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Insufficient Documentation Of Securitized Mortgages Results In Dismissal (Without Prejudice) Of Foreclosure Actions In Ohio Federal Courts

On October 31, 2007, Judge Christopher Boyko of the United States District Court for the Northern District of Ohio entered an opinion and order dismissing 14 separate foreclosure actions brought by trustees for securitized mortgage loans as a result of the trustees' failure to provide clear proof of ownership of the mortgages as of the date the foreclosure actions were commenced. *In re Foreclosure Cases*, 07-cv-2282, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007). In reaching its decision, the court cited the plaintiff-trustees' failure to comply with recording requirements under Ohio law and noted its own "independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction." The court went on to say that, as a result of their failure to comply with Ohio recording laws, the plaintiffs were unable to establish diversity jurisdiction (that the plaintiff and defendants are citizens of different states) and therefore lacked standing to bring the foreclosure suit in federal court.

Two weeks later, on November 14, 2007, Judge Kathleen O'Malley of the same court followed Judge Boyko's lead and dismissed 32 additional foreclosure actions, citing the same deficiencies in ownership documentation. *In re Foreclosure Actions*, No. 07-cv-1007 (N.D. Ohio Nov. 14, 2007). Similarly, on November 15, 2007, Judge Thomas Rose of the United States District Court for the Southern District of Ohio issued an order requiring plaintiffs in 27 mortgage foreclosure lawsuits to prove their ownership of the subject mortgage loans within 30 days in order to avoid dismissal. *In re Foreclosure Actions*, 07-cv-043 (S.D. Ohio Nov. 15, 2007). Judge Boyko and Judge O'Malley dismissed the cases "without prejudice," meaning that the plaintiff trustees will be free to re-file their foreclosure actions once they have straightened out the issues the court identified with their ownership documentation.

The pooling and servicing agreements that govern securitized mortgage pools generally provide that loans are assigned to a particular trustee for the benefit of security holders and specify the documentation required for the loans to be transferred. In most instances, the trustee must receive the original promissory note, properly endorsed from the original lender to the last assignee, and an executed assignment of the mortgage. After receiving the assignment of mortgage, trustees generally do not record the assignment, although some states, Ohio being one of them, require that the assignment be recorded prior to the commencement of a foreclosure proceeding.

In each of the dismissed cases, the trustees were unable to provide proper documentation of the chain of transfer from the original lender to the trustee. As a result, the Court concluded that the trustee-plaintiffs lacked standing to bring the foreclosure actions. Judge Boyko, in dismissing cases in which plaintiffs provided copies of assignments of mortgages recorded after the commencement of the foreclosure proceeding, made it clear that a foreclosure plaintiff must be able to provide proof of its ownership of the note and mortgage *at the time that a foreclosure complaint is filed*.

It is important to note that we are unaware of Judge Boyko's decision being followed outside of the State of Ohio, which is among the hardest hit states by the recent increase in mortgage foreclosure actions. Ohio's foreclosure rate of 3.5 percent for the first quarter of the year was nearly three times the national average. Another undercurrent possibly affecting Judge Boyko's decision was the perceived attitude of counsel for the securitization trustees. In the words of the court: "Plaintiff's 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process."

However, although these cases do not seem to be having an impact outside of Ohio, they illustrate a common issue in the documentation of the chain of title of mortgages sold into the secondary market. Any plaintiff seeking to foreclose on mortgage loans should ensure that the chain of transfer has been properly documented – that the note has been properly endorsed and that the assignment of mortgage has been properly executed (and, if necessary, recorded) – prior to the initiation of its foreclosure suit. If basic precautions are taken by lenders and trustees, the issues resulting in Judge Boyko's decision and those that followed should not present any significant hurdles to foreclosures of securitized mortgages. Failing to ensure proper documentation could result in dismissal of foreclosures, however, as it did recently in Ohio.

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Thomas J. Cunningham, J. Matthew Goodin, and Douglas R. Sargent, are attorneys in the firm's litigation department and class action practice group. They represent mortgage lenders, banks, insurance companies and other financial institutions, as well as many other types of business clients in state and federal courts throughout the country. For more information about their practice or the issues discussed in this *Client Alert*, please contact the authors.