

This is Google's cache of <http://www.lexology.com/library/detail.aspx?g=f224b204-b3a7-45b4-9a65-9a9c27791b60>. It is a snapshot of the page as it appeared on Nov 5, 2011 14:03:09 GMT. The [current page](#) could have changed in the meantime. [Learn more](#)

These search terms are highlighted: **dorner odita**

[Text-only version](#)

In cooperation with



# LEXOLOGY®

## Improperly executed but properly recorded mortgage isn't a lien

**Frost Brown Todd LLC**  
**William T. Repasky**

**USA**

November 1 2011



The mortgage was not properly executed because the borrower / mortgagor's signature was not notarized as required by Ohio Revised Code Section 5301.01. The mortgage was appropriately recorded despite the deficiency. With record notice of the current mortgage (and possibly actual notice too), a second lender advanced money to the same borrower and recorded a properly executed mortgage. The latter mortgage was recorded about two years after the first, improperly executed, mortgage was recorded.



Author page »

When the owner of the mortgage recorded second filed for foreclosure and the two lienors decided to dispute priority, Lucas County Judge Frederick H. McDonald had to determine if Ohio Revised Code Section 5321.23 (the first-in-time is first-in-right statute) was applicable. In *OneWest Bank v. Dorner*, 164 Ohio Misc.2d 63 (Lucas County 2011), he decided that the statute did not apply because the first filed mortgage was defectively executed. Judge McDonald based that decision on: (i) an Ohio Supreme Court case which he said holds that a defectively executed deed does not transfer property such that a later creditor of the transferor cannot get that property, *National Bank v. Denison*, 165 Ohio St. 89 (1956); and (ii) an Ohio Appellate case that he said holds that a defectively executed mortgage does not create a lien on property that has priority over the subsequent lienor, *MERS v. Odita*, 159 Ohio App.3d. 1 (2004) ("Although a defectively executed mortgage is not entitled to record, even if it is recorded, the defective mortgage is treated as though it has not been recorded.")

The holder of the first filed but defectively executed mortgage was an assignee. Asserting that the situation was not its fault and that fairness should place in first position the true first lienor, especially since the true second lienor had knowledge of the first lien, the first mortgagee asked Judge McDonald to do equity. Judge McDonald declined the opportunity to apply equitable principals to correct the error made by the original should-have-been-first mortgagee despite the lament that the plaintiff / holder of the mortgage recorded second was allegedly unjustly enriched.

Note: Contrary to what some courts are doing, Judge McDonald in Lucas County permitted the foreclosure to continue despite the fact that the assignment transferring the second-filed mortgage

to the Plaintiff was not recorded until after the litigation was initiated. Judge McDonald noted that the situation was corrected soon after the case was filed and that no party to the litigation was prejudiced by this situation.

---

**Register now** - as you are not an existing subscriber please register for the **free** daily legal newsfeed service.

If you have any questions about the service please contact customerservices@lexology.com or call Lexology Customer Services on +44 20 7234 0606.

Register

---

**Tags** USA, Banking, Litigation, Frost Brown Todd LLC

---

If you are interested in submitting an article to Lexology, please contact Andrew Teague at ateague@lexology.com.

**Dr Jürgen Fegbeutel**  
**Legal Services Director**  
**BMW (South Africa) (Pty) Ltd**

---

© Copyright 2006-2011 Globe Business Publishing Ltd | Disclaimer | Privacy policy