

OHIO COURTS REACT TO ROBO-SIGNERS BY PLACING BURDEN UPON LAWYERS

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Many lawyers and judges around the country were surprised with the disclosure by employees of various mortgage lenders and mortgage servicers that they were signing affidavits in support of motions for summary judgment in residential mortgage foreclosures without making any effort to verify what they were signing. There so-called “robo-signers” were signing hundreds of affidavits a day, and there was simply no way for them to verify the accuracy of the affidavits they signed.

Courts in two of Ohio’s largest counties, Franklin County (where Columbus is located) and Cuyahoga County (where Cleveland is located), reacted to this problem in a somewhat unique way – they issued Case Management Orders that required the lawyers for the plaintiff mortgagees to ascertain and certify to the court regarding the accuracy of facts, documents, and other information provided to the Court by their clients. Despite the claims by those lawyers that these orders forced them to violate the attorney/client privilege and become witnesses in these cases, those courts have refused to modify those orders, and in a recent ruling the Ohio Supreme Court refused to order the courts to do so.

This issue first arose shortly after the robo-signer problem came to light. In response to those disclosures, the Common Pleas Court of Cuyahoga County² issued a “Case Management Order” applicable to all residential foreclosures requiring that “before any judgment is granted on any dispositive motion (for either default or summary judgment) in a residential foreclosure action, plaintiff’s counsel must personally certify the authenticity and accuracy of all documents submitted in support of judgment.” The model certification form adopted by the court contains the following certifications, among others:

2. On the date of _____, I communicated with [name of affiant]

_____, a representative of the party seeking foreclosure who has executed an affidavit or multiple affidavits in this case, who informed me that he/she: (a) has personally reviewed the documents and records relating to this case; (b) has reviewed the pleadings and all other papers filed in this matter in support of foreclosure; and (c) has confirmed the factual accuracy of these court filings and the accuracy of the notarizations in documents signed by this affiant.

3. Based upon my communication with [person specified in ¶2] _____, as well as upon my own inspection of the papers filed with the Court and other diligent inquiry, I certify that, to the best of my knowledge, information, and belief, the pleadings and all other documents filed in support of this action for foreclosure are accurate in all relevant respects. I understand my continuing obligation to amend this Affidavit in light of newly discovered facts following its filing.

Subsequently, several judges of the Common Pleas Court of Franklin County³ issued their own Case Management Orders which required a certification that appears to go even further than the Cuyahoga County certification. These orders require that for a judgment of foreclosure to be entered in a residential foreclosure, the lawyer for the plaintiff must certify to the following, among others:

2. I certify that I have personally verified that plaintiff is the holder of the original note, which is in its possession and will be produced at the court's request. I certify that the attached copy of the note is a true and accurate representation of the original. I certify that the attached copy of any assignment of the note is a true and accurate representation of the original.
3. I certify that, to the best of my knowledge, information and belief, the summons, complaint, and all other documents filed in support of this residential foreclosure action are complete and accurate in all relevant respects.
4. I understand my continuing obligation to amend this certification in light of any facts discovered following its filing.

Not surprisingly, lawyers representing lenders and servicing agents in residential foreclosures objected on various grounds, not the least of which was that (i) it would constitute an ethical violation to execute the certificate because it would require the lawyer to disclose privileged communications between the lawyer and his client, and (ii) it would effectively make the lawyer a witness in the action.

A number of the firms who handle a large volume of foreclosures joined together and obtained an opinion from a legal ethics expert. That opinion, among other things, stated as follows:

Therefore, it is our reasoned opinion, and to a legal certainty, that by a court ordering an attorney to provide the attached "Certification(s)" verifying facts and information obtained through communications with the attorney's client without the client's informed consent and waiver of the

privilege, the court is compelling the attorney to breach the client's attorney-client privilege as well as violate RPC 1.6. Moreover, and contrary to the standard of law discussed above, the court's order requiring an attorney "Certification" compels an attorney to seek from the client an express waiver of the attorney-client privilege and the client's informed consent to disclose the client's confidential information or otherwise, inform the client that they cannot bring a mortgage foreclosure claim in Franklin County, Ohio.

