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Gallagher Sharp Newsflash: Ohio Requires Foreclosing Party to Hold Mortgage and Note When Foreclosure Complaint is Filed

Today, October 31, 2012, the Supreme Court of Ohio held that a mortgage company did not have standing to file a foreclosure action before it received an assignment of the mortgage. Standing is determined at the time of the filing of the complaint.

In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017, the defendants purchased a home in Xenia, Ohio in November of 2006, and obtained a mortgage loan from Legacy Mortgage. Defendants executed a promissory note and a mortgage granting Legacy Mortgage a security interest in the property. Legacy Mortgage then endorsed the promissory note to Wells Fargo Bank, N.A., and on November 27, 2006 assigned it the mortgage. Defendants defaulted on the loan and on April 15, 2009, Federal Home Loan Mortgage Corporation (“Federal Home Loan”) commenced a foreclosure action. It attached a copy of the mortgage identifying the Defendants as the borrowers and Legacy Mortgage as lender, but did not attach a copy of the note. On May 15, 2009, a month after Federal Home Loan commenced the foreclosure action, Wells Fargo assigned the note and mortgage to Federal Home Loan.

The trial court entered judgment in favor of Federal Home Loan. The Second District Court of Appeals affirmed the judgment and held that although Federal Home Loan lacked standing at the time it commenced the foreclosure action, it cured that defect by the assignment of the mortgage and transfer of the note prior to entry of judgment. Specifically, Federal Home Loan’s lack of standing was cured under Civ.R.17(A) by substituting the real party in interest for an original party.

The Supreme Court of Ohio disagreed and held that because Federal Home Loan failed to establish an interest in the note or mortgage at the time it commenced foreclosure proceedings, it failed to establish it suffered any injury and it had no standing. Furthermore, it rejected Federal Home Loan’s argument that it could substitute the real party in interest pursuant to Civ. R. 17. Specifically, the Court held that “a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance.” *Id.* at ¶38. Thus, “a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.” *Id.* at ¶39.

This decision is important in several respects. It is anticipated that parties may attempt to vacate prior judgments against them in foreclosure matters. It is also anticipated that the Supreme Court of Ohio’s decision will fuel the filing of lawsuits against lenders, servicers and the law firms that file foreclosure actions on behalf of their clients, claiming that the filing of a foreclosure action on behalf of a party without standing violates the FDCPA and state consumer protection statutes.

A copy of the full opinion can be found

at: <http://www.supremecourtofohio.gov/rod/docs/pdf/0/2012/2012-ohio-5017.pdf>

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