In the
Supreme Court of Ohio

SHARON WILBORN, et al.,	:	Case No. 2007-0558
	:	
Plaintiffs-Appellants,	:	On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District
v.	:	
BANK ONE CORPORATION, et al.,	:	
	:	Court of Appeals Case No. 04-MA-182
Defendants-Appellees.	:	

MERIT BRIEF OF *AMICUS CURIAE* THE STATE OF OHIO IN SUPPORT OF PLAINTIFFS-APPELLANTS SHARON WILBORN ET AL.

JAMES C. MARTIN*
Counsel of Record
PERRY A. NAPOLITANO
JOSEPH E. CULLEITON
DAVID J. BIRD
Reed Smith, LLP
435 Sixth Avenue
Pittsburgh, PA 15219
412-288-3131
412-288-3063 fax
jcmartin@reedsmith.com

BOBBIE L. FLYNT (0066909)
Comstock, Springer & Wilson Co. LPA
100 Federal Plaza E., Ste. 926
Youngstown, Ohio 44503
330-746-5643
330-746-4925 fax
blf@csandw.com

Counsel for Defendants-Appellees
Bank One, N.A.,
Principal Residential Mortgage, Inc.,
Ameriquest Mortgage Company,
Wells Fargo Home Mortgage Company, Inc.,
Washtenaw Mortgage Company,
Mortgage Electronic Registration Systems, Inc.,
and Chase Manhattan Mortgage Company

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL* (0038077)
Solicitor General
Counsel of Record
ROBERT J. KRUMMEN (0076996)
Deputy Solicitor
DANIEL W. FAUSEY (0079928)
TODD A. NIST (0079436)
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*
State of Ohio

STEPHEN T. BOLTON (0010994)
Manchester, Bennett, Powers & Ullman
The Commerce Building
201 E. Commerce Street, Atrium Leve12
Youngstown, Ohio 44503
330-743-1171
330-743-1190 fax
SBolton@mbpu.com

Counsel for Defendant-Appellee
Chase Manhattan Mortgage Company

JOHN WINSHIP READ (0030827)*
Counsel of Record
MATTHEW E. ALBERS (0075687)
Vorys Sater Seymour & Pease
1375 E. 9th Street, Suite 2100
Cleveland, Ohio 44114
216-479-6103
216-937-3737 fax

Counsel for Defendants-Appellees
Homeside Lending, Inc.,
Washington Mutual Bank Successor To
Homeside Lending, Inc.

PAMELA S. PETAS (0058627)*
Counsel of Record
RICK D. DEBLASIS (0012992)
Lerner, Sampson & Rothfuss
120 E. 4th Street, 8th Floor
Cincinnati, Ohio 45202
513-241-3100
513-241-4094 fax

Counsel for Defendant-Appellee
Lerner, Sampson & Rothfuss

MICHAEL S. MILLER* (0009398)
Counsel of Record
DANIEL R. VOLKEMA (0012250)
Volkema Thomas, LPA
140 East Town Street, Suite 1100
Columbus, Ohio 43215
614-221-4400
614-221-6010 fax
mmiller@vt-law.com

STUART T. ROSSMAN
National Consumer Law Center
77 Summer Street, 10th Floor,
Boston, MA 02210
617-542-8010
617-542-8028 fax

SETH R. LESSER
Locks Law Firm PLLC
110 East 55th Street, 12th Floor
New York, NY 10022
212-838-3333
212-838-3735 fax
slesser@lockslawny.com

Counsel for Plaintiffs-Appellants
Sharon Wilborn, et al.

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INTRODUCTION

Consumer mortgage provisions that require consumers to pay the lender's attorney fees as a precondition to post-default mortgage reinstatement are invalid, unconscionable, and unenforceable under Ohio law. This Court has already said that attorney fees may not be shifted upon default of a debt obligation. In *Miller v. Kyle* (1911), 85 Ohio St. 186, this Court held that provisions in debt agreements providing for payment of attorney fees in the event of default were unenforceable. The attorney fees provision in the instant case is substantially similar in nature to the provision deemed unenforceable in *Miller*.

