

IN THE SUPREME COURT OF OHIO

Federal Home Loan Mortgage Corp.	:	Case No. 2011-1362
	:	
Plaintiff-Appellee,	:	On Appeal from the Greene County
	:	Court of Appeals, Second Appellate
	:	District
v.	:	
	:	Court of Appeals
Duane Schwartzwald, et al.	:	Case No. 2010 CA 0041
	:	
Defendants-Appellants.	:	

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

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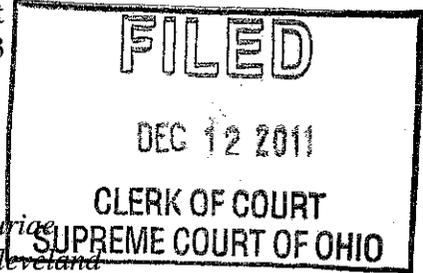
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST OF AMICI CURIAE	1
STATEMENT OF THE FACTS AND CASE	2
ARGUMENT	2
I. Question Presented	2
II. Introduction.....	3
III. Standing is an integral doctrine of the judicial system applicable to all.....	4
A. A party that does not have an interest in the contract upon which it bases its lawsuit does not have standing.....	5
B. A foreclosure claim is not ripe for adjudication if the plaintiff had no interest in the mortgage.....	7
IV. This Court should enforce the doctrine of standing and the rules for prosecuting an action in the name of the real party in interest, which already exist for all litigants.....	8
A. The question of whether a party is a real party in interest under Civ.R. 17 is a separate issue from whether that party has standing.....	8
B. Civ.R.17 does not apply to situations in which foreclosing plaintiffs know when filing suit that they have no standing and could have determined real party in interest.....	9
IV. It would be dangerous for courts to deviate from standing and real party in interest requirements to accommodate the business practices of one industry.....	15
VI. Foreclosing plaintiffs’ recent and ongoing assault on the integrity of the courts is exemplified by this case.....	16
VII. The rampant industry practice of filing suit without being properly positioned to do so is an abuse of Ohio courts and a threat to every homeowner, not just the clients of Amici Ohio Legal Services programs.....	18

VIII.	Departure from prudential mortgage lending standards was a major cause of the foreclosure crisis, and foreclosing plaintiffs should not be permitted to keep relaxing the rules for their own convenience and profit.....	19
IX.	Upholding well-established standing and real party in interest requirements will not hinder mortgage holders from bringing legitimate foreclosure actions.....	19
X.	Conclusion	23
	CERTIFICATE OF SERVICE	25
	APPENDIXES	26

TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. Brown</i> (1968), 13 Ohio St.2d 53, 233 N.E.2d 584	10
<i>Bank of New York v. Gindele</i> , 1st Dist. No. C-090251, 2010-Ohio-542	10, 12
<i>Carr v. Home Owners Loan Corp.</i> (1947), 148 Ohio St. 533, 36 O.O. 177, 76 N.E.2d 389	6
<i>Crowder v. Gordons Transports, Inc.</i> (C.A.8, 1967), 387 F.2d 413	12
<i>Cuyahoga Cty. Bd. of Commrs. v. State</i> , 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330	3
<i>Deutsche Bank Natl. Trust Co. v. Edwards</i> (C.P. Erie Cty. 2009), No. 08-CV-712E	13
<i>Deutsche Bank Natl. Trust Co. v. Hanna</i> (N.D. Ohio), 2007 WL 4276661	17
<i>DLJ Mortgage Capital, Inc. v. Bazzy</i> (C.P. Montgomery Cty. 2003), No. 02-4136	13
<i>Feist v. Consolidated Freightways Corp.</i> (E.D.Pa.1999), 100 F. Supp. 2d 273	12, 13
<i>First Union Natl. Bank v. Hufford</i> (3rd Dist.), 146 Ohio App.3d 673, 2001-Ohio-2271, 767 N.E.2d 1206	9
<i>Fortner v. Thomas</i> (1970), 22 Ohio St.2d 13, 51 O.O.2d 35, 257 N.E.2d 371	6
<i>Grant Thornton v. Windsor House, Inc.</i> (1991), 57 Ohio St.3d 158, 566 N.E.2d 1220	9
<i>Haxtun Tel. Co. v. AT&T Corp.</i> (C.A.10, 2003), 57 Fed.Appx. 355	12
<i>In re Foreclosure Cases</i> (N.D. Ohio), 2007 WL 3232430	16, 17
<i>In re Foreclosure Cases</i> (S.D. Ohio 2007), 521 F.Supp.2d 650	16
<i>Keller v. City of Columbus</i> , 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964	4
<i>Kincaid v. Erie Ins. Co.</i> , 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207	3, 6, 9
<i>Kirk v. Kirk</i> (3d Dist.), 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125	7

<i>Northland Ins. Co. v. The Illuminating Co.</i> , 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529.....	8, 11
<i>Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.</i> (10th Dist.), 182 Ohio App.3d 814, 2009-Ohio-3238, 915 N.E.2d 397	12
<i>Ohio Contrs. Assn. v. Bicking</i> (1994), 71 Ohio St.3d 318, 643 N.E.2d 1088	6
<i>Ohio Pyro, Inc. v. Ohio Dept. of Commerce</i> , 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550	3, 5
<i>Simon v. Union Trust Co.</i> (1933), 126 Ohio St. 346, 185 N.E. 425	6
<i>State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County</i> (1996), 74 Ohio St.3d 536, 660 N.E.2d 458	4
<i>State ex rel. Dallman v. Court of Common Pleas, Franklin County</i> (1973), 35 Ohio St.2d 176, 298 N.E.2d 515	6
<i>State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio</i> (1998), 82 Ohio St.3d 88, 694 N.E.2d 459	7
<i>State ex rel. Jones v. Suster</i> (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002	5
<i>State ex rel. Keller v. Columbus</i> (10th Dist.), 164 Ohio App.3d 648, 2005-Ohio-6500, 843 N.E.2d 838	7
<i>State ex rel. Merrill v. Ohio Dept. of Natural Resources</i> , 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935	3
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062	5
<i>State v. Stambaugh</i> (1987), 34 Ohio St.3d 34, 517 N.E.2d 526	5
<i>Stewart v. Stewart</i> (4th Dist. 1999), 134 Ohio App.3d 556, 731 N.E.2d 743	5, 7
<i>Travelers Indemn. Co. v. R.L. Smith Co.</i> (Apr. 13, 2001), 11th Dist. No. 2000-L-014, 2001 WL 369677	11
<i>U.S. Bank Natl. Assn. v. Ibanez</i> (2011), 458 Mass. 637, 941 N.E.2d 40	17
<i>U.S. for Use & Benefit of Wulff v. CMA, Inc.</i> (C.A.9, 1989), 890 F.2d 1070	11, 12
<i>Wells Fargo Bank, N.A. v. Byrd</i> (1st Dist.), 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722	10, 11, 20

<i>Wells Fargo Bank, N.A. v. Heiskell</i> (C.P. Franklin Cty. 2003), No. 02 CVE-10-11149	13-14
<i>Wells Fargo Bank, N.A. v. Hissa</i> (C.P. Lucas Cty. 2009), No. CI-08-6993	14
<i>Wells Fargo Bank, N.A. v. Jordan</i> , 8th Dist. No. 91675, 2009-Ohio-1092	11
<i>Woods v. Oak Hill Community Med. Ctr., Inc.</i> (4th Dist. 1999), 134 Ohio App.3d 261, 730 N.E.2d 1037	4-5
Constitutional Provisions	Page
Article IV, §4(B)	4, 6
Rules	Page
Civ.R. 10	13
Civ.R. 11	13
Civ.R. 17	passim
Civ.R. 17(A), 1970 Staff Notes	10
Cuyahoga County, Third Revised Residential Mortgage Foreclosure Affidavit Policy	20
Fed.R.Civ.P. 17	10, 11, 12, 17
Fed.R.Civ.P. Committee Notes, 1966 Amendment	11-12
Hamilton County Court of Common Pleas Local Rule 45	20-21
Highland County Court of Common Pleas Local Rule 15.3	21
Lucas County Court of Common Pleas Local Rule 8.02	21
Summit County Court of Common Pleas Local Rule 11.01	21

