

# TAKING A STAND ON STANDING: THE REAL PARTY IN INTEREST CONFLICT IN OHIO FORECLOSURE ACTIONS

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## I. INTRODUCTION

In February of 2005, Gloria, a sixty-six year old former minister from Ohio, obtained a \$56,100 mortgage from WMC Mortgage Corporation (WMC).<sup>1</sup> Less than seven months later, Gloria defaulted on her mortgage for non-payment.<sup>2</sup> It seemed as if Gloria would soon be left without a home after a foreclosure action commenced. As it turns out, Gloria remained in her home for three more years.<sup>3</sup>

At this point, one might be wondering how someone managed to live in a home without making a mortgage payment for close to three years.<sup>4</sup> In Gloria's case, as often happens, after originating her mortgage loan, WMC conveyed the loan elsewhere on the secondary mortgage market.<sup>5</sup> Gloria's loan was subsequently pooled with other similar loans and placed in a securitized trust for investment purposes.<sup>6</sup> Because Gloria's loan could have passed through many different hands on the secondary market, Gloria could delay the foreclosure proceedings by simply alleging that the entity suing on behalf of the trust would not be able to prove that it owned her

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<sup>1</sup> Magistrate's Decision at 1, *Wells Fargo Bank v. Byrd*, No. A0700643 (Hamilton Cnty. Ct. C.P. July 23, 2007). *See also State Hopes Ruling Can Slow Pace of Foreclosures*, COLUMBUS DISPATCH, Dec. 10, 2007, at B3.

<sup>2</sup> Complaint in Foreclosure, *Wells Fargo Bank v. Byrd*, No. A0700643 (Hamilton Cnty. Ct. C.P. Jan. 23, 2007) (noting that October 1, 2006 was the date of default).

<sup>3</sup> *See Wells Fargo Bank v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008) (affirming the trial court's decision three years after the case was initiated).

<sup>4</sup> *See Complaint in Foreclosure, Wells Fargo Bank v. Byrd*, No. A0911166 (Hamilton Cnty. Ct. C.P. Nov. 24, 2009). Wells Fargo was forced to file a subsequent action on the same default. *Id.*

<sup>5</sup> *See Complaint in Foreclosure, supra* note 2. Wells Fargo attempted to foreclose on behalf of the Certificate holders of Morgan Stanley ABS Capital, Inc. Trust 2005-WMC5 Mortgage Pass-Through Certificates, Series 2005-WMC5, which is a securitized trust. *Id.*

<sup>6</sup> *See id.*

loan at the time it filed the foreclosure action.<sup>7</sup> That is exactly what she did.<sup>8</sup>

Gloria's case typifies one of the most highly contested issues in Ohio foreclosure litigation: Homeowners contesting foreclosures by alleging that that the plaintiff is not the proper party with standing to bring the action.<sup>9</sup> Although identifying the party entitled to bring a residential foreclosure action seems straightforward, in today's complex world of mortgage securitization,<sup>10</sup> this determination has become a daunting task for both judges and lawyers alike.<sup>11</sup>

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<sup>7</sup> See *State Hopes Ruling Can Slow Pace of Foreclosures*, *supra* note 1.

<sup>8</sup> Magistrate's Decision, *supra* note 1.

<sup>9</sup> *Wells Fargo Bank v. Sessley*, 935 N.E.2d 70, 76 (Ohio Ct. App. 2010) ("Appellate courts are often presented with real-party-in-interest issues in foreclosure actions."). See also *Bank of N.Y. v. Stuart*, No. 06CA008953, 2007 WL 936706, at \*1 (Ohio Ct. App. Mar. 30, 2007); *Deutsche Bank Nat'l Trust Co. v. Pagani*, No. 09CA000013, 2009 WL 3440028, at \*1 (Ohio Ct. App. Oct. 23, 2009); *DLJ Mortg. Capital v. Parsons*, No. 07-MA-17, 2008 WL 697400, at \*1 (Ohio Ct. App. Mar. 13, 2008); *Kramer v. Millott*, No. E-94-5, 1994 WL 518173, at \*1 (Ohio Ct. App. Sept. 23, 1994); *Mid-State Trust IX v. Davis*, No. 07-CA-31, 2008 WL 1838350, at \*1 (Ohio Ct. App. Apr. 25, 2008); *Nat'l Bank v. Hufford*, 767 N.E.2d 1206, 1207 (Ohio Ct. App. 2001); *U.S. Bank v. Marcino*, 908 N.E.2d 1032, 1032 (Ohio Ct. App. 2009); *Wash. Mut. Bank v. Green*, 806 N.E.2d 604, 605 (Ohio Ct. App. 2004); *Wash. Mut. Bank v. Novak*, No. 88121, 2007 WL 701081, at \*1 (Ohio Ct. App. Mar. 8, 2007); *Wells Fargo Bank v. Byrd*, 897 N.E.2d 722, 722 (Ohio Ct. App. 2008); *Wells Fargo Bank v. Jordan*, No. 91675, 2009 WL 625560, at \*3 (Ohio Ct. App. Mar. 12, 2009); *Wells Fargo Bank v. Stovall*, No. 91802, 2010 WL 320487, at \*1 (Ohio Ct. App. Jan. 28, 2010).

<sup>10</sup> See Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 538-39 (2002). Eggert noted:

A typical securitization of a loan secured by a residence might proceed as follows. The borrower negotiates with a mortgage broker for the terms of the loan. Mortgage brokers may originate the loans in their own names in three ways: (1) by using "table funding" provided by the pre-arranged buyer of the loan; (2) by access to a warehouse line of credit; or (3) by supplying the broker's own funds. Alternatively, the mortgage broker may close the loan in the name of the lender providing the money. Whether the broker closes the loan in his or her own name or in the name of the lender, the broker typically almost immediately transfers the loan to a lender. This lender quickly sells the loan to a

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Of course, for many borrowers facing foreclosure, the complexities of the secondary mortgage market have opened the door to challenge a plaintiff's right to bring the action without fail.<sup>12</sup> Oddly enough, this has nothing to do with a borrower's failure to make mortgage payments—just ask Gloria.<sup>13</sup>

Some of the confusion involved in determining the proper plaintiff may be attributed to the multitude of entities involved in both the securitization process and the process by which loans are transferred from one entity to another on the secondary market.<sup>14</sup> For instance, the proper party with standing to bring a foreclosure action could be the trustee of a securitized trust, the mortgage servicer, or even the sub-servicer of the mortgage loan.<sup>15</sup> Add to this uncertainty an endless stream of borrowers defaulting on their mortgage obligations, and the result is a judicial system flooded with foreclosure actions.<sup>16</sup>

In an effort to slow the tide of foreclosures in Ohio, the Appellate Courts of the First and Eighth Districts have taken matters into their own hands, dismissing foreclosure actions based on the tenuous notion that the plaintiff did not prove that it had the right to foreclose prior to filing the

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different financial entity, which pools the loan together with a host of other loans in a mortgage pool. The loans in the pool may all come from one lender, from a multitude of lenders, or any number in between.

*Id.* (internal citations omitted).

<sup>11</sup> Robert Hardaway, *The Great American Housing Bubble: Re-Examining Cause and Effect*, 35 U. DAYTON L. REV. 33, 38–39 (2009).

<sup>12</sup> See Tamara R. Parker, *Foreclosure Defense: Where Do We Stand on Standing?*, COLUMBUS BAR LAW. Q., Winter 2011, at 25, 25 (equating the real party in interest and standing defense to a “knock it out of the ballpark” defense to foreclosure).

<sup>13</sup> Answer of Gloria & Ellsworth Byrd at 1, *Wells Fargo Bank v. Byrd*, No. A0700643 (Hamilton Cnty. Ct. C.P. Feb. 14, 2001). Gloria never denied the default status of the loan in her pleadings. *Id.*

<sup>14</sup> See, e.g., Chris Markus et al., *From Main Street to Wall Street: Mortgage Loan Securitization and New Challenges Facing Foreclosure Plaintiffs in Kentucky*, 36 N. KY. L. REV. 395 (2009).

<sup>15</sup> See, e.g., *CWCapital Asset Mgmt. v. Chicago Props.*, 610 F.3d 497, 500–01 (7th Cir. 2010).

<sup>16</sup> THE SUPREME COURT OF OHIO, 2009 OHIO COURTS STATISTICAL SUMMARY 53 (2010), available at <http://www.sconet.state.oh.us/Publications/annrep/09OCS/summary/trend.pdf> (showing an increase in Ohio foreclosure filings).

complaint.<sup>17</sup> As a result, courts across Ohio mistakenly believe that certain forms of evidence obtained after the commencement of a foreclosure action—but prior to moving for judgment—will not suffice to establish the foreclosure plaintiff’s right to sue.<sup>18</sup>

However, other Ohio appellate courts, including those of the Second, Fifth, Seventh, and Ninth Districts,<sup>19</sup> prefer to adjudicate cases on their merits, rather than engage in a procedural exercise aimed at delaying the plaintiff’s right to have its day in court.<sup>20</sup> In these districts, standing is not a jurisdictional issue and foreclosure plaintiffs are not required to try their case and disprove a borrower’s defense at the pleading stage of the proceedings.<sup>21</sup> Plaintiffs in these districts may prosecute a residential foreclosure action based on various alternative forms of proof that demonstrate the plaintiff’s right to enforce the debt prior to the entry of judgment.<sup>22</sup>

The apparent conflict between the appellate districts of Ohio, while still unresolved, has not gone unnoticed.<sup>23</sup> The Supreme Court of Ohio

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<sup>17</sup> See, e.g., *Wells Fargo Bank v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008); *Wells Fargo Bank v. Jordan*, No. 91675, 2009 WL 625560, at \*5 (Ohio Ct. App. Mar. 12, 2009).

