IN THE INDIANA COURT OF APPEALS

CAUSE NO. 87A01-0807-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, vs. MARK DILL PLUMBING COMPANY, MARK E. NEFF, and INVIRONMENTAL TECHNOLOGIES, LLC, Appellees-Defendants.	)	Appeal from the Warrick Superior Court Trial Court Cause No.: 87D01-0709-MF-365 Hon. Keith A. Meier, Judge

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BRIEF OF *AMICUS CURIAE* INDIANA LAND TITLE ASSOCIATION, INC. IN SUPPORT OF PETITION FOR REHEARING

Mark R. Galliher
Craig D. Doyle
DOYLE LEGAL CORPORATION, P.C.
41 West Washington Avenue, Suite 400
Indianapolis, Indiana 46204
(317) 264-5000
Counsel for *Amicus Curiae*
Indiana Land Title Association, Inc.

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DOYLE LEGAL CORPORATION, P.C.
41 West Washington Avenue, Suite 400
Indianapolis, Indiana 46204
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Counsel for *Amicus Curiae*
Indiana Land Title Association, Inc.

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BRIEF OF *AMICUS CURIAE* INDIANA LAND TITLE ASSOCIATION, INC. IN SUPPORT OF PETITION FOR REHEARING

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Indiana Land Title Association, Inc. ("ILTA") is an Indiana not for profit corporation. Founded in 1907, the primary mission of the ILTA is to educate its members and the public about the real estate industry, and to advocate for improved standards governing transactions involving Indiana real estate. The ILTA's members include title insurance agents, closing agents, abstractors, title insurance underwriters and other professionals employed in the real estate

industry. ILTA's interest here is in preserving the settled rules of law governing: (1) the respective rights of foreclosing mortgage holders and lienholders who for whatever reason are not made defendants to a foreclosure action; and (2) the use of the judicial remedy commonly called "strict foreclosure" to fairly resolve the competing rights of such parties.

II. SUMMARY OF ARGUMENT

In its March 25, 2009 Opinion, this Court correctly ruled that the prior foreclosure action and sheriff's deed of Appellant, Deutsche Bank National Trust Company, as Trustee ("Deutsche Bank"), did not extinguish the judgment liens of Defendants Mark Dill Plumbing Company, Mark E. Neff, and Invironmental Technologies, Inc. (collectively, "the Lienholders"). The Court's Opinion, however, could be read as changing the well-established rule that a foreclosing lender who takes a sheriff's deed does not lose what were and remain its prior mortgage rights, but may still assert the priority of its mortgage against junior lienholders who were not made parties to the original foreclosure. The Court's Opinion could also be read as curtailing such lenders' use of "strict foreclosure" to lay to rest such lienholders' claims. As articulated in prior Indiana caselaw, the remedy of strict foreclosure, including a fair opportunity for the omitted junior lienholders to "bid" for the real estate, serves to fairly vindicate the rights both of the foreclosing lender and of lienholders who were not joined in the foreclosure action. The ILTA urges this Court to modify its Opinion to avert such possible misunderstandings of its Opinion in this case.

III. ARGUMENT

A. A Foreclosing Lender's Mortgage Rights are not Extinguished by Merger in the Sheriff's Deed

The main thrust of the Court's Opinion is that the Lienholders' liens were not extinguished by Deutsche Bank's prior foreclosure and sheriff's deed. The Opinion could, however, be read as holding that Deutsche Bank's prior rights were extinguished by the sheriff's deed, so that the Lienholders' liens leap-frogged from last place into first position, ahead of Deutsche Bank's rights in the Real Estate. In this regard, the Lienholders asked that "Deutsche Bank's equity of redemption be foreclosed and another Sheriff's sale be held to satisfy the amounts owed to [the Lienholders]." *Deutsche Bank National Trust Co. v. Mark Dill Plumbing Co.*, 903 N.E.2d 166, 167 (Ind. Ct. App. 2009). In affirming the Trial Court's judgment, this Court indicated that the proper result here was the one reached by the Court in *Watson v. Strohl*, 220 Ind. 672, 46 N.E.2d 204 (1943), in which an omitted mechanics' lien holder was granted priority over the holder of a competing lien who had foreclosed and taken a sheriff's deed without joining the mechanic's lien holder in its foreclosure. The ILTA is concerned that these portions of the Court's Opinion could be read as broadly holding that a lender who, like Deutsche Bank, omits a junior lienholder from its foreclosure action and takes a sheriff's deed, forfeits the right to enforce the priority of its mortgage over the omitted junior liens.

