

ORIGINAL

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

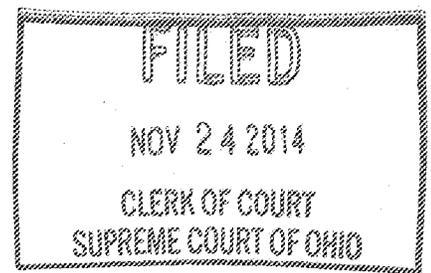


Charles M. Caldwell
Charles M. Caldwell
United States Bankruptcy Judge

Dated: November 21, 2014

14-2036

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re: : Case No. 13-57467
Daren A. Messer : Chapter 13
Angela L. Messer, :
Debtors. : Judge Caldwell

Daren Messer & :
Angela L. Messer, :
Plaintiffs. :
v. : Adv. Pro. No. 13-2448
JPMorgan Chase Bank, NA :
Defendant. :

ORDER OF CERTIFICATION TO THE SUPREME COURT OF OHIO (DOC. NO. 25)

Pursuant to Section 9 of the Supreme Court of Ohio Rules of Practice, the above signed Judge of the United States Bankruptcy Court for the Southern District of Ohio hereby certifies questions of state law, *sua sponte*, to the Supreme Court of Ohio. No controlling precedent of the Supreme Court of Ohio answers these questions, which will be dispositive of the above-captioned case. For reasons explained in more detail below, this Court requests that the Supreme Court of Ohio answer the certified questions of state law asked in this Certification Order.



I certify that this is a
copy of the original
filed Nov 21, 2014
Clerk of the Bankruptcy Court
By [Signature] Deputy Clerk
Issued Nov 24, 2014

A. Name of the Case

The name of the case is Messer v. JPMorgan Chase Bank, NA (In re Messer), No. 2:13-ap-024480-JCC.

Darren A. and Angela L. Messer are the debtors in this Chapter 13 bankruptcy case (13-57467). After filing, they commenced an adversary proceeding to challenge the validity of the security interest of JPMorgan Chase Bank, NA (*In re Messer*, Adv. Pro. No. 13-2448).

B. Statement of Facts

I. The Certified Questions

1. Does O.R.C. §1301.401 apply to all recorded mortgages in Ohio?
2. Does O.R.C. §1301.401 act to provide constructive notice to the world of a recorded mortgage that was deficiently executed under O.R.C. §5301.01?

II. A Brief History of Ohio Revised Code Section 5301.234

The Ohio General Assembly first attempted to ease the requirements for what is considered a properly recorded mortgage on June 30, 1999, when O.R.C. §5301.234 (addressing the recordation of mortgages) became effective. This legislation created an irrefutable presumption that any recorded mortgage was properly executed, regardless of whether there were defects in the witnessing or acknowledgement of the mortgage. O.R.C. §5301.234 further provided that any recorded mortgage afforded constructive notice to the world of its existence, again, regardless of defects.

This provision was short lived, both in the courts and legislature. In 2001, a Northern District of Ohio Bankruptcy Court ruled that the statute was unconstitutional as a violation of the “One-Subject” rule, and that the irrefutable presumption was unconstitutional, as a violation of the Ohio Rules of Evidence. *In re Barkley*, 263 B.R. 553, 567 Bankr. N.D. Ohio 2001). Then, on February 1, 2002, O.R.C. §5301.234 was repealed and replaced by an updated O.R.C. §5301.01 (addressing the acknowledgment of mortgages) which did not include the language “regardless of defect.”

Though repealed and replaced, O.R.C. §5301.234 litigation continued. Later in 2002, the Supreme Court of Ohio ruled in one sentence that the former statute could be applied

retroactively, but did not rule on its constitutionality. *In re Stewart*, 96 Ohio St. 3d 67, 2002-Ohio-3526 (in response to a certified question from the Bankruptcy Appellate Panel). In 2003 this Court agreed with *In re Barkley* that O.R.C. §5301.234 violated the “One-Subject” rule, and was thus unconstitutional before it was repealed. *In re Carte*, 303 B.R. 338, 342 (Bankr. S.D. Ohio 2003). A year later, the Supreme Court of Ohio agreed that O.R.C. §5301.234 had been unconstitutional due to the “One-Subject” rule. *In re Nowak*, 104 Ohio St. 3d 466, 482 2004-Ohio-6777.

