

**AFTER MORTGAGOR'S DEFAULT, MORTGAGEE MAY SUE ON  
THE NOTE, SEEK EJECTMENT, OR FORECLOSE, EACH OF  
WHICH CAN BE PURSUED SEPARATELY**

**Key Notes:**

- Standing in a foreclosure action is measured by being a party entitled to enforce the note or the mortgage at the time the complaint is filed
- After a mortgagor's default, a mortgagee may sue on the note, seek ejectment, or foreclose, each of which can be pursued separately
- To receive judgment on a foreclosure claim, a plaintiff must demonstrate that it is the party entitled to enforce the note

Thompson Hine procured another victory in the ongoing debate on standing to file a foreclosure action. In *Deutsche Bank Natl. Trust Co. v. Holden*, the Ohio Supreme Court held that an action to enforce a promissory note is separate and distinct from an action to enforce a mortgage, and that when the debt on the note has been discharged in bankruptcy, the holder of the mortgage can foreclose on the property and collect the deficiency judgment after a foreclosure sale even if there was no standing to enforce the note. The court, however, held that to obtain judgment, the lender must have the right to enforce both note and mortgage.

In *Holden*, the borrowers executed a note in favor of another lender, and discharged their obligations on the note in 2009. In 2011, Deutsche Bank initiated a foreclosure action against the borrowers, attaching to the complaint copies of the note (without indorsement by the original lender), the mortgage, and an assignment of the mortgage to the bank. The borrowers defended the foreclosure and filed counterclaims premised on the allegation that because the note had not been indorsed, the bank did not own the note or mortgage when it commenced the foreclosure.

In support of its summary judgment motion, the bank provided the affidavit of an assistant secretary of the mortgage servicer, who testified that the note was purchased in 2005 and that the servicer had possession of the note until it forwarded the note to counsel for the foreclosure. She also authenticated a copy of the original note, and testified that the original note had been indorsed in blank.

The trial court granted summary judgment in favor of the bank, but that decision was reversed by Ohio's Ninth Circuit Court of Appeals, which held that the differing copies of the note precluded summary judgment.

The Ohio Supreme Court reversed. Clarifying prior precedent, the Court initially noted that “the issue presented in this appeal is whether a party filing a foreclosure action is required to establish ownership of both the note and the mortgage in order to have standing to commence the action.” *Holden*, 2016-Ohio-4603, ¶ 18. The Court began by recognizing that “upon a mortgagor’s default, the mortgagee may elect among separate and independent remedies to collect the debt secured by a mortgage.” *Id.*, ¶ 21.

The Court then acknowledged that mortgagee may (i) seek a personal judgment for the balance due on the note without attempting to foreclose on the property; (ii) bring an action in ejectment to “take possession of the mortgaged property, receive the income from it, and apply the proceeds to the debt, restoring the property to the mortgagor when the debt is satisfied[;]” or (iii) foreclose and cut off the mortgagor’s right of redemption, determine the existence and extent of the lien, and have the property sold in satisfaction. *Id.*, ¶¶ 22-24.

The Ohio Supreme Court reiterated that “[w]e have long recognized that an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are ‘separate and distinct’ remedies. ... [O]ne is an action on a contract, while the other is an action to enforce a property interest created by the mortgage—we have explained that ‘the bar of the note or other instrument secured by mortgage does not necessarily bar an action on the mortgage.’” *Holden*, 2016-Ohio-4603, ¶ 25. The Court acknowledged that this is true when the debt has been discharged in bankruptcy, but held that “[e]ven in a case in which the personal liability of the debtor has been discharged in bankruptcy, however, the creditor seeking to foreclose on the mortgage must prove that it was the person or entity entitled to enforce the note secured by the mortgage.” *Id.* at ¶ 26.

The Court then tried to “clarify” confusion surrounding its decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, which had stated that a foreclosing plaintiff needed to demonstrate an interest in the “note or mortgage” at the time the complaint was filed to establish standing. The Court stated that because Deutsche Bank attached to its Complaint a valid assignment of mortgage and a note that referenced the mortgage, it alleged a personal stake in the controversy sufficient to have standing to file the foreclosure action, even though it had attached an unindorsed copy of the note to the complaint. *Holden*, 2016-Ohio-4603, ¶ 33. The Court, however, went on to hold that “[t]o achieve *judgment* on its foreclosure claim, Deutsche Bank needed to prove that it was the party entitled to enforce the note” (emphasis in original) *Id.* at ¶ 34.

The Ohio Supreme Court's opinion could impact lawsuits in which borrowers allege that a bank or other financial institution cannot enforce its security interest due to its inability to enforce the underlying debt. In addition to the context observed in *Holden*, these arguments often occur in cases where the ability to enforce the underlying debt is barred by the statute of limitations.