Other Authorities	Page
Comment, <i>Mootness and Ripeness: The Postman Always Rings Twice</i> (1965), 5 Colum.L.Rev. 867	7
C. Wright and A. Miller, <i>Federal Practice and Procedure</i> §1555 (1971)	12
Policy Matters Ohio, <i>Home Insecurity: Foreclosure Growth in Ohio 2011</i> (Feb. 2011)	22
Supreme Court of Ohio, <i>2008 Ohio Courts Statistical Summary</i>	18
Supreme Court of Ohio, “Foreclosures Down 4 percent in 2010,” Feb. 10, 2011	22

STATEMENT OF INTEREST OF THE AMICI CURIAE

All of Ohio's Civil Legal Services Programs¹ ("Amici") join Defendants-Appellants Duane and Julie Schwartzwald in opposing the certified rule of law that was adopted by the Second District Court of Appeals on July 27, 2011 in *Federal Home Loan Mortgage Corp. v. Duane Schwartzwald, et al.*, 2nd Dist. No. 2010 CA 41, at 4. Amici have been on the forefront

¹ Advocates for Basic Legal Equality (ABLE) and Legal Aid of Western Ohio are 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 is 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 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.

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 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.

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.

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 nonprofit 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.

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, local, and public interest resources.

Since Amici became Save the Dream partners in 2008, the programs have provided direct representation to over 14,600 homeowners statewide at all levels of services. In addition, legal aid lawyers have participated in hundreds of borrower outreach and other public education events to 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 also worked 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 widespread practices of the lending industry in foreclosure actions that undermine the integrity of the judicial process.

STATEMENT OF FACTS AND CASE

In the interests of judicial economy, Amici adopt by reference the Statement of Facts and Case submitted by Defendants-Appellants Duane and Julie Schwartzwald.

ARGUMENT

I. Question presented

The Second District Court of Appeals certified the following rule of law as being in conflict with the judgment on the same question by another district court of appeals:

"In a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment."

Amici submit that this certified rule of law is erroneous. The proper rule of law is as follows: For any plaintiff in civil litigation, lack of standing is a fatal defect that cannot be “cured” after a lawsuit is filed. In a mortgage foreclosure action, a plaintiff’s lack of standing cannot be cured by obtaining an assignment of the mortgage prior to judgment. Furthermore, failure to prosecute an action as a real party in interest can be “cured” only under limited circumstances and in accordance with the requirements of Civ.R. 17. In a mortgage foreclosure action where a financial institution files suit before obtaining assignment of the mortgage, merely obtaining subsequent assignment of the mortgage does not trigger the protections of Civ.R. 17 to preclude dismissal of the action for failure of standing. This is consistent with decisions by the First and Eighth District Courts of Appeals. It also comports with both constitutional requirements and common sense.

II. Introduction

The certified rule of law goes to the issue of whether a plaintiff in a mortgage foreclosure action can cure either lack of standing or a real party in interest defect after that plaintiff has filed a mortgage foreclosure lawsuit. The real issue before this Court is whether *any* plaintiff can cure lack of standing or a real party in interest defect after a lawsuit is filed. The importance of standing as a prerequisite to adjudication cannot be overstated. This Court most recently has restated the position it has long held that “[s]tanding is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.” *State ex rel. Merrill v. Ohio Dept. of Natural Resources.*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 27, citing *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9; accord *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22.

Foreclosure cases are governed by the Ohio Constitution, the Ohio Rules of Civil Procedure, and common law standards applicable to all civil litigation. They do not require their own separate procedural rules. This Court should not alter its own precedent on the doctrine of standing and the requirements for prosecuting an action in the name of the real party in interest under Civ.R.17 simply to accommodate an industry that considers it inconvenient to follow the rules and requirements of our state. Requiring the industry to follow traditional rules preserves the integrity of our justice system – a justice system that applies the same rules to all litigants.

Adoption of the proposition posed by the Second District would represent nothing short of a radical rewriting of Ohio civil justice as well as two hundred years of Ohio constitutional law. It would require this Court either to redefine the fundamental requirements of standing and real party in interest that apply to all plaintiffs or to create a separate set of judicial principles for banks and foreclosure actions. Either would be an ill-advised, unnecessary, and even revolutionary response to what are merely sloppy business practices adopted by some of the nation's largest banks and Wall Street investment houses.

III. Standing is an integral doctrine of the judicial system applicable to all.

Under Article IV of the Ohio Constitution, courts of common pleas have original jurisdiction over “all justiciable matters.” Art. IV, §4(B). This Court has stated that under Article IV, justiciability requires an actual controversy between adverse parties – the plaintiff and “a party whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law.” *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County* (1996), 74 Ohio St.3d 536, 541, 660 N.E.2d 458; *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 26 (“In order to be justiciable, a controversy must be ripe for review.”); see also *Woods v. Oak Hill Community Med. Ctr., Inc.* (4th Dist. 1999),

134 Ohio App.3d 261, 271, 730 N.E.2d 1037 (“The requirement that a plaintiff have standing to sue is an indispensable element of justiciability that we may not compromise.”); *Stewart v. Stewart* (4th Dist. 1999), 134 Ohio App.3d 556, 558, 731 N.E.2d 743 (“For a cause to be justiciable, there must be a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties,” quoting *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38, 517 N.E.2d 526 (Douglas, J., concurring in part and dissenting in part)). The issue of justiciability is so important that courts must raise it sua sponte. *Stewart* at 558.

As the foreclosure crisis continues, the issue of justiciability in the context of foreclosure now comes before this Court. Amici submit that as with any other cause of action wherein justiciability is not expressly defined by statute, a complaint in foreclosure is justiciable only when the plaintiff has standing to sue upon filing, and the claim is ripe for adjudication. These doctrines of standing and ripeness are separate, and their requirements must be satisfied.

A. A party that does not have an interest in the contract upon which it bases its lawsuit does not have standing.

Standing is “a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Ohio Pyro, Inc.*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, at ¶ 27, quoting Black’s Law Dictionary (8th Ed.2004). “Standing is a threshold question for a court to decide in order for it to proceed to adjudicate the action.” *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002.

A plaintiff must establish standing before a court can consider the merits of the legal claims. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062. “The concept of standing embodies general concerns about how courts should function in a democratic society.” *Id.*

The issue of whether a party has standing depends on “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.” *State ex rel. Dallman v. Court of Common Pleas, Franklin County* (1973), 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515. For a plaintiff to have standing, this Court requires the injury to be “concrete and not simply abstract or suspected.” *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. “To have standing, a party must have a personal stake in the outcome of the legal controversy with an adversary. This holding is based on 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.’” *Kincaid*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, at ¶ 9, quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371, citing Section 4(B), Article IV, of the Ohio Constitution.

When considering the issue of standing in the foreclosure context, the court must recognize that a foreclosure action is the consolidation of two separate and distinct claims, one for a personal judgment on the note and one for foreclosure of the mortgage. *Carr v. Home Owners Loan Corp.* (1947), 148 Ohio St. 533, 540, 36 O.O. 177, 76 N.E.2d 389. These claims “are thus merely brought into one action for enforcement. Their independent characteristics are retained.” *Simon v. Union Trust Co.* (1933), 126 Ohio St. 346, 349, 185 N.E. 425.

Because there are two distinct actions being pursued concurrently, a party who wishes to file a foreclosure action must establish justiciability – and thus standing – for each action. Without an ownership interest in the mortgage, the plaintiff is a mere stranger to the mortgage and has no legal standing to request the court to foreclose on that contract. Here, Freddie Mac

did not have any interest in either the Note or the Mortgage when it filed its Complaint. As a result, it had no personal stake in the outcome of the claim and, thus, had no standing to ask the trial court to foreclose on the Mortgage.

