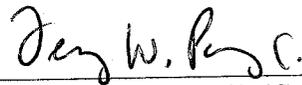


it in fact had standing as of the filing of the Complaint, and to instruct the common pleas court to only dismiss the case without prejudice if Freddie Mac cannot do so.

Freddie Mac is filing the attached Memorandum in support of the Motion.

Respectfully submitted,



Scott A. King (#0037582) (Counsel of Record)

Terry W. Posey, Jr. (#0078292)

THOMPSON HINE LLP

Austin Landing I

10050 Innovation Drive

Suite 400

Dayton, Ohio 45342

Telephone: (937) 443-6560

Facsimile: (937) 443-6635

Scott.King@Thompsonhine.com

Terry.Posey@Thompsonhine.com

*Counsel for Plaintiff-Appellee Federal Home Loan
Mortgage Corporation*

IN THE SUPREME COURT OF OHIO

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff-Appellee,

v.

DUANE SCHWARTZWALD, et al.,

Defendants-Appellants.

Case No. 2011-1201 and 2011-1362
:
:
:
:
On Appeal From Greene County Court of Appeals, Second Appellate District
:
:
Court of Appeals
Case No. 2010 CA 0041
:
:
:

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Opinion held that a plaintiff must be able to prove that it has standing to maintain the action as of the time that it filed the complaint, and that if it does not do so, a plaintiff has no ability to “invoke the jurisdiction” of a common pleas court in the first instance, requiring the case to be dismissed. Because the record in this case did not show that Freddie Mac had standing as of the time of filing of the Complaint, the Court dismissed this case without prejudice.

The Opinion is unclear as to whether the Court intended to hold that a plaintiff’s failure to have standing and its inability to “invoke the jurisdiction” of the court deprives a common pleas court of subject matter jurisdiction. That distinction is crucial, as a judgment rendered by a court without subject matter jurisdiction is void (and not merely voidable).

If the Court did intend to hold that a plaintiff’s failure to have standing deprives a common pleas court of subject matter jurisdiction, then the Opinion changed the law of Ohio,

and threw into question judgments rendered in literally hundreds of thousands of foreclosure actions (and potentially every judgment ever rendered in this state). If a plaintiff's lack of standing deprives a common pleas court of subject matter jurisdiction, then Plaintiff-Appellee Federal Home Loan Mortgage Corporation ("Freddie Mac") respectfully suggests that the Opinion be limited to prospective application only.

Finally, following the common pleas court's judgment in this case, Defendants-Appellants Duane and Julie Schwartzwald did not seek a stay of the sheriff's sale, and the property has been sold to a third party.¹ The Opinion's dismissal of this case without prejudice leaves the parties in an unusual position. To avoid this case once again being returned to the appellate process, Freddie Mac requests that this case be remanded to the common pleas court and that it be afforded the opportunity to show that it in fact had standing as of the filing of the Complaint.

II. DISCUSSION

A. The Court should clarify whether a plaintiff's failure to prove standing at the time of filing deprives a common pleas court of subject matter jurisdiction.

In the Opinion, the Court rejected the holding of the plurality in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998) (as well as the opinions of the majority of the appellate districts) and held that a lack of standing may not be cured under Civ.R. 17(A). Opinion, ¶ 38. The Court went on to hold "the lack of standing at the commencement of a foreclosure action requires dismissal of the complaint." *Id.*, ¶ 40.

The Opinion repeatedly states that a plaintiff without standing may not "invoke the jurisdiction" of the court,² but never addresses what the Court meant by that phrase. At the same

¹ A copy of the Auditor's property card reflecting the sales of the property are attached as Exhibit A.

² *E.g.*, "standing is required to invoke the jurisdiction of the common pleas court"(¶ 3); "It is an

time, other parts of the Opinion could be read as conflating a lack of standing with a lack of subject matter jurisdiction (“Pursuant to Civ.R. 82, the Rules of Civil Procedure *do not extend the jurisdiction of the courts of this state*, and a common pleas court cannot substitute a real party in interest for another party if no party with standing invoked its jurisdiction in the first instance[.]” and “It is fundamental that a party commencing litigation *must have standing to sue to present a justiciable controversy* and invoke the jurisdiction of the common pleas court.”). Opinion, ¶¶ 38 and 41 (emphasis added).

Conflation of standing and subject matter jurisdiction is not consistent with this Court’s precedent. Rather, this Court has discussed standing and subject matter jurisdiction as different concepts. *City of N. Canton v. City of Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586; *Swanton Local School Dist. Library v. Budget Com. of Lucas County*, 55 Ohio St.2d 41, 378 N.E.2d 139 (1978).

The Court has separated the concepts of a court having subject matter jurisdiction and the court’s exercise of jurisdiction in a particular case in defining the difference between void and voidable judgments: “a judgment is generally void only when the court rendering the judgment lacks subject-matter jurisdiction or jurisdiction over the parties; however, a voidable judgment is one rendered by a court that lacks jurisdiction over the particular case due to error or irregularity.” *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 2012-Ohio-2845, 972 N.E.2d 568,

elementary concept of law that a party without standing to *invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action[.]” (emphasis in original) (¶ 22, citing *State ex rel. Dallman v. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973)); “standing to sue is required to invoke the jurisdiction of the common pleas court” (¶ 24); “invoking the jurisdiction of the court ‘depends on the state of things at the time the action is brought’” (¶ 25, citing *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)); “Thus, because [Freddie Mac] failed to establish an interest in the note or mortgage at the time that it filed suit, it had no standing to invoke the jurisdiction of the common pleas court[.]” (¶ 28); “Standing is required to invoke the jurisdiction of the common pleas court[.]” (¶ 38).

¶ 12, citing *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, at ¶¶ 10, 15. Similarly, the Court has explained “where it is apparent from the allegations that the matter alleged is **within the class of cases** in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the ‘exercise of jurisdiction,’ as distinguished from the want of jurisdiction in the first instance.” *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 714 N.E.2d 867 (1999) (emphasis added).

The lower courts have separated standing from subject matter jurisdiction. *Robbins v. Warren*, 12th Dist. No. CA95-11-200, 1996 Ohio App. LEXIS 1815, at *4-5 (May 6, 1996); *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157; *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. No. 23927, 2010-Ohio-5285 (holding that standing is waived if not timely raised) (jurisdiction **declined** by this Court in Case No. 2010-2136); *EverHome Mortg. Co. v. Behrens*, 11th Dist. No. 2011-L-128, 2012-Ohio-1454, ¶ 12 (same) (jurisdiction **declined** by this Court in Case No. 2012-1089); *Adlaka v. Quaranta*, 7th Dist. No. 09-MA-134, 2010-Ohio-6509, ¶ 44; *U.S. Bank Nat’l Ass’n v. Spicer*, 3rd Dist. Case No. 9-11-01, 2011-Ohio-3128, ¶ 37, citing *First Union Nat’l Bank v. Hufford*, 146 Ohio App. 3d 673, 677, 2001-Ohio-2271, 767 N.E.2d 1206, ¶13; *Travelers Indemn. Co. v. R. L. Smith Co.*, 11th Dist. No. 2000-L-014, 2001 Ohio App. LEXIS 1750 (Apr. 13, 2001); *Hang-Fu v. Halle Homes, Inc.*, 8th Dist. No. 76589, 2000 Ohio App. LEXIS 3625 (Aug. 10, 2000); *Mid-State Trust IX v. Davis*, 2nd Dist. No. 07-CA-31, 2008-Ohio-1985, ¶ 56; *Chase Home Fin., L.L.C. v. Heft*, 3rd Dist. Nos. 8-10-14, 8-10-16, 2012-Ohio-876, ¶ 29.

The distinction between a plaintiff’s lack of standing and a court’s lack of subject matter jurisdiction is crucial. A judgment that is void for lack of subject matter jurisdiction may be collaterally attacked at any time. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11; *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 358 N.E.2d 536 (1976); *In re Nat’l*

Century Fin. Enters., No. 10-4194, 2012 U.S. App. LEXIS 18474 (6th Cir. Aug. 9, 2012).

Because void judgments may be attacked at any time, this Court has been careful to limit its characterization of errors which will be deemed to deprive a common pleas court of subject matter jurisdiction. As this Court noted in *Nelson-Miller*, “we have a strong interest in preserving the finality of judgments . . . If delayed attacks such as the appellee’s were possible, [] decisions would be perpetually open to attack, and finality would be impossible.” *Nelson-Miller*, 2012-Ohio-2845, ¶ 18, citing *In re Hatcher*, 443 Mich. 426, 440, 505 N.W.2d 834 (1993).

Beginning literally within hours of the issuance of the Opinion, borrowers have filed motions to vacate judgments rendered long ago, arguing that the Opinion stands for the proposition that a plaintiff’s lack of standing means that a common pleas court lacked subject matter jurisdiction.³ Counsel for lenders and borrowers (including counsel for the Schwartzwalds and their amicus curiae) have noted that language of the Opinion may have left open the question whether foreclosure judgments entered without standing are void for lack of subject matter jurisdiction.⁴

Given its prior precedent and the holdings of numerous appellate districts, Freddie Mac does not believe that the Court intended to dramatically change Ohio law in this fashion. Before permitting the onslaught of attacks on prior judgments (in both foreclosure and non-foreclosure cases), the Court should clarify the Opinion to make clear that a lack of standing does not affect a common pleas court’s subject matter jurisdiction.

B. If a failure to prove standing affects subject matter jurisdiction, the Opinion should apply prospectively only.

If the Court really did intend to hold that a plaintiff’s lack of standing deprives a common pleas court of subject matter jurisdiction, then it should apply that rule prospectively only. In

³ Samples of these motions are attached as Exhibit B.

⁴ Examples are attached as Exhibit C.

DiCenzo v. A Best Prods. Co., 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132, ¶ 25, the Court adopted the analysis of the U.S. Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), in determining whether a common law decision should only apply prospectively. In making that determination, the Court is to consider:

(1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result.

Id.

Those elements are present here. First, not only had the Second District and the plurality in *Suster* concluded that defects in standing could be cured, so had the majority of the appellate districts. *U.S. Bank Nat'l Ass'n v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115; *Deutsche Bank Nat'l Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-2959; *U.S. Bank, N.A. v. Marcino*, 181 Ohio App. 3d 328, 2009-Ohio-1178, 908 N.E.2d 1032 (7th Dist.); *Bank of N.Y. v. Stuart*, Ninth Dist. No. 06CA008953, 2007-Ohio-1483; *Countrywide Home Loan Servicing, L.P. v. Thomas*, Tenth Dist. No. 09AP-819, 2010-Ohio-3018; *Kinder v. Zuzak*, Eleventh Dist. No. 2008-L-167, 2009-Ohio-3793; *Washington Mutual Bank, FA v. Betty Wallace, et al.*, Case No. 2011-1694 (12th Dist.).

Second, retroactive application of the decision would not promote its purpose. There is no evidence that any borrower who was a defendant in a case where the lender lacked standing has been subjected to claims by a different lender seeking to recover on the same debt.

Third, retroactive application of the rule would cause inequitable results. The Ohio Courts Statistical Reports produced by this Court show that there have been **320,856 default judgments in foreclosure actions** in the past 10 years alone.⁵ If the Court intended to hold that

⁵ See <http://www.supremecourt.ohio.gov/publications/annrep/11OCS/2011OCS.pdf>

a plaintiff's lack of standing deprives a common pleas court of lack of subject matter and that rule were applied retroactively, then every one of these judgments would be open to collateral attack. In fact, if that is the law, then every judgment ever rendered in this state could now be challenged by a collateral attack that the plaintiff's lack of standing meant that the court never had subject matter jurisdiction in the first instance. That outcome that would be "pregnant with fearful consequences." *Nelson-Miller*, 2012-Ohio-2845, ¶ 19, quoting *Bingham v. Miller*, 17 Ohio 445, 448 (1848). If the Court did in fact hold that the plaintiff's failure to possess standing at the time of filing the complaint deprives a trial court of subject matter jurisdiction, that rule should be applied prospectively only.

- C. The Court should permit Freddie Mac to show that it in fact had standing as of the filing of the Complaint.

In the Opinion, the Court ordered that the case be dismissed, but noted that the "dismissal had no effect on the underlying duties, rights or obligations of the parties." Opinion, ¶ 40. Freddie Mac asks that this disposition be reconsidered, and that this case be remanded to the common pleas court to permit Freddie Mac to show that it had standing as of the filing of the Complaint.

<http://www.supremecourt.ohio.gov/Publications/annrep/10OCS/2010OCS.pdf>
<http://www.supremecourt.ohio.gov/Publications/annrep/09OCS/2009OCS.pdf>
<http://www.supremecourt.ohio.gov/Publications/annrep/08OCS/2008OCS.pdf>
<http://www.supremecourt.ohio.gov/Publications/annrep/07OCS/2007OCS.pdf>
http://www.supremecourt.ohio.gov/Publications/annrep/06OCS/2006_Court_Summary.pdf
http://www.supremecourt.ohio.gov/Publications/annrep/05OCS/2005_Court_Summary.pdf
http://www.supremecourt.ohio.gov/Publications/annrep/04OCS/2004_Court_Summary.pdf
http://www.supremecourt.ohio.gov/Publications/annrep/03OCS/2003_Court_Summary.pdf
<http://www.supremecourt.ohio.gov/Publications/annrep/02OCS/COMPLETE-OCS.pdf>

A tabular report of the number of foreclosure cases resolved by default judgment in Ohio is attached as Exhibit D.

As noted both in the Briefs and during argument, there is a copy of the Note in the record in this case that bears a blank indorsement, making it bearer paper, and thus enforceable by its holder, including Freddie Mac. Notice of Filing of Note; R.C. 1303.31(A)(1). However, the copy of the Note with the blank indorsement was not authenticated as required by Rule 56, and thus could not be the basis of a summary judgment in favor of Freddie Mac. Instead, the only admissible copy of the Note in this case was one that was not indorsed. Because of the limitations of the record, Freddie Mac had to rely on its possession of the Note and the post-filing Assignment of the Note and Mortgage to defend the summary judgment rendered in its favor.

Prior to the Opinion, that was of no moment because both the plurality in *Suster* and the majority of the appellate districts (including the Second District) permitted any defect in standing to be cured. The Court, of course, has now made clear that is not the law, and that a plaintiff's failure to have standing as of the time of filing requires dismissal of the case without prejudice.

But the application of that rule to this case in its current posture presents a series of uncertainties. The Schwartzwalds did not obtain a stay pending this appeal. During the pendency of the appeal before the Second District and this Court, the property has since sold to a third party. R.C. 2329.45, the statute meant to address situations in which a judgment has been reversed, does not expressly address what happens when the reversal results only in a dismissal without prejudice.

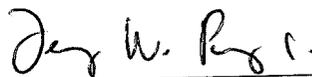
In these circumstances, Freddie Mac respectfully suggests that affording it the opportunity to show that it did in fact have standing as of the date of the Complaint would obviate a number of questions, including how R.C. 2329.45 applies to a dismissal of a case without prejudice. This is particularly appropriate where there are materials in the record suggesting that Freddie Mac could prove standing, and its conduct was consistent with the law

that was then in effect in the Second Appellate District. Accordingly, Freddie Mac respectfully requests that the Court remand this case to the common pleas court, and order that if Freddie Mac cannot show that it had standing at the time of filing its complaint, that the case would then be dismissed without prejudice.

