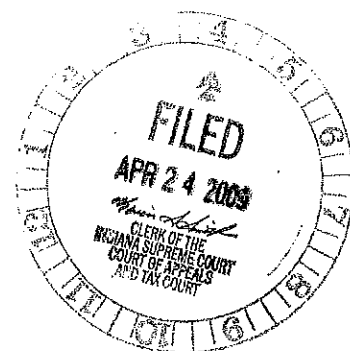


IN THE INDIANA COURT OF APPEALS

CAUSE NO. 87 A 01-0807-CV-307



DEUTSCHE BANK NATIONAL TRUST)
COMPANY, As Trustee on Behalf of the)
Certificateholders of Morgan Stanley ABS)
Capital I Inc. Trust 2004-HE9, Mortgage)
Pass-Through Certificates Series 2004-HE9,)
As Assignee of ("MERS") Mortgage)
Electronic Registration Systems, Inc.,)
Acting Solely as a Nominee for Accredited)
Home Lenders, Inc. a California)
Corporation,)

Appellant-Plaintiff,)

v.)

MARK DILL PLUMBING COMPANY)
MARK E. NEFF and ENVIRONMENTAL)
TECHNOLOGIES, LLC,)

Appellees.)

Appeal from the Warrick
Superior Court

Trial Court Cause No.:
87D01-0709-MF-365

Hon. Keith A. Meier, Judge

VERIFIED MOTION TO APPEAR AS AMICUS CURIAE

Comes now the Indiana Land Title Association, Inc., by counsel, pursuant to Rule 41 of the Indiana Rules of Appellate Procedure, and for its Motion to Appear as *Amicus Curiae*, states as follows:

1. The Indiana Land Title Association, Inc. ("ILTA") is a non-profit corporation that has been in existence in various capacities since 1907, whose membership is comprised of local and national companies and individuals in all ninety-two (92) Indiana counties who are involved in the production and evaluation of real estate title information. Specifically, the ILTA's membership primarily consists of title insurance agents, closing agents, abstractors, and title insurance underwriters. The ILTA has approximately 250 company members who employ thousands of Indiana residents. The ILTA's database consists of approximately 3,000

individuals working in the real estate industry, who have attended or have been involved in continuing education over the course of the last two (2) years.

2. The ILTA's position in this matter is substantively aligned with the Appellant, Deutsche Bank National Trust Company, as trustee ("Deutsche Bank"). The ILTA's *amicus curiae* brief will be helpful to this Court in reviewing the Appellant's Petition for Rehearing, in that members of the ILTA and its members are deeply involved in fostering the fair and orderly creation and enforcement of interests in Indiana real estate.

3. Among other services, ILTA members perform real estate title searches on behalf of lien holders, who then rely upon those searches in order to determine the necessary parties to their foreclosure actions.

4. As a result of numerous causes, including human error by a title searcher, the failure of a lien holder to properly docket his interest, or a county-wide backlog in making docketed judgments and recorded documents searchable, a mortgage, judgment, mechanic's lien, or other interest in real estate will occasionally be omitted from the title search.

5. When a lien holder purchases the subject real estate at sheriff's sale, ILTA members perform an additional title search and close the transaction at which the lien holder sells the subject real estate to a third party.

6. If a subordinate, omitted lien holder is discovered prior to that closing, the remedy of strict foreclosure was always available. Strict foreclosure performs a dual function of (1) acknowledging and protecting the due process rights of the omitted lien holder and (2) giving the omitted lien holder an opportunity to vindicate its lien rights as efficiently as possible, without disturbing the original foreclosure or the judgment.

7. Through strict foreclosure, the omitted lien holder is given the opportunity to assert his interest and redeem the property from sale. Essentially, the omitted lien holder has the option of (a) asserting priority over the foreclosing lien holder (b) asserting a subordinate interest and providing funds that would have been sufficient to outbid the foreclosing lender at the sheriff's sale in the original foreclosure, or (c) abandoning the real estate to the purchaser at the original sale.

8. This process fully protects the rights of the omitted lien holder, placing him in the same positions as if he had appeared in the original foreclosure, and prevents the significant expense and risk of attempting to set aside a sheriff's sale, set aside a foreclosure judgment, amend the complaint, obtain a new judgment, re-advertise a sheriff's sale, and conduct a new sale.

9. In denying this particular lender the remedy of strict foreclosure, the Court's opinion in *Deutsche Bank v. Dill*, 903 N.E.2d 166 (Ind. Ct. App. 2009), implies that the omitted junior lien holder may foreclose its lien and sell the real estate out from under the sheriff's sale purchaser. Further, the Court's opinion could be read as suggesting that a lender's right to win relief in a strict foreclosure action depends on whether or not the ultimate loss will be borne by a title insurer. *Id.* at 170-171 (n. 4).

10. If read in this manner, the Court's decision would essentially eliminate the long-established remedy of strict foreclosure as it exists in Indiana, and it would cut against the Indiana Supreme Court's preference for using equitable doctrines to enforce the expectations of parties to real estate transactions, as long as prejudice to the parties can be avoided. *See Bank of New York v. Nally*, 820 N.E.2d 640 (Ind. 2005).

11. The ILTA's interest in this matter is in maintaining the viability of the remedy of strict foreclosure. Keeping the remedy functional in situations when it applies serves to reduce the costs and volume of litigation, and prevents title agents and searchers from needlessly being embroiled in foreclosure litigation. While the ILTA does not believe that this Court's opinion was intended to eradicate the remedy of strict foreclosure or elevate the priority of junior omitted lien holders, it believes that the opinion may be misconstrued by trial court judges and attorneys and cited as requiring such results.

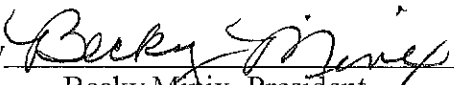
12. Because the ILTA and its members are on the ground floor of the title search and foreclosure process, they are in a unique position to discuss and explain the practical impact of the Court's opinion as it is currently written and the impact of the changes and clarifications sought on the Appellant's Petition for Rehearing.

13. Appellant supports the ILTA's Motion to Appear as *Amicus Curiae*.


WHEREFORE, the Indiana Land Title Association, Inc. prays that the Court grant it leave to file an *amicus curiae* brief in support of the Appellant's Petition for Rehearing, and for all other relief just and proper in the premises.

Respectfully submitted,

INDIANA LAND TITLE ASSOCIATION, INC.

By  _____
Becky Minix, President

DOYLE LEGAL CORPORATION, P.C.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Verified Motion to Appear as *Amicus Curiae* has been served upon the following by first class United States mail, postage prepaid, this 24th day of April, 2009.

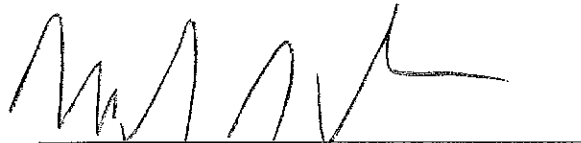
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