Because the provisions are found in adhesion contracts, they are presumptively invalid under *Miller* and its progeny. First, the provisions at issue impermissibly shift fees upon default of a debt obligation. Second, as in *Miller*, the provision provides an incentive for lenders to foreclose because the homeowner is responsible for costs and attorney fees. Finally, cases since *Miller* indicate that attorney-fee shifting is unenforceable when the parties lack equal bargaining power. That is the case here. Homeowners are unable to bargain over the attorney-fees provision. Accordingly, the mortgages are contracts of adhesion, so they must be scrutinized skeptically, and should not be enforced in the absence of fairly arrived-upon terms.

Even if *Miller* does not apply, the provisions would still be unenforceable under the doctrine of unconscionability. The attorney-fees shifting provisions here unreasonably favor the drafter-lenders. The homeowner enjoys no corresponding fee-shifting if the lender defaults. And the homeowners' rights to mortgage reinstatement are on terms written by, and heavily favorable to, the lenders. Additionally, both parties to the contract benefit from reinstatement, so the precondition of repayment of attorney fees stands out as unjustified and one-sided.

Public policy forbids this type of fee-shifting for homeowners in default on their mortgages. Such provisions are bad for the State, because they contribute to an already mounting foreclosure crisis. Foreclosures have deleterious effects on families, neighborhoods, and even the lenders themselves. Moreover, the fee-shifting occurs at the worst possible time for the homeowner—when he is already in financial crisis. The public policy of the State runs against allowing such fee-shifting provisions in residential mortgage contracts.

For these reasons, the Court should reverse the decision of the appeals court and find that such attorney-fee shifting provisions are unenforceable.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann acts as the State of Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring that common consumer contracts, including the mortgage contracts at issue, are fair and equitable for Ohio consumers. As the people's lawyer, Attorney General Dann is responsible for ensuring that Ohio's citizens are given the full and equitable protection of the laws. As the State's lawyer, the Attorney General has a responsibility to ensure that Ohio's law and policies regarding consumer contracts are rigorously enforced.

STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the statement contained in the Merit Brief of Appellants. The Attorney General summarizes only the general facts applicable to all of the mortgage agreements in question.

The Appellants (the "homeowners") in this case are consumers who obtained mortgage loans from various lending institutions. Each homeowner defaulted on payment obligations under his respective mortgage. In each case, one of the Appellees (the "lenders") began foreclosure proceedings.

Each mortgage contract contained a "reinstatement provision" allowing the homeowner to reinstate the mortgage after the lender initiated foreclosure proceedings, if the homeowner assumed financial responsibility for the lender's legal costs—including attorney fees.[1] Specifically, if the homeowner defaults on his payment obligations, the reinstatement provision allows the homeowner to halt the foreclosure proceedings and to reinstate the parties' obligations under the mortgage by catching up on the past-due mortgage payments. To invoke the reinstatement provision, however, the homeowner must pay the lender's attorney fees incurred in initiating the foreclosure proceedings. The parties did not negotiate over these fee-shifting provisions. Rather, as with most borrowers in Ohio, the homeowners were presented with mortgage obligations that they had to accept—or find another loan. Though a record has not been developed on this issue, it is unlikely that the homeowners here could have found a mortgage without similar provisions. That unlikelihood is demonstrated by the fact that the majority of the mortgages at issue contain identical reinstatement clauses despite originating from different lenders. See Attachments 4, 6, 7, 8, and 9 to First Amended Class Action Complaint.[2]

[1] Of the nine mortgages attached to the complaint, only Appellant Wilborn's mortgage did not contain a "reinstatement provision." See Attachment 1 to First Amended Class Action Complaint. However, Wilborn's mortgage did contain a provision that stated: "Mortgagor shall be liable to Mortgagee for all legal costs, including but not limited to reasonable attorney fees and costs and charges of any sale in any action to enforce any of its rights hereunder whether or not such action proceeds to final judgment." *Id* at 2.

