack of proof of ownership of the notes and mortgages in question *are still potentially liable* on the debts to the true holders of their notes. Because of the potential for such a harsh miscarriage of justice, courts must demand that foreclosure plaintiffs show at the time of filing that they are entitled to enforce the negotiable instruments on which they are suing. Furthermore, courts must not use Civ.R. 17 to expose debtors to this risk, but instead should follow the purpose of Civ.R. 17 to prevent such an injustice and protect the debtors, rather than the foreclosing entities.

[9] Ohio Courts can look to federal caselaw because Ohio modeled Civ.R. 17(A) after Fed.R.Civ.P. 17(a). See 1970 Staff Notes to Civ.R. 17(A).

B. Civ.R. 17 does not protect plaintiffs who could have determined the actual party in interest by looking at the exhibits to their complaints.

"Rule 17(a) is to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made." *U.S. for Use & Benefit of Wulff v. CMA, Inc.* (C.A.9, 1989), 890 F.2d 1070, 1074; *Nelson v. County of Allegheny* (C.A.3, 1995), 60 F.3d 1010, 1015, fn. 8; Note of Advisory Committee on 1966 Amendment to Fed.R.Civ.P. 17; 6 C. Wright and A. Miller, *Federal Practice and Procedure,* § 1555 (1971). Fed.R.Civ.P. 17(a) does not protect those who deliberately conceal the true source of their claims. *Haxtun Tel. Co. v. AT&T Corp.* (C.A.10, 2003), 57 F. Appx. 355 (Attached as Appx. A); *U.S. for Use & Benefit of Wulff,* 890 F.2d at 1074. In other words, Civ.R.17 does not protect parties who know they are not the real party in interest at the time they file. *Haxtun Tel. Co.*, 57 F. Appx. at 359; 6 C. Wright and A. Miller, Federal Practice and Procedure, § 1555 (1971).

Wulff and *Haxtan* are instructive. In both cases, the plaintiffs sued claiming to be the real party in interest. As is the case here, both plaintiffs, after filing the lawsuit, sought to obtain an assignment from the actual real party in interest. The courts in each case rejected this attempt.

The *Wulff* Court wrote: "The Wulffs' persistent efforts to obtain an assignment from B & K of this claim, efforts which were eventually successful-though untimely-show that the Wulffs were aware that B & K was the real party in interest." *Wulff,* 890 F.2d at 1074-1075. Thus, the *Wulff* court held Fed.R.Civ.P. 17 does not apply because "there was no difficulty and no mistake in determining who was the proper party to bring suit." Id. at 1075.

The *Haxtun* court reached the same conclusion. "Haxtun knew of Zonicom's claims well before it filed its complaint and yet chose to represent to that court that the disputed charges were solely for Haxtun's access services." 57 Fed. Appx. at 359. The Court of Appeals in *Haxtun* then held: "We agree with the district court that Haxtun 'deliberately concealed the true sources of the charges it sought * * *.'" Id. The court concluded, "such a belated attempt at ratification would not further the interests of justice." Id.

In every conflict case, the plaintiffs knew they did not hold the note, the mortgage, or both. This case is a prime example, although U.S. Bank claimed it owned and was holder of a note attached to the Complaint, the note attached to the complaint is payable **only to Wells Fargo**. See Exhibit A to U.S. Bank's Complaint. U.S. Bank claimed rights under the Mortgage attached to the Complaint. That too was incorrect. U.S. Bank was not a party to that Mortgage and the Mortgage does not reflect an assignment to it. See Exhibit B to U.S. Bank's Complaint.

Thus, just as in *Haxton* and *Wulff*, the plaintiff filing a foreclosure action knows who is the proper party–the owner of the note and mortgage–prior to bringing the suit. Therefore, "a belated attempt at ratification" does not serve the interests of justice.

C. This Court should not reward plaintiffs' sloppy business practices by allowing them to use Civ.R. 17 to cure defects in the real party in interest.

This Court should reject the plaintiff's real party in interest arguments because they are legally presumed to know the real party in interest by looking at the loan documents in their possession. The number of conflict cases in which plaintiffs are filing when they have neither the note nor the mortgage demonstrates that this is not merely an occasional oversight but, in fact, a deliberate practice. This cannot be permitted to continue.

In addition to the conflict cases, a case in point is *In re Foreclosure Cases*, in which the court expressed its dismay over the inadequacy of pleadings and dismissed fourteen foreclosure cases brought by Deutsche Bank. *In re Foreclosure Cases,* (N.D. Ohio 2007), 2007 WL 3232430, at *3 ((Attached as Appx. B). Deutsche Bank averred that it was the "owner and holder of a Promissory Note * * * a copy of which is attached hereto as Exhibit A." Id. at *1. Deutsche Bank argued it established real party in interest status by executing mortgage assignments after it filed its complaints. Id. at *2. The court rejected this argument because Deutsche Bank did not "allege mistake or that a party cannot be identified." Id. at *2. The Court then chided the bank for its "condescending" attitude toward compliance with safeguards that "compel(s) the Court to stop them at the gate." Id. at *3, n. 3. See also *In re Foreclosure Cases* (S.D. Ohio, 2007), 521 F.Supp.2d 650, 655 (involving an additional twenty-seven cases). The reasoning in *In re Foreclosure Cases* is echoed by other state and federal courts. *Feist v. Consolidated Freightways Corp.* (E.D. Pa. 1999), 100 F. Supp. 2d 273, 276; *HSBC Bank USA v. Thompson* (2nd Dist. 2010), 2010-Ohio-4158, ¶85; *Byrd*, 178 Ohio App. 3d 285, 897 N.E.2d 722, fn. 16.

Civ.R. 17 was meant "to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made." *Wulff*, 890 F.2d at 1074; *Nelson*, 60 F.3d at 1015, fn. 8. It was never meant to assist a party who could find the real party by looking at the contracts that are the basis of its complaint.

D. Plaintiffs have ignored Civ.R. 17(A) in thousands of foreclosure cases.

Again, in an attempt to minimize these issues into one of "paperwork," U.S. Bank suggests that its actions could be "ratified" by the true owner. Appellant's Brief at 27. However, just as the indorsement of notes and assignment of mortgages have not been completed prior to filing the complaint, foreclosure plaintiffs do not later ratify as required by Civ.R. 17. In fact, "neither Civ.R. 17(A) nor the decided Ohio cases describe how ratification is to be accomplished." 1 Baldwin's Oh. Civ. Prac. § 17:28 (2011); see also Civ.R. 17(A). Federal courts hold that "ratification" requires the real party in interest to inform the court that it (i) authorizes the plaintiff to continue with the action; and (ii) agrees to be bound by the lawsuit's result. *Wieburg v. GTE Southwest, Inc.* (C.A.5 2011), 272 F.3d 302, 307, citing *Naghiu v. Inter-*

Cont'l Hotels Group, Inc. (D. Del. 1996), 165 F.R.D. 413, 421; *ABB Daimler-Benz Transp.(N. Am.), Inc. v. Nat'l R.R. Passenger Corp.* (D.D.C. 1998), 14 F. Supp. 2d 75, 84.

