UNINTENDED EFFECTS AND INADEQUATE CONSUMER BENEFIT: ANALYZING *FEDERAL HOME LOAN MORTGAGE CORP. V. SCHWARTZWALD*

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I. INTRODUCTION

Although more than five years have passed since the burst of the housing bubble and the subprime mortgage crisis in the United States, many states, including Ohio, are still feeling the secondary effects at their peak. The main secondary effect is rapid foreclosures and they show no signs of slowing down. Studies done as recent as the third quarter in 2012 still categorize Ohio foreclosures as "crisis level," improving only slightly from 2011.[1] More than 8.5 percent of all Ohio mortgages are either actively in foreclosure or past due in their payments by at least 90 days—a slight increase since 2012.[2] Because Ohio is a judicial foreclosure state,[3] this crisis has had a dramatic impact on the courts, clogging dockets and raising issues of disagreement between districts. As these issues find their way up to the Supreme Court of Ohio for final determination, a large amount of judicial resources are utilized.

One such issue involved the increased practice of selling and securitizing mortgages and the effects of the practice on bringing foreclosure actions. The term mortgage, as it is commonly used today, refers to two separate documents: the promissory note and the security

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1. David Rothstein, *Home Insecurity 2012: Foreclosures and Housing in Ohio*, POLICY MATTERS OHIO (Apr. 2012), http://www.policymattersohio.org/wp-content/uploads/2012/04/Foreclosure_April20121.pdf.

2. *Id*.

3. *An Overview of the Home Foreclosure Process*, FED. HOUSING FIN. AGENCY OFFICE OF INSPECTOR GEN. 20, *available at* http://fhfaoig.gov/Content/Files/SAR%20Home%20Foreclosure%20Process_0.pdf (last visited Sept. 22, 2012) [hereinafter *OIG Overview*]. A judicial foreclosure is a litigation process with a specific remedy. To begin a foreclosure action, the noteholder's representative files a complaint with the court requesting the ability to foreclose on the property because the debtor defaulted. This complaint must also be served on the homeowner, notifying them of the litigation. The specific requirements differ from state to state, but generally the law requires the foreclosing party to assert for the record that: 1) the homeowner is indebted to the foreclosing party, 2) the homeowner has defaulted on the loan, 3) the loan is secured by a mortgage, and the foreclosing party is or represents the mortgagee, and 4) service of process has been made on the homeowner. *Id*. at 10. Most judicial foreclosures are not contested and result in default judgments against the homeowner. *Id*. at 11.

instrument, which is known itself as the mortgage document.[4] Securitization is a process where a financial institution assembles pools of income-producing assets, such as loans, and then sells an interest in the cash flows as securities to investors.[5] Fannie Mae and Freddie Mac (The Enterprises) are some of the most prominent participants in the purchase and sale of mortgages.[6] Thus, rather than work directly with homeowners, they purchase mortgages from the original lenders.[7] An official endorsement and assignment of the mortgage documents from the original lender to the purchaser is required to establish the mortgagee's rights in the property relative to other parties, including other mortgagees.[8]

However, it became an industry-wide practice in Ohio for The Enterprises and other large-scale banks to bring a foreclosure action before actually acquiring the official endorsement of the mortgage or promissory note. These practices lead to increased foreclosure litigation featuring the show-me-the-note defense. A critical element to the show-me-the-note defense is that it does not involve any claim that the homeowner is not in default. Rather, it focuses on whether the foreclosing party is the party legally entitled to foreclose.[9] To be entitled to foreclose, the plaintiff must have legal ownership of the mortgage. Therefore, this defense is a demand that the foreclosing party produce evidence establishing actual ownership of the mortgage. However, it was not clear exactly *when* in the proceedings the plaintiff needed to acquire ownership to be entitled to foreclose. This eventually caused a split in the Ohio district courts of appeals, which eventually was resolved by the Supreme Court of Ohio in *Federal Home Loan Mortgage Corp. v. Schwartzwald*.[10]

This Casenote considers whether the Supreme Court of Ohio should have provided a more thorough resolution to this district split—whether foreclosing plaintiffs need to have adequate standing prior to the commencement of a foreclosure proceeding. Part II will discuss the conflicting standards for standing adopted by various Ohio district courts. Part III outlines the tiebreaker case, *Federal Home Loan Mortgage Corp. v. Schwartzwald*. Part IV presents the negative

4. The promissory note represents the promise or agreement of the homeowner (mortgagor) to repay the loan to the lender or note holder, and specifies the terms of repayment. Thus, it is an important document because it specifies who the borrower must pay, which may differ from the original lender if the mortgage is sold. *Id*. at 3.

5. *Id*.

6. *Id*.

7. *Id*.

8. *Id*.

9. *Id*. at 12.

10. 979 N.E.2d 1214 (Ohio 2012).

implications of the ambiguities in the *Schwartzwald* decision, and how they are inconsistent with the purpose behind the Supreme Court of Ohio's decision. Part IV also offers recommendations to remedy the unforeseen effects. Finally, this Casenote concludes that further action needs to be taken with respect to the *Schwartzwald* ambiguities to fulfill the purpose behind the landmark decision and to prevent further exacerbated harm.

II. BACKGROUND

A. The "Old" Rule—Standing Can Be Cured

Until 2008, standing challenges to foreclosure actions in Ohio were analyzed under the real party in interest framework promulgated in *Jones v. Suster*.[11] In *Suster*, a plurality of the Supreme Court of Ohio held that a lack of standing did not equate to a lack of jurisdiction—as long as it was cured prior to challenge or judgment.[12] Their rationale relied on an interpretation of Rule 17(a) of the Ohio Rules of Civil Procedure, whose basic premise is that "[e]very action shall be prosecuted in the name of the real party in interest."[13] However, the rule further states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action . . . ."[14] The purpose of this rule is to protect the defendant from multiple judgments on the same obligation.[15]

Ohio courts have described the real party in interest as "'one who is directly benefitted or injured by the outcome of the case.'"[16] More specifically, the plurality in *Suster* interpreted this language to allow for a party to cure their lack of standing, expressly stating:

> Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Unlike lack of subject matter jurisdiction, other affirmative defenses can be

11. 701 N.E.2d 1002, 1008 (Ohio 1998).

12. *Id*.

13. OHIO CIV. R. 17(a).

14. *Id*.

15. John B. Leach, *Taking a Stand on Standing: The Real Party in Interest Conflict in Ohio Foreclosure Actions*, 40 CAP. U. L. REV. 1099, 1113 (2012) (discussing the purpose of the real party in interest requirement).

16. *Id*. at 1112 (quoting Shealy v. Campbell, 485 N.E.2d 701, 702 (Ohio 1985)).