[2] A typical reinstatement provision reads:

> ***19. Borrower's Right to Reinstate After Acceleration.*** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; ***(c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited***

Appellants Darin and Amy Beth Distel, William and Julie Wymer, Todd and Traci Campbell, and Shirley Wright invoked the reinstatement provisions contained in their mortgages and paid the banks the amount of their default, plus costs and attorney fees. See *Wilborn v. Bank One Corp.* (7th Dist.), 2007 Ohio App. Lexis 565, 2007-Ohio-596 ¶ 4. The homeowners initiated this class action suit to recover attorney fees paid under the reinstatement provision.

The lenders moved the trial court to dismiss the complaint pursuant to Civ. R. 12(B)(6). The trial court granted that motion and the Seventh District Court of Appeals affirmed. This Court accepted the appeal as to the following proposition of law:

> A provision in a residential mortgage to the effect that a borrower in default whose mortgage has been made the subject of a foreclosure action may only reinstate the mortgage, and thereby avoid foreclosure, upon payment of the attorney fees incurred by the lender in initiating the foreclosure action, is against public policy and void.

The State of Ohio, as *amicus curiae*, joins the homeowners and urges this Court to reverse the judgment of the court below.

> ***to, reasonable attorneys' fees, property inspection and valuation fees, and other fees*** incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

Wilborn v. Bank One Corp. (7th Dist.), 2007 Ohio App. Lexis 565, 2007-Ohio-596 ¶ 5 (emphasis added).

ARGUMENT

***Amicus Curiae* State of Ohio's Proposition of Law:**

A residential mortgage provision is contrary to established law, unconscionable, and void for public policy when it requires that the homeowner in default pay the lender's attorney fees incurred in a foreclosure action whether as a consequence of foreclosure or as a prerequisite to reinstating the mortgage.

A. The attorney-fees provisions at issue are unenforceable under *Miller v. Kyle* and its progeny.

Miller v. Kyle (1911), 85 Ohio St. 186, and its progeny forbid the attorney-fees shifting provisions at issue. The *Miller* Court found it to be the "[s]ettled law of the state" that "stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void." *Id.* at syllabus. Under *Miller's* holding, the provisions in this case are void because they create an obligation to pay attorney fees in the event of a default on a debt obligation, and because the provisions encourage litigation. See *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St. 3d 238, 242.

Cases following and interpreting *Miller* have explained that shifting attorney fees in non-negotiable adhesion contracts is impermissible. See *Worth*, 32 Ohio St. 3d at 242-43; *Nottingdale Homeowners' Ass'n v. Darby* (1987), 33 Ohio St. 3d 32, 35 & n.7; *First Capital Corp. v. G & J Indus.* (10th Dist. 1999), 131 Ohio App. 3d 106, 113; *Vermeer of S. Ohio, Inc. v. Argo Constr. Co.* (10th Dist. 2001), 144 Ohio App. 3d 271, 277-78. In particular, this Court's opinions in *Nottingdale* and *Worth* confirm that *Miller's* bar against attorney-fee shifting provisions applies to adhesion agreements, where the terms are not open for bargaining. *Nottingdale*, 33 Ohio St. 3d at 35 & n.7; *Worth*, 32 Ohio St. 3d at 257-8. *Miller* is still good law and should be followed.

1. The fees-shifting provisions at issue are indistinguishable from the provisions found unenforceable in *Miller* and are therefore unenforceable.

The *Miller* Court concluded that attorney-fees shifting provisions in contracts creating a debt obligation were unenforceable. *Miller*, 85 Ohio St. at 192. *Miller* recognized that "it has been firmly established, and long and consistently maintained," that attorney-fees provisions arising out of default on a debt obligation are unenforceable as against public policy. *Id.*

In *Miller*, the mortgage and note contained parallel provisions that required repayment of the lender's attorney fees if the borrower defaulted on his payment obligations and the lender legally enforced the default. Similarly, here, reinstatement of the mortgage can occur only if the homeowner pays the lender's legal fees incurred in pursuing the default. Thus, the lenders seek to obtain by contract what they could not obtain from the courts. These provisions are barred by the Court's decision in *Miller* because a shift in the financial responsibility to pay attorney fees arises out of default on a debt obligation.[3]