IV. CONCLUSION

For the past ten years, foreclosure actions constituted a significant portion of the Ohio common pleas court docket, and appeals of those decisions (including to this Court) are legion. The lack of clarity of the language in the Opinion invites dissatisfied defendants to challenge literally hundreds of thousands of judgments already rendered in this state. Clarifying the language in the Opinion would bring guidance to parties and the lower courts. If the Court really did mean to hold that a lack of the plaintiff's standing deprives a common pleas court of subject matter jurisdiction, then that rule should be applied prospectively only. In any event, Freddie Mac should be afforded the opportunity to show that it in fact met the requirements of the rule announced in the Opinion.

Respectfully submitted,



Scott A. King (#0037582) (Counsel of Record)

Terry W. Posey, Jr. (#0078292)

THOMPSON HINE LLP

Austin Landing I

10050 Innovation Drive

Suite 400

Dayton, Ohio 45342

Telephone: (937) 443-6560

Facsimile: (937) 443-6635

Scott.King@Thompsonhine.com

Terry.Posey@Thompsonhine.com

*Counsel for Plaintiff-Appellee Federal Home Loan
Mortgage Corporation*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 13th day of November, 2012:

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

Julie K. Robie
Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113

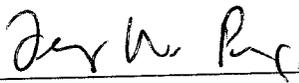
Christina M. Janice
Paul E. Zindle
Community Legal Aid Services, Inc.
50 South Main Street, Suite 800
Akron, Ohio 44308

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

Noel M. Morgan
Legal Aid Society of Southwest Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, Ohio 45202

Andrew D. Neuhauser
Advocates for Basic Legal Equality, Inc.
525 Jefferson Avenue
Toledo, Ohio 43604

Linda Cook
Ohio Poverty Law Center, LLC
555 Buttles Avenue
Columbus, Ohio 43215



Terry W. Posey, Jr.

Parcel ID: C05-0001-0007-0-0112-00 Tax Year: 2011 Card: 1 of 1



C05000100070011200 04/13/2012

Owner: MCCORMICK LAYNE
 CHERYL
 Mailing Name/Address:
 MCCORMICK LAYNE
 CHERYL
 1669 N CENTRAL DR
 DAYTON OH 45432
 Tax District: C05 - CAESARCREEK TP XCSD

Description: VMS 2473
 N OF SPRING VLY PNTRSVL RD
 2202 SPRING VLY PNTRSVL RD
 Property Address: 2202 SPRING VALLEY PAINTERSVILLE RD
 Class: R - SINGLE FAMILY, 10-19.999 AC
 Map/Routing: 0007.00 071.00
 Neighborhood: 00140.000
 Parcel Tieback: C050001000700005100

LAND DATA	Type	Effective Frontage	Depth	Square Footage	Acres	Value
Homesite	ACREAGE				1	31000
Tillable	ACREAGE				9.157	34800
Right of Way	ACREAGE				0.021	0

SALES DATA	Sale Date	Type	Amount	Source
	3/9/2012	LAND & BUILDING	191000	AGENT
	9/29/2011	LAND & BUILDING	260000	AGENT
	12/1/2006	LAND & BUILDING	335000	BUYER
	3/29/1995	LAND & BUILDING	219900	AGENT

DWELLING DATA	Style	Total Rooms	Masonry Trim Area
	SPLIT LEVEL	8	
	1	3	
	MASONRY & FRAME	1	
	Remod	3	
	1993	0	
	3221	3	
	1860	0	
	Basement	12	
	Heating	No	
	Heat Fuel	No	
	ELECTRIC	No	
	Attic	NONE	
	Int vs Ext	SAME	

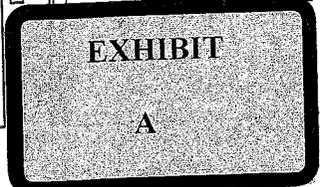
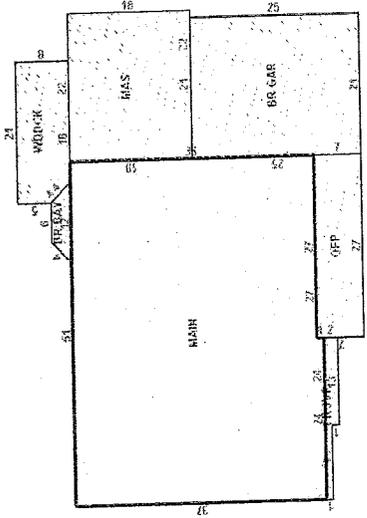
VALUES	Land Value	Bldg Value	Total Value	Value Date
Appraised	65800	230340	296140	6/7/2012
Assessed (35%)	23030	80620	103650	

TAXES	Delinquent	1st Half	2nd Half	Total
Real:	0.00	2,472.18	1,241.22	3,713.40
Special	0.00	0.00	0.00	0.00
Total:	0.00	2,472.18	1,241.22	3,713.40
Total Tax:				0.00
Amount Due:				

PROPERTY FACTORS	Utilities	Street/Road	Traffic
Topography	WELL	PAVED	LIGHT
LEVEL	SEPTIC		

ADDITION DATA	#	Lower	First	Second	Third	Area
A0			MAIN BUILDING			1860
A1			MASONRY BAY			28
A2			MASONRY			396
A3			MASONRY GARAGE			525
A4			OPEN FRAME PORCH			189
A5			FRAME OVERHANG			37
A6			WOOD DECKS			164

DWELLING & YARD ITEMS	Yr Bld	Area	Rate	Units	Value
CLOSED MTL POLE BLDG	1999	2520	8.9246	1	15070



In the Delaware County Court of Common Pleas

[Handwritten signature]

US Bank National Association as Trustee
for SASCO Pass Through Mortgage
Certificate Series 2005 RF-4

Case No.: 08 CV E 02 0280

Plaintiff,

Judge W. Duncan Whitney

vs.

Brian S. Bayless,

Defendant

JAN ANTONOPLOS
CLERK

2012 NOV -7 PM 3:55

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

Defendant's Motion to Vacate

Now comes defendant Brian S. Bayless, requesting that this Court vacate its December 11, 2008 entry granting US BANK's (Plaintiff's) motion for summary judgment against defendant. The case is *void ab initio* on the basis of the Ohio Supreme Court's unanimous holding in *Fed. Home Loan Mgt. Corp. v. Schwartzwald 2012-Ohio-5017*.

Respectfully submitted,

[Handwritten signature]

Brian S. Bayless
1630 Park Place Drive
Westerville, Ohio 43081
Defendant Pro Se
740.274.5450



08 CV E 02
0280
00022969553
WMOMS

EXHIBIT

B-1

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Memorandum in Support

Introduction

On February 28, 2008, U.S. Bank National Association as Trustee for SASCO Pass-Through Certificates Series 2005 RF-4 (hereafter US BANK) filed a lawsuit against defendant to recover the balance due on a promissory note and to foreclose on a mortgage. Since that time, years of litigation ensued, including motions for relief from judgment in accordance with Civ. R. 60(B). However, this does not alter or change the overriding fact that this court did not have jurisdiction to hear this matter on February 28, 2008 when the Plaintiff US BANK filed the foreclosure case, or at any point thereafter, since the plaintiff, of its own admission, had not first been assigned the mortgage in question prior to the filing of the complaint.

I. Pertinent Facts

1. On February 28, 2008, Plaintiff filed a foreclosure case against defendant.
2. As of February 28, 2008, Plaintiff had not been assigned the note and/or mortgage in question from whomever was the previous holder.
3. On May 30, 2008, plaintiff filed a notice of assignment of mortgage, which shows that the note and accompanying mortgage were not allegedly formally transferred to Plaintiff until April 1, 2008, fully 32 days after the complaint was filed. (Exhibit A)
4. The recording of this purported assignment of the note and mortgage in question was completed in Delaware County on April 14, 2008, 45 days after the complaint was filed.
5. On December 11, 2008, the Court granted Summary Judgment to Plaintiff and then entered a decree of foreclosure against Defendant.

1 **II. Law and Argument**

2
3 In a recently decided case in the Ohio Supreme Court, *Fed. Home Loan Mtge. Corp. v.*
4 *Schwartzwald 2012-Ohio-5017* (Exhibit "B"), the bank brought a foreclosure action against the
5 Schwartzwald's prior to obtaining the assignment of mortgage securing the loan. Defendants
6 argued and maintained that plaintiff lacked standing to bring the suit (as did defendant in the
7 present case) because the assignment of the mortgage and subsequent recording confirming that
8 assignment had not occurred prior to the initiation of the suit. Plaintiff *Federal Home Loan* was
9 only formally assigned the mortgage after the foreclosure complaint was filed. However, the
10 trial court entered summary judgment against defendant and the Second District Court of
11 Appeals affirmed.

12 The Supreme Court, however, on October 31, 2012, reversed the rulings of the trial and
13 appellate courts, and confirmed that standing is a jurisdictional question that must be satisfied to
14 bring a foreclosure lawsuit:

15 **"We recognized that standing is a jurisdictional requirement in *State ex rel. Dallman***
16 ***v. Frank Cty. Court of Common Pleas* (1973), 35 Ohio ST. 2d 176, and we stated: 'It**
17 **is an elementary concept of law that a party lacks standing to invoke the jurisdiction**
18 **of the court unless he has, in an individual or representative capacity, some real**
19 **interest in the subject matter of the action.'" (Emphasis was added by the Court).**

20 (Schwartzwald at paragraph 22)

21 The court further stated:

22 **"Because standing to sue is required to invoke the jurisdiction of the common pleas**
23 **court, 'standing is to be determined as of the commencement of suit.'"**

24 (*Id.* at paragraph 24)

25 **"Invoking the jurisdiction of the court, thus depends upon the state of things at the**
26 **time the action is brought, and not after."**

27 (*Id.* at paragraph 25)

1 The Supreme Court then reversed the trial and appellate courts, concluding:

2 **“The lack of standing at the commencement of a foreclosure action requires**
3 **dismissal of the complaint.”**

4 (Id. at paragraph 40)

5 In the present case, it is an indisputable fact based upon US BANK’s own admission that
6 it had not acquired the note and/or the assignment of mortgage at the time of the filing of the
7 foreclosure action against the Defendant. The aforementioned May 30, 2008 entry filed by
8 plaintiff confirms that US Bank attempted to retroactively cure this deficiency nearly a month
9 after the initiation of the proceedings.

10
11 **III. Conclusion**

12
13 In accordance with the findings in *Schwartzwald*, since US BANK filed to foreclose on
14 Bayless on February 28, 2008 when it did not have “standing to invoke the jurisdiction of the
15 court”, it was prohibited from curing this defect through a subsequent assignment of a mortgage
16 on April 1, 2008.

17 As a result, this court’s December 11, 2008 decision, granting summary judgment to
18 plaintiff and subsequent decree of foreclosure is *void ab initio*, as opposed to merely being
19 voidable. Accordingly, defendant requests that the December 11, 2008 entry be vacated and the
20 case otherwise dismissed.

21
22 Respectfully submitted,

23 

24
25 Brian S. Bayless

26 1630 Park Place Drive
27 Westerville, Ohio 43081
28 *Defendant Pro Se*
740.274.5450

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing was delivered to the following via regular US Mail postage prepaid this 7th day of November, 2012.

Terry Posey, Esq.
Scott King, Esq.
10050 Innovation Drive
Suite 400
Dayton, OH 45342

Susanna Lykins, Esq.
120 East 4th Street
Cincinnati, OH 45202



Brian S. Bayless

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EXHIBIT "A"

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2008 MAY 30 PM 2:08
JAN ANTONIOLLO
CLERK

200809509
(ml)

COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

U.S. Bank National Association,
as Trustee for SASCO Mortgage
Pass-Through Certificates Series
2005- RF4

Case No. 08 CV E 02 288

Judge W. Duncan Whitney

Plaintiff,

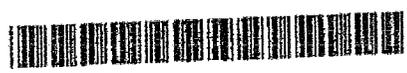
PLAINTIFF'S NOTICE OF FILING OF
ASSIGNMENT OF MORTGAGE AND NOTE

-vs-

Brian S. Bayless, et al.

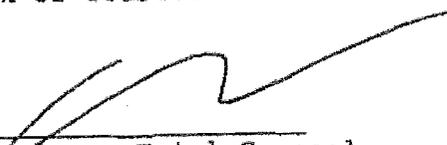
Defendants.

Now comes the Plaintiff, U.S. Bank National Association, as Trustee for SASCO Mortgage Pass-Through Certificates Series 2005-RF4, and hereby gives notice to the Court and all parties to this action of the filing of the Assignment of Mortgage and Note, attached hereto as Exhibit 'A.' This Assignment shows that the original lender, Wells Fargo Bank, N.A. successor by merger to Wells Fargo Home Mortgage, Inc. formerly known as Norwest Mortgage, Inc., has legally assigned its interests in the note and mortgage that are the subject matter of this foreclosure action to the Plaintiff, U.S. Bank National Association, as Trustee for SASCO Mortgage Pass-Through Certificates Series 2005-RF4. The Assignment of the Mortgage says, on its face, that the mortgage is being assigned "together with the Promissory Note." This



08 CV E 02
0220
00014889760
NOTC

Assignment is on public record in this County, having been recorded with Delaware County Recorder on April 14, 2008 in Official Records Volume 841, page 2813. It is now also on record with the Delaware County Clerk of Courts.



Carlos S. Ramirez, Trial Counsel
Ohio Supreme Court Reg. #0067732
LERNER, SAMPSON & ROTHFUSS
ATTORNEYS FOR PLAINTIFF
P.O. Box 5480
Cincinnati, OH 45201-5480
Phone: (513) 241-3100
Fax: (513) 241-4094
attyemail@lsrlaw.com

CERTIFICATE OF SERVICE

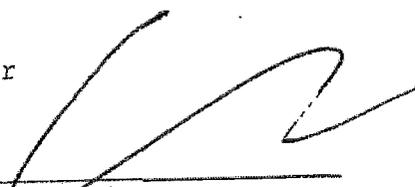
This is to certify that a true and exact copy of the foregoing has been duly served upon the following by ordinary U.S. mail, postage prepaid, this 29th day of May, 2008.