B. A foreclosure claim is not ripe for adjudication if the plaintiff had no interest in the mortgage.

Ripeness is a question of timing. *State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio* (1998), 82 Ohio St.3d 88, 89, 694 N.E.2d 459. “The basic principle of ripeness may be derived 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.” *Id.*, quoting Comment, *Mootness and Ripeness: The Postman Always Rings Twice* (1965), 65 Colum.L.Rev. 867, 876. “A claim is not ripe for review if it rests upon a future event that might not occur or occur as anticipated.” *Kirk v. Kirk* (3rd Dist.), 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125, ¶ 5; see *Stewart*, 134 Ohio App.3d at 558-559, 731 N.E.2d 743; *State ex rel. Keller v. Columbus* (10th Dist.), 164 Ohio App.3d 648, 2005-Ohio-6500, 843 N.E.2d 838, ¶ 20. “The determination of whether a cause is ripe for review is made based upon the circumstances at the time of the filing, not on subsequent facts that could not have been known at the time the motion was filed.” *Kirk* at ¶ 5.

Here, the appellate court determined that Freddie Mac had no interest in the Note or the Mortgage when it filed its Complaint. Freddie Mac’s foreclosure claim was not ripe because it rested upon a future event – execution of an assignment from the actual owner of the Mortgage to Freddie Mac – that might not occur or occur as anticipated. The fact that those future events actually occurred is irrelevant because the trial court was required to determine ripeness – and thus justiciability – at the time Freddie Mac filed its Complaint.

IV. This Court should enforce the doctrine of standing and the rules for prosecuting an action in the name of the real party in interest, which already exist for all litigants.

A. The question of whether a party is a real party in interest under Civ.R. 17 is a separate issue from whether that party has standing.

Grappling with deficiencies in the mass filings of complaints in the emerging foreclosure crisis, Ohio's appellate courts have split on whether and how a plaintiff asserting a cause of action in foreclosure can "cure" a lack of standing to sue. At least four districts, including the Second District, that have allowed a "cure" to a defect in standing have done so via expansion of Civ.R. 17. The First and Eighth Districts have held that foreclosure plaintiffs cannot acquire standing by obtaining their interest in the mortgage after having filed suit. These courts have held that Civ.R. 17 cannot be expanded, misapplied, or misread to cure an otherwise fatal defect.

The constitutional mandate of standing to sue and Civ.R. 17 both involve the plaintiff's personal interest in a case. That, however, is the extent of the connection between the doctrine of standing and the remedial mechanism of Civ.R. 17. The two should not be confused as interchangeable. Standing is a constitutional requirement for a plaintiff to enter into the courthouse, while Civ.R. 17 is a procedural device that governs the subsequent conduct of the parties. See *Northland Ins. Co. v. The Illuminating Co.*, 11th Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, ¶ 17. Because of these very distinctions, Civ.R. 17 cannot and must not be misapplied as an antidote to "cure" a plaintiff's complete lack of standing in the first instance.

These two distinct concepts have become intertwined in foreclosure-related case law only because banks have muddled the concepts to fit their self-created predicament of filing foreclosure actions prematurely, before actually acquiring an interest in the mortgages they seek to foreclose. Accordingly, there are relatively few appellate cases that analyze the distinction

because, until recently, few plaintiffs in any other area of the law have had the temerity to sue to enforce obligations or redress injuries in which they had no cognizable interest at the time of filing. As with any lawsuit, when presented with a foreclosure case, a court must first consider whether the foreclosing party has standing. If the plaintiff does not have standing, the case must be dismissed. If the plaintiff has standing, the case can proceed, but upon a challenge by the defendant, the court must then decide whether the plaintiff is the real party in interest. See *First Union Natl. Bank v. Hufford* (3rd Dist.), 146 Ohio App.3d 673, 2001-Ohio-2271, 767 N.E.2d 1206, ¶ 18.

B. Civ.R. 17 does not apply to situations in which foreclosing plaintiffs know when filing suit that they have no standing and could have determined the real party in interest.

The Second District allowed Freddie Mac to use Civ.R. 17 to circumvent its lack of standing. Although the Supreme Court of Ohio has yet to apply standing specifically to foreclosure plaintiffs, this Court has repeatedly and consistently held that a party must have standing to bring a lawsuit. In a case involving claims under an insurance contract, the Court held that “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 * * *.” *Kincaid*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, at ¶ 9. In a contracts case, this Court held that “only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio.” *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St. 3d 158, 161, 566 N.E.2d 1220. The issue of standing often arises in challenges to the constitutionality of statutes and ordinances, and this Court has held that “[a] person has no

standing to attack the constitutionality of an ordinance unless he has a direct interest in the ordinance of such a nature that his rights will be adversely affected by its enforcement.”

Anderson v. Brown (1968), 13 Ohio St.2d 53, 233 N.E.2d 584, paragraph one of the syllabus.

The First and Eighth District Courts of Appeals have properly applied this Court’s holdings to foreclosure cases in which the plaintiffs sought to cure the lack of standing by citing their right to cure a real party defect under Civ.R. 17. The First District held in *Wells Fargo v. Byrd* that “in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.” *Wells Fargo v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, ¶ 16. The court rejected the plaintiff’s contention that it had cured under Civ.R. 17, finding “instructive” the reasoning of a federal court in the analogous context of a statute of limitations defect: “Rule 17(a) does not apply to a situation where a party with no cause of action files a lawsuit to toll the statute of limitations and later obtains a cause of action through assignment.” *Id.* at ¶ 15, quoting *United States v. CMA, Inc.* (C.A.9, 1989), 890 F.2d 1070, 1074 (discussing analogous federal rule).² The First District reaffirmed its *Byrd* holding in a case in which “[a] thorough review of the record reveals that the sole indication of [the bank’s] interest as mortgagee is an after-acquired assignment * * *.” *Bank of New York v. Gindele*, 1st Dist. No. C-090251, 2010-Ohio-542, ¶ 3. The court rejected the availability of a Civ.R. 17 cure because “the record does not reflect any understandable mistake by Bank of New York; there is no indication that the identity of the proper party was difficult to ascertain; and there is no documentary proof that Bank of New York owned an enforceable interest when it filed its foreclosure complaint.” *Id.* at ¶ 5.

² Ohio courts can look to the federal rule and accompanying case law on this issue because Ohio’s Civ.R. 17(A) is modeled after Fed.R.Civ.P. 17(a). See 1970 Staff Notes to Civ.R. 17(A).

In *Wells Fargo Bank, N.A. v. Jordan*, the Eighth District Court of Appeals reversed judgment for a foreclosing bank that took assignment of the mortgage “nearly three weeks after it filed its complaint,” and adopted the Civ.R. 17 analysis of the First and Eleventh Districts that “[a] person lacking any right or interest to protect may not invoke the jurisdiction of the court” and that “Civ.R. 17 only applies if the action is commenced by someone who is sui juris or the proper party to bring the action.” *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 21, quoting *Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, at ¶ 9, *Northland Ins. Co.*, Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, at ¶ 17, and *Travelers Indemn. Co. v. R.L. Smith Co.* (Apr. 13, 2001), 11th Dist. No. 2000-L-014, 2001 WL 369677. The court explicitly followed *Byrd*, dismissing the foreclosure suit because the bank had not been “the real party in interest on the date it filed its complaint seeking foreclosure.” *Id.* at ¶ 25.

