

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.,

Plaintiff-Appellant,

v.

Antoine Duvall, et al.,

Defendants-Appellees.

Case No. 2011-0218

On Appeal from Cuyahoga County
Court of Appeals, Eighth Appellate
District

Court of Appeals
Case No. CA-10-094714

REPLY BRIEF OF AMICI CURIAE, FANNIE MAE AND FREDDIE MAC,
IN SUPPORT OF APPELLANT

Rick D. DeBlasis (0012992)
Cynthia M. Fischer (0073761)
Jennifer B. Madine (0082278)
Lerner, Sampson & Rothfuss
120 East Fourth Street, Suite 800
Cincinnati, OH 45202
Ph: (513) 412-6614
Fax: (513) 354-6765
rdd@lsrlaw.com

*Counsel for Amici Curiae,
Fannie Mae and Freddie Mac*

Scott A. King (0037582)
Terry W. Posey Jr. (0078292)
Thompson Hine LLP
2000 Courthouse Plaza, NE
Dayton, Ohio 45401-8801
Ph: (937) 443-6560
Fax: (937) 443-6830
Scott.King@Thompsonhine.com

*Counsel for Plaintiff-Appellant, U.S.
Bank National Association, as Trustee
for CMLTI 2007-WFHE2*

Gary Cook (0021240)
3655 Prospect Avenue East
3rd Floor
Cleveland, Ohio 44115
Ph: (216) 965-4410
Fax: (216) 431-6149
gcookesq@yahoo.com

*Co-counsel for Defendants-Appellees,
Antoine Duvall and Madinah Samad*

Michael Aten (0083386)
3214 Prospect Avenue East
Cleveland, Ohio 44115
Ph: (216) 431-7400 x 117
Fax: (216) 431-6149
michaelaten@hotmail.com

*Co-counsel for Defendants-Appellees,
Antoine Duvall and Madinah Samad*

FILED
SEP 06 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Bruce M. Broyles (0042562)
5815 Market Street
Suite 2
Boardman, Ohio 44512
Telephone: (330) 965-1093
Facsimile: (330) 953-0450

*Counsel for Amici Curiae, Homeowners of
Ohio and Ohiofraudclosure.blogspot.com*

Andrew D. Neuhauser (0082799)
Advocates for Basic Legal Equality, Inc.
525 Jefferson Avenue
Toledo, Ohio 43604
Telephone: (419) 255-0814
Facsimile: (419) 259-2880
E-mail: aneuhauser@ablelaw.org

*Counsel for Amicus Curiae,
Advocates for Basic Legal Equality, Inc.*

Peggy P. Lee (0067912)
Southeastern Ohio Legal Services
964 East State Street
Athens, Ohio 45701
Telephone: (740) 594-3558
Facsimile: (740) 594-3791
E-mail: plee@oslsa.org

*Counsel for Amicus Curiae,
Southeastern Ohio Legal Services*

Howard G. Strain (0069262)
Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113
Telephone: (216) 861-5198
Facsimile: (216) 575-6209
E-mail: howard.strain@lascllev.org

*Counsel for Amicus Curiae,
Legal Aid Society of Cleveland*

Noel M. Morgan (0066904)
Legal Aid Society of Southwest Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, Ohio 45202
Telephone: (513) 362-2837
Facsimile: (513) 241-7871

*Counsel for Amicus Curiae, Legal Aid
Society of Southwest Ohio, LLC*

Linda Cook (0038743)
Ohio Poverty Law Center, LLC
555 Buttles Avenue
Columbus, Ohio 43215
Telephone: (614) 221-7201
Facsimile: (614) 221-7625
E-mail: lcook@ohiopovertylaw.org

*Counsel for Amicus Curiae,
Poverty Law Center, LLC*

Miriam H. Sheline (0018333)
Pro Seniors, Inc.
7162 Reading Road, Suite 1150
Cincinnati, Ohio 45237
Telephone: (513) 458-5509
Facsimile: (513) 621-5613
E-mail: msheline@proseniors.org

*Counsel for Amicus Curiae,
Pro Seniors, Inc.*

Philip D. Althouse (0051956)
Legal Aid Society of Cleveland
538 West Broad Street
Suite 300
Elyria, Ohio 44035
Telephone: (440) 323-8240
Facsimile: (440) 323-8536
E-mail: philip.althouse@lascllev.org

