IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-697

ROMAN PINO,
Petitioner

v.

THE BANK OF NEW YORK, etc., *et al.*,
Respondents

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT OF FLORIDA (Case No. 4D10-378)

BRIEF OF AMICI CURIAE, THE MORTGAGE BANKERS ASSOCIATION AND THE FLORIDA BANKERS ASSOCIATION, IN SUPPORT OF RESPONDENTS

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The Amici, Mortgage Bankers Association ("MBA") and Florida Bankers Association ("FBA"),[1] are voluntary organizations. Promoting affordable and sustainable home ownership and seeking to ensure the continued strength of our nation's residential, multifamily and commercial real estate markets, the MBA has been a leader in representing the concerns of the real estate finance industry for over 100 years. In an industry that employs more than 280,000 people in virtually every community in the country, the MBA has in excess of 2,200 members, comprised of mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and other organizations that lend on real estate or support lenders and investors in mortgages. The MBA has a direct interest in this litigation because many of its members have offices in Florida and, collectively, they have made tens of thousands of mortgage loans in the State.

The FBA represents the interests of lenders in Florida and is composed of more than 300 banks and financial institutions. The FBA's members include: small community banks and thrifts; medium sized banks, operating in several parts of the State; and large, regional, financial institutions, headquartered in or outside

[1] In their brief, the Amici, MBA and FBA, refer to Petitioner, Roman Pino, as "Pino," to Respondents, The Bank of New York Mellon *et alia*, collectively as "BNY Mellon," and to Kaufman, Englett and Lynd, PLLC, the Amicus Curiae for Pino, as "Pino's Amicus."

of Florida. Because its member banks have made mortgage loans throughout Florida, the FBA has a keen interest in this case.

The proliferation of residential mortgage foreclosure actions in Florida has greatly impacted the real estate finance industry in general and the members of the MBA and the FBA in particular. The Amici seek to avoid unnecessary harm to their already distressed industry by encouraging fair, but efficient, means for foreclosures to proceed in Florida. The instant case, however, has the potential to do real harm by imposing undue impediments to the foreclosure process. The real estate finance industry and the MBA's and FBA's members will be significantly affected by this Court's ruling on the Certified Question,

> Does a trial court have jurisdiction and authority under Rule 1.540(b), Fla. R. Civ. P. or under its inherent authority to grant relief from a voluntary dismissal where the motion alleges a fraud on the court in the proceedings but no affirmative relief on behalf of the plaintiff has been obtained from the court?

The MBA and FBA appear in this matter to provide industry perspective on the Certified Question and discuss potential impacts of this Court's actions.

SUMMARY OF THE ARGUMENT

This Court's opinion will have a significant impact upon the Amici's members, and all other litigants in civil cases. The Amici urge this Honorable Court to answer the Certified Question in the negative. Permitting a party to seek relief from a voluntary dismissal without prejudice would eviscerate the

plaintiff's long-recognized right, provided by Fla. R. Civ. P. 1.420(a), to dismiss a claim voluntarily prior to a hearing on a motion for summary judgment. Additionally, Fla. R. Civ. P. 1.540 should not apply to a voluntary dismissal without prejudice, which is not a final order, decree or proceeding. Moreover, if the dismissing party has not obtained affirmative relief, a trial court should not be authorized to set aside a voluntary dismissal. Further, such relief is not appropriate in the instant action.

Because the Amici desire to promote stability and dependability in Florida jurisprudence, they urge the Court to be mindful that Florida is a lien theory jurisdiction, in which the holder of a note has standing to commence foreclosure proceedings, irrespective of an assignment of mortgage. Indeed, in many jurisdictions, a borrower cannot contest the technical validity of an assignment because the borrower is not a party to the assignment. The resolution of the Certified Question should reflect that, if the plaintiff is a holder in due course of the note, scrutiny of an assignment of mortgage should not be permitted during foreclosure proceedings.

ARGUMENT

The question certified by the Fourth District has broad and significant implications for litigants in general and the Amici's members in particular. An affirmative answer to the Certified Question would constitute a drastic departure

from existing law and would negatively impact the right of any plaintiff voluntarily to dismiss a claim without prejudice prior to a hearing on a motion for summary judgment — a right established by Fla. R. Civ. P. 1.420(a)(1). Authorizing a trial court to use a motion for relief from judgment to scrutinize a party's motives for a voluntary dismissal in order to entertain sanctions would constitute a sea change in Florida civil procedure, have a chilling effect upon litigation in this State, discourage parties from asserting potentially valid claims for fear of retribution and cause widespread repercussions in the lending industry. The Certified Question should be answered in the negative.