Brian S. Bayless
231 Overtrick Drive
Delaware, OH 43015-3403

Karen L. Bayless
231 Overtrick Drive
Delaware, OH 43015

Christopher D. Betts, Esq.
140 N. Sandusky Street
Delaware, OH 43015

Bill Purtell, Esq.
120 East Fourth Street, 8th Floor
Cincinnati, OH 45202



Carlos S. Ramirez

LS&R No.: 200809509
 Loan No.: 7003344

200800010651
 Filed for Record in
 DELAWARE COUNTY, OHIO
 ANDREW D BRENNER
 04-14-2008 At 02:10 pm.
 MTG ASSIGN 32.00
 OR Book 241 Page 2813 - 2814

**EXHIBIT
 A.**

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Wells Fargo Bank, N.A. sbmt Wells Fargo Home Mortgage, Inc. fka Norwest Mortgage, Inc., whose address is 3476 Stateview Boulevard, Fort Mill, SC 29715 Mac# 7801-013, does hereby sell, assign, transfer and set over unto U.S. Bank National Association, as Trustee for SASCO Mortgage Pass-Through Certificates Series 2005- RF4, whose address is 3476 Stateview Boulevard, Fort Mill, SC 29715 Mac# 7801-013, a certain mortgage from Brian S. Bayless, a married person, Karen L. Bayless his wife signing solely to release her dower rights to Norwest Mortgage, Inc. , dated November 10, 1998, recorded November 12, 1998, in Volume 1053, Page 642, in the office of the Delaware County Recorder, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon, and secured by the following real estate: *

SITUATED IN THE STATE OF OHIO, COUNTY OF DELAWARE, AND IN THE CITY OF DELAWARE:

BEING LOT NUMBER SIX THOUSAND SEVEN HUNDRED SEVENTY-ONE (6771), IN LOCUST CURVE HIGHLANDS SECTION 1, PART 2, AS THE SAME IS NUMBERED AND DELINEATED UPON THE RECORDED PLAT THEREOF, OF RECORD IN PLAT CABINET 2, SLIDES 42-42A, RECORDER'S OFFICE, DELAWARE COUNTY, OHIO.

PROPERTY ADDRESS:	200800010651
231 OVERTRICK DRIVE	LERNER SAMPSON & ROTHFUSS
DELAWARE, OH 43015	PO BOX 5480
	CINCINNATI OH 45273

IN WITNESS WHEREOF, Wells Fargo Bank, N.A. sbmt Wells Fargo Home Mortgage, Inc. fka Norwest Mortgage, Inc. has set its hand this 1st day of April, 2008.

Wells Fargo Bank, N.A. sbmt
 Wells Fargo Home Mortgage, Inc.
 fka Norwest Mortgage Inc.

By: 
 *Anita Antchelli
 *VP of Loan Documentation

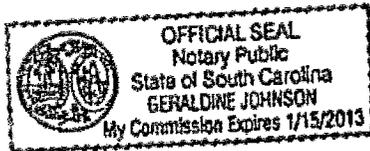
STATE OF SOUTH CAROLINA

SS.

COUNTY OF YORK

On April 1, 2008 before me Geraldine Johnson, Notary Public, State of South Carolina, personally appeared Anita Antonelli, VP of Loan Documentation, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.



Geraldine Johnson

Notary Public
My Commission Expires:

This instrument was prepared by:

LERNER, SAMPSON & ROTHFUSS
A Legal Professional Association
P.O. Box 5480
Cincinnati, OH 45201-5480

EXHIBIT "B"

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-5017

**FEDERAL HOME LOAN MORTGAGE CORPORATION, APPELLEE, v.
SCHWARTZWALD ET AL., APPELLANTS.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

Foreclosure—Jurisdictional aspects of standing—Civ.R. 17(A)—Jurisdiction determined as of time of filing suit.

(Nos. 2011-1201 and 2011-1362—Submitted April 4, 2012—Decided October 31, 2012.)

APPEAL from and CERTIFIED by the Court of Appeals for Greene County, No. 2010 CA 41, 194 Ohio App.3d 644, 2011-Ohio-2681.

O'DONNELL, J.

{¶ 1} Duane and Julie Schwartzwald appeal from a judgment of the Second District Court of Appeals affirming a decree of foreclosure entered in favor of the Federal Home Loan Mortgage Corporation. In addition, the appellate court certified that its decision in this case conflicts with decisions of the First and

EXH. B

SUPREME COURT OF OHIO

Eighth Districts on the following issue: "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."

{¶ 2} Federal Home Loan commenced this foreclosure action before it obtained an assignment of the promissory note and mortgage securing the Schwartzwalds' loan. The Schwartzwalds maintained that Federal Home Loan lacked standing to sue. The trial court granted summary judgment in favor of Federal Home Loan and entered a decree of foreclosure. The appellate court affirmed, holding that Federal Home Loan had remedied its lack of standing when it obtained an assignment from the real party in interest.

{¶ 3} However, standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint. Thus, receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.

{¶ 4} Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Facts and Procedural History

{¶ 5} In November 2006, Duane and Julie Schwartzwald purchased a home in Xenia, Ohio, and received a mortgage loan from Legacy Mortgage in the amount of \$251,250. They executed a promissory note and a mortgage granting Legacy Mortgage a security interest in the property. Legacy Mortgage then endorsed the promissory note as payable to Wells Fargo Bank, N.A., and assigned it the mortgage.

{¶ 6} In September 2008, Duane Schwartzwald lost his job at Barco, Inc., and the Schwartzwalds moved to Indiana so he could accept a new position. They continued making mortgage payments as they tried to sell the house in Xenia, but they went into default on January 1, 2009. In March 2009, Wells

Fargo agreed to list the property for a short sale, and on April 8, 2009, the Schwartzwalds entered into a contract to sell it for \$259,900, with closing set for June 8, 2009.

{¶ 7} However, on April 15, 2009, Federal Home Loan Mortgage Corporation commenced this foreclosure action, alleging that the Schwartzwalds had defaulted on their loan and owed \$245,085.18 plus interest, costs, and advances. It attached a copy of the mortgage identifying the Schwartzwalds as borrowers and Legacy Mortgage as lender, but did not attach a copy of the note, claiming that "a copy of [the note] is currently unavailable."

{¶ 8} Julie Schwartzwald then contacted Wells Fargo about the foreclosure complaint. She testified, "I was told that it was 'standard procedure' and 'don't worry about it' because we were doing a short sale." The Schwartzwalds did not answer the complaint.

{¶ 9} On April 24, 2009, Federal Home Loan filed with the court a copy of the note signed by the Schwartzwalds in favor of Legacy Mortgage. The final page carries a blank endorsement by Wells Fargo placed above the endorsement by Legacy Mortgage payable to Wells Fargo.

{¶ 10} On May 15, 2009, Wells Fargo assigned the note and mortgage to Federal Home Loan, and Federal Home Loan filed with the court a copy of the assignment on June 17, 2009. It then moved for a default judgment and a summary judgment, but the trial court discovered that Federal Home Loan had failed to establish a chain of title because no assignment of the mortgage from Legacy Mortgage to Wells Fargo appeared in the record.

{¶ 11} During this time, even though it had assigned its interest in the note and mortgage to Federal Home Loan, Wells Fargo continued discussing a short sale of the property with the Schwartzwalds, but delays in this process eventually caused the Schwartzwalds' buyer to rescind the offer. On December 14, 2009, the trial court granted the Schwartzwalds leave to file an answer. That

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same day, Federal Home Loan filed with the court a copy of the assignment of the mortgage from Legacy Mortgage to Wells Fargo dated November 27, 2006.

{¶ 12} Federal Home Loan again moved for summary judgment, supporting the motion with the affidavit of Herman John Kennerty, vice president of loan documentation for Wells Fargo as servicing agent for Federal Home Loan, who averred that the Schwartzwalds were in default and who authenticated the note and mortgage as well as the assignment of the note and mortgage from Wells Fargo. Subsequently, Federal Home Loan filed copies of the notarized assignments from Legacy Mortgage to Wells Fargo and from Wells Fargo to Federal Home Loan.

{¶ 13} The Schwartzwalds also moved for summary judgment, asserting that Federal Home Loan lacked standing to foreclose on their property.

{¶ 14} The trial court entered summary judgment for Federal Home Loan, finding that the Schwartzwalds had defaulted on the note, and it ordered the equity of redemption foreclosed and the property sold. Federal Home Loan purchased the property at a sheriff's sale.

{¶ 15} On appeal, the Second District Court of Appeals affirmed and held that Federal Home Loan had established its right to enforce the promissory note as a nonholder in possession, because assignment of the mortgage effected a transfer of the note it secured. The court further explained that standing is not a jurisdictional prerequisite and that a lack of standing may be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). Thus, the court concluded that although Federal Home Loan lacked standing at the time it commenced the foreclosure action, it cured that defect by the assignment of the mortgage and transfer of the note prior to entry of judgment.

{¶ 16} The court of appeals certified that its decision conflicted with *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.), ¶ 15-16; *Bank of New York v. Girdele*, 1st Dist. No. C-

090251, 2010-Ohio-542, ¶ 3-4; and *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 21, cases that held that a lack of standing cannot be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). We accepted the conflict and the Schwartzwalds' discretionary appeal on the same issue.

Arguments on Appeal

{¶ 17} The Schwartzwalds explain that the essential aspect of standing is injury to a legally protected right and claim that Federal Home Loan had not been injured by their default at the time it commenced this foreclosure action, because it had not obtained the note and mortgage until after it filed the complaint. Relying on federal caselaw, they maintain that standing is determined as of the time the action is brought, so that subsequent events do not cure a lack of standing. They further urge that although the requirement of a real party in interest can be waived, that requirement cannot be equated with the requirement of standing.

{¶ 18} Federal Home Loan asserts that pursuant to R.C. 1303.31, it is a "person entitled to enforce the note" because it is "[a] nonholder in possession of the instrument who has the rights of a holder" by virtue of the negotiation of the note from Legacy to Wells Fargo and the assignment from Wells Fargo. Further, it maintains that R.C. 1303.31 defines only which party is entitled to enforce a note and that the failure to be a real party in interest at the commencement of suit can be cured pursuant to Civ.R. 17(A) by the assignment of the mortgage and note. It also contends that the jurisdictional requirement of justiciability is satisfied if the allegations of the complaint establish that the plaintiff has standing to present a justiciable controversy and that even if it is determined that those allegations were in fact false, the matter remains justiciable so long as the plaintiff subsequently obtains the right to foreclose prior to judgment. On this basis, it argues that because "the Ohio Constitution bestows general (and not limited)

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jurisdiction on common pleas courts, common pleas courts have 'jurisdiction' to hear disputes, even if the named plaintiff was not the correct person to invoke it." Thus, it concedes that the record in this case does not establish that it was a person entitled to enforce the note as of the date the complaint was filed, but it maintains that it "proved that it was such a person prior to judgment."

{¶ 19} Accordingly, the question presented is whether a lack of standing at the commencement of a foreclosure action filed in a common pleas court may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment.

Law and Analysis

Standing to Sue

{¶ 20} The Ohio Constitution provides in Article IV, Section 4(B): "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." (Emphasis added.)

{¶ 21} In *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987), we stated:

" Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a "personal stake in the outcome of the controversy." "

Id., quoting *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986), quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1972). Similarly, the United States Supreme Court observed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), that “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case.”

{¶ 22} We recognized that standing is a “jurisdictional requirement” in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: “It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Emphasis added.) See also *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) (“the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings”); Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004) (noting that the jurisdiction of the common pleas court is limited to justiciable matters).

{¶ 23} And recently, in *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, we affirmed the dismissal of a complaint for lack of standing when it had been filed before the claimant had suffered any injury. There, Kincaid asserted claims that his insurer had breached the insurance contract by failing to pay expenses covered by the policy; however, he had never presented a claim for reimbursement to the insurer. We concluded that Kincaid lacked standing to assert the cause of action, explaining, “Until Erie refuses to pay a claim for a loss, Kincaid has suffered no actual damages for breach of contract, the parties do not have adverse legal interests, and there is no justiciable controversy.” *Id.* at ¶ 13.

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{¶ 24} Because standing to sue is required to invoke the jurisdiction of the common pleas court, "standing is to be determined as of the commencement of suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5; see also *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154-1155 (10th Cir.2005); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir.2003); *Perry v. Arlington Hts.*, 186 F.3d 826, 830 (7th Cir.1999); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061 (5th Cir.1991).

{¶ 25} Further, invoking the jurisdiction of the court "depends on the state of things at the time of the action brought," *Mullan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824), and the Supreme Court has observed that "[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction." *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

{¶ 26} Thus, "[p]ost-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress." 13A Wright, Miller & Cooper, *Federal Practice and Procedure* 9, Section 3531 (2008); see *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 575, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004), quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, 117 S.Ct. 467, 136 L.Ed.2d 437 (rejecting argument that "'finality, efficiency, and judicial economy'" can justify suspension of the time-of-filing rule); *Utah Assn. of Counties v. Bush*, 455 F.3d 1094, 1101, and fn. 6 (10th Cir.2006) (a plaintiff cannot rely on injuries occurring after the filing of the complaint to establish standing).

{¶ 27} This principle accords with decisions from other states holding that standing is determined as of the filing the complaint. See, e.g., *Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 (“If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder *after the foreclosure action was filed*, then the case may be dismissed without prejudice * * *” [emphasis added]); *U.S. Bank Natl. Assn. v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 (“U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank” [emphasis added]); *Mige. Electronic Registration Sys., Inc. v. Sawiders*, 2010 ME 79, 2 A.3d 287, ¶ 15 (“Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts” [emphasis added]); *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 309 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) (explaining that “[s]tanding is the legal right to set judicial machinery in motion” and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action); *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) (“the plaintiff must prove that it had standing to foreclose when the complaint was filed”); see also *Burley v. Douglas*, 26 So.3d 1013, 1019 (Miss.2009), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5 (“‘standing is to be determined as of the commencement of suit’ ”); *In re 2007 Administration of Appropriations of Water of the Niobrara*, 278 Neb. 137, 145, 768 N.W.2d 420 (2009) (“only a party that has standing may invoke the jurisdiction of a court or tribunal. And the junior appropriators did not lose standing if they possessed it under the facts existing when they commenced the litigation” [footnote omitted]).

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{¶ 28} Here, Federal Home Loan concedes that there is no evidence that it had suffered any injury at the time it commenced this foreclosure action. Thus, because it failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.

The Real-Party-in-Interest Rule

{¶ 29} The court of appeals and Federal Home Loan relied on the plurality opinion in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998), which suggested that “[t]he lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17.” However, four justices declined to join that portion of the opinion, and therefore it is not a holding of this court. See Ohio Constitution, Article IV, Section 2(A) (“A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment”).

{¶ 30} At common law, all actions had to be brought in the name of the person holding legal title to the right asserted, and individuals possessing only equitable or beneficial interests could not sue in their own right. See generally Clark & Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259 (1925); 6A Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1541 (2010). However, the practice in equity relaxed this requirement, and states later abrogated the common-law rules and adopted “rules that permitted any ‘real party in interest’ to bring suit.” *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 279, 128 S.Ct. 2531, 171 L.Ed 2d 424 (2008).

{¶ 31} In Ohio, Civ.R. 17(A) governs the procedural requirement that a complaint be brought in the name of the real party in interest and provides:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee,

trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶ 32} Considering Civ.R. 17(A) in *Shealy v. Campbell*, 20 Ohio St.3d 23, 24-25, 485 N.E.2d 701 (1985), we observed:

The purpose behind the real party in interest rule is “ * * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.” *Celanese Corp. of America v. John Clark Industries* (5 Cir.1954), 214 F.2d 551, 556.” [*In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237] 240 [273 N.E.2d 903].