Nor does it matter that the attorney-fees-shifting-provision attaches to reinstatement rather than default. This is a distinction without a difference. The reality is that struggling homeowners are forced to pay the lender's attorney fees to keep their homes, and therefore all of the problematic characteristics expressed by *Miller* and its progeny are present. These provisions attempt to create an end-run around *Miller's* prohibition. It is immaterial that the obligation to pay attorney fees is triggered only in the event that the homeowner seeks to reinstate the mortgage, for the obligation is still inextricably linked to the default. Here, reinstatement is

[3] As explained below in Subsection 3, this Court has narrowed *Miller's* general prohibition to allow contracts in which the fee-shifting provision was included as the result of arms-length bargaining by similarly situated and competent parties. *Nottingdale Homeowners' Ass'n v. Darby* (1987), 33 Ohio St. 3d 32, 35 & n.7; *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St. 3d 238, 257-8. However, as argued below, the exception by *Nottingdale* and *Worth* does not apply here because the contracts were not arrived at by mutual bargaining. Thus, the holding of *Miller* still applies.

conditioned upon default, and a condition of reinstatement is payment of attorney fees. The prohibition of *Miller* is that payment of attorney fees could not be conditioned "upon default in payment of a debt." *Miller*, 85 Ohio St. at 192. Any attempt to distinguish on the basis of when the obligation occurs is meaningless, because, in substance, the attorney-fees provision operates in the same way as the provisions in *Miller*: as a penalty for having defaulted on the mortgage. In fact, the only way to forestall the consequences of default—namely the loss of one's home—is conditioned on the payment of the lender's attorney fees. Because the financially struggling homeowner has no reasonable alternative, these provisions are against the public policy of the State.

2. The attorney-fees provisions are also unenforceable under *Miller* because they encourage litigation.

Residential mortgage provisions that encourage litigation by the lender create a strong presumption that they are unenforceable. The rule in *Miller* was supported by the fact that attorney-fees-shifting provisions encourage litigation. Because the borrower was required to pay attorney fees upon its default of the note, the lending institution faced a strong incentive to initiate litigation to establish a default or breach, and no incentive to negotiate.

The attorney-fees provisions at issue here encourage litigation in the same way the provision in *Miller* did. The fee-shifting provision provides no disincentives to litigation because the homeowner bears the burden of all costs associated with the action in the event that the mortgage is reinstated. In short, the lender always wins, and the struggling homeowner always pays. When the lender establishes default it gets a cost-free choice among: (1) acceleration of the debt obligation (with costs and attorney fees recoverable under most contracts[4]); (2) reinstatement of the mortgage upon payment by the homeowner of the lender's costs and attorney fees; or (3) foreclosure. The lender has little incentive to work with a homeowner in light of these contract remedies. Rather, the lender simply brings an action in foreclosure and tacks on the attorney fees for that action.

Moreover, the *Miller* Court's concern for encouraging litigation comports with the American Rule that parties bear their own litigation costs absent an enforceable contract to the contrary. *Miller* recognized that shifting attorney fees through an adhesion contract defeated the policy of the American Rule because of the "obvious tendency of such contracts to encourage litigation." *Miller*, 85 Ohio St. at 193. As the United States Supreme Court has noted, "it has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or *enforceable* contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.* (1967), 386 U.S. 714, 717. Because the parties did not openly negotiate the waiver of the American Rule and because these provisions encourage litigation, the attorney-fee shifting provisions should not be enforced.

3. The provisions at issue here are unenforceable because each homeowner had no realistic choice as to its terms.

Courts have reconciled the *Miller* rule with the freedom to contract by limiting the rule to situations involving inequality of bargaining power. See *Nottingdale*, 33 Ohio St. 3d at 35 & n.7; *Worth*, 32 Ohio St. 3d at 257-8. The continuing legacy of *Miller* is that an attorney-fees-

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[4] See, e.g., the Wymers' Mortgage, attached to Amended Complaint as Attachment 6 at ¶ 22 ("Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. *Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22*, [Acceleration] including, but not limited to, costs of title evidence.") (Emphasis added).

shifting provision contained in a mortgage is unenforceable when the mortgage amounts to an adhesion contract.

