

OHIO SUPREME COURT HOLDS **BORROWERS CANNOT RAISE** **STANDING CHALLENGES IN POST** **JUDGMENT MOTIONS**

On October 8, 2014, the Ohio Supreme Court issued *Bank of America v. Kuchta*, Slip Op. No. 2014-Ohio-4275 which substantially limits attacks on foreclosure judgments in Ohio, and which should resolve concerns of title insurers and purchasers of foreclosed properties.

In 2012, in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E. 2d 1214, the Ohio Supreme Court held that a bank in a foreclosure action had to establish “standing” – its right to enforce the note and mortgage – as of the commencement of the action, and that if it did not (or could not) do so, the foreclosure judgment had to be vacated and the case dismissed. *Schwartzwald* stated that standing was a component of “jurisdiction.”

Schwartzwald involved a borrower who had defended the case at trial on the basis of standing and immediately appealed. That case left open the issue of whether borrowers could collaterally attack foreclosure judgments that had already been rendered based on a lack of standing. Between 2002 and 2013 alone, there were more than 850,000 foreclosure actions filed in Ohio, and more than 380,000 default judgments entered.

Using *Schwartzwald*, borrowers began attacking foreclosure judgments and foreclosure sales of their properties.

In *Kuchta*, the borrowers participated in the case and asserted that Bank of America did not have standing when it filed the foreclosure action. The borrowers lost but did not appeal. After the time for appeal expired, the borrowers moved to vacate the judgment, arguing that the bank lacked standing under *Schwartzwald*, and as a result the judgment was void for lack of jurisdiction. The Ohio Ninth District Court of Appeals agreed, finding that under *Schwartzwald*, a lack of standing deprived the court of jurisdiction, and foreclosure judgments could be attacked for lack of standing at any time, even years later.

The Ohio Supreme Court disagreed, substantially limiting *Schwartzwald*. Chief Justice O'Connor's majority opinion reasoned that a lack of standing to invoke jurisdiction was not a defect in the trial court's "subject matter jurisdiction," and, therefore, any lack of standing had to be raised during the case or in a direct appeal from the judgment. *Kuchta* held that the borrowers could not file a post judgment motion again raising the standing issue.

The [Kuchta opinion](#) is broadly written, stating that a borrower can *never* raise a standing challenge in a post judgment motion: "Lack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment in foreclosure." If applied literally, this would mean that not only are borrowers who appeared during the proceedings barred from attempting to later attack the judgment, but even borrowers who never appeared and had a default judgment rendered against them would also be precluded from raising standing.

Given the large number of foreclosures that have taken place in Ohio, post judgment attacks gave concern to those who purchased properties at foreclosure sales, as well as title insurers who issued policies for those sales. The Supreme Court's opinion should alleviate these concerns.