{¶ 33} As the Supreme Court explained in *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005), the real-party-in-interest

rule concerns only proper party joinder. Civ.R. 17(A) does not address standing; rather, the point of the rule is that "suits by representative plaintiffs on behalf of the real parties in interest are the exception rather than the rule and should only be allowed when the real parties in interest are identifiable and the res judicata scope of the judgment can be effectively determined." *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.1975) (construing analogous District of Columbia rule).

{¶ 34} Thus, the Third and the Ninth Circuits have rejected the notion that Fed.R.Civ.P. 17(a), on which Civ.R. 17(A) is based, allows a party with no personal stake in a controversy to file a claim on behalf of a third party, obtain the cause of action by assignment, and then have the assignment relate back to commencement of the action, stating:

"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. Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake; it is not a provision to be distorted by parties to circumvent the limitations period."

Gardner v. State Farm Fire & Cas. Co., 544 F.3d 553, 563 (3d Cir.2008), quoting *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1075 (9th Cir.1989).

{¶ 35} The Sixth Circuit Court of Appeals' decision in *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir.2002), illustrates this point. In that case, a fire at a warehouse destroyed property insured by American Guarantee, which paid out a claim for damages. However, another insurance company, Zurich Switzerland, filed a complaint claiming to be the insured's subrogee, notwithstanding the fact that Zurich Switzerland had neither issued an insurance

policy nor paid out any money to the insured. The defendants moved to dismiss for lack of standing, and Zurich Switzerland sought to substitute American Guarantee as the real party in interest pursuant to Fed.R.Civ.P. 17(a). The district court dismissed the action.

{¶ 36} The Sixth Circuit Court of Appeals acknowledged that the statute of limitations would bar American Guarantee's claim unless Fed.R.Civ.P. 17(a) allowed it to be substituted for Zurich Switzerland. However, the court distinguished between the requirement of standing and the objection that the plaintiff is not the real party in interest, and it held that because "Zurich American admittedly has not suffered injury in fact by the defendants, it had no standing to bring this action and no standing to make a motion to substitute the real party in interest." *Id.*

{¶ 37} Other courts have also determined that a plaintiff cannot rely on procedural rules similar to Civ.R. 17(A) to cure a lack of standing at the commencement of litigation. *Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir.2007) ("whether or not Dux was the real-party-in-interest, it does not have standing, and it cannot cure its standing problem through an invocation of Fed.R.Civ.P. 17(a)"); *Clark v. Trailiner Corp.*, 242 F.3d 388 (10th Cir.2000) (table), opinion reported at 2000 WL 1694299 (noting that the plaintiff cannot "retroactively become the real-party-in-interest" in order to cure a lack of standing at the filing of the complaint [emphasis sic]); accord *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027-1028 (Ala.1999) (rejecting the argument that a lack of standing can be cured after filing of the complaint); *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.App.1975) (explaining that dismissal for lack of standing is consistent with D.C. Super.Ct.Civ.R. 17(a)); see also *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) ("a party is not permitted to establish the right

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to maintain an action retroactively by acquiring standing to file a lawsuit after the fact”).

{¶ 38} We agree with the reasoning and analysis presented in these cases. Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.

{¶ 39} Accordingly, a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.

Effect of Lack of Standing on Foreclosure Actions

{¶ 40} The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice. *See State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 51. Because there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties.

Conclusion

{¶ 41} It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

{¶ 42} Here, it is undisputed that Federal Home Loan did not have standing at the time it commenced this foreclosure action, and therefore it failed

to invoke the jurisdiction of the court of common pleas. Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Judgment reversed
and cause dismissed.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, LANZINGER, CUPP,
and MCGEE BROWN, JJ., concur.

Thompson Hinc, L.L.P., Scott A. King, and Terry W. Posey Jr., for
appellee.

Andrew M. Engle, for appellants.

Bruce M. Broyles, urging reversal for amici curiae Homeowners of the
State of Ohio and Ohiofraudclosure.blogspot.com.

Advocates for Basic Legal Equality, Inc., and Andrew D. Neuhauser;
Legal Aid Society of Cleveland and Julie K. Robie; Legal Aid Society of
Southwest Ohio, L.L.C., and Noel M. Morgan; Community Legal Aid Services,
Inc., Christina M. Janice, and Paul E. Zindle; and Ohio Poverty Law Center and
Linda Cook, urging reversal for amici curiae Advocates for Basic Legal Equality,
Inc., Legal Aid Society of Cleveland, Legal Aid Society of Southwest Ohio,
L.L.C., 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.

The Supreme Court of Ohio

FILED

OCT 31 2012

CLERK OF COURT
SUPREME COURT OF OHIO

Federal Home Loan Mortgage Corp.

v.

Duane Schwartzwald et al.

Case No. 2011-1201

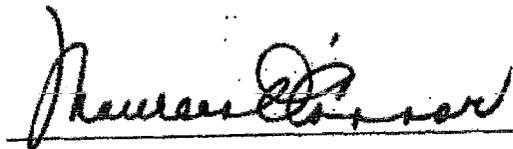
JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Greene County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is dismissed consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Court of Common Pleas for Greene County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Greene County for entry.

(Greene County Court of Appeals; No. 2010CA41)



Maureen O'Connor
Chief Justice

JK

IN THE DELAWARE COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

DEUTSCHE BANK NATL. TRUST CO.)
)
Plaintiff,)
)
-vs.-)
)
ROBERT SLAYTON, et al.)
)
Defendants.)

CASE NO.: 08 CV E 09 1219

JUDGE: KRUEGER

JAN ANTONOPLOS
CLERK

2012 OCT 31 PM 4:11

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

DEFENDANT'S MOTION TO VACATE

Now comes Defendant, Robert Slayton ("Defendant"), by and through his undersigned counsel, and for his motion to vacate this Court's August 26, 2010 judgment entry granting Plaintiff Deutsche Bank National Trust Co's ("Plaintiff") motion for summary judgment on the basis of the Supreme Court's October 31, 2012 holding in *Federal Home Loan Mortgage Corporation v. Schwartzwald*, 2012-Ohio-5017.

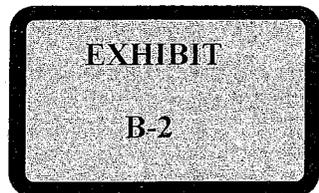
Respectfully submitted,

MILLS, MILLS, FIELY & LUCAS, LLC

/s/ John Sherrod

JOHN SHERROD (0078598)
503 South Front Street, Ste. 240
Columbus, Ohio 43215
614.754.7076
330.336.7956 fax
jsherrod@mmflaw.com

Counsel for Defendant



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KMOMS

E-FILED

Memorandum In Support

Introductory Statement

As an initial matter, Defendant freely acknowledges that Plaintiff filed this lawsuit in 2008, and much litigation has since ensued, including an appeal and motion for relief from judgment pursuant to Civ. R. 60(B). This does not, however, change the fact that the Court did not have jurisdiction to hear this matter on September 10, 2008, the date Plaintiff filed the foreclosure complaint, or at any point thereafter, without Plaintiff having first been assigned the mortgage in question.

I. Relevant Factual Background

1. On September 10, 2008, Plaintiff filed the foreclosure complaint in this action.
2. As of September 10, 2008, the mortgage at issue had not been assigned from whoever the previous holder/owner was, to Plaintiff herein.
3. On August 2, 2010, Plaintiff filed a notice of assignment of mortgage, which attached a copy of a recorded assignment of Defendant's mortgage to Plaintiff. ("The Assignment," attached hereto as Exh. "A").
4. Plaintiff recorded the Assignment on September 18, 2008, or eight days after the filing of the foreclosure lawsuit.
5. On August 26, 2010, the Court granted Plaintiff's motion for summary judgment and entered a decree of foreclosure against Defendant.

II. Law and Argument

In *Federal Home Loan Mortgage Corporation v. Schwarzwald, et al.*, a case recently decided by the Supreme Court, plaintiff bank brought a foreclosure lawsuit before it obtained an

assignment of the mortgage securing defendant homeowners' loan. Defendants maintained that plaintiff lacked standing to sue (much as Defendant previously contended in this case) because the assignment of mortgage had not been recorded prior to the filing of the lawsuit. Plaintiff was assigned the mortgage via formal assignment, as here, only after the filing of the lawsuit. The trial court entered summary judgment in favor of plaintiff, and the Second District Court of Appeals affirmed.

The Supreme Court reversed, holding that standing is a jurisdictional requirement that must be satisfied to even initiate a foreclosure lawsuit:

We recognized that standing is a 'jurisdictional requirement' in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, and we stated: 'It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.' (Emphasis added by the Court).

(*Schwarzwald*, attached hereto as Exh. "B" at para. 22).

Further, the Court stated, "Because standing to sue is required to invoke the jurisdiction of the common pleas court, 'standing is to be determined as of the commencement of suit.'" *Id.* at para. 24. Invoking jurisdiction of the court, thus, depends on the state of things at the time the action is brought, and not after. *Id.* at para. 25.

In reversing the Second District, the Supreme Court concluded:

The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint[.]

Id. at para. 40 (Emphasis added).

Here, in accordance with the Supreme Court, when Plaintiff filed this lawsuit on September 10, 2008, it did not have "standing to invoke the jurisdiction of the court," because it had not yet been assigned the mortgage, and it could not cure this lack of standing through the

later filing of the mortgage assignment as it attempted to do on August 2, 2010. *Id.* at para. 41. As a result, the Court's August 26, 2010 entry granting Plaintiff's motion for summary judgment and issuing a decree of foreclosure should be void ab initio (as opposed to voidable). Accordingly, based upon the foregoing, Defendant respectfully requests that the August 26, 2010 entry be vacated and this matter otherwise dismissed.

Respectfully submitted,

MILLS, MILLS, FIELY & LUCAS, LLC

/s/ John Sherrod

JOHN SHERROD (0078598)
503 South Front Street, Ste. 240
Columbus, Ohio 43215
614.754.7076
330.336.7956 fax
jsherrod@mmlflaw.com

Counsel for Defendant

Certificate of Service

Undersigned certifies a true and accurate copy of the foregoing, was delivered to the following, via regular US Mail, this 31st day of October, 2012, postage prepaid:

Scott King, Esq.
10050 Innovation Drive
Ste. 400
Dayton, Ohio 45342

/s/ John Sherrod

John Sherrod

RECORDED 08-09-10 12:10:18

Handwritten initials

200842792
(kdk)

COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

Deutsche Bank National trust
Company, as Trustee for FFMLT
2006-FF13

Plaintiff,

Case No. 08 CV E 09 1219

Judge Everett H. Krueger

-vs-

NOTICE OF FILING
ASSIGNMENT OF MORTGAGE

Robert P. Slayton, et al.
Defendants.

Now comes the plaintiff and hereby gives notice of the
filing of the Assignment of Mortgage, said Assignment of
Mortgage being attached hereto as Exhibit "A".

Handwritten signature

Julia E. Steelman
Ohio Supreme Court Reg. #0082778
Amy Hathaway
Ohio Supreme Court Reg. #0075169
Brad J. Terman
Ohio Supreme Court Reg. #0083974
LERNER, SAMPSON & ROTHFUSS
Attorney for Plaintiff
P.O. Box 5480
Cincinnati, OH 45201-5480
(513) 241-3100
attyemail@lsrlaw.com

2008 AUG -2 PM 2:00
CLERK ANTHONY PLOS
COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO



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NOTC

EXH A

RECEIVED 12:10:58

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 26th day of July, 2010.

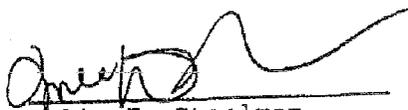
Mortgage Electronic
Registration Systems, Inc.
P.O. Box 7814
Ocala, FL 34478-7814

Beneficial Ohio, Inc.
2700 Sanders Road
Prospect Heights, IL 60070

Terri L. Samson
2460 Old Stringtown Road
Grove City, OH 43123

Michael T. Gunner, Esq.
3535 Fishinger Blvd.
Suite 220
Hilliard, OH 43026

Christopher D. Betts, Esq.
140 N. Sandusky Street
Delaware, OH 43015


Julia E. Steelman

WF

LS&R No.: 200842792
 Loan No.: 1328016301
 Pidn: 317-230-09-007-000

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Mortgage Electronic Registration Systems, Inc. as nominee for First Franklin a Division of Nat. City Bank of IN, its successors and assigns, whose address is PO Box 7814, Ocala, FL 34478, does hereby sell, assign, transfer and set over unto Deutsche Bank National Trust Company, as Trustee for FFMLT 2006-FF13, whose address is 3476 Stateview Boulevard, Fort Mill, SC 29715 Mac# 7801-013, a certain mortgage from Robert P. Slayton and Lisa J. Slayton, husband and wife, to Mortgage Electronic Registration Systems, Inc. as nominee for First Franklin a Division of Nat. City Bank of IN, its successors and assigns, dated July 24, 2006, recorded August 11, 2006, in Volume 729, Page 989, in the office of the Delaware County Recorder, and all sums of money due and to become due thereon, and secured by the following real estate:

LEGAL DESCRIPTION

Situated in the State of Ohio, in the County of Delaware and in the Township of Genoa:

Being Lot Number Three Thousand Four Hundred Sixty-one (3461), of HIGHLAND HILLS AT THE LAKES SECTION ONE, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Cabinet 1, slides 706 and 706A, Recorder's Office, Delaware County, Ohio.

PROPERTY ADDRESS:
 5244 LEYDORF LANE
 WESTERVILLE, OH 43082

200800026906
 Filed for Record in
 DELAWARE COUNTY, OHIO
 ANDREW D BRENNER
 09-18-2008 At 10:03 am.
 MTG ASSIGN 32.00
 OR Book 865 Page 1590 - 1591

Certified True Copy
 09-18-2008 At 10:03 am.
 ANDREW D BRENNER
 RECORDER
 DELAWARE COUNTY, OHIO

RECORDED 09-18-2008 10:10:35

ESAMINER: 09/08/10 12:10:57

IN WITNESS WHEREOF, Mortgage Electronic Registration Systems, Inc. as nominee for First Franklin a Division of Nat. City Bank of IN, its successors and assigns has set its hand this 11 day of Sept., 2008.

Mortgage Electronic Registration Systems, Inc. as nominee for First Franklin a Division of Nat. City Bank of IN, its successors and assigns

By: [Signature]
Kevin Prieshoff,
Assistant Secretary and Vice President

STATE OF OHIO

SS.

COUNTY OF HAMILTON

PAMELA K. TROXELL

On SEP 11 2008 before me [Signature], Notary Public, State of Ohio, personally appeared Kevin Prieshoff, Assistant Secretary and Vice President, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

[Signature]
Notary Public
My Commission Expires:



PAMELA K. TROXELL
Notary Public, State of Ohio
My Commission Expires
June 4, 2013

This instrument was prepared by:
LERNER, SAMPSON & ROTHFUSS
A Legal Professional Association
P.O. Box 5480
Cincinnati, OH 45201-5480

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-5017

FEDERAL HOME LOAN MORTGAGE CORPORATION, APPELLEE, v.

SCHWARTZWALD ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

Foreclosure—Jurisdictional aspects of standing—Civ.R. 17(A)—Jurisdiction determined as of time of filing suit.