As the First, Eighth, and Eleventh Districts have held, Civ.R. 17 cannot be used to fix a lack of standing. Rather, “[Rule] 17(a) is the codification of the statutory principle that an action should not be forfeited because of an honest mistake.” *U.S. for Use & Benefit of Wulff v. CMA, Inc.* (C.A.9, 1989), 890 F.2d 1070, 1075. Civ.R. 17(A) applies only when determining the correct party is difficult or when a plaintiff makes an honest and understandable mistake. Fed.R.Civ.P. Advisory Committee Notes, 1966 Amendment. The Advisory Committee Notes from the 1966 Amendment, the last substantive change to Fed.R.Civ.P. 17, are particularly applicable to this case. The Committee said, “Modern decisions are inclined to be lenient when an honest mistake has been made in choosing a party in whose name the action is to be filed * *

*. The provision should not be misunderstood or distorted. It is intended to prevent forfeiture

when determination of the proper party to sue is difficult or when an understandable mistake has been made.”

One example of an understandable and excusable mistake under Fed.R.Civ.P. 17 is when a surviving spouse brings a wrongful death lawsuit as the administrator of the estate and the court determines that the law of another state, which requires the suit to be brought in her own name, controls. *Crowder v. Gordons Transports, Inc.* (C.A.8, 1967), 387 F.2d 413, 418-419. However, 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 Fed.Appx. 355; *U.S. for Use & Benefit of Wulff*, 890 F.2d at 1074. In other words, Civ.R. 17 does not protect parties who know or should know that they are not the real party in interest at the time they file. *Haxtun Tel. Co.*, 57 Fed.Appx. at 359; 6 C. Wright and A. Miller, *Federal Practice and Procedure* § 1555 (1971).

Ohio’s courts have adopted the position of the federal Advisory Committee. In *Ohio Cent. RR. Sys. v. Mason Law Firm Co., LPA*, the Tenth District stated, “When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed.” 182 Ohio App.3d 814, 2009-Ohio-3238, 915 N.E.2d 397, ¶ 41, quoting *Feist v. Consol. Freightways Corp.* (E.D.Pa. 1999), 100 F. Supp.2d 273, 275); see *Gindele*, 2010-Ohio-542 at ¶4. The court in *Ohio Cent. RR.* upheld the trial court’s refusal to allow ratification under Civ.R. 17, finding that the plaintiff “made no attempt to demonstrate to the trial court that the failure to name the real party in interest * * * was the result of an honest mistake under the circumstances in which it was difficult to ascertain the identity of the proper party.” 182 Ohio App.3d 814 at ¶ 43. As the court in *Feist* said, “To allow a substitution where a plaintiff cannot establish that he was acting

as the result of an honest mistake would contravene the purpose of Rule 17(a).” 100 F. Supp.2d at 280.

Pursuant to Civ.R. 10, a foreclosing plaintiff must attach to its complaint the “written instruments” – here the note and mortgage – giving rise to the foreclosure, or provide a statement in its complaint explaining the reason for its omission. The foreclosing party must therefore scrutinize its written instruments before filing suit, and should not be excused from making a determination of whether it is properly positioned to file its lawsuit. As Freddie Mac never owned an interest in the note and mortgage before filing the underlying suit, it misapplied Civ.R. 17 to correct its false pleadings.

Several Ohio trial courts, positioned on the front lines of receiving mass quantities of defective foreclosure pleadings, have seen through this misuse of the Rules of Civil Procedure and have refused to permit it. For example, in *DLJ Mortgage Capital, Inc. v. Bazy*, the foreclosing plaintiff was assigned the mortgage after it filed the complaint but before the defendant raised any objection. (May 16, 2003), No. 02-4316 at 5 (attached as Appendix A). In dismissing the complaint, the Court of Common Pleas of Montgomery County stated, “This Court refuses to apply Civ.R. 17(A) in a way that would encourage – much less reward – what can be at best deemed gross inaccuracies within the Complaint. Civ.R. 17(A) does not serve to relieve a prosecuting party of its duties under Civ.R. 11, specifically that the information contained within a pleading has good grounds to support it. * * * This Court refuses to allow a party to ‘correct’ a clearly false pleading by relying on Civ.R. 17(A).” *Id.* In the Appendix to this Brief, Amici submit other trial court decisions from throughout the state that similarly dismiss faulty foreclosure complaints. *Deutsche Bank Natl. Trust Co. v. Edwards* (C.P. Erie Cty. 2009), No. 08-CV-712E (attached as Appendix B); *Wells Fargo Bank v. Heiskell* (C.P. Franklin

Cty. 2003), No. 02CVE-10-11149 (attached as Appendix C); *Wells Fargo Bank, N.A. v. Hissa* (C.P. Lucas Cty. 2009), No. CI-08-6993 (attached as Appendix D). Amici submit that trial courts faced with dedicating immense resources to the proper litigation of these claims need the clarity of this Court's expression that justiciability in the foreclosure context requires both standing and ripeness upon the filing of a complaint in foreclosure.

Such a requirement is not onerous. It is simply due diligence. In every conflict case, the plaintiffs claimed in their complaints that they had an interest in the note, mortgage, or both subject to litigation. In the present case, Freddie Mac did not have any interest in either of the contracts upon which it based its claims when it filed its Complaint. As the Second District noted, in its Complaint, Freddie Mac claimed to be the holder of the Note. 2011-Ohio-2681, -- N.E.2d --, ¶ 5. That was incorrect, a fact sustained by the appellate court's decision. *Id.* at ¶ 41-52. In fact, it had no interest at all in the Note at that time. *Id.* In addition, Freddie Mac claimed in its Complaint it was the owner of the Mortgage. That too was incorrect. In reality, Freddie Mac did not have any interest in the Mortgage until one month after it filed its Complaint. *Id.* at ¶ 8.

Freddie Mac had the obligation to determine whether it was a proper party to file the lawsuit, prior to filing its Complaint. Freddie Mac knew or should have known from its own attachments to the Complaint that it did not own an interest in the note and mortgage subject to its lawsuit. Just as Civ.R. 17 was not designed to allow plaintiffs to circumvent the doctrine of standing, it also was not designed to allow plaintiffs to file pleadings that they know or should know are false when filed.

Freddie Mac's filing of a foreclosure complaint before it had standing is not an isolated incident excusable as a mere oversight or the failure to compare its exhibits with its pleadings.

Instead, it is merely one instance of a common, deliberate, and flagrant abuse of Ohio courts by foreclosure plaintiffs. The number of conflict cases in which foreclosing plaintiffs filed a complaint when they did not have an interest in either the note, the mortgage, or both, shows that this is not merely an occasional oversight but, in fact, a deliberate practice. Just like the plaintiffs in the other conflict cases, Freddie Mac knew when it filed its Complaint that it had no interest in the written instruments on which it based its lawsuit. Instead, Freddie Mac and the other plaintiffs all filed with the expectation of routinely submitting a post-dated note endorsement or mortgage assignment – if challenged by a homeowner. This Court should not permit this practice to continue.

V. It would be dangerous for courts to deviate from the standing and real party in interest rules to accommodate the business practices of one industry.

The basic requirement that a plaintiff have standing in order to file a lawsuit applies to all litigants in our legal system, and is indeed one of the concepts on which our entire justice system is based. If this Court were to affirm the Second District's holding and adopt it as a general rule to be applied to all plaintiffs, it would open the courthouse door wide to abuse. For example, a property speculator could file eviction complaints to remove tenants before buying the property. Debt collectors could minimize their risks by suing a multitude of debtors and waiting to buy the debts of only those who failed to file an answer. Taken to its logical conclusion, the Second District's holding would permit an individual plaintiff to sue a bank over his neighbor's bank account, so long as that plaintiff thought he might marry the neighbor and become a co-holder of that account in the future. Indeed, allowing mortgage foreclosure plaintiffs to file suit without standing would have far-reaching consequences. There is nothing unique to foreclosure cases that should compel this Court to upset the legal order for all civil suits or to carve out exceptional rules of law and civil procedure for foreclosures.

