No. 2007-0558

In the Supreme Court of Ohio

ON APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO
CASE NO. 04-MA-182

SHARON WILBORN, et al.
Plaintiffs-Appellants,

v.

BANK ONE CORPORATION, et al.,
Defendants-Appellees.

BRIEF OF AMICI CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, MORTGAGE BANKERS ASSOCIATION, OHIO BANKERS LEAGUE, AND OHIO MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF APPELLEES

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I. INTEREST OF THE AMICI

The United States Congress chartered the Federal Home Loan Mortgage Corporation ("Freddie Mac") in 1970 as part of the government's response to the worst crisis in home mortgage credit since the Great Depression.[1] While Freddie Mac is a stockholder-owned company, Congress inscribed into Freddie Mac's Congressional Charter (the "Freddie Mac Act") specific statutory purposes, a public mandate[2] that includes improving the stability, liquidity and attractiveness of the mortgage market for primary lenders and secondary market investors.

Equally relevant here, Congress' mandate to Freddie Mac includes ongoing assistance to the market for "mortgages on housing for low- and moderate income families" and the promotion "of access to mortgage credit throughout the Nation" (including central cities, rural areas, and underserved areas."[3] Unlike other privately-owned mortgage investors and lenders, Congress has imposed on Freddie Mac "an affirmative obligation to facilitate the financing of affordable housing for low- and

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[1] See Title III of the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84. Stat. 450 (July 24, 1970, codified as amended 12 U.S.C. §1451-59 (2006)). Title III is the "Freddie Mac Act." Opening the 1970 hearings leading to the Freddie Mac Act, House Banking Committee Chairman Wright Patman flatly said "half the population – *virtually all moderate income families* – have been priced out of the housing market. To assert that the country is experiencing a housing crisis is to understate the situation." "Emergency Home Financing," Hearings before the House Committee on Banking and Currency, 91st Cong. 2d Sess. at 1 (1970) (emphasis added).

[2] See 12 U.S.C. §1451 (Note).

[3] 12 U.S.C. §1451(b)(3) and (4) (Note).

moderate-income families in a manner consistent with their overall public purposes, while maintaining a strong financial condition and a reasonable economic return."[4] Clearly, Congress requires Freddie Mac to balance the interests of a stockholder-owned company with broader public interests in access to mortgage credit and affordable housing. Freddie Mac (and Fannie Mae) wrote and inserted the reinstatement clause challenged by Appellants here, at the behest of consumer advocates, as part of the Uniform Mortgage Instruments Congress urged Freddie Mac and Fannie Mae to create in 1970 to promote the broad public purposes just described.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located throughout the United States and the District of Columbia. It includes banks of all types and sizes – money center banks, regional banks, and community banks. The ABA frequently appears as amicus curiae in cases that raise issues of widespread importance and concern to banks or consumers of banking services.

The American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

[4] 12 U.S.C. §4501(7).

The Consumer Bankers Association ("CBA") is the nationally recognized voice on retail banking issues. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers and mortgage origination-service providers committed to the proper interpretation and enforcement of consumer mortgage laws and regulations. CMC's members originate, service and provide mortgage services involving the loans made to over 60% of the consumers in the United States mortgage market.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry. MBA invests in communities across the nation by ensuring the continued strength of the nation's residential and commercial real estate markets; expanding homeownership and extending access to affordable housing to all Americans and supporting financial literacy efforts. The MBA has over 3,000 member companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field.

The Ohio Bankers League ("OBL") is a non-profit trade association representing nearly 300 banks, savings banks and savings associations doing business in the State of Ohio. The OBL membership spans the entire range of depository institutions from small mutual thrifts that are managed from a single office to holding companies that do business from coast to coast and around the world.

The Ohio Mortgage Bankers Association ("OMBA") is a statewide organization devoted exclusively to the field of residential and commercial real estate finance. OMBA's membership comprises mortgage originators and servicers, as well as investors, and a wide variety of mortgage industry-related firms. The OMBA consists of 145 member companies which represent approximately 80% of the mortgage lending business in the State of Ohio.