In both *Nottingdale* and *Worth*, the Court took special care to note that their respective holdings, which restrict the scope of *Miller*, do not apply to adhesion contracts. *Nottingdale*, 33 Ohio St. 3d at 35 and n.7; *Worth*, 32 Ohio St. 3d at 257-8. This is a reflection of Ohio's disfavor for one-sided contracts. This Court views adhesion contracts with skepticism. See, e.g, *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St. 3d 44, 47 ("Often one party to a contract, being in a position to impose terms upon the other with no realistic opportunity to bargain afforded, would include those standardized clauses in the contract as would unreasonably impose upon the nonbargaining party burdens which were wholly inequitable."). Ohio courts closely scrutinize provisions such as those at issue here because they are imposed upon a party with little or no bargaining power and therefore no realistic choice as to the provision's inclusion. See *Id.*

Thus, the two cases that "test the rule" of *Miller*, as the appeals court put it, actually explain how the *Miller* rationale applies to the case at hand. *Wilborn*, 2007-Ohio-596 ¶¶ 13-32, (citing *Worth*, 32 Ohio St. 3d 238, and *Nottingdale*, 33 Ohio St. 3d at 32 as "new situations presented themselves years later that tested that rule" of *Miller*). In both cases, the Court recognized that the contracts at issue were distinguishable from *Miller* because they involved parties with equal bargaining positions. Appellate courts continue to apply *Miller*, as refined through *Nottingdale* and *Worth*, to invalidate attorney-fees provision in adhesion contract situations. See *First Capital*, 131 Ohio App. 3d at 113; *Vermeer*, 144 Ohio App. 3d at 277-278; *Safdi v. Gallegos* (1st Dist.), 1999 Ohio App. Lexis 3294; *Sabin v. Ansorge* (11th Dist.), 2000 Ohio App. Lexis 5611.

Indeed, the General Assembly has specifically adopted the line between *Miller*-type adhesion contracts and those allowable between parties with equal bargaining power. In R.C. 1301.21, enacted in 2000, the General Assembly essentially codified the *Nottingdale* and *Worth* exceptions. The new statute expressly allows mortgages with attorney-fees provisions in arms-length commercial settings when the value of the mortgage is over $100,000. However, no such exceptions exist in the context of consumer mortgages. To the contrary, Ohio's statutes express a strong policy against the payment of attorney fees in adhesion-type consumer contracts. In fact, some of the provisions at issue would have been illegal if they were entered into after January 1, 2007, when R.C. 1345.031(C) went into effect. That statute states that:

> (1) Any unconscionable arbitration clause, unconscionable clause requiring the consumer to pay the supplier's attorney fees, or unconscionable liquidated damages clause included in a mortgage loan contract is unenforceable.
> (2) No supplier shall do either of the following:
> (a) Attempt to enforce, by means not limited to a court action, any clause described in division (C)(1) of this section;
> (b) By referring to such a clause, attempt to induce the consumer to take any action desired by the supplier.

R.C. 1345.031(C). The administrative rules, which implement the statute, define as "unconscionable" (and therefore unenforceable) a mortgage-loan-contract clause that "purports to bind the consumer to the payment of the supplier's attorney fees or legal costs in connection with the supplier's claim that the consumer has breached a term of the residential mortgage loan." O.A.C. 109:4-3-28. Surely this reflects the General Assembly's continued intent that such provisions are unenforceable.

The mortgages at issue are contracts of adhesion in which the homeowner has no choice as to contract terms. Ohio courts consistently turn to *Black's Law Dictionary* to define "adhesion contract." See *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St. 3d 464, 482 (Cook, concurring in part and dissenting in part); *Sekeres v. Arbaugh* (1987), 31 Ohio St. 3d 24, 31 (Brown, J., dissenting); *Taylor Bldg. Corp. of Am. v. Benfield*, 168 Ohio App. 3d 517, 524, 2006-Ohio-4428. *Black's* defines an adhesion contract as a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." Black's Law Dictionary (7th Ed. 1999) 342. The "distinctive feature" of adhesion contracts is that the "weaker party has no realistic choice as to its terms." *Sekeres*, 31 Ohio St. 3d at 31 (Brown, J., dissenting) (citations omitted).

