

Disputed ownership

BY RYAN DORAN

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The Connecticut Superior Court ruled that an institution that began a foreclosure action against a Madison woman could not go forward because the institution could not establish that it owned the loan.

The court's decision released on April 17 could make it more difficult for lenders to foreclose on mortgages.

"This is a ground-breaking ruling," said Christopher Brown, partner at Begos, Horgan & Brown L.L.P. of Westport and Bronxville, NY. "The Court said that a lender can't foreclose on a mortgage if it can't prove that it owned the loan when it filed the action. It may sound like a simple idea, but as far as I know, it's the first time a Connecticut court has dismissed a foreclosure for this reason. It is likely that the same defect that was fatal to the lender in this case exists in many, many other mortgage foreclosure cases."

The case, Mortgage Electronic Registration Systems, Inc. as nominee for Finance America LLC vs. Anna M. Miller, involved an action filed in November of 2004 to foreclose on Mrs. Miller's house in Madison.

After forcing Mortgage Electronic Registration Systems to produce extensive documents detailing the changes in ownership of the loan, Brown, the Miller's attorney, became convinced that

the company did not own the loan when it started the action. Brown asked the Court to dismiss the action, a request that Mortgage Electronic Registration Systems and its lawyers fought strongly.

The court held a hearing in March. Though Mortgage Electronic Registration Systems brought a witness from Colorado to testify about the ownership of the loan, the court was not persuaded, and the court dismissed the action on April 17.

"Lenders have grown sloppy, suing first, and then trying to fix up the paperwork later," said Brown. "This ruling has significant implications for both lenders and borrowers in the foreclosure wave that has already started to crash in the courts."

The significance, according to Brown, is that many mortgage loans are sold repeatedly, so the institution attempting to foreclose is typically not the institution that made the loan in the first place.

Whoever owns the note has the right to receive the payments that the borrower makes. Because the ownership of the note may change many times very quickly, the lenders may lose track of

the actual owner at any point. It is not uncommon for the note itself to become lost. Only the actual owner of the loan is supposed to be able to foreclose on the loan.

According to Begos, Horgan & Brown, borrowers often do not challenge allegations about who owns the note, and a foreclosure action often gets started in the name of a lender that used to own the note, or that intended to purchase the note and never did. According to the firm, if the borrower doesn't hire a lawyer, or the lawyer doesn't ask the right questions, it might be the wrong entity that gets a foreclosure judgment, though the borrower still loses his or her house.

In the Miller case, the plaintiff and its attorney argued that it didn't matter who actually owned the note when the action was started, as long as it was straightened out by the end. The Court disagreed, essentially telling lenders that they need to get their records straight before they attempted to take away a borrower's house.

"This decision could generate an enormous problem for the entities who bought mortgage loans from other lenders, because it's going to make it harder for any institution to collect if and when the loan goes into default," said Brown. "Remember only the institution that can prove it owns the loan can foreclose in the case of default. But the industry has created a system that makes it difficult to prove who the owner is."



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