Indiana case law on this point is well-settled, and holds that, when a lender forecloses its mortgage and obtains a sheriff's deed, it generally does not lose its priority rights pursuant to its mortgage. Rather, absent clear evidence that the lender intended to extinguish its mortgage rights, the lender may assert the priority of its mortgage against junior lienholders, who perfected their liens after the lender's mortgage, but before the sheriff's deed. *E.g., Brightwell v. United States*, 805 F. Supp. 1464, 1473-74 (S.D. Ind. 1992); *Zilky v. Carter*, 226 Ind. 396, 402-03, 81 N.E.2d 597, 599 (1948); *Egbert v. Egbert*, 226 Ind. 346, 80 N.E.2d 105 (1948); *Swatts v. Bowen*, 141 Ind. 322, 40 N.E. 1057 (1894); *Evansville Gas-Light v. State*, 73 Ind. 219, 222, 1881 WL 6346 (1881); *Ellsworth v. Homemakers Finance Serv, Inc.*, 424 N.E.2d 166, 168 (Ind. Ct. App. 1981).

This rule makes sense: creditors whose liens are junior to an existing mortgage -- especially a mortgage their debtor used to buy the real estate -- should not be allowed to leapfrog into a first lien position based merely on a simple mistake of the mortgagee or its agents in failing to name the lienholders as defendants in the foreclosure action. *See Brightwell, supra*, 805 F. Supp. at 1474 (the anti-merger rule "allows the mortgagee to prevent junior lienholders from stepping up in priority . . . and reducing the mortgagee's already diminished recovery . . ."). As Judge McKinney noted in *Brightwell*, "the anti-merger rule gives a mortgagee first crack at any money generated by foreclosures on the property, ahead of any junior lienholders, until it has been paid what it is owed in full." *Id.*

In this case, the Lienholders apparently agreed that Deutsche Bank had a valid mortgage, and that such mortgage was recorded before the Lienholders' judgments. The Lienholders submitted no evidence to rebut the presumption that Deutsche Bank intended to preserve its rights under its former mortgage to claim priority over later judgments. Thus, this Court would err in holding that Deutsche Bank lost its right to claim priority over the Lienholders when it took a sheriff's deed without joining the Lienholders in its foreclosure action. To the extent this Court's Opinion could be read as so holding, the ILTA urges the Court to clarify its adherence to the rule of cases such as *Ellsworth v. Homemakers Finance Serv, Inc., supra.*

B. Absent Special Equities Favoring the Junior Lienholders, the Prior Mortgagee should be Granted Strict Foreclosure

Moreover, portions of the Court's Opinion discussing the remedy of "strict foreclosure" could be read as holding that Indiana Courts should allow such a mortgagee to enforce its rights over omitted lienholders only in extraordinary circumstances, or should deny the mortgagee priority if it or its agents were negligent in omitting the lienholders from the prior foreclosure action. The ILTA respectfully submits that such a restrictive view of "strict foreclosure" would represent a departure from existing law. A lender should be freely allowed to use a strict foreclosure action to exercise its "first crack" at the property, so long

as the omitted lienholders are given a fair opportunity to extract payment from any equity in the property based on their junior liens.

Properly speaking, an action for "strict foreclosure" against omitted junior lienholders does not seek a judgment that such liens were extinguished by a prior foreclosure and sheriff's sale, to which they were not parties. As this Court correctly noted in its Opinion, the rights of junior lienholders cannot be affected by a foreclosure action in which they had no opportunity to participate. *See Watson v. Strohl*, 220 Ind. 672, 684-85, 46 N.E.2d 204, 209 (1943). Rather, the goal of a strict foreclosure action is to give such lienholders their chance to extract payment from any equity in the property, while vindicating the rights of the sheriff's deed holder under its prior mortgage.

