

Legal analysis to guide the mortgage industry and protect its interests.

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***In re Foreclosure Cases* does not apply to Nonjudicial Foreclosures** by Meaghan E. Ryan

On October 31, 2007, in *In re Foreclosure Cases*, 2007 WL 3232420 (N.D. Ohio Oct. 31, 2007), Judge Christopher Boyko of the United States District Court for the Northern District of Ohio dismissed 14 cases in which servicers sought to foreclose on residential mortgages. *In re Foreclosure Cases* has raised concerns among servicers; however, at least one federal district court has recognized that the holding of *In re Foreclosure Cases* is limited to judicial foreclosures and rejected a borrower's attempt to extend the holding of *In re Foreclosure Cases* to nonjudicial foreclosure proceedings. *Ernestberg v. Mortgage Investors Group*, 2009 WL 160241 (D. Nev. January 22, 2009).

In *Ernestberg*, the Plaintiff-borrower filed a lawsuit challenging a nonjudicial foreclosure on property formerly owned by the borrower. The borrower argued (1) that the servicer had a duty to produce the original note before it could commence nonjudicial foreclosure proceedings, and (2) that because the servicer did not produce the original Note, the servicer did not qualify as a holder in due course and had no right to declare default or proceed with foreclosure. In support of his argument, the borrower cited to the *In re Foreclosure Cases* opinion from Ohio.

The district court rejected the borrower's argument. The court noted that there was no requirement under Nevada law that tied the trustee's power of sale to presentment of the original note to the borrower. The court further observed that the servicer complied with all applicable foreclosure procedures under Nevada law. Importantly, the district court rejected the borrower's attempt to analogize *In re Foreclosure Cases*, observing that *In re Foreclosure Cases* involved judicial foreclosure procedures brought by lenders, rather than nonjudicial foreclosures pursuant to powers of sale.

While the court did not expand on the distinction, *Ernestberg* indicates that courts may not be swayed by the colorful opinion of *In re Foreclosure Cases* and will instead enforce only those foreclosure requirements promulgated by individual states. One of the significant limitations of *In re Foreclosure Cases* is the Ohio foreclosure procedure: In Ohio, a foreclosing servicer must provide evidence that it is the holder of the note and that it is the mortgagee of record. *In re Foreclosure Cases* is properly limited to its analysis and application of Ohio law, and should not be extended to apply to cases involving nonjudicial foreclosures. Servicers seeking to nonjudicially foreclose on mortgages, however, should still take efforts to ensure that they are in compliance with the individual requirements of the state in which they seek to foreclose.