*Counsel for Amicus Curiae,
Legal Aid Society of Cleveland*

Andrew M. Engel (0047371)
7071 Corporate Way
Suite 201
Centerville, Ohio 45459
Telephone: (937) 938-9412
Facsimile: (937) 938-9411
E-mail: amengel@sbcglobal.net

*Counsel for Amici Curiae,
Duane and Julie Schwartzwald*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	5
INTRODUCTION.....	7
ARGUMENT.....	7
1. Appellant and its amici, Fannie Mae and Freddie Mac, urge upon this Court a solution to the certified question, which not only is consistent with the basic tenets of the U.C.C., the prior decisions of this Court, and the Civil Rules, but also practical in its application.....	7
2. Appellees and their numerous amici urge upon this Court varied and internally inconsistent positions, but closer analysis shows agreement with appellant and its amici regarding many of the U.C.C. and common law concepts.....	8
3. Notes and Mortgages may contain distinct contractual terms and still travel together as a matter of law.....	10
4. This Court should follow established law of negotiable instruments and the Ohio Revised Code.....	13
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

Page

CASES:

Countrywide Home Loans Servicing, L.P. v. Shifflet, 3rd Dist. No. 9-09-31,
2010-Ohio-1266..... 12

Kernohan v. Manss (1895), 53 Ohio St. 118, 41 N.E. 258..... 8, 12,
15

Kuck v. Sommers (1950), 100 N.E.2d 68, 59 Ohio Abs. 400..... 10

Mortgage Electronic Registration Systems, Inc. v. Mosley,
8th Dist. Case No. 93170, 2010-Ohio-2886..... 12

U.S. Bank Nat’l Ass’n v. Marcino, 181 Ohio App.3d 328, 2009-Ohio-1178,
908 N.E.2d 1032..... 10

Wilborn v. Bank One Corp., 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396..... 11, 14

STATUTES:

Ohio

R.C. 1301.01(T)..... 9

R.C. 1303.03..... 9

R.C.1303.05(B)..... 11

R.C. 1303.21..... 10

R.C. 1303.31..... 7, 8,
9, 13,
14

R.C. 1303.52..... 7, 9

R.C. 1309.109(A)(3)..... 12

R.C. 1309.203(G).....10, 12

RULES

Civ.R. 17..... 13

INTRODUCTION

The Court has agreed to answer a question certified by the Eighth District Court of Appeals as being subject to conflicting Ohio appellate decisions, and which is of prime importance to the future of real estate financing in Ohio, to wit:

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?

Appellant and its amici, Fannie Mae and Freddie Mac, urge this Court to answer that question in the negative. Their positions are consistent with each other, consistent with nationally adopted provisions of the U.C.C., and consistent with the prior decisions of this Court. Conversely, appellees and their numerous amici urge positions that are inconsistent with each other and existing law. Applying basic tenets of the U.C.C., codified in the Revised Code and enunciated in the decisions of this Court for over one hundred years, will lend stability to Ohio's mortgage lending arena for years to come.

ARGUMENT

1. **Appellant and its amici, Fannie Mae and Freddie Mac, urge upon this Court a solution to the certified question, which not only is consistent with the basic tenets of the U.C.C., the prior decisions of this Court, and the Civil Rules, but also practical in its application.**

Appellant U.S. Bank and amici Fannie Mae and Freddie Mac argue that a “person entitled to enforce,” as defined by the Ohio Revised Code, is the proper plaintiff in a foreclosure. R.C. 1303.31(A), 1303.52(B). Because “the obligation is owed to the person entitled to enforce the instrument...,” the person entitled to enforce the instrument – a mortgage note – has standing to be a plaintiff in an Ohio foreclosure. R.C. 1303.52(B). The Revised Code distinguishes between person entitled to enforce and “owner,” as follows: “[a] person may be a ‘person

entitled to enforce' the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." R.C. 1303.31(B).

The mortgage follows the note as a matter of law. *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258. It is inconsequential to ask to whom the mortgage was last formally assigned. The person entitled to enforce the note may also enforce the mortgage as a matter of law.

Appellant and its amici adopt internally consistent positions well-supported by Ohio's version of U.C.C. Articles 3 and 9, plus over 100 years of Supreme Court precedent. A majority of Ohio's courts of appeal supports these positions. *Appellant's Reply Brief*, at p. 1. By contrast, appellees and their amici urge upon this Court varying and muddled views of the law in this area, all motivated not by a fear of the potential to be dunned for the same debt after having paid it off, but by an understandable impulse to delay or avoid the ultimate result of foreclosure. A deeper look at the positions of appellees and their amici, however, reveals significant similarities to the above principles.