Specifically, upon proof that the sheriff's deed holder's mortgage was recorded before the defendants' liens, the trial court in a strict foreclosure action should either: (1) order a new sheriff's sale of the property, at which the plaintiff may once again "bid" the full amount of its mortgage claim, and the junior lienholders may outbid the plaintiff, by paying the full amount of the plaintiff's claim and then bidding with their judgment amounts; or (2) short circuit the sale process by ordering the junior lienholders to pay, within a set time, the full amount found due on the Plaintiff's mortgage.[1] Under either approach, the Plaintiff deed-holder is entitled to receive either full payment of its mortgage

[1] The redemption amount due to the Plaintiff is not the amount of its prior foreclosure judgment, or the amount it bid for the property at sheriff's sale, but the full amount payable under the terms of its mortgage. *E.g., Hosford v. Johnson*, 74 Ind. 479 (1881); *Troost v. Davis*, 31 Ind. 34, 1869 WL 3183 (1869).

claim, or clear title to its collateral, free of the defendants' liens. Because there is usually no practical benefit to a second sheriff's sale of property that has already been auctioned once, the latter form of decree is the usual remedy. *See, e.g., Hosford v. Johnson,* 74 Ind. 479 (1881); *Troost v. Davis,* 31 Ind. 34, 1869 WL 3183 (1869); see 59A C.J.S *Mortgages* § 694 (2008); *see also ABN AMRO Mortgage Group, Inc. v. American Residential Services, LLC,* 845 N.E.2d 209, 215 (Ind. Ct. App. 2006)(stating in dictum that the deed holders were entitled to pursue such an action to remove the clouds on their title to the real estate). Either way, the result is the same as if the lienholders were joined in the original foreclosure: the junior lienholders have their chance to extract payment from any equity in the property, but will lose their liens if the prior mortgage is not paid in full.

To be sure, Indiana Courts have at times characterized the remedy of strict foreclosure as "harsh" and to be used only "under special and peculiar circumstances." *Jefferson v. Coleman,* 110 Ind. 515, 517, 11 N.E. 465, 466 (1887). The "harsh" aspect of the remedy is allowing the defendant's interest in real estate to be extinguished without a sheriff's sale, based on its failure to pay the redemption amount due to the plaintiff. As the Supreme Court's decision in *Jefferson* makes clear, however, the "peculiar circumstances" in which this remedy is appropriate include cases where, as here, a foreclosing lender has taken a sheriff's deed, and seeks to compel junior lienholders to exercise their redemption rights, or lose them. *Id.* In such circumstances, according to the

Supreme Court, the usual sheriff's sale process is not only optional, but generally "inappropriate," presumably on grounds that a second sheriff's sale is a pointless exercise if the junior lienholders do not intend to pay the amount necessary to outbid the first mortgage holder.[2] *Id.*

Under this formulation, strict foreclosure is available only if the plaintiff can show its lien was prior to the omitted lienholders'. As illustrated by the Supreme Court's holding in *Watson v. Strohl*, 220 Ind. 672, 46 N.E.2d 204 (1943), if the lien of the plaintiff/sheriff's deed holder is junior to the omitted lienholder's claim, the plaintiff is not entitled to strict foreclosure, and omitted lienholder may complete a garden-variety foreclosure of its first lien, and conduct its own sheriff's sale. Again, however, it is apparently undisputed in this case that Deutsche Bank's July 2004 mortgage came before the Lienholders' liens, which were docketed in September of 2004 and in 2005.

This Court's Opinion correctly notes that a strict foreclosure action is equitable, and that the Trial Court had latitude to weigh the equities of the parties' competing claims. The ILTA respectfully submits, however, that in weighing the equities, the court was bound to attach significant weight to Deutsche Bank's surviving, senior rights in the property based on its mortgage,

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[2] Courts in other jurisdictions have recognized that where the subject Real Estate has substantial value in excess of the lender's mortgage, equity may require the Court to order a new sheriff's sale of the property, in hopes that a third-party bidder will buy the property for a price sufficient to pay the lender's mortgage claim in full, with money left over to pay the junior lienholder's claim. *Fidelity Trust Co. v. Irick*, 206 Conn. 484, 538 A.2d 1027 (1988).

on the grounds that equity follows the law. *First Federal Savings Bank v. Hartley,* 799 N.E.2d 36, 40 (Ind. Ct. App. 2003).

