

11TH CIR & GEORGIA APPEALS CT ISSUE COMPETING OPINIONS ON STANDING TO CHALLENGE SECURITY DEED ASSIGNMENTS

The Eleventh Circuit Court of Appeals and Georgia Court of Appeals recently issued competing orders about mortgage borrowers' standing to challenge security deed assignments. Though the Eleventh Circuit affirmed that borrowers *cannot* challenge their security deed assignments when making wrongful foreclosure claims, the Georgia Court of Appeals found that borrowers *can* challenge their assignments under Georgia's Quiet Title Act. This newly-clarified distinction will perhaps provoke borrowers to file quiet title actions to frustrate Georgia foreclosure efforts in the future.

In *Haynes v. McCalla Raymer, LLC*, — F.3d —, No. 14-14036 (11th Cir. July 13, 2015), the borrower plaintiffs argued that their mortgage servicer (the assignee of their security deed) wrongfully foreclosed their real property.

Georgia law now clearly authorizes security deed assignees to non-judicially foreclose encumbered property. *See You v. JP Morgan Chase Bank*, 293 Ga. 67, 743 S.E.2d 428 (2013); O.C.G.A. § 44-14-162(b). The *Haynes* borrowers, however, alleged that defects on their security deed assignment rendered the assignment ineffective. The borrowers concluded and claimed that the servicer-assignee therefore lacked authority to foreclose the borrowers' property. The District Court rejected this theory and granted the servicer summary judgment.

In affirming the trial court, the Eleventh Circuit Court of Appeals noted that the borrowers "are not parties to the assignment they are challenging — it is between MERS and [Bank of America]." *Haynes* at p. 8. Citing the Georgia Court of Appeals in *Montgomery v. Bank of Am.*, 740 S.E.2d 434 (2013), *cert. denied*, the *Haynes* court "found that homeowners lacked standing to challenge the assignment." *Id.*

The very next day, however, the Georgia Court of Appeals recognized a borrower's standing to challenge his security deed assignments in a Quiet Title action. In *Johnson v. Bank America, N.A.*, — S.E.2d —, No. A15A0688 (Ga. Ct. App. July 14, 2015), the borrower plaintiff brought a quiet title action against "all the world" to remove what he alleged were clouds on his real property title. The borrower specifically sued the assignee of his security deed, arguing that the assignment was "without foundation, doubtful and constitute[s] a cloud recorded against [the borrower's] title to the property." *Id.* at 1. The trial court granted the

servicer's motion to dismiss, filed on the *Montgomery* theory that the borrower lacked standing to challenge the assignment.

The Georgia Court of Appeals rejected the servicer's standing argument and reversed the trial court. The *Johnson* court noted that a "plaintiff in a quiet title action need not be a party to possible clouds upon title in order to bring a quiet title action in an attempt to remove those clouds." *Id.* at 3.

Haynes affirmed that borrowers lack standing to challenge security deed assignments when asserting a wrongful foreclosure claim. *Johnson* diminishes the reach of the "standing" defense by permitting plaintiffs to challenge assignments in quiet title actions. *Johnson* may result in a new influx of "quiet title" actions filed by borrowers to frustrate or delay non-judicial foreclosures and post-foreclosure evictions. Though plaintiffs will ultimately struggle to prevail in most "quiet title" actions, the *Johnson* opinion obviates the "standing" theory in quiet title motions to dismiss.