I. IMPEDING A MORTGAGEE'S RIGHT TO DISMISS VOLUNTARILY WOULD CAUSE ECONOMIC TURMOIL AND WOULD BE CONTRARY TO PUBLIC POLICY

Initiating radical change in the applications of Rules 1.420 and Rule 1.540(b) could convert the mortgage debacle, from which Florida slowly is recovering, into a widespread financial crisis. The Amici's members rely on the stability and consistency of Florida law in order to advance foreclosure proceedings efficiently and fairly. An affirmative answer to the Certified Question would impact general credit and lending practices, just as the fragile real estate finance industry begins to rebound from a severe economic downturn. If the Amici's members face potential revocation of voluntary dismissals, lending practices in Florida could come to a grinding halt. The threat of sanctions would

force lenders either to prosecute technically infirm cases, rather than cure defects in a new proceeding, or risk being prohibited from re-filing, after faulty documents have been corrected. Such unduly harsh procedural impediments would deprive lenders of the ability to collect their loans or apply collateral to satisfy these obligations. Without the ability to collect on defaulted notes, lenders would be unable to make new loans and refinance existing indebtedness in this State. The economic impact could be devastating to the State of Florida.

The Amici do not condone, in any way, intentional misconduct in the foreclosure process or the initiation of judicial proceedings without proper documentation. Nor do the members of the Amici expect the expensive expediency of a voluntary dismissal, followed by a refiled suit, to be routinely employed; this practice should be the rare exception, used only when necessary. However, with large numbers of defaulted loans in their portfolios, members of the MBA and FBA no doubt occasionally will make clerical errors, lose promissory notes, or discover other deficiencies in their foreclosure complaints that mandate correction in the interests of fairness. For these lenders, having an absolute right to dismiss an initial complaint under Rule 1.420 in order to correct an error is critically important. The Court should not strip lenders and other litigants of the right to dismiss the case voluntarily, especially where it is sometimes necessary to

cure alleged defects in documentation in order to avoid improprieties in the judicial process.

Here, upon becoming aware of the allegations that the assignment was fraudulent, BNY Mellon decided to exercise its absolute right to terminate the litigation voluntarily without prejudice, in order to correct a potential flaw in the case. The right thing was done, albeit under uncomfortable circumstances. This Court has noted that discouraging the use of voluntary dismissals results in a "greater burden on the judicial system and a waste of litigants' resources. *See Coastal Petroleum Co., v. Mobil Oil Corp*., 583 So. 2d 1022, 1024 (Fla. 1991). Thus, a chilling effect on voluntary dismissals should be avoided whenever possible. *Id*. at 1024. Whether under the circumstances of this case or in general, Rule 1.540 should not be applied to voluntary dismissals without prejudice. Holding otherwise would increase, not relieve, the burden on our judiciary and would discourage litigants from asserting potentially valid claims for fear of possible sanctions. The economic implications to both lenders and the citizens of Florida would be vast and potentially devastating. The Certified Question should be answered in the negative.

II. TO MAINTAIN HARMONY IN THE APPLICATIONS OF FLA. R. CIV. P. 1.420 AND 1.540, THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE

To preserve the uniform interpretations of Florida Rules of Civil Procedure 1.420 and 1.540, and avoid unnecessarily harming business markets and disturbing virtually all aspects of civil litigation, this Court should give a negative answer to the Certified Question. "Neither rule 1.540(b) nor the common law exceptions to that rule allow a defendant to set aside the plaintiff's notice of voluntary dismissal where the plaintiff has not obtained any affirmative relief before dismissal." *Pino v. Bank of New York Mellon*, 57 So. 3d 950, 952 (Fla. 4th DCA 2011).

As BNY Mellon clearly and convincingly argued in its Brief, well-settled case law undergirds plaintiffs' absolute right to dismiss their complaints voluntarily before a hearing on a motion for summary judgment, pursuant to Rule 1.420(a). *See Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So. 2d 68, 69 (Fla. 1978); *Bevan v. D'Alessandro*, 395 So. 2d 1285, 1286 (Fla. 2d DCA 1981). The Amici's members and thousands of other civil litigants in Florida routinely make legitimate legal and business decisions, premised on the certainty that a trial court must honor the absolute right to dismiss voluntarily.