(Nos. 2011-1201 and 2011-1362—Submitted April 4, 2012—Decided October 31, 2012.)

APPEAL from and CERTIFIED by the Court of Appeals for Greene County,
No. 2010 CA 41, 194 Ohio App.3d 644, 2011-Ohio-2681.

O'DONNELL, J.

{¶ 1} Duane and Julie Schwartzwald appeal from a judgment of the Second District Court of Appeals affirming a decree of foreclosure entered in favor of the Federal Home Loan Mortgage Corporation. In addition, the appellate court certified that its decision in this case conflicts with decisions of the First and

EXH. B

SUPREME COURT OF OHIO

Eighth Districts on the following issue: "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."

{¶ 2} Federal Home Loan commenced this foreclosure action before it obtained an assignment of the promissory note and mortgage securing the Schwartzwalds' loan. The Schwartzwalds maintained that Federal Home Loan lacked standing to sue. The trial court granted summary judgment in favor of Federal Home Loan and entered a decree of foreclosure. The appellate court affirmed, holding that Federal Home Loan had remedied its lack of standing when it obtained an assignment from the real party in interest.

{¶ 3} However, standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint. Thus, receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.

{¶ 4} Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Facts and Procedural History

{¶ 5} In November 2006, Duane and Julie Schwartzwald purchased a home in Xenia, Ohio, and received a mortgage loan from Legacy Mortgage in the amount of \$251,250. They executed a promissory note and a mortgage granting Legacy Mortgage a security interest in the property. Legacy Mortgage then endorsed the promissory note as payable to Wells Fargo Bank, N.A., and assigned it the mortgage.

{¶ 6} In September 2008, Duane Schwartzwald lost his job at Barco, Inc., and the Schwartzwalds moved to Indiana so he could accept a new position. They continued making mortgage payments as they tried to sell the house in Xenia, but they went into default on January 1, 2009. In March 2009, Wells

January Term, 2012

Fargo agreed to list the property for a short sale, and on April 8, 2009, the Schwartzwalds entered into a contract to sell it for \$259,900, with closing set for June 8, 2009.

{¶ 7} However, on April 15, 2009, Federal Home Loan Mortgage Corporation commenced this foreclosure action, alleging that the Schwartzwalds had defaulted on their loan and owed \$245,085.18 plus interest, costs, and advances. It attached a copy of the mortgage identifying the Schwartzwalds as borrowers and Legacy Mortgage as lender, but did not attach a copy of the note, claiming that "a copy of [the note] is currently unavailable."

{¶ 8} Julie Schwartzwald then contacted Wells Fargo about the foreclosure complaint. She testified, "I was told that it was 'standard procedure' and 'don't worry about it' because we were doing a short sale." The Schwartzwalds did not answer the complaint.

{¶ 9} On April 24, 2009, Federal Home Loan filed with the court a copy of the note signed by the Schwartzwalds in favor of Legacy Mortgage. The final page carries a blank endorsement by Wells Fargo placed above the endorsement by Legacy Mortgage payable to Wells Fargo.

{¶ 10} On May 15, 2009, Wells Fargo assigned the note and mortgage to Federal Home Loan, and Federal Home Loan filed with the court a copy of the assignment on June 17, 2009. It then moved for a default judgment and a summary judgment, but the trial court discovered that Federal Home Loan had failed to establish a chain of title because no assignment of the mortgage from Legacy Mortgage to Wells Fargo appeared in the record.

{¶ 11} During this time, even though it had assigned its interest in the note and mortgage to Federal Home Loan, Wells Fargo continued discussing a short sale of the property with the Schwartzwalds, but delays in this process eventually caused the Schwartzwalds' buyer to rescind the offer. On December 14, 2009, the trial court granted the Schwartzwalds leave to file an answer. That

SUPREME COURT OF OHIO

same day, Federal Home Loan filed with the court a copy of the assignment of the mortgage from Legacy Mortgage to Wells Fargo dated November 27, 2006.

{¶ 12} Federal Home Loan again moved for summary judgment, supporting the motion with the affidavit of Herman John Kennerty, vice president of loan documentation for Wells Fargo as servicing agent for Federal Home Loan, who averred that the Schwartzwalds were in default and who authenticated the note and mortgage as well as the assignment of the note and mortgage from Wells Fargo. Subsequently, Federal Home Loan filed copies of the notarized assignments from Legacy Mortgage to Wells Fargo and from Wells Fargo to Federal Home Loan.

{¶ 13} The Schwartzwalds also moved for summary judgment, asserting that Federal Home Loan lacked standing to foreclose on their property.

{¶ 14} The trial court entered summary judgment for Federal Home Loan, finding that the Schwartzwalds had defaulted on the note, and it ordered the equity of redemption foreclosed and the property sold. Federal Home Loan purchased the property at a sheriff's sale.

{¶ 15} On appeal, the Second District Court of Appeals affirmed and held that Federal Home Loan had established its right to enforce the promissory note as a nonholder in possession, because assignment of the mortgage effected a transfer of the note it secured. The court further explained that standing is not a jurisdictional prerequisite and that a lack of standing may be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). Thus, the court concluded that although Federal Home Loan lacked standing at the time it commenced the foreclosure action, it cured that defect by the assignment of the mortgage and transfer of the note prior to entry of judgment.

{¶ 16} The court of appeals certified that its decision conflicted with *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.), ¶ 15-16; *Bank of New York v. Gindele*, 1st Dist. No. C-

January Term, 2012

090251, 2010-Ohio-542, ¶ 3-4; and *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 21, cases that held that a lack of standing cannot be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). We accepted the conflict and the Schwartzwalds' discretionary appeal on the same issue.

Arguments on Appeal

{¶ 17} The Schwartzwalds explain that the essential aspect of standing is injury to a legally protected right and claim that Federal Home Loan had not been injured by their default at the time it commenced this foreclosure action, because it had not obtained the note and mortgage until after it filed the complaint. Relying on federal caselaw, they maintain that standing is determined as of the time the action is brought, so that subsequent events do not cure a lack of standing. They further urge that although the requirement of a real party in interest can be waived, that requirement cannot be equated with the requirement of standing.

{¶ 18} Federal Home Loan asserts that pursuant to R.C. 1303.31, it is a "person entitled to enforce the note" because it is "[a] nonholder in possession of the instrument who has the rights of a holder" by virtue of the negotiation of the note from Legacy to Wells Fargo and the assignment from Wells Fargo. Further, it maintains that R.C. 1303.31 defines only which party is entitled to enforce a note and that the failure to be a real party in interest at the commencement of suit can be cured pursuant to Civ.R. 17(A) by the assignment of the mortgage and note. It also contends that the jurisdictional requirement of justiciability is satisfied if the allegations of the complaint establish that the plaintiff has standing to present a justiciable controversy and that even if it is determined that those allegations were in fact false, the matter remains justiciable so long as the plaintiff subsequently obtains the right to foreclose prior to judgment. On this basis, it argues that because "the Ohio Constitution bestows general (and not limited)

SUPREME COURT OF OHIO

jurisdiction on common pleas courts, common pleas courts have 'jurisdiction' to hear disputes, even if the named plaintiff was not the correct person to invoke it." Thus, it concedes that the record in this case does not establish that it was a person entitled to enforce the note as of the date the complaint was filed, but it maintains that it "proved that it was such a person prior to judgment."

{¶ 19} Accordingly, the question presented is whether a lack of standing at the commencement of a foreclosure action filed in a common pleas court may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment.

Law and Analysis

Standing to Sue

{¶ 20} The Ohio Constitution provides in Article IV, Section 4(B): "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." (Emphasis added.)

{¶ 21} In *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987), we stated:

" Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a "personal stake in the outcome of the controversy." "

Id., quoting *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986), quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1972). Similarly, the United States Supreme Court observed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), that “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case.”

{¶ 22} We recognized that standing is a “jurisdictional requirement” in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: “It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Emphasis added.) See also *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) (“the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings”); Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004) (noting that the jurisdiction of the common pleas court is limited to justiciable matters).

{¶ 23} And recently, in *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, we affirmed the dismissal of a complaint for lack of standing when it had been filed before the claimant had suffered any injury. There, Kincaid asserted claims that his insurer had breached the insurance contract by failing to pay expenses covered by the policy; however, he had never presented a claim for reimbursement to the insurer. We concluded that Kincaid lacked standing to assert the cause of action, explaining, “Until Erie refuses to pay a claim for a loss, Kincaid has suffered no actual damages for breach of contract, the parties do not have adverse legal interests, and there is no justiciable controversy.” *Id.* at ¶ 13.

SUPREME COURT OF OHIO

{¶ 24} Because standing to sue is required to invoke the jurisdiction of the common pleas court, “standing is to be determined as of the commencement of suit.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5; see also *Friendly of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154-1155 (10th Cir.2005); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir.2003); *Perry v. Arlington Hts.*, 186 F.3d 826, 830 (7th Cir.1999); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061 (5th Cir.1991).

{¶ 25} Further, invoking the jurisdiction of the court “depends on the state of things at the time of the action brought,” *Mullan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824), and the Supreme Court has observed that “[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction.” *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

{¶ 26} Thus, “[p]ost-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress.” 13A Wright, Miller & Cooper, *Federal Practice and Procedure* 9, Section 3531 (2008); see *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 575, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004), quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, 117 S.Ct. 467, 136 L.Ed.2d 437 (rejecting argument that “ ‘finality, efficiency, and judicial economy’ ” can justify suspension of the time-of-filing rule); *Utah Assn. of Counties v. Bush*, 455 F.3d 1094, 1101, and fn. 6 (10th Cir.2006) (a plaintiff cannot rely on injuries occurring after the filing of the complaint to establish standing).

{¶ 27} This principle accords with decisions from other states holding that standing is determined as of the filing the complaint. See, e.g., *Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 (“If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder *after the foreclosure action was filed*, then the case may be dismissed without prejudice * * *” [emphasis added]); *U.S. Bank Natl. Assn. v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 (“U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank” [emphasis added]); *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 287, ¶ 15 (“Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts” [emphasis added]); *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 309 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) (explaining that “ ‘[s]tanding is the legal right to set judicial machinery in motion’ ” and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action); *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) (“the plaintiff must prove that it had standing to foreclose when the complaint was filed”); see also *Burley v. Douglas*, 26 So.3d 1013, 1019 (Miss.2009), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5 (“ ‘standing is to be determined as of the commencement of suit’ ”); *In re 2007 Administration of Appropriations of Water of the Niobrara*, 278 Neb. 137, 145, 768 N.W.2d 420 (2009) (“only a party that has standing may invoke the jurisdiction of a court or tribunal. And the junior appropriators did not lose standing if they possessed it under the facts existing when they commenced the litigation” [footnote omitted]).

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{¶ 28} Here, Federal Home Loan concedes that there is no evidence that it had suffered any injury at the time it commenced this foreclosure action. Thus, because it failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.

The Real-Party-in-Interest Rule

{¶ 29} The court of appeals and Federal Home Loan relied on the plurality opinion in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998), which suggested that “[t]he lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17.” However, four justices declined to join that portion of the opinion, and therefore it is not a holding of this court. See Ohio Constitution, Article IV, Section 2(A) (“A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment”).

{¶ 30} At common law, all actions had to be brought in the name of the person holding legal title to the right asserted, and individuals possessing only equitable or beneficial interests could not sue in their own right. See generally Clark & Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259 (1925); 6A Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1541 (2010). However, the practice in equity relaxed this requirement, and states later abrogated the common-law rules and adopted “rules that permitted any ‘real party in interest’ to bring suit.” *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 279, 128 S.Ct. 2531, 171 L.Ed 2d 424 (2008).

{¶ 31} In Ohio, Civ.R. 17(A) governs the procedural requirement that a complaint be brought in the name of the real party in interest and provides:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee,

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trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶ 32} Considering Civ.R. 17(A) in *Shealy v. Campbell*, 20 Ohio St.3d 23, 24-25, 485 N.E.2d 701 (1985), we observed:

The purpose behind the real party in interest rule is “ * * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.” *Celanese Corp. of America v. John Clark Industries* (5 Cir.1954), 214 F.2d 551, 556.” [*In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237] 240 [273 N.E.2d 903].

{¶ 33} As the Supreme Court explained in *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005), the real-party-in-interest

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rule concerns only proper party joinder. Civ.R. 17(A) does not address standing; rather, the point of the rule is that "suits by representative plaintiffs on behalf of the real parties in interest are the exception rather than the rule and should only be allowed when the real parties in interest are identifiable and the res judicata scope of the judgment can be effectively determined." *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.1975) (construing analogous District of Columbia rule).

{¶ 34} Thus, the Third and the Ninth Circuits have rejected the notion that Fed.R.Civ.P. 17(a), on which Civ.R. 17(A) is based, allows a party with no personal stake in a controversy to file a claim on behalf of a third party, obtain the cause of action by assignment, and then have the assignment relate back to commencement of the action, stating:

"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. Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake; it is not a provision to be distorted by parties to circumvent the limitations period."

Gardner v. State Farm Fire & Cas. Co., 544 F.3d 553, 563 (3d Cir.2008), quoting *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1075 (9th Cir.1989).

{¶ 35} The Sixth Circuit Court of Appeals' decision in *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir.2002), illustrates this point. In that case, a fire at a warehouse destroyed property insured by American Guarantee, which paid out a claim for damages. However, another insurance company, Zurich Switzerland, filed a complaint claiming to be the insured's subrogee, notwithstanding the fact that Zurich Switzerland had neither issued an insurance

policy nor paid out any money to the insured. The defendants moved to dismiss for lack of standing, and Zurich Switzerland sought to substitute American Guarantee as the real party in interest pursuant to Fed.R.Civ.P. 17(a). The district court dismissed the action.

{¶ 36} The Sixth Circuit Court of Appeals acknowledged that the statute of limitations would bar American Guarantee's claim unless Fed.R.Civ.P. 17(a) allowed it to be substituted for Zurich Switzerland. However, the court distinguished between the requirement of standing and the objection that the plaintiff is not the real party in interest, and it held that because "Zurich American admittedly has not suffered injury in fact by the defendants, it had no standing to bring this action and no standing to make a motion to substitute the real party in interest." *Id.*

{¶ 37} Other courts have also determined that a plaintiff cannot rely on procedural rules similar to Civ.R. 17(A) to cure a lack of standing at the commencement of litigation. *Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir.2007) ("whether or not Dux was the real-party-in-interest, it does not have standing, and it cannot cure its standing problem through an invocation of Fed.R.Civ.P. 17(a)"); *Clark v. Trailiner Corp.*, 242 F.3d 388 (10th Cir.2000) (table), opinion reported at 2000 WL 1694299 (noting that the plaintiff cannot "retroactively become the real-party-in-interest" in order to cure a lack of standing at the filing of the complaint [emphasis sic]); accord *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027-1028 (Ala.1999) (rejecting the argument that a lack of standing can be cured after filing of the complaint); *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.App.1975) (explaining that dismissal for lack of standing is consistent with D.C. Super.Ct.Civ.R. 17(a)); see also *McLean v. JP Morgan Chase Bank Nail. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) ("a party is not permitted to establish the right

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to maintain an action retroactively by acquiring standing to file a lawsuit after the fact").