III. A Brief History of Ohio Revised Code Section 1301.401

In December 2012, the General Assembly enacted O.R.C. §1301.401, which may or may not resurrect the substance of O.R.C. §5301.234. This new provision, effective March 27, 2013, provides in relevant part as follows:

(A) For purposes of this section, “public record” means either of the following:

(1) Any document described or referred to in section 317.08 of the Revised Code;

(2) Any document the filing or recording of which is required or allowed under any provision of Chapter 1309. of the Revised Code.

(B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

(C) Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.

O.R.C. §1301.401 (emphasis supplied).

IV. The Facts and the Procedural History of Messer v. JPMorgan

Darren and Angela Messer are the Plaintiffs in the above-captioned adversary proceeding and the Debtors in the parent bankruptcy case. JP Morgan Chase Bank, NA, is the Defendant in the above-captioned adversary proceeding and a Creditor in the parent bankruptcy case. The facts necessary to this Certification Order are not in dispute between the Parties.

On November 26, 2007, Plaintiffs executed a promissory note and a Mortgage (“Mortgage”) on real property located at 359 W. Waterloo St., Canal Winchester, OH 43110, in favor of Mortgage Electronic Registrations Systems, Inc. (“MERS”). The notary acknowledgement on the Mortgage was left blank, and there is no indication as to whether the Plaintiffs executed the Mortgage in front of a notary. On December 4, 2007, the Mortgage was recorded with the Franklin County Recorder, with the notary section still incomplete. On June 25, 2013, MERS assigned all of its interest in the Mortgage to the Defendant. The Assignment of Mortgage was recorded with the Franklin County Recorder on July 8, 2013.

On September 19, 2013, the Plaintiffs initiated the above-captioned Chapter 13 bankruptcy by filing a voluntary petition for relief under the Bankruptcy Code. On December 13, 2013, the Plaintiffs, through assigned authority from the Chapter 13 Trustee, commenced the above-captioned adversary proceeding, asking to avoid the Mortgage under 11 U.S.C. §544(a)(1) and/or 11 U.S.C. §544(a)(3) as defectively executed under O.R.C. §5301.01. The Defendant filed a Motion to Dismiss the adversary, alleging that under O.R.C. §1301.401, detailed above, Plaintiffs had constructive notice of the Mortgage, and thus their claims should fail as a matter of law. This Court held a hearing on the Motion to Dismiss on June 27, 2014.

Upon reviewing the briefing of both Parties and the arguments made at the hearing on Defendant’s Motion to Dismiss, this Court determined that its interpretation of O.R.C. §1301.401 would be dispositive of the case. Upon research, this Court found no interpretation of O.R.C. §1301.401 by the Supreme Court of Ohio – or any other court. There is no dispute in this case that the Mortgage was improperly executed under O.R.C. §5301.01, and there is no dispute that prior to the enactment of O.R.C. §1301.401 the Plaintiffs could have avoided the mortgage. The questions concern whether the new statute changes the result.

V. The Supreme Court of Ohio Should Have the First Opportunity to Interpret O.R.C. §1301.401

The decision to certify is within the sound discretion of the federal court, and is most beneficial when there is a novel question of state law and no guidance from state courts. *Gascho v. Golbal Fitness Holdings, LLC*, 918 F.Supp.2d 708, 713 (S.D. Ohio 2013). The Supreme Courts of Ohio and the United States have each instructed on the virtues of certification. “[S]tate sovereignty is unquestionably implicated when federal courts construe state law.” *Scott v. Bank One Trust Co.*, 62 Ohio St. 3d 39, 42 (1991). “[Certification of] novel or unsettled questions of state law for authoritative answers by a State’s highest court ... may save time, energy, and resources and help build a cooperative judicial federalism.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 46 (1997).

There are millions of mortgages on Ohio homes. Even if less than 1% of these were executed improperly, the interpretation of this statute could potentially affect tens of thousands of properties. The Supreme Court of Ohio has previously answered certified questions from federal courts concerning Ohio statutes which change recording laws. *In re Stewart*, 96 Ohio St. 3d 67, 2002-Ohio-3526; *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777. This Federal Bankruptcy Court defers the opportunity to the Supreme Court of Ohio to interpret this Ohio law as well.