<sup>18</sup> See, e.g., *Deutsche Bank Nat’l Trust Co. v. Sexton*, No. CV2009 02 0652, 2009 WL 7229013, at \*3 (Butler Cnty. Ct. C.P. Oct. 16, 2009) (order granting motion for summary judgment). See also *infra* Section III.

<sup>19</sup> *Wachovia Bank v. Cipriano*, No. 09CA007, 2009 WL 3308733, at \*5 (Ohio Ct. App. Oct. 13, 2009). The court held that where an assignment was dated after foreclosure action had commenced, but two months before summary judgment motion was filed, the foreclosing bank acted properly because it “was the real party of interest and holder of the note prior to any judgment entered via summary judgment . . . . Pursuant to Civ. R. 17(A), the real party of interest shall ‘prosecute’ the claim. The rule does not state ‘file’ the claim.” *Id.* See also *Bank of N.Y. v. Stuart*, No. 06CA008953, 2007 WL 936706, at \*3 (Ohio Ct. App. Mar. 30, 2007); *Countrywide Home Loan Servicing v. Thomas*, No. 09AP-819, 2010 WL 2636887, at \*3 (Ohio Ct. App. June 30, 2010); *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 957 N.E.2d 790, 804 (Ohio Ct. App. 2011); *U.S. Bank v. Marcino*, 908 N.E.2d 1032, 1038 (Ohio Ct. App. 2009).

<sup>20</sup> See, e.g., *Stuart*, 2007 WL 936706.

<sup>21</sup> See, e.g., *Schwartzwald*, 957 N.E.2d at 803; *Marcino*, 908 N.E.2d at 1038; *Stuart*, 2007 WL 936706, at \*2; *Cipriano*, 2009 WL 3308733, at \*6.

<sup>22</sup> *Stuart*, 2007 WL 936706, at \*3.

<sup>23</sup> *U.S. Bank v. Duvall*, 944 N.E.2d 693 (Ohio 2011). The Eighth District Court of Appeals framed the conflict as: “To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note and the mortgage when the complaint was  
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recently accepted the following certified question from the Second District Court of Appeals that is poised to resolve the split in authority among the Ohio courts:<sup>24</sup> “In a mortgage foreclosure action, [can] the lack of standing or the real party in interest defect . . . be cured by assignment of the mortgage prior to judgment[?]”<sup>25</sup> The court’s acceptance of this question would suggest that it has acknowledged, at least implicitly, that residential foreclosure actions in Ohio are being resolved solely because of where the action is prosecuted, and that locality should not be dispositive of the legal rights of Ohio’s citizens or businesses.<sup>26</sup>

This comment first highlights the divide among the intermediate appellate courts of Ohio on the issue of exactly when, and by what means, a plaintiff should be required to prove standing in a residential foreclosure action. Then, the article provides the necessary contextual and procedural grounding to fully understand the conflicting positions taken by the various appellate districts. The final section argues that a dismissal founded upon an alleged failure to prove standing at the pleading stage does not comport with Ohio law, and that a court’s unqualified reliance on certain forms of proof to establish a plaintiff’s right to sue is not justified in today’s complex world of mortgage lending. The ultimate goal of this comment is to present a more consistent standard for establishing the rights of plaintiffs in Ohio foreclosure actions—a standard that harmonizes the basic principles of Ohio law with the realities of mortgage lending.

## II. BACKGROUND

### A. *Mortgage Foreclosure 101*

The mortgage lending process begins with a monetary loan to a borrower based on that borrower’s promise to repay the loan at a specified time.<sup>27</sup> A promissory note evidences this promise, and is secured by a

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filed?” *Id.* After certification, U.S. Bank released the subject mortgage and the court dismissed the case as moot, without opinion. Entry, U.S. Bank v. Duvall, No. 2011-0218 (Ohio Sept. 21, 2011). As a result, the conflict remains unresolved.

<sup>24</sup> *Schwartzwald*, 954 N.E.2d.

<sup>25</sup> *Id.*

<sup>26</sup> See *infra* Section II.D.

<sup>27</sup> See Debra Pogrud Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 643 (1997); *Wells Fargo Bank v. Young*, No. 2009 CA 12, 2011 WL 245788, at \*4–6 (Ohio Ct. App. Jan. 14, 2011).

mortgage on the borrower's home.<sup>28</sup> When a borrower fails to keep the promise, thereby defaulting on the note, the lender then has the right to avail itself under the terms of both the promissory note and the related mortgage.<sup>29</sup> In Ohio, this means that once the lender has established default on the promissory note, it has the right to sue the borrower to foreclose on the real property secured by the mortgage.<sup>30</sup>

When a lender, sometimes referred to as a mortgagee, seeks to foreclose on a borrower's home, it files a complaint in the court best suited to hear the action.<sup>31</sup> Because state law heavily governs foreclosures on real property,<sup>32</sup> Ohio state courts are generally the best forum to litigate Ohio foreclosure actions.<sup>33</sup> In most cases, this means filing a foreclosure complaint in the court where the real property is located.<sup>34</sup>

If a mortgagee sells or assigns the loan on the secondary mortgage market, then the new owner of the loan steps into the shoes of the original lender to receive payment from the borrower or, if necessary, to enforce the terms of the promissory note and mortgage by foreclosure on the property.<sup>35</sup> If a foreclosure action is commenced and fully adjudicated in favor of the owner of the loan, then it has the right to sell the foreclosed property to recoup the money originally lent to the defaulting borrower.<sup>36</sup>

For the most part, residential foreclosure actions are a result of the borrower's default under the terms of the promissory note.<sup>37</sup> Because Ohio law requires a copy of any instrument on which a claim is based to be

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<sup>28</sup> Stark, *supra* note 27, at 643.

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.,* Gaul v. Olympia Fitness Ctr., Inc., 623 N.E.2d 1281, 1284 (Ohio Ct. App. 1993).

<sup>31</sup> *See* Wilborn v. Bank One Corp., 906 N.E.2d 396, 402 (Ohio 2009) (citing OHIO REV. CODE ANN. ch. 2329 (West 2010)).

<sup>32</sup> *See id.* at 402; Wells Fargo Bank v. Young, No. 2009 CA 12, 2011 WL 245788, at \*4 (Ohio Ct. App. Jan. 14, 2011).

<sup>33</sup> *See Wilborn*, 906 N.E.2d at 402.

<sup>34</sup> OHIO REV. CODE ANN. § 2323.261 (West 2010).

<sup>35</sup> *See* Bank of N.Y. v. Dobbs, No. 2009-CA-000002, 2009 WL 2894601, at \*3-4 (Ohio Ct. App. Sept. 8, 2009).

<sup>36</sup> OHIO REV. CODE ANN. § 2329.01 (West 2010).

<sup>37</sup> *See, e.g.,* Gaul v. Olympia Fitness Ctr., Inc., 623 N.E.2d 1281, 1284 (Ohio Ct. App. 1993). Failure to perform other obligations under the mortgage can also lead to default. *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.6(b)(1), (c) (1996).

attached to the complaint,<sup>38</sup> copies of both the promissory note and the related mortgage are the only instruments required to be filed with a basic residential foreclosure complaint.<sup>39</sup>

*B. The Promissory Note and Mortgage*

If the lender named on the face of either the promissory note or the mortgage does not match the identity of the party that commenced the action, Ohio courts will likely require additional evidence of the plaintiff's right to foreclose.<sup>40</sup> The "assignment of mortgage" is generally accepted as an adequate form of proof.<sup>41</sup> This is hardly surprising, given that the assignment is a document that can be recorded in the county land records where the real property is located and can therefore provide sufficient evidence of the chain of title.<sup>42</sup>

*1. The Unintended Rise of the Assignment of Mortgage*

The assignment of mortgage was never intended to be used as a form of proof to establish a party's right to bring a foreclosure lawsuit. Rather, its function is to provide notice to world that the real estate is subject to a mortgage lien.<sup>43</sup> The purpose of the assignment of mortgage is to record a party's interest in a transferred mortgage to establish the primacy of that party's claims related to the property; in other words its purpose is to be first in line.<sup>44</sup>

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<sup>38</sup> OHIO R. CIV. P. 10(D) ("When any claim or defense is founded on an account or other written instrument, a copy thereof must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.").

<sup>39</sup> *Beneficial Mortg. of Ohio v. Jacobs*, No. 01CA0080, 2002 WL 1349581, at \*1 (Ohio Ct. App. June 21, 2002).

