

Cities Suing Subprime Lenders
By: Michael D. Goler and Kevin L. Shepherd

The City of Cleveland, Ohio, filed an unusual lawsuit this past January. Styled City of Cleveland vs Deutsche Bank Trust Company et al, in the Court of Common Pleas (Case No. CV-08-646970), Cuyahoga County, Ohio, the City is seeking damages from a multiplicity of national and international lenders, investment bankers and financial service companies. The City claims these companies created a public nuisance, resulting from actions defendants pursued which the City claims was “proliferating toxic sub-prime mortgages within [Cleveland’s] borders, under circumstances that made the resulting spike in foreclosures a foreseeable and inevitable result.”

A related but different lawsuit has also now been filed in the federal court in Cleveland. Filed on February 7, 2008 and styled Whittiker v. Deutsche Bank National Trust Co., et al, in the United States District Court for the Northern District of Ohio, Eastern Division (Case No. 08-CV-00300), Cleveland, Ohio, this case seeks class action certification and names Deutsche Bank and three law firms (one in Cleveland and the others in Columbus and Cincinnati) as defendants. Plaintiffs claim that the filing of foreclosures without evidencing duly assigned loan documents (such as the note and mortgage) violates the Fair Debt Collection Practices Act and further allege that the defendants’ lack of documentation evidencing assignment of the loans to Deutsche Bank was not mere oversight but fraud. Plaintiffs further allege that Deutsche Bank engaged in business in Ohio without complying with Ohio statutory requirements regarding its activities as a trustee. Finally, Plaintiffs claim that the volume of these allegedly fraudulent foreclosures constitutes a pattern of corrupt activity which would create liability for the Defendants under applicable RICO (i.e, racketeering) statutes.

The claims in the Whittiker action appear to have been sparked by orders by U.S. District Judge Christopher A. Boyko in Cleveland in the fall of 2007 dismissing certain foreclosure actions because the notes and underlying mortgages had not been assigned to or physically transferred to the foreclosing entities and, thus, the plaintiff lenders had failed to prove they were the real parties in interest and true holders of the loans on the properties which they had sought to foreclose. Similar decisions have subsequently been reported from federal courts both in Cleveland and in other jurisdictions (*See* the report by Gretchen Jeffries in the December 2007 issue of *eReport*).

Cleveland has been at the epicenter of what it calls a growing foreclosure crisis. The rampant and growing crush of foreclosures from literally entire neighborhoods, and the City has charged the defendants with, in essence, reckless disregard for what it says was the clear and unavoidable consequence of their sub-prime lending activity, namely, a slew of abandoned and boarded up homes which have become eyesores, possible fire hazards and targets for criminal activity. The City claims that the defendants undertook a pattern of lending which they should have known would, in Cleveland, have this result due to what the City claims was the well-known economic condition of the City.

Answers have not yet been filed by any of the Defendants in the City of Cleveland case or the Whittiker case.

In January 2008, the City of Baltimore filed a multi-million dollar lawsuit against Wells Fargo Bank alleging violations of the federal Fair Housing Act. The lawsuit alleges that the bank intentionally targeted minority communities for unfair and discriminatory lending practices, including unfair pricing, unsuitable products, and discriminatory terms. According to the city, these practices have spawned disproportionately higher foreclosure rates in minority neighborhoods, which has cost the city millions of dollars in damages in the form of declining property values, an increased number of abandoned and vacant homes, increased expenses for police and fire protection, and expenditures for administrative, legal, and social services. The Baltimore lawsuit also seeks punitive damages against the lender.

These will be interesting cases to watch. Many involved in the industry believe there is little likelihood, at least at this stage, of any quick settlements, due in large part to what many say is the possibility of this kind of lawsuit being filed in many other jurisdictions. Stay tuned to this publication for updates on the status and progress of these unusual cases.

The report on the Cleveland case is provided by Michael D. Goler of Miller Goler Faeges LLP, Cleveland, Ohio (www.millergolerfaeges.com), Managing Editor Emeritus of eREPORT and long-time practitioner in commercial real estate transactions and related litigation in Cleveland, Ohio and beyond. Michael has agreed to provide this publication with periodic updates on these unusual and possibly ground-breaking cases.

Kevin L. Shepherd contributed the information on the Baltimore case. He is a member of the firm of Venable LLP (www.venable.com) and a past Chair of the Section.