C. The Parties

Daren & Angela Messer, *Plaintiffs*
359 W. Waterloo St.
Canal Winchester, OH 43110

JPMorgan Chase Bank, NA, *Defendant*
3415 Vision Drive
Columbus, OH 43219

D. Counsel for the Parties

Plaintiffs’ Counsel

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Defendant's Counsel

Amelia A. Bower (13474)
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300 E. Broad St., Suite 590
Columbus, Ohio 43215
(614) 629-3004

E. Designation of Moving Party

Although neither party requested or desired certification, this Court designates Plaintiffs Daren and Angela Messer as the moving party. This designation is made because Plaintiffs initiated this case, and because they are procedurally positioned as the “challengers” to the applicability of O.R.C. §1301.401.

Instructions to the Clerk

The Clerk of the United States Bankruptcy Court of the Southern District of Ohio, Kenneth Jordan, is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

Copies to:

Amelia A. Bower, Esq. (electronic service)
Brent R. Sheraw, Esq. (electronic service)
Danielle R. Weinzimmer, Esq. (electronic service)
Kathleen Tourgemon, Courtroom Deputy

**U.S. Bankruptcy Court
Southern District of Ohio (Columbus)
Adversary Proceeding #: 2:13-ap-02448
Internal Use Only**

Assigned to: Charles M Caldwell

Date Filed: 12/20/13

Lead BK Case: 13-57467

Lead BK Title: Daren A Messer and Angela L Messer

Lead BK Chapter: 13

Demand:

Nature[s] of Suit: 21 Validity, priority or extent of lien or other interest in property

Plaintiff

Daren Messer

359 W. Waterloo St.
Canal Winchester, OH 43110

represented by **John C Ridge**

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Plaintiff

Angela L Messer

359 W Waterloo St.
Canal Winchester, OH 43110

I certify that this is a
copy of the original
filed Nov 21 2014

[Signature]
Deputy Clerk represented by **John C Ridge**
(See above for address)

Nov 24 2014



Brett R Sheraw
(See above for address)

Danielle R Weinzimmer
(See above for address)

V.

Defendant

JPMorgan Chase Bank, NA
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Columbus, OH 43219

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Filing Date	#	Docket Text
12/20/2013	<u>1</u>	Adversary case 2:13-ap-02448. (21 (Validity, priority or extent of lien or other interest in property)): Complaint by Daren Messer, Angela L Messer against JP Morgan Chase Bank NA. Receipt Number exempt, Fee Amount of \$ 0.00 is Exempt (Weinzimmer, Danielle) (Entered: 12/20/2013)
12/20/2013	<u>2</u>	Summons(es) on JP Morgan Chase Bank NA Issued On 12/20/2013, and Answer Due On 01/21/2014 (Weinzimmer, Danielle) (Entered: 12/20/2013)
01/23/2014	<u>3</u>	Motion to Extend/Shorten Time to Move or Plead in Response to Plaintiffs' Complaint Filed by Defendant JPMorgan Chase Bank, NA (Johnson, Kenneth) (Entered: 01/23/2014)
01/28/2014	<u>4</u>	Agreed Order Granting Motion of JPMorgan Chase Bank, N.A. for Extension of Time to Move or Plead in Response to Plaintiffs' Complaint (Related Doc # <u>3</u>) (2ss) (Entered: 01/29/2014)