> waived. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.[17]

Ohio courts later relied on this language to allow a foreclosing plaintiff lacking an assignment of the mortgage prior to commencing the action to cure this standing defect by obtaining assignment of the mortgage or promissory note prior to judgment.

B. The First and Eighth Districts Make the Big Move, Fail to Sway Other Districts

Suster's interpretation of Rule 17(a) governed for decades, until the increase in mortgage securitization and foreclosure litigation brought some of the issues with the standard to light. In 2008, the First District Court of Appeals changed the requirements for foreclosing plaintiffs in *Wells Fargo v. Byrd*.[18] In this case, Wells Fargo brought a foreclosure action against mortgagors in January 2007 claiming to be the holder of the promissory note and mortgage deed on which defendants were in default.[19] In actuality, WMC Mortgage Corporation was the holder of both the promissory note and the mortgage deed at the time the action was filed. Nearly two months later, WMC assigned the mortgage documents to Wells Fargo.[20]

When its standing was challenged, Wells Fargo relied on a decision from the Ninth District Court of Appeals citing Rule 17(a) to allow a foreclosing plaintiff to cure a lack of standing by obtaining the mortgage prior to judgment.[21] The First District rejected the argument, finding the Ninth Circuit Court of Appeals decision in *United States v. CMA, Inc.* more applicable.[22] In *CMA* the Ninth Circuit found that "'[Rule] 17(a) does not apply to a situation where a party with no cause of action files a lawsuit . . . and later obtains a cause of action through assignment.'"[23] In light of such authority, the First District held that a foreclosing plaintiff lacks standing to invoke the jurisdiction of the court when it commences an action before obtaining legal ownership of the mortgage.[24]

Shortly following the First District's decision, the Eighth District

17. *Suster*, 701 N.E.2d at 1008 (citations omitted).
18. 897 N.E.2d 722 (Ohio Ct. App. 2008).
19. *Id*. at 723.
20. *Id*.
21. *Id*. at 725.
22. *Id*. at 726.
23. *Id*. (quoting United States v. CMA, Inc., 890 F.2d 1070, 1074 (9th Cir. 1989)).
24. *Id*.

Court of Appeals decided *Wells Fargo Bank v. Jordan*.[25] Again, Wells Fargo commenced a foreclosure action three weeks before officially obtaining the mortgage.[26] Following the First District's analysis, the Eighth District held that Wells Fargo Bank was not the real party in interest at the time it commenced the suit.[27] This lack of standing, and conditional lack of jurisdiction, caused the Eighth District to dismiss the action without prejudice.[28]

Other districts, however, were not as eager to abandon decades old precedent. For example, the Fifth District Court of Appeals took a contrasting view in *U.S. Bank Nat'l Ass'n v. Bayless*.[29] In *Bayless*, U.S. Bank initiated foreclosure on a property, and it was not assigned the mortgage until two months later.[30] When defendants raised the show-me-the-note defense, the Fifth District relied on *Suster* and the language in Rule 17(a) to hold that the real party in interest need only prosecute the claim—not necessarily file it.[31] Therefore, because U.S. Bank obtained the mortgage prior to judgment and prosecuted the claim, the standing defect was sufficiently cured.[32]

The Ninth District Court of Appeals was also loyal to the *Suster* practices in deciding *Bank of New York v. Stuart*.[33] *Stuart* involved similar facts; a foreclosing plaintiff filed an action prior to obtaining legal ownership of the mortgage.[34] However, the court rejected the argument that this evidenced a lack of standing due to the function of Rule 17(a).[35] In fact, the court held that "filing the assignment [of the mortgage] with the trial court before judgment was entered was sufficient to alert the court . . . that [the named plaintiff] was the real party in interest."[36]

Thus, in the First and Eighth Districts, a foreclosing plaintiff was required to have standing prior to commencement of the action or risk dismissal. In contrast, the Fifth and Ninth Districts refused to modify the standard, and continued to allow a foreclosing plaintiff to cure standing defects prior to judgment. This conflict was certified to the Supreme Court of Ohio around the same time a Xenia, Ohio couple,

25. No. 91675, 2009 Ohio App. LEXIS 881 (Ohio Ct. App. Mar. 12, 2009).
26. *Id*. at *12.
27. *Id*.
28. *Id*.
29. No. 09 CAE 01 004, 2009 Ohio App. LEXIS 5131 (Ohio Ct. App. Nov. 13, 2009).
30. *Id*. at *2.
31. *Id*. at *6–7.
32. *Id*. at *7.
33. No. 06CA008953, 2007 Ohio App. LEXIS 1387 (Ohio Ct. App. Mar. 30, 2007).
34. *Id*. at *2–3.
35. *Id*. at *5.
36. *Id*. at *7.

Duane and Julie Schwartzwald, submitted a discretionary appeal on the same issue. The Supreme Court of Ohio accepted the conflict and appeal together in *Federal Home Loan Mortgage Corp. v. Schwartzwald.*[37]

III. THE TIE BREAKER: *FEDERAL HOME LOAN MORTGAGE CORP. V. SCHWARTZWALD*

A. Factual Background and The Second District's Decision

In November 2006, Duane and Julie Schwartzwald purchased a home with a mortgage loan from Legacy Mortgage in the amount of $251, 250.[38] They executed a promissory note and a mortgage granting Legacy a security interest in the property.[39] Legacy thereafter endorsed the promissory note payable to Wells Fargo Bank and also assigned it the mortgage.[40]

Two years later, Duane Schwartzwald lost his job in Xenia, Ohio and the Schwartzwalds moved to Indiana.[41] For four months, the family continued making mortgage payments as they attempted to sell the house in Xenia, but they went into default on January 1, 2009.[42] In March 2009, Wells Fargo and the Schwartzwalds agreed to list the property for a short sale in an attempt to prevent the foreclosure action.[43] In April 2009, the Schwartzwalds entered into a contract to sell the home for $259,900 with a closing set for June 8, 2009.[44]

While things were looking up for the Schwartzwalds, their period of relief was cut short on April 15, 2009, when Freddie Mac commenced a foreclosure action against them in the Greene County Court of Common Pleas.[45] Attached to the complaint was a copy of the mortgage identifying the Schwartzwalds as the debtors and Legacy Mortgage as the lender, but it did not attach a copy of the note.[46] Instead, Freddie Mac noted in the complaint that "'a copy of [the note] is currently unavailable.'"[47]

Upon service of the complaint, a panicked Julie Schwartzwald

37. 979 N.E.2d 1214 (Ohio 2012).
38. *Id*. at 1216.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*. at 1217.
46. *Id*.
47. *Id*.

contacted the Wells Fargo associates involved in the short sale process.[48] Julie thereafter testified in court that during that conversation, she was told that it was "'standard procedure'" and "'don't worry about it'" because they were actively involved in a short sale.[49] Consequently, the Schwartzwalds did not file an answer to Freddie Mac's complaint.[50]