Moreover, the ILTA submits that the Trial Court's discretion did not extend to denying Deutsche Bank any relief, and effectively treating Deutsche Bank's prior mortgage as extinguished, based only on the apparent negligence of Deutsche Bank or its agents in failing to discover the Lienholders' judgments and add the Lienholders to the original foreclosure action. As a practical matter, such a rule effectively abolishes the remedy of strict foreclosure, which exists precisely to allow a lender to correct omissions in its original foreclosure action. As a representative of real estate professionals throughout Indiana, the ILTA can attest that, despite all reasonable diligence, judgment liens are sometimes overlooked, due to (1) defects in the Clerk's judgment records, (2) mistakes as to whether the foreclosure defendant and the judgment lien defendant are the same person, and (3) simple human oversight. Forfeiture of a lender's first lien position is an unreasonably harsh penalty for such mere oversights.

The Court must also consider that denying Deutsche Bank the priority of its mortgage will result in an extraordinary and unjustifiable windfall to the Lienholders, who would be allowed to leap-frog from last place into first position, ahead of Deutsche Bank's prior rights to the Real Estate. Equity requires that the Lienholders be given the same chance to enforce their junior liens against the Real Estate as they would have had as parties to the foreclosure action.

Equity cannot, however, countenance elevating the Lienholders' junior liens to priority over the mortgage of Deutsche Bank.

Our Supreme Court's decision in *Bank of New York v. Nally*, 820 N.E.2d 644 (Ind. 2004), although not directly on point, is instructive as to the equities presented here. In *Nally*, the Supreme Court held that a refinancing mortgage lender was entitled to assert the priority of the mortgage it paid off over the lien of a second mortgage holder whose lien attached after the first mortgage, but before the refinancing mortgage was recorded. In so holding, the Court noted that the junior lienholder should not get a windfall by having its junior lien "leapfrog" into first place, based only on allegedly negligent acts of the Plaintiff that did it no harm. 820 N.E.2d at 655. Deutsche Bank's equities here are stronger than those of a refinancing lender seeking equitable subrogation. Thus, consistent with the Supreme Court's ruling in *Nally*, Deutsche Bank should not be deprived of its priority rights in the Real Estate absent evidence that it was guilty of intentional wrongdoing, or that the Lienholders suffered some substantial prejudice from having their junior liens adjudicated in this action, rather than the original foreclosure.

The ILTA recognizes that, by footnote 5 of its Opinion, this Court may have intended to express some or all of the principles set forth above. Nevertheless, the ILTA is concerned that trial courts and everyday practitioners may misconstrue this Court's Opinion as drastically curtailing the use of strict foreclosure actions. It is not the ILTA's place, as *amicus curiae*, to argue that

Deutsche Bank should win this appeal. Nevertheless, whether the Court ultimately rules for or against Deutsche Bank, ILTA urges this Court to amplify its Opinion to make it clear that the Court does not intend to change existing law.

In particular, the ILTA urges the Court, on rehearing, to reaffirm existing Indiana law that (1) the mortgage rights of a foreclosing lender are not extinguished by merger when the lender takes a sheriff's deed, and (2) first lienholders who take a sheriff's deed may address omitted junior lienholders through an action for "strict foreclosure," in which the trial court will, absent some showing of special equities in favor of the junior lienholders, order such lienholders to pay the full amount of the plaintiff's mortgage claim within a set time or else have their junior liens extinguished as they would have been in the prior foreclosure.

Finally, the ILTA urges this Court, in amplifying its Opinion, to note that the District Court's opinion in *Brightwell, supra,* misstates Indiana law on a significant point. As noted above, the *Brightwell* Court correctly held that the prior mortgage holder who took a sheriff's deed to the property without naming the Internal Revenue Service as a Defendant retained the right to assert the priority of its mortgage in a strict foreclosure action. The Court went on, however, to hold that such priority rights did not transfer to the party who bought the property from the foreclosing mortgage holder. 805 F. Supp. at 1474-

75. In so ruling, the Court said, "there is apparently no [Indiana] case on point." *Id.* at 1474.

In fact, there is an Indiana decision on point, holding that one who buys land from a foreclosing mortgagee may assert the mortgagee's right of priority over junior judgment liens that attached after the mortgagee received its mortgage, but before its foreclosure and deed. *Troost v. Davis*, 31 Ind. 34, 1869 WL 3183 (1869). In *Troost*, Frendenberger bought land in Logansport, Indiana in 1864 and granted two mortgages against the property, totaling $2,400. After the mortgages were recorded, a creditor obtained a judgment lien for $925. After that, the mortgage holder sued to foreclose, and Frendenberger deeded him the property in lieu of foreclosure. The mortgagee sold the land to Troost for $1,600.