It is our opinion that the court's order and required "Certification" create serious consequences for attorney and client, alike. The attorney risks exposure to facing disciplinary charges, legal malpractice claims, being placed into a conflict of interest position in opposition to the client, and being made a witness to the action. More important are interests of the clients, in view of our profession's overriding duty to protect the interests of those we represent, who are forced to either forego their claim for foreclosure or alternatively, waive their attorney-client privilege thereby potentially opening the door for opposing parties to freely discover information protected by the attorney-client privilege in all matters in which the client is represented by that attorney.⁴

When the lawyers, armed with that opinion, were unable to persuade the Franklin County judges that the Case Management Orders requiring lawyer certification should be rescinded, they filed a Complaint for Writ of Prohibition with the Supreme Court of Ohio against the three Franklin County judges who were issuing these Case Management Orders.⁵ In that Complaint, the lawyers alleged that (i) the orders were contrary to law in that they required certification by lawyers that forced the lawyers to divulge information protected by attorney/client privilege under both statute and common law and their ethical obligations with respect to the confidentiality of client information, (ii) the judges had no authority to require such certification, and (iii) the lawyers had no adequate remedy at law, and they asked the Supreme Court to issue a writ of prohibition enjoining, restraining and prohibiting the judges from enforcing the orders in question.

In the Memorandum of Support of their Complaint, the lawyers relied on the affidavit and opinion of a legal ethics expert⁶ and arguments regarding the appropriateness of the writ of prohibition remedy. The respondent judges responded by filing a Motion to Dismiss on the basis that a writ of prohibition was not the appropriate remedy since the lawyers had an adequate remedy in the ordinary course of law by means of a trial on the merits or an appeal of an adverse judgment.

In an Entry dated April 6, 2011 signed only by the Chief Justice, the Ohio Supreme Court, without an opinion or any indication of the basis for its decision, granted

the respondent judges' Motion to Dismiss. While it appears likely that the Supreme Court based its decision to dismiss on the procedural issue that a writ of prohibition was not the appropriate remedy, because of the lack of any reasoning for the decision, lower courts and lawyers are left to wonder whether the decision may also represent the Court's view of the merits and that the Supreme Court endorses the certification requirements. The author is aware of no case to date in which a court's right to require such certification by a lawyer has been appealed through the traditional appellate procedure.

The practical result of this decision is that most lawyers representing residential mortgagees and their servicers in these courts are now advising their clients that they have two options: (1) waive the attorney/client privilege to allow the lawyer to sign the certification, or (2) have an employee personally appear at a hearing on the motion for summary judgment or default judgment and testify as to the accuracy of the documents and information. This then presents the mortgagee or servicer with the difficult choice of either waiving the attorney/client privilege, which some are unwilling to do, or incur the expense and inconvenience of sending an employee to attend a hearing, which in most cases would not have otherwise been held.

It remains to be seen whether, emboldened by the Supreme Court's action, other courts and judges will adopt similar attorney certification requirements. However, at least in some courts in Ohio, residential foreclosures, which historically have been fairly routine legal proceedings, have become more complex and involved for mortgage lenders and servicers and the attorneys who represent them.

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² Common pleas courts are Ohio's courts of general jurisdiction.

³ Unlike Cuyahoga County, this was not a general order applicable to all judges, but orders were issued by several individual judges.

⁴ Opinion of Richard S. Koblentz attached to Complaint for Writ of Prohibition, Including Request for Relief in the case of James L. Sassno, et al. v. Honorable John F. Bender, Honorable Kimberly Crocrott, Honorable Guy C. Reece, II, Judges Franklin County Court of Common Pleas, Ohio Supreme Court Case No. 10-2239.

⁵ James L. Sassno, et al. v. Honorable John F. Bender, Honorable Kimberly Crocrott, Honorable Guy C. Reece, II, Judges Franklin County Court of Common Pleas, Ohio Supreme Court Case No. 10-2239.

⁶ See footnote 4 supra.