II. SUMMARY OF ARGUMENT

This case is not, contrary to Appellants, about the interests of financially troubled homeowners against the interests of foreclosing mortgage lenders and investors. Instead, this case is about enforcing a clause that gives such homeowners – who may have defaulted on their mortgage payments – a legally enforceable right to reinstate their mortgage after default.

Ohio homeowners do not have this right as a matter of law. Rather, Ohio homeowners – like homeowners in all 50 States – acquired this right as a matter of contract under the Uniform Mortgage Instruments created by Freddie Mac (and Fannie Mae) in the early 1970s. Freddie Mac and Fannie Mae created those Uniform

Instruments at the specific behest of Congress to bring uniformity, evenhandedness and fairness to the rights and duties of mortgage borrowers and lenders. Because of its origins, the Uniform Instruments are far and away the most common security instrument used in residential mortgage lending.

Appellants and their amici seek to extend a 1911 usury decision, long predating this development, as support for an ill-considered effort to isolate and extinguish that portion of the reinstatement clause representing the necessary and reasonable quid pro quo for a borrower's contractual right to reinstate a defaulted mortgage and terminate a foreclosure proceeding. Neither Appellants nor their amici acknowledge the mutual benefits that flow from the lender and investor's voluntary agreement to the reinstatement rights contained in the Uniform Instruments. The borrower acquires an opportunity to what may be the only feasible way to save his or her home from foreclosure sale. The lender (or mortgage investor) is comforted that, although it is continuing to take a chance on a borrower who now has a track record of default, at least it has recovered the reasonable attorneys' fees incurred as a direct result of that default. This is a fair and reasonable bargain.

It is not surprising, then, plaintiffs and their amici can offer this Court no authority from any jurisdiction supporting their claim that the "reasonable attorneys' fee upon reinstatement" provision is void as against public policy. Fairness and evenhandedness is an integral part of the relationship that characterizes the Uniform Instruments promulgated by Freddie Mac and Fannie Mae over 30 years ago. Should Ohio preclude lenders and investors from recovering reasonable attorneys' fees when a borrower defaults and then exercises its contractual right to reinstate the mortgage, lenders would be forced to bear expenses that they never sought. The ultimate result could be increased costs of mortgage credit to all Ohio homeowners - forcing Ohioans who remain current to subsidize those who default. This would be inherently unfair, both to lenders and that large majority of borrowers who are able to pay their mortgage obligations timely and consistently.

III. THE HISTORY OF THE REINSTATEMENT CLAUSE AND ITS INCLUSION IN THE UNIFORM MORTGAGE INSTRUMENTS PROMULGATED BY FREDDIE MAC AND FANNIE MAE

As both courts below explained, the reinstatement clause is an integral part of the uniform mortgage documents sold and traded in a national secondary mortgage market. The development of that market over the last half century, including the evolution of the Uniform Instruments, support the conclusion of those courts that the reinstatement clause is not only valid and enforceable under Ohio law, but a benefit to Ohio homeowners.

A. The Federal Government Invigorates the Secondary Mortgage Market During the Great Depression

In its simplest form, the secondary mortgage market consists of investors purchasing mortgages from lenders to collect the monthly principal and interest payments. Prior to the 1970s, these investments were static and cumbersome, as investors could not alter the return on their investment or the manner of payment and the investors had to service the mortgage themselves. Bradner, The Secondary Mortgage Market and State Regulation of Real Estate Financing (1987), 36 Emory L.J. 971, 973.

The first significant changes in the U.S. housing market were the product of the devastating effect of the economic depression of the 1930s, which led to record numbers of foreclosures that left hundreds of thousands of Americans homeless. Id. at 975. As foreclosures shook investor confidence, an already stultified secondary mortgage market became moribund, removing desperately needed capital from the housing sector. Malloy, The Secondary Mortgage Market a Catalyst for Change in Real Estate Transactions (1986), 39 Sw. L.J. 991, 992.