<sup>40</sup> *Id.*

<sup>41</sup> *See, e.g., LaSalle Bank v. Zapata*, 921 N.E.2d 1072, 1073 (Ohio Ct. App. 2009).

<sup>42</sup> *Id.* at 1075–76 ("[A] mortgagee assignee succeeds to all the rights of the mortgagee.").

<sup>43</sup> *BAC Home Loans Servicing v. Hall*, No. CA2009-10-135, 2010 WL 2891780, at \*2 (Ohio Ct. App. July 26, 2010) (citing *Wead v. Kutz*, 83 N.E.2d 482, 487 (Ohio Ct. App. 2005) (holding that Ohio's recording statute does not invalidate an assignment that has not been recorded)).

<sup>44</sup> *Id.*

It follows that the failure to record the assignment of mortgage in the county land records will not impede a foreclosure plaintiff's right to sue.<sup>45</sup> Ohio's recording statutes are intended to govern priorities between lenders, not the validity of their liens.<sup>46</sup> A lack of recording does not mean that the assignee's interest is invalid or that the assignee does not own an interest in the property.<sup>47</sup>

The assignment of mortgage is merely discretionary in nature and not a condition precedent to enforcing the borrower's promise to pay.<sup>48</sup> The Restatement (Third) of Property (Mortgages) speaks to this issue rather succinctly:

[R]ecordation of a mortgage assignment is not necessary to the effective transfer of an obligation or the mortgage securing it. However, assignees are well advised to record. One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage.<sup>49</sup>

Accordingly, the issue of whether an assignee can ascertain the primacy of the assignee's lien over liens of third parties—that did not have notice of the assignee's interest due to lack of recording—does not implicate the assignee's right to commence a residential foreclosure action.<sup>50</sup> The recording of an assignment of mortgage is simply intended to enforce lien priority.<sup>51</sup>

## 2. *Enforcing the Promissory Note*

The focus placed on the assignment of mortgage is tempered by the well-established legal principle that a transfer of the promissory note also transfers an equitable mortgage.<sup>52</sup> This principle holds true even when evidence of a separate assignment of mortgage does not exist.<sup>53</sup> This is because the promissory note is the primary evidence of the debt, and the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4.

<sup>50</sup> *Hall*, 2010 WL 2891780, at \*2.

<sup>51</sup> *Id.*

<sup>52</sup> *Kuck v. Sommers*, 100 N.E.2d 68, 75 (Ohio Ct. App. 1950).

<sup>53</sup> *Id.*

accompanying mortgage merely follows the promissory note.<sup>54</sup> The “mortgage [itself] is not property separate and distinct from the [promissory] note which it secures, but . . . [rather], the mortgage security is an incident of the debt . . . .”<sup>55</sup> Thus, it cannot be argued that the failure to present an assignment of mortgage will diminish the rights of the party entitled to enforce the underlying promissory note.<sup>56</sup>

Ohio categorizes a promissory note as a negotiable instrument.<sup>57</sup> The negotiability of promissory notes provides a means of passing to a transferee the rights of the original payee, thereby granting “the right to demand money or bring suit to recover money on the note.”<sup>58</sup> Ohio statutory law provides that the holder of a promissory note, even if the holder played no part in the original transaction, is the party entitled to transfer the promissory note.<sup>59</sup> The holder of the promissory note is determined by reference to Ohio’s version of the Uniform Commercial Code (U.C.C.).

Through its adoption of the U.C.C., the Ohio General Assembly declared that a holder of a promissory note “means either of the following: (a) If the instrument is payable to bearer, a person who is in possession of the instrument; (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.”<sup>60</sup> Under this scheme, a bearer is a “person in possession of an instrument, document of title, or certified security payable to bearer or endorsed in blank.”<sup>61</sup> Taken together, one becomes the holder of a promissory note when the note is

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<sup>54</sup> *Id.*

<sup>55</sup> *Edgar v. Haines*, 141 N.E. 837, 838 (Ohio 1923).

<sup>56</sup> *See Washer v. Tontar*, 190 N.E. 231, 232 (Ohio 1934) (citing *Simon v. Union Trust Co.*, 185 N.E. 425, 425–26 (Ohio 1933)).

<sup>57</sup> *Buckeye Fed. Sav. & Loan Ass’n v. Guirlinger*, 581 N.E.2d 1352, 1354 (Ohio 1991) (citing OHIO REV. CODE ANN. § 1303.03(A) (West 1991)) (“[N]egotiable instrument’ means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order . . . .”); *Midland Title Sec., Inc. v. Carlson*, 872 N.E.2d 968, 973 (Ohio App. Ct. 2007).

<sup>58</sup> *Midland Title*, 872 N.E.2d at 973.

<sup>59</sup> OHIO REV. CODE ANN. § 1301.01. The negotiability of promissory notes may raise more questions than answers, and an analysis of the concept of negotiability is beyond the scope of this comment.

<sup>60</sup> *Id.* § 1301.01(T)(1)(a)–(b).

<sup>61</sup> *Id.* § 1301.01(E).

either issued to that person or negotiated to them through the exchange of possession and endorsement of the promissory note.<sup>62</sup>

Ohio's version of the U.C.C. also sets forth a list of persons who are entitled to "enforce" a promissory note.<sup>63</sup> This section of the Ohio Revised Code recognizes that the right to enforce a promissory note is not limited to holders.<sup>64</sup> Not only is the note enforceable by the holder and subsequent holders, but also it is enforceable by a non-holder in possession of the note with the rights of a holder.<sup>65</sup>

A person classified as a non-holder in possession of a promissory note with the rights of a holder could be either a party that acquires the rights of a holder when the promissory note is delivered for the purpose of enforcement,<sup>66</sup> or a party who is a successor to the holder or otherwise acquires the holder's rights.<sup>67</sup> Given that the promissory note carries with it a corresponding right to foreclose the mortgage,<sup>68</sup> and that the note can be enforced by a party other than the holder,<sup>69</sup> the proper party with standing in Ohio foreclosure actions is more accurately described as the party entitled to enforce the terms of the promissory note.

In *Bank of New York v. Dobbs*,<sup>70</sup> the Fifth District provided a persuasive justification for the use of the assignment of mortgage as a means of establishing that a party is entitled to enforce the promissory note and therefore has standing to sue.<sup>71</sup> In that case, the plaintiff, Bank of New York, was not the original lender under the promissory note, and there was no evidence on the record that the promissory note had been endorsed to

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<sup>62</sup> *See id.* §§ 1303.21 cmt. 1 ("Negotiation" is the term used in Article 3 to describe this post-issuance event. Normally, negotiation occurs as a result of a voluntary transfer of possession of an instrument by a holder to another person who becomes the holder as a result of the transfer."), 1301.01(T)(1)(a), 1303.25 (1990).

<sup>63</sup> *Id.* § 1303.31.

<sup>64</sup> *Id.* § 1303.31(A)(1)–(3).

<sup>65</sup> *Id.* § 1303.31(A)(2).

<sup>66</sup> *See id.* §§ 1303.22(A), 1303.31, official comment (citing Official Comment to U.C.C. § 3-301).

<sup>67</sup> *Id.* § 1303.22(A).

<sup>68</sup> *Kernohan v. Manss*, 41 N.E. 258, 260 (Ohio 1895) (declaring as settled law in Ohio, "a transfer of the note by the owner, so as to vest legal title in the [endorsee], will carry with it equitable ownership of the mortgage").

<sup>69</sup> OHIO REV. CODE ANN. § 1303.31.

<sup>70</sup> No. 2009-CA-000002, 2009 WL 2894601 (Ohio Ct. App. Sept. 8, 2009).

<sup>71</sup> *Id.* at \*3–5.

Bank of New York.<sup>72</sup> However, the record did contain copies of the original promissory note and mortgage, both of which the borrower signed.<sup>73</sup> The record also contained an assignment of mortgage, executed after the foreclosure proceedings were initiated.<sup>74</sup> The Fifth District concluded that Bank of New York had the right to enforce the promissory note because the terms of the promissory note and the mortgage referenced each other, and the assignment of mortgage provided additional evidence of the transferring parties' intent to keep the documents together.<sup>75</sup> The Fifth District premised its conclusion on the principles found in the Restatement (Third) of Property (Mortgages):

The Restatement asserts as its essential premise that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly. The Restatement suggests that with fair frequency mortgagees fail to document their transfers so carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4(b) suggests "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." Thus, the obligation follows the mortgage if the record indicates the parties so intended.<sup>76</sup>

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<sup>72</sup> *Id.* at \*3.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*5.

<sup>76</sup> *Id.* at \*4 (quoting RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4(b) (1997)).