On April 24, 2009, Freddie Mac filed a copy of the note signed by the Schwartzwalds in favor of Legacy Mortgage.[51] On the final page, there was a blank endorsement by Wells Fargo.[52] Sometime thereafter, Wells Fargo officially executed the assignment of the note and mortgage to Freddie Mac.[53] Freddie Mac filed this assignment with the court, identifying itself as the official holder of both the mortgage and the note—nearly two months after the commencement of the foreclosure lawsuit.[54]

Although Wells Fargo had knowingly assigned its interest in the note and mortgage to Freddie Mac, it simultaneously continued negotiating a short sale of the property with the Schwartzwalds. Eventually, delays in the process caused the potential buyer to rescind his offer.[55] The Schwartzwalds became concerned about their potential foreclosure and requested leave from the court to file an answer. In December 2009, the trial court granted their request.[56] That same day, some eight months after first commencing the action, Freddie Mac finally completed the official chain of title.[57]

Shortly thereafter, both parties moved for summary judgment. Freddie Mac supported its motion with an affidavit from Herman John Kennedy, the vice president of loan documentation for Wells Fargo and the serving agent for Freddie Mac.[58] Kennedy affirmed that the Schwartzwalds were in default and authenticated the assignment of the

48. *Id*.

49. *Id*.

50. *Id*.

51. *Id*.

52. *Id*.

53. *Id*.

54. *Id*. At this time, although Freddie Mac moved for Summary Judgment, it was denied due to the absence of the assignment from Legacy Mortgage to Wells Fargo in the record. *Id*.

55. *Id*. The court never says whether these delays stemmed from the activity of assigning the mortgage or failure to be able to establish a chain of title, but considering the short sale was supposed to end on June 9 and the assignment from Wells Fargo to Freddie Mac occurred June 17, one could reasonably assume that the disrupted chain of title had something to do with the delay in the sale.

56. *Id*.

57. *Id*. At this time, Freddie Mac brought the assignment from Legacy Mortgage to Wells Fargo into the record, completing the transaction from Legacy to Wells Fargo and finally to Freddie Mac.

58. *Id*.

note and mortgage to Freddie Mac from Wells Fargo.[59] The Schwartzwalds argued that as a matter of law, the case required dismissal because Freddie Mac did not have standing to initiate the action.[60]

The trial court entered judgment for Freddie Mac, concluding from the evidence that it properly cured its lack of standing prior to judgment, and that the Schwartzwalds had defaulted on the loan.[61] The property was ordered to be sold at a sheriff's sale.[62] The Schwartzwalds appealed. On appeal, the Second District Court of Appeals, loyal to their *Suster* precedent, affirmed the trial court, holding that standing was not a jurisdictional requirement.[63]

B. The Supreme Court of Ohio Decision: The Court Sides with the First and Eighth Districts

The sole issue presented to the court was whether a lack of standing at the commencement of a foreclosure action may be cured by obtaining an assignment of the note and mortgage prior to the entry of judgment. The Supreme Court of Ohio unanimously agreed the answer was no.

In rejecting Freddie Mac's argument that standing is not a jurisdictional requirement, the court stated firmly: "[i]t is an elementary concept of the law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action."[64] The unanimous opinion additionally dismissed Freddie Mac's reliance on *Suster*, holding that because it was a plurality opinion, it is not considered binding precedent.[65] After reviewing other jurisdictions' take on the issue, the court ultimately found that a litigant cannot, pursuant to Rule 17, cure a lack of standing by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest.[66] In doing so, the court resolved the district court split.

Applying this newly adopted standard to the facts before them, the court ultimately found that without standing at commencement, Freddie Mac failed to invoke the jurisdiction of the court. Accordingly, the

59. *Id*.

60. *Id*.

61. *See id*.

62. *Id*. Freddie Mac bought the property back at the sheriff's sale, and thereafter transferred it to a third party. *Id*.

63. *Id*.

64. *Id*. at 1219 (quoting Dallman v. Franklin Cnty. Ct. of Common Pleas, 298 N.E.2d 515, 517 (Ohio 1973)).

65. *Id*. at 1220.

66. *Id*. at 1223.

judgment of the Second District was reversed, and the case was dismissed without prejudice after three years of litigation.

IV. DISCUSSION

As a policy matter, and in light of the nature of Wells Fargo's actions in the *Schwartzwald* case, it was difficult to criticize the court's opinion immediately following its release. Certainly, mortgage lenders should be making good faith representations to struggling, defaulting homeowners in suggesting foreclosure alternatives instead of simultaneously selling their interest in said property. Equally as important and focused on at oral argument, The Enterprises or other large-scale financial institutions should not expect beneficial treatment with respect to producing adequate paperwork to commence a lawsuit when they historically impose strict paperwork standards on their customers.[67] However, the emotional and policy driven decision left much to be clarified before having a workable standard. The ambiguities present in the *Schwartzwald* decision have resulted in unintended consequences, arguably harming consumers and courts more than the intended targets of the opinion. Further, the purely theoretical benefit to previous homeowners calls into question the urgency justifying the unclear standard and resulting effects. In order to have a workable standard consistent with the underlying purposes of the *Schwartzwald* decision while also minimizing the negative effects borne out of the decision, further action is required by both the legislature and the judiciary.

A. The Unintended Parties Exposed to Harm as a Result of Schwartzwald

As a result of the ambiguities present in the *Schwartzwald* decision, the courts, consumer purchasers of foreclosed homes, banks and their investors, as well as the foreclosed-on homeowners have experienced hardship. Although these effects were unintended, they are very real and in need of a solution. This Part of the Casenote details these negative implications, and proposes possible solutions that simultaneously reinforce the true purpose of the *Schwartzwald* decision.

67. Marianna Bettman, *Merit Decision: Court Smacks Freddie Mac in Home Foreclosure Case*, LEGALLY SPEAKING OHIO (Oct. 31, 2012), http://www.legallyspeakingohio.com/2012/10/merit-decision-court-smacks-freddie-mac-in-home-foreclosure-case-federal-home-loan-mortgage-corp-v-schwartzwald/.

1. The Courts

As a result of the *Schwartzwald* decision, questions about past foreclosures now occupy docket space already clogged with new and pending foreclosure actions. These delays call into question the efficiency of the court foreclosure process. Illustrating this negative consequence, the district courts have interpreted and applied *Schwartzwald* haphazardly, and these inconsistencies have resulted in yet another certification to the Supreme Court of Ohio based on a case less than four months old.[68]

The conflict resulted from one of the major ambiguities in the *Schwartzwald* opinion: whether the standard applies in the context of a Civil Rule 60(B) Motion for Relief from Judgment (Rule 60(b)). In other words, courts were forced to question whether the failure to raise this defense in accordance with the time requirements of Rule 60(B) resulted in a waiver of the defense thereafter. To answer this question, courts first had to determine whether the *Schwartzwald* decision equated a lack of standing to a lack of *subject matter* jurisdiction particularly or some other type of jurisdiction.