Being able to foreclose upon real property efficiently is crucial to lenders, especially smaller banks, who hold hundreds of defaulted mortgages. Having the

absolute ability to dismiss an initial foreclosure complaint in order to correct flawed documentation, in the interests of justice and fairness, is similarly important. Nothing about the facts of this case warrants circumscribing the absolute right to dismiss voluntarily.

The practical implications of revoking a voluntary dismissal cannot be overstated. Plaintiffs do not expect dismissed cases to be resurrected. Litigants, including the Amici's members, initiate thousands of lawsuits annually. Litigants develop strategies and weigh the strengths and weaknesses of their cases over the course of litigation, making reasoned decisions about where and when to continue to expend resources on lawsuits. Sometimes, a litigant learns that its pre-suit perception of the facts is incorrect. Sometimes, it is proper to end a technically flawed proceeding, and then recommence it after correcting the flaw. Under the Rules of Civil Procedure, a plaintiff may voluntarily dismiss his or her lawsuit "simply by announcing that fact." *Randle-Eastern*, 360 So. 2d at 68. Reopening a voluntarily dismissed lawsuit, in order to consider imposing sanctions, would foist inordinate insecurity into what should be routine business decisions and contravene Rule 1.420(a)(1).[2]

Florida's courts approve of using corrective assignments to cure flaws in previously recorded documents. *See Riggs v. Aurora Loan Services, LLC,* 36 So.

[2] Even Florida Statutes, §57.105 provides for a safe harbor, permitting a party to withdraw a flawed claim or defense voluntarily, to avoid exposure to sanctions.

3d 929, 932 (Fla. 4th DCA 2010); *Glynn v. First Union Nat'l Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 2005). The recording of a defective assignment does not justify the imposition of serious sanctions upon a foreclosing plaintiff. It does, however, justify the voluntary dismissal of a foreclosure case in order to correct technically flawed instruments.

A. Rule 1.540 Does Not Apply to a Voluntary Dismissal Without Prejudice

The 1967 Authors' Comments to Rule 1.540 make the intended scope of the Rule clear:

> Subsection (b) provides for motion practice to relieve a party upon such terms as are just from a *final* judgment, decree, order, or proceeding on five specified grounds, whereas the comparable Federal Rule provides for an additional reason whenever it justifies relief from operation of the judgment.

Fla. R. Civ. P. 1.540, Comments (emphasis added). The Comments further note that "as in the Federal Rule, Rule 1.540(b) does not extend to interlocutory judgments." The application of Rule 1.540(b) specifically was limited to final judgments, decrees and proceedings; it does not apply to non-final orders or events during the course of litigation. *See, e.g. Hollifield v. Renew & Co., Inc.*, 18 So. 3d 616, 617 (Fla. 1st DCA 2009); *Hialeah Hotel, Inc. v. Woods*, 778 So. 2d 314, 315 (Fla. 3d DCA 2000).

In *Pino*, the Fourth DCA cited *Miller v. Fortune Insurance Co*., 484 So. 2d 1221 (Fla. 1986), for the proposition that Rule 1.540(b) may be used to afford relief to "all litigants who can demonstrate the existence of grounds set out under [Rule 1.540(b)]." *Pino,* 57 So. 3d at 955. Relying on *Miller*, in his initial brief, Pino argues that "A notice of voluntary dismissal is a 'proceeding' from which the court may grant relief under Rule 1.540(b)." Initial Brief – Merits, at 9; *see also Miller*, 484 So. 2d at 1224. However, *Miller* involved an erroneous dismissal *with prejudice* that the plaintiff sought to correct. A dismissal with prejudice, of course, is a final decree or proceeding. However, "[a] dismissal without prejudice is not an adjudication on the merits." *CPI Mfg. Co., Inc. v. Industrias St. Jack's,* 870 So. 2d 89, 92 (Fla. 3d DCA 2003); *see also Delgado v. J. Byrons, Inc.*, 877 So. 2d 822, 823 (Fla. 4th DCA 2004). Accordingly, *Miller* does not subject all voluntary dismissals to scrutiny under Rule 1.540(b).