Based on this section of the Restatement, as well as the terms of the promissory note, the mortgage, and the assignment of mortgage, the Fifth District reasoned that when the record indicates that the parties intended to transfer both the promissory note and the mortgage together, “it makes little sense” to believe that the plaintiff is not entitled to enforce the terms of the promissory note.<sup>77</sup>

Although some Ohio courts stray from the position that the promissory note is controlling, other state courts continue to view the promissory note as the primary evidence of ownership.<sup>78</sup> For instance, Pennsylvania courts have held that a purchaser of a mortgage loan who does not obtain a formal assignment of mortgage nonetheless receives an “equitable” assignment of mortgage.<sup>79</sup> Courts in Connecticut and Florida also recognize the rights conferred through the transfer of the promissory note, even when the transferee either did not receive a formal assignment of mortgage or received a formal assignment of mortgage after the commencement of the foreclosure action.<sup>80</sup> In these states, the entity with the right to enforce the promissory note is also entitled to enforce the mortgage that secures the note, regardless of whether the entity has been assigned the mortgage.

### *C. Standing and the Real Party in Interest Under Ohio Law*

The standing issue and the real party in interest requirement are similar in their scope and purpose.<sup>81</sup> In the context of Ohio foreclosure actions, the interchangeable use of these concepts will not impact the result of the

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<sup>77</sup> *Id.* at \*4.

<sup>78</sup> *See, e.g.,* *Mortg. Elec. Registration Sys., Inc. v. Coakley*, 838 N.Y.S.2d 622, 623 (N.Y. App. Div. 2007) (internal citations omitted) (“[A]t the time of the commencement of this action, MERS was the lawful holder of the promissory note and of the mortgage, which passed as an incident to the promissory note.”).

<sup>79</sup> *U.S. Bank v. Mallory*, 982 A.2d 986, 994 (Penn. 2009).

<sup>80</sup> *See, e.g.,* *Ingomar Ltd. P’ship v. Packer*, No. CV020467401, 2007 WL 1675846, at \*4 (Conn. Super. Ct. May 23, 2007) (holding the plaintiff had standing in the absence of a formal assignment of the note and mortgage at the time the action was commenced); *Mortg. Elec. Registration Sys., Inc. v. Revoredo*, 955 So.2d 33, 34 n.2 (Fla. Dist. Ct. App. 2007) (finding that the plaintiff, as the holder of the promissory note, had standing because “mortgage security follows the note” (quoting 37 FLA. JUR. 2D. *Mortgages, Etc.* § 519 (2007))).

<sup>81</sup> *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 957 N.E.2d 790, 802 (Ohio Ct. App. 2011).

analysis.<sup>82</sup> Therefore, the party that is entitled to enforce the promissory note not only has the requisite standing to prosecute a foreclosure action<sup>83</sup> but also, at the same time, satisfies the real party in interest requirement under Rule 17(A) of the Ohio Rules of Civil Procedure.<sup>84</sup>

### 1. *The Issue of Standing*

According to the Supreme Court of Ohio, courts should view the issue of standing “a threshold question for the court to decide in order for it to proceed to adjudicate the action.”<sup>85</sup> It “is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.”<sup>86</sup> The purpose of standing is to ensure that a genuine dispute between parties exists before a judicial tribunal renders its final judgment.<sup>87</sup>

In the state courts of Ohio, the issue of standing does not implicate the court’s subject matter jurisdiction to hear a case.<sup>88</sup> Unlike federal courts, the federal constitutional requirement of Article III does not bind Ohio courts.<sup>89</sup> Rather, the Ohio Constitution<sup>90</sup> and the General Assembly<sup>91</sup> have

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<sup>82</sup> See, e.g., *Deutsche Bank Nat’l Trust Co. v. Cassens*, No. 09AP-865, 2010 WL 2501519, at \*8 (Ohio Ct. App. June 22, 2010) (citing *Bank of N.Y. v. Stuart*, No. 06CA008953, 2007 WL 936706, at \*9 (Ohio Ct. App. Mar. 30, 2007)).

<sup>83</sup> *Id.* (quoting *Wells Fargo Bank v. Stovall*, No. 91802, 2010 WL 320487, at \*15 (Ohio Ct. App. Jan. 28, 2010)).

<sup>84</sup> *Schwarzwald*, 957 N.E.2d at 804.

<sup>85</sup> *State ex rel. Jones v. Suster*, 701 N.E.2d 1002, 1008 (Ohio 1998) (plurality opinion).

<sup>86</sup> *Kincaid v. Erie Ins. Co.*, 944 N.E.2d 207, 209 (Ohio 2010) (citing *Ohio Pyro, Inc. v. Dep’t of Commerce*, 875 N.E.2d 550, 557 (Ohio 2007); *Cuyahoga Cnty. Bd. of Comm’rs v. State*, 858 N.E.2d 330, 333 (Ohio 2006)).

<sup>87</sup> *Id.* (citing *Fortner v. Thomas*, 257 N.E.2d 371, 372 (Ohio 1970)).

<sup>88</sup> *Suster*, 701 N.E.2d at 1008.

<sup>89</sup> *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081 (Ohio 1999) (citing 59 AM. JUR. 2D § 36 (1987)) (“Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint . . . and [state courts] are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.”).

<sup>90</sup> *Seventh Urban, Inc. v. Univ. Circle Prop. Dev., Inc.*, 423 N.E.2d 1070, 1073 (Ohio 1981) (“The jurisdictional foundation for courts of common pleas . . . is set forth specifically in Section 4(B) of Article IV [of the Ohio Constitution].”).

<sup>91</sup> *Id.* (citing *Cincinnati v. Bosert Mach. Co.*, 243 N.E.2d 105, 107 (Ohio 1968)); *Wolfrum v. Wolfrum*, 208 N.E.2d 537, 539 (Ohio 1965); *Jacobsen v. Jacobsen*, 131 N.E.2d 833, 835–36 (Ohio 1956); *State ex rel. Black v. White*, 5 N.E.2d 163, 165 (Ohio 1936); *Ellis* (continued)

vested common pleas courts with broad subject matter jurisdiction over all civil cases as granted.

The Supreme Court of Ohio has specifically “held standing to be jurisdictional only in limited cases of administrative appeals[.]”<sup>92</sup> Because foreclosure actions generally do not involve administrative agencies, it follows that the issue of standing is not a jurisdictional matter in residential foreclosure cases.<sup>93</sup> An objection based on an alleged lack of standing cannot divest the court of jurisdiction, but is more accurately described as a defense to foreclosure.<sup>94</sup> Thus, a borrower’s attack on a foreclosing plaintiff’s standing to sue is a waivable defense, not a component of subject matter jurisdiction.<sup>95</sup>

## 2. Rule 17(A) of the Ohio Rules of Civil Procedure

Rule 17(A) of the Ohio Rules of Civil Procedure states that “[e]very action shall be prosecuted in the name of the real party in interest.”<sup>96</sup> Ohio courts have described the real party in interest as “one who has a real interest in the subject matter of the action,”<sup>97</sup> or “one who is *directly* benefitted or injured by the outcome of the case.”<sup>98</sup> If a party’s status as

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v. Urner, 181 N.E. 22, 23 (Ohio 1932); Hess v. Devou, 146 N.E. 311, 312 (Ohio 1925); Miller v. Eagle, 117 N.E. 23, 25 (Ohio 1917)).

<sup>92</sup> *Suster*, 701 N.E.2d at 1008 n.4 (citing *Buckeye Foods v. Cuyahoga Cnty. Bd. of Revision*, 678 N.E.2d 917, 919 (Ohio 1997); *New Boston Coke Corp. v. Tyler*, 513 N.E.2d 302, 305 (Ohio 1987)). Although this case may be of questionable precedential value inasmuch as it was a plurality opinion, the author of the opinion, Justice Evelyn Lundberg Stratton, is the only remaining justice. *Justices of the Supreme Court of Ohio*, THE SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/SCO/justices/default.asp> (last visited Feb. 21, 2012).

<sup>93</sup> *Suster*, 701 N.E.2d at 1008; *Mid-State Trust IX v. Davis*, 2d Dist. No. 07-CA-31, 2008 WL1838350, at \*8 (Ohio Ct. App. Apr. 25, 2008) (quoting *Suster*, 701 N.E.2d at 1008; *Wash. Mut. Bank v. Novack*, No. 88121, 2007 WL 701081, at \*2 (Ohio Ct. App. Mar. 8, 2007)) (“The issue of lack of standing ‘challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.’ Accordingly, the issue of standing or the ‘real party in interest’ defense is waived if not timely asserted.”).

<sup>94</sup> *Mid-State Trust IX*, 2008 WL1838350, at \*8.

<sup>95</sup> *Id.*

<sup>96</sup> OHIO R. CIV. P. 17(A).

<sup>97</sup> *Shealy v. Campell*, 485 N.E.2d 701, 702 (Ohio 1985) (citing *W. Clermont Bd. of Educ. Ass’n v. W. Clermont Bd. of Educ.* 426 N.E.2d 512, 514 (Ohio Ct. App.1980)).