{¶ 38} We agree with the reasoning and analysis presented in these cases. Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.

{¶ 39} Accordingly, a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.

Effect of Lack of Standing on Foreclosure Actions

{¶ 40} The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice. See *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 51. Because there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties.

Conclusion

{¶ 41} It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

{¶ 42} Here, it is undisputed that Federal Home Loan did not have standing at the time it commenced this foreclosure action, and therefore it failed

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to invoke the jurisdiction of the court of common pleas. Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Judgment reversed
and cause dismissed.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, LANZINGER, CUPP,
and MCGEE BROWN, JJ., concur.

Thompson Hinc, L.L.P., Scott A. King, and Terry W. Posey Jr., for
appellee.

Andrew M. Engle, for appellants.

Bruce M. Broyles, urging reversal for amici curiae Homeowners of the
State of Ohio and Ohiofraudclosure.blogspot.com.

Advocates for Basic Legal Equality, Inc., and Andrew D. Neuhauser;
Legal Aid Society of Cleveland and Julie K. Robie; Legal Aid Society of
Southwest Ohio, L.L.C., and Noel M. Morgan; Community Legal Aid Services,
Inc., Christina M. Janice, and Paul E. Zindle; and Ohio Poverty Law Center and
Linda Cook, urging reversal for amici curiae Advocates for Basic Legal Equality,
Inc., Legal Aid Society of Cleveland, Legal Aid Society of Southwest Ohio,
L.L.C., 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.

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

WELLS FARGO BANK, N.A.)	CASE NO.: 10 CVE 05 7187
)	
Plaintiff,)	JUDGE: HORTON
)	
v.)	
)	
TERRY A. GILLOTTE, et al.)	
)	
Defendants.)	

DEFENDANTS' MOTION TO VACATE

Now come Defendants, Terry and Deborah Gillotte ("Defendants"), by and through their undersigned counsel, and for their motion to vacate the Court's September 8, 2010 decree of foreclosure given the Supreme Court's October 31, 2012 holding in *Federal Home Loan Mortgage Corporation v. Schwartz*, 2012-Ohio-5017.

Respectfully submitted,

MILLS, MILLS, FIELY & LUCAS, LLC

/s/ John Sherrod
 JOHN SHERROD (0078598)
 503 South Front Street, Ste. 240
 Columbus, Ohio 43215
 614.754.7076
 614.767.5229 fax
jsherrod@mmflaw.com

Counsel for Defendants



Memorandum In Support

I. Relevant Factual Background

1. On May 12, 2010, Plaintiff Wells Fargo Bank, NA ("Plaintiff") filed the foreclosure complaint in this action.
2. As of May 12, 2010, the mortgage at issue had not been assigned from whoever the previous holder was to Plaintiff.
3. On June 11, 2010, Plaintiff filed a notice of assignment of mortgage, which attached a copy of the recorded assignment of Defendants' mortgage to Plaintiff. ("The Assignment," attached hereto as Exh. "A").
4. Plaintiff recorded the Assignment on June 10, 2010, or about a month after filing this lawsuit.
5. On October 31, 2010, the Court entered judgment against Defendants and entered a decree of foreclosure.¹

II. Law and Argument

In *Federal Home Loan Mortgage Corporation v. Schwartzwald, et al.*, a case recently decided by the Supreme Court, plaintiff bank brought a foreclosure lawsuit before it obtained an assignment of the mortgage securing defendant homeowners' loan. Defendants maintained that plaintiff lacked standing to sue because the assignment of mortgage had not been recorded prior to the filing of the lawsuit. Plaintiff was assigned the mortgage via formal assignment, as here, only after the filing of the lawsuit. The trial court entered summary judgment in favor of plaintiff, and the Second District Court of Appeals affirmed.

¹ There is also a Civ. R. 60(B) motion pending in this case, which raises as an affirmative defense Plaintiff's lack of standing.

The Supreme Court reversed, holding that standing is a jurisdictional requirement that must be satisfied to even initiate a foreclosure lawsuit:

We recognized that standing is a 'jurisdictional requirement' in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, and we stated: 'It is an elementary concept of law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.' (Emphasis added by the Court).

(*Schwarzwald*, attached hereto as Exh. "B" at para. 22).

Further, the Court stated, "Because standing to sue is required to invoke the jurisdiction of the common pleas court, 'standing is to be determined as of the commencement of suit.'" *Id.* at para. 24. Invoking jurisdiction of the court depends on the state of things at the time the action is brought, and not after. *Id.* at para. 25.

In reversing the Second District, the Supreme Court concluded:

The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint[.]

Id. at para. 40 (Emphasis added).

Here, in accordance with the Supreme Court, when Plaintiff filed this lawsuit on May 12, 2010, it did not have "standing to invoke the jurisdiction of the court," because it had not yet been assigned the mortgage, and it could not cure this lack of standing through the later filing of the mortgage assignment as it attempted to do on June 11, 2010. *Id.* at para. 41. As a result, the Court's October 31, 2010 entry granting Plaintiff's motion for summary judgment and issuing a decree of foreclosure should be void ab initio (as opposed to voidable). Accordingly, based upon the foregoing, Defendants respectfully request that the October 31, 2010 entry be vacated and this matter otherwise be dismissed.

Respectfully submitted,

MILLS, MILLS, FIELY & LUCAS, LLC

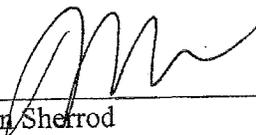
/s/ John Sherrod

JOHN SHERROD (0078598)
503 South Front Street, Ste. 240
Columbus, Ohio 43215
614.754.7076
614.767.5229 fax
jsherrod@mmflaw.com

Counsel for Defendants

Certificate of Service

Undersigned certifies that a true and accurate copy of the foregoing was delivered to all counsels of record via this Court's e-file system on this 31st day of October, 2012.



John Sherrod

E0135 - L9

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Wells Fargo Bank, NA

Plaintiff,

vs.

Terry A. Gillotte, et al.

Defendants.

Case No. 10CVE-05-7187

Judge Timothy S. Horton

NOTICE OF FILING OF
ASSIGNMENT OF MORTGAGE

Attached hereto as Exhibit A is a recorded assignment of mortgage in reference to the
above captioned case.

Respectfully submitted,



Kevin L. Williams (0061656)
Manley Deas Kochalski LLC
P. O. Box 165028
Columbus, OH 43216-5028
Telephone: 614-222-4921
Fax: 614-220-5613
Email: klw@mdk-llc.com
Attorney for Plaintiff
Loss Mitigation Help:
www.mdklossmit.com
MDK File Number: 10-508444

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2012 JUN 23 AM 11:21
CLERK OF COURTS-CV

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Ref# 10-508444/1.ME2

F27

a

EXH. A

E0135 - L10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Filing of Assignment of Mortgage was sent to the following by ordinary U.S. Mail, postage prepaid, on the date indicated below:

Terry A. Gilotte
6135 Brice Park Drive
Canal Winchester, OH 43110

Deborah Ann Rapp
6135 Brice Park Drive
Canal Winchester, OH 43110

Melinda S. Carlson
Attorney for Child Support Enforcement
Agency of Franklin County
80 E. Fulton Street
Columbus, OH 43215

Adria L. Fields
Attorney for Franklin County Treasurer
373 South High Street - 14th Floor
Columbus, OH 43215

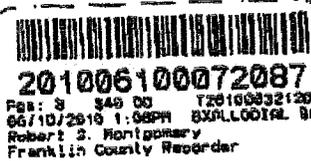


Kevin L. Williams

June 22nd, 2010
Dated

É0135 - L11

EXHIBIT A



ASSIGNMENT

"MERS", Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Affinity Group Mortgage ("Assignor"), whose address is P.O. Box 2026, , Flint, MI 48501, hereby executes this mortgage assignment for the purpose of acknowledging, and placing third parties on notice of, the transfer, conveyance, and assignment to Wells Fargo Bank, NA ("Assignee"), whose address is c/o Wells Fargo Bank N.A., 3476 Stateview Boulevard, Fort Mill, South Carolina 29715, its interest in that mortgage dated July 26, 2004 executed and delivered by Terry A Gillotte, unmarried, which mortgage was filed August 4, 2004, recorded at Official Instrument Number 200408040181656, Recorder's Office, Franklin County, Ohio.

The property encumbered by such mortgage is described as follows:

See Exhibit "A" for legal description.

Parcel No. 090-000375-00.

Property Address: 109 Santa Maria Lane, Columbus, OH 43213

The Recorder is hereby requested to cross-reference this Assignment to the recording reference of the mortgage hereinbefore described.

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IN ORDER TO COMPLY WITH ORC 317.114**

Ref# 10-508444/AJT

E0135 - L13

EXHIBIT "A"

Legal Description:

Situated in the County of Franklin in the State of Ohio and in the City of Whitehall:

Being Lot Number One Hundred Sixteen (116) of Norton Field Plat No. 1, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book 21, Page 46, Recorder's Office, Franklin County, Ohio.

Ref# 10-508444/AJT



[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-5017

**FEDERAL HOME LOAN MORTGAGE CORPORATION, APPELLEE, v.
SCHWARTZWALD ET AL., APPELLANTS.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.]

Foreclosure—Jurisdictional aspects of standing—Civ.R. 17(A)—Jurisdiction determined as of time of filing suit.

(Nos. 2011-1201 and 2011-1362—Submitted April 4, 2012—Decided October 31, 2012.)

APPEAL from and CERTIFIED by the Court of Appeals for Greene County, No. 2010 CA 41, 194 Ohio App.3d 644, 2011-Ohio-2681.

O'DONNELL, J.

{¶ 1} Duane and Julie Schwartzwald appeal from a judgment of the Second District Court of Appeals affirming a decree of foreclosure entered in favor of the Federal Home Loan Mortgage Corporation. In addition, the appellate court certified that its decision in this case conflicts with decisions of the First and

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Eighth Districts on the following issue: "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."

{¶ 2} Federal Home Loan commenced this foreclosure action before it obtained an assignment of the promissory note and mortgage securing the Schwartzwalds' loan. The Schwartzwalds maintained that Federal Home Loan lacked standing to sue. The trial court granted summary judgment in favor of Federal Home Loan and entered a decree of foreclosure. The appellate court affirmed, holding that Federal Home Loan had remedied its lack of standing when it obtained an assignment from the real party in interest.

{¶ 3} However, standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint. Thus, receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.

{¶ 4} Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Facts and Procedural History

{¶ 5} In November 2006, Duane and Julie Schwartzwald purchased a home in Xenia, Ohio, and received a mortgage loan from Legacy Mortgage in the amount of \$251,250. They executed a promissory note and a mortgage granting Legacy Mortgage a security interest in the property. Legacy Mortgage then endorsed the promissory note as payable to Wells Fargo Bank, N.A., and assigned it the mortgage.

{¶ 6} In September 2008, Duane Schwartzwald lost his job at Barco, Inc., and the Schwartzwalds moved to Indiana so he could accept a new position. They continued making mortgage payments as they tried to sell the house in Xenia, but they went into default on January 1, 2009. In March 2009, Wells

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Fargo agreed to list the property for a short sale, and on April 8, 2009, the Schwartzwalds entered into a contract to sell it for \$259,900, with closing set for June 8, 2009.

{¶ 7} However, on April 15, 2009, Federal Home Loan Mortgage Corporation commenced this foreclosure action, alleging that the Schwartzwalds had defaulted on their loan and owed \$245,085.18 plus interest, costs, and advances. It attached a copy of the mortgage identifying the Schwartzwalds as borrowers and Legacy Mortgage as lender, but did not attach a copy of the note, claiming that “a copy of [the note] is currently unavailable.”

{¶ 8} Julie Schwartzwald then contacted Wells Fargo about the foreclosure complaint. She testified, “I was told that it was ‘standard procedure’ and ‘don’t worry about it’ because we were doing a short sale.” The Schwartzwalds did not answer the complaint.

{¶ 9} On April 24, 2009, Federal Home Loan filed with the court a copy of the note signed by the Schwartzwalds in favor of Legacy Mortgage. The final page carries a blank endorsement by Wells Fargo placed above the endorsement by Legacy Mortgage payable to Wells Fargo.

{¶ 10} On May 15, 2009, Wells Fargo assigned the note and mortgage to Federal Home Loan, and Federal Home Loan filed with the court a copy of the assignment on June 17, 2009. It then moved for a default judgment and a summary judgment, but the trial court discovered that Federal Home Loan had failed to establish a chain of title because no assignment of the mortgage from Legacy Mortgage to Wells Fargo appeared in the record.

{¶ 11} During this time, even though it had assigned its interest in the note and mortgage to Federal Home Loan, Wells Fargo continued discussing a short sale of the property with the Schwartzwalds, but delays in this process eventually caused the Schwartzwalds’ buyer to rescind the offer. On December 14, 2009, the trial court granted the Schwartzwalds leave to file an answer. That

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same day, Federal Home Loan filed with the court a copy of the assignment of the mortgage from Legacy Mortgage to Wells Fargo dated November 27, 2006.

{¶ 12} Federal Home Loan again moved for summary judgment, supporting the motion with the affidavit of Herman John Kennerty, vice president of loan documentation for Wells Fargo as servicing agent for Federal Home Loan, who averred that the Schwartzwalds were in default and who authenticated the note and mortgage as well as the assignment of the note and mortgage from Wells Fargo. Subsequently, Federal Home Loan filed copies of the notarized assignments from Legacy Mortgage to Wells Fargo and from Wells Fargo to Federal Home Loan.

{¶ 13} The Schwartzwalds also moved for summary judgment, asserting that Federal Home Loan lacked standing to foreclose on their property.

{¶ 14} The trial court entered summary judgment for Federal Home Loan, finding that the Schwartzwalds had defaulted on the note, and it ordered the equity of redemption foreclosed and the property sold. Federal Home Loan purchased the property at a sheriff's sale.

{¶ 15} On appeal, the Second District Court of Appeals affirmed and held that Federal Home Loan had established its right to enforce the promissory note as a nonholder in possession, because assignment of the mortgage effected a transfer of the note it secured. The court further explained that standing is not a jurisdictional prerequisite and that a lack of standing may be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). Thus, the court concluded that although Federal Home Loan lacked standing at the time it commenced the foreclosure action, it cured that defect by the assignment of the mortgage and transfer of the note prior to entry of judgment.

{¶ 16} The court of appeals certified that its decision conflicted with *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.), ¶ 15-16; *Bank of New York v. Gindele*, 1st Dist. No. C-

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090251, 2010-Ohio-542, ¶ 3-4; and *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 21, cases that held that a lack of standing cannot be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A). We accepted the conflict and the Schwartzwalds' discretionary appeal on the same issue.

Arguments on Appeal

{¶ 17} The Schwartzwalds explain that the essential aspect of standing is injury to a legally protected right and claim that Federal Home Loan had not been injured by their default at the time it commenced this foreclosure action, because it had not obtained the note and mortgage until after it filed the complaint. Relying on federal caselaw, they maintain that standing is determined as of the time the action is brought, so that subsequent events do not cure a lack of standing. They further urge that although the requirement of a real party in interest can be waived, that requirement cannot be equated with the requirement of standing.