Here, the homeowners lacked any real choice whether to include the attorney-fees provision. To purchase their homes, they required financing, which they sought from the only available source—large financial institutions that offer residential mortgages. The lenders presented form mortgages contracts to the home buyers, and, apart from the interest rate, the homeowners were not free to negotiate the terms. Notably, the fee-shifting provisions were part of the original mortgage contract, and were not developed later as part of the reinstatement. The appeals court's analysis seemed to assume that the provision arose later, as it referred to reinstatement as a second, optional bargaining situation, that differed from the original mortgage. *Wilborn*, 2007-Ohio-596 ¶¶ 27-32. But it is plain from the face of the mortgage that the terms of reinstatement were set at the time of the original contract, so the homeowners had no opportunity to negotiate those terms. Indeed, the adhesive nature of these contracts is further shown by the fact that several mortgage contracts here purport to require the precise type of fee shifting that *Miller* barred nearly 100 years ago. See Wymers' Mortgage, attached to Amended Complaint as Attachment 6 at ¶ 22. And even if the homeowners were able to renegotiate the terms of reinstatement at that later time, as implicitly construed by the appeals court, the homeowners would then be in an even worse bargaining position with the lender than they were when the loan originated. A borrower in foreclosure is in crisis and is realistically unable to do business with another lender, he needs whatever *this* lender will give him. The unequal strength of the parties' relative bargaining positions is readily apparent, and as a result the consumers had no realistic choice as to the inclusion of the attorney-fees provisions.

Moreover, the homeowners had no meaningful consumer choice among mortgages in terms of the available reinstatement provisions. Eight of the nine mortgages at issue contained reinstatement provisions. See Attachments to First Amended Class Action Complaint. These include some of Ohio's major financial institutions, such as Ameriquest, Wells Fargo, and Chase Manhattan. All reinstatement clauses required payment of any attorney fees incurred by the lender as a result of default. Indeed, several of the contracts even include fee-shifting provisions barred by *Miller*. And five of the eight provisions contained identical or virtually identical language. See Attachments 4, 6, 7, 8, and 9 to First Amended Class Action Complaint.

Where, as here, the relative bargaining positions of the parties are inherently unequal, an adhesion contract exists and *Miller* applies to invalidate the attorney fees provision with no exception. Accordingly, the *Miller* rationale governs when the attorney fees provision is incorporated into an adhesion contract, rendering the provision unenforceable.

B. The attorney-fees provision is unenforceable under the doctrine of unconscionability.

Even if the provisions at issues survived *Miller*, they would still be invalid because they are unconscionable under longstanding contract-law principles. Under the mortgages in question, reinstatement is conditioned entirely upon boilerplate terms written by, and biased in favor of, the lenders. Even though both lenders and homeowners benefit from mortgage reinstatement, only the lenders are contractually entitled to the repayment of attorney fees. Accordingly, the contract terms create an imbalance in the benefits that is unconscionable and should not be enforced against the homeowners.

Adhesion contracts' terms are stricken as unconscionable when they are "unreasonably favorable" to the party offering the contract, who is in the stronger bargaining position. *Lake Ridge Academy v. Carney* (1993), 66 Ohio St. 3d 376, 383 (internal citations omitted). For the *Worth* Court, unreasonably favorable terms would include a "one-sided attorney fees provision," and contractual "imbalance." 32 Ohio St. 3d at 243.

Contractual imbalance exists because the terms for default and reinstatement exist entirely upon the lenders' terms. Those terms allow the lender to declare a breach, pursue legal remedies, and then send the attorney's bill to the homeowner if the homeowner seeks to "reinstate" the mortgage. Thus, lenders are free to pursue their rights, with an attendant safety net. This differs greatly from the situation in which a homeowner breaches a contract, and the parties work out a way forward, both mindful of the attendant costs of pursuing legal remedies. Such a situation might cause lenders to be more cautious in seeking default and litigation to enforce breach. In such a case, as the *Miller* Court foresaw, the lenders might more readily seek an outcome that does not involve litigation and attorney fees, as they would be more likely to have to pay those fees themselves.