<sup>98</sup> *Id.*

the real party in interest is challenged, then “courts must look to the substantive law creating the rights being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.”<sup>99</sup>

In Ohio foreclosures, the status of the real party in interest turns on the establishment of the party entitled to enforce the promissory note and foreclose on the related mortgage.<sup>100</sup> This makes sense, considering the function of Rule 17(A) is to protect the defendant-borrower against a subsequent action by a party actually entitled to recover, or “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 in interest on the same matter.”<sup>101</sup> The purpose of the real party in interest requirement is to ensure that a defendant is not exposed to multiple judgments on the same obligation.<sup>102</sup> Like the issue of standing, an objection to the plaintiff’s status as the real party in interest cannot rise to the level of divesting the court of jurisdiction.<sup>103</sup> Thus, a party must plead any objection to the real party in interest requirement under Rule 17(A) as a defense to foreclosure.<sup>104</sup>

Like all Ohio Rules of Civil Procedure, Rule 17(A) “shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.”<sup>105</sup> The rule expressly states that:

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

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<sup>99</sup> *Id.* at 703.

<sup>100</sup> *See* Everhome Mortg. Co. v. Rowland, No. 07AP-615, 2008 WL 747698, at \*2–3 (Ohio Ct. App. Mar. 20, 2008); Conrad v. Rainey, 181 N.E. 444, 447 (1932).

<sup>101</sup> *Shealy*, 485 N.E.2d at 702 (citations and quotations omitted).

<sup>102</sup> *Id.*

<sup>103</sup> Oshourne v. Ahern, No. 05CA9, 2005 WL 3338032, at \*3 (Ohio Ct. App. Dec. 1, 2005) (citing HOWARD P. FINK ET AL., GUIDE TO THE OHIO RULES OF CIVIL PROCEDURE § 17:3 (2005 ed.)).

<sup>104</sup> *Id.*

<sup>105</sup> OHIO R. CIV. P. 1(B).

effect as if the action had been commenced in the name of the real party in interest.<sup>106</sup>

In keeping with the purpose of the civil rules, the Ohio Supreme Court has found that the provisions of Rule 17(A) can cure a lack of standing.<sup>107</sup>

*D. A Certifiable Conflict*

In the context of residential foreclosures, the Ohio appellate courts are divided on two fundamental issues. First, the courts are divided on when a foreclosure plaintiff is required to prove its standing.<sup>108</sup> Second, the courts are at odds on what type of proof is sufficient to establish the plaintiff's right to prosecute the lawsuit.<sup>109</sup>

In *Wachovia Bank v. Cipriano*,<sup>110</sup> the Fifth District Court of Appeals emphasized that “[p]ursuant to Civ.R. 17(A) the real party of interest shall ‘prosecute’ the claim. The rule does not state ‘file’ the claim.”<sup>111</sup> In that case, the court relied on the plain language of Rule 17(A) when it held that the plaintiff, Wachovia Bank, was entitled to summary judgment even though it initiated the proceedings before assigned the mortgage.<sup>112</sup> Wachovia Bank did not produce any evidence of a valid interest in the mortgage until months after it filed the complaint.<sup>113</sup> The borrower argued that the trial court lacked jurisdiction because Wachovia Bank was not the holder or owner of the promissory note and mortgage at the time of the filing of the complaint.<sup>114</sup> The Fifth District has typically held that when a mortgagee has filed a motion for summary judgment, the mortgagee need only “attach[] Civ. R. 56 evidence that the mortgagee was the lawful

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<sup>106</sup> OHIO R. CIV. P. 17(A).

<sup>107</sup> *State ex rel. Jones v. Suster*, 701 N.E.2d 1002, 1008 (Ohio 1998) (plurality opinion).

<sup>108</sup> For a summary of the conflict concerning the standing issue, see *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 957 N.E.2d 790, 802–03 (Ohio Ct. App. 2011).

<sup>109</sup> For a summary of the conflict concerning the type of proof, compare *Wachovia Bank v. Cipriano*, No. 09CA007A, 2009 WL 3308733, at \*5 (Ohio Ct. App. Oct. 13, 2009) (holding that a promissory note is sufficient), with *Bank of N.Y. v. Stuart*, No. 06CA008953, 2007 WL 936706, at \*2–3 (Ohio Ct. App. Mar. 30, 2007) (holding that an assignment is sufficient).

<sup>110</sup> 2009 WL 3308733.

<sup>111</sup> *Id.* at \*5.

<sup>112</sup> *Id.* at \*5–6.

<sup>113</sup> *Id.* at \*5.

<sup>114</sup> *Id.*

holder and owner of the note and mortgage.”<sup>115</sup> In this fashion, the *Cipriano* court rejected the borrower’s standing argument and found that the foreclosure plaintiff was in fact “the real party of interest and holder of the note prior to any judgment entered via summary judgment.”<sup>116</sup> Nothing more was required.

In *U.S. Bank National Association v. Marcino*,<sup>117</sup> the Seventh District Court of Appeals held that the foreclosure plaintiff, U.S. Bank, had the necessary standing to bring the foreclosure action even though U.S. Bank had not produced an assignment of mortgage.<sup>118</sup> In that case, U.S. Bank attached copies of both the original promissory note and the mortgage to its complaint.<sup>119</sup> The borrower argued that U.S. Bank failed to show that it was the real party in interest because it “did not present evidence how it became the holder of the note and mortgage.”<sup>120</sup> The Seventh District reasoned that standing was not measured by U.S. Bank’s ability to produce an assignment of mortgage.<sup>121</sup> Instead, the court focused on the promissory note and relied on longstanding principles of Ohio law to conclude that “negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage was not assigned or delivered.”<sup>122</sup>

In *Bank of New York v. Stuart*,<sup>123</sup> the Ninth District Court of Appeals framed the issue as “whether [Bank of New York] was the real party in interest or not.”<sup>124</sup> At the trial court level, Bank of New York supported its motion for summary judgment with an assignment of mortgage running from the original lender, America’s Wholesale Lender, to Bank of New York.<sup>125</sup> The effective date of the assignment of mortgage was “more than

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<sup>115</sup> *Vanderbilt Mortg. & Fin. v. Lloyd*, No. 10 CA 24, 2011 WL 4059179, at \*4 (Ohio Ct. App. Sept. 14, 2011) (citing *LaSalle Bank v. Street*, No. 08 CA 60, 2009 WL 1040300, at \*4 (Ohio Ct. App. Apr. 17, 2009); *Provident Bank v. Taylor*, No. 04CAE05042, 2005 WL 1227900, at \*2 (Ohio Ct. App. May 23, 2005)).

<sup>116</sup> *Cipriano*, 2009 WL 3308733, at \*5.

<sup>117</sup> 908 N.E.2d 1032 (Ohio Ct. App. 2009).

<sup>118</sup> *Id.* at 1034.

<sup>119</sup> *Id.* at 1032. Attached to the promissory note was an “allonge” with an endorsement in blank from the original payee on the promissory note. *Id.*

<sup>120</sup> *Id.* at 1035.

<sup>121</sup> *Id.* at 1038.

<sup>122</sup> *Id.* at 1038–39.

<sup>123</sup> No. 06CA008953, 2007 WL 936706 (Ohio Ct. App. Mar. 30, 2007).

<sup>124</sup> *Id.* at \*2.

<sup>125</sup> *Id.*

five months after [Bank of New York] filed its complaint for foreclosure.”<sup>126</sup> The borrowers argued that trial court erred in granting Bank of New York judgment because the mortgage had not been assigned to Bank of New York until after it filed the complaint.<sup>127</sup> The Ninth District rejected the borrowers’ argument, answering the question of whether Bank of New York was the real party in interest in the affirmative.<sup>128</sup>

In affirming the lower court’s decision, the Ninth District relied heavily on Rule 17(A), stating that its purpose “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 he will be protected against another suit brought by the real party in interest on the same matter.’”<sup>129</sup> Remaining true to the purpose of the rule, the Ninth District concluded that the borrowers failed to explain how they would be “prejudiced” from the after-acquired assignment, and that the assignment from America’s Wholesale Lender did in fact preclude the possibility of another suit against the borrowers on the same mortgage loan.<sup>130</sup>

By contrast, other Ohio courts continue to dismiss foreclosure actions based on a lack of standing, even in the face of valid proof that demonstrates a plaintiff’s right to bring suit.<sup>131</sup> Unlike the Second District, some appellate districts have taken “a more rigid view” on the issue of standing.<sup>132</sup> The first opinion to express such a rigid view came out of the First District Court of Appeals in 2007.<sup>133</sup> The Eighth District Court of Appeals followed suit, rendering an almost identical opinion in 2009.<sup>134</sup> Not only are these decisions at odds with the jurisdictional requirements in Ohio state courts, but they also seem to disregard both the Ohio Rules of Civil Procedure and the realities of mortgage lending.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* at \*2 (quoting *Shealy v. Campbell* 485 N.E.2d 701, 702 (Ohio 1985)).

<sup>130</sup> *Id.* at \*3.

<sup>131</sup> *See Wells Fargo Bank v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008).

<sup>132</sup> *HSBC Bank USA v. Thompson*, No. 23761, 2010 WL 3451130, at \*13 (Ohio Ct. App. Sept. 3, 2010). The Second District noted the conflict between the Ohio appellate courts, but concluded that it did not need to reach the issue. *Id.*

<sup>133</sup> *See Byrd*, 897 N.E.2d at 722.