This becomes a significant issue because in the experience of Amici, plaintiffs are not asking the original lenders to ratify. When the amici have had occasion to review court records in default cases, we have never found evidence that plaintiffs ratify prior to obtaining these default judgments. This Court reported in its "2008 Ohio Courts Statistical Summary" that nearly half of all foreclosure cases ended with a default judgment. The Supreme Court of Ohio, "2008 Ohio Courts Statistical Summary," at 56. The number of default judgments was more than double the number of dismissals and increasing. Id. This means that, based on 2010 foreclosure filing statistics, almost 42,000 Ohio foreclosure cases were resolved through default judgment.

U.S. Bank claims that "defects in real party in interest standing must only be cured prior to the entry of judgment." Appellant's Brief at 1. However, this would presume foreclosing parties actually correct this issue prior to seeking default judgment. In fact, foreclosing parties regularly do not follow all steps necessary to foreclose when it can more easily obtain a judgment. See *U.S. Bank, N.A. v. Detweiler* (5th Dist.), 191 Ohio App.3d 464, 2010-Ohio-6408, 946 N.E.2d 777, at ¶57 (voiding unopposed summary judgment because U.S. Bank failed to follow pre-foreclosure servicing requirements for mortgages insured by the Federal Housing Administration); *Bank of New York v. Bartmas*, 10th Dist. Case No. 04-AP-1011, 2005-Ohio-6099, at ¶11 (finding that the plaintiff erroneously moved for default judgment without perfecting service on parties); *Nat'l City Mortgage Co. v. Richards* (10th Dist. 2009), 182 Ohio App.3d 534, 2009-Ohio-2556, 913 N.E.2d 1007, at ¶30 (finding that the plaintiff did not properly send a notice of default to the homeowners, which was a condition precedent to filing a foreclosure action). Thus, the only logical conclusion is that, in the majority of default judgment cases, the foreclosing plaintiff does not have the true owner ratify its actions.

The Massachusetts Supreme Judicial Court recently addressed this claim in the non-judicial context and affirmed a lower court's ruling undoing foreclosure sales in which the foreclosing parties did not acquire an interest in the mortgage **until after the sale**. *U.S. Bank Ass'n v. Ibanez* (2011), 458 Mass. 637, 638-639, 655, 941 N.E.2d 40. The foreclosing parties argued that post-sale assignments were sufficient since the practice was "customary in the industry." Id. at 653. The Court rejected this argument since *an assignment of mortgage is a transfer of legal title and, thus, cannot be in effect until it actually happens*. Id. at 653-654. Otherwise, the result is a "cloud of title." Id. at 653. As the Court concluded, "The legal principles and requirements we set forth are well established in our case law and our statute. All that has changed is plaintiff's apparent failure to abide by those principles and requirements in a rush to sell mortgage-backed securities." Id. at 655. These same principles apply here.

U.S. Bank requests this Court to allow it and other financial institutions to ignore basic time-honored principles that the plaintiff must have the right to enforce the note and mortgage at the time it files the complaint in order to allow it time to acquire the right sometime prior to judgment. Such a concept would be the same as allowing a couple to file for divorce and then get married before judgment. U.S. Bank provides no justification for why foreclosing plaintiffs should be treated differently from other suing parties, except, as the Massachusetts Supreme Judicial Court noted, its "apparent failure to abide by those principles and requirements in a rush to sell mortgage-backed securities." Id. Instead, the only possible conclusion is to apply to foreclosing plaintiffs the same principles that are applied to all other plaintiffs seeking redress in the courts, that the foreclosing plaintiffs must be the owners of both the note and the mortgage prior to filing the complaint for foreclosure. Furthermore, it is incumbent upon the courts to review the proof of ownership in order to accurately determine that the lender has standing because it is the owner of the note and mortgage at the time the complaint was filed. Finally, the courts must conclude that the plaintiff's claims are ripe for adjudication. Thus, the foreclosing entity must show proof of their ownership interests at the time the complaint is filed.

VIII. Public policy supports the finding that plaintiffs in foreclosure cases must own both the note and the mortgage prior to filing the complaint and show proof of that ownership at the time of filing.

U.S. Bank and Amici Fannie and Freddie argue ownership of the note and mortgage prior to filing for foreclosure is merely a procedural formality and such demands would injure the "liquidity" of mortgage-backed securities. Thus, they should be permitted to acquire ownership rights prior to judgment, and show this proof only upon demand. In weighing the public policy concerns of the harm caused by such a policy versus the possible effects on "liquidity" requires a review of the true effects of foreclosures.

Foreclosures in Ohio remain at near-record levels. In the past ten years, 701,419 foreclosures were filed in Ohio. Supreme Court of Ohio, "Foreclosures Down 4 Percent in 2010," February 10, 2011.[10] Not only does the lenders' rush to foreclose ignore well-established Ohio law, they damage Ohio's communities. Foreclosures harm everyone involved: homeowners, neighbors, communities, court systems, and the banks themselves. Adam J. Levitin and Tara Twomey, *Mortgage Servicing,* Georgetown Public Law and Legal Theory Research Paper No. 11-09 at 5 (forthcoming in Yale J. of Reg.).[11]

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[10] Available online at http://www.supremecourt.ohio.gov/PIO/news/2011/foreclosureStats_021011.asp.
[11] Available online at http://scholarship.law.georgetown.edu/facpub/498.

A. Foreclosures have a devastating effect on homeowners and their families.

Nearly one in every three Ohio mortgages is "underwater," meaning that there is negative equity in the house. Policy Matters Ohio, *Home Insecurity: Foreclosure Growth in Ohio 2010*, Executive Summary.[12] In 2010, one in every six Ohio homeowners with a mortgage was either 30 days delinquent or in foreclosure, an increase of 36 percent from 2007. Id. Ohio also ranks at the bottom of states for successful mortgage modifications under the federal Home Affordable Modification Program. Id.