2. Appellees and their numerous amici urge upon this Court varied and internally inconsistent positions, but closer analysis shows agreement with appellant and its amici regarding many of the U.C.C. and common law concepts.

Amici Duane and Julie Schwartzwald concede as follows: "Generally, Article 3 of the U.C.C. does not speak in terms of 'ownership' of promissory notes. So perhaps 'ownership' of the note and mortgage is not the best way to define what interest must be possessed. In that regard, the question is perhaps best answered in the negative." *Merit Brief of Amici Curiae Duane and Julie Schwartzwald in Support of Appelles*, at p. 13.

Amicus Advocates for Basic Legal Equality, Inc. ("ABLE"), and those joining it, concede as follows: "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.” *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 13. These amici also state that, “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.” *Id.* at p. 15. These amici essentially equate the word “owner,” which is undefined in the U.C.C., with the “person entitled to enforce.” R.C. 1303.31(A). Thus, their insistence upon “ownership” can be seen as a requirement that the plaintiff be entitled to enforce the instrument pursuant to the Ohio Revised Code.¹

Amici Homeowners of the State of Ohio and Ohiofraudclosureblogspot.com² propose that an entity “[f]ile the complaint in the name of the entity who *holds* the promissory note and who owns an interest in the mortgage.” *Merit Brief of Amici Curiae Homeowners of the State of Ohio and Ohiofraudclosure.blogspot.com*, at p. 16 (emphasis added). First, these amici agree that a holder has standing to enforce a note. *Id.* Second, they rely on terminology from the U.C.C. and Revised Code supporting the idea that a holder, or person entitled to enforce, is the proper plaintiff in a foreclosure. *Id.*; see also, R.C. 1301.01(T), 1303.31(A)(1).

Appellees, Antoine Duvall and Madinah Samad, flounder in their definition of “owner,” writing as follows: “Where the plaintiff files a complaint upon a note which it does not own but of which it is in possession and otherwise entitled to enforce, the note necessarily has not been negotiated to plaintiff (otherwise the plaintiff, in possession of the note negotiated to it, would in

¹ Amici ABLE and those joining also allege that some notes are not negotiable instruments. *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 12-13. However, Fannie Mae and Freddie Mac’s uniform notes are negotiable instruments as defined in U.C.C. § 3-104(a) and R.C. 1303.03.

² It is unclear who these amici are. Their brief contains no Statement of Interest of Amici Curiae and purports on its face to be filed on behalf of all Ohio homeowners and a “blog.” It is inconceivable that all of Ohio’s homeowners have been consulted about this brief or that a “blog” constitutes an entity that can retain counsel and appear in the Supreme Court.

fact be its owner).” *Appellees’ Merit Brief*, at p. 15. Appellees seem to rely upon concepts included in the Ohio Revised Code and Uniform Commercial Code, such as negotiation and person entitled to enforce. However, Appellees overlook that negotiation is defined in the Revised Code differently from the definition they propose. R.C. 1303.21. Appellees do not provide a citation to authority to support their position.

The lack of consistency between Appellees and their supporting amici is telling. Appellees and their amici would leave this important area of the law muddled. Their lack of consensus is driven by a lack of legal support for their positions.

3. **Notes and Mortgages may contain distinct contractual terms and still travel together as a matter of law.**

Appellees’ amici argue that the “‘rule’ [a mortgage follows a note] only applies in the most basic mortgage that merely references the note and does not include terms separate from the note.” *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 23. These amici do not provide authority for this proposition and do not explain how a court is to determine whether a mortgage is a “most basic mortgage” or one that does not follow the note.

Appellees, on the other hand, concede that, “*Negotiation* of the note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328; *Kuck v. Summers* (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400.” *Appellees’ Merit Brief*, at p. 14-15 (emphasis in original shown in italics).

Amici Homeowners of the State of Ohio and Ohiofraudclosure.blogspot.com point out that U.C.C. 9-203(g) as adopted in R.C. 1309.203(G) explicitly provides that the mortgage automatically follows the note: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also

attachment of a security interest in the security interest, mortgage, or other lien.” *Merit Brief of Amici Curiae Homeowners of the State of Ohio and Ohiofraudclosure.blogspot.com*, at p. 9-10.