01/29/2014		(private) JPMorgan Chase Bank, NA Answer Deadline Reset for 2/10/2014 - per Order <u>4</u> . (2ss) (Entered: 01/29/2014)
01/31/2014	<u>5</u>	BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>4</u> Order on Motion to Extend/Shorten Time) Notice Date 01/31/2014. (Admin.) (Entered: 02/01/2014)
02/10/2014	<u>6</u>	Answer to Complaint to <i>Determine Validity and Extent of Lien, to Avoid Mortgage Lien, to Recover Money Judgment and to Disallow Claim</i> Filed by JPMorgan Chase Bank, NA. (Johnson, Kenneth) (Entered: 02/10/2014)
02/13/2014	<u>7</u>	Order Governing Pretrial and Trial Procedures in Adversary Proceedings (or Prehearing and Hearing Procedures in Certain Contested Matters) and Ordering Preliminary Pretrial Statement. Each Party Shall File a Preliminary Pretrial Statement No Later than March 17, 2014 . (2ss) (Entered: 02/14/2014)
02/16/2014	<u>8</u>	BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>7</u> Order Governing Pretrial) Notice Date 02/16/2014. (Admin.) (Entered: 02/17/2014)
02/26/2014	<u>9</u>	Notice of Appearance and Request for Notice by Amelia A Bower Filed by Defendant JPMorgan Chase Bank, NA. (Bower, Amelia) (Entered: 02/26/2014)
03/14/2014	<u>10</u>	Motion to Dismiss Adversary Proceeding <i>Motion to Dismiss and/or for Judgment on the Pleadings</i> Filed by Defendant JPMorgan Chase Bank, NA (Bower, Amelia) (Entered: 03/14/2014)
03/14/2014	<u>11</u>	Pretrial Statement Filed by Defendant JPMorgan Chase Bank, NA (RE: related document(s) <u>1</u> Complaint). (Bower, Amelia) (Entered: 03/14/2014)
03/17/2014	<u>12</u>	Pretrial Statement Filed by Plaintiffs Angela L Messer, Daren Messer (RE: related document(s) <u>1</u> Complaint). (Weinzimmer, Danielle) (Entered: 03/17/2014)
03/19/2014	<u>13</u>	Notice of Pretrial Conference (related document(s) <u>1</u> Complaint filed by Plaintiff Daren Messer, Plaintiff Angela L Messer) Pretrial set for 4/23/2014 at 02:00 PM Judge Caldwell's Chambers. (2kg) (Entered: 03/19/2014)
03/21/2014	<u>14</u>	BNC Certificate of Mailing (RE: related documents(s) <u>13</u> Hearing (Adv Other) Set) Notice Date 03/21/2014. (Admin.) (Entered: 03/22/2014)

03/27/2014	<u>15</u>	Notice of Supplemental Authority in Support of Its Motion to Dismiss and/or Judgment on the Pleadings Filed by Defendant JPMorgan Chase Bank, NA (RE: related document(s) <u>10</u> Motion to Dismiss Adversary Proceeding <i>Motion to Dismiss and/or for Judgment on the Pleadings</i> Filed by Defendant JPMorgan Chase Bank, NA filed by Defendant JPMorgan Chase Bank, NA). (Bower, Amelia) (Entered: 03/27/2014)
04/03/2014	<u>16</u>	Notice of Appearance and Request for Notice by Brett R Sheraw Filed by Plaintiffs Angela L Messer, Daren Messer. (Sheraw, Brett) (Entered: 04/03/2014)
04/03/2014	<u>17</u>	Motion to Extend/Shorten Time to Respond to Moton of JP Morgan Chase Bank NA to Dismiss and/or For Judgment on the Pleadings Filed by Plaintiffs Angela L Messer, Daren Messer (Sheraw, Brett) (Entered: 04/03/2014)
04/08/2014	<u>18</u>	Agreed Order Granting Motion of Plaintiffs Daren A. Messer and Angela L. Messer for Extension of Time to File a Response to the Motion of JPMorgan Chase Bank NA to Dismiss and/or for Judgment on the Pleadings (Related Doc # <u>17</u>) (2ss) (Entered: 04/09/2014)
04/11/2014	<u>19</u>	BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>18</u> Order on Motion to Extend/Shorten Time) Notice Date 04/11/2014. (Admin.) (Entered: 04/12/2014)
04/18/2014	<u>20</u>	Response to (related document(s): <u>10</u> Motion to Dismiss Adversary Proceeding <i>Motion to Dismiss and/or for Judgment on the Pleadings</i> filed by Defendant JPMorgan Chase Bank, NA) Filed by Plaintiffs Angela L Messer, Daren Messer (Sheraw, Brett) (Entered: 04/18/2014)
04/24/2014		Proceeding Memo: 4/23/14 Pretrial Conference Held - Appearances: A. Bower, B. Sheraw, D. Weinzimmer - Oral Arguments on dispositive motions to be heard 6/27/14 at 1:00 p.m. Defendant has until May 9, 2014, to reply to Plaintiffs Response to Motion to Dismiss. Deadline for filing of Amended Answer is 5/9/14. Court to prepare scheduling order. (2kg) (Entered: 04/24/2014)
05/01/2014	<u>21</u>	Scheduling Order for Adversary Complaint (RE: related document(s) <u>1</u> Complaint filed by Plaintiff Daren Messer, Plaintiff Angela L Messer). Hearing to be held on 6/27/2014 at 01:00 PM Courtroom B for <u>1</u> , (2ss) (Entered: 05/02/2014)
05/04/2014	<u>22</u>	

		BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>21</u> Order to Set Hearing) Notice Date 05/04/2014. (Admin.) (Entered: 05/05/2014)
05/09/2014	 <u>23</u>	Answer to Complaint (<i>Amended Answer</i>) Filed by JPMorgan Chase Bank, NA. (Bower, Amelia) (Entered: 05/09/2014)
05/09/2014	 <u>24</u>	Reply to (related document(s): <u>20</u> Response filed by Plaintiff Daren Messer, Plaintiff Angela L Messer) Filed by Defendant JPMorgan Chase Bank, NA (Bower, Amelia) (Entered: 05/09/2014)
06/27/2014		Proceeding Memo: 6/27/14 Hearing Held on Motion of JPMorgan Chase Bank NA to Dismiss And/Or For Judgment On The Pleadings (10) - Appearances: A. Bower, B. Sheraw, D. Weinzimmer - Oral arguments made by both parties. Matter taken under advisement. (2kg) (Entered: 06/30/2014)
09/18/2014		(private) Transcript of June 27, 2014 Hearing Ordered on 9/18/14 - Requested by: Judge Caldwell - Transcribing Company: Transcripts Plus - 30 day deadline. (2km) (Entered: 09/18/2014)
09/26/2014	 <u>25</u>	Scheduling Order Directing the Submission of Memoranda and Setting Hearing Date Regarding Certified Question to the Supreme Court of Ohio (RE: related document(s) <u>10</u> Motion to Dismiss Adversary Proceeding filed by Defendant JPMorgan Chase Bank, NA). Hearing to be held on 11/13/2014 at 02:00 PM Courtroom B for <u>10</u> . (2ss) (Entered: 09/29/2014)
09/29/2014		Judge's Deadlines Updated per Order <u>25</u> - Brief due by 10/27/2014. (2ss) (Entered: 09/29/2014)
10/01/2014	 <u>26</u>	BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>25</u> Order to Set Hearing) Notice Date 10/01/2014. (Admin.) (Entered: 10/02/2014)
10/14/2014	 <u>27</u>	Submission of Transcript for Court Review. This document is not available for public view. (Hartmann, Karen) (Entered: 10/14/2014)
10/14/2014	  <u>28</u>	Transcript regarding Hearing Held 6/27/14 RE: Motion to Dismiss and/or for Judgment on the Pleadings. TRANSCRIPT IS RESTRICTED UNTIL 1/12/2015. Notice of Intent to Request Redaction Deadline Due By 10/21/2014. Redaction Request Due By 11/4/2014. Redacted Transcript Submission Due By 11/14/2014. Transcript access will be restricted through 1/12/2015. (2km) (Entered: 10/14/2014)

10/14/2014	● <u>29</u>	Notice of Filing of Official Transcript. Notice is hereby given that an official transcript of the Motion to Dismiss and/or for Judgment on the Pleadings hearing held on 6/27/14 has been filed. Pursuant to the new policy adopted by the Judicial Conference, transcripts are available for inspection only at the clerk's office or may be purchased from the court transcriber for a 90 day period (RE: related document(s) <u>28</u> Transcript) (2km) (Entered: 10/14/2014)
10/27/2014	● <u>30</u>	Brief in Response to Scheduling Order Directing the Submission of Memoranda and Setting Hearing Date Regarding Certified Question to the Supreme Court of Ohio Filed by Plaintiffs Angela L Messer, Daren Messer. (Sheraw, Brett) (Entered: 10/27/2014)
10/27/2014	● <u>31</u>	Brief of JP Morgan Chase NA on the Issue of Certification to the Ohio Supreme Court Filed by Defendant JPMorgan Chase Bank, NA. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B) (Bower, Amelia) (Entered: 10/27/2014)
11/13/2014	●	Proceeding Memo: 11/13/14 Hearing Canceled. Order regarding certification pending. (2kg) (Entered: 11/14/2014)
11/21/2014	● <u>32</u>	Order Of Certification To The Supreme Court Of Ohio. (Doc. No. <u>25</u>) (2ao) (Entered: 11/21/2014)
11/23/2014	● <u>33</u>	BNC Certificate of Mailing - PDF Document (RE: related documents(s) <u>32</u> Order (Generic)) Notice Date 11/23/2014. (Admin.) (Entered: 11/24/2014)