Foreclosures cause significant damage to families. A recent study from the University of Pennsylvania found that 60 percent of homeowners who were delinquent on their mortgage payment had skipped or delayed a meal because they could not afford food and nearly half could not fill a prescription in the previous year because of the expense. "Health Status of People Undergoing Foreclosure in the Philadelphia Region," American Journal of Public Health, October 2009, Vol. 99, No. 10, 1833, 1836.[13] The study found that people undergoing foreclosure had "significantly higher" rates of hypertension and heart disease than others in the community, even when adjusting for demographic and financial factors. Id. at 1835.

These significant foreclosure-related problems extend to children. A report from Case Western University found that children displaced by foreclosures have long-term lower academic achievement, slower growth, and increased mental health issues. "Understanding the Impact of Foreclosures on Children, Families and Neighborhoods in Cuyahoga County," Case Western University's Schubert Center for Child Studies, Policy Brief 17, October 2009.[14] One-third of children who experience homelessness do so specifically because of a foreclosure. National

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[12] Available online at http://www.policymattersohio.org/pdf/HomeInsecurity2010.pdf.
[13] Available online at http://www.rwjf.org/files/research/4204.pdf.
[14] Available online at http://schubertcenter.case.edu/en-US/SYN/9426/Templates/DocumentDownloadTemplate.aspx.

Association for the Education of Homeless Children and Youth (NAEHCY) and First Focus, "A Critical Moment: Child and Youth Homelessness in Our Nation's Schools," July 2010, page 2.[15]

Although the State Foreclosure Prevention Working Group—consisting of twelve attorneys generals—found loss mitigation to be an increasingly effective long-term solution to the foreclosure epidemic, the Working Group found that 60 percent of seriously delinquent homeowners were not involved in loss mitigation activity. State Foreclosure Prevention Working Group, "Memorandum on Loan Modification Performance," August 2010, pages 1, 5.[16] The reason is evident: instead of engaging homeowners in loss mitigation to prevent foreclosures, banks, such as U.S. Bank, rush to foreclosure without first acquiring any interest in the note or mortgage.

B. The harmful effects of foreclosures extend to communities.

The effect of foreclosures in Ohio is not limited to homeowners. Studies have shown that a single foreclosure on a home lowered the value of other nearby homes by an average of 0.9%. Center for Responsible Lending, *Subprime Spillover: Foreclosures Cost Neighbors $202 Billion; 40.6 Million Homes Lose $5,000 on Average*.[17] Furthermore, each additional foreclosure in a neighborhood lowers nearby home values by an additional 0.9%. Id. In short, foreclosures increase housing supply – which depresses housing values and erode property tax bases, which results in higher taxes or decreased services. Levitin at 5-6.

The damage on Ohio's communities is unprecedented. In Cleveland, an estimated 15,000 of the 84,000 single-family houses are vacant and deteriorating. Christopher L. Peterson, "Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System,"

[15] Available online at http://www.naehcy.org/dl/crit_mom.pdf.
[16] Available online at http://*www.csbs.org/regulatory/Documents/SFPWG/DataReportAug2010.pdf.*
[17] Available online at http://www.responsiblelending.org/pdfs/subprime-spillover.pdf

78 U. Cin. L. Rev. 1359, 1360. Cumulative foreclosures translated into an estimated loss of $2.8 billion in Ohio home values in 2008-2009. Center for Responsible Lending, *Updated Projections of Subprime Foreclosures in the United States and Their Impact in Home Values and Communities*, August 2008.[18]

Foreclosures have also strained budgets of local governments around the country. A 2010 survey of mayors found that 63 percent of cities experienced an increase in the number of vacant and abandoned properties due to mortgage foreclosures. The United States Conference of Mayors, "Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities: A 77-City Survey," June 2010 at page 3.[19] Violent crime is three-times more likely in areas with high foreclosure rate. G. Thomas Kingsley, Robin Smith, and David Price "The Impact of Foreclosures on Families and Communities," The Urban Institute, May 2009, page 21.[20]

Estimates put the cost of each foreclosure to a municipality at $20,000. Kingsley at 21. A study of eight Ohio cities identified nearly $64 million in costs to local jurisdictions related to vacant and abandoned properties. Community Research Partners and Rebuild Ohio, *$60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities*.[21] This included nearly $15 million in city service costs such as code enforcement, boarding, demolition, maintenance, and police and fire services, and over $49 million in lost tax revenues from demolitions and tax delinquencies. Id. School districts are facing the greatest impact of tax loss since school districts receive about two-thirds of real property tax revenue. Id.

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[18] Available online at http://www.responsiblelending.org/pdfs/updated-foreclosure-and-spillover-brief-8-18.pdf.
[19] Available online at www.usmayors.org/publications/2010%20VAP%20Report.pdf.
[20] Available online at http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf.
[21] Available online at http://greaterohio.org/files/policy-research/FullReport_Nonembargoed.pdf.

Thus, the statistics bear out the fact that the loss of one's home has vast societal repercussions that cannot be ignored. In weighing these effects against the claimed burden on the financial institution's need for "liquidity," it is clear that the financial institution's needs do not justify a special exemption for them in pursuing foreclosures. Instead, due to the devastating societal effect of foreclosure, following the same rules that all plaintiffs in a contractual dispute must follow is of even greater necessity.

C. Fannie Mae, Freddie Mac, and similar financial institutions lack credibility and therefore cannot be relied on to correctly allege their ownership interests.

Fannie and Freddie ask this Court to give them special treatment by following their desires regarding the transferability of promissory notes and mortgages to maintain "liquidity." To the contrary, this search for liquidity has lead to the morass of foreclosures today. Because Amici Fannie and Freddie ignored basic tenets of real property law in order to improve liquidity, these bundled securities cannot be unbundled and banks are left scrambling to make the ownership of the note and mortgage through accepted legal methods a reality.

Fannie and Freddie ask this Court to give them special treatment by following their desires regarding the transferability of promissory notes and mortgages to maintain "liquidity." To the contrary, this search for liquidity has lead to the morass of foreclosures today. Because Amici Fannie and Freddie ignored basic tenets of real property law in order to improve liquidity, these bundled securities cannot be unbundled and banks are left scrambling to make the ownership of the note and mortgage through accepted legal methods a reality Thus, if foreclosing plaintiffs are only required to actually own the note and mortgage *when challenged* by the homeowner, this will cut their costs. Their argument therefore, that this is merely a case of "paperwork," a mere formality. To the contrary, ownership rights to enforce the note and mortgage are not mere formalities to be glossed over unless contested but are, in fact, an attack on the integrity of Ohio's courts.

