

# Am I a party entitled to enforce a promissory note?

June 23, 2020

Shareholder Derivative Lawsuit

*Aungst v. Light*, 9th Dist. Summit No. 29349, 2020-Ohio-3347

In this appeal, the Ninth Appellate District affirmed the trial court's decision, finding that when a shareholder's derivative lawsuit is based upon acts beyond a corporation's authority (i.e., an ultra vires act) that have already been committed, the shareholder must demonstrate that its claim satisfies both the fraud on minority exception and the wrongdoer control exception before the lawsuit is permitted to proceed.

## The Bullet Point

Where an individual shareholder of a company seeks to bring a lawsuit to recover compensation for a company's loss caused by an ultra vires transaction, the harm was done to the company and not the shareholder. As such, the company has the right of redress and not the shareholder. Under this so-called "Foss" rule, a shareholder may bring a derivative claim on behalf of a company only if a simple majority of the shareholders could not ratify the conduct on which the lawsuit is based. In other words, no individual shareholder can maintain an action if the alleged wrong is capable of ratification by a simple majority of the shareholders. As this court noted, the four exceptions to this Foss rule which permit a shareholder to maintain a derivative lawsuit apply when the conduct is at issue are: "1) ultra vires; 2) requires a special majority to ratify; 3) infringes a shareholder's personal rights, or 4) qualifies as a 'fraud on the minority.'" Moreover, where the ultra vires act complained of has already occurred, the shareholder must demonstrate that its claim satisfies both the fraud on minority exception and the wrongdoer control exception. As such, the minority shareholder must plead fraud on the minority in addition to alleging past ultra vires conduct in order to survive a motion to dismiss.

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Garnishment Proceedings

*Univ. of Akron v. Rushin*, 9th Dist. Summit No. 29467, 2020-Ohio-3268

In this appeal, the Ninth Appellate District reversed and remanded the trial court's decision, finding that the trial court lacked authority at a garnishment hearing to determine whether the debtor's underlying debt had been discharged.

## The Bullet Point

Pursuant to Ohio law, a person who obtains a judgment against another may garnish that person's wages to

satisfy the judgment through a statutory proceeding referred to as a garnishment hearing. R.C. 2716.01(A). As this court stressed, a garnishment hearing “is not a vehicle for re-litigating the underlying lawsuit which resulted in the original judgment against the judgment debtor.” Instead, the garnishment hearing is limited to a determination of the amount of the judgment debtor’s wages that can be used for the satisfaction of the judgment owed to the judgment creditor. R.C. 2716.06(C). No objection to the judgment itself can be heard or considered at the hearing. As such, a judgment debtor will not be permitted to use garnishment proceedings to object to or re-litigate the underlying debt.

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### Ability to Enforce Promissory Note

#### ***Bank of New York Mellon v. Workman, 11th Dist. Lake No. 2019-L-134, 2020-Ohio-3330***

In this appeal, the Eleventh Appellate District affirmed the trial court’s decision, granting judgment in a foreclosure action to the bank.

#### **The Bullet Point**

In order to have standing to bring a mortgage foreclosure action in Ohio, the mortgage lender must establish an interest in the promissory note or in the mortgage at the commencement of the lawsuit. A party who is considered a “holder” of a negotiable instrument has standing and the ability to enforce it. “To be a ‘holder,’ a party must be in possession of the instrument that is either payable to the party in possession (specifically endorsed) or payable to bearer (blank endorsement).” Moreover, as this court held, “[a] person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent.” Accordingly, “[a] plaintiff does not lose constructive and legal possession of bearer paper merely because it was held by an agent on behalf of the plaintiff.” Stated differently, in cases where the holder’s agent is in physical possession of the note, the holder may still enforce the note based upon its constructive possession of the note. That being said, a note indorsed in blank does not establish who is in possession of the note and when said possession transpired. In such cases, the holder must submit a supporting affidavit that attests to how and when the entity became the holder of the note and the affiant must produce supporting business records to establish possession of the note.

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### Right to Intervene

#### ***Huntington Natl. Bank v. Rex, 8th Dist. Cuyahoga No. 108670, 2020-Ohio-3305***

In this appeal, the Eighth Appellate District affirmed the trial court’s decision, finding that the debtor’s former husband did not have a right to intervene in the foreclosure action as he did not have a judgment lien on the foreclosed property.

#### **The Bullet Point**

Under Civ.R. 24(A)(2), a party seeking intervention as of right must show in part that they claim an interest relating to the subject of the action. In Ohio foreclosure actions, the mortgaged property is the subject matter of

the action. Parties who claim an interest in the property include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property. As this court noted, an order from a court that does not set forth a judgment creditor, judgment debtor, the amount of judgment, and interest, if any, does not meet the criteria for a judgment lien under R.C. 2329.02. Moreover, a judgment lien is not created merely because it was filed with a county's recorder and auditor's office.

Likewise, an affidavit of facts relating to title does not create an equitable lien or encumbrance on property to give one a right to intervene in a foreclosure. Pursuant to R.C. 5301.252(A), "an affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate." As explained in R.C. 5301.252(B)(3), such an affidavit of facts may provide information relating to the "happening of any condition or event that may create or terminate an estate or interest." That being said, the filing of an affidavit of facts "can only be evidence of an adverse interest, not an interest itself." Consequently, even if a party seeking intervention files such an affidavit, this will not create an interest in the property or encumbrance on the title that is the subject of the foreclosure action.

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## Discovery Rule

### *Tchankpa v. Ascena Retail Group, Inc.*, 10th Dist. Franklin No. 19AP-760, 2020-Ohio-3291

In this appeal, the Tenth Appellate District affirmed the trial court's decision, finding that because the plaintiff had actual knowledge of his injury caused by the defendant, the statute of limitations had run.

#### **The Bullet Point**

It is a long-established rule in Ohio that a "[s]tatute of limitations commences to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent." Plainly stated, a cause of action begins to accrue when the wrongful act is committed. There are exceptions to this general rule "where an unconscionable result would be had if a plaintiff's right to recovery was barred by the statute of limitations before he or she was even aware of his or her injuries." One exception is the so-called discovery rule. Under the discovery rule, when an injury does not manifest itself immediately, the cause of action does not 'arise' for the purposes of determining the statute of limitations until the plaintiff knows, or by the exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant. In applying the discovery rule's two-pronged test, the statute of limitations begins to accrue when the plaintiff has actual knowledge that he had been injured and that his injury was caused by the conduct of the defendant.

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