Faced with these facts, which match those in *Brightwell*, the Supreme Court held that, because his seller had the right to "keep his mortgage afoot" and assert its priority over the later judgment lien, Troost acquired the mortgagee's right to pursue an action for strict foreclosure, and assert the priority of his seller's mortgage over the judgment creditor's omitted lien. The Court went on to say that, on remand, the trial court should determine the full amount due to Troost, including the full amount of Frendenberger's mortgage debts, and further ruling that, "if no bid shall be made for the property exceeding the sum . . . due [Troost], the property shall be struck off to him, and a deed ordered, free from the lien of the judgment." The Supreme Court's ruling in *Troost*, although old, has never been reversed. To the contrary, in *ABN AMRO Mortgage Group,*

Inc. v. American Residential Services, LLC, 845 N.E.2d 209, 215 (Ind. Ct. App. 2006), this Court stated in dictum that the buyers from a foreclosing lender "as successors, are entitled to continue that action [for strict foreclosure]." Accordingly, the ILTA respectfully submits that this Court, in its opinion upon rehearing, should qualify any citation of the decision in *Brightwell, supra,* with an observation that the ultimate holding in *Brightwell* is contrary to Indiana law as established by the Supreme Court in *Troost.*

IV. CONCLUSION

For the foregoing reasons, the ILTA respectfully requests that the Court grant rehearing in this matter, and render an opinion in this matter consistent with the facts and authorities cited in this Brief.

Respectfully submitted,

DOYLE LEGAL CORPORATION, P.C.

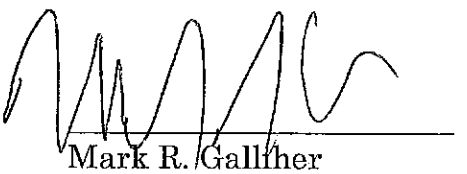
By: _____

Mark R. Galliher (#8319-49)
Craig D. Doyle (#4783-49)
Attorneys for *Amicus Curiae*
Indiana Land Title Association, Inc.

DOYLE LEGAL CORPORATION, P.C.
41 West Washington, Suite 400
Indianapolis, Indiana 46204
Telephone: (317) 264-5000
Facsimile: (317) 264-5400

WORD COUNT CERTIFICATE

I verify that this Brief of *Amicus Curiae* Indiana Land Title Association, Inc., in Support of Petition for Rehearing, contains not more then 4,200 words, computed pursuant to Rule 44(C) of the Indiana Rules of Appellate Procedure.



Mark R. Gallther
Attorney No. 8319-49
Attorney for *Amicus Curiae*
Indiana Land Title Association, Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief of *Amicus Curiae* Indiana Land Title Association, Inc., in Support of Petition for Rehearing has been served upon the following by first class United States mail, postage prepaid, this 24th day of April, 2009.

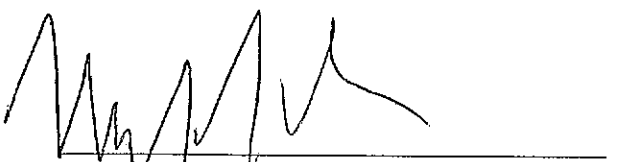
Ole J. Olsen, Jr.
OLSEN, WHITE & HAMBRIDGE, LLP
123 Locust Street
Evansville, Indiana 47708-1488
Attorney for Appellee,
Mark Dill Plumbing Company

Mark E. Neff
MARK E. NEFF LAW OFFICE, P.C.
224 W. Locust Street, P.O. Box 603
Boonville, Indiana 47601
Appellee Mark E. Neff

C. Richard Martin
MARTIN & MARTIN
125 S. Second Street, P.O. Box 29
Boonville, Indiana 47601
Attorney for Appellee,
Invironmental Technology, LLC

Phillip A. Norman, No. 13734-64
PHILLIP A. NORMAN, P.C.
2110 Calumet Avenue
Valparaiso, IN 46383

Theodore J. Nowacki, No. 9678-49
George T. Patton, Jr., No. 13745-49
David J. Jurkiewicz, No. 18018-53
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204



Mark R. Galliher