VI. Foreclosure plaintiffs' recent and ongoing assault on the integrity of the courts is exemplified by this case.

In the present case, Freddie Mac filed a foreclosure suit on April 15, 2009. The Second District determined that Freddie Mac had no rights in either the homeowner's note or mortgage when it sued and only acquired those rights one month later, on May 15, 2009. Although the particulars vary, the conflict cases before this Court have similar facts in common: the plaintiffs acquired their legal interest in the homeowners' mortgages *after* suing to foreclose.

This fact pattern is all-too-familiar to Amici, who routinely defend foreclosure cases that were brought prematurely by plaintiffs who had no legal interest in the mortgages when they filed suit. Such plaintiffs claim they are entitled to foreclose on homeowners' interests in their property when, in fact, the homeowners' mortgage contracts are with other lending institutions. The foreclosing banks then seek to legitimize their claims by purporting to acquire an ownership interest after filing the lawsuit. This widespread industry practice amounts to utter disregard for basic tenets of constitutional standing and rules of civil procedure, and constitutes an assault on the integrity of Ohio courts. A financial institution that does not have any ownership interest in a borrower's note and mortgage should not posture to an Ohio court that it is somehow entitled to foreclose and take that borrower's home. Financial institutions are not entitled to unique exemptions from the doctrine of standing and rules of procedure.

Although most foreclosures are filed and adjudicated in state courts, this issue first made national headlines in a series of decisions in Ohio federal courts. In the fall of 2007, federal courts in both Northern and Southern Ohio dismissed numerous cases simultaneously and *sua sponte* because the foreclosing plaintiffs had filed suit before any rights or interests in the underlying mortgages had been transferred to them. *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F. Supp.2d 650, 655; *In re Foreclosure Cases* (N.D. Ohio), 2007 WL 3232430, *3; see also

Deutsche Bank Natl. Trust Co. v. Hanna (N.D. Ohio), 2007 WL 4276661, *2.³ In dismissing fourteen foreclosure cases brought by Deutsche Bank in the Northern District, Judge Boyko rebuked the plaintiff for having “rushed” to sue without owning the subject notes and mortgages, pointing out that, “The [financial] 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.” *In re Foreclosure Cases*, 2007 WL 3232430, *3.

The Massachusetts Supreme Judicial Court recently affirmed a lower court’s ruling undoing foreclosure sales where foreclosing parties did not acquire an interest in the mortgage until after sheriff’s sale. *U.S. Bank Assn. 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 because an assignment of mortgage is a transfer of legal title and, thus, cannot take effect until it actually happens. *Id.* at 653-654. 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.

Likewise, in the instant action, the Second District Court of Appeals has created an unwarranted exception to the well-established legal principles that apply to all other litigants who attempt to bring claims before Ohio courts. Those principles have not changed; all that has

³ While one of the considerations in the federal dismissals was whether the plaintiff banks, lacking notes and/or mortgages, had met federal diversity requirements, the federal courts have also attended to the absence of ownership as a standing defect and the invalidity of reliance of Fed.R.Civ.P. 17 as a cure for premature foreclosure suits by lenders who did not have the necessary interest in the note and/or mortgage when they sued.

changed is the lenders' desire to foreclose on mortgages they do not yet own. This Court must uphold the requirements that a plaintiff must have standing in order to file a lawsuit and that a real party in interest defect can be "cured" only in certain narrow circumstances that do not apply to these cases. Only this Court can ensure that these basic requirements are consistently applied throughout Ohio.

VII. The rampant industry practice of filing suit without being properly positioned to do so is an abuse of Ohio courts and a threat to every homeowner, not just the clients of Amici Ohio Legal Services programs.

Enforcement of standing and real party in interest requirements is critical in the foreclosure context, where a severe imbalance of knowledge and resources characterizes almost every case. Foreclosure cases are decided only rarely through contested litigation. This Court reported in its *2008 Ohio Courts Statistical Summary* that nearly half of all foreclosure cases ended with a default judgment. 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, well over 40,000 Ohio foreclosure cases were resolved through default judgment. Amici's anecdotal experience suggests that the vast majority of the remaining cases are only nominally contested by homeowners who file pro se answers but, due to lack of ability and resources, make no meaningful response to the plaintiff's motion for summary judgment. Therefore, as the vast majority of foreclosure cases are decided with no meaningful opposition, the traditional doctrine of standing and rules pertaining to real party in interest are necessary to protect the rights of Ohio homeowners.

VIII. Departure from prudential mortgage lending standards was a major cause of the foreclosure crisis, and foreclosing plaintiffs should not be permitted to keep relaxing the rules for their own convenience and profit.

As embodied in the Second District Court of Appeal's certified rule of law, foreclosure plaintiffs are essentially asking this Court to waive the standing requirements that apply to all litigants and adopt the concept of "sue now, obtain standing later" in mortgage foreclosure actions. Not only would such a decision have serious foreseeable and unintended consequences throughout Ohio's court system, but the financial industry's pursuit of such special treatment is ironic, given that the financial industry's own departure from prudential lending standards was largely responsible for the tsunami of foreclosure actions that has hit Ohio courts. This is a problem of the financial industry's own making.

The spectacle of banks suing to foreclose on homeowners before obtaining standing to sue is a recent phenomenon, a by-product of the rampant securitization of risky mortgage loans. Poorly underwritten mortgage loans were bundled together and traded as commodities, and ownership interests were "sliced and diced." When large numbers of homeowners began to default, financial institutions found themselves scrambling to obtain original documents and reconstruct the fractured chain of ownership of notes and mortgages. Thus, financial institutions are now asking the courts to deviate from the traditional doctrine of standing and rules pertaining to real party in interest. The proper solution, however, is to require financial institutions to conform their practice to the same law applicable to all.

IX. Upholding well-established standing and real party in interest requirements will not hinder mortgage holders from bringing legitimate foreclosure actions.

Since mortgage foreclosure plaintiffs are often able to obtain a legal interest in a mortgage after filing suit, it is clear that they can also do so before filing. In each of the conflict

cases, the plaintiff had no ownership interest at the time the case was filed, but managed to obtain a purported ownership interest by the time it moved for judgment. In fact, in the instant case, Wells Fargo assigned the Mortgage to the plaintiff, Freddie Mac, just one month after filing suit. Given many plaintiffs' eventual ability to produce some evidence of ownership, it is not surprising that properly presented foreclosures have not been stymied where Ohio courts have required plaintiffs to show ownership of the note and mortgage at the time of filing. Several Ohio courts have adopted local rules and policies that require each foreclosing plaintiff to produce what is essentially evidence of standing and evidence that the plaintiff is the real party in interest.

In November 2010, the Cuyahoga County Common Pleas Court adopted a Residential Mortgage Foreclosure Affidavit Policy, which requires each plaintiff's attorney to sign an affidavit certifying that he or she has communicated with a representative of the foreclosing plaintiff, who has confirmed the accuracy of the documents, pleadings, court filings, and notarizations in the case. As an alternative to counsel signing such an affidavit, the plaintiff's representative can appear in person at a hearing and testify regarding the substantive affidavits that have been filed in the case.⁴

In accordance with the First District's decision in *Byrd*, Hamilton County requires attachment of the note and mortgage to the complaint. The rule specifies, "If the plaintiff is not the payee of the Note or the original mortgagee, then the assignment of mortgage bearing the plaintiff's name shall also be attached to the complaint. If the documents are not attached, the

⁴ A copy of the Third Revised Residential Mortgage Foreclosure Affidavit Policy is available at [http://cp.cuyahogacounty.us/internet/CourtDocs/Magistrates/Residential%20Foreclosure%20Affidavit%20Policy\(Rev4\).pdf](http://cp.cuyahogacounty.us/internet/CourtDocs/Magistrates/Residential%20Foreclosure%20Affidavit%20Policy(Rev4).pdf) (accessed Nov. 21, 2011).

reason for the omission must be stated in the pleading.” Hamilton County Court of Common Pleas, Local Rule 45 (dated April 15, 2009).⁵

