



Lenders Must Record Mortgage Interest Prior to Foreclosure, Appeals Court Rules

Grand Rapids, Michigan

Bridgewater Place
333 Bridge Street, N.W.
P.O. Box 352
Grand Rapids, MI 49501
Phone: 616/336-6000
Fax: 616/336-7000

Lansing, Michigan

The Victor Center
201 N. Washington Square
Suite 810
Lansing, MI 48933
Phone: 517/482-6237
Fax: 517/482-6937

Kalamazoo, Michigan

251 North Rose Street
4th Floor
Kalamazoo, MI 49007
Phone: 269/382-2300
Fax: 269/382-2382

Grand Haven, Michigan

The Chemical Bank Building
1600 South Beacon
Suite 240
Grand Haven, MI 49417
Phone: 616/846-7100
Fax: 616/846-7101

Metro Detroit, Michigan

39500 High Pointe Boulevard
Suite 350
Novi, MI 48375
Phone: 248/567-7400
Fax: 248/567-7440

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A recent decision by the Michigan Court of Appeals may serve as the basis for other homeowners to challenge what are likely to be thousands of sheriff's sales that occurred before the banks' mortgage interest was recorded.

In a unanimous decision in *Kim v JP Morgan Chase Bank*, the court ruled that Chase was not authorized to proceed with a sheriff's sale under Michigan's foreclosure by advertisement statute because Chase had not recorded its mortgage interest before the sheriff's sale occurred.

As a published decision, the *Kim* ruling is binding on all Michigan circuit courts and subsequent panels of the Court of Appeals that address the same issue.

Chase acquired the disputed mortgage interest as part of its purchase of the assets of Washington Mutual Bank pursuant to a Purchase and Assumption Agreement it executed with the Federal Deposit Insurance Corporation (the "FDIC"), as receiver of Washington Mutual. Chase commenced foreclosure by advertisement proceedings against the Plaintiffs in May 2009, and purchased the foreclosed property at a sheriff's sale in June 2009. Plaintiffs filed a complaint against Chase in November 2009 seeking, among other relief, to set aside the sheriff's sale on the basis that Chase had not recorded its mortgage interest before the sale occurred. The trial court granted Chase's dispositive motion, relying principally on a January 2004 Michigan Attorney General Opinion (the "OAG"). Plaintiff's appealed the trial court's decision, arguing that the plain language of Michigan's foreclosure by advertisement statute required Chase to record its mortgage interest before the sheriff's sale. Consistent with its position before the trial court and the OAG relied upon by the trial court, Chase argued that

it was not subject to the statutory recording requirement because it acquired its interest by operation of law.

Rejecting this argument, the Court of Appeals held that the FDIC, not Chase, had acquired the mortgage interest by operation of law, and that Chase had simply purchased the mortgage interest thereafter. As a result, the Court of Appeals ruled that Chase was subject to the recording requirement of the foreclosure by advertisement statute and reversed the trial court's ruling in Chase's favor.

What is the Ruling's Effect?

Given the number of Washington Mutual Bank loans Chase acquired from the FDIC, it is not surprising that Chase has filed an application for leave to appeal with the Michigan Supreme Court. There is some question, however, whether the Supreme Court will intervene in the same way it did in *Residential Funding Co v Saurman*, (2011), in which the Court ruled that a party holding record of a mortgage has a sufficient interest in real estate to allow foreclosure by advertisement, even if that party does not own the mortgage note itself.

In light of the *Kim* ruling, mortgage interest holders must be certain to record their interest in property before proceeding with foreclosure by advertisement. Review of recent foreclosure by advertisement proceedings may also be advisable to ensure that the underlying mortgage interests were timely recorded.

Varnum will be following the *Kim* matter and will issue a follow-up advisory when the Michigan Supreme Court determines if it will grant leave to appeal and, if it does, that Court's ruling on the issue.