

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

\* \* \* \* \*

DEUTSCHE BANK NATIONAL	*	
TRUST COMPANY, as Trustee	*	
of the Residential Asset	*	
Securitization Trust	*	NO. H-11-CV-1658
2007-A8, Mortgage Pass-	*	
Through Certificates,	*	Houston, Texas
Series 2007-H under the	*	
Pooling and Servicing	*	2:04 p.m. - 2:56 p.m.
Agreement Date	*	
	*	January 27, 2017
vs.	*	
	*	
JOANNA and JOHN BURKE	*	

\* \* \* \* \*

**STATUS CONFERENCE**

BEFORE THE HONORABLE STEPHEN W. SMITH  
UNITED STATES MAGISTRATE JUDGE

\* \* \* \* \*

Proceedings recorded by electronic sound recording  
Transcript produced by transcription service.

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7 For the Defendants:

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## P R O C E E D I N G S

2:04 P.M. - JANUARY 27, 2017

THE COURT: Good afternoon, everyone. Please be seated.

All right. We're here on a status conference in the case of *Deutsche Bank, et al vs. John and Joanna Burke*, Civil Action H-11-1658.

Will counsel please state your appearances for the record.

MR. HOPKINS: Good morning, Your Honor, Mark Hopkins here on behalf of Deutsche Bank.

THE COURT: Mr. Hopkins.

MS. PFEIFFER: Good afternoon, Judge. Connie Pfeiffer and Fatima Hassan Ali here on behalf of the Burkes.

THE COURT: All right. Good afternoon, counsel.

All right, counsel, of course, this status conference is to assess where we are now on this case in light of the Fifth Circuit's ruling reversing this Court a few months -- well, back in the summer. I have asked the parties to address some issues in a Briefing Order. But I guess the most important question, seems to me, the first question is whether or not the trial record establishes whether or not Deutsche Bank had a

1 valid homestead lien under the provisions of Article  
2 XVI, Section 50 of the Texas Constitution. I've  
3 reviewed the parties' briefing on that. I appreciate  
4 that.

5                   But with that, let me hear from you,  
6 Ms. Pfeiffer, first, your arguments as to why the  
7 trial record does not -- or establishes, in fact, that  
8 the homestead lien is invalid.

9                   MS. PFEIFFER: Yes, Your Honor, we've outlined  
10 a few points and these are somewhat preliminary  
11 because we may not have all the documents we need to  
12 properly evaluate this. But in trying to determine  
13 whether the lien complies with all 26 requirements of  
14 the Texas Constitution, there's a few that we think  
15 perhaps are defects.

16                   And one being that we don't think that  
17 there was a signed Loan Application for this particular  
18 loan. It's our understanding that there was initially  
19 a signed Loan Application that was denied and that  
20 IndyMac later on contacted the Burkes that they could  
21 forward with the loan after all, but there wasn't a new  
22 application that was signed.

23                   THE COURT: There was also an issue with  
24 regard to the documents that were provided afterwards.

25                   MS. PFEIFFER: That's right. The documents

1 have to be provided at closing and I believe one of the  
2 Burkes testified during the trial that they weren't  
3 provided until four days after closing.

4 THE COURT: All right. All right, so --

5 MS. PFEIFFER: And they wouldn't have been  
6 provided with the signed Loan Application --

7 THE COURT: Yeah. So I think you may have  
8 mentioned that there was a false income statement  
9 included in the document that was provided to the  
10 Burkes and I recall Mr. Burke testifying to that. Is  
11 that one of your -- one of the contentions? Does that  
12 violate the Texas Constitution in your view?

13 MS. PFEIFFER: I don't think that violates  
14 the Constitution. I think it could be potentially a  
15 fact that would be relevant to the fraud claim.

16 THE COURT: All right. And of course, we  
17 don't -- you know, we're not trying a fraud case at  
18 this point.

19 All right, what other arguments under --

20 MS. PFEIFFER: That's all that we've been able  
21 to identify. And, you know, there's the 80 percent  
22 loan to equity requirement in the Constitution, that if  
23 the income were misstated, then the 80 percent rule has  
24 been violated. But we first have to prove that the  
25 income was misstated and, again, I think that may be a

1 fraud claim, because, as the loan was issued, it was  
2 within the 80 percent at the time.

3 THE COURT: The valuation of the home?

4 MS. PFEIFFER: That's right.

5 THE COURT: Okay.

6 MS. PFEIFFER: Yeah, I apologize, I'm now  
7 talking about the appraisal.

8 THE COURT: Okay, so it's the appraisal. I  
9 think there was a representation you made that there  
10 was a verbal appraisal that was given to Mr. and  
11 Mrs. Burke in the amount of \$740,000, whereas the  
12 actual -- I thought the loan agreement recited 770,000.  
13 And if it were the latter figure, then that would  
14 comply with the 80 percent rule, would it not?

15 MS. PFEIFFER: That's correct.

16 THE COURT: Okay.

17 MS. PFEIFFER: So, if the 770 is the right  
18 number, it's not a --

19 THE COURT: Where in the record is there  
20 evidence about the \$740,000 appraisal?

21 MS. PFEIFFER: It was a -- it was through  
22 testimony at trial.

23 THE COURT: All right. Then also, you made  
24 another claim with regard to the loan closing earlier  
25 than 12 days after the application. I guess that's

1 sort of tied up with your argument about there wasn't  
2 an application really?

3 MS. PFEIFFER: That's right.

4 THE COURT: But there was an initial  
5 application. As I understand, as I recall, there was  
6 an initial application that the Burkes made, which was  
7 turned down. And then later the bank, according to  
8 Mr. Burke or Mrs. Burke, contacted them and said, well,  
9 we think we can -- we can work something out, and  
10 something to the effect that the initial loan officer  
11 was no longer employed or no longer on the font.