Re-interpreting Rule 1.540 to extend to non-final orders or proceedings in general, and voluntary dismissals without prejudice in particular, would be a radical change in procedure, not contemplated by the drafters of the Rule. Such a change in procedure would invite relitigation of every order and filing in an action, unnecessarily multiplying and confusing the systematic progress of justice in this State.

Pino relies heavily on *Select Builders of Florida, Inc. v. Wong,* 367 So. 2d 1089 (Fla. 3d DCA 1979), as the basis for employing Rule 1.540(b) to strike a notice of voluntary dismissal. Initial Brief – Merits at 9, 11-12. However, the Court in *Select Builders* determined that "…it certainly was within its inherent power (as an equity court) to protect its integrity," by revoking the notice of voluntary dismissal filed by a plaintiff, which had obtained *affirmative relief*. *Select Builders,* 367 So. 2d at 1091; *see also Service Experts, LLC v. Northside Air Conditioning & Electrical Serv., Inc.*, 56 So. 3d 26, 30-31 (Fla. 2d DCA 2010). *Select Builders* therefore neither supports Pino's argument that Rule 1.540 applies to a voluntary dismissal without prejudice nor justifies any drastic re-interpretation of the Rule.

B. Reopening a Case to Sanction a Party for Conduct of Counsel Is Inappropriate and Unnecessary

In his Rule 1.540(b) Motion to Strike Notice of Voluntary Dismissal and Motion for Dismissal with Prejudice, Pino asserted that the "nature of the misconduct is the apparent backdating of the assignment in this case." Appendix to Initial Brief – Merits, at A-71. However, Pino never accused BNY Mellon itself of having backdated the assignment. Initial Brief – Merits, at 9-11. To the contrary, Pino contended that BNY Mellon's trial counsel, the Law Office of David J. Stern, prepared the assignment and the firm's Operations Manager signed

it.[3] Appendix to Initial Brief – Merits, at A-76. Nothing in the record suggests that BNY Mellon even was aware that the assignment had been prepared.

Notably, Pino also did not claim that the assignment of *his* mortgage was false, *i.e.*, that assignor did not intend to assign the note to assignee. He merely argued that a phony assignment, discovered in a separate, unrelated case of Stern's, indicated that the assignment of Pino's mortgage was suspicious. After declaring that "all those at Plaintiff's counsel's firm who participated in the execution, witnessing and the notarization of the assignment of mortgage in an unrelated case did so with the intent of committing a fraud on this court," without citation or explanation, Pino leapt to the bold conclusion that the deficient assignment in the unrelated case constituted "sufficient grounds for believing the mortgage assignment in the instant case was similarly backdated." *Id.* at A-73.

Thus, Pino's Brief to this Court and his motions before the trial court do not allege that BNY Mellon itself did anything wrong. BNY Mellon is not alleged to have created the questionable documents itself, and there is no indication that BNY Mellon either was aware of or sanctioned the conduct of Stern's firm. Accordingly, BNY Mellon did not commit a fraud on the court because "it can[not] be demonstrated, clearly and convincingly, that the *party* has sentiently

[3] The MBA and FBA do not in any way condone the conduct in which the Stern Law Firm allegedly engaged. The Amici affirmatively discourage their members from engaging in misconduct in connection with the documentation of loans or the prosecution of foreclosures.

set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Pino*, 57 So. 3d at 954) (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989)) (emphasis added).

Pino argues that the court can dismiss a case with prejudice if a party has committed fraud. Initial Brief – Merits, at 14 (citing *Taylor v. Martell*, 893 So. 2d 645, 646 (Fla. 4th DCA 2005). Yet, the Fifth District Court of Appeal recently overturned a dismissal with prejudice where, as here, the validity of assignments and the plaintiff's standing to foreclose were at issue. *Deutsche Bank National Trust Co. v. Tony Lippi*, 2012 WL 162023 (Fla. 5th DCA Jan. 20, 2012).

The trial court in *Lippi* granted the homeowner's motion to dismiss with prejudice as a sanction for behavior attributed to the plaintiff and its counsel, which was designed to hinder the fair administration of justice. *Id*. at * 4. The appellate court held that "dismissing a case with prejudice is the ultimate sanction and should only be used in 'those aggravating circumstances in which a lesser sanction would fail to achieve a just result.'" *Id*. at *3 (quoting *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993)).