As part of President Roosevelt's New Deal, the federal government passed the National Housing Act of 1934. One of the Act's objectives was to make home loans available to more Americans by generating capital from mortgage investments in the secondary mortgage market. Bradner, 36 Emory L.J. at 975. To invigorate that market, Congress authorized Fannie Mae to buy and sell mortgages that were guaranteed by the Federal Housing Administration ("FHA") or the Veteran's Administration ("VA"). Id. at 975-976. The FHA and VA loan programs developed new lending guidelines that reduced the required downpayments and led to long-term (20 to 30 years), fixed-rate mortgages. Malloy, 39 Sw. L.J. at 992. The federal guarantees were intended to, and did, foster greater investor confidence in the market.

B. <u>The Secondary Mortgage Market Expands to Conventional Loans and Develops Mortgage Backed Securities</u>

The next significant development in the secondary mortgage market was the enactment of the Emergency Home Finance Act of 1970, which allowed Fannie Mae to invest in conventional, non-government-insured loans, and created Freddie Mac to compete with Fannie Mae. Bradner, 36 Emory L.J. at 978.

The policy decision to develop a standard mortgage form was the "first order of business" Freddie Mac and Fannie Mae undertook. Jensen, Mortgage Standardization: History of Interaction of Economic, Consumerism and Governmental Pressure (1972), 7 Real Prop. Prob. & Tr. J. 397, 399[5]. Both institutions recognized that a vibrant secondary mortgage market would advance their "public statutory mission" to meet "low- and moderate-income housing goals." *Mendrala v. Crown Mortg. Co.* (C.A.7, 1992), 955 F.2d 1132, 1140-1141. To attract new sources of investment capital to the secondary mortgage market, Freddie Mac and Fannie Mae needed to increase the marketability of mortgages; to increase mortgage marketability, they needed to develop uniform mortgage instruments and uniform policies for buying and selling the mortgages. Malloy, 39 Sw. L.J. at 994.

Uniform mortgages would allow Freddie Mac and Fannie Mae to package mortgages for sale to investors by purchasing mortgages originating from a broad spectrum of banks and mortgage lenders, pooling them, and then offering them to

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[5] Raymond Jensen was a member of the task force charged with developing a standard mortgage form.

investors as mortgage-backed securities. Bradner, 36 Emory L.J. at 981. Investors could purchase either an equity or debt participation in the pool, while the loans themselves would be serviced separately. Mortgage-backed securities benefit investors by enabling them to purchase a diverse interest in pooled loans from around the country, without the cost of servicing the loans; they benefit lenders by providing greater liquidity for their portfolios and freeing up capital available for the housing sector; and they benefit home buyers by making additional capital available for mortgages. Id.

C. Freddie Mac and Fannie Mae Promulgate Uniform Instruments that Balance the Rights of Borrowers and Lenders and Improve Market Liquidity.

As Freddie Mac General Counsel Arthur Leibold stated during initial public hearings on draft documents in 1971, "the draft documents which we are discussing here today represent a stage in the development of forms which we hope are:

> (1) Clear and understandable so that the rights and duties of both borrower and lender are evident;
>
> (2) Fair and equitable to both parties; and
>
> (3) Attractive to investors so that funds for housing will be consistently available at fair prices."

S. Doc. No. 21, 92nd Cong., 1st Sess. at 29 (1971) (Statement of Freddie Mac General Counsel Arthur Leibold).

For this reason, Freddie Mac and Fannie Mae took steps that would ensure that the uniform mortgage documents would balance the interests of both lender and borrower. First, they arranged for the publication of the drafts in the Federal Register. See 36 Fed.

Reg. 4712 (March 11, 1971). Second, they held two days of public hearings at which over 40 witnesses testified, "[r]oughly *** divided into two groups, one representing primarily lenders and the other representing primarily borrowers, and senators and congressmen who took the same position as the borrowers in general." Jensen, 7 Real Prop. Prob. & Tr. J. at 402. Consumer advocate witnesses included Ralph Nader and Professor John A. Spanogle, Jr., a founding member of Nader's Public Interest Research Group and "the chief technical spokesman for the borrowers." Id.