One example of a cost-cutting technique was the formality of forging legal documents, known "robo-signing." See e.g. *Ohio v. GMAC Mortgage, LLC* (N.D. Ohio, 2011), 760 F.Supp.2d 741, 743; Jia Lynn Yang, *Wells Fargo acknowledges problems in foreclosure paperwork*, WASHINGTON POST, Oct. 27, 2010.[22] In fact, robo-signing was likely present in *Perry*, as the affidavit presented by the Plaintiff as proof of ownership was signed by "China Brown." See Michael Riley, *Wells Fargo 'Robo-Signer' Draws Dismissal Motion in Maryland*, BLOOMBERG NEWS, Nov. 2, 2010.[23] Despite the fact that "robo-signing" has been repudiated as illegal nullities, the practice continues.

3. The robo-signing of crucial documents in foreclosure cases remains rampant.

On July 18, 2011, the Associated Press' reporters Michelle Conlin and Pallavi Gogoi, published the article *Mortgage 'robo-signing' goes on*:[24]

> Mortgage industry employees are still signing documents they haven't read and using fake signatures more than eight months after big banks and mortgage companies promised to stop the illegal practices that led to a nationwide halt of home foreclosures.

Id. In addition, a recent *60 Minutes* report highlighted how employees of DocX, a subsidiary of a major default servicing company, signed the name "Linda Green" on thousands of assignments of mortgages that their office generated in order to recreate missing mortgage assignments for the banks and provide the legally-required signatures of bank vice presidents and notaries:

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[22] Available online at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102707361.html.
[23] Available online at http://www.bloomberg.com/news/2010-11-01/wells-fargo-foreclosure-robo-signer-draws-maryland-dismissal-motion.html.
[24] Available online at http://hosted2.ap.org/APDefault/*/Article_2011-07-18-Mortgages-Robo-Signing/Id-31ac2d43644d4e3eafb48f36337f53da.

DocX, and companies like it, were recreating missing mortgage assignments for the banks and providing the legally required signatures of bank vice presidents and notaries. Linda Green says she was named a bank vice president by DocX because her name was short and easy to spell. As demand exploded, DocX needed more Linda Greens.

> "So you're Linda Green?" Pelley asked Chris Pendley.
>
> "Yeah, can't you tell?" Pendley, who is a man, replied.
>
> Pendley worked at DocX at the same time and signed as Linda Green.
>
> "When you came in to DocX on your first day, what did they tell you your job was gonna be?" Pelley asked.
>
> "They told me that I was gonna be signing documents for using someone else's name," Pendley remembered.
>
> "Did you think there was something strange about that in the beginning?" Pelley asked.
>
> "Yeah, it seemed a little strange. But they told us and they repeatedly told us that everything was above board and it was legal," Pendley said.
>
> Pendley told Pelley he had no previous experience in banking, in legal documents, and that there were no requirements for the job.
>
> "You had to be able to hold a pen?" Pelley remarked.
>
> "Hold a pen," he agreed.
>
> Asked if he understood what these documents were, Pendley said, "Not really."
>
> "But you were signing these documents as if you were an officer of the bank?" Pelley pointed out.
>
> "Correct," Pendley said.
>
> "How many banks were you vice president of in a given day?" Pelley asked.
>
> "I would guess somewhere around five to six," Pendley said.
>
> He was paid $10 an hour for this job.

Pendley showed us how he signed mortgage documents as "Linda Green." He told us DocX employees had to sign at least 350 an hour. Pendley estimates that he alone did 4,000 a day.

"The Next Housing Shock" (CBS television broadcast, April 3, 2011).[25]

While foreclosing entities would have courts believe otherwise, the secondary market—where billions of dollars worth of mortgage loans were sold, resold, and bundled into seemingly

[25] Available online at http://www.cbsnews.com/video/watch/?id=7375936n&tag=mncol;lst;1.

endless numbers of securitized trusts packaged as investment products on Wall Street—is why "robo-signing" came to be and why it continues today. Robo-signing was the mortgage industry's way to fix "faulty paperwork" that did not comply with legal requirements on a massive scale in order to pursue quick and cheap foreclosures. Such a practice in any other industry would be considered as fraudulent and nullities. In the mortgage industry, however, mortgage holders, by calling it "mere paperwork," excuse this illegal practice as a necessary means of keeping the mortgage loan markets "liquid." In fact, this practice is a direct attack on the integrity of the court system. If legal documents such as affidavits and mortgage assignments supposedly signed under oath are fraudulently produced on a mass scale, the courts cannot rely on the veracity of statements given under oath.

They now seek a similar exemption from this court that also attacks the integrity of this Court: Ignore constitutional standards that must be met by all others in the name of maintaining "liquidity." The constitutional safeguards of standing are equally applicable to all. To make such an exception for one industry for that industry's convenience would put into question the court's position as the neutral arbiter for all disputes.

4. Fannie Mae and Freddie Mac's questionable business practices eliminate their believability as experts in the mortgage field.

Fannie and Freddie were, for decades, private corporations heavily influenced by Congress. Their dual missions are to support the mortgage market and maximize returns for shareholders. Financial Crisis Inquiry Commission, "The Financial Crisis Inquiry Report: Financial Report of the National Commission of the Causes of the Financial and Economic Crisis in the United States," January 2011 at 39.[26]

[26] Available online at http://www.gpoaccess.gov/fcic/fcic.pdf.

As Citigroup's CEO said in 2007, liquidity in the secondary market was essentially a game of musical chairs. Id. at 175. At the same time, Fannie Mae's Chief Risk officer said that it "had 'one of the weakest control processes' that he 'ever witnessed in his career, * * * was not even close to having proper control processes for credit, market and operational risk,' and was 'already back to the old days of scraping on controls * * * to reduce expenses.'" Id. at 182. The result was the "deteriorating financial position and potential default on $5.4 trillion in outstanding financial obligations that threatened the stability of the financial markets" and both Fannie and Freddie being placed in government conservatorship in September 2008. United States Government Accountability Office, "Report to Congressional Requesters, Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight," GAO-11-433 at 10, fn. 18, May 2011.[27] In the months before it collapsed, Fannie suffered a "liquidity squeeze" when "it was unable to borrow against its own securities to raise sufficient cash in the repo market" because it was undercapitalized, "underreserved", "unsafe," and "unsound." Id. at 315-317, 319.

While Fannie and Freddie claim to be leaders creating a well-functioning secondary mortgage market, the Office of the Comptroller of Currency found otherwise: "Given the role of the GSEs and their market dominance, they should be industry leaders with respect to effective and proactive risk management, productive analysis, and comprehensive reporting. Instead they appear to significantly lag the industry in all respects." Id. at 317-318, quoting OCC's "Observations – Allowance Process and Methodology," August 2008 (last revised September 8, 2008), page 3.[28] One veteran government financial investigator called Fannie Mae "the worst-

[27] Available online at http://www.gao.gov/new.items/d11433.pdf.
[28] Available online at http://bit.ly/onZ4BG.

run financial institution" in his thirty years as a banking regulator. "The Financial Crisis Inquiry Report" at 321.