Contrary to the argument of Pino's Amicus, the appellate court in *Lippi* held, "Sanctions *short of* dismissing a case with prejudice are appropriate when the

errors are made by the attorney and not the client." *Lippi*, at * 3 (emphasis added). Because the lender apparently was not involved in the alleged improper act and the delay had not prejudiced the homeowner, the court ruled that "it was error for the lower court to dismiss [the] foreclosure action with prejudice as a sanction. Dismissal with prejudice is unwarranted in this case and the lower court should have considered less severe sanctions." *Id*. at * 4. The same is true in *Pino.*

Existing remedies, including the Rules Regulating the Florida Bar and criminal penalties, protect the integrity of the court system. Particularly worthy of note, the recent amendment to Fla. R. Civ. P. 1.110(b) promotes the increased accuracy of documents filed in support of foreclosure complaints and provides courts "greater authority to sanction plaintiffs who make false allegations." *In Re Amendments to the Fla. Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010). Provisions for heightened sanctions and greater protections for foreclosure defendants protect the integrity of the judicial system without upsetting long-standing legal precedent.

When mortgage lenders retain counsel to bring foreclosure actions, they do not become sureties for their counsel's behavior. Attorney misconduct is regulated by the Florida Bar — to which the Fourth District Court of Appeal promptly and appropriately reported Stern's firm for investigation and possible discipline. Employing Fla. R. Civ. P. 1.540(b) to reopen a case, which voluntarily has been

dismissed, in order to sanction a party for its attorney's alleged misconduct is unnecessary and misguided, and holds a party responsible for its attorney's behavior. Concern over being held accountable for its attorney's conduct could have a decidedly chilling effect on a party's decision whether to initiate litigation. Public policy disfavors judicial action which might dissuade a party from asserting its rights.

III. BECAUSE BNY MELLON HELD PINO'S NOTE, AS A MATTER OF LAW, THE ASSIGNMENT WAS IRRELEVANT TO BNY MELLON'S STANDING TO FORECLOSE

The Amici believe that the Certified Question should be answered in the negative. However, should the Court hold otherwise, the Amici suggest that the scope of such a ruling should be strictly circumscribed to avoid inappropriate and unnecessary repercussions in foreclosure litigation and the mortgage industry. Judicial scrutiny of mortgage assignments certainly is inappropriate when the plaintiff holds the note and generally may be improper even when the plaintiff is not a holder.

Florida courts ascribe to the "lien theory" in foreclosure cases, uniformly holding that "[b]ecause the lien follows the debt, there [is] no requirement of attachment of a written and recorded assignment of the mortgage in order" to maintain a foreclosure action. *Chemical Residential Mortgage v. Rector*, 742 So. 2d 300, 300-01 (Fla. 1st DCA 1998). Possession of the mortgage (or an

assignment of it) is not required inasmuch as "a mortgage is but an incident to the debt, the payment of which it secures." *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938), *quoted in Taylor v. Bayview Loan Servicing, LLC*, 36 Fla. L. Weekly D2448 (Fla. 2d DCA Nov. 9, 2011). When a note is properly transferred without a formal assignment of the mortgage, the mortgage passes to the transferee in equity. *Johns*, 184 So. at 143.

Even if an assignment is invalid, the holder of the promissory note has standing to sue to foreclose. *Philogene v. ABN Amro Mortgage Group*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006); *see also Johns*, 184 So. at 143; *MERS v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007); *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004); *Zimmerman v. Nilsson*, 363 So. 2d 1130 (Fla. 3d DCA 1978). An assignment is required to confer standing upon a foreclosing plaintiff only when the plaintiff is not a holder. *Lippi*, 2012 WL 162023 at *2, 3. As the Fourth District recently held,

> A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under section 673.3091, Florida Statute. *State St. Bank & Trust Co. v. Lord*, 851 So. 2d 790, 791 (Fla. 4th DCA 2003). Moreover, if the note does not name the plaintiff as the payee, the note must bear a special indorsement in favor of plaintiff or a blank indorsement. *Riggs v. Aurora Loan Servs. LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010). ***Alternatively***, the plaintiff may submit evidence of an assignment from the payee to the plaintiff or of an affidavit of ownership to prove its status as a holder of the note. *Verizzo v . Bank of N.Y*, 28 So. 3d 976 (Fla. 2d

> DCA 2010); *Stanley v. Wells Fargo Bank*, 937 So. 2d 708 (Fla. 5th DCA 2006).