12 So why couldn't the bank just reactivate  
13 the initial application, and would that not then comply  
14 with the time limits issue?

15 MS. PFEIFFER: I'm not sure that they couldn't.  
16 That might be a valid option for them.

17 THE COURT: And then I think you also make an  
18 argument that the -- that there was a failure to  
19 receive all the executed documents at closing. Is  
20 that -- and I guess that tracks back a little bit to  
21 your argument that they were provided the Loan  
22 Application four days after the closing?

23 MS. PFEIFFER: Yes, I think it's two-fold.  
24 One, I guess it would depend on whether that initial  
25 application is valid -- you know, whether the bank can

1 rely on that after it had been initially denied;  
2 whether that was provided to them at closing, which I'm  
3 not sure if that was; and if it was provided at closing  
4 or four days afterwards, as Mr. Burke testified.

5 THE COURT: Now, well, the only testimony that  
6 was in trial was Mr. Burke because the bank didn't call  
7 any witnesses. So there's no other evidence about  
8 contradicting the claim that he received it for the  
9 first time four days later.

10 Doesn't that provision of the Texas  
11 Constitution say that they have to receive the executed  
12 documents at the time the extension of credit is made?

13 MS. PFEIFFER: Yes.

14 THE COURT: Okay. And do we know what date  
15 that was? Is that the date of closing or is that  
16 another date?

17 MS. PFEIFFER: Well, it would be the closing  
18 date, but are you asking what precise date it was?

19 THE COURT: Well, I think we know what the  
20 closing date was, I believe.

21 MS. PFEIFFER: It would be when all the  
22 documents were signed.

23 THE COURT: Okay, when the documents were  
24 signed. So, at the time the extension of credit is  
25 made, that is the -- that's the closing date as far as



1 you're concerned?

2 MS. PFEIFFER: Yes.

3 THE COURT: All right. All right, well, let  
4 me hear from Mr. Hopkins. And again, I've reviewed  
5 your brief, Mr. Hopkins. Are you saying that the issue  
6 of the validity of the lien was already admitted in the  
7 defendant's answer?

8 MR. HOPKINS: Your Honor, I'm saying Texas  
9 law is very clear what a mortgagee has to prove at  
10 trial to substantiate its claim and move forward with  
11 foreclosure: That a debt exists, and the Burkes  
12 admitted in their answer that a debt exists and also  
13 in their trial testimony. That the debt is secured by  
14 a lien credit under the Texas Constitution regarding  
15 home equity lending. The Burkes also admitted that  
16 within their answer.

17 THE COURT: Where?

18 MR. HOPKINS: It's cited in my brief, Your  
19 Honor. It's -- and I footnoted it. Their answers is --

20 THE COURT: Well, I have a copy of the  
21 defendant's answer and I think you refer to paragraph 8  
22 and I'll read it here. It says, "Defendant admits that  
23 the loan referenced in paragraph 7 was made pursuant to  
24 Article XVI, Section 50(a)(6) et seq. of the Texas  
25 Constitution. However, Plaintiffs deny that the loan

1 complied with Article 16, Section 50(a)(6) et seq. of  
2 the Texas Constitution."

3 Didn't they put that at issue then?

4 MR. HOPKINS: Your Honor, with the aid of  
5 counsel because they had the counsel at the time that  
6 their answer was final. They agreed that the loan was  
7 intended to be a home equity loan under the  
8 Constitution, and they assert that the lien or loan  
9 documents do not comply with the requirements of the  
10 Constitution. And as set out elsewhere in my brief,  
11 that representation alone is insufficient to put the  
12 bank on notice, which was with respect to what the  
13 defects are with the loan agreement.

14 Specifically, the *Curry* case, the Dallas  
15 Court of Appeals on very similar grounds, where the  
16 borrower says --

17 THE COURT: Is that a summary judgment case?

18 MR. HOPKINS: Yes, Your Honor.

19 THE COURT: Okay. We're not at summary  
20 judgment stage here, right, we're after a trial?

21 MR. HOPKINS: I don't believe the bank's  
22 burden is any different at a summary judgment than at a  
23 trial of this cause, Your Honor. They were required to  
24 establish --

25 THE COURT: Well, wait a minute. A summary

1 judgment under Texas law, the moving party has to  
2 establish, you know, that there's no issue of law that  
3 they're entitled to relief, so that burden is not the  
4 same as the trial burden.

5 MR. HOPKINS: Your Honor, I believe we're  
6 discussing how the issue of whether or not a loan is  
7 compliant with the Texas Constitution comes in new  
8 existence.

9 The Texas Supreme Court in the *Wood* case,  
10 which Ms. Pfeiffer was counsel for, describes the cure  
11 provisions and a borrower's obligations as a defense to  
12 foreclosure, the cited language in my brief.

13 The sister case to that Supreme Court  
14 case, that *Garofolo* case, describes the borrower's  
15 rights to challenge whether a home equity loan is  
16 compliant as a shield to foreclosure.

17 THE COURT: A shield. You accord "shield" with  
18 affirmative defense?

19 MR. HOPKINS: I do, Your Honor. And Your  
20 Honor had asked us to look into the *EverBank* case from  
21 the 14th Court of Appeals. While not the *EverBank*  
22 case, the 14th Court of Appeals -- may I sit when I  
23 read this screen?

24 THE COURT: Sure.

25 MR. HOPKINS: The 14th Court of Appeals, in

1 *Wilson vs. Ames Capital* -- it's at 2007 Westlaw  
2 3072054 -- in that case the Court of Appeals  
3 entertained a borrower's allegations that a lender was  
4 required to prove all the 26 elements of the Texas Home  
5 Equity lending requirements within their case in chief.