At the outset of the hearings, Retired Congressman Albert Rains, who moderated the hearings, reminded the participants that "one of the major considerations that led Congress to authorize this program was the need to develop so far as possible some kind of uniformity in mortgage documents," and "in developing this uniformity, it's imperative that to the extent possible an evenhandedness in the rights and duties between borrower and lender be achieved." S. Doc. No. 21, 92nd Cong., 1st Sess. at 1 (Statement of Hon. Albert Rains). Professor Ernest Gellhorn of the University of Virginia echoed those sentiments, noting that standard forms "provide an important opportunity to take positive steps forward in consumer protection, protecting the home-owning public from frauds and abusive collection techniques and specifying lender responsibilities as well as rights." Id. at 169 (Statement of Brennon Feeley).

Following full hearings and after careful consideration, Freddie Mac and Fannie Mae issued the first edition of the joint "Uniform Instruments" in 1975. Since then, the Uniform Instruments have continued to evolve, and gained such wide acceptance that many lenders began to use them without regard to whether the mortgages would be sold to either Freddie Mac or Fannie Mae. See Restatement of the Law 3d, Property (1997), Section 8.1, Comment *e* (the reinstatement clause is part of "the most commonly used residential mortgage form in the United States ***." As a leading treatise explains:

> [T]he entire process by which the [Freddie Mac/Fannie Mae Uniform Instruments] were developed is exemplary of reasonable compromise. While the initial exposure drafts were quite pro-lender, the final versions gave both consumers and lenders a good deal to show for their efforts. The resulting forms have been revised and modified in several respects since their promulgation, but much of the original language remains intact, and they are very widely employed, even by lenders who have no expectation of selling their loans to [Freddie Mac or Fannie Mae].

2 G. Nelson & D. Whitman, Real Estate Finance Law (4 Ed. 2002), at 332.

As a result of the growth of the secondary mortgage market (assisted by uniform mortgages) over the past decade, Freddie Mac has invested $134 billion to help 1,312,716 Ohio families finance their home. See Freddie Mac, *Making Home Possible in Ohio,* available at http://www.freddiemac.com/corporate/about/pdf/Ohio.pdf. That investment includes $471.1 million over the past five years in mortgage revenue bonds that provide low-cost mortgages to Ohio families and, since 1988, $429.6 million in low-income housing tax credits, creating 21,113 affordable homes for Ohio families. Id. In 2005 alone, Freddie Mac enabled 11,043 home buyers to purchase their first home, financed 82,498 homes for low and moderate-income Ohio families and prevented foreclosure on the homes of 2,480 Ohio families. Id.

D. **<u>Because Consumer Advocates Urged the Inclusion of a Means for Borrowers to Have the Option of Keeping Their Home in the Event of Default, Freddie Mac and Fannie Mae Added the Reinstatement Clause to the Uniform Mortgage.</u>**

The reinstatement clause was not part of the original draft documents. Jensen, 7 Real Prop. Prob. & Tr. J. at 415. It was added after Prof. Spanogle, on behalf of consumer advocate witnesses, urged Freddie Mac and Fannie Mae to incorporate a provision that would allow borrowers to keep their homes after default. Id. The clause *empowers*, but does not *require*, a defaulting borrower to keep his or her home so long as the borrower agrees to reimburse the lender for *reasonable* costs, including *reasonable* attorneys' fees, expended in initiating the foreclosure proceeding.[6] The quid pro quo, like the other provisions of the Uniform Instruments, balances the rights of lenders and borrowers.

The inclusion of a right of reinstatement in uniform mortgages is consistent with Freddie Mac's continuing dedication "to helping borrowers avoid foreclosure." *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures*, 110 Cong. (Sept. 20, 2007) (statement of Richard F. Syron, Chairman and

[6] The reinstatement clause allows the borrower to cure his or her default if he or she: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. *Wilborn*, 2007-Ohio-596, at ¶ 5.

CEO, Freddie Mac), available at http://www.freddiemac.com/corporate/about/policy/articles_commentary.html#mission. It is *only* available in contract – no Ohio law allows borrowers to resume payments "as if no acceleration had occurred" and force the dismissal of a foreclosure action. *Wilborn v. Bank One Corp.*, 7th Dist. No. 04-MA-182, 2007-Ohio-596, at ¶ 5.

