

ORIGINAL

In the Supreme Court of Ohio

FirstMerit Bank, N.A.,

Plaintiff-Appellant,

v.

Daniel E. Inks, *et al.*,

Defendants-Appellees.

) CASE NOS.: 2013-0091, 2013-0203
) (Consolidated)

) On Appeal from the Summit County Court of
) Appeals, Ninth Appellate District

) Court of Appeals Case No. 26182
)

BRIEF OF AMICUS CURIAE OHIO BANKERS LEAGUE IN SUPPORT OF APPELLANT FIRSTMERIT BANK, N.A.

John J. Kulewicz (0008376)
Jeffery E. Smith (0010863)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5634
Facsimile: (614) 719-4812
Email: jjkulewicz@vorys.com
jesmith@vorys.com

Jeffrey D. Quayle (0011322)
Ohio Bankers League
4249 Easton Way, Suite 150
Columbus, Ohio 43219
Telephone: (614) 340-7603
Facsimile: (614) 340-7596
Email: jqayle@ohiobankersleague.com

*Counsel for Amicus Curiae Ohio Bankers
League*

Thomas D. Warren (0077541)
Counsel of Record
Brett A. Wall (0070277)
Patrick T. Lewis (0078314)
Dustin M. Dow (0089599)
Baker & Hostetler LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
Email: twarren@bakerlaw.com
bwall@bakerlaw.com
plewis@bakerlaw.com
ddow@bakerlaw.com

Counsel for Appellant FirstMerit Bank, N.A.

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CLERK OF COURT
SUPREME COURT OF OHIO

Scott H. Kahn (0006779)
Gregory J. Ochocki (0063383)
Kahn Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114
Telephone: (216) 579-4114
Facsimile: (216) 579-0605

Counsel for Appellees Daniel E. Inks, et al.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Bankers League (“OBL”) is a non-profit trade association that represents the interests of Ohio’s commercial banks, savings banks and savings associations and their holding companies and affiliated organizations. The OBL roster includes over two hundred members. They comprise the overwhelming majority of all depository institutions doing business in Ohio, and include the full spectrum of FDIC-insured depository institutions. Among the OBL’s members are small savings associations organized as mutual thrifts and owned by their depositors; locally owned and operated community banks; and large regional and multistate holding companies that conduct business from coast to coast through several bank and non-bank affiliates. OBL’s Ohio depository institutions directly employ more than 130,000 people.

This case has vital importance for OBL members, Ohio businesses and the general public. Certainty with respect to the terms and conditions of lending agreements is critical to OBL members, Ohio businesses, and the general public. Eliminating or weakening the ability of parties to rely on the stated terms of lending agreements would present a systemic threat to the financial services industry in Ohio as well as to the ability of investors and others to rely on the financial statements of lenders and borrowers.

STATEMENT OF FACTS

Ohio Bankers League hereby adopts and incorporates the Statement of Facts in Appellant FirstMerit Bank, N.A.’s brief.

ARGUMENT

Proposition of Law 1: A party cannot use Civ.R. 60(B) to enforce an alleged oral forbearance agreement when the Statute of Frauds would prohibit that party from enforcing the same agreement through a complaint or counterclaim.

A. Permitting Parties To Enforce Oral Loan Agreements Would Undermine The Statute Of Frauds' Critical Role In Reducing Systemic Risk In The Financial Services Industry.

One of the most important issues in the financial services industry is the critical need for certainty with respect to agreements between borrowers and lenders. Certainty is the predicate for transparency in financial statements reflecting the financial condition of borrowers and lenders as well as the ability of parties to a written agreement to rely on the enforceability of their respective contractual obligations. Eliminating or weakening that transparency and the ability to rely on financial statements of lenders and borrowers would present a systemic threat to the financial services industry in Ohio as well as to the ability of investors and others to rely on financial statements of borrowers.

Assets in the financial services industry do not consist of nuts, bolts and screws, but rather contractual obligations between lender, borrower and related parties. The ability to know and understand the nature and enforceability of the agreements between parties in a lending arrangement, and to rely on those agreements in written documents, is critical to valuing the loan as an asset and to knowing what, if any, changes and revisions have been agreed to between the parties. That knowledge is, in turn, key to knowing and understanding the financial condition of the lender and a critical element of the examination process for state and federal regulatory agencies, as well as auditors, in making important determinations with respect to that financial condition. It is likewise key to the safety and soundness of the financial system and the ability of investors and depositors to know and understand the financial condition of the institution with which they do, or may do, business. Multiple parties rely on the written record of the lending relationship between the borrower and lender, and they must have the ability to rely on that

record with confidence that it represents fully the status of the loan and the relationship of the parties.

