

## COA Opinion: Equitable Subrogation May Give Refinancing Mortgagee Priority Over Intervening Lienholders Where Refinancing Mortgagee Also Held The Prior Discharged Mortgage

December 16, 2011, By Nicole Mazzocco

On December 15, 2012, the Michigan Court of Appeals released its opinion in *Citimortgage Inc. v. Mortgage Electronic Registration Systems Inc*, No. 298004. The Court held that equitable subrogation may apply to give a mortgagee who refinances its prior mortgage priority over intervening lienholders, but only where the intervening lienholders are not prejudiced, adopting the Third Restatement of Property (Mortgages) § 7.3.

On September 6, 2000, Sheryll Catton and Gregory Catton granted a mortgage to ABN AMRO Mortgage Group, Inc. On May 4, 2001, the Cattons refinanced their loan, discharging the original mortgage in favor of a new mortgage also granted to ABN AMRO. On July 11, 2002, the Cattons obtained a home equity loan from GMAC Mortgage L.L.C., granting GMAC a second mortgage on the property. On November 25, 2002, the Cattons refinanced their 2001 loan, discharging the 2001 ABN AMRO mortgage in favor of another mortgage granted to ABN AMRO. GMAC's mortgage was recorded, but ABN AMRO was unaware of the GMAC mortgage at the time it took the new mortgage.

On August 22, 2005, the Cattons filed for bankruptcy, and their property was sold at a foreclosure sale to Federal Home Loan Mortgage Corporation. ABN AMRO's successor-in-interest Citimortgage, Inc. and Federal Home filed a suit to quit title against GMAC and the Cattons, arguing that ABN AMRO's mortgage had priority under the doctrine of equitable subrogation. The trial court concluded that equitable subrogation did not apply. Citimortgage appealed.

The Court of Appeals began by noting that applicable version of Michigan's recording statute, MCL 565.25, allows the courts to use equity to alter mortgage priorities. Thus, equitable subrogation could be employed. The Court then reviewed the Third Restatement of Property (Mortgages) §

7.3. Comment b of that section explains that “[u]nder § 7.3 a senior mortgagee that discharges its mortgage of record and records a replacement mortgage does not lose its priority as against the holder of an intervening interest unless that holder suffers material prejudice.” The Court adopted the Restatement where the senior mortgagee discharges its own mortgage and contemporaneously takes a replacement mortgage, reversing the trial court’s holding that equitable subrogation could not apply in such a situation.

The Court then remanded the matter to the trial court to evaluate any prejudice and competing equities between the parties and to make any relevant factual determinations.