In their brief, Fannie and Freddie talk at length about the guidelines they have for its mortgage servicers when handling foreclosure cases. However, they do not ensure that the mortgage servicers actually follow these guidelines. The Government Accountability Office found that Fannie, Freddie, and its conservator, the Federal Housing Finance Administration, "did not in the past routinely examine these enterprises' oversight of their servicers' foreclosure procedures." Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight at 22. Fannie and Freddie "were not actively taking steps to ensure that the servicers they contracted with to manage the loans they purchased or pooled into [mortgage-backed securities] were following appropriate foreclosure practices." Id. Thus, the long explanation of Fannie and Freddie's procedures regarding "the natural liquidity of negotiable instruments to further Congressional purposes" rings hollow since neither took any meaningful steps to ensure that their procedures were actually followed.

The "unique position" that Fannie and Freddie hold regarding the issues in this case derives solely from the fact that both entities set the industry standards for ignoring long-standing business practices all in the name of creating apparent "liquidity on the national secondary mortgage market." Brief of Fannie and Freddie at 11. Other than pointing out its role in a market that it helped bring down through its "imprudent" and "ill-advised and poorly executed decisions," "The Financial Crisis Inquiry Report" at 319, Fannie and Freddie do not attempt to explain why this Court should follow its misguided claims regarding Ohio law. However, based on the above, this Court should follow long-standing Ohio law dedicated to ensure the integrity of the judicial process instead of perpetuating Fannie and Freddie's decades of substandard practices.

IX. Conclusion

The certified question before the Court has two parts: (1) must foreclosing plaintiffs own the note and mortgage when they file their complaint, and (2) how they must show ownership. The answer to both questions is yes. The related doctrines of standing and ripeness require actual ownership at the time the complaint is filed. The financial institutions are asking this Court to make an exception for foreclosing entities and have the courts ignore constitutional requirements of standing to order the foreclosure on the homes of thousands of Ohioans when the foreclosing entity has no ownership interest in the note or mortgage. Every Ohioan requesting redress in Ohio courts must have suffered an injury personal to him caused by an adverse party. In a contract action, the redress sought must be from one of the contracting parties, or another who has acquired those ownership rights from the original owner. However, this acquisition must have taken place prior to filing the complaint. Otherwise, there is no relationship between the plaintiff and the defendant.

U.S. Bank and Amici Fannie and Freddie ask this Court for a special waiver of this constitutional mandate of standing in the name of "liquidity." This waiver cannot be granted. Only when there is a real and present controversy between the parties does the court have authority to grant relief. Until the financial institution has ownership of the note and mortgage, there is no real or present controversy between it and the obligor on the note and mortgage and ~~therefore the plaintiff has no standing to bring the foreclosure action.~~

The secondary inquiry regarding ripeness requires the court to review the actual documents, namely the note and mortgage, to determine whether the foreclosing entity has an actionable claim at the commencement of the action. This, too, financial institutions claim is too burdensome. However, here again, all Ohioans must show, based upon the contracts between the parties, that their claim is ripe for adjudication. No justification is given by the financial institutions as to why they should be granted a special waiver of this requirement, other than "liquidity." Obligors on the notes and mortgages in foreclosure are entitled to the same review that all contracting parties receive on all breach of contract claims. Plaintiffs requesting foreclosure should not receive special consideration simply because they are financial institutions.

Civ.R. 17's real party in interest requirement, although reflecting these constitutional concepts of standing, is not a substitute for them and cannot be used to avoid the necessity of a real and present controversy between the parties at the time the complaint is filed. Further, Civ.R. 17's party substitution rules are only for the case of an unknown error prior to filing. It cannot be utilized here, where the plaintiff seeking foreclosure knows who owns the contracts upon which it is suing.

Finally, Ohio law has always recognized the severity of foreclosure and the statistics of the societal affect support this policy. Therefore, regardless of the claimed difficulties imposed upon foreclosing entities, caused by their own search for "liquidity," there is no justification for granting them a special waiver on constitutional mandates of standing in owning the note and mortgage prior to filing the complaint or in the ripeness of their claims.

Therefore, Amici Ohio Legal Services Programs urge this Court to find that to have standing, foreclosing plaintiffs must show ownership of the note and mortgage prior to filing their complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. Mail to the following counsel on this 16th day of August, 2011:

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APPENDIX

Appendix A

57 Fed.Appx. 355
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals, Tenth Circuit.

HAXTUN TELEPHONE COMPANY, Plaintiff–Counter–Defendant–Appellant,
v.
AT&T CORP., Defendant–Counter–Claimant–Appellee.

No. 01–1582.Jan. 23, 2003.

Local exchange carrier brought action against long distance carrier, claiming breach of contract and violation of local carrier's regulatory tariff due to long distance carrier's alleged failure to pay local carrier for providing access telephone service to its local customers. The United States District Court for the District of Colorado dismissed action for lack of standing, and local carrier appealed. The Court of Appeals, Brorby, Senior Circuit Judge, held that: (1) evidence was insufficient to establish that local carrier had a valid assignment of legal rights from competitive access provider under Colorado law, as required to give local carrier standing to sue long distance carrier for access charges originally incurred by provider, and (2) filed rate doctrine did not entitle local carrier to award of interest on undisputed access charge amounts owed by long distance carrier.

Affirmed.

West Headnotes (3)

1 **Telecommunications**
Persons entitled to sue

372Telecommunications
372IIITelephones
372III(F)Telephone Service
372k912Civil Liabilities and Actions
372k916Actions
372k916(2)Persons entitled to sue
(Formerly 372k337.1)

Under Colorado law, evidence was insufficient to establish that local exchange carrier had a valid assignment of legal rights from competitive access provider, as required to give local carrier standing to sue long distance carrier for access charges originally incurred by provider; at most, evidence reflected deliberate attempt on part of provider to disguise its bills for unauthorized service as though they were local charges in order to avoid possibility that long distance carrier would again refuse to pay provider's bills.

2 **Telecommunications**
Persons entitled to sue

372Telecommunications
372IIITelephones
372III(F)Telephone Service
372k912Civil Liabilities and Actions
372k916Actions
372k916(2)Persons entitled to sue
(Formerly 372k337.1)

Affidavit of competitive access provider's director stating that provider was aware of local exchange carrier's action against long distance carrier and claiming to "support and ratify" local carrier's action on its behalf was not a valid ratification of local carrier's claim, so as to give local carrier standing, where affidavit included no language evidencing an agreement to be bound by the result of the action, and local carrier was aware of provider's claims well before it filed its complaint and yet chose to represent to court that disputed charges were solely for its access services. Fed.Rules Civ.Proc.Rule 17(a), 28 U.S.C.A.