6           And reading the Court's response, it  
7 reads, "Wilson's challenge to the evidence supporting  
8 the judgment relies on her contention that as the party  
9 seeking to enforce the lien (Ames, the lender) had the  
10 burden to plead and prove that its lien on Wilson's  
11 homestead satisfied the many requirements set forth in  
12 Subsections 50(a)(6), A through Q. However, Wilson  
13 cites no authority, and we have found none, indicating  
14 that a home equity lender seeking to enforce its lien  
15 has the burden of proof on those requirements."

16           Continuing, the Court says, "If anything,  
17 judicial economy would dictate that a failure to comply  
18 with any of these requirements is in the nature of an  
19 affirmative defense, so that judicial resources are  
20 spent litigating the few requirements that are  
21 contested rather than the many that are not."

22           That's from the 14th Court of Appeals,  
23 Your Honor. And I believe that matches with the  
24 Constitution, the way, as described in the *Wood* case, a  
25 lender always has the right to cure, and a borrower is

1 put to the obligation of letting the lender know where  
2 the defects are.

3 THE COURT: And in this case the argument is  
4 that Mr. Burke notified the bank about the false  
5 information on the application about his income and  
6 nothing was done about it.

7 MR. HOPKINS: Your Honor, first, the notice  
8 has to be in writing.

9 THE COURT: Where is -- does the Constitution  
10 say that?

11 MR. HOPKINS: It specifically provides that  
12 the notice must be in writing, Your Honor. Nowhere in  
13 the trial court's record does it reflect that the bank  
14 was given written notice.

15 And I'd also point out to the Court,  
16 while the Court only has the aid of the evidence that's  
17 before it, the Burkes consistently use the term  
18 "employment income." It's not -- and I believe the  
19 Court may have the perception that this loan was closed  
20 with no reflection at all with respect to the Burkes'  
21 income. I've had the benefit of reviewing that closing  
22 file, which wasn't put in evidence before the Court  
23 because the allegations were raised by the Burkes. But  
24 it clearly shows that Mrs. Burke has an offshore  
25 pension account, foreign bank accounts that she asked

1 be kept strictly confidential, banking relations with  
2 Barclay's, Bank of America, Chase and Citi, and credit  
3 from Neiman's and Nordstrom's and Jaguar.

4 THE COURT: Well, the bank never -- the bank  
5 had the opportunity at trial to introduce the evidence  
6 or to contradict Mr. Burke's testimony and did not, so  
7 this is out.

8 MR. HOPKINS: If the issues were tried, Your  
9 Honor.

10 THE COURT: Well, and of course, I'm reading  
11 from your -- the Plaintiff's Pretrial Order. One of  
12 the contested propositions of law was whether or not  
13 Plaintiff has a valid and subsisting home equity home  
14 made pursuant to Article XVI, Section 50(a)(6), et seq.  
15 of the Constitution. So there's no doubt, seems to me,  
16 that the issue of the validity of the lien was  
17 something to be tried.

18 MR. HOPKINS: Your Honor, I respectfully --

19 THE COURT: Then we get to the issue of  
20 burdens of proof.

21 MR. HOPKINS: I respectfully disagree with  
22 Your Honor. I've cited 10 or 12 cases in my brief that  
23 set out what our burden was. I could have easily cited  
24 a hundred or two hundred that set out that across Texas  
25 it's very standard in these types of cases for a debt,

1 a lien and default and notices, and that's the extent  
2 of the proof.

3 THE COURT: I know. And you cited all --  
4 these are all federal court cases, but "To foreclose  
5 under a security instrument in Texas ..." -- and I'm  
6 reading from your brief --

7 MR. HOPKINS: Yes.

8 THE COURT: -- which quotes Judge Miller, not  
9 Judge Smith, by the way -- "the lender must demonstrate  
10 (1) a debt exists; (2) the debt is secured by a lien  
11 created under Article XVI, Section 50(a)(6) of the  
12 Texas Constitution."

13 So, that's your element. That's one of  
14 the elements of the mortgagee's prima facie case,  
15 right, entitling the mortgagee to foreclose?

16 So item (2) is whether there's a valid  
17 lien under the Texas Constitution; correct?

18 MR. HOPKINS: Your Honor, with all respect,  
19 you and I can both Wordsmith our briefs. I am trying  
20 to articulate for the Court what I believe Texas law is  
21 and what's required to be shown at trial.

22 THE COURT: Well, I guess where we're -- and I  
23 don't mean to quibble with you, but from reading your  
24 brief, you seem to say that the whole issue, entire  
25 issue of the validity of the lien, under the Texas

1 Constitution had already been admitted or conceded by  
2 the defendants, and I do not think these pleadings  
3 support that. In fact, they clearly contradict that.

4           Now, with regard to once the issue is --  
5 you know, exactly what your burden of proof is to  
6 establish the validity of the lien under the Texas  
7 Constitution, I will take a look at those cases that  
8 you cited. But it seems to me, just in general, that  
9 that is part of your prima facie case, the burden to  
10 show that you -- and that this is a lien that's valid  
11 under the Texas Constitution.

12           MR. HOPKINS: And, Your Honor, I understand  
13 what you're asserting. And if this Court were to so  
14 hold that a lender is required to establish these 26  
15 elements in connection with foreclosing on a home  
16 equity loan, I would argue that this would be the only  
17 Court in Texas, state or federal, that has put a  
18 lender to such a burden. I believe the issue is only  
19 relevant -- and if you look at the Texas Supreme Court  
20 in *Wood* that I've set out in my brief, it sets out that  
21 a homestead lien that may not have complied with  
22 constitutional requirements at the outset --

23           THE COURT: Can be cured, I understand.

24           MR. HOPKINS: -- can be made valid at a later  
25 date.



1 THE COURT: Right.

2 MR. HOPKINS: If they give us proper notice  
3 and a notice -- if they give us proper notice and  
4 opportunity to cure. And then that issue is what's  
5 tried as their affirmative defense at trial: What  
6 notice did they give us, what actions didn't we take,  
7 and was their notice justified? That didn't happen in  
8 this case because it wasn't in their pleadings. It  
9 wasn't in the case that we came to try, Your Honor, and  
10 they did not make it an issue.