These amici concede that the sale of a note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note. *Id.* However, these amici erroneously state, without citation of authority, that these statutory provisions do not apply in the context of mortgage-backed securities. *Id.*

Amicus ABLE, and those joining it, argue that the inclusion of the thirty-day notice provision in the standard Fannie Mae and Freddie Mac mortgage evidences the parties’ intent to separate the mortgage from its corresponding note. *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 26-27. Once again, amici provide no support for this assertion and offer no guidance for the outcome in such a situation. On the contrary, the notice provision relates to the lender’s ability to accelerate the debt evidenced by the note, necessarily establishing how the two documents are linked. See, e.g., R.C. 1303.05(B).

An example of another provision that appears in the standard Fannie Mae and Freddie Mac uniform mortgage, but not in the uniform note, is the reinstatement provision, which was discussed and approved in *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396. A reinstatement under this provision in the mortgage de-accelerates amounts due under the note. *Id.* at ¶3. In *Wilborn*, the Court upheld the enforceability of the reinstatement provision and also held as follows: “Moreover, public policy strongly favors the use of these uniform mortgage forms to further Congress’s stated purpose and to permit the trading of Ohio’s conventional mortgages on the secondary market.” *Id.* at ¶38. Amicus ABLE’s position, that the mortgages containing separate contractual terms are somehow severed from the notes, is

unsupported by the law and may impede the transfer of Ohio's mortgages on the secondary mortgage market, contrary to the dictates of *Wilborn*.

Although the market for buying and selling mortgage loans may have changed, the laws governing the transfer of mortgage loans have not. Appellees' amici rely upon a Vermont case for their assertion that when the lender retains possession of the note or transfers the note by indorsement, and the lender identifies a separate entity as the mortgagee or transfers the mortgage to a different entity, then the mortgage does not follow the note. *Merit Brief of Amici Curiae Homeowners of the State of Ohio and Ohiofraudclosure.blogspot.com*, at p. 11.

However, this is not the law in Ohio. See, e.g., *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258; see also, R.C. 1309.109(A)(3), 1309.203(G), Comment 9 to R.C. 1309.203.

Ohio courts have upheld mortgage contracts which provide that when the lender names a nominee to serve as mortgagee of record, such as Mortgage Electronic Registrations, Inc. ("MERS"), the nominee holds only legal title to the interests granted by the borrower in the security instrument, and the lender retains the beneficial interest in the mortgage. See, e.g., *Mortgage Elec. Registration Sys. v. Mosley*, 8th Dist. No. 93170, 2010-Ohio-2886, ¶18-20; *Countrywide Home Loans Servicing, L.P. v. Shifflet*, 3rd Dist. No. 9-09-31, 2010-Ohio-1266, ¶16. Therefore, the use of MERS solely as nominee for the lender, its successors and assigns, does not change the essential relationship between the note and the mortgage, or evidence an intent on the part of the lender and the mortgagor to separate the note from the mortgage. To the contrary, neither the inclusion of MERS as a party to a mortgage, nor inclusion of additional terms, such as those relating to collateral or acceleration, results in severing the mortgage from the debt it secures.

4. **This Court should follow established law of negotiable instruments and the Ohio Revised Code.**

Amici for the Appellees allege, erroneously, that Freddie Mac and Fannie Mae are seeking special treatment under Ohio law for foreclosure plaintiffs. *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 39; *Schwartzwald Amicus Brief*, p. 3-4. Whether a court would apply the provisions of the U.C.C., prior negotiable instrument law, or the common law pertaining to ordinary contracts, the result is the same. Debt instruments are freely negotiable, and the security follows the debt. When the court views the evidence, it should ensure that the plaintiff has a valid claim against the defendant which the court can adjudicate.

Indeed, it is the Appellees and their amici who propose to depart from long-standing law and to make foreclosures the exception under Ohio law. An obvious example is the one discussed herein: namely, whether a foreclosure plaintiff would need to show “ownership” to establish standing. Such a requirement would treat foreclosures as the exception to Civ.R. 17 and to other cases regarding negotiable instruments. Such a decision would place an undue burden on foreclosure plaintiffs, lead to litigation on the definition of “owner,” and have Ohio courts depart from the plain language of the Ohio Revised Code. R.C. 1303.31.

