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Question of the Month: Rhode Island borrowers lack standing to challenge mortgage assignment: Void or voidable?

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Ever since the 2008 financial crisis, Rhode Island has been a hot bed for foreclosure challenges. A recent Rhode Island case follows the majority of states, including Massachusetts, in holding that residential mortgagors have standing to challenge an assignment of their mortgage only if the allegation, if true, would render that assignment void and not merely voidable. But what characteristics of an assignment render it void?

A void assignment is one in which the putative assignor never properly held the mortgage (e.g., was never the mortgagee) and thus had no interest to assign. In contrast an assignment with a procedural informality (e.g., the person executing the assignment was not an authorized signer) is voidable at the election of the parties, not void.

The Federal District Court for the District of Rhode Island recently applied this void/voidable boundary in *Caito v. MERS* and three other cases holding specifically that borrowers do not have standing to challenge an assignment to a securitized trust on the ground that the transfer violates the trust's pooling & servicing agreement.

The Rise and Fall of *Erobobo*

The Rhode Island plaintiffs initially relied on *Wells Fargo Bank, N.A. v. Erobobo*, a 2013 New York state case. In the context of a judicial foreclosure proceeding, and in an attempt to oppose the trust's motion for summary judgment, *Erobobo* alleged that the securitized trust accepted his mortgage after the trust "cut-off" date. *Erobobo* argued that under New York trust law the acceptance of a mortgage after the trust cut-off date is void. The trial court was persuaded and found that the trust failed to prove it had standing to foreclose.

Although a couple of trial court decisions cite *Erobobo* with approval, the majority of courts, including all First Circuit courts to confront the issue, criticize *Erobobo*'s reasoning and reject its holding. Mass. and N.H. courts explicitly reject *Erobobo*'s reasoning and hold that borrowers lack standing to challenge mortgage assignments on the ground that the transfer violates a trust document. The First Circuit Court of Appeals has also noted that "claims that merely assert procedural infirmities in the assignment of a mortgage, such as a failure to abide by the terms of a governing trust agreement, are barred for lack of standing."

In 2014, the Court of Appeals for the Second Circuit (which includes New York) explicitly rejected *Erobobo*'s holding. At least one borrower in *Rajamin v. Deutsche Bank* attempted to challenge the mortgage assignment on the ground that the mortgage was assigned after the trust cut-off date. The court held that borrowers do not have standing to make such allegations. It reasoned: "[a]s unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable."

This spring, the New York appeals court reversed the trial court's *Erobobo* decision. Relying on the

Rajamin decision, the appeals court stated: "In any event, Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA."

Application to D.R.I.

Standing Exception

In July, after reading the parties' papers and hearing oral argument, the Rhode Island District Court held that plaintiffs lacked standing to pursue Erobobo-like claims. A violation of a pooling & servicing agreement is a procedural informality that is voidable at the election of the parties, not a third-party mortgagor.

Now, R.I., Mass., and N.H. all definitively ruled on this issue. The First Circuit may soon settle the issue for the entire region, as the Caito plaintiff has appealed the ruling.

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