11 THE COURT: Okay. You understand that the  
12 Burkes represented themselves in this case. They did  
13 not have the benefit of counsel at trial?

14 MR. HOPKINS: I understand that.

15 THE COURT: And you understand also that there  
16 was no Joint Pretrial Order in this case that was  
17 signed that narrowed down the issues at trial, which is  
18 common and customary. And in fact, in your brief, the  
19 submission, the Proposed Pretrial Order, you know,  
20 basically -- it doesn't say we don't have to prove  
21 anything with regard to the -- to the existence of a  
22 valid lien under the Texas Constitution. It didn't say  
23 that.

24 MR. HOPKINS: Your Honor, I did not try the  
25 case but I also -- and I'm not taking cover for that

1 fact, but I also don't believe any pretrial filing on  
2 behalf of a party can actually change their required  
3 burden of proof under the law.

4 THE COURT: Okay. But it does make a  
5 difference as to whether or not an issue has been  
6 conceded and admitted in an answer. You agree with me  
7 there; right?

8 MR. HOPKINS: Your Honor, when I try cases, I  
9 look at the pleadings.

10 THE COURT: I do, to.

11 MR. HOPKINS: And in this case I looked at the  
12 Burke's pleadings.

13 THE COURT: And their pleadings say they  
14 didn't agree that your home equity lien was valid under  
15 the Texas Constitution. So that issue was in play in a  
16 general way. Now, I think, you know, you're focusing  
17 on the particular elements, whether or not all the 26  
18 elements, there has to be proof of all those. May be  
19 or may not be according to the cases that you cited,  
20 and I will take a hard look at those.

21 MR. HOPKINS: Yes. And I wanted to impress  
22 upon the Court, to the extent possible, that the  
23 allegation -- the general allegation that the loan does  
24 not comply with the Texas Constitution is insufficient  
25 as determined by both the Supreme Court in *Wood* and

1 also the Dallas Court of Appeals in *Curry*, where they  
2 require specific allegations with respect to what the  
3 defect is so the bank can specifically focus and  
4 address the concerns as they're combing through the  
5 entire loan documents. That's what I believe Texas  
6 State Court law is.

7 THE COURT: All right.

8 Ms. Pfeiffer, do you have anything to  
9 offer in this -- on these points?

10 MS. PFEIFFER: Very briefly, Your Honor, and I  
11 think Mr. Hopkins and I are both in difficult positions  
12 trying to speak to a record that we haven't lived  
13 through and a trial that we haven't lived through.

14 I am a hundred percent confident that  
15 where the validity of the lien is at issue, then the  
16 burden is on the lender to prove that they have a valid  
17 lien to foreclose on. And I do agree with Your Honor  
18 that the pleadings don't seek the validity of the lien.

19 THE COURT: What about the particular  
20 elements -- assuming, then, that the validity of the  
21 lien is an issue to be tried at trial, in your view,  
22 what is the burden of the lender, what do they have to  
23 show to meet that burden?

24 MS. PFEIFFER: Well, in my view, the burden  
25 would be to show whatever particular defects are

1 alleged, that they are not actually defects. And so I  
2 would agree with Mr. Hopkins that you don't have to go  
3 through and show every single of the 26 requirements  
4 unless they're all at issue, which I think in most  
5 cases they wouldn't be. So it would be a  
6 defect-by-defect showing.

7 THE COURT: Well, how do you -- is it an  
8 affirmative defense? Does the homeowner have to allege  
9 affirmatively, as an affirmative defense, the lien is  
10 not valid because it does not meet X, Y, Z or 1, 2, 3  
11 requirements?

12 MS. PFEIFFER: No, it's not an affirmative  
13 defense because then the burden would be on the  
14 homeowner. It's simply -- it's a denial. It's simply  
15 putting at issue --

16 THE COURT: Right.

17 MS. PFEIFFER: -- that there is a valid lien  
18 that could be foreclosed on.

19 THE COURT: And so obviously, in most cases  
20 they go to trial. It's unusual to go to trial where  
21 one side is represented by counsel and the other side  
22 is not. Ordinarily, if both sides are represented at  
23 trial, then counsel work together to narrow down the  
24 issues and then the Court proceeds. In this case that  
25 didn't happen. And so, again, I'd like to have an idea

1 from you, from your perspective as to what it was that  
2 the bank would be required to prove.

3 MS. PFEIFFER: Well, is it -- is it --

4 THE COURT: Go ahead.

5 MS. PFEIFFER: -- the case that the Burkes  
6 were pro se during the trial?

7 THE COURT: They were -- they were pro se  
8 during the trial. In fact, they were initially  
9 represented by counsel, I believe, at the time the  
10 answer was filed. But about that time their counsel  
11 withdrew or they were no longer represented. So, for  
12 the great balance of this litigation up to the time of  
13 trial, they were representing themselves.

14 MS. PFEIFFER: I mean, I do think when you're  
15 the party with the burden of proof, especially when  
16 your opponent is pro se, you would want to go above and  
17 beyond what would ordinarily be required. **But if there**  
18 **were no clarity on which particular defects the Burkes**  
19 **were alleging, the defendant has to prove every last**  
20 **part of the Constitution was complied with.**

21 THE COURT: Of course, at trial, though, we  
22 did have testimony from Mr. Burke with regard to what  
23 he felt like was the problem with the loan application.

24 MS. PFEIFFER: It sounds like that went  
25 unrefuted.

1 THE COURT: Well, it was. There were no  
2 witnesses called by the bank. They weren't -- the only  
3 people that testified at trial were Mr. and Mrs. Burke.