<sup>134</sup> *See Wells Fargo Bank v. Jordan*, No. 91675, 2009 WL 625560, at \*5 (Ohio Ct. App. Mar. 12, 2009).

In *Wells Fargo Bank, N.A. v. Byrd*,<sup>135</sup> the First District held that a foreclosure plaintiff was not the real party in interest and thus did not have standing to enforce the promissory note as alleged in its complaint.<sup>136</sup> There, WMC originated the mortgage loan and the assignment of mortgage to Wells Fargo was executed and recorded after the foreclosure action was filed.<sup>137</sup> The borrower objected to Wells Fargo's status as the real party in interest. Relying on reasoning from Ninth District, the magistrate found that Wells Fargo was entitled to judgment.<sup>138</sup> However, the trial court summarily rejected the magistrate's decision and found in favor of the borrower. On appeal, the First District questioned "whether Wells Fargo, which was clearly not a real party in interest when the suit was filed, could later have cured the defect by producing an after-acquired interest in the litigation."<sup>139</sup>

The First District further noted that Rule 17(A) "allows a plaintiff to cure a real-party-in-interest problem by (1) showing that the real party in interest has ratified the commencement of the action, or (2) joining or substituting the real party in interest."<sup>140</sup> After determining that Wells Fargo was not acting as agent for WMC when it filed the foreclosure action, the court found that an after-acquired assignment of mortgage could not cure the standing defect.<sup>141</sup> Even though the First District had everything in front of it to show that Wells Fargo was the real party in interest, it nonetheless concluded "that in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage."<sup>142</sup>

In *Wells Fargo Bank, N.A. v. Jordan*,<sup>143</sup> the Eighth District followed the reasoning of the First District.<sup>144</sup> There, Delta Funding originated the mortgage loan, and the assignment of mortgage to Wells Fargo was recorded weeks after the foreclosure action was filed.<sup>145</sup> Like the plaintiff

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<sup>135</sup> 897 N.E.2d 722 (Ohio Ct. App. 2008).

<sup>136</sup> *Id.* at 726.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 722.

<sup>139</sup> *Id.* at 724.

<sup>140</sup> *Id.* at 725.

<sup>141</sup> *Id.* at 725–26.

<sup>142</sup> *Id.*

<sup>143</sup> No. 91675, 2009 WL 625560 (Ohio Ct. App. Mar. 12, 2009).

<sup>144</sup> *Id.* at \*5.

<sup>145</sup> *Id.*

in *Byrd*, Wells Fargo did not dispute that it acquired the loan from Delta Funding after the foreclosure action was filed.<sup>146</sup> Because Wells Fargo acquired an assignment of mortgage after filing the action, the Eighth District held that Wells Fargo lacked standing to bring the foreclosure action and dismissed the case.<sup>147</sup>

Finally, in *Wells Fargo Bank, N.A. v. Sessley*,<sup>148</sup> the Tenth District Court of Appeals not only abandoned the Ninth District's reasoning but also rejected the reasoning from both the First and Eighth Districts.<sup>149</sup> Yet, less than a week later, the Tenth District addressed the standing issue again in *Countrywide Home Loan Servicing, L.P. v. Thomas*.<sup>150</sup> In that case, the borrower relied on the principles established by the Eighth District to argue that Countrywide did not have standing to commence the action.<sup>151</sup> In refusing to dismiss the case, the Tenth District relied solely on precedent from both the Fifth and Seventh Districts.<sup>152</sup> Although Countrywide did not formally assign the mortgage until after the action was commenced,<sup>153</sup> the Tenth District concluded that the borrower failed to establish a triable issue of fact regarding the issue of standing because the assignment was made prior to rendering summary judgment.<sup>154</sup> Based on this case, the Tenth District appears to have taken the position that a defect in standing can be cured under the principles of Rule 17(A), emphasizing that "the real party of interest shall 'prosecute' the claim[, t]he rule does not state 'file' the claim."<sup>155</sup>

Thus, in the First and Eighth Districts, a foreclosure plaintiff must affirmatively prove standing at the pleading stage or risk outright dismissal. The Second, Fifth, Seventh, and Ninth Districts have refused to

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 935 N.E.2d 70 (Ohio Ct. App. 2010).

<sup>149</sup> *Id.* at 78 (disagreeing with the Ninth District's *Bank of New York v. Stuart*, No. 06CA008953, 2007 WL 936706 (Ohio Ct. App. Mar. 30, 2007), the First District's *Wells Fargo Bank v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008), and the Eighth District's *Wells Fargo Bank v. Jordan*, No. 91675, 2009 WL 625560, at \*3 (Ohio Ct. App. Mar. 12, 2009)).

<sup>150</sup> No. 09AP-819, 2010 WL 2636887 (Ohio Ct. App. 2010).

<sup>151</sup> *Id.* at \*2.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*3 (quoting *Wachovia Bank v. Cipriano*, No. 09CA007A, 2009 WL 3308733, at \*5 (Ohio Ct. App. June 30, 2010)).

adopt such a rigid view on the issue of standing and will allow foreclosure plaintiffs a reasonable time to cure any alleged defect in standing.

### III. ANALYSIS

Generally, the real party in interest with standing to prosecute a foreclosure action in Ohio is the party entitled to enforce the promissory note and the related mortgage.<sup>156</sup> Thus, at the very least, a plaintiff should be entitled to commence a foreclosure action without fear that its claims will be dismissed because it is not the proper party. The plaintiff can do this by attaching copies of both the original promissory note and the mortgage to its complaint, and, at a minimum, avers that it has the right to enforce the promissory note in the complaint. The position adopted by the First and Eighth Districts blurs this simple pleading standard and is plainly inconsistent with that of the Second, Fifth, Seventh, and Ninth Districts.<sup>157</sup>

#### A. *To Dismiss or Not to Dismiss*

In early 2004, the Seventh District Court of Appeals addressed the issue of whether a foreclosure complaint should be dismissed when the promissory note and mortgage attached the complaint are still endorsed to the previous note holder, and the plaintiff, Washington Mutual Bank, alleged in its complaint that it was holder and owner of the note and mortgage.<sup>158</sup> Prior to answering the complaint, the borrower, Linda Green, moved to dismiss Washington Mutual's complaint pursuant to Ohio Rule of Civil Procedure 12(B)(6) for failure to state a claim for relief.<sup>159</sup> In her motion and on appeal, Green argued that Washington Mutual was not the

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<sup>156</sup> *Everhome Mortg. Co. v. Rowland*, No. 07AP-615, 2008 WL 747698, at \*2 (Ohio Ct. App. Mar. 20, 2008) (quoting OHIO R. CIV. P. 17(A)). *See also* *Conrad v. Rainey*, 181 N.E. 444, 447 (Ohio 1932).

<sup>157</sup> *See infra* Section II.D; *Bank of N.Y. v. Stuart*, No. 06CA008953, 2007 WL 936706, at \*2 (Ohio App. Ct. Mar. 30, 2007) (stating that the real party has an interest in the outcome of the case and must commence the action in a reasonable time); *Cipriano*, 2009 WL 3308733, at \*5 (discussing the notion that a real party need only prosecute a claim and not file a claim); *HSBC Bank USA v. Thompson*, No. 23761, 2010 WL 3451130, at \*12–13 (Ohio Ct. App. Sept. 3, 2010) (discussing the conflict of the Ohio appellate districts, comparing the Eighth and the First Districts with the Seventh District).

<sup>158</sup> *Wash. Mut. Bank v. Green*, 806 N.E.2d 604, 605 (Ohio Ct. App. 2004).

<sup>159</sup> *Id.* at 605.

real party in interest because the promissory note attached to the complaint identified “Check ‘n Go” as the holder, rather than Washington Mutual.<sup>160</sup>

Washington Mutual responded by arguing that Rule 8(A) of the Ohio Rules of Civil Procedure indicates that Ohio is a notice pleading state under these rules, and therefore, only a short and plain statement of the claim and the relief sought was required.<sup>161</sup> Attached to the plaintiff’s complaint were copies of the promissory note and mortgage, both of which Green executed.<sup>162</sup> The Seventh District affirmed the lower court’s finding that Washington Mutual adequately stated a claim for relief under the Ohio Rules of Civil Procedure, and therefore, the court did not dismiss the complaint for lack of real party in interest status.<sup>163</sup> The Seventh District explained:

As long as a set of facts consistent with the complaint would allow plaintiff recovery, the court shall not grant a motion to dismiss.

Here, Washington Mutual’s complaint states that it is the owner and holder of the promissory note and mortgage. It is well established that the real party in interest in such a case is the current note holder/mortgage holder, which, due to the possibility of assignment, could be different from the original holder.

Under the aforesaid premises behind motions to dismiss, we must thus presume that Washington Mutual’s statement is true. If this statement is presumed true, then Washington Mutual is considered to be the real party in interest for purposes of the pretrial motion to dismiss stage of the proceedings. As such, the trial court correctly refused to grant the motion to dismiss at a time before the allegations of the complaint were required to be proven.<sup>164</sup>

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<sup>160</sup> *Id.* at 606.