The purpose behind the enactment of R.C. 1335.02 was consistent with establishing certainty and transparency of contractual obligations between borrowers, lenders and related parties. That purpose remains just as important, if not more so, today as it did when that statute was enacted. Bankers, auditors, investors, depositors and regulatory agencies need to be able to value loans as assets of the lending institution and likewise to know, with certainty, the condition and terms of those loans. Loans as assets are represented by contracts between the parties, and the ability to examine documents pertaining to value of those assets is critical for transparency and value analysis. Just as lenders are required to have written documentation supporting the amount owed and loan terms in enforcing loan obligations under R.C. 1335.02, borrowers must likewise have written documentation that would support any terms, including repayment obligations, that differ from the terms in the signed agreements between the parties.

B. Both Lenders And Borrowers Benefit From The Predictability Afforded By The Statute Of Frauds.

The certainty and predictability afforded by the Statute of Frauds benefits *both* parties to loan agreements, not simply lenders. If a borrower is permitted to “defensively” enforce alleged oral loan agreements with terms that differ from those in the parties’ written loan documents, so too can a lender. Imagine the confusion, uncertainty and chaos that borrowers would incur if lenders were able to assert that borrowers owed more than the amount reflected by the terms and conditions of written and executed loan agreements, or that the terms of the credit relationship differed from those reflected by the written record. Personal and business borrowers alike would be unable to provide accurate and reliable financial statements to investors, lenders and a multitude of other potentially interested parties if a lender could later attempt to enforce an “oral

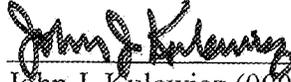
loan agreement” with terms that are different from those in the parties’ written and executed loan agreements.

To allow a defense based on an oral agreement that is inconsistent with the express terms of the written loan documents and contrary to the intent and purpose of R.C. 1335.02 would be to open a “Pandora’s Box” of confusion and introduce great uncertainty to the lending and repayment process. It could form the basis for extensive abuse by lenders and borrowers alike, and would pose a systemic risk to the financial system by taking away the ability of bankers, auditors, investors and regulatory agencies to depend on the documents representing the financial assets of the lender and their value. It would likewise eliminate the ability of the public to rely on financial statements issued by lenders and borrowers alike, and would present a threat to not only the institution and related parties in question, but also depositors, investors and others dealing with those parties in whatever capacity.

CONCLUSION

Therefore, for the very same reasons that R.C. 1335.02 was enacted by the Ohio General Assembly, it is critical to the overall systemic health and well-being of the financial institutions system of Ohio that the requirements set forth in that section be recognized and that parties not be allowed to assert oral revisions to written agreements as a defense to enforcement of the written agreement between the parties. To do otherwise would be to throw uncertainty into the financial system, which would make the financial condition of lenders and borrowers alike incapable of accurate ascertainment and determination.

Respectfully submitted,



John J. Kulewicz (0008376)
Jeffery E. Smith (0010863)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5634
Facsimile: (614) 719-4812
Email: jjkulewicz@vorys.com
jessmith@vorys.com

Jeffrey D. Quayle (0011322)
Ohio Bankers League
4249 Easton Way, Suite 150
Columbus, Ohio 43219
Telephone: (614) 340-7603
Facsimile: (614) 340-7596
Email: jquayle@ohiobankersleague.com

Counsel for Amicus Curiae Ohio Bankers League

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae Ohio Bankers League in Support of Appellant FirstMerit Bank, N.A.* was served this 24th day of June, 2013, via regular United States Mail upon the following:

Thomas D. Warren, Esq.
Brett A. Wall, Esq.
Patrick T. Lewis, Esq.
Dustin M. Dow, Esq.
Baker & Hostetler LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, Ohio 44114

Counsel for Appellant FirstMerit Bank, N.A.

Scott H. Kahn, Esq.
Gregory J. Ochocki, Esq.
Kahn Kruse Co., LPA
The Galleria and Towers at Erieview
1301 East Ninth Street, Suite 2200
Cleveland, Ohio 44114

Counsel for Appellees Daniel E. Inks, et al.



John J. Kulewicz (0008376)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5634
Facsimile: (614) 719-4812
Email: jjkulewicz@vorys.com

Counsel for Amicus Curiae Ohio Bankers League