The Highland County Common Pleas Court requires that a copy of the mortgage be attached to the complaint, and “[i]f the Plaintiff is not the mortgagee named in the mortgage, the Plaintiff shall file copies of the assignments of the mortgage with the complaint whether or not the assignment has been recorded.” Highland County Court of Common Pleas, Local Rule 15.3, (dated July 1, 2009).⁶

Lucas County Common Pleas Court requires that every foreclosure complaint be accompanied by an affidavit “documenting that the named plaintiff is the owner and/or holder of the note and mortgage.” Lucas County Court of Common Pleas, Local Rule 8.02 (dated March 31, 2008).⁷

Summit County Common Pleas Court has adopted a rule requiring plaintiff’s attorneys, when filing foreclosure actions, to file “a Certificate of Readiness and any required supporting documentation, demonstrating that plaintiff is the real party in interest and the matter is ready to proceed against all necessary parties.” Summit County Court of Common Pleas, Local Rule 11.01 (dated June 1, 2008).⁸

In each of these counties, adoption of these policies does not appear to be hindering financial institutions’ ability to initiate foreclosure actions. Although foreclosure filings

⁵ Available at http://www.hamilton-co.org/common_pleas/Rules.htm (accessed Nov. 21, 2011).

⁶ Available at <http://www.hccpc.org/assets/pdf/hccpc-court-rules-2009-07-01.pdf> (accessed Nov. 21, 2011).

⁷ Available at <http://www.co.lucas.oh.us/documents/Court%20of%20Common%20Pleas/GENRULES012309a.PDF> (accessed Nov. 21, 2011).

⁸ Available at http://www.akronlegalnews.com/rules_of_court/common_pleas/general_division_11 (accessed Nov. 21, 2011).

decreased in each of these counties from 2009 to 2010, those decreases were not unique.⁹ Across the state of Ohio, there was an overall decrease in foreclosure filings of 4 percent during that same period. Policy Matters Ohio, *Home Insecurity: Foreclosure Growth in Ohio 2011* (Feb. 2011) at Table 4.¹⁰ Furthermore, the decreases have been attributed to the “robo-signing” controversy that drew so much media attention during the second half of 2010. “Several of the largest lenders and servicers * * * announced in the summer of 2010 that they were postponing filing new foreclosures because of document errors that included improper signing of legal forms. Had this legal and political controversy not ensued, it is likely that foreclosure filings in Ohio would have continued to increase in 2010.” *Id.* at 4. Indeed, even with these decreases, the number of foreclosures in Ohio “has been and remains at crisis levels.” *Id.* at 1. In 2010, foreclosure plaintiffs initiated 12,825 foreclosure actions in Cuyahoga County; 6,556 foreclosure actions in Hamilton County; 307 foreclosure actions in Highland County; 4,232 foreclosure actions in Lucas County; and 4,320 foreclosure actions in Summit County. *Id.* at Table 4.

Thus, despite being required to adhere to basic constitutional and procedural requirements of standing and real party in interest in these five counties, financial institutions appear to have been virtually unfettered in their ability to initiate huge numbers of foreclosure actions in these Ohio courts. The main difference is that borrowers in these counties are now more fully protected by a system that ensures that all plaintiffs who approach the courthouse

⁹ From 2009 to 2010, the percentage decreases were as follows: 9.5% in Cuyahoga; 2.4% in Hamilton; 19.4% in Highland; 5.8% in Lucas; and 6.8% in Summit. While the percentage decrease in Highland County appears large, this is likely due to the relatively small number of foreclosures in that county and thus the fact that each foreclosure filing represents a larger percentage of the overall total. In absolute numbers, 381 foreclosure cases were filed in Highland County in 2009, and 307 foreclosures were filed there in 2010. Supreme Court of Ohio, “Foreclosures Down 4 percent in 2010,” Feb. 10, 2011.

¹⁰ Available online at <http://www.policymattersohio.org/home-insecurity-foreclosure-growth-in-ohio-2011>.

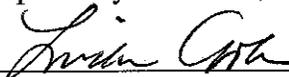
door have standing to do so and are real parties in interest. This Court should make clear that in all Ohio courts, plaintiffs who wish to foreclose on residential mortgages must meet the same standing and real party in interest requirements that apply to all other litigants in our system of justice.

The dismissal of an improperly filed foreclosure imposes no undue hardship upon the foreclosing plaintiff. Civ.R.17 is used to prevent the forfeiture of a claim. The dismissal of a foreclosure where the plaintiff does not own the mortgage is not the forfeiture of a claim. It is merely the enforcement of longstanding requirements that a foreclosing plaintiff, just as any other litigant, have standing to sue. The foreclosing plaintiff is in the best position to verify its interests before commencing litigation. The rule of law proposed by Amici protects the integrity of the court system by requiring that a plaintiff in foreclosure, just like any other litigant seeking redress in court, have an actual, justiciable claim at the time an action is brought.

X. Conclusion

For all of the foregoing reasons, Amici urge this Court to find that in a mortgage foreclosure action, a plaintiff's lack of standing cannot be cured by the assignment of the mortgage prior to judgment, and that where a financial institution files a foreclosure action before obtaining assignment of the mortgage, the "cure" provided under Civ.R. 17 does not apply.

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
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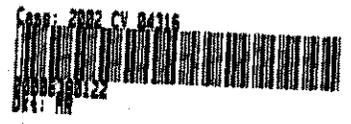
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APPENDIXES

- A. *DLJ Mortgage Capital, Inc. v. Bazzy* (C.P. Montgomery Cty. 2003), No. 02-4136A
- B. *Deutsche Bank Natl. Trust Co. v. Edwards* (C.P. Erie Cty. 2009), No. 08-CV-712E
- C. *Wells Fargo Bank, N.A. v. Heiskell* (C.P. Franklin Cty. 2003), No. 02 CVE-10-11149
- D. *Wells Fargo Bank, N.A. v. Hissa* (C.P. Lucas Cty. 2009), No. CI-08-6993

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DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

DLJ MORTGAGE CAPITAL INC.,	:	Case No. 02-4316
Plaintiff,	:	(Judge John W. Kessler)
v.	:	
JAMIL BAZZY, et al.,	:	DECISION, ORDER AND ENTRY
Defendants.	:	SUSTAINING DEFENDANT BAZZY'S
	:	MOTION TO DISMISS; AND
	:	MOOTING ALL OTHER PENDING
	:	MOTIONS

This matter is before the Court on Plaintiff DLJ Mortgage Capital Inc.'s ("DLP") Motion for Summary Judgment filed October 15, 2002; Defendant Jamil Bazy's ("Bazy") Motion to Dismiss and Motion for Judgment on the Pleadings filed October 17, 2002; Defendant Bazy's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed October 17, 2002; Defendant Bazy's Motion for Leave to File Third Party Complaint filed October 17, 2002; and Plaintiff's Memorandum in Opposition to Motion to Dismiss and Motion for Judgment on the Pleadings filed October 29, 2002.

For the reasons stated below, Defendant Bazy's Motion to Dismiss is SUSTAINED; and all other pending Motions are hereby rendered MOOT.

Appendix A

I. FACTS

On January 9, 2002, Bazy executed and delivered a mortgage deed secured by a promissory note ("Note") in the amount of \$65,700.00, to Mortgage Electronic Registration Systems, Inc., as a Nominee for Finance America, LLC ("Finance America"). On April 1, 2002, Bazy failed to pay the installment of principal and interest due on the ("Note"). Under Paragraph 7(B) of the Note, this failure to tender payment constituted a default on the Note. As result, on July 5, 2002, DLJ filed a Complaint for Foreclosure and alleged in party that subsequent to January 9, 2002, the Note had been indorsed to it. Pursuant to Ohio Rule of Civil Procedure 10(D), DLJ attached a copy of the Note to its Complaint. The Note listed the lender as Finance America and did not indicate that it had been indorsed to DLJ. As part of its present Motion for Summary Judgment, DLJ attached a copy of an Assignment of Mortgage ("Assignment") for the Note, indicating that the Note had been assigned to it on August 1, 2002.