The term "jurisdiction" essentially applies in three different contexts: 1) subject matter jurisdiction, which is the most significant, as it asserts the power of the court to adjudicate the matter entirely, 2) personal jurisdiction, and 3) jurisdiction over a particular case, which is described as "the court's authority to 'determine a specific case within that class of cases that is within its subject matter jurisdiction.'"[69] There is no time bar under the first theory, as a judgment is considered void whenever the lack of subject matter jurisdiction is proven.[70] Therefore, the language in Rule 60(B) requiring the defense to be raised within a reasonable amount of time, or one year, does not apply.[71] Conversely, a party claiming that the court lacked any other type of jurisdiction is constrained to bringing the action within the time frame specified in Rule 60(B).[72] Thus, these judgments are more accurately described as *voidable*.[73] The distinction is critical in determining whether the legitimacy of the judgment can be brought into question after a certain

68. Bank of Am. v. Kuchta, No. 12CA0025-M, 2012 Ohio App. LEXIS 4830 (Ohio Ct. App. Dec. 3, 2012), *cert. granted*, No. 2013-0304, 2013 Ohio LEXIS 1131 (Ohio May 8, 2013).

69. Monica E. Russell, *The Schwartzwald Effect: The Impact of the Ohio Supreme Court's Decision in* Fed. Home Loan Mortg. Corp. v. Schwartzwald *on Foreclosures in Ohio*, 6 CLEVELAND METRO. BAR J. 18 (2013) (quoting Pratts v. Hurley, 806 N.E.2d 992, 996 (Ohio 2004)), *available at* http://www.msfraud.org/LAW/Lounge/The%20Schwartzwald%20Effect_10-13.pdf.

70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*.

period of time. Unfortunately, the vagueness of the *Schwartzwald* opinion with respect to this distinction resulted in inconsistent interpretations by Ohio district courts with serious consequences.

First addressing the issue was the Ninth District Court of Appeals in *Bank of America v. Kuchta.*[74] The Ninth District ultimately concluded that a post-complaint mortgage assignment was an issue that warranted a post-judgment application of Rule 60(B).[75] The court interpreted the opinion to hold that a lack of standing results in a lack of subject matter jurisdiction with no time bar on raising the defense. Thus, the matter was reversed and remanded for application of *Schwartzwald* a year after the sheriff's sale of the property.[76] Consequently, the judgment was found to be void.

Conversely, the Tenth District Court of Appeals explicitly ruled that *Schwartzwald* cannot be applied in the context of Rule 60(B).[77] In *PNC Bank, Nat'l Assn. v. Botts*, the facts were similar to that of *Kutcha* where no appeal from the original foreclosure judgment was filed.[78] However, the Tenth District relied on the language in *Suster*, which held that "'[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.'"[79] Consequently, the judgment is voidable only if the issue is raised within a reasonable time period and not automatically void as it would be if the court lacked subject matter jurisdiction. Thus, coupling the *Suster* precedent with the well-settled law in Ohio that a motion for relief from judgment cannot be a substitute for an appeal, the Tenth District held that by failing to raise the show-me-the-note defense in the proceedings or on a timely appeal, it was effectively waived.[80]

Soon thereafter, the Ninth District certified that a conflict existed between *Kutcha* and *Botts* regarding the retroactivity of the *Schwartzwald* standard. The question certified to the Supreme Court of Ohio was: "When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?"[81] This has yet to be decided.

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74. No. 12CA0025-M, 2012 Ohio App. LEXIS 4830 (Ohio Ct. App. Dec. 3, 2012).

75. *Id*. at *8.

76. *Id*.

77. PNC Bank, Nat'l Ass'n v. Botts, No. 12AP-256, 2012 Ohio App. LEXIS 4716, at *14–15 (Ohio Ct. App. Nov. 20, 2012).

78. *Id*. at *2–3.

79. *Id*. at *17–18 (quoting Wash. Mut. Bank v. Beatley, No. 06AP-1189, 2008 Ohio App. LEXIS 1438, at *6 (Ohio Ct. App. Apr. 8, 2008) (quoting Jones v. Suster, 701 N.E.2d 1002, 1008 (Ohio 1998))) (internal quotation marks omitted).

80. *Id*. at *11.

81. Bank of Am. v. Kuchta, No. 2013-0304, 2013 Ohio LEXIS 1131, at *1 (Ohio May 8, 2013) (internal quotation marks omitted).

Additionally, disagreement exists between Ohio's district courts on the *Schwartzwald* requirements for sufficient standing. It is unclear whether the foreclosing plaintiff needs to possess the note, the mortgage, or both. The majority of districts hold that "a party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint for foreclosure, it either (1) has had [the] mortgage assigned *or* (2) is the holder of the note."[82] However, a more narrow reading of *Schwartzwald* has been applied to deny standing where the foreclosing plaintiff "did not allege in the complaint that it was a successor to the note *and* mortgage . . . ."[83]

A historical reading of the Uniform Commercial Code (U.C.C.) and corresponding Ohio law suggests that the person entitled to enforce the note is also entitled to enforce the mortgage that secures the promissory note.[84] This suggests that to establish adequate standing, a foreclosing plaintiff need only show he was assigned the note prior to commencing the action. In fact, the Permanent Editorial Board (PEB) of the U.C.C recently affirmed the accepted proposition that "the security follows the debt" in response to the recent interest that the mortgage foreclosure crisis has generated:[85]

> What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC § 9-203(g) explicitly provides that, in such cases, *the assignment of the interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee*.[86]

Considering that Ohio has adopted the U.C.C., this language indicates that the current district split is unnecessary. However, the continued disagreement among Ohio district courts results from a lack of clarity in the Supreme Court of Ohio's opinion.[87] As a result, locality continues

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82. CitiMortgage, Inc. v. Patterson, 984 N.E.2d 392, 397–98 (Ohio Ct. App. 2012). *See also* U.S. Bank N.A. v. McGinn, No. S-12-004, 2013 Ohio App. LEXIS 2, at *8 (Ohio Ct. App. Jan. 4, 2013); Fed. Home Loan Mortg. Corp. v. Koch, No. 2012-G-3084, 2013 Ohio App. LEXIS 4660 (Ohio Ct. App. Oct. 7, 2013); Bac Home Loans Servicing, L.P. v. Meister, No. 2012-L-042, 2013 Ohio App. LEXIS 765 (Ohio Ct. App. Mar. 11, 2013).