{¶ 18} Federal Home Loan asserts that pursuant to R.C. 1303.31, it is a "person entitled to enforce the note" because it is "[a] nonholder in possession of the instrument who has the rights of a holder" by virtue of the negotiation of the note from Legacy to Wells Fargo and the assignment from Wells Fargo. Further, it maintains that R.C. 1303.31 defines only which party is entitled to enforce a note and that the failure to be a real party in interest at the commencement of suit can be cured pursuant to Civ.R. 17(A) by the assignment of the mortgage and note. It also contends that the jurisdictional requirement of justiciability is satisfied if the allegations of the complaint establish that the plaintiff has standing to present a justiciable controversy and that even if it is determined that those allegations were in fact false, the matter remains justiciable so long as the plaintiff subsequently obtains the right to foreclose prior to judgment. On this basis, it argues that because "the Ohio Constitution bestows general (and not limited)

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jurisdiction on common pleas courts, common pleas courts have 'jurisdiction' to hear disputes, even if the named plaintiff was not the correct person to invoke it." Thus, it concedes that the record in this case does not establish that it was a person entitled to enforce the note as of the date the complaint was filed, but it maintains that it "proved that it was such a person prior to judgment."

{¶ 19} Accordingly, the question presented is whether a lack of standing at the commencement of a foreclosure action filed in a common pleas court may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment.

Law and Analysis

Standing to Sue

{¶ 20} The Ohio Constitution provides in Article IV, Section 4(B): "The courts of common pleas and divisions thereof shall have such original jurisdiction *over all justiciable matters* and such powers of review of proceedings of administrative officers and agencies as may be provided by law." (Emphasis added.)

{¶ 21} In *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987), we stated:

“ ‘Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a “personal stake in the outcome of the controversy.” ’ ”

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Id., quoting *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986), quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1972). Similarly, the United States Supreme Court observed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), that “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case.”

{¶ 22} We recognized that standing is a “jurisdictional requirement” in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: “It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Emphasis added.) See also *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) (“the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings”); Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004) (noting that the jurisdiction of the common pleas court is limited to justiciable matters).

{¶ 23} And recently, in *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, we affirmed the dismissal of a complaint for lack of standing when it had been filed before the claimant had suffered any injury. There, Kincaid asserted claims that his insurer had breached the insurance contract by failing to pay expenses covered by the policy; however, he had never presented a claim for reimbursement to the insurer. We concluded that Kincaid lacked standing to assert the cause of action, explaining, “Until Erie refuses to pay a claim for a loss, Kincaid has suffered no actual damages for breach of contract, the parties do not have adverse legal interests, and there is no justiciable controversy.” *Id.* at ¶ 13.

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{¶ 24} Because standing to sue is required to invoke the jurisdiction of the common pleas court, “standing is to be determined as of the commencement of suit.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5; see also *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154-1155 (10th Cir.2005); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir.2003); *Perry v. Arlington Hts.*, 186 F.3d 826, 830 (7th Cir.1999); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061 (5th Cir.1991).

{¶ 25} Further, invoking the jurisdiction of the court “depends on the state of things at the time of the action brought,” *Mullan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824), and the Supreme Court has observed that “[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction.” *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

{¶ 26} Thus, “[p]ost-filing events that supply standing that did not exist on filing may be disregarded, denying standing despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress.” 13A Wright, Miller & Cooper, *Federal Practice and Procedure* 9, Section 3531 (2008); see *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 575, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004), quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, 117 S.Ct. 467, 136 L.Ed.2d 437 (rejecting argument that “ ‘finality, efficiency, and judicial economy’ ” can justify suspension of the time-of-filing rule); *Utah Assn. of Counties v. Bush*, 455 F.3d 1094, 1101, and fn. 6 (10th Cir.2006) (a plaintiff cannot rely on injuries occurring after the filing of the complaint to establish standing).

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{¶ 27} This principle accords with decisions from other states holding that standing is determined as of the filing the complaint. *See, e.g., Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 (“If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder *after the foreclosure action was filed*, then the case may be dismissed without prejudice * * *” [emphasis added]); *U.S. Bank Natl. Assn. v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 (“U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank” [emphasis added]); *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 287, ¶ 15 (“Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts” [emphasis added]); *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 309 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) (explaining that “ ‘[s]tanding is the legal right to set judicial machinery in motion’ ” and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action); *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) (“the plaintiff must prove that it had standing to foreclose when the complaint was filed”); *see also Burley v. Douglas*, 26 So.3d 1013, 1019 (Miss.2009), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5 (“ ‘standing is to be determined as of the commencement of suit’ ”); *In re 2007 Administration of Appropriations of Water of the Niobrara*, 278 Neb. 137, 145, 768 N.W.2d 420 (2009) (“only a party that has standing may invoke the jurisdiction of a court or tribunal. And the junior appropriators did not lose standing if they possessed it under the facts existing when they commenced the litigation” [footnote omitted]).

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{¶ 28} Here, Federal Home Loan concedes that there is no evidence that it had suffered any injury at the time it commenced this foreclosure action. Thus, because it failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.

The Real-Party-in-Interest Rule

{¶ 29} The court of appeals and Federal Home Loan relied on the plurality opinion in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998), which suggested that “[t]he lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17.” However, four justices declined to join that portion of the opinion, and therefore it is not a holding of this court. See Ohio Constitution, Article IV, Section 2(A) (“A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment”).

{¶ 30} At common law, all actions had to be brought in the name of the person holding legal title to the right asserted, and individuals possessing only equitable or beneficial interests could not sue in their own right. See generally Clark & Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259 (1925); 6A Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1541 (2010). However, the practice in equity relaxed this requirement, and states later abrogated the common-law rules and adopted “rules that permitted any ‘real party in interest’ to bring suit.” *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 279, 128 S.Ct. 2531, 171 L.Ed 2d 424 (2008).

{¶ 31} In Ohio, Civ.R. 17(A) governs the procedural requirement that a complaint be brought in the name of the real party in interest and provides:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee,

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trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶ 32} Considering Civ.R. 17(A) in *Shealy v. Campbell*, 20 Ohio St.3d 23, 24-25, 485 N.E.2d 701 (1985), we observed:

The purpose behind the real party in interest rule is “ * * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.’ *Celanese Corp. of America v. John Clark Industries* (5 Cir.1954), 214 F.2d 551, 556.” [*In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237] 240 [273 N.E.2d 903].

{¶ 33} As the Supreme Court explained in *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005), the real-party-in-interest

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rule concerns only proper party joinder. Civ.R. 17(A) does not address standing; rather, the point of the rule is that “suits by representative plaintiffs on behalf of the real parties in interest are the exception rather than the rule and should only be allowed when the real parties in interest are identifiable and the res judicata scope of the judgment can be effectively determined.” *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.1975) (construing analogous District of Columbia rule).

{¶ 34} Thus, the Third and the Ninth Circuits have rejected the notion that Fed.R.Civ.P. 17(a), on which Civ.R. 17(A) is based, allows a party with no personal stake in a controversy to file a claim on behalf of a third party, obtain the cause of action by assignment, and then have the assignment relate back to commencement of the action, stating:

“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. Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake; it is not a provision to be distorted by parties to circumvent the limitations period.”

Gardner v. State Farm Fire & Cas. Co., 544 F.3d 553, 563 (3d Cir.2008), quoting *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1075 (9th Cir.1989).

{¶ 35} The Sixth Circuit Court of Appeals’ decision in *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir.2002), illustrates this point. In that case, a fire at a warehouse destroyed property insured by American Guarantee, which paid out a claim for damages. However, another insurance company, Zurich Switzerland, filed a complaint claiming to be the insured’s subrogee, notwithstanding the fact that Zurich Switzerland had neither issued an insurance

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policy nor paid out any money to the insured. The defendants moved to dismiss for lack of standing, and Zurich Switzerland sought to substitute American Guarantee as the real party in interest pursuant to Fed.R.Civ.P. 17(a). The district court dismissed the action.

{¶ 36} The Sixth Circuit Court of Appeals acknowledged that the statute of limitations would bar American Guarantee's claim unless Fed.R.Civ.P. 17(a) allowed it to be substituted for Zurich Switzerland. However, the court distinguished between the requirement of standing and the objection that the plaintiff is not the real party in interest, and it held that because "Zurich American admittedly has not suffered injury in fact by the defendants, it had no standing to bring this action and no standing to make a motion to substitute the real party in interest." *Id.*

{¶ 37} Other courts have also determined that a plaintiff cannot rely on procedural rules similar to Civ.R. 17(A) to cure a lack of standing at the commencement of litigation. *Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir.2007) ("whether or not Dux was the real-party-in-interest, it does not have standing, and it cannot cure its standing problem through an invocation of Fed.R.Civ.P. 17(a)"); *Clark v. Trailiner Corp.*, 242 F.3d 388 (10th Cir.2000) (table), opinion reported at 2000 WL 1694299 (noting that the plaintiff cannot "retroactively become the real-party-in-interest" in order to cure a lack of standing at the filing of the complaint [emphasis sic]); accord *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027-1028 (Ala.1999) (rejecting the argument that a lack of standing can be cured after filing of the complaint); *Consumer Fedn. of Am. v. Upjohn Co.*, 346 A.2d 725, 729 (D.C.App.1975) (explaining that dismissal for lack of standing is consistent with D.C. Super.Ct.Civ.R. 17(a)); see also *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012) ("a party is not permitted to establish the right

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to maintain an action retroactively by acquiring standing to file a lawsuit after the fact”).

{¶ 38} We agree with the reasoning and analysis presented in these cases. Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.

{¶ 39} Accordingly, a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.

Effect of Lack of Standing on Foreclosure Actions

{¶ 40} The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice. *See State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 51. Because there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties.

Conclusion

{¶ 41} It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

{¶ 42} Here, it is undisputed that Federal Home Loan did not have standing at the time it commenced this foreclosure action, and therefore it failed

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to invoke the jurisdiction of the court of common pleas. Accordingly, the judgment of the court of appeals is reversed, and the cause is dismissed.

Judgment reversed
and cause dismissed.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, LANZINGER, CUPP,
and MCGEE BROWN, JJ., concur.

Thompson Hine, L.L.P., Scott A. King, and Terry W. Posey Jr., for
appellee.

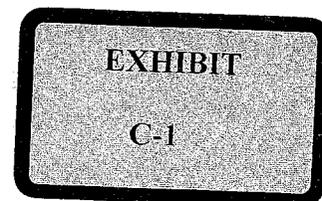
Andrew M. Engle, for appellants.

Bruce M. Broyles, urging reversal for amici curiae Homeowners of the
State of Ohio and Ohiofraudclosure.blogspot.com.

Advocates for Basic Legal Equality, Inc., and Andrew D. Neuhauser;
Legal Aid Society of Cleveland and Julie K. Robie; Legal Aid Society of
Southwest Ohio, L.L.C., and Noel M. Morgan; Community Legal Aid Services,
Inc., Christina M. Janice, and Paul E. Zindle; and Ohio Poverty Law Center and
Linda Cook, urging reversal for amici curiae Advocates for Basic Legal Equality,
Inc., Legal Aid Society of Cleveland, Legal Aid Society of Southwest Ohio,
L.L.C., 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.

Marc Dann

DANNLAW



Foreclosure Defense, foreclosure defense ohio, Ohio Supreme Court, schwartzwald decision

Schwartzwald Case means that Foreclosed Homeowners Should Take A Second Look Legal Issues Related to Their Foreclosure.

In Uncategorized on **November 1, 2012** at **12:36 pm**
By Marc Dann (http://dannlaw.wordpress.com/about-these-ads/)

Yesterday, the Ohio Supreme court issued an important decision affecting Ohio Homeowners who are now or who have recently been in foreclosure. In Federal Home Mortgage Corporation v. Schwartzwald the Court unanimously agreed with the position that our firm has been strongly advocating for the past 4 years that only someone who actually holds a homeowner's note and mortgage may use the courts of Ohio to foreclose on their homes.

This seems obvious. But apparently not to the loan servicers and their foreclosure mill co-conspirators who gleefully sued thousands of Ohioans on behalf of entities that had no right the use the courts of Ohio.

The Court correctly held that Article IV of the Ohio Constitution limits the use of the Common Pleas Court to parties who actually have a dispute with one and other. One doesn't need to be a lawyer to understand that A can't sue B for a debt that B owes to C. Apparently that logic wasn't so obvious to the lenders and loan servicers who originated millions mortgages (often predatory ones) between 2001 and 2008 and sold and resold them to each other and unsuspecting bond holders on Wall Street. For any one remembers playing musical chairs as a child, think of the notes and mortgages originated last decade as the chairs and the originators, special purpose entities, investment banks and Bond Trusts as the players. When the music stopped in 2008 when the Market for mortgage backed securities crashed, we have learned that it is surprisingly unclear who was holding notes and mortgages of Ohio Homeowners.

That is why all of the major lenders and loan servicers in Ohio simply ignored the legal

requirements of owning someone's note and mortgage and just filed for foreclosure in the name of whatever entity they "thought" was the last to buy the note. Believe it or not, thousands of lawsuits for foreclosure in Ohio were filed by entities that simply don't have any dispute with the homeowner they were suing. In the Schwartzwald Decision, the Ohio Supreme Court has said definitively that courts that granted judgments in such circumstances were without jurisdiction to do so, and that courts that are currently deciding cases must dismiss those where the lender did not possess the note and mortgage prior to filing their foreclosure complaint.

What does this mean for Ohio Homeowners:

First, it is important to understand that courts do not have an obligation to independently review cases to determine whether or not the party suing has standing to do so. Someone who is sued by a lender or servicer that does not hold the note and mortgage must put the information about the lender's lack of standing before the court. The Schwartzwald Decision makes it more important than ever that homeowners being sued for foreclosure in Ohio retain a lawyer to represent them. While this can conceivably be done by some one without a lawyer, it is a rather sophisticated and complicated argument and can best be put forward by a lawyer who is experienced in defending foreclosures. Our firm and others offer payment arrangements that make retaining counsel affordable to homeowners who are in foreclosure. For those who qualify, local legal aid offices have some of the best staff and volunteer foreclosure defense lawyers in Ohio.

Second, if you have been sued for foreclosure over the past several years, even if the matter has been resolved by way of a loan modification or a cash for keys settlement, you should consult a lawyer about whether or not you have claims against the companies involved in suing you. Under the Federal Fair Debt Collection Practices Act and Ohio's Consumer Sales Practices Act you may have claims for damages and attorneys fees, but they both have short statutes of limitations, therefore time is of the essence. Our firm and others will bring some of these claims on a contingent fee basis, meaning that you would not owe a fee unless we recover damages on your behalf.

Most importantly, it may be possible to seek an order vacating a judgment of foreclosure particularly if the real estate has not yet been sold at Sheriff's sale.

The critical lesson from this important decision is how important it is for homeowners who are facing foreclosure to fight back by challenging every claim that is made. Believe it or not, in thousands of cases throughout Ohio and the Country the largest banks in America and their foreclosure mill lawyers cheerfully sued thousands of Ohioans for debts that weren't owed to them. The courage of the Schwartzwalds and the brilliant work of their superb lawyer Andy Engel has cleared the path for thousands of Ohioans to seek justice.