II. LAW AND ANALYSIS

Presently before the Court are DLJ's Motion for Summary Judgment, Bazy's Motion to Dismiss and Motion for Judgment on the Pleadings, and Bazy's Motion for Leave to File Third Party Complaint. The Court will begin by addressing Bazy's Motion to Dismiss, as such is potentially dispositive of the other Motions.

A. Bazy's Motion to Dismiss and Judgment on the Pleadings

Bazy moves this Court to dismiss the foreclosure action asserted against him by DLJ, contending that he is entitled to judgment on the pleadings because at the time DLJ filed the action, it was not the holder of the mortgage note, and as such, not the real party in interest as

required under Ohio Rule of Civil Procedure 17(A).

Civ. R. 17(A) mandates that “[e]very action shall be prosecuted in the name of the real party in interest.” The underlying purpose of this is “to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter.” *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24-35. A “real party in interest” is one who is directly benefitted or injured by the outcome of the case and does not merely possess an interest in the action itself. *Id.*, at 24. When attempting to ascertain the “real party in interest,” it is proper for a court to inquire which party would be entitled to damages. *Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1993), 88 Ohio App.3d 12, 16. If a prosecuting party fails to establish itself as a real party in interest, said party lacks standing to invoke the jurisdiction of the court and is not entitled to judgment as a matter of law. *Kramer v. Millott* (Sept. 23, 1994), Erie Co. App. No. E-94-5, unreported, at 1994 WL 518173.

It is undisputed that DLJ filed the Complaint nearly four weeks before the Note had been indorsed to it. As such, at the time of the July 5, 2002, filing date, DLJ was not a real party in interest as it would have been Finance America, not DLJ, who would have been entitled to damages under the Note.

While conceding this, DLJ points out that Civ. R. 17(A) also provides 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. 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.” DSL claims that by this language, the Complaint should not be dismissed because by virtue of the Assignment of the Note on August 1, 2002 it became the real party in interest in this foreclosure action. The Court rejects DLJ’s contention that mere submission of the copy of the Assignment is sufficient to establish that it is the real party in interest for this action for two reasons.

First, the language of Civ. R. 17(A) specifically requires that any ratification of commencement of the action by, or joinder or substitution of, the real party in interest take place *after* an objection is made that the prosecuting party is not a real party in interest. Such objection was not raised until Bazy’s Answer was filed on August 23, 2002, indicating that DLJ “may not be the proper and duly authorized assignee of the mortgage and/or note and/or the true party interest.” Thus under Civ. R. 17(A), once this objection was raised, DLJ had a “reasonable time” to obtain a ratification of commencement of the action from Finance America, or otherwise move to substitute or join them to the action. However, it made no effort to obtain such ratification of commencement or otherwise comport with Civ. R. 17(A). Instead, DLJ waited until October 15, 2002, and filed a Motion for Summary Judgment. As part of this Motion for Summary Judgment, DLJ simply attached the Assignment made on August 1, 2002, and relied thereon to establish that it was the real party in interest. The Court finds that this copy of the Assignment made August 1, 2002, does not comport with the plain language of Civ. R. 17(A). Civ. R. 17(A) required that after the objection was raised, an affirmative action be taken by DLJ as the prosecuting party to place on the record a ratification of commencement of the action from Finance Mortgage, just as such an affirmative action would have been

required to substitute or join Finance Mortgage. DLJ certainly had a reasonable time to take such action, but chose instead to file its Motion for Summary Judgment and rely on the Assignment made after the filing of the Complaint but before Defendant Bazzy's objection was raised. Therefore, this Court finds that under the present facts, DLJ has failed to establish that it is a real party in interest as required under Civ. R. 17(A), and as such, lacks standing to invoke the jurisdiction of this Court.

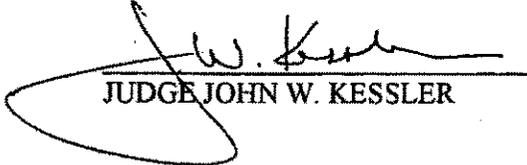
Second, even if this Court could find that DLJ's mere inclusion the Assignment was sufficient to comport with Civ. R. 17(A), this Court refuses to apply Civ. R. 17(A) in a way that would encourage—much less reward—what can be at best deemed gross inaccuracies within the Complaint. Civ. R. 17(A) does not serve to relieve a prosecuting party of its duties under Civ. R. 11, specifically that the information contained within a pleading has good grounds to support it. In other words, Civ. R. 11 prohibits a party from knowingly making a false statement in a pleading. In its Complaint filed on July 5, 2002, DLJ specifically stated that Finance America had indorsed the Note to it. However, by DLJ's own admission, Finance America did not assign the Note to DLJ until August 1, 2002. Thus DLJ averred that the Note had been indorsed to it as of July 5, 2002, when in fact such was not the case. This Court refuses to allow a party to “correct” a clearly false pleading by relying on Civ. R. 17(A).

For these reasons, the Court hereby SUSTAINS Bazzy's Motion to Dismiss and Judgment on the Pleadings. As such, all other pending motions are hereby rendered MOOT.

III. CONCLUSION

After a thorough analysis of the facts and authorities proffered in this case, Bazzy's Motion to Dismiss is SUSTAINED and all other pending Motions are hereby rendered MOOT.

SO ORDERED:


JUDGE JOHN W. KESSLER

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail on this filing date.

Jeffrey V. Laurito, Attorney for Plaintiff, 35 Commercial Way, Springboro, OH 45066

Ronald L. Burdge, Attorney for Defendant Bazy, 2299 Miamisburg Centerville Road, Dayton, OH 45459

Richard M. Zimmerman, Attorney for A-OK Exterminating Company, 2755 Springmont Avenue, Dayton, OH 45420

Arbors at Dayton, 320 Albany Street, Dayton, OH 45408

C. Robert Swaninger, Assistant Prosecuting Attorney and Attorney for Defendant Montgomery County Treasurer, 5th Floor, 301 W. Third Street, Dayton, OH 45402

Tim Walker, Bailiff

ORIGINAL

FILED
COMMON PLEAS COURT
2009 APR 14 AM 10 02
ENNIFER L. WILKINS
CLERK OF COURTS
OTTAWA COUNTY, OHIO

IN THE COMMON PLEAS COURT OF
OTTAWA COUNTY, OHIO

Deutsche Bank National Trust Company, as
Trustee for Saxon Asset Securities Trust
2006-3

: Case No 08-CV-712E

Plaintiff(s),

v.

: JUDGMENT ENTRY

Christopher Lee Edwards, et. al.,

Defendant(s).

{¶1} This matter is before the Court *sua sponte*.¹ The foreclosure plaintiff named in this matter has not complied with the Court's Notice of Intent to Dismiss filed December 29, 2008, requiring it to show that it is the real party in interest. "[A] foreclosure plaintiff * * *

¹ *Buckeye Foods v. Cuyahoga Cty. Bd. Of Revision* (1999), 78 Ohio St.3d 459, 460, 1997 Ohio 1999, 678 N.E.2d 917. *State ex rel. Intl. Assn. of Firefighters, Local 381, AFL-CIO v. The City of Findlay*, 3rd Dist. No. 5-05-21,

VOL 0576 PG 304

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Appendix B

116

COMMON PLEAS COURT OF OTTAWA COUNTY

especially one who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit was filed. In other words, a foreclosure plaintiff must provide documentation that it is the owner and holder of the note and mortgage as of the date the foreclosure action is filed.”²

{¶2} IT IS ORDERED, ADJUDGED, and DECREED that the foreclosure plaintiff has failed to file documentation identifying it as the owner and holder of the note, as the original mortgage holder, or as an assignee, trustee or successor-in-interest as required by this Court’s Notice of Intent to Dismiss;

{¶3} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this action is DISMISSED pursuant to Civ.R. 41(B)(1) with costs to the foreclosure plaintiff;

{¶4} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Clerk of Courts shall send copies of this Judgment Entry to all parties of record or their counsel by regular U.S. Mail, “forthwith.”³

APRIL 13, 2009



BRUCE WINTERS, JUDGE

2006-Ohio-1774. *County Treasurer v. Battersby (In re Foreclosure of Liens & Forfeiture of Prop.)*, 11th Dist. No. 11th Dist. No. 2007-L-002, 2007-Ohio-4377, 2007 Ohio App. LEXIS 3949.