83. Wells Fargo Bank, N.A. v. Burrows, No. 26326, 2012 Ohio App. LEXIS 5170, at *7 (Ohio Ct. App. Dec. 19, 2012) (emphasis added).

84. OHIO REV. CODE ANN. § 1309.203(G) (LexisNexis 2013).

85. Brief of Appellee Federal Home Loan Mortgage Corporation at 15, Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214 (Ohio 2012) (Nos. 2011-1201, 2011-1362) [hereinafter Appellee Brief].

86. *Id.* at 15–16 (emphasis added).

87. Some argue that by declining to review *CitiMortgage v. Patterson*, the Supreme Court of Ohio clarified this disagreement between district courts. In *CitiMortgage*, the foreclosing plaintiff had only the promissory note assigned, and lacked the mortgage itself. The Eighth District Court of Appeals

to have a marked impact on the resolution of residential foreclosure actions in Ohio, and remains problematic. Due process concerns increase when locality is dispositive of legal rights.[88] Litigants should be able to foresee the result of a lawsuit, and that right is disturbed as a result of inconsistent rulings. Further, these inconsistencies could promote district shopping when possible for foreclosing plaintiffs, resulting in severe consumer inequity. This is the opposite of what *Schwartzwald* was attempting to accomplish.

Further, particularly by failing to limit the retroactivity of the standard, the ability of common pleas courts to work through thousands of pending and future foreclosures is being threatened by having to go back and revisit old ones. It has been estimated that nearly 50% of foreclosures in the 1990's and 2000's were not properly assigned, and thus, after *Schwartzwald*, could now be determined void.[89] This is not simply speculation—hours after the *Schwartzwald* decision, there were lawsuits filed all over the state of Ohio challenging old foreclosures alleging a lack of standing.[90]

In sum, in an attempt to place a limit on the court's jurisdiction and the industry-wide foreclosure practices of mortgage–security purchasing banks, the court arguably agreed to revisit years of litigation in a time where litigation is only growing. As a result, the time and money spent on these actions, as well as due process concerns for the homeowners and lenders have, and will continue to, increase.

2. Innocent Third Party Purchasers

Ironically enough, the unintended group most negatively affected by the *Schwartzwald* decision is consumers. Where a foreclosure judgment is later found to be void, arguably the subsequent sales of the property

affirmed that that was sufficient for standing to file suit. Patterson asked the Supreme Court of Ohio to review the matter, and the Court declined. This does suggest strongly that they believed the Eighth District got it right, but it does not display binding precedent for other districts to follow. Thus, although creditors can be relieved of the burden to collect both documents before bringing the foreclosure action, they still may incur litigation costs arguing the issue depending on which district it is brought in. Jack Greiner & Harry Cappel, *Ohio Supreme Court Takes A Pass–And That's Good News*, GRAYDON HEAD & RITCHEY LLP (May 2, 2013), http://www.graydonhead.com/docs/default-source/litigation-alert/may-02-2013---ohio-supreme-court-takes-a-pass---and-that's-good-news.pdf?sfvrsn=4.

88. Leach, *supra* note 15, at 1103.

89. Scott Stevenson, Federal Home Loan Mortgage Corp. v. Schwartzwald*: The Unforeclosure*, IN CLOSING (Mar. 25, 2013), http://inclosing.net/2013/federal-home-loan-mortgage-corp-v-schwartzwald-the-unforeclosure/335/.

90. Scott A. King & Terry W. Posey, Jr., *True Crime and Standing in Foreclosure Actions: How the Real Life Fugitive Story Leads to Years of Litigation*, *in* STANDING TO FORECLOSE: A MASSACHUSETTS CASE STUDY AND MULTI-JURISDICTION SURVEY (2013), *available at* http://www.americanbar.org/groups/litigation/events_cle/program_materials/2013_sac_friday.html.

are as well. The purchaser at sale did not take good title and cannot convey good title to a future purchaser. Therefore, clarification of what type of jurisdiction was lacking in *Schwartzwald* is pertinent to this determination as well. If a lack of standing equates to a lack of subject matter jurisdiction, then hundreds of thousands of subsequent purchasers of foreclosed homes will soon find out they have faulty title to their home. The consequences of faulty title can be devastating.

The Ohio Revised Code appears to have a protection for innocent third party purchasers, but the provision is silent as to void judgments. Title XXIII § 2325.03 of the Ohio Revised Code states that:

> The title to property, which title is the subject of a final judgment or order sought to be *vacated, modified, or set aside* by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack; nor shall the title to property that is sold before judgment under an attachment be affected by the proceeding or attack. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.[91]

Other Ohio Revised Code provisions further solidify the bona fide purchaser protections. For example, R.C. 2329.45 specifies that if a sheriff's sale is reversed, the purchaser's title is not defeated, but the judgment creditor must make restitution.[92] Unfortunately, Ohio case law suggests that these protections do not apply to void judgments.[93] In *Lincoln Tavern, Inc. v. Snader*, the court held that "[a] proceeding to vacate a judgment on the ground that it is void for want of jurisdiction is not subject to the provisions of Section 2325.01 *et seq.*, Revised Code, which apply to the vacation or modification of only those judgments which are merely voidable and those which are not void *ab initio*."[94]

The title insurance industry shares this narrow understanding of R.C. 2325.03's scope. Due to the lack of clarification in the *Schwartzwald* opinion as to whether the judgment is void or voidable, the industry has taken a safe position and assumed the former. This position has resulted in burdensome processes of obtaining necessary title insurance for recent purchasers of foreclosures. Underwriters have

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91. OHIO REV. CODE ANN. § 2325.03 (LexisNexis 2013) (emphasis added).

92. *Id.* § 2329.45. Additionally, § 2329.46 allows a sheriff sale purchaser to be subrogated to the right of a judgment creditor against a debtor if the title is invalid by reason of defect in the proceedings. However, not always is the purchaser of a foreclosed home the purchaser from a sheriff sale. As mentioned previously, financial institutions commonly purchase the property from the sheriff sale in an attempt to mitigate the loss incurred by low bids on the property. They then attempt to market and sell the home themselves in a traditional manner. Therefore, it is questionable whether these protections apply to subsequent purchases or just the sheriff sale purchasers. *Id.* § 2329.46.

93. Russell, *supra* note 69.

94. *See id.* (quoting Lincoln Tavern, Inc. v. Snader, 133 N.E.2d 606 (Ohio 1956)).

begun to require exceptions on title insurance policies to what is known in the industry as the "*Schwartzwald* Problem."[95] These exceptions make clear that title insurance agencies will not cover claims related to attempts to set aside foreclosure judgments or subsequent sales based on lack of standing arguments.[96] For new homeowners, particularly those who went through the drawn-out process of purchasing a foreclosure, this lurking liability can be intimidating.

