

Holder in Due Course — What's the Big Deal?

Posted on March 12, 2009 by livinglies

The big deal is that it is ONLY the holder in due course who is allowed in court to make claims or enforce any rights regarding the mortgage and note. No servicer (e.g. Countrywide), administrator (e.g. MERS), or trustee has any right to do a judicial or non-judicial foreclosure because they are not the holder "in due course." In order to qualify as a holder in due course, the first requirement is that you MUST have an economic interest, which means that the money is owed to you and not someone else. If the money on these mortgages is owed to anyone it is owed to investors or the Federal government which paid off many of these loans. If anyone has a right to be in court, it is the investors or the government. But They won't step up and make the claim because THAT would expose them to liability for predatory lending, usury, fraud and dozens of other claims from the borrower.

"Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession....

M.G.L.A. 106 § 1-201(20). The term "holder" is similarly defined when used in connection with a mortgage. See BLACK'S LAW DICTIONARY, 1034 (8th ed. 2004)(mortgage-holder or mortgagee is "one to whom property is mortgaged; the mortgage creditor or lender").

Unfortunately the parties' confusion and lack of knowledge, or perhaps sloppiness, as to their roles is not unique in the residential mortgage industry. *In re Maisel*, 378 B.R. 19 (Bankr. D. Mass. 2007); *In re Schwartz*, 366 B.R. 265 (Bankr. D. Mass. 2007). See also *In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio 2007). Nor are "mistakes" and misrepresentations limited to the identification of roles played by various entities in this industry. *In re Schuessler*, 2008 WL 1747935, *3 (Bankr. S.D.N.Y. 2008) (movant's motion misrepresented debtor's equity); Porter, Katherine M., "Misbehavior and Mistake in Bankruptcy Mortgage Claims" (November 6, 2007). University of Iowa Legal Studies Research Paper No. 07-29. Available at SSRN: <http://ssrn.com/abstract=1027961>. As this Court has noted on

more than one occasion, those parties who do not hold the note or mortgage and who do not service the mortgage do not have standing to pursue motions for relief or other actions arising from the mortgage obligation. *Schwartz*, 366 B.R. at 270. The Court has had to expend time and resources, as have debtors already burdened in their attempts to pay their mortgages, because of the carelessness of those in the residential mortgage industry and the bombast this Court and others have encountered when calling them on their shortcomings. *In re Foreclosure Cases*, 2007 WL 3232430 at *3, n.1.

“The purpose of Rule 9011 is to deter baseless filings in bankruptcy and thus avoid the expenditure of unnecessary resources by imposing sanctions on those found to have violated it.” *In re MAS Realty Corp.*, 326 B.R. 31, 37 (Bankr. D. Mass. 2005). Pursuant to Fed. R. Bankr. 9011(b), an attorney or unrepresented party who signs “a pleading, written motion, or other paper” is, among other things, certifying to the Court that “the allegations and other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....” The certification is not an absolute guaranty of accuracy, however; the rule expressly permits the representations to be based upon the signer’s best knowledge, information, and belief “formed after an inquiry reasonable under the circumstances.” The standard to be applied is “an objective standard of reasonableness under the circumstances.” *Cruz v. Savage*, 896 F.2d 626, 631 (1st Cir. 1990). “Courts, therefore, must inquire as to whether ‘a reasonable attorney in like circumstances could believe his actions to be factually and legally justified.’” *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987). *Cullen v. Darwin*, 132 B.R. 211, 215 (D. Mass. 1991). A finding of unreasonableness must be shown by a preponderance of the evidence. *Miller-Holzwarth, Inc. v. U.S.*, 2000 WL 291728, 3 (Fed. Cir. 2000).¹²