Serviedo v. US Bank N.A., 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (emphasis added); *see also Lippi*, 2012 WL 162023 at *2, 3 (when plaintiff is a holder, the validity of an assignment is irrelevant).

Moreover, scrutiny of the validity of an assignment of mortgage may be inappropriate under any circumstances. Holding that a borrower lacks standing to contest an assignment of mortgage or trust deed is a growing trend in other jurisdictions.[4] These decisions reflect national, judicial recognition of the need to

[4] For a sampling of these cases, see *Rogan v. Bank One*, 457 F.3d 561 (6th Cir. 2006) (applying Kentucky law); *Liu v. T&H Machine, Inc*., 191 F.3d 790, 797 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract)(applying Illinois law); *Blackford v. Westchester Fire Ins. Co*., 101 F. 90, 91 (8th Cir. 1900) (applying laws of various jurisdictions to the Indian Territory); *In re Mortgage Electronic Registration Systems (MERS) Litigation*, 2011 WL 4550189 (D. Ariz. Oct. 3, 2011); *Peterson v. GMAC Mortg., LLC,* 2011 WL 5075613 (D. Mass. Oct. 25, 2011); *Livonia Props. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings*, 717 F. Supp. 2d 724, 747 (E.D. Mich. 2010) (plaintiff borrower did not have standing to dispute the validity of an assignment between assignor and assignee because plaintiff was a "non party to those documents"); *Bridge v. Ames Capital Corp*., 2010 WL 3834059 (N.D. Ohio Sept. 29, 2010); *Fryzel v. Mortgage Elec. Registration Sys.*, No. 10-352M (D.R.I. Jun. 10, 2011); *Wolf v. Federal Nat. Mortg. Ass'n*, 2011 WL 5881764, * 6 (W.D. Va. Nov. 23, 2011); *Ifert v. Miller*, 138 B.R. 159 (Bankr. E.D. Pa. 1992); *In re Perretta*, 2011 WL 6305552 (Bankr. D.R.I. Dec. 16, 2011); *Olson v. Iacometti*, 533 P.2d 1360 (Nev. 1975); *Kriegel v. Mortg. Electronic*, 2011 WL 4947398, *1 (R.I. Super. Oct 13, 2011); 29 Williston on Contracts, §74:50 (4th ed.) ("the debtor has no legal defense [based on the invalidity of the assignment] … for it cannot be assumed that the assignee is desirous of avoiding the assignment"). *See also Bank of New York Trust Co., v. Rodgers*, 2012 WL 126572 at * 1 (Fla. 3d DCA Jan. 18, 2012) (an assignment of mortgage is a self-executing instrument).

prevent the foreclosure process from being derailed by claims and defenses based upon technical matters, such as flaws in the execution of secondary documents.

While, at this time, this Court might decline to hold that a borrower generally lacks standing to contest a mortgage assignment, well-established Florida law certainly mandates the determination that, if a plaintiff is foreclosing based on a note that it holds, the technical validity of an assignment is entirely irrelevant and should neither be scrutinized nor provide a basis for setting aside an otherwise valid judgment.[5]

In reliance on well-settled Florida law, members of the MBA and FBA have commenced thousands of foreclosure proceedings. Reopening a voluntarily dismissed case due to questions about the validity of an assignment of mortgage, notwithstanding a validly transferred note, would overturn more than seventy (70) years of Florida jurisprudence. Since original notes must be surrendered prior to the entry of the judgment, additional procedural safeguards are unnecessary. The Amici, the MBA and FBA, therefore urge this Court to answer the Certified Question, "No."

[5] Frequently, when a loan is transferred, the new holder nevertheless will record an assignment to provide statutory notice to third-parties, such as purchasers or inferior lienholders. Florida Statutes, §701.02; *see Lippi*, 2012 WL 162023 at * 2, 3; *Am. Bank v. Rothenberg*, 598 So. 2d 289, 291 (Fla. 5th DCA 1992).

CONCLUSION

For the foregoing reasons, the Amici Curiae, the Mortgage Bankers Association and the Florida Bankers Association, respectfully request the Court to answer the Certified Question in the negative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief was prepared with Times Roman 14 point font and that it complies with the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I certify that, on this 3rd day of February, 2012, a true and correct copy of the foregoing was furnished by email and U.S. First Class mail to:

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