One possibility for such new homeowners may be a quiet title action, but Massachusetts caselaw illustrates that this method can be largely unsuccessful. In 2011, Massachusetts was faced with a similar issue to that resulting from *Schwartzwald*, after the state's highest court decided *U.S. Bank, N.A. v. Ibanez.* In *Ibanez*, the court held that a foreclosing entity, if not the original mortgagee, must hold an assignment of the mortgage at the time it forecloses on the home.[97] Consequently, if the assignment of the mortgage is obtained after commencement of the foreclosure, a subsequently-completed foreclosure is viewed as unlawful and void.[98] The Massachusetts Supreme Court held in a subsequent case that a purchaser at foreclosure, or even later in the chain of title, could not bring a statutory title action if the foreclosure was void under *Ibanez*, because the foreclosure deed was ineffective to convey the title.[99] Therefore, the new homeowner plagued by defective title does not actually "own" the property for purposes of the try title action.[100]

Defective title carries many concerning consequences, such as difficulty obtaining financing or selling the home, even in instances where the previous homeowner is not actively defending his ownership. Despite the caveat emptor nature of purchasing a foreclosed home, these effects are harsh and unjust.[101]

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95. *More on Schwartzwald: Ohio Supreme Court Reverses Another Foreclosure*, SOURCE OF TITLE BLOG (Jan. 21, 2013), http://www.sourceoftitle.com/blog_node.aspx?uniq=977.

96. *Id*.

97. U.S. Bank, Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 55 (Mass. 2011). Massachusetts is a nonjudicial foreclosure state, in which foreclosures proceed rather differently. Instead of filing a foreclosure complaint with the court after a default, a foreclosing party notifies the homeowner of the default and the scheduled sale. There are no filings or showings of proof required. However, the assumption in a nonjudicial foreclosure proceeding is that the foreclosing party has the right to foreclose, provided it appropriately gives the homeowner notice and advertises the sale. In *Ibanez*, the issue was what gives a foreclosing party the right to foreclose, so in that way, it is similar to the *Schwartzwald* issue, which was what does a foreclosing party have to have in order to invoke the standing of the court, to foreclose on a property. This may be a subtle difference, but one worth noting. *OIG Overview*, *supra* note 3, at 13.

98. *Ibanez*, 941 N.E.2d at 50.

99. Bevilacqua v. Rodriguez, 955 N.E.2d 884, 897 (Mass. 2011).

100. *Id*. at 898.

101. Caveat emptor, which literally means "let the buyer beware," is "[a] doctrine holding that purchasers buy at their own risk." BLACK'S LAW DICTIONARY 201 (9th ed. 2009).

3. Banks and Investors

The fears motivating consumer support of the show-me-the-note defense are admittedly frightening: the transfer of mortgages from one lender to another could potentially result in homeowners facing foreclosure by multiple parties while the paperwork is in limbo. Further, resulting from a lack of a personal relationship between lending entities and mortgagors, homeowners not truly in default could, in theory, be foreclosed on as a result of lenders excessively buying and selling mortgage packages and getting confused. However, these fears have amounted only to speculation since the increase in the securitization practice years ago. Disputes regarding the actual default of the borrower or prior foreclosure by another entity are rare.[102] More typically in show-me-the-note litigation, the only claims raised are those concerning the validity of the foreclosing party's complaint.[103] Therefore, the large burdens placed on financial institutions are difficult to justify in practice. This is particularly evident in light of the industry standard at play: this practice was largely thought to be the reasonable practice of foreclosing entities, as opposed to financial institutions acting negligent or reckless in commencing foreclosure actions. In sum, in accepting the show-me-the-note defense, the Supreme Court of Ohio intended to protect consumers. In fact, they are essentially delaying the inevitable.

Nevertheless, the industry-wide mistake that banks have made in attempting to foreclose before the actual assignment of the mortgage will now cost them a large amount of time and money. Each time an otherwise valid foreclosure action is dismissed and forced into refiling, the attorney's fees, filing fees, and hours spent on that action increase dramatically. In some Ohio districts, the filing fee for a foreclosure action is extraordinarily high; $475 as opposed to $100 for all other civil actions.[104] This difference may appear to be a slight burden, but when referring to the large percentage of homes in the state of Ohio actively in foreclosure, those costs compound quickly. Although it is necessary to recognize that the courts can decide only the issue before it at the time, it is unsettling that the consumer loss will eventually occur regardless of whether the plaintiff–lender had standing at the time it commenced the lawsuit.[105] This brings into question whether the added costs, delays,

102. Richard A. Oetheimer & Diane C. Tillotson, Eaton v. Federal National Mortgage Association*: Additional Burdens Provide Little Consumer Benefit*, BOSTON BAR JOURNAL, Winter 2013, at 26, *available at* http://www.bostonbar.org/docs/default-document-library/winter-2013-boston-bar-journal.pdf.

103. *Id*.

104. Leach, *supra* note 15, at 1125.

105. Oetheimer & Tillotson, *supra* note 102.

and effects of those delays resulting from the *Schwartzwald* decision are worthwhile.

These resulting delays themselves carry significant secondary effects for investors. Indeed, investors are routinely referred to as the "new housing victims."[106] Many pension plans and retirement funds, including the Ohio Teacher's Retirement Fund, are funded in large part by buying and selling mortgage-backed securities on the open market.[107] When foreclosures are delayed, the value of securities holding delinquent mortgages continues to suffer.[108] As a result, an individual retiring at the "wrong time" could find their retirement fund worthless.

4. Hopeful Previous Homeowners

At the heart of the *Schwartzwald* decision is the court's desire to stand up for the victims of the subprime mortgage crisis. As socially significant as the decision is, the lack of tangible benefits to defaulting homeowners call into question the necessity of the decision, in light of its harmful effects. In addition, previous homeowners, who are arguably uneducated on the foreclosure process, may have unfair expectations resulting from the void judgment.

Most often, defaulting homeowners are unable to raise the accelerated amount of the note in the time period between having the foreclosure dismissed and the banks refilling. Consequently, it is unlikely that a homeowner will remain in her house with a perfect credit score as a result of a foreclosure being dismissed without prejudice. At best, the defaulting borrower may regain bargaining power and attempt to negotiate foreclosure alternatives. However, like foreclosure, these options commonly result in the homeowners' loss of their home.[109] Thus, the typical alternatives—short sales, deeds in lieu, and bankruptcy—can be described as lackluster in terms of consumer benefit.