3 **Telecommunications**
Actions

372Telecommunications
372IIITelephones
372III(F)Telephone Service
372k912Civil Liabilities and Actions
372k916Actions

372k916(1)In general
(Formerly 372k337.1)

Filed rate doctrine did not entitle local exchange carrier to award of interest on undisputed access charge amounts owed by long distance carrier, although local carrier's filed tariff specified fixed rate for interest on overdue payments, where local carrier deliberately misrepresented its claims, and any delay in payment from long distance carrier was solely due to local carrier's conduct throughout the litigation. Communications Act of 1934, § 203(c)(1), 47 U.S.C.A. § 203(c)(1).

1 Cases that cite this headnote

Attorneys and Law Firms

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Before BRISCOE, Circuit Judge, BRORBY, Senior Circuit Judge, and HARTZ, Circuit Judge.

Opinion

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

BRORBY, Senior Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Haxtun Telephone Company (Haxtun) appeals the district court's entry of summary judgment and dismissal of Haxtun's cause of action for lack of standing. Haxtun brought suit against AT&T Corporation (AT&T) claiming breach of contract and violation of Haxtun's regulatory tariff due to AT&T's alleged failure to pay Haxtun money for providing access telephone service to its local customers. The district court determined that Haxtun did not have standing to pursue its claims because the access charges at issue belonged to a third party, Zonicom, Inc. (Zonicom), and the evidence did not support Haxtun's claim that it had acquired Zonicom's legal right to payment from AT&T. Subsequently, Haxtun moved to amend the judgment to allow an award of money that was undisputedly owed to Haxtun for AT&T's local access. The district court granted that motion as to the undisputed amount, but denied Haxtun's request for interest or penalties for AT&T's late payment. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and we affirm.

I.

Haxtun, a local exchange carrier serving Haxtun, Fleming, and Crook, Colorado, provides access telephone services to AT&T, a long distance carrier, in order for AT&T to provide long distance service to Haxtun's local customers. Haxtun's bills to AT&T for originating and terminating access services are governed by a tariff filed with the Federal Communications Commission (FCC).

*357 In 1995, Zonicom was created as a "competitive access provider" with its own tariff filed with the FCC. Zonicom leased lines from Haxtun in Fleming, Colorado, purportedly to receive interstate calls directed to a computerized chat line. In January and February 1996, Zonicom attempted to bill AT&T directly for access service on interstate calls terminating in Fleming. AT&T refused to pay because it had not ordered service from Zonicom, and because AT&T believed Zonicom was engaged in an unlawful revenue sharing arrangement with a chat line. Soon after, Zonicom wrote to inform AT&T that the amounts previously billed should not have been billed by Zonicom and that the carrier traffic at issue would be billed by Haxtun. Zonicom also wrote Haxtun a letter confirming their oral agreement to verify terminating carrier service to Fleming, Colorado, as Haxtun's traffic rather that Zonicom's traffic. According to this letter, Zonicom agreed to invoice Haxtun for terminating traffic in Fleming, and Haxtun, in turn, agreed to include the Zonicom traffic in Haxtun's monthly bills to long distance carriers, including AT&T.

With the addition of the Zonicom traffic, Haxtun's monthly bills to AT&T increased by over two thousand percent. Suspecting the addition of Zonicom's unwanted carrier traffic, but unable to separate it from the traffic AT&T actually ordered from Haxtun, AT&T began sending Haxtun payments for amounts based on the average monthly amount paid to Haxtun prior to the increase.

Haxtun sued, alleging AT&T improperly withheld payment for Haxtun's access services. During discovery, AT&T obtained evidence that Haxtun was adding Zonicom charges to its bills, and AT&T moved the district court to stay the proceedings and refer the case to the FCC to determine which carrier's charges were at issue. The district court granted that motion, but Haxtun did not file a complaint with the FCC until approximately fifteen months later. In that complaint, Haxtun for the first time alleged that AT&T wrongfully withheld payment to Haxtun and Zonicom jointly. The FCC subsequently determined that the disputed charges in the case were for access services provided by Zonicom and that therefore Haxtun's claims before the FCC were substantially different from its claims before the district court. Consequently, the FCC dismissed the case without prejudice to permit the district court to address threshold issues of standing and joinder and to determine whether Haxtun's claims remained appropriate for primary jurisdiction referral to the FCC.

At a status conference held after the FCC's dismissal, the district court denied Haxtun's motion to join Zonicom as a plaintiff. AT&T subsequently moved for summary judgment, arguing that Haxtun did not have standing to sue and was not the real party in interest because it sought to enforce the rights of a third party, Zonicom. The district court granted AT&T's motion and dismissed Haxtun's case with prejudice, concluding that Haxtun lacked standing. Doing so, the court rejected Haxtun's argument that it was assigned the legal right to sue on Zonicom's behalf pursuant to its billing agreement. Haxtun subsequently moved to amend the judgment to allow for an award of $45,725, an amount that AT&T conceded it owed for local access charges now clearly attributable to service actually performed by Haxtun during the relevant period. The district court granted the uncontested motion, but denied Haxtun's request for interest on the award. This appeal followed.

II.

We review the district court's grant of summary judgment de novo, applying the *358 same legal standard used by the district court. *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir.2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When applying this standard, "we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir.1998) (quotation omitted). We also review de novo the district court's determination as to standing. *Loving v. Boren*, 133 F.3d 771, 772 (10th Cir.1998). "Plaintiffs bear the burden of proving standing with the manner and degree of evidence required at the particular stage of the litigation." *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir.2000) (quotation omitted). Therefore, "[w]hen the procedural posture of the case is a Federal Rule of Civil Procedure 56 motion for summary judgment and plaintiff['s] standing is at issue, to prevail on such a motion a plaintiff must establish that there exists no genuine issue of material fact as to justiciability, and mere allegations of injury, causation, and redressability are insufficient." *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir.) (quotation omitted), *cert. denied*, 537 U.S. 947, 123 S.Ct. 411, 154 L.Ed.2d 291 (2002); *cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883–84, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

III.

1 In its brief on appeal, Haxtun contends that it has demonstrated standing pursuant to a billing agreement between Haxtun and Zonicom. The parties agree that a valid assignment of legal rights under Colorado law from Zonicom to Haxtun would confer standing on Haxtun to sue AT&T for access charges originally incurred by Zonicom. They disagree over the district court's conclusion that Haxtun produced insufficient evidence to show such an assignment. As in the district court, Haxtun points to two letters, a series of invoices from Zonicom to Haxtun, and affidavits by Zonicom Director Clint Frederick and Haxtun's Johnny Ross to argue that, despite the lack of a written assignment agreement, the actions and conduct of the parties evidence a valid assignment of Zonicom's legal rights.

