

## **BANK HAS STANDING TO ENFORCE THE MORTGAGE EVEN IF IT CANNOT COLLECT ON THE UNDERLYING DEBT**

The Ohio Supreme Court has issued a ruling further clarifying the issue of standing that has dogged lenders throughout the recent mortgage foreclosure crisis. In *Deutsche Bank Natl. Trust Co. v. Holden*, the court found that even when the lender cannot enforce the note, if it is the holder of the mortgage securing the note in default, it can enforce the mortgage and foreclose on the property.

After the Holdens defaulted on their note, they discharged their debt on the note in bankruptcy in 2009. In 2011, Deutsche Bank, as successor to the original lender, filed a complaint for foreclosure, which included as exhibits a copy of the note bearing no indorsements, the mortgage, and the assignment of the mortgage to Deutsche Bank. The Holdens responded to the complaint with counterclaims alleging that because the note was not endorsed, Deutsche Bank was not the proper holder of both the note and the mortgage when it commenced the foreclosure.

In support of its summary judgment motion, Deutsche Bank provided an affidavit of an assistant secretary of the mortgage servicer, who explained the history of the note and authenticated a copy of the original note, which had been indorsed in blank. The trial court granted summary judgment in favor of the Deutsche Bank, but that decision was reversed by Ohio's Ninth Circuit Court of Appeals, which held that a foreclosure action could only be initiated by the holder of both the note and mortgage and that differing copies of the note precluded summary judgment.

The Ohio Supreme Court reversed. The Court noted that the lender's standing in a particular action on a debt depends on the type of remedy sought. Upon a borrower's default, the lender "may elect among separate and independent remedies": (i) an action for personal judgment for the balance due on the note without attempting to foreclose on the property; (ii) 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) a foreclosure action that would lead to the property being sold in satisfaction of the outstanding debt. *Holden*, ¶ 21-24. The Court further explained that **"the bar of the note or other instrument secured by mortgage [such as a bankruptcy discharge] does not necessarily bar an action on the mortgage"** if the lender is able to establish standing as a party entitled to enforce the note secured by the mortgage. *Holden*, 2016-Ohio-4603, ¶ 25-26.

The Court then attempted to address any confusion that resulted from its 2012 *Schwartzwald* decision, where the Court found on the facts of that case the plaintiff failed to establish standing because it could not show a valid interest in the “note or mortgage” at the time of filing. The *Holden* Court commented that other courts have erroneously taken *Schwartzwald* to mean that interest in either the note **or** the mortgage was sufficient to prove standing, and that actual “personal stake in the outcome” was key to establishing standing. The Court then determined that Deutsche Bank established the threshold standing requirement by attaching to its complaint a valid assignment of mortgage and a note that referenced the mortgage. *Holden*, 2016-Ohio-4603, ¶ 33. However, “[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.* On the facts of the case, the Court determined that Deutsche Bank was entitled to summary judgment because it was in possession of the note before filing the complaint and otherwise demonstrated its right to foreclose on the property, while the Holdens offered no evidence to the contrary.

**This decision makes clear that in situations where the lender is hampered by inability to enforce the underlying debt (not only in situations where the debt was discharged in bankruptcy, but also where collection may be barred by an expired statute of limitations or other circumstances), it may still be made whole through a foreclosure proceeding.**