A short sale is a process in which the homeowner conducts a private sale of the house, and the lender releases its lien in exchange for the sale proceeds. Typically, the sale is for considerably less than the outstanding debt, resulting in a possible deficiency action against the previous homeowner.[110] Even if the deficiency is forgiven, it is imputed as taxable income for the homeowner.[111] Short sales also affect the

106. Leach, *supra* note 15, at 1126.

107. *Id*.

108. *Id*.

109. *OIG Overview*, *supra* note 3, at 17.

110. *Id*.

111. *Id*. at 17–18.

previous homeowner's credit score nearly as much as the foreclosure itself would.

Similarly, deeds in lieu also require a homeowner to surrender title and possession of the property.[112] This process is a voluntary agreement between the parties to exchange the deed to the home for a discharge of the partial or full amount of the outstanding debt.[113] This may be beneficial because it avoids the time and cost of a foreclosure court process. However, those benefits are outweighed by the reality that the homeowner still faces a greatly reduced credit score, and the possibility of being liable for a deficiency.[114]

Bankruptcy is another unfavorable alternative. Commencing a bankruptcy action requires the homeowner to pay for an attorney and go through a grueling and possibly degrading court process, where all the borrower's creditors assemble and fight over who should be paid first. The harm to the credit score is normally just as significant as a foreclosure action.[115] In addition, the homeowner may not retain the property, absent of the lenders consent.[116]

Alternatives aside, the most common occurrence after a successful show-me-the-note defense is the bank refilling the foreclosure action. The defaulting homeowner cannot normally afford the time and effort it takes to defend a foreclosure.[117] Therefore, the bank is typically successful in the second action, which may come as a disappointing surprise to those bringing the show-me-the-note defense in the first place.

B. The Real Reason for the Schwartzwald *Decision, and the Failed Significance*

Through *Schwartzwald*, the Supreme Court of Ohio unanimously solidified its desire to defend the fundamental procedures of Ohio courts.[118] Additionally, and more importantly, the court demonstrated

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112. *Id.* at 18.

113. *Id.*

114. Beverly Bird, *Effects of Short Sale vs. Deed in Lieu on Credit*, GLOBAL POST, http://everydaylife.globalpost.com/effects-short-sale-vs-deed-lieu-credit-4383.html (last visited Nov. 10, 2013).

115. *See Which Is Worse for Your FICO Score: Bankruptcy, Foreclosure, Short-Sale, or Loan Modification?*, NOLO, http://www.nolo.com/legal-encyclopedia/which-is-worse-your-fico-score-bankruptcy-foreclosure-short-sale-loan-modification.html (last visited Nov. 10, 2013).

116. *Id.*

117. Often, they fail to appear in the second action lacking the show-me-the-note defense. Leach, *supra* note 15, at 1128.

118. "It is an elementary concept of the law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1219 (Ohio

its empathy for those going through the struggle of losing their home by declining to allow financial institutions to cut corners in the process. Unfortunately, at the true root of these positions is, arguably, the disapproval of the institutionalization of the mortgage market in recent decades, which courts alone cannot remedy.

Although the purpose of the decision was commendable at a glance, the effects stemming from the ambiguities described previously in this Casenote demonstrate the reality that more harm may have been done than good. Thankfully, by clarifying some minor details left open to interpretation in *Schwartzwald*, the holding and social significance of the decision can be preserved while also mitigating the negative effects.

C. Recommendations for a Workable Standard

To remedy the harmful, unintended effects of the *Schwartzwald* decision while also upholding its purpose, the ambiguous standard can, and should, be altered. The standard can be positively modified by several simple steps requiring action by both the judiciary and the legislature. First, the Ohio judiciary should amend the pleading requirements for foreclosure actions to provide for more uniformity. Further, the Supreme Court of Ohio should take the opportunity to clarify the *Schwartzwald* holding as prospective only in resolving the *Kutcha/Botts* conflict. Finally, the Ohio Legislature should explicitly delineate what the foreclosing plaintiff needs to prove at the commencement of a foreclosure action; that is, who is entitled to enforce the mortgage. Additionally, it should create a new legal entity that is protected from a clouded title as a result of the termed *Schwartzwald* problem.

1. Amend the Pleading Standards

First, the Ohio Judiciary, through it's Commission on Rules of Practice and Procedure (The Commission), should amend Ohio Civil Rule 3: Commencement of Action; Venue to include specific procedures for commencing a foreclosure action.[119] Currently, the rule states in

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2012) (internal quotation marks omitted).

119. In 1968, the citizens of Ohio proposed amendments to Article IV of the Ohio Constitution granting the Supreme Court rule-making authority for the judicial branch of the Ohio Government. This amendment is referred to as one of the Modern Courts Amendments. To carry out this new role, the Supreme Court of Ohio created the Commission on the rules of Practice and Procedure (Commission). The Commission consists of nineteen members, including judges nominated by judges associations and members of the practicing bar as appointed by the Supreme Court. The Commission annually reviews and recommends amendments to the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, Rules of Juvenile Procedure, and Rules of Evidence. In the fall of each year, the

pertinent part: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant . . . ."[120] In other words, this is a one-size-fits-all pleading standard for civil actions. However, by implementing additional requirements upon foreclosing plaintiffs specifically, the rule would clarify what the Supreme Court of Ohio envisioned after *Schwartzwald*. Accordingly, Rule 3 should be amended to require foreclosure plaintiffs to attach adequate proof of standing to their complaint when commencing a foreclosure action.

Although some may argue this change in procedure will be a burden to the court, in 2013, The Commission successfully implemented four amendments to the Ohio Rules of Civil Procedure, and there has yet to be any dysfunction as a result of the changes.[121] Indeed, other judicial foreclosure states such as Maine, New York, and Vermont already have statutory authority requiring proof of ownership to be attached to the complaint.[122] More importantly, the amended pleading standard would preserve the purpose of the *Schwartzwald* decision, while also resolving many of the unintended effects of the decision.

An amended pleading standard would ensure the accountability of foreclosing plaintiffs and provide for a generally applicable standard with no ambiguity. Simply put, financial institutions would not be able to commence a foreclosure lawsuit without the properly attached paperwork. This supports the Supreme Court of Ohio's significant opposition to giving financial institutions a break in regards to paperwork, when customers would not get that luxury from the institutions themselves.[123] Additionally, overcrowded court dockets

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Commission submits its suggestions to the Supreme Court, and recommend it take effect July 1 of the following year. The Supreme Court then publishes the recommended amendments for Public Comment before deciding on whether to implement them the following year. The Public Comments are reviewed by the Commission, and it may withdraw, amend, or resubmit the recommended amendments if it sees fit. If the Supreme Court decides to submit the amendments for implementation, it must have them submitted to the General Assembly by January 15. There is then a second Public Comment phase, and the Commission again has the right to withdraw, amend, or resubmit the rule. *See Amendments to the Ohio Rules of Appellate Procedure, the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, and the Ohio Rules of Juvenile Procedure*, SUP. CT. OF OHIO (2012) [hereinafter *Amendments*], *available at* https://www.supremecourt.ohio.gov/PIO/news/2012/practiceProcedure2012.pdf.