4 MR. HOPKINS: Your Honor, for the purpose of  
5 clarity for our record --

6 THE COURT: Yes.

7 MR. HOPKINS: -- while Deutsche Bank didn't  
8 call its own witnesses, it certainly did object to  
9 Mr. Burke's testimony with respect to these issues.

10 THE COURT: Object? You mean object to the  
11 testimony itself?

12 MR. HOPKINS: Yes, Your Honor.

13 THE COURT: Okay, in not overruling the  
14 objections that were made -- in fact, I do recall  
15 sustaining some hearsay objections, but the evidence  
16 came in.

17 MR. HOPKINS: Your Honor, if the implication  
18 is that Deutsche Bank elected that these matters were  
19 to be tried by consent, the record squarely reflects  
20 that trial counsel objected to this testimony and the  
21 issues were not tried by consent and they are not  
22 supported by the pleadings.

23 THE COURT: Which issues are you talking  
24 about? I'm talking about the validity of the law and  
25 also the -- okay.

1 MR. HOPKINS: Yes, Your Honor.

2 THE COURT: So you're saying that -- okay,  
3 well, I'll go back and read the transcript and see if  
4 there was specific objection to this testimony.

5 MR. HOPKINS: Yes, Your Honor.

6 THE COURT: All right. Then I suppose that  
7 brings me to the third issue, which I guess I would  
8 like counsel to enlighten me because I'm still  
9 confused. I am -- I have read the Fifth Circuit's  
10 ruling several times and I guess I am just dense. It's  
11 still incomprehensible to me. Perhaps my original  
12 opinion was unclear, it must have been, because it  
13 seems to me that the Fifth Circuit opinion and my  
14 decision seemed to be like two ships passing in the  
15 night. Maybe we were driving down two different  
16 highways in different directions. But let me throw  
17 this out to both sides and you can tell me where you  
18 think I'm wrong.

19 I totally get and understand and don't  
20 dispute that MERS has the authority and the capacity to  
21 act as both beneficiary and nominee. Texas law, that's  
22 clear. So they can act both as a principal and as an  
23 agent regarding homestead property rights. They have  
24 rights as a beneficiary. They act as an agent on  
25 behalf of banks who also have rights in the property.

1 I don't dispute that at all.

2           In fact, that's not really a novel or  
3 surprising proposition because most legal entities and  
4 individuals have the right to act both as a principal  
5 and on behalf of other people. They can act both as  
6 principal on their own behalf and as an agent for  
7 somebody else. Attorneys make a living doing that.  
8 They act on behalf of others, their clients. And yet  
9 attorneys can also act on their own behalf. For  
10 example, they sign an office lease. They're acting and  
11 they're on the line.

12           So it seems important for attorneys, just  
13 like any other entity, to spell out when they execute a  
14 contract in what capacity they're executing a contract.  
15 What hat are they wearing, the principal on their own  
16 behalf or as an agent on behalf of somebody else? I  
17 mean, is there anything controversial about that? I  
18 don't -- I don't see that there is.

19           And so even when a party has the authority  
20 or the capacity to exercise such a right, whether it  
21 has in fact exercised that right in that capacity is a  
22 separate issue, seems to me. Okay? And it seems to me  
23 especially important to be clear in a contract when the  
24 attorney and the client both share an interest in the  
25 subject matter. So, for example, if they were -- the



1 attorney and his client were co-owners of a certain  
2 piece of property and the attorney would be asked to  
3 draw up deeds or contracts regarding that property.

4           And so maybe it would help -- maybe it  
5 would help you to follow me and tell me where I'm  
6 wrong. We take a hypothetical. Assume that  
7 Mr. Hopkins has a 10 percent interest in a building  
8 and his client, the client bank, owns the remaining 90  
9 percent. The client bank asks Mr. Hopkins to prepare a  
10 contract, assigning the client bank's interest in that  
11 property to another bank, assignee bank. And  
12 Mr. Hopkins prepares a contract, he signs the contract  
13 on behalf of his client; in fact, below the signature  
14 states "Attorney Acting on Behalf of Client Bank."

15           Now, Mr. Hopkins, again, owns 10 percent,  
16 client bank owns 90 percent. Now, is there any  
17 question in your mind or anybody's mind that, as a  
18 result of that signature, the assignee bank acquires  
19 only the 90 percent interest of Mr. Hopkins' client?

20           Mr. Hopkins, do you disagree with that?

21           MR. HOPKINS: Your Honor, I, like you, have  
22 examined the Fifth Circuit's opinion in this case when  
23 they say: We appreciate that the assignment is in the  
24 name of MERS as nominee, not as beneficiary, and we  
25 think the fact -- we appreciate the distinction and we

1 find it unimportant.

2 THE COURT: I didn't see they said anything  
3 about appreciating the distinction. They said they  
4 didn't find any case --

5 MR. HOPKINS: I put that in my own  
6 parenthetical.

7 THE COURT: -- that found it, okay.

8 MR. HOPKINS: Usually, they speak with a  
9 purpose. So, to answer your question and your  
10 hypothetical, I believe 90 percent interest in the  
11 property was conveyed.

12 THE COURT: Okay, all right. Then what if  
13 then the assignee bank comes back and says, "Wait a  
14 minute, Mr. Hopkins, you signed this contract. You  
15 also own 10 percent. And so, in fact, we acquired your  
16 10 percent, as well as your client's 10 percent"? I  
17 mean, that would be a bogus argument; right?

18 MR. HOPKINS: I believe XXX doesn't get  
19 anything.

20 THE COURT: Okay, all right. So there would  
21 be no intent, based on the facts as I've presented  
22 here, to transfer your own interest, Mr. Hopkins, only  
23 your client's interest, okay. And we know that based  
24 on the language of the contract.