² *In re Foreclosure Actions*, 2007 WL 4034554 (N.D. Ohio).

³ *Seger v. For Women, Inc.* 110 Ohio St.3d 451, 2006-Ohio-4855 (“The Civil Rules * * * require immediate service, and the clerk violates his duties by failing to attempt prompt service.”) Black’s Law Dictionary defines “forthwith” as “[i]mmediate; without delay.” Black’s Law Dictionary (8th Ed. 2004) 680.

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Wells Fargo Bank Minnesota, N.A., as Trustee,

Plaintiff,

vs.

Donna M. Heiskell, et al.,

Defendants.

FINAL APPEALABLE ORDER

Case No. 02CVE-10-11149

JUDGE CRAWFORD

TERMINATION NO. 18
[Signature]

DECISION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED
DECEMBER 20, 2002

&

ENTRY DISMISSING THE ABOVE-CAPTIONED MATTER

Rendered this 28th day of January, 2003.

CRAWFORD, J.

This matter is before the Court on Plaintiff Wells Fargo Bank Minnesota, N.A., as Trustee's (hereinafter referred to as "Plaintiff") Motion for Summary Judgment, filed December 20, 2002. Plaintiff moves the Court, pursuant to Civ. R. 56, for a summary judgment in its favor for all the relief prayed for in its Complaint on the grounds that there is no genuine issue as to any material fact in this action and Plaintiff is entitled to judgment as a matter of law. On January 6, 2002, Defendant Donna M. Heiskell filed a Memorandum Contra to Plaintiff's Motion for Summary Judgment.

Plaintiff supports its Motion with the affidavit of Teresa Bratcher (hereinafter referred to as "Bratcher"). Bratcher states that on July 13, 1998, Defendant Donna M. Heiskell (hereinafter referred to as "Defendant") executed and delivered to Delta Funding Corporation her promissory note in the principal amount of \$35,100.00 with interest at the rate of 11.5% per annum.

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CLERK OF COURTS

Appendix C

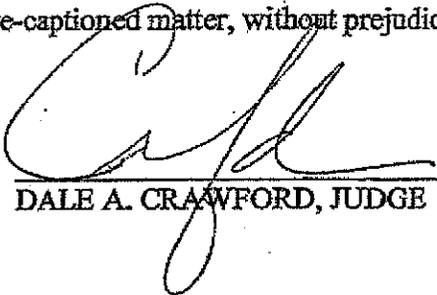
(Bratcher Affidavit ¶ 4) On that same date and contemporaneously therewith, Defendant executed and delivered her mortgage deed to Delta Funding Corporation to secure the above-referenced promissory note. (Bratcher Affidavit ¶ 5) Bratcher asserts that the mortgage deed was subsequently assigned to Plaintiff. (Bratcher Affidavit ¶ 5)

Bratcher states that Defendant failed to pay, when and as it became due, the monthly payment on the mortgage due on July 17, 2000 and all monthly payments subsequently due. (Bratcher Affidavit ¶ 8) Therefore, Defendant is in default for non-payment under the terms of the mortgage. (Bratcher Affidavit ¶ 8) Bratcher asserts Defendant owes \$34,689.43, plus interest at the rate of 11.5% from July 17, 2002, plus late charges, and its advances for taxes and insurance, costs. (Bratcher Affidavit ¶ 10)

Defendant asserts in her Memorandum Contra that Plaintiff was not the real party in interest at the time the above-captioned matter was filed. Defendant states that the Assignment of Mortgage was dated on November 18, 2002 and was recorded on November 25, 2002; however, the above-captioned matter was filed on October 8, 2002. Therefore, at the time Plaintiff filed the above-captioned matter it was not the real party in interest because it was not the holder of the promissory note and mortgage. As a result, the Court finds that at the time the above-captioned matter was commenced Plaintiff did not have a cause of action against Defendant.

Accordingly, the Court hereby denies Plaintiff's Motion for Summary Judgment, filed December 20, 2002. Additionally, due to the fact that Plaintiff had no claim against Defendant in the time the above-captioned matter was filed and since Plaintiff did not file a Supplemental Amended Complaint, the Court hereby dismisses the above-captioned matter, without prejudice.

So Ordered.



DALE A. CRAWFORD, JUDGE

Copies to:

Glenn Alban
Counsel for Plaintiff

Joseph V. Maskovyak
Counsel for Defendant Donna M. Heiskell

Unknown Spouse of Donna M. Heiskell
Defendant

Unknown Tenant of 1310 Moundview Avenue
Columbus, Ohio 43207

FILED
LUCAS COUNTY

2009 FEB 25 A 8:32

COMMON PLEAS COURT

IN LUCAS COUNTY, OHIO, COMMON PLEAS COURT

Wells Fargo Bank, N.A.,

Plaintiff,

vs.

Jill Hissa, et al.,

Defendants.

*

Case No. CI 08-6993

*

Honorable Denise Ann Dartt

*

**OPINION AND JUDGMENT
ENTRY**

*

*

This foreclosure action is before the Court upon Defendant Jill Hissa's Motion to Dismiss on the basis that Plaintiff Wells Fargo Bank was not a real party in interest at the time the complaint was filed.

The holder of a mortgage is the real party in interest with standing to sue on the contract.¹ It is undisputed that Option One Mortgage Corporation ("Option One") was the holder of the note and mortgage at issue when the complaint was filed in the instant case. Plaintiff Wells Fargo Bank was not assigned the mortgage until three days later. The issue, therefore, is whether the assignment of the mortgage after the filing of the complaint is sufficient to establish Wells Fargo Bank as the real party in interest.

Civ.R. 17(A) provides that "Every action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not

¹*Kramer v. Millot* (Sept. 23, 1994), Erie App. No. E-94-5, 1994 Ohio App. Lexis 4454.

prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

However, the Eleventh District Court of Appeals has held that Civ.R. 17(A) is not applicable unless a plaintiff had standing to invoke the jurisdiction of the court in the first place.² Moreover, Civ.R. 17(A) “only allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest.”³ There is no evidence in this case that Option One ratified the commencement of this action or that Wells Fargo Bank was acting as Option One’s agent.

The Court therefore finds that Wells Fargo Bank cannot cure its lack of standing by subsequently obtaining an interest in the mortgage. Accordingly, Defendant Jill Hissa’s Motion to Dismiss is well-taken.

²*Travelers Indemn. Co. v. R.L. Smith Co.* (Apr. 13, 2001), Lake App. No. 2000-L-014, 2001 Ohio App. Lexis 1750; *Northland Ins. Co. v. Illuminating Co.*, 2004 Ohio 1529, Ashtabula App. Nos. 2002-A-0058 and 2002-A-0066. See also, *DLJ Mortgage Capital Inc. v. Bazy* (May 16, 2003), Montgomery C.P. No. 02-4316.

³*Wells Fargo Bank v. Byrd* (2008), 178 Ohio App.3d 285.

JUDGMENT ENTRY

It is **ORDERED** that the Motion to Dismiss filed by Defendant Jill Hissa is **GRANTED**, and all claims are **DISMISSED** without prejudice.

Date: 2-20-09

Denise Ann Dartt
Denise Ann Dartt, Judge