Dann Doberdruk and Harshman can be found at www.dannlaw.com

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THE LAW OFFICE OF BRUCE M. BROYLES

SHERIFF SALES STOPPED TO DATE

I was keeping track of the number of Sheriff's Sales stopped, but I decided that this gave the wrong impression to viewers. An attorney should not be consulted as a matter of last resort. Instead an attorney should be consulted early in the process and the sooner an attorney is consulted the more likely a Homeowner will have a favorable result

The Law Office of Bruce M. Broyles

5815 Market Street, Suite 2, Boardman, Ohio 44512

Phone: (330) 965-1093 Fax: (330) 953-0450

bruce@brucebroyleslaw.com

The Ohio Rules of Professional Conduct suggest that the reader be informed that one of the purposes of this blog is to attract potential clients, and therefore should be considered attorney advertisement

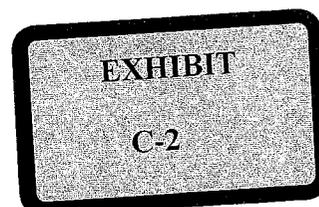
WEDNESDAY, OCTOBER 31, 2012

FOLLOWERS

Ohio Supreme Court Reverses Schwartzwald

While the issue was not expressly addressed, I believe the language of the opinion allows motions to vacate void judgments based upon the lack of standing.

The Ohio Supreme Court addressed the following certified conflict:
"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.”

The Ohio Supreme Court held that standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint.

The Ohio Supreme Court concluded:

It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

The entire opinion can be viewed at the following link:

<http://www.sconct.state.oh.us/ROD/docs/pdf/0/2012/2012-Ohio-5017.pdf>

The Decision was unanimous without any concurring opinion. The Legal Scholars do not need to attempt to decipher how the political winds may have affected the outcome. The Court applied the Laws and Rules of Court.

Throughout this process I have been having a debate with others as to whether the lack of standing resulted in a void judgment or merely a voidable judgment. A void judgment can be challenged at any time. The issue can be raised at any point in the proceedings. The issue cannot be waived. I have always argued that standing was not "jurisdictional" and therefore the lack of standing did not result in a void judgment. I had always asserted in the debate that the Courts used the phrase "invoke the jurisdiction" of the Court, but they did not really mean that a "jurisdictional" flaw existed.

In the Ohio Supreme Court's decision today, I believe that there is a much stronger argument to be made that the lack of standing creates a jurisdictional flaw that results in a void judgment.

The Ohio Supreme Court addresses the issue of standing by relying upon the Ohio Constitution's grant of original jurisdiction, stating:

The Ohio Constitution provides in Article IV, Section 4(B): “The courts of common pleas and divisions thereof shall have such original jurisdiction *over all justiciable matters* and such powers of review of proceedings of administrative officers and agencies as may be provided by law.”

The Ohio Supreme Court then cites holdings from its previous cases and holds:
“[s]tanding to sue is part of the common understanding of what it takes

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BLOG ARCHIVE

▼ 2012 (15)

▼ October (2)

Ohio Supreme Court Reverses
Schwartzwald

Thank you

► July (3)

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► May (3)

► April (1)

► March (1)

► February (3)

► 2011 (22)

ABOUT ME



BRUCE BROYLES

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to make a justiciable case."

The resulting conclusion is that without standing there is no justiciable matter over which the Court of Common pleas can exercise jurisdiction, and any resulting judgment would be void, not merely voidable.

The Ohio Supreme Court also makes the following statement:

Standing is required to invoke the jurisdiction of the common pleas court. Pursuant to Civ.R. 82, the Rules of Civil Procedure do not extend the jurisdiction of the courts of this state, and a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.

Based upon the Ohio Supreme Court's decision in Schwartzwald 2012-Ohio-5017, a strong argument can be made that a Plaintiff that did not possess an interest in the promissory note and mortgage at the time the complaint was filed, had no standing to invoke the Court's jurisdiction, and any resulting judgment is void and subject to a motion to vacate.

POSTED BY BRUCE BROYLES AT 8:21 AM

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3 COMMENTS:



amicusman November 1, 2012 5:11 AM

You would be wrong in your believe.

If a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action, but the court is not deprived of subject matter jurisdiction. See State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St. 3d 70, 1998 Ohio 275, 701 N.E.2d 1002, citing State ex rel. Smith v. Smith (1996), 75 Ohio St.3d 418, 420, 1996 Ohio 215, 662 N.E.2d 366, 369; State ex rel. LTV Steel Co. v. Gwin (1992), 64 Ohio St.3d 245, 251, 1992 Ohio 20, 594 N.E.2d 616, 621.

Reply

Replies



A Engel November 1, 2012 6:40 AM

Amicusman - Read Schwartzwald. Justice O'Donnell expressly stated that Suster is NOT the law. Also, the Court clearly stated that standing and real party in interest are NOT the same thing, and standing cannot be "cured" under Rule 17(A). These issues are what Schwartzwald are all about. What

you say was generally held to be true in Ohio, but that all changed yesterday.

Reply



A Engel November 1, 2012 6:44 AM

Bruce - There is absolutely no doubt that the judgments entered in foreclosure cases in which the plaintiff lacked standing when the complaint was filed can be attacked. They are void. Period. The hard part will be proving the lack of standing.

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Andrew M. Engel Co., L.P.A.

Proudly Serving the Miami Valley

How Schwartzwald Could Help You

Posted on November 5, 2012

The Ohio Supreme Court's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald* gives new hope to Ohioans who have lost their homes to foreclosure. Because of the *Schwartzwald* ruling, Ohio trial courts can be asked to take a fresh look at old, closed foreclosure cases in which the foreclosing bank was not entitled to enforce the note and mortgage. This new hope comes from a very old concept – standing. The Supreme Court reaffirmed the crucial role standing plays in all civil lawsuits, including foreclosure cases. Without standing, a bank is not allowed to file a foreclosure case, and if a plaintiff lacks standing, a court is not permitted to grant any relief. And it doesn't matter if the bank obtains the right to enforce the note and mortgage during the case. It must possess that right at the time the case is filed. In other words, if the bank didn't have its paperwork in order when the case was filed, the judgment and sale can be thrown out.

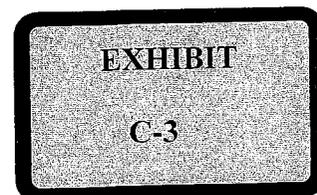
But it won't be easy to convince a court that it didn't have the power to grant a judgment. The law governing promissory notes is complex. And securitization – the process of bundling mortgage loans into trusts and selling interests in the trusts to investors – makes these issues doubly complex. Still, thousands of Ohioans may have had their home wrongfully foreclosed.

I have read dozens of blog posts and articles analyzing the impact of the *Schwartzwald* decision. Many miss the more subtle points of how standing is determined in foreclosure cases. Not everyone will be able to attack their old foreclosure judgment. But for those who can, it is important to have a lawyer who truly understands the issues involved.

I am happy to review your case to determine if it can be reopened. Call today for an appointment.

This entry was posted in foreclosure, Schwartzwald by Andy. Bookmark the permalink [<http://engellawdayton.com/?p=93>].

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Ohio Supreme Court Rules on Lender Foreclosure Actions - 11/2/2012

On October 31, 2012, the Ohio Supreme Court unanimously held that a party who files a foreclosure lawsuit prior to acquiring title to the underlying note and mortgage lacks standing to bring the action, and that such defect cannot be cured through an assignment prior to judgment. The Court's opinion in *Federal Home Loan Mortgage Corp. v. Schwartzwald*, Slip Op. No. 2012-Ohio-5017, mandates dismissal of any pending foreclosure case filed before the plaintiff obtained a valid assignment of the loan documents and requires those plaintiffs to restart the foreclosure process. This decision resolves a split of authority among Ohio appellate courts, as courts in several jurisdictions had previously allowed foreclosure plaintiffs to obtain standing through a post-filing assignment. The opinion does not address whether prior judgments entered despite this defect are void or subject to a motion to vacate.

In *Schwartzwald*, the defendant-borrowers purchased their home in November 2006. In connection with this purchase they executed a promissory note and mortgage in favor of Legacy Mortgage. Legacy immediately endorsed the promissory note and assigned the mortgage to Wells Fargo Bank, N.A., who was the servicing agent for Federal Home Loan Mortgage Corporation (Freddie Mac). The borrowers failed to make their payment due for January 2009, and on April 15, 2009, Freddie Mac filed a foreclosure lawsuit. The complaint included a copy of the mortgage in favor of Legacy, but did not attach the promissory note or any assignments. On May 15, 2009, Wells Fargo executed an assignment of the note and mortgage to Freddie Mac, which Freddie Mac filed with the trial court on June 17, 2009. Freddie Mac later filed the 2006 assignment from Legacy to Wells Fargo.

The trial court granted Freddie Mac's motion for summary judgment and entered a decree of foreclosure based on the borrowers' default under the promissory note. The trial court also denied the borrowers' cross-motion for summary judgment, which asserted that Freddie Mac lacked standing to foreclose. The Second District Court of Appeals affirmed the trial court's decision, but certified that its decision conflicted with opinions from two other Ohio appellate courts, rendering it appropriate for consideration by the Supreme Court.

In a 7-0 decision, the Supreme Court reversed the decision of the Second District and ordered that Freddie Mac's foreclosure be dismissed. In reaching its decision, the Court noted that "a party commencing litigation must have standing to sue" and a party's standing "depends on the state of things at the time of the action brought." Based on this fundamental principle, the Court held that a party "receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action." Because Freddie Mac failed to establish its interest in the promissory note and mortgage as the date of its foreclosure filing, "it had no standing to invoke the jurisdiction of the common pleas court."

Freddie Mac argued that any lack of interest in the note and mortgage could be cured before judgment under Civil Rule 17(A), which states that no action should be dismissed until a reasonable time has been allowed for "ratification of commencement of the action by, or joinder or substitution of, the real party in interest." The Court rejected this argument, holding that a trial court "cannot substitute a real party in interest for another party if no party with standing has invoked jurisdiction in the first instance."

The Court did note that although a lack of standing at the commencement of a foreclosure action requires dismissal of the complaint, such dismissal is not an adjudication on the merits and is therefore without prejudice. In effect, a plaintiff with no interest at the time its foreclosure is filed must file a new action after obtaining proper legal title to the promissory note and mortgage.

The *Schwartzwald* opinion highlights an important consideration for lenders to address prior to a foreclosure filing. For loans originated with a separate financial institution, it is necessary to obtain valid assignments of the note and mortgage securing that loan from the originating lender, as well as any other party in the chain of ownership, before filing any judicial action. It is unclear what effect this decision will have on prior judgments, although it is very possible that borrowers will try to use *Schwartzwald* as a basis to vacate existing judgments where the lender-creditor obtained its interest through an assignment.

For further information regarding this development and its practical impact, contact [John F. Kostelnik](#), Bankruptcy/Creditor Rights Practice Area Leader or any of the following Frantz Ward attorneys:

[Gregory R. Farkas](#) [Brian E. Roof](#)
[Hans L. Larsen](#) [Timothy J. Richards](#)
[Mark L. Rodio](#) [Dale S. Smith](#)

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EXHIBIT

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Ohio Supreme Court Issues Landmark Decision

In a surprising decision from the Ohio Supreme Court, the Court decided a significant issue of law involving both the standing of foreclosure plaintiffs in Ohio actions and the role played by mortgage assignments in determining standing.

In *Federal Home Loan Mortgage Corporation v. Schwartzwald*, 2012-Ohio-5017, the Court resolved a split among the intermediate Ohio courts of appeal on the specific issue of whether "the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment." Before the *Schwartzwald* decision, the majority rule in Ohio had been that a standing or real party in interest defect could be cured by assignment of the mortgage before judgment. However, the Court instead sided with the minority view that standing is jurisdictional, and any post-complaint events cannot cure a lack of standing that existed on the day the complaint was filed.

On the facts of *Schwartzwald*, the foreclosure plaintiff had been assigned the note and mortgage approximately one month after the complaint was filed. Additionally, no copy of the note was attached to the complaint, and a copy that was subsequently filed was not indorsed in blank or specifically indorsed to the foreclosure plaintiff. Nor was any evidence introduced that the foreclosure plaintiff had possession of the note before the complaint was filed. Subsequently, the borrowers mounted a challenge to the standing of the foreclosure plaintiff in the trial court. However, that challenge was unsuccessful as summary

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judgment was entered in favor of the foreclosure plaintiff. The judgment was affirmed on appeal to the Ohio Second District Court of Appeals, but a certified question of law on the issue of standing and mortgage assignments was accepted by the Ohio Supreme Court.

In reversing and ruling in favor of the borrower, the Court found a doctrinal difference existed between Ohio Civ.R. 17(A), which requires that all actions be prosecuted in the name of the real party in interest, and the standing doctrine, which requires that plaintiffs have a stake in the action through an injury. The Court held that, regardless of the dictates of Rule 17(A), standing in Ohio is jurisdictional, which requires that a complaint be dismissed if the plaintiff did not have standing on the day the complaint was filed. Additionally, the Court looked primarily to the mortgage assignment to determine whether the foreclosure plaintiff had standing on the day the complaint was filed and did not address the foreclosure plaintiff's arguments under the Uniform Commercial Code that its production of the note established its standing.

The result of this decision is that all foreclosure plaintiffs in Ohio must produce evidence of their standing to file foreclosure actions on or before the complaint filing date. In practice, this means ensuring that mortgage assignments be executed in favor of foreclosure plaintiffs on or before the complaint filing date and that evidence of such execution appear in the complaint and/or its attachments.

Otherwise, the Court did not address the issue of whether foreclosure judgments that violate the holding in *Schwartzwald* are void for lack of subject matter jurisdiction. However, the Ohio doctrine of res judicata will likely prevent borrowers from vacating unappealed judgments on the basis of *Schwartzwald* that pre-date *Schwartzwald*. Nevertheless, we expect borrowers' counsel to attempt to leverage *Schwartzwald* to attempt to vacate settled judgments in many situations.

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Foreclosure Cases - 2002-2011

	Pending at Beginning of the Year	New Cases Filed	Transferred/ Reactivated/ Redesignated	Default Judgment	Percentage Resolved Through Default	Source
2011	38,501	71,556	14,076	27,146	22%	1
2010	37,629	85,483	11,929	37,589	28%	2
2009	31,680	89,053	10,146	39,068	30%	3
2008	32,264	85,773	8,522	40,034	32%	4
2007	35,001	83,230	8,334	41,133	32%	5
2006	20,268	79,072	13,221	35,874	32%	6
2005	19,975	63,996	10,476	27,572	29%	7
2004	20,712	59,007	7,117	26,687	31%	8
2003	20,406	57,083	6,452	24,616	29%	9
2002	16,951	55,274	4,445	21,137	28%	10
Total Defaults Cumulative Percentage Resolved Through Default				320,856	29%	

Sources

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- 2 <http://www.supremecourt.ohio.gov/Publications/annrep/10OCS/2010OCS.pdf>
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