25 So I suppose, though, it's possible that

1 if you, Mr. Hopkins -- again, in my hypothetical  
2 situation, I'm sorry to pick on you. But if you had  
3 intended also to transfer your 10 percent, as well as  
4 your client's 90 percent, probably there would be a  
5 separate signature line for that where you would be  
6 signing as principal on your own behalf, and then  
7 another signature line where you're signing on behalf  
8 of your client. But absent that or some other evidence  
9 of intent, I don't think that any court in Texas would  
10 find that you had assigned away your own 10 percent  
11 interest in that property.

12                   Okay, so take it one step further. Assume  
13 the same facts, but assume that client bank, your  
14 client, had already sold its rights to the property to  
15 a third party, so that at the time of this assignment  
16 it had no interest in the property. In that event,  
17 seems to me, the assignee bank would acquire no rights  
18 in the property because that would be a null and void  
19 assignment. I mean, my understanding is, seems to me,  
20 I think this is pretty much Hornbook Law, isn't it,  
21 that an assignor cannot assign away rights it doesn't  
22 have.

23                   So you see where I'm heading with all of  
24 this. You substitute MERS in place of Mr. Hopkins in  
25 these transactions and you have what I view as the

1 assignment in this lease; that you apply the same  
2 rules, contract construction that apply in any other  
3 normal contract case, this assignment or that  
4 assignment would be void.

5                   Now, obviously, Fifth Circuit didn't agree  
6 with that and I'm trying to understand why. It seems  
7 to me two possibilities would come to mind. One, a  
8 Court was rejecting, you know, centuries worth of  
9 common law regarding principal and agent and capacity  
10 to contract. Certainly, that would be ridiculous. I  
11 mean, I can't contemplate that that's what they  
12 intended. Or the Court is saying those rules that  
13 apply to any other legal entity in Texas don't apply to  
14 MERS, that MERS is unique in Texas law.

15                   Now, maybe that's the view they took and  
16 that seems to be, you know, what they said there in the  
17 footnote. They said they hadn't found a single case  
18 from any Texas State Court that made that distinction  
19 between MERS signing a contract or executing an  
20 assignment as a principal versus MERS signing as an  
21 agent. In other words, it seems to me the Court is  
22 saying that whenever MERS' signature appears on a  
23 document, they are always acting both as principal and  
24 agent regardless of what the language may say, even if  
25 the language says MERS signed solely as nominee or

1 agent for their member bank. And the Court said, no,  
2 Texas -- Texas court ruled otherwise.

3           And so that's where, seems to me, every  
4 bank comes in because that opinion distinguishes  
5 between MERS acting as a beneficiary versus MERS acting  
6 as a nominee. I grant you the context is different and  
7 it deals with an argument regarding the assignment of a  
8 note, I think, rather than a deed. It doesn't involve  
9 a Deed of Trust, I grant you that. But, at least, you  
10 have a Texas Court of Appeals recognizing the  
11 distinction that seems to -- that I was drawing and  
12 that Texas law always draws with regard to other legal  
13 entities in Texas that you can act sometimes as an  
14 agent, sometimes as a principal, and the language of  
15 the document determines which it is.

16           So it seems to me that we now have a  
17 Texas Court recognizing the distinction that the Fifth  
18 Circuit said did not exist or they couldn't find a  
19 Texas case that said it existed.

20           So, walking all that through, how can I  
21 be sure then that the Fifth Circuit might not rule  
22 differently if they don't -- if they are confronted  
23 with this new case from the Texas Court of Appeals?

24           Mr. Hopkins?

25           MR. HOPKINS: First of all, Your Honor, you

1 asked if MERS was different from anyone in Texas and I  
2 point out that Texas Statute, speaking with a smirk,  
3 says book entry system.

4 THE COURT: I understand.

5 MR. HOPKINS: And nowhere are you and I listed  
6 as a book entry system, so they are unique in some  
7 degree. Your question regarding the *EverBank* case, the  
8 *EverBank* addresses MERS' rights and capacities if it  
9 were a note holder and also its rights and capacities  
10 if it were acting as a beneficiary. The language Your  
11 Honor has focused on was MERS as a note holder. And  
12 there could be a distinction as -- not implied, but as  
13 discussed modestly in *EverBank*, whether MERS can hold a  
14 note as a nominee. *EverBank* was relying on *Nueces*  
15 *County vs. MERSCORP*, and you remember the news where all  
16 the counties were suing MERS.

17 THE COURT: Okay.

18 MR. HOPKINS: That *Nueces County* opinion  
19 further fleshed out the distinction Your Honor was  
20 talking about. That case was subsequently dismissed.  
21 Its sister case, *Harris County vs. MERS*, went to the  
22 Fifth Circuit and the Fifth Circuit rejected the  
23 arguments that were within the District Court case in  
24 *Nueces County*.

25 So I would present to the Court that the

1 Fifth Circuit has been presented with the possibility  
2 of this distinction in the Harris County case. They  
3 specifically rejected it. They also specifically  
4 objected that it's important in our case. I'm not a  
5 judge. I'm not an appellate judge. I don't have the  
6 wisdom that those justices have. But as a litigator  
7 handling thousands of foreclosures, whether MERS is  
8 acting as a nominee or a beneficiary does not seem to --

9 THE COURT: Doesn't seem to matter?

10 MR. HOPKINS: I didn't say that. It doesn't  
11 seem to be where any of the arguments focus, and the  
12 parties --

13 THE COURT: Well, I recognize -- I recognize  
14 that this tact that I seem to be -- that I am taking or  
15 this is -- hasn't been taken by another court, other  
16 than in every other contract -- in every other contract  
17 situation, Texas Courts, the U.S. Supreme Court has  
18 ruled on this distinction between someone signing a  
19 contract as an agent versus someone signing as a  
20 beneficiary. Justice John Marshall's court made that  
21 distinction. That's an ancient common law distinction  
22 to make, whether you're signing a contract and what  
23 capacity you're signing as principal or agent.