After reviewing this evidence, we also conclude that it was insufficient to demonstrate Zonicom's assignment of legal rights so as to give Haxtun standing to sue on the disputed charges. We agree with the district court that, at most, the evidence reflects "a deliberate attempt on the part of Zonicom to disguise its bills for unauthorized service as though they are Haxtun's charges in order to avoid the possibility that AT&T would again refuse to pay Zonicom's bills." Aplt.App. Vol. 3 at 449. Haxtun's arguments to the contrary are unavailing, as they do not persuade us that Haxtun has met its threshold burden to establish standing. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.") (quotations omitted).

IV.

2 Likewise, Haxtun's contention that Zonicom subsequently ratified Haxtun's claims against AT&T is without merit. The district court denied Haxtun's motion to join Zonicom as a plaintiff on February **359* 1, 2001. At that time, the court concluded "that Haxtun had knowledge of all the facts contained in its complaint with the [Federal Communications] Commission before it filed its complaint in this court." Aplt.App., Vol. 3 at 450. The court explained that ruling, stating that "[i]t was evident to me then, and it is still evident to me now, that [Haxtun] is trying to backtrack and cover up things that [it] knew three years ago." *Id.* (quotation omitted). Haxtun then filed the affidavit of Clint Frederick, the director of Zonicom, in which he states "Zonicom has been aware of the above-captioned action since its inception and supports and ratifies Haxtun's claims against AT&T on its behalf." *Id.* Vol. 2 at 302. Haxtun contends that this statement from Mr. Frederick's affidavit constitutes a valid ratification under Fed.R.Civ.P. 17.

Federal Rule 17 states that

> [n]o 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; and 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.

Fed.R.Civ.P. 17(a). As explained in the advisory committee notes, this section of the rule was added in the interests of justice:

> This provision keeps pace with the law as it is actually developing. 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.... It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.

Id. advisory committee's note (1966 Amend.). In this case, we conclude that the purported ratification by Zonicom is not effective and does not preclude summary judgment. "A proper ratification under Rule 17(a) requires that the ratifying party (1) authorize continuation of the action and (2) agree to be bound by its result." *ICON Group, Inc. v. Mahogany Run Dev. Corp.,* 829 F.2d 473, 478 (3d Cir.1987). Although Frederick's affidavit claims to "support and ratify" Haxtun's claims against AT&T on behalf of Zonicom, it includes no language evidencing an agreement to be bound by the result in Haxtun's action. Indeed, Zonicom has already demonstrated its unwillingness to be bound by Haxtun's case by filing its own action against AT&T on March 20, 2002, seeking recovery of the same access charges disputed in the instant action.

Moreover, the record in this case confirms the district court's observations that Haxtun knew of Zonicom's claims well before it filed its complaint and yet chose to represent to that court that the disputed charges were solely for Haxtun's access services. We agree with the district court that Haxtun "deliberately concealed the true sources of the charges it sought." Aplt.App., Vol. 3 at 527. Given Haxtun's overall conduct in this case, as fully explained in the district court's orders, the allowance of such a belated attempt at ratification would not further the interests of justice. Therefore, the district court did not abuse its discretion by rejecting Haxtun's claim that summary judgment was improper due to Rule 17. *See Scheufler v. Gen. Host Corp.,* 126 F.3d 1261, 1270 (10th Cir.1997) (holding that district court's decision under Rule 17 is reviewed for abuse of discretion).

**360* V.

3 Finally, Haxtun contends that the district court erred in refusing to award interest on the undisputed access charge amounts owed by AT&T. Specifically, Haxtun argues that the "filed rate doctrine," as codified in the Communications Act, prohibits the district court from deciding on its own that AT&T need not pay Haxtun interest on money admittedly due Haxtun under its tariff. We disagree.

The filed rate doctrine in this context specifies that a filed tariff governs the relationship between a common carrier and its customers as to charges, and forbids a carrier from either charging or receiving any rate that is "greater or less or different" from those rates properly filed with the FCC. *See* 47 U.S.C. § 203(c)(1). According to Haxtun, because its filed tariff specifies a fixed rate for interest on overdue payments, the district court was obligated to award interest at that rate for the undisputed amount of money owed by AT&T for access services provided solely by Haxtun. Haxtun relies on *Cincinnati Bell Telephone Co. v. Allnet Communication Services, Inc.*, 17 F.3d 921 (6th Cir.1994), as authority for its argument that the district court has no discretion in awarding prejudgment interest. That case, however, merely held that once the district court determined that interest was due for late payment, the actual rate of interest was determined by the filed tariff. Haxtun points to no direct authority compelling us to retreat from this Circuit's controlling law that affords a district court the discretion to determine whether a party is entitled to an award of interest in the first instance. *See Malloy v. Monahan,* 73 F.3d 1012, 1019 (10th Cir.1996) (holding that prejudgment interest is not recoverable as a matter of right, and a district court's refusal to award interest is reviewed for abuse of discretion).

In denying Haxtun's request for interest, the district court determined that Haxtun deliberately misrepresented its claims and that any delay in payment from AT&T was solely due to Haxtun's conduct throughout the litigation. After independently reviewing the record, we agree with these determinations and conclude that the district court did not abuse its discretion in refusing to award Haxtun interest on the amount discovered to have been rightfully owed by AT&T.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Parallel Citations

2003 WL 157544 (C.A.10 (Colo.))

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Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio,
Eastern Division.

In re FORECLOSURE CASES.

Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029.Oct. 31, 2007.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

CHRISTOPHER A. BOYKO, J.

1* On October 10, 2007, this Court issued an Order requiring Plaintiff-Lenders in a number of pending foreclosure cases to file a copy of the executed Assignment demonstrating Plaintiff was the holder and owner of the Note and Mortgage ***as of the date the Complaint was filed,* or the Court would enter a dismissal. After considering the submissions, along with all the documents filed of record, the Court dismisses the captioned cases without prejudice. The Court has reached today's determination after a thorough review of all the relevant law and the briefs and arguments recently presented by the parties, including oral arguments heard on Plaintiff Deutsche Bank's Motion for Reconsideration. The decision, therefore, is applicable from this date forward, and shall not have retroactive effect.