Without the contractual right to reinstate a loan, Ohio borrowers would be left with limited options. Ohio law provides a defaulting borrower a right of redemption, but redemption requires the payment of *all* of the outstanding debt, including interest and costs to keep the defaulted property. See R.C. 2329.33; *Hausman v. City of Dayton*, 73 Ohio St.3d 671, 1995-Ohio-277, at 676, citing Hausser & Van Aken, Ohio Real Estate Law and Practice (1993) 744, Section 53.01(D). The standard form reinstatement clause, in contrast, does not require a complete payment of the entire accelerated debt, instead requiring merely the repayment of the amount necessary to cure the delinquency.

Most defaulting borrowers simply cannot afford to invoke, and do not invoke, redemption. In contrast, defaulting borrowers frequently invoke their contractual right of reinstatement, thereby initiating a dialogue on a wide range of workout options. In addition to a straight reinstatement, Freddie Mac and other investors and lenders typically employ a wide range of "workout" options – which are essentially payment plans – that include: (1) *forbearance* – in which a lender agrees to take no, or reduced, payments for a period of time; (2) *partial reinstatement* – in which a borrower resumes regular payments and agrees to a repayment plan for the remainder due; (3) *loan modification* –

in which the lender agrees to change a term in the mortgage agreement, typically reducing the interest rate, thus making it affordable for the borrower to reinstate the loan; and (4) *partial claim* – an option offered by the FHA as part of the loan loss mitigation program that allows the lender to advance a borrower funds necessary to reinstate the loan. Amy Crews Cutts and Richard K. Green, Innovative Servicing Technology: Smart Enough to Keep People in Their Houses? (July 2004, Freddie Mac Working Paper #04-03), 5-7, available at http://www.freddiemac.com/news/pdf/fmwp_0403_servicing.pdf.

Moreover, reinstatement is available all the way up until five days before a foreclosure sale or the entry of a judgment enforcing the security interest. *Wilborn*, 2007-Ohio-596, at ¶ 5. Indeed, if Freddie Mac acquires title to the property following a foreclosure sale (which it does on every Freddie Mac-owned loan unless a third-party outbids Freddie Mac's servicing lender at the sale), Freddie Mac is even willing in some circumstances to permit the borrower to reinstate the loan, provided the foreclosure court consents. The quid pro quo for this valuable right is that the borrower must pay costs, including reasonable attorneys' fees, incurred in enforcing the security interest.

IV. ARGUMENT

Appellees' Proposition of Law No. 1:

> **A provision in a mortgage loan contract, a mortgage modification, or other contractual arrangement that gives a defaulting borrower the right to cure a default, settle a payment dispute, and compel the dismissal of a foreclosure action does not violate Ohio public policy by conditioning the exercise of that right on the payment of the lender's reasonable expenses, including reasonable attorneys' fees incurred by the lender as a result of the default, workout, and settlement.** (*Miller v. Kyle* (1911), 85 Ohio St. 186, distinguished).

The Seventh District Court of Appeals correctly analyzed the application of *Miller v. Kyle* (1911), 85 Ohio St. 186 to the reinstatement clause, and correctly concluded that the payment of attorneys' fees in the context of a reinstatement was not synonymous with the payment of attorneys' fees for defaulting on a mortgage. *Wilborn*, 2007-Ohio-596, at ¶ 7. Distinctions between the one-sided attorney fee provision in *Miller* and the reinstatement provision of the uniform mortgage documents, include: (1) the reinstatement clause is not for the sole interest of the lender; (2) it allows the borrower to come to an agreement with the lender and keep his or her home; (3) the attorneys' fees represent reasonable costs expended before or in connection with reinstating the mortgage – not a penalty; and (4) the attorneys' fees provision is not an obligation of the borrower but a condition should the borrower choose reinstatement. Id. at ¶ 43-45. Moreover, the decision below should be affirmed for an additional reason – the reinstatement provision is wholly consistent with both the public policy concerns expressed in *Miller* and the objectives of Congress when it authorized Freddie Mac and Fannie Mae's expansion into the secondary mortgage market.