24 And so I don't understand -- I understand  
25 MERS is a new entity, but the reason why I gave you

1 the parallel of an entity of someone who acts both as  
2 principal and agent as an attorney, seems to me, I  
3 don't understand why there should be any difference.  
4 MERS has rights of its own as beneficiary and they can  
5 also act on behalf -- or exercise the rights as an  
6 agent of their member banks. That's the same thing  
7 that an attorney does. That's the same thing that  
8 anybody does that can act both as a principal and an  
9 agent.

10                   And so I'm just flummoxed as to why it  
11 should make a difference. If MERS and MERS' -- the  
12 attorneys prepare documents and they sign documents and  
13 MERS says, "I am acting solely as nominee for this  
14 bank," it seems to me, that seems -- if you're reading  
15 the English language and understanding the English  
16 language, that means MERS is not acting on its own  
17 behalf. We're not asserting the rights as beneficiary.  
18 I guess we could, just like MERS has the authority as  
19 the mortgagee under Texas law to foreclose or they can  
20 give that right to somebody else. And my understanding  
21 is, as a manner of policy, MERS doesn't foreclose on  
22 their own.

23                   And so I don't, for the life of me, I  
24 can't understand why we have this exception for MERS  
25 that doesn't apply to any other legal entity under the



1 law.

2 MR. HOPKINS: Your Honor, my response, I'm in  
3 District Court, but I was retained after the case was  
4 tried, so as appellate counsel --

5 THE COURT: Sure.

6 MR. HOPKINS: -- that I appreciate Your  
7 Honor's argument and that is not the argument that I  
8 see being advanced in the state court or at federal  
9 court level because they look beyond MERS as nominee or  
10 beneficiary. And I suggest to the Court, I appreciate  
11 that Your Honor closed the evidence in the case, but if  
12 we wanted to let ourselves out of the trap with respect  
13 to whether or not Deutsche Bank really had standing to  
14 foreclose, Your Honor says perhaps the assignment's  
15 defective. I challenge that argument, and I have.

16 THE COURT: And the Fifth Circuit agreed with  
17 you.

18 MR. HOPKINS: And I suggested to Your Honor  
19 that, while not required, Deutsche Bank was more than  
20 capable of presenting the original note, which is a  
21 separate avenue to foreclose. Of course, that didn't  
22 come into evidence. I asked the Court to consider that  
23 and that had been rejected. So here we are  
24 discussing --

25 THE COURT: You're asking for a new trial --

1 you're asking for a do-over again, and that --

2 MR. HOPKINS: Within your discretion, Your  
3 Honor, I just say --

4 THE COURT: I understand.

5 MR. HOPKINS: -- in my mind equity -- the  
6 facts of the case tell me, even had MERS not been able  
7 to foreclose as beneficiary, it certainly could have  
8 pursued its rights as a note holder. Also, not in the  
9 case that was presented to the Court, just like the home  
10 equity violations weren't presented to the Court. It  
11 could have taken a much different case.

12 THE COURT: Thank you, Mr. Hopkins.

13 Ms. Pfeiffer, I mean, I realize you, in  
14 your submission you seem to agree with Mr. Hopkins that  
15 *EverBank* doesn't change things.

16 MS. PFEIFFER: That's correct, Your Honor.  
17 And I do want to make an important clarification, which  
18 is we don't necessarily agree that the Fifth Circuit  
19 was correct in reversing this Court's judgment. But  
20 the question presented to us was: Does *EverBank* give  
21 the Court a basis as regarding Fifth Circuit opinion?  
22 We don't see that.

23 And I will add -- and Ms. Hassan Ali might  
24 want to comment on this as well -- I do think the  
25 Court's hypothetical and understanding of centuries of

1 common law is correct, and it may just be that MERS is  
2 unique.

3 MS. HASSAN ALI: Yes, Your Honor. In my  
4 research in this matter or in this issue, I could find  
5 no other case where in the distinction -- well,  
6 actually, as the Fifth Circuit opinion notes in  
7 *Casterline*, there is, you know, understanding that MERS  
8 acting as a nominee could do what it did similar to  
9 what it did here. But perhaps MERS is just a creature  
10 or a statute and, as such, is able to -- it may be  
11 difficult to distinguish between it acting as a nominee  
12 and a beneficiary in the way that you set out in your  
13 hypothetical with the bank versus the attorney.

14 THE COURT: All right. Mr. Hopkins?

15 MR. HOPKINS: Your Honor, while we're here --

16 THE COURT: Yes, ma'am, -- yes, sir, excuse me.

17 MR. HOPKINS: You -- I read your footnotes,  
18 Your Honor, and you had suggested that the bank isn't  
19 relieved from any obligation it had with respect to  
20 mediating this case. And you had indicated you had  
21 instructed that mediation occur twice, and I wanted to  
22 address that issue, Your Honor.

23 THE COURT: Okay, go ahead.

24 MR. HOPKINS: First, trial counsel, I believe,  
25 was required to mediate prior to trial, and there was

1 discussion on your record how that did not occur  
2 because of an accident in scheduling, no one's  
3 intentional election not to mediate.