LAW AND ANALYSIS

A party seeking to bring a case into federal court on grounds of diversity carries the burden of establishing diversity jurisdiction. *Coyne v. American Tobacco Company,* 183 F.3d 488 (6th Cir.1999). Further, the plaintiff "bears the burden of demonstrating standing and must plead its components with specificity." *Coyne,* 183 F.3d at 494; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The minimum constitutional requirements for standing are: proof of injury in fact, causation, and redressability. *Valley Forge,* 454 U.S. at 472. In addition, "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Coyne,* 183 F.3d at 494 (quoting *Pestrak v. Ohio Elections Comm'n,* 926 F.2d 573, 576 (6th Cir.1991)). To satisfy the requirements of Article III of the United States Constitution, the plaintiff must show he has ***personally suffered some actual injury*** as a result of the illegal conduct of the defendant. (Emphasis added). *Coyne,* 183 F.3d at 494; *Valley Forge,* 454 U.S. at 472.

In each of the above-captioned Complaints, the named Plaintiff alleges it is the holder and owner of the Note and Mortgage. However, the attached Note and Mortgage identify the mortgagee and promisee as the original lending institution-one other than the named Plaintiff. Further, the Preliminary Judicial Report attached as an exhibit to the Complaint makes no reference to the named Plaintiff in the recorded chain of title/interest. The Court's Amended General Order No.2006-16 requires Plaintiff to submit an affidavit along with the Complaint, which identifies Plaintiff either as the original mortgage holder, or as an assignee, trustee or successor-in-interest. Once again, the affidavits submitted in all these cases recite the averment that Plaintiff is the owner of the Note and Mortgage, without any mention of an assignment or trust or successor interest. Consequently, the very filings and submissions of the Plaintiff create a conflict. In every instance, then, Plaintiff has not satisfied its burden of demonstrating standing at the time of the filing of the Complaint.

2* Understandably, the Court requested clarification by requiring each Plaintiff to submit a copy of the Assignment of the Note and Mortgage, executed as of the date of the Foreclosure Complaint. In the above-captioned cases, ***none* of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint. The Assignments, in every instance, express a present intent to convey all rights, title and interest in the Mortgage and the accompanying Note to the Plaintiff named in the caption of the Foreclosure Complaint upon receipt of sufficient consideration on the date the Assignment was signed and notarized. Further, the

Assignment documents are all prepared by counsel for the named Plaintiffs. These proffered documents belie Plaintiffs' assertion they own the Note and Mortgage by means of a purchase which pre-dated the Complaint by days, months or years.

Plaintiff-Lenders shall take note, furthermore, that prior to the issuance of its October 10, 2007 Order, the Court considered the principles of "real party in interest," and examined Fed.R.Civ.P. 17-"Parties Plaintiff and Defendant; Capacity" and its associated Commentary. The Rule is not *apropos* to the situation raised by these Foreclosure Complaints. The Rule's Commentary offers this explanation: "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.... It is, in cases of this sort, intended to insure against forfeiture and injustice ..." Plaintiff-Lenders do not allege mistake or that a party cannot be identified. Nor will Plaintiff-Lenders suffer forfeiture or injustice by the dismissal of these defective complaints otherwise than on the merits.

Moreover, this Court is obligated to carefully scrutinize all filings and pleadings in foreclosure actions, since the unique nature of real property requires contracts and transactions concerning real property to be in writing. R.C. § 1335.04. Ohio law holds that when a mortgage is assigned, moreover, the assignment is subject to the recording requirements of R.C. § 5301.25. *Creager v. Anderson* (1934), 16 Ohio Law Abs. 400 (interpreting the former statute, G.C. § 8543). "Thus, with regards to real property, before an entity assigned an interest in that property would be entitled to receive a distribution from the sale of the property, their interest therein must have been recorded in accordance with Ohio law." *In re Ochmanek,* 266 B.R. 114, 120 (Bkrtcy.N.D.Ohio 2000) (citing *Pinney v. Merchants' National Bank of Defiance,* 71 Ohio St. 173, 177, 72 N.E. 884 (1904).1

1 Astoundingly, counsel at oral argument stated that his client, the purchaser from the original mortgagee, acquired complete legal and equitable interest in land when money changed hands, even before the purchase agreement, let alone a proper assignment, made its way into his client's possession.

This Court acknowledges the right of banks, holding valid mortgages, to receive timely payments. And, if they do not receive timely payments, banks have the right to properly file actions on the defaulted notes-seeking foreclosure on the property securing the notes. Yet, this Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations.

*3 Despite Plaintiffs' counsel's belief that "there appears to be some level of disagreement and/or misunderstanding amongst professionals, borrowers, attorneys and members of the judiciary," the Court does not require instruction and is not operating under any misapprehension. The "real party in interest" rule, to which the Plaintiff-Lenders continually refer in their responses or motions, is clearly comprehended by the Court and is not intended to assist banks in avoiding traditional federal diversity requirements.2 Unlike Ohio State law and procedure, as Plaintiffs perceive it, the federal judicial system need not, and will not, be "forgiving in this regard."3

2 Plaintiff's reliance on Ohio's "real party in interest rule" (ORCP 17) and on any Ohio case citations is misplaced. Although Ohio law guides federal courts on substantive issues, state procedural law cannot be used to explain, modify or contradict a federal rule of procedure, which purpose is clearly spelled out in the Commentary. "In federal diversity actions, state law governs substantive issues and federal law governs procedural issues." *Erie R.R. Co. v. Tompkins,* 304 U.S. 63 (1938); *Legg v. Chopra,* 286 F.3d 286, 289 (6th Cir.2002); *Gafford v. General Electric Company,* 997 F.2d 150, 165-6 (6th Cir.1993).

3 Plaintiff's, "Judge, you just don't understand how things work," argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. Typically, the homeowner who finds himself/herself in financial straits, fails to make the required mortgage payments and faces a foreclosure suit, is not interested in testing state or federal jurisdictional requirements, either *pro se* or through counsel. Their focus is either, "how do I save my home," or "if I have to give it up, I'll simply leave and find somewhere else to live."

In the meantime, the financial institutions or successors/assignees rush to foreclose, obtain a default judgment and then sit on the deed, avoiding responsibility for maintaining the property while reaping the financial benefits of interest running on a judgment. The financial institutions know the law charges the one with title (still the homeowner) with maintaining the property.

There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit-to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.

The Court will illustrate in simple terms its decision: "Fluidity of the market"-"X" dollars, "contractual arrangements between institutions and counsel"-"X" dollars, "purchasing mortgages in bulk and securitizing"-"X" dollars, "rush to file, slow to record after judgment"-"X" dollars, "the jurisdictional integrity of United States District Court"-"Priceless."

CONCLUSION

For all the foregoing reasons, the above-captioned Foreclosure Complaints are dismissed without prejudice.

IT IS SO ORDERED.

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