A. **The Public Policy Bases for the *Miller* Decision Do Not Support Reversal of the Decisions Below.**

Miller identified two public policy grounds in support of its common law rule: (1) the enforcement of contracts for the payment of counsel fees upon default "would result in evasions of the usury laws"; and (2) "the obvious tendency of such contracts to encourage suits." *Miller*, 85 Ohio St. at 192-193. Enforcing the uniform reinstatement clause and permitting fair reinstatements promotes the public policies that inspired the *Miller* rule.

First, the reasonable attorney fee quid pro quo is an actual, reasonable expense, not a penalty percentage added to increase the interest rate following a default. In fact, Freddie Mac and Fannie Mae require strict compliance with state usury laws. See, e.g., *Freddie Mac Single-Family Seller/Servicer Guide*, Sections 6.2 and 22.28, available at http://www.freddiemac.com/sell/guide/# (the Guide is the core contract between Freddie Mac and its Seller/Servicers). Further, the instruments themselves specifically state that if any charge results in an illegal (or usurious) term, that charge shall be reduced or eliminated. The uniform documents, like *Miller*, safeguard usury laws.

Second, an attorneys' fees provision in the reinstatement clause of a mortgage does not encourage additional lawsuits. To the contrary, it provides a means of settling disputes and *terminating* litigation. Appellants' claim that reasonable attorneys' fees will actually promote foreclosure litigation (e.g., Appt.'s Br., p. 22), simply ignores the economic realities of a foreclosure. "Contrary to popularly held myths, mortgage finance institutions lose money on nearly all foreclosures. Not only that, but they lose more on a foreclosure than they do on any workout option." Charles A. Capone, Jr., "Providing Alternatives to Mortgage Foreclosure: A Report to Congress" (1996), U.S. Department of Housing and Urban Development, at 38, available at http://www.huduser.org/publications/hsgfin/mortgage.html. Even the Amicus Brief filed by the Attorney General recognizes that "the lender loses out when they must seek foreclosure." (Atty. Gen. Amicus Br., p. 14.)

Freddie Mac Deputy Chief Economist Amy Crews Cutts and Professor Richard K. Green have described lender costs from foreclosure as follows:

> For a lender, costs accumulate as the seriousness of the contractual failure increases. These costs include the opportunity cost of principal and income not yet received, servicing costs, legal costs, costs of property preservation and costs of property disposition. Although foreclosure is a rare event, the costs of foreclosure are enormous. For example, Focardi (2002) estimated that for a sample of loans that went through the full formal foreclosure process, the total cost, including lost interest during delinquency, foreclosure costs, and disposition of the foreclosure property, ran $58,759 and the process took an average of 18 months to resolve.

Amy Crews Cutts and Richard K. Green, (July 2004, Freddie Mac Working Paper #04-03), at 5, citing Craig Focardi, "Servicing Default Management: An Overview of the Process and Underlying Technology" (Nov. 15, 2002), TowerGroup Research Note, No. 033-13C. The economic reality is that even beyond the attorneys' fees and administrative costs associated with initiating a foreclosure, the lender incurs significant additional costs each time they initiate a foreclosure proceeding.

Moreover, the amount of reasonable attorneys' fees available for bringing a foreclosure action is controlled both by Freddie Mac and the court system. In Ohio, as an example, Freddie Mac generally limits attorneys' fees to $900 for standard foreclosures. See *Freddie Mac Single-Family Seller/Servicer Guide*, at Exhibit 57A. Additionally, as the Uniform Instruments provide, and this Court has held, the attorney's fee must be *reasonable*. *Nottingdale*, 33 Ohio St.3d at the syllabus. Thus, any fees available to the attorneys bringing the foreclosure action are limited and strictly controlled by both Freddie Mac and well-settled Ohio law.