4           After I was retained, we were here before  
5 Your Honor and you indicated that you would be signing  
6 an order requiring mediation, but prior to the entry of  
7 that order, the case was once again taken back to the  
8 Fifth Circuit. So this Court, I believe, didn't enter  
9 that order. As soon as the case was remanded back to  
10 you and you appointed Ms. Pfeiffer, I did call  
11 Ms. Pfeiffer and introduce myself. I did send written  
12 correspondence that we would mediate the case at any  
13 time. We have engaged in that discussion. It hasn't  
14 been fruitful and I'll let -- I didn't directly engage  
15 the Burkes because they in the past have been rather  
16 hostile --

17           THE COURT: Yeah, that hasn't been very  
18 fruitful, yes.

19           MR. HOPKINS: And I believe Ms. Pfeiffer --  
20 I'll let her speak for herself -- might also suggest  
21 that any mediation or settlement discussions be between  
22 counsel, that involving the actual litigants in the  
23 mediation might not be fruitful.

24           THE COURT: Okay. Ms. Pfeiffer?

25           MR. HOPKINS: But I wanted the Court to know

1 that we have tried to comply with your request.

2 THE COURT: Thank you.

3 Ms. Pfeiffer?

4 MS. PFEIFFER: I can agree with everything  
5 that's just been said.

6 THE COURT: Uh-huh.

7 MS. PFEIFFER: I don't -- I don't know if I  
8 can see this case settling very easily.

9 THE COURT: Uh-huh.

10 MS. PFEIFFER: So I'm certainly open to the  
11 concept and idea.

12 THE COURT: Yeah, you know, I had sensed that  
13 from your indirect exposure to your dealings with your  
14 clients. What is your reaction to the possibility of  
15 reopening the record or retrying the record -- or  
16 retrying the case?

17 MS. PFEIFFER: Well, I mean, as it stands  
18 right now, it sounds like the only evidence is that the  
19 bank did not fully comply with the Constitution when  
20 making this loan, so that there is not a valid lien.

21 So, if that's the Court's understanding of the state of  
22 the record, I'd like to keep the record as it is.

23 THE COURT: Well, what about the -- you know,  
24 again, I'm not inclined to keep retrying cases over and  
25 over again, even a second trial. That seems to me to

1 be just fundamentally unfair. And if we get into the  
2 habit of trying cases and then we get it resolved and  
3 one side says, "Oh, well, I could have done something  
4 else, Judge, just give me another shot," that's a  
5 receipt for disaster. We'll never get any finality in  
6 litigation if that happens. So there has to be a good  
7 reason for a new trial other than, okay, there may be  
8 some imperfections in the way the case initially was  
9 tried. So I'm not inclined at this point to reopen the  
10 record.

11 But, Ms. Pfeiffer, you did say that there  
12 was some -- a lack of clarity or -- I mean, I guess  
13 what I'm asking is would counsel -- do you want  
14 another round of briefing? I hesitate to impose that  
15 obligation on parties since this case has been going on  
16 for so long already. I know it's been -- it's time  
17 consuming and expensive, so --

18 MS. PFEIFFER: I kind of hate to do that to  
19 you, but that actually might be the best solution here.  
20 And part of the issue is we didn't get the full record  
21 until very, very recently.

22 THE COURT: Okay.

23 MS. PFEIFFER: And so I just don't -- I don't  
24 feel that I have a mastery of it. That's part of the  
25 lack of clarity.

1                   And so if the Court were inclined to keep  
2 the record closed, I think it would be helpful to have  
3 one more round of understanding exactly what the state  
4 of the record is.

5                   THE COURT: Mr. Hopkins, one more round of  
6 briefs?

7                   MR. HOPKINS: Your Honor, I believe that my  
8 brief adequately sets out what we think our burden of  
9 proof was. If Your Honor wants to engage us with  
10 respect to the 26 elements of the Texas Constitution,  
11 I'm going to resist that that's ever my burden, but I'm  
12 happy to set that out in Paragraph No. 1 that it's not  
13 our burden and then address those issues to the Court.

14                   THE COURT: I think that may be good. At  
15 least the counsel can join issue as to, you know, what  
16 specifically needs to be proven and what elements were  
17 fairly at issue in the case as it went to trial, and  
18 why it wasn't -- well, what the bank's burden was and  
19 what your client's burden was, Ms. Pfeiffer.

20                   So, all right, I'll allow -- we'll set  
21 another round of briefing, then. Hopefully, it will be  
22 the final round.

23                   Timetable?

24                   MS. PFEIFFER: I would ask for a month.

25                   THE COURT: All right. Mr. Hopkins?

1 MR. HOPKINS: We'll make a month work, Your  
2 Honor.

3 MS. PFEIFFER: And let me say this: If you  
4 want more, I could easily agree to more. It's going to  
5 be difficult to do it earlier than a month.

6 MR. HOPKINS: I don't want to say --

7 THE COURT: Yeah, I don't think he was holding  
8 out for more time.

9 MS. PFEIFFER: Okay.

10 MR. HOPKINS: No, my client believes these  
11 matters needs to be resolved.

12 THE COURT: I understand. Right.

13 MR. HOPKINS: It's only my schedule that's at  
14 issue within the 30 days and I'll make it work.

15 MS. PFEIFFER: Okay.

16 THE COURT: Okay, all right. So today's the  
17 27th. Say February 28th --

18 MS. PFEIFFER: That works.

19 MR. HOPKINS: Yes, Your Honor.

20 THE COURT: -- for briefing on that burden of  
21 proof issue.

22 MS. PFEIFFER: Thank you, Your Honor.

23 THE COURT: All right. Anything else this  
24 afternoon, Mr. Hopkins?

25 MR. HOPKINS: No, Your Honor.



1 THE COURT: Ms. Pfeiffer?

2 MS. PFEIFFER: No, Your Honor.

3 THE COURT: Thank you both for your  
4 presentations.

5 All right, court is adjourned.

6 **[2:56 p.m. - Proceedings adjourned]**

7

8 C E R T I F I C A T I O N

9

10 I certify that the foregoing is a correct  
11 transcript of the electronic sound recording of the  
12 proceedings in the above-entitled matter.

13

14

15 /s/ Gwen Reed

16 2-4-17

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