Without citation to authority, amici for appellees allege that, “Amici Fannie and Freddie ignored the basic tenets of real property law in order to improve liquidity...” *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 39. This makes no sense. Fannie Mae and Freddie Mac relied upon the Uniform Commercial Code in creating and updating their guidelines so that the guidelines will be effective in all states.³ In support of their absurd accusation, amici for Appellees cite to “robo-signing,” which has recently been the subject of

³ This is equally true for pooling and servicing agreements, which are also created in reliance on the Uniform Commercial Code so that they can address loans in multiple states.

public scrutiny. However, amici for appellees have not alleged that Fannie and Freddie were executing documents filed in foreclosures. Additionally, the popularized term, “robo-signing,” is wholly unrelated to the issue before the Court and is a clear attempt to distract the Court from the underlying law. Fannie Mae and Freddie Mac have set up national servicing guidelines in compliance with the Uniform Commercial Code and state property law.

Appellees’ amici attempt to impute a number of ills, which are unrelated to the issue of standing in Ohio foreclosures, upon Fannie Mae and Freddie Mac, without cause or justification. Amici argue, without any citation to authority, that, “this search for liquidity has lead to the morass of foreclosures today.” *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 39. Amici for Appellees also include several pages addressing the societal impact of foreclosure. *Merit Brief of Amici Curiae Advocates for Basic Legal Equality, Inc., et seq.*, at p. 37-39. However, amici overlook that for vacant properties to be sold to new owners, purchasers need to have access to funds. If loans are more difficult to obtain in Ohio, it will slow down recovery. This is something that the Ohio Supreme Court touched upon in *Wilborn* when it noted that, “To declare some part of these forms unenforceable would make Ohio less competitive in the secondary mortgage market, ... denying lenders liquidity for their investment portfolios, and decreasing the capital available to borrowers for mortgages.” *Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶38.

CONCLUSION

The contradictory positions and lack of legal support among Appellees and their amici highlight the weaknesses in their arguments. The Revised Code governs who is entitled to enforce a negotiable instrument, including a specific definition of “person entitled to enforce.” R.C. 1303.31(A). The security, or mortgage, is “a mere incident” of the debt it secures and,

therefore, follows the note as a matter of law. *Kerhohan*, 53 Ohio St. 118, 133, 41 N.E. 258. Appellees and their amici would lead the Court away from these basic, consistent, established legal principles with hysterical diatribes about “robo-signing,” mortgaged-backed securities, and the country’s economic woes. Fannie Mae and Freddie Mac do not ignore or discount the foreclosure crisis spurred by high unemployment and declining property values. However, none of these changes the basic tenets of Ohio law, which are controlling on the question being decided in this case. Enunciation of these basic legal tenets would constitute one step toward stability in the mortgage industry.

Respectfully submitted,

Rick D. DeBlasis by *Brad J. Terman* #0083974
Rick D. DeBlasis (0012992) with e-mail authorization
Cynthia M. Fischer (0073761)
Jennifer B. Madine (0082278)
Lerner, Sampson & Rothfuss
120 East Fourth Street, Suite 800
Cincinnati, OH 45202
Ph: (513) 412-6614
Fax: (513) 354-6765
rdd@lsrlaw.com

Attorneys for Amici, Freddie Mac and Fannie Mae

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing has been duly served upon the following by ordinary U.S. mail, postage prepaid, this 6th day of September, 2011:

Gary Cook, Esq.
3655 Prospect Avenue East
3rd Floor
Cleveland, Ohio 44115

Peggy P. Lee, Esq.
Southeastern Ohio Legal Services
964 E. State Street
Athens, Ohio 45701

Michael Aten, Esq.
3214 Prospect Avenue East
Cleveland, Ohio 44115

Miriam H. Sheline, Esq.
Pro Seniors, Inc.
7162 Reading Road, Suite 1150
Cincinnati, Ohio 45237

Scott A. King, Esq.
Terry W. Posey Jr., Esq.
Thompson Hine LLP
2000 Courthouse Plaza, NE
P.O. Box 8801
Dayton, Ohio 45401-8801

Howard G. Strain, Esq.
1223 W. 6th St.
Cleveland, Ohio 44113

Andrew M. Engel, Esq.
7071 Corporate Way
Suite 201
Centerville, Ohio 45459

Philip D. Althouse, Esq.
538 W. Broad St.
Suite 300
Elyria, Ohio 44035

Bruce M. Broyles, Esq.
5815 Market Street
Suite 2
Boardman, Ohio 44512

Linda Cook, Esq.
555 Buttles Avenue
Columbus, Ohio 43215

Noel M. Morgan, Esq.
215 East Ninth Street, Suite 500
Cincinnati, Ohio 45202

Andrew D. Neuhauser, Esq.
525 Jefferson Avenue
Toledo, Ohio 43604

Rick D. DeBlasis by *Brad J. Terman*
Rick D. DeBlasis with e-mail authorization