<sup>161</sup> *Id.* at 605.

<sup>162</sup> *Id.* at 606; Everhome Mortg. Co. v. Rowland, No. 07AP-615, 2008 WL 747698, at \*3 (Ohio Ct. App. Mar. 20, 2008).

<sup>163</sup> *Green*, 806 N.E.2d at 607.

<sup>164</sup> *Id.* (citations omitted).

The Seventh District's position on dismissal comports with the primary function of Rule 12(B)(6) by looking only to the sufficiency of the complaint. To dismiss a claim under this rule,

it must appear beyond a doubt that that [claimant] can prove no set of facts . . . that would entitle [it] to relief[,] . . . [t]he allegations of the complaint must be construed as true[,] . . . and the complaint's material allegations and any reasonable inferences drawn therefrom must be construed in the nonmoving party's favor.<sup>165</sup>

It is entirely unreasonable to conclude that a foreclosure plaintiff "can prove no set of facts that would entitle it to relief" when it declares its holder status or its right to enforce the promissory note in the complaint, and attaches the note and mortgage to the complaint. The allegations and facts pled "must be taken as true" for the purposes of a motion to dismiss brought under Ohio Rule 12(B)(6).<sup>166</sup>

Furthermore, because mortgage lending involves transferable rights, the idea that the real party in interest could file a subsequent suit on the same matter is grounded in the possibility that the loan is actually held by a different entity.<sup>167</sup> This reasoning cuts both ways, in that it is the very possibility of assignment that compels a court to accept that the entity that initiated the action can be the assignee with the ability to prove the necessary set of facts to foreclose.<sup>168</sup> Under these circumstances, where the plaintiff attached to its complaint copies of both the promissory note and related mortgage, and the plaintiff alleged that it has the right to enforce the promissory note,<sup>169</sup> there is simply too much doubt to dismiss the complaint.

More fundamental is the reality that Ohio is a notice pleading state, and notice of the nature and character of the claims are all that is

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<sup>165</sup> *LeRoy v. Allen, Yurasek & Merklin*, 872 N.E.2d 254, 257–58 (Ohio 2007).

<sup>166</sup> *Id.* at 257.

<sup>167</sup> *See Wells Fargo Bank v. Sessley*, 935 N.E.2d 70, 78 (Ohio Ct. App. 2010) (acknowledging the concern about "multiple judgments on the same debt").

<sup>168</sup> *See Conrad v. Rarey*, 181 N.E. 444 (Ohio 1931); OHIO R. CIV. P. 17 cmt. 1 (1970).

<sup>169</sup> OHIO REV. CODE ANN § 1303.31(B) (West 2010) ("A person may be a 'person entitled to enforce' the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

necessary.<sup>170</sup> Even the basic purpose behind the Federal Rules of Civil Procedure, from which Ohio's rules were crafted, is to give notice only of what the adverse party may expect to meet and not to define the controversy with exactitude.<sup>171</sup> In the foreclosure context, an alleged claim of default is surely recognizable by a borrower who signed and dated both the promissory note and mortgage that are attached to the complaint. Moreover, a borrower certainly knows whether the required mortgage payments have actually been made as agreed. Any argument to the contrary simply belies reality.

The case of *Washington Mutual F.A. v. Green*<sup>172</sup> brings to light a second, less visible problem with dismissing foreclosure actions based on an alleged lack of standing. The problem comes with forcing foreclosure plaintiffs to prove their case and disprove a borrower's defense at the pleading stage.<sup>173</sup> As discussed in previous sections, a challenge to standing or the real party in interest requirement is not a jurisdictional matter, but a defense to foreclosure.<sup>174</sup> Rule 8(C) of the Ohio Rules of Civil Procedure plainly states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."<sup>175</sup> Requiring foreclosure plaintiffs to disprove a borrower's defense at the pleading stage effectively forces a plaintiff to try its case based on adequate proof at the pleading stage of the action. The plaintiff's burden to affirmatively prove the elements of its

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<sup>170</sup> *York v. Ohio State Highway Patrol*, 573 N.E.2d 1063, 1065 (1991); OHIO R. CIV. P. 8.

<sup>171</sup> *See* FED. R. CIV. P. 8(A); OHIO R. CIV. P. 8 cmt. (1994):

Under Rule 8(A) much less emphasis is placed on the form of the language in the complaint, distinctions between "facts," "conclusions of law," and "evidence" being minimized so long as the operative grounds underlying the claim are set forth so as to give adequate notice of the nature of the action.

*Id.*

<sup>172</sup> 806 N.E.2d 604 (Ohio Ct. App. 2004).

<sup>173</sup> *See id.* This problem does not occur with the defenses listed under Ohio R. Civ. P. 12(B), and the statute of limitations defense because elapsed dates are clear from the face of complaint. *Id.*

<sup>174</sup> *See supra* Section II.C (showing that under Ohio law, a challenge to a plaintiff's standing or real party in interest status is defense, and therefore can be waived).

<sup>175</sup> OHIO R. CIV. P. 8(C).

claim, or disprove a properly raised defense, arises after the pleading stage.<sup>176</sup>

The 1970 Staff Notes to Ohio Rule 12(B)(6) touch on this “loose and irregular practice”:<sup>177</sup>

[A] defendant with a potentially decisive defense would not be content simply to assert the defense in his answer and prove it at trial; instead, he would often utilize some procedure not authorized by the code, usually a motion to dismiss, which could result in final judgment in his favor *before trial*. The courts and even plaintiffs have tended to tolerate illegitimate motions of this kind. The evil of this loose and irregular practice is often not apparent to the judges and lawyers involved in a particular case, who view it as a common sense method of determining a decisive issue in that case. However, if we consider civil procedure as a comprehensive system for the fair and efficient conduct of legal controversy, the evil becomes apparent.<sup>178</sup>

The drafters go on to note that they intended to correct the practice described above through the construction of Ohio Rule (B)(6), which “lays down the clear, simple and comprehensive rule that every affirmative defense . . . except for the seven enumerated defenses (and *only* those defenses)” must be asserted in a “responsive pleading.”<sup>179</sup>

Any concern about multiple judgments on the same debt can be addressed at the summary judgment stage of a foreclosure action, a stage where both parties can present competent evidence on the issue.<sup>180</sup> The burden shifting scheme condoned by the First and Eighth Districts is the very practice that the Ohio Rules of Civil Procedure meant to correct. It is doubtful that such a heightened pleading requirement would ever be placed on struggling borrowers.

The precedent set by First and Eighth District Courts of Appeal blurs Ohio’s clear standard of dismissal. In these districts, even if the plaintiff

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<sup>176</sup> *Mills v. Whitehouse Trucking Co.*, 320 N.E.2d 668, 671 (Ohio 1974) (holding that a Rule 12(B)(6) dismissal based on a defense would incorrectly “place the burden of affirmatively pleading” against possible defenses on the plaintiff).

<sup>177</sup> OHIO R. CIV. P. 12 cmt. 3 (1970).

<sup>178</sup> *Id.*

<sup>179</sup> OHIO R. CIV. P. 12(B) cmt. 3.

<sup>180</sup> *See* OHIO R. CIV. P. 56.

attaches copies of both the promissory note and mortgage to its complaint, and declares its right to enforce the note, the complaint is still vulnerable to dismissal for an outright lack of standing.

In *Byrd*, the First District rejected the plaintiff's argument that an alleged lack of standing could be cured under Ohio Rule 17(A).<sup>181</sup> There, Wells Fargo attempted to cure the alleged lack of standing by providing an after-acquired assignment of mortgage.<sup>182</sup> The assignment would have effectively cut off any other claim of ownership to the borrower's property and thus, would have satisfied the purpose behind Ohio Rule 17(A).<sup>183</sup>

Nevertheless, the First District refused to accept Wells Fargo's argument that an alleged lack of standing could be cured using a mortgage assignment dated after the complaint.<sup>184</sup> The court found that Wells Fargo could not invoke the "jurisdiction" of the court<sup>185</sup> and in doing so, elevated a lack of standing to a jurisdictional defect.<sup>186</sup>

However,

[o]ne could speculate on the effect of a holding that any judgment and decree of foreclosure ever granted wherein it can be shown that the mortgagee did not, at the time of the initial complaint, have standing and thus was not the real party in interest, results in the court's not having jurisdiction.<sup>187</sup>

Neither the text of Ohio Rule 17(A),<sup>188</sup> nor the Supreme Court of Ohio ascribe to such a rigid view. Rather, courts are permitted to properly exercise their jurisdiction and resolve controversies on the merits.<sup>189</sup> The question of whether an after-acquired assignment of mortgage can be used to cure a foreclosure plaintiff's standing should be decided in the affirmative.<sup>190</sup>

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<sup>181</sup> *Byrd*, 897 N.E.2d at 726.

<sup>182</sup> *Id.*

<sup>183</sup> *See infra* Section II.B.1; *Shealy v. Campbell*, 485 N.E.2d 701, 702 (Ohio 1985).

<sup>184</sup> *Byrd*, 897 N.E.2d at 726.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 957 N.E.2d 790, 803 (Ohio Ct. App. 2011).