Thus, the inclusion of an indemnity clause in a mortgage-reinstatement provision is little more than the mortgage-drafter's thumb on the scale. Such provisions make litigation cost-free to the lenders, as discussed above. But it is not cost-free for the homeowners because there is no parallel provision in the contracts to indemnify the homeowners, should the lenders default upon their contractual obligations. If a lender defaults, the homeowner bears his own legal costs for pursuing legal remedies. Moreover, this practice imposes costs on the court system. Because it is virtually cost-free for the lender, lenders are able to use the court as their private collection agency—imposing unnecessary costs on both the individual homeowner and the community-at-large. Courts should not enforce this type of one-sided benefit in an adhesion contract.

Because both parties benefit from reinstating the mortgage, nothing justifies a one-sided attorney-fees provision. A homeowner gains from reinstatement by avoiding acceleration, or foreclosure, and may retain possession of their property. A lender benefits from the continued and regular payment of a mortgage loan. By contrast, the lender loses out when they must seek foreclosure. A lender loses as much as $40,000 to $50,000 per foreclosure, and recuperate only a small portion of the amounts they are owed, sometimes losing fifty cents on the dollar. News Release, Comptroller of the Currency, Administrator of National Banks, NR 2007-44, Comptroller Dugan Expresses Concern over Subprime Mortgage Foreclosures; Receives "Making-the-Difference" Award from Credit Counseling Foundation (Apr. 24, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-44.htm ("Comptroller News Release"). Thus, it is a financial benefit to the lender that a homeowner resumes making loan payments. A homeowner's continued possession and occupancy of the home also benefits a lender. When a lender takes possession of a house, it must pay for maintenance, insurance, and taxes. An empty house is a "nonperforming asset" for banks, and the longer it sits empty, the less it is worth. Joan Caplin, *Bargains for the Brave*, Money, June 2004, at 98. Both a homeowner and a lender stand to gain by avoiding foreclosure. For those reasons, an indemnity clause cannot be considered "fair," or the result of a trade-off in benefits, because both parties benefit from the reinstatement of a mortgage.

In sum, the lenders' terms unreasonably favor lenders. These provisions give lenders unreasonable, unbargained-for benefits, and for that reason should be struck from the contracts as unconscionable.

C. Requiring payment of attorney fees as a precondition to mortgage reinstatement is against the public policy of the State and would harm Ohio's citizens by making it harder to avoid foreclosures.

Whereas the question of unconscionability concerns the parties to the contract, a court may also refuse to enforce all or parts of a contract based on the injurious effects that enforcement would create throughout society. *Eagle v. Fred Martin Mot. Co.* (9th Dist. 2004), 2004-Ohio-829 ¶¶ 63-64 (citing *King v. King* (1900), 63 Ohio St. 363, 372); *Porter v. Cincinnati S. R. Co.* (1917), 96 Ohio St. 29, 33-34. Courts refuse to enforce a contract's provisions when "they have a mischievous tendency, and are thus injurious to the interests of the state, apart from illegality or immorality." *King*, 63 Ohio St. at, 372; see also *Porter v. Cincinnati S. R. Co.* (1917), 96 Ohio St. 29, 33-34 ("The test is the evil tendency of the contract and not its actual injury to the public in a particular instance.").

The contract provisions at issue here are mischievous indeed. If the homeowner becomes delinquent on a few payments, the sword drops: the bank engages an attorney to begin foreclosure, and the homeowner, to avoid the foreclosure, must pay not only the amount in arrears and the bank's administrative fees, but also the attorney fees for the suspended foreclosure action. The payment of attorney fees occurs at a time when the homeowner is already under severe financial distress. By that time, she owes at least a few months of mortgage payments to the bank. The provision shifting attorney fees makes it even less likely that the homeowner will be able to catch up on her home debt and reinstate her mortgage.