120. OHIO CIV. R. 3(A).

121. *Amendments*, *supra* note 119.

122. *Bill 19-676: Saving DC Homes from Foreclosure Clarification Amendment Act of 2012*, COMM. ON PUB. SERVS. AND CONSUMER AFFAIRS COUNCIL OF D.C. (June 28, 2012) (testimony of Jennifer Ngai Lavalle, Legal Aid Society of D.C.), *available at* http://www.legalaiddc.org/issues/documents/2012%20Legal%20Aid%20Testimony%20on%20Foreclosure%20Mediation%20Law.pdf.

123. This concern goes to the heart of the social significance of the *Schwartzwald* decision. Professor Bettman noted in her blog, "Justice McGee Brown said it all, when at oral argument she noted that financial institutions are sticklers for the strictest compliance on paperwork from their customers,

would also benefit from this preliminary check by the clerk of courts at filing, because a foreclosure complaint would not be assigned to a docket until it possessed the rule-based prerequisites. Finally, it would prevent both parties from spending the time, judicial resources, and money beginning discovery only to find that a plaintiff does not have standing to foreclose. This remedy is especially important as both parties to a foreclosure action are uniquely hurting for cash—the plaintiff is being defaulted on and not receiving its projected accounts receivables, and the defendant is struggling financially to the point that they can no longer afford their home. In sum, it would provide for uniform, efficient, and equitable foreclosure litigation.

2. Clarify Retroactivity

The Supreme Court of Ohio should clarify that a lack of standing equates to a lack of general jurisdiction over that particular case, and does not implicate subject matter jurisdiction, in resolving the *Kutcha/Botts* conflict. By limiting the standard articulated in *Schwartzwald* to prospective foreclosures only, many of the unintended effects that surfaced so quickly after the decision would be resolved.

With respect to the efficiency and due process concerns of foreclosure litigation, court dockets will not be clogged incessantly with years of old foreclosures demanding dismissal, without any dispute on the actual default. Consequently, mortgagees will not be forced into commencing multiple actions in an effort to foreclose on one home. This will benefit the courts, banks, and mortgage-backed pension plan investors alike, as delays and costs involved in the foreclosure process will certainly decrease, mitigating the resulting losses in value of mortgage-backed securities. Furthermore, and maybe most importantly, recent third party foreclosure purchasers will not live in fear of finding out that they do not actually "own" their home. They will not experience difficulty obtaining title insurance or conveying their property in the future. By eliminating these negative effects of *Schwartzwald*, the decision is more in line with disciplining financial institutions who act in bad faith in the future, instead of in line with industry standards as before. Further, the social significance of the decision will no longer be clouded by the harm done to consumers, whom the opinion was intended to protect.

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but are now asking the Court to relax its standards. She asked why the Court should 'find a more relaxed rule for Freddie Mac than Freddie Mac would otherwise give to its customers?'" Bettman, *supra* note 67.

3. Define the Person Entitled to Enforce the Mortgage

The Ohio Legislature needs to clarify the requirements an entity must satisfy to enforce a mortgage loan. Taking direction from the U.C.C. PEB, the legislature should endorse the long standing idea that "security follows the debt" in a comment to R.C. 1303.31.[124] This would aid in the implementation of the pleading rule change, as it would instruct the clerk of courts that an assigned promissory note alone is sufficient for standing in a foreclosure action. Further, this clarification would quickly resolve the district disagreement about what exactly the foreclosing plaintiff is required to possess prior to commencing an action. As a consequence, this issue would not utilize the judicial costs, time, and resources making its way up to the Supreme Court of Ohio to be decided.

The idea that "a mortgage is a mere incident of the debt evidenced by the note" is a long standing principle in Ohio jurisprudence.[125] The negotiation and transfer of a promissory note operates as an equitable assignment of the mortgage, even if the mortgage is neither assigned nor delivered.[126] Additionally, the Supreme Court of Ohio has evidenced its support of the principle before, in *Kernohan v. Manss*.[127] In *Kernohan*, two parties were claiming entitlement to proceeds of a property. Kernohan was assigned the original mortgage to the property, and Manss was assigned the original promissory note. The court held that Manss was entitled to the entire sum of the sale, despite Kernohan having the actual mortgage title.[128] The underlying holding of the case illustrates support of the aforementioned principle, stating: "a transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage."[129] Solidifying this principle in Ohio commercial law will ensure that foreclosing plaintiffs are absolutely clear about what must be in their possession at the commencement of a foreclosure action, while also preserving long standing practices of Ohio courts.

4. Protect Innocent Third Parties

Finally, the legislature should craft a protection for innocent third party purchasers affected by clouded title due to the *Schwartzwald*

124. Appellee Brief, *supra* note 85, at 16.

125. *Id*. at 14.

126. *Id*.

127. *Id*. (citing Kernohan v. Manss, 41 N.E. 258 (Ohio 1895)).

128. *Kernohan*, 41 N.E. at 261.

129. *Id*. at 260.

holding. Although the negative consequences affecting these third party purchasers will arguably be resolved if the Supreme Court decides the retroactivity conflict as recommended in this Casenote, their livelihood should not be solely contingent on that decision. The protection provided by the bona fide purchaser statute should be expanded to safeguard the purchasers' interest in the event of a void judgment. In addition, previous homeowners should be granted rights of restitution from financial institutions if they can prove that their home was truly wrongfully foreclosed-on, and subsequently sold for value. This reassurance would promote consumers to purchase foreclosed properties, which is essential to the financial health of the state of Ohio at a time where the foreclosure rate is high. Title underwriters will be able to revert back to their long standing practices instead of attempting to adapt to a novel situation.

V. Conclusion

In deciding *Federal Home Loan Mortgage Corp. v. Schwartzwald*, the Supreme Court of Ohio intended to protect consumers. Maybe as a result of the emotional nature of the case, or the underlying disagreement with the institutionalization of the mortgage market, this decision was made with haste and came at a high cost. Ohio courts, innocent third party purchasers of foreclosed homes, financial institutions, investors, and previous homeowners are negatively affected by the ambiguities in the unanimous opinion. To remedy these effects while also preserving the commendable purpose of the *Schwartzwald* decision, action needs to be taken by multiple branches of the Ohio government. By amending the pleading rules, limiting the retroactivity of the standard, defining what is sufficient to demonstrate standing, and expanding the bona fide purchaser protection, the judiciary and the legislature can sustain the supported holding while also mitigating the unintended effects.