Third, unlike the one-sided fee-shifting clause condemned in *Miller,* the reinstatement clause represents a careful balancing of the interests of defaulting borrowers, borrowers who pay their mortgage loans in a timely fashion and lenders. See, e.g., *Nottingdale Homeowners' Assoc. Inc. v. Darby* (1987), 33 Ohio St.3d 32, 37. *Nottingdale* explains that in the context of a condominium association agreement, a fee-shifting provision protects the association from having to pay for the delinquency of others. Without such a provision, unit owners would be forced to abandon claims against delinquent unit owners; with it, the debtor is encouraged to pay his or her obligations to avoid litigation, and the association is protected if its suit is meritorious. Id. "A more ideal arrangement can scarcely be imagined." Id.

Here, the uniform reinstatement clause is even more "ideal," because it allows the borrower – after default – to decide whether to reinstate the mortgage. As in *Nottingdale*, the lender would be at a significant disadvantage if each time the borrower defaulted on his or her mortgage – forcing the lender to incur expenses associated with enforcing its security interest – the borrower simply reinstated the mortgage. In that instance, the lender would be forced to incur costs that are not recoverable and the borrower would have lesser motivation to pay his or her mortgage loan timely. Requiring the borrower, in exchange for reinstatement, to pay for attorneys' fees necessitated by his or her default, balances the interests of lender and borrower, encourages the performance of previously agreed obligations, and reduces foreclosure litigation.

B. Ohio Law Should Encourage Contract Provisions That Assist in Avoiding Foreclosure Sales and Promote the Resolution of Litigation.

"By law, [Freddie Mac and Fannie Mae] have a broad and important public mission to provide liquidity, stability and affordability to the nation's residential mortgage markets." *Legislative Proposals on GSE Reform*, 110 Cong. (Mar. 15, 2007) (statement of Richard F. Syron, Chairman and CEO, Freddie Mac), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/ht031507.shtml. They were chartered to help more Americans own a home and do not advance that public mission by promoting foreclosure. For that reason, Freddie Mac has "consistently been at the forefront of efforts to help borrowers avoid foreclosure." Richard F. Syron, Chairman and CEO, Freddie Mac, Prepared Remarks, Address To a Conference on the Liquidity

Crunch at The UCLA – Anderson School of Management Los Angeles, California (Nov. 13, 2007) available at http://www.freddiemac.com/speeches/syron/ds111307.html. Since early 2004, Freddie Mac has helped nearly 200,000 families find alternatives to foreclosure – more than 33,000 in 2007 alone. Id.

The balanced rights and obligations of the reinstatement clause promote Freddie Mac and Fannie Mae's public mission to expand the ability of Americans to buy *and keep* their homes. The clause also advances the resolution of disputes and settlement of litigation that is costly to the lender, the borrower and the court system. Eliminating the quid pro quo within the reinstatement clause would likely increase the costs of the overall loan process, resulting in the subsidization of defaulting borrowers by those borrowers who pay their loans timely. Reversing the court below may also make Ohio mortgages less competitive in the secondary mortgage market: "Through the buying and selling of mortgages and mortgage-related securities, the secondary market can direct funds in or out of states with divergent local law ***. In this way the market will reward or punish states for the way in which their local law corresponds to investor desires and expectations at a national level." Malloy, 39 Sw. L.J. at 999.

V. CONCLUSION

Appellants and their amici simply ignore the modern secondary mortgage market that forms an essential context for the reinstatement clause at issue, as well as the quid pro quo between the right of reinstatement and the payment of reasonable expenses, including reasonable attorneys' fees, resulting from a default. Their unfounded attack on the reinstatement clause would upset the careful balance in uniform instruments developed over 35 years, is unsupported by law or policy, and would have far-reaching and unintended consequences for Ohio. Federal Home Loan Mortgage Corporation, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Mortgage Bankers Association, Ohio Bankers League, and Ohio Mortgage Bankers Association therefore urge this Court to affirm the decisions of the trial and appellate courts below.

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CERTIFICATE OF SERVICE

A copy of the foregoing **Brief of Amici Curiae Federal Home Loan Mortgage Corporation, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Mortgage Bankers Association, Ohio Bankers League, and Ohio Mortgage Bankers Association in Support of Appellees** has been served this 3rd day of December, 2007, by U.S. Mail, postage prepaid, upon the following:

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