When lenders increase the costs of avoiding foreclosure, the impact ripples throughout society. The additional expense of attorney fees results in more foreclosures because the attorney fees increase the cost of reinstatement for the homeowner. Ohio already faces a tidal wave of foreclosures. According to one report, Ohio ranks eighth in the nation for highest ratio of foreclosures to households. See Special Report by the Joint Economic Committee, *Sheltering*

Neighborhoods from the Subprime Foreclosure Storm, at 6, (Apr. 11, 2007), *available at* http://www.jec.senate.gov/Documents/Reports/subprime11apr2007revised.pdf. According to this report, the current wave of foreclosures is only the "tip of the iceberg." *Id.* at 1. As of May 2007, eighteen Ohio counties, including Cuyahoga, Hamilton, Lucas, Montgomery, and Fairfield, saw over 300% more foreclosures than two years earlier. Joint Economic Committee, *Economic Fact Sheet; Sheltering Neighborhoods from the Subprime Foreclosure Storm*, at 4, (June 22, 2007), *available at* http://jec.senate.gov/Documents/Reports/06.22.07%20Subprime%20Fact%20Sheet.pdf.

Foreclosures are costly to the public: they harm families, lower neighboring property values, and cost taxpayers money. *Id.* at 1-2. "Foreclosures drag down neighborhood property values and make it harder to refinance or obtain new financing. Leaving a property vacant while in foreclosure often creates a negative cycle of disinvestment and decline for entire communities." Comptroller News Release. Empty houses can lead to blight in a neighborhood, reducing the value of surrounding homes. David Streitfeld, *Blight Moves in After Foreclosures; Untended Properties Become Eyesores*, L.A. Times, Aug. 28, 2007, at A1.

Enforcing attorney-fees shifting provisions in mortgage "reinstatement" clauses will unfortunately lead to a rise in foreclosures in this state because the provisions increase the cost of avoiding foreclosure. Because the provisions take advantage of already struggling homeowners, this Court should find the provision for attorney fees in mortgage reinstatement clause void for public policy.

CONCLUSION

For the above reasons, this Court should reverse the judgment below and hold that mortgage reinstatement provisions requiring repayment of attorney fees in the event of default of the mortgage are void and unenforceable.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL* (0038077)
Solicitor General
Counsel of Record
ROBERT J. KRUMMEN (0076996)
Deputy Solicitor
DANIEL W. FAUSEY (0079928)
TODD A. NIST (0079436)
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* the State of Ohio in Support of Plaintiffs-Appellants Sharon Wilborn et al. was served by U.S. mail this 15th day of October, 2007, upon the following counsel:

James C. Martin
Perry A. Napolitano
Joseph E. Culleiton
David J. Bird
Reed Smith, LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Bobbie L. Flynt
Comstock, Springer & Wilson Co. LPA
100 Federal Plaza E., Ste. 926
Youngstown, Ohio 44503

Counsel for Defendants-Appellees Bank One, N.A., Principal Residential Mortgage, Inc., Ameriquest Mortgage Co., Wells Fargo Home Mortgage Company, Inc., Washtenaw Mortgage Company, Mortgage Electronic Registration Systems, Inc., and Chase Manhattan Mortgage Company

Stephen T. Bolton
Manchester, Bennett, Powers & Ullman
The Commerce Building
201 E. Commerce Street, Atrium Leve12
Youngstown, Ohio 44503

Counsel for Defendant-Appellee Chase Manhattan Mortgage Company

John Winship Read
Matthew E. Albers
Vorys Sater Seymour & Pease
1375 E. 9th Street, Suite 2100
Cleveland, Ohio 44114

Counsel for Defendants-Appellees Homeside Lending, Inc., Washington Mutual Bank Successor To Homeside Lending, Inc.

Pamela S. Petas
Rick D. Deblasis
Lerner, Sampson & Rothfuss
120 E. 4th Street, 8th Floor
Cincinnati, Ohio 45202

Counsel for Defendant-Appellee Lerner, Sampson & Rothfus

Michael S. Miller
Daniel R. Volkema
Volkema Thomas, LPA
140 East Town Street, Suite 1100
Columbus, Ohio 43215

Stuart T. Rossman
National Consumer Law Center
77 Summer Street, 10th Floor,
Boston, MA 02210

Seth R. Lesser
Locks Law Firm PLLC
110 East 55th Street, 12th Floor
New York, NY 10022

Counsel for Plaintiffs-Appellants Sharon Wilborn, et al.

Robert J. Krummen
Deputy Solicitor