# OHIO FORECLOSURE CASES:
# LENDERS BEWARE – THE RIPPLE CONTINUES

**By Gretchen D. Jeffries and Michael J. Ball**

In previous articles appearing in the *eReport*, we discussed the two foreclosure cases from the United States District Court for the Northern District of Ohio: *In re Foreclosure Cases*, 2007 WL 3232430 (N.D.Ohio, Oct. 31, 2007) and *In re Foreclosure Actions*, 2007 WL 4034554 (N.D.Ohio, Nov. 14, 2007) (collectively, the "Northern District Foreclosure Cases") and the influence of these decisions, including subsequent cases in the United States District Court for the Southern District of Ohio, which followed the lead of the Northern District Foreclosure Cases. The courts in these cases dismissed complaints to foreclose on mortgages because the plaintiff lender failed to submit to the court a copy of the assignment of the note and mortgage evidencing the plaintiff's status as holder of the note and mortgagee under the mortgage at the time the foreclosure complaint was filed. The previous articles also addressed the open issue of whether the Ohio state courts would take the same position as the federal courts and require proof of ownership of the note and mortgage at the time of the filing of the foreclosure complaint. The Ohio cases decided prior to the Northern District Foreclosure Cases appeared to offer more latitude to foreclosing lenders that did not attach assignment documents to the complaint, allowing, in some instances, for the lender to submit a post-filing assignment to establish the plaintiff lender's standing.

Despite these earlier cases, one recent case in the First Appellate District of Ohio indicates that the tide is ebbing toward the federal cases, *Wells Fargo Bank, N.A. v. Byrd*, 2008-Ohio-4603 (Ohio App. 1 Dist., 2008). On January 23, 2007, Wells Fargo filed a foreclosure action claiming that it was the holder of a promissory note and mortgage deed from Gloria and Ellsworth Byrd; however, both the note and mortgage identified WMC Mortgage Corp. as the lender. *Id* at ¶2. Attached to Wells Fargo's motion for summary judgment was an assignment of the note and mortgage dated March 2, 2007, acknowledging that WMC Mortgage Corp. had assigned the note and mortgage to Wells Fargo. *Id* at ¶3. The trial court dismissed the case with prejudice and ordered the law firm representing Wells Fargo to submit proof that its client is a real party in interest at the time of the filing of any future foreclosure complaints. *Id* at ¶4. The appellate court addressed the issue of whether a plaintiff lender, which is not a real party in interest when the suit is filed, can later cure the defect by producing an after-acquired interest in the litigation. *Id* at ¶7. Wells Fargo argued that in dismissing the case, the trial court misapplied Civ.R.17, which provides:

> Every action shall be prosecuted in the name of the real party in interest….No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Citing cases from the Eleventh and Twelfth Appellate District in Ohio, the appellate court reasoned that Civ.R.17 is not applicable unless the plaintiff has standing to invoke the jurisdiction of the court in the first place, either in an individual or representative capacity, with some real interest in the subject matter. *Id* at ¶9. In other words, if the plaintiff lender does not have standing to be in the courtroom, the plaintiff lender cannot avail itself of the right to Civ.R.17's provision allowing for "a reasonable time…after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." The appellate court held 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." *Id* at ¶16. However, the appellate court did find that the trial court was in error to dismiss the foreclosure action with prejudice. *Id* at ¶23. The appellate court further found that the trial court lacked authority to order the plaintiff lender's law firm, upon filing of future foreclosure complaints, to present additional documentation demonstrating that its clients are the real party in interest. *Id* at ¶24.

In addition to dismissing cases in which plaintiff lenders have been sloppy in their record keeping, courts and politicians inside and outside of Ohio have been profferring and promulgating manners in which to deal with the "foreclosure crisis" clogging the court systems. In a previous article, we discussed the order issued in Summit County, Ohio incorporating new procedures for foreclosure cases, including the requirement of a "Certificate of Readiness," which serves to demonstrate that the plaintiff lender is the real party in interest and that the matter is ready to proceed against all necessary parties.

Along this same line, Chief Judge Robert J. Morris, Jr. of the Sixth Judicial Circuit in and for Pasco and Pinellas Counties, Florida recently issued Administrative Order No. 2008-081 regarding mortgage foreclosure actions. In the order, Chief Judge Morris admonishes attorneys for their role in predicating the inefficiency associated with the ever-increasing volume of mortgage foreclosure cases:

> Frequently, attorneys who handle a large volume of mortgage foreclosure cases do not have their pleadings in order or fail to appear at scheduled hearings, causing the court to reschedule or delay hearings in mortgage foreclosure cases. The volume of the cases and the resetting of these hearings results in difficulties scheduling these summary proceedings. In light of the court's finite resources, it is necessary to establish procedures for more efficient handling of mortgage foreclosure cases.

Citing these problems as its basis, the order provides for additional procedural steps to be taken in connection with a complaint to foreclose a mortgage by an institutional lender in Pasco and Pinellas Counties, Florida. The additional steps include: (1) that a notice to homeowner and a plaintiff/lender contact information sheet be submitted to the Clerk of Circuit Court with the initial foreclosure filing; [1] (2) that prior to requesting a mortgage foreclosure summary judgment hearing date, plaintiff's attorney file with the Clerk a uniform certificate titled "Certification of Compliance with

[1] This requirement applies only to foreclosure on a homestead property.

Foreclosure Procedures", which provides the attorney's certification of the completion of requisite actions and the dates upon which those actions were completed; and (3) delivery of a foreclosure judgment packet[2] by plaintiff's attorney to the presiding judge's office at least 5 business days prior to the scheduled hearing date for the motion for summary judgment. Among the items required to be submitted in the foreclosure judgment package is the **original** promissory note.

Outside of the court system, politicians too are taking measures in reaction to the "foreclosure crisis." For example, the mayor of Providence, Rhode Island proposed a new ordinance in December, 2008 affecting the statutory non-judicial residential mortgage foreclosure process in the City of Providence. The new ordinance requires, among other things, the following: (1) written notice from the lender to the City of lender's intent to foreclose at the same time the lender issues notice to the homeowner of the foreclosure action; (2) filing of the notice of intent by the lender with the City Clerk/Recorder of Deeds; (3) a ***mandatory mediation conference*** between the homeowner and lender; and (4) prior to the mediation, a loan counselor to be assigned to the homeowner by a HUD-approved independent counseling agency. The ordinance provides for a penalty of not less than $1,000 per offense.

Whether it is an unwillingness on the part of the courts to allow a plaintiff lender to skirt the formal procedural requirements regarding assignment of notes and mortgages or additional procedural requirements instigated by bureaucrats and judges alike, it is clear that foreclosing on mortgages can no longer be a perfunctory function for lenders, at least for now and the foreseeable future.

**********

Gretchen D. Jeffries is an associate in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a member of its commercial and real estate group. Ms. Jeffries is an articles editor for the ABA RPPT E-Report and a graduate of The University of Texas School of Law. Michael J. Ball is an associate in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a graduate of the University of Notre Dame Law School.

[2] The packet consists of the following items: (a) Proposed Uniform Final Judgment; (b) Original Promissory Note; (c) Notice of Sale; (d) copy of Certification of Compliance with Foreclosure Procedures; and (e) copy of the Notice of Hearing.