<sup>188</sup> OHIO R. CIV. P. 17(A).

<sup>189</sup> *Schwartzwald*, 957 N.E.2d at 804.

<sup>190</sup> *See U.S. Bank v. Duvall*, 944 N.E.2d 693 (Ohio 2011).

*B. Who Really Wins When Foreclosures Are Delayed*

In 1969, long before the current foreclosure crisis hit Ohio, the Hamilton County Court of Common Pleas denied a lender judgment in a foreclosure action out of what appeared to be sympathy for the borrowers.<sup>191</sup> In reversing the decision of the lower court, the First District Court of Appeals stated:

The trial court had nothing before it upon which to deny judgment. The mortgagee could not be compelled to yield the largess established by the court. Appellant's claim rests upon written instruments and long established law. The trial court's disposition of that claim rests only upon sympathy for the appellees.

While we are cognizant that as interpreters of the law we must sometimes temper justice with mercy, only injustice can result when a litigant is denied due process of law in the court's effort to avoid carrying out its clear legal duty.<sup>192</sup>

In their efforts to delay foreclosure actions and help defaulting borrowers, the courts of the First and Eighth Districts threaten the ability of Ohio courts to work through hundreds, even thousands, of pending and future foreclosures. At the local level, these efforts have even gone as far as to require the foreclosing party's attorney to submit "certifications" attesting to the client's right to foreclose.<sup>193</sup> In addition to a host of attorney-client privilege issues, this requirement appears to skirt the abolishment of verified complaints under Rule 11 of the Ohio Rules of Civil Procedure.<sup>194</sup> Adding insult to injury, these districts also charge the lender extraordinarily high filing fees for each foreclosure action, forcing lenders to pay an inordinate amount in court costs each time an otherwise valid foreclosure action is dismissed and then re-filed.<sup>195</sup>

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<sup>191</sup> *Eagle Savings & Loan Ass'n v. Williams*, 250 N.E.2d 888 (Ohio Ct. App. 1969).

<sup>192</sup> *Id.* at 890.

<sup>193</sup> *See, e.g.*, Journal Entry at 1, *Citimortgage, Inc. v. Jones*, No. CV-10-734674 (Cuyahoga Cnty. Ct. C.P. Nov. 9, 2010).

<sup>194</sup> OHIO R. CIV. P. 11.

<sup>195</sup> *See* CUYAHOGA CNTY. C.P. CT. LOCAL R. 7.0. The charge to file a foreclosure action is \$475, as compared to \$100 for all other civil actions. *Id.*

On a broader scale, when courts take it upon themselves to slow foreclosures to a crawl, investors become the new housing victims. That is, many mutual funds and pension plans across the country, such as the Ohio teacher's retirement fund, buy and sell mortgage-backed securities on the open market.<sup>196</sup> When foreclosures are delayed, the value of those investment vehicles holding the delinquent mortgages will continue to suffer.<sup>197</sup> As a result, an individual's retirement fund could be rendered worthless.

The federal government provides another equally disconcerting argument against the undue delay in foreclosures. If securities become worthless, investors lose their money, but the bulk of the risk is borne by the government.<sup>198</sup> This is because billions of dollars worth of delinquent mortgages and mortgage-backed securities are held directly or indirectly by the federal government due to its takeover of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation in 2008.<sup>199</sup> The ultimate casualty in this case is not the borrower, who continues to live in the home for free, but the taxpayers who are forced to pay for their neighbor's mortgage, which sits in the hands of the federal government.<sup>200</sup>

In Ohio, more than 20% of homeowners are "underwater" or have negative equity in their home.<sup>201</sup> Over 89,000 new Ohio foreclosure actions were filed in 2009.<sup>202</sup> By the end of 2009, nearly 15.7% of all Ohio

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<sup>196</sup> See STATE TEACHERS RET. SYS. OF OHIO, SUMMARY OF INVESTMENT ASSETS (2010), available at [https://www.strsoh.org/pdfs/CAFR2010/invest-asset\\_summary.pdf](https://www.strsoh.org/pdfs/CAFR2010/invest-asset_summary.pdf).

<sup>197</sup> See Shaun Ramey, 'Standing' on Shifting Ground, MORTGAGE BANKING, Aug. 2011, at 80, 83.

<sup>198</sup> See Grant Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 586 (2010).

<sup>199</sup> See Peter J. Wallison & Charles W. Calomiris, *The Last Trillion-Dollar Commitment: The Destruction of Fannie Mae and Freddie Mac*, J. STRUCTURED FIN., Spring 2009, at 71, 71.

<sup>200</sup> Press Release, U.S. Dep't of Treasury, Statement by Secretary Henry M. Paulson Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>

<sup>201</sup> Jim Weiker, *Almost 22% of Mortgage Loans in Ohio 'Underwater'; National Rate Higher for Those Owning More Than Home is Worth*, COLUMBUS DISPATCH, June 9, 2011, at 10A.

<sup>202</sup> THE SUPREME COURT OF OHIO, *supra* note 16.

mortgages were either currently in foreclosure or were thirty days delinquent.<sup>203</sup> In fact, during the last twenty years, Ohio common pleas courts have experienced an increase in the volume of new foreclosure filings at a rate of over 311%.<sup>204</sup> As one would expect, the number of pending foreclosures also continues to rise, with upwards of 45,000 active foreclosure cases clogging the dockets of Ohio's courts at the end of 2009.<sup>205</sup>

Certain Ohio counties have experienced significantly higher rates of foreclosure filings.<sup>206</sup> Cuyahoga County reported over 14,000 new foreclosure filings in 2009.<sup>207</sup> During the same year, Franklin, Hamilton, Lucas, and Montgomery Counties accounted for another 27,000 new foreclosure actions.<sup>208</sup> These staggering statistics suggest that Ohio courts will face even more challenges with the management of their foreclosure caseloads in the years to come.

Yet, despite these astonishing numbers and the practical realities of the secondary mortgage market, some Ohio courts have clung to what can only be described as a purely arbitrary standard for determining whether a plaintiff has the right to commence a foreclosure action.<sup>209</sup> In their rush to blame the banks, these same courts have seemingly lost sight of the fact that mortgage securitization did not cause the foreclosure fallout—rather, it was the overwhelming amount of delinquencies that are responsible for the current epidemic.<sup>210</sup> Thus, it can appropriately be said that judicial attempts to allow delinquent borrowers to stay in homes they can no longer afford will only serve to perpetuate prolonged economic instability across the state of Ohio.

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<sup>203</sup> MORTG. BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY: FOURTH QUARTER 2009 4 (Feb. 2009).

<sup>204</sup> THE SUPREME COURT OF OHIO, *supra* note 16.

<sup>205</sup> *Id.*

<sup>206</sup> THE SUPREME COURT OF OHIO CASE MGMT. SECTION, NEW FORECLOSURE CASE FILINGS 2001 THROUGH 2010 (2010), *available at* [http://www.sconet.state.oh.us/JCS/disputeResolution/foreclosure/ForeclosureFiling2001\\_2010.xls](http://www.sconet.state.oh.us/JCS/disputeResolution/foreclosure/ForeclosureFiling2001_2010.xls).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *See supra* Section III.A.

<sup>210</sup> *See generally* Louise Schiavone, *Foreclosure Nation*, MORTGAGE BANKING, Dec. 2010, at 34, 34, 38.

## IV. CONCLUSION

Before concluding, it seems fitting to revisit the case of Gloria, the borrower first mentioned in the introduction to this comment. Gloria is none other than Gloria Byrd, the borrower in the First District case of *Wells Fargo, N.A. v. Byrd*.<sup>211</sup> As it turns out, Wells Fargo was forced to file a second foreclosure action against Gloria.<sup>212</sup> In the second case, Gloria chose not to challenge Wells Fargo's standing to bring the action.<sup>213</sup> In fact, Gloria never appeared to defend her case at all, and, some five years after Wells Fargo first attempted to foreclose on the property, Gloria ultimately lost her home to foreclosure.<sup>214</sup> Wells Fargo, it would seem, was the real party in interest all along.

The requirements for the commencement and prosecution of foreclosure actions should be uniform throughout the state and consistent with Ohio law. If the Supreme Court of Ohio elects not to address just how these requirements should be met, the divide among the courts of Ohio will continue to grow. This divide will almost certainly come at a cost, as courts hand down rulings that run contrary to well-established legal principles, while simultaneously increasing litigation costs for all parties involved, including the courts themselves.

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<sup>211</sup> *Wells Fargo Bank v. Byrd*, 897 N.E.2d 722 (Ohio Ct. App. 2008).

<sup>212</sup> Complaint in Foreclosure, *supra* note 4.

<sup>213</sup> Judgment Entry, *Wells Fargo Bank v. Byrd*, No. A011166 (Hamilton Cnty. Ct. C.P. Jan. 29, 2010).

<sup>214</sup> *Wells Fargo Bank, N.A. v. Byrd*, No. A011166 (Hamilton, Ohio C.P. Ct. 2009) (Confirmation of Sherriff's Sale).