IN THE SUPREME COURT OF OHIO

WELLS FARGO FINANCIAL OHIO 1, INC.,	:	08-0905
Defendant-Appellant,	:	On Appeal From Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
LILLIE ALEXANDER,	:	Court of Appeals Case No. CA-07-089277
Plaintiff-Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, WELLS FARGO FINANCIAL OHIO 1, INC.

William C. Wilkinson (#0033228)
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
Telephone: (614) 469-3266
Facsimile: (614) 469-3361
William.Wilkinson@Thompsonhine.com

Scott A. King (#0037582) (COUNSEL OF RECORD)
Terry W. Posey, Jr. (#0078292)
THOMPSON HINE LLP
2000 Courthouse Plaza, NE
P.O. Box 8801
Dayton, Ohio 45401-8801
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
Terry.Posey@Thompsonhine.com
Scott.King@Thompsonhine.com

Counsel for Defendant-Appellant,
Wells Fargo Financial Ohio 1, Inc.

Patrick J. Perotti (#005481)
Dworken & Bernstein Co., L.P.
60 South Park Place
Painesville, Ohio 44077
Telephone: (440) 351-3391
Facsimile: (440) 352-3469
pperotti@dworkenlaw.com

Brian G. Ruschel (#0046631)
925 Euclid Avenue, Suite 660
Cleveland, Ohio 44115-1405
Telephone: (216) 621-3370
Facsimile: (216) 621-3371
bruschel@aol.com

Counsel for Plaintiff-Appellee
Lillie Alexander

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This case affects the interpretation of virtually every agreement to arbitrate in Ohio. Arbitration agreements are typically drafted to apply to all disputes "arising from or related to" the business relationship between the parties. The American Arbitration Association recommends that a standard arbitration agreement cover "[a]ny controversy or claim arising out of or relating to this contract." American Arbitration Association, Drafting Dispute Resolution Clauses (2007) at 7. The standard arbitration clause recommended by ADR Options, Inc. covers "any dispute aris[ing] out of, or relat[ing] to, any term of, or performance under, any aspect of this contract or agreement." The National Arbitration Forum's standard agreement covers "any claim or dispute between us...whether related to this agreement or otherwise." National Arbitration Forum, Arbitration Agreement Drafting Guide, at 4. Both the Federal Arbitration Act and the Ohio Arbitration Act speak in the same terms, sanctioning the validity of an arbitration agreement for any controversy "arising out of such contract or transaction." 9 U.S.C. § 2; R.C. 2711.01 ("arises out of the contract").

The parties used this language in this case, agreeing to arbitrate all disputes "arising from or related to" a consumer loan agreement. The Eighth District held that this standard, broad language did not apply because Plaintiff in this consumer class action asserted claims that were based on violation of statutory — not contractual – duties. The Eighth District also held that the arbitration agreement was "extinguished" because Plaintiff claimed to have fully performed the underlying agreement.

The Eighth District not only re-wrote Ohio law, it adopted a construction of an arbitration provision that will effectively re-write every agreement to arbitrate in this state, impacting thousands (if not millions) of consumers and business in Ohio, and creating chaos in an already

unstable business sector. Under the Eighth District's rationale, *no* claim under *any* consumer statute will ever be subject to arbitration. Moreover, any party to *any* arbitration agreement may avoid arbitration merely by claiming that the underlying contract has been performed, thereby "extinguishing" its promise to arbitrate. No reasonable lender in the State of Ohio would have anticipated these results, and if left untouched, the Eighth District's decision will dissuade lenders from transacting business here. The Court should restore Ohio law and enforce the reasonable expectations that arbitration agreements will be enforced in this state like they are in all others.

Equally important, there are already divergent opinions both outside and inside the Eighth District on these very issues. The Eighth District's opinion in this case was the subject of a stinging dissent criticizing the new legal standard that the Eighth District adopted. In September, 2007, faced with the same language that the Eighth District held did not require arbitration, a United States District Court *compelled* arbitration of a class action consumer claim based on the *same claims* asserted here. Enforcement of arbitration agreements now depends in which Ohio court an action is filed. This Court should accept jurisdiction over this matter to clarify the meaning of standard consumer arbitration agreements and to establish the state of the law in Ohio.

Finally, this matter raises identical issues to those currently pending before the Court in Case No. 2008-0635, *Wells Fargo Ohio Financial 1, Inc. v. Bluford*, and should be accepted for the same reasons discussed therein.

STATEMENT OF THE CASE AND FACTS

Statement of the Case.

On May 4, 2006, Plaintiff-Appellee, Lillie Alexander ("Alexander") filed the Complaint, alleging a single claim under R.C. 5301.36, asserting that Defendant-Appellant, Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo"), did not release Alexander's residential mortgage within the statutory time allotted. Alexander alleged no actual damages associated with the late release, but instead sought recovery of the $250 provided by R.C. 5301.36 on behalf of Alexander and those similarly situated. On June 5, 2006, Wells Fargo filed a Motion to Compel Arbitration and Stay or Dismiss Proceedings ("Motion to Compel"). On December 22, 2006, the Trial Court sustained the Motion to Compel ("Decision"). On January 10, 2007, Alexander filed a Notice of Appeal. On April 7, 2008, the Eighth District journalized its opinion ("Opinion") reversing the Decision.

Statement of the Facts.

On December 5, 2000, Alexander executed a Note and a Mortgage in favor of Wells Fargo ("Loan Agreement"). In conjunction with the Note and Mortgage, Wells Fargo and Alexander entered into a separate Arbitration Agreement. The Arbitration Agreement provides for arbitration of all disputes "arising out of or relating to" the Loan Agreement:

> Any party covered by this Agreement may elect to have any claim, dispute or controversy ("Claim") of any kind (whether in contract, tort or otherwise) arising out of or relating to your Loan Agreement, or any prior or future dealings between us, resolved by binding arbitration.

The Complaint alleged that Alexander had paid off the Loan Agreement, but that Wells Fargo had not released its mortgage lien within 90 days after Alexander's pay off. The Complaint sought $250 provided by R.C. 5301.36 on behalf of Alexander and a class she sought to represent.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I

A promise to arbitrate disputes "arising out of or related to" a contract is to be broadly construed to provide for arbitration of any disputes which would not exist but for the contract or the relationship created by the contract.

This proposition of law calls on the Court to resolve an important issue regarding the interpretation of standard language used in Ohio agreements providing for arbitration—the promise to arbitrate disputes "arising out of or related to" the agreement. In particular, the Court is asked to resolve whether a dispute that would not exist *but for the contract or the relationship created by the contract* "arises out of or relates to" the contract.

The Eighth District held that a claim that would not exist "but for" the underlying contract was not covered by a standard arbitration provision. The Eighth District initially reasoned that under *Pinchot v. Charter One Bank* (2003), 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, the release of a mortgage is not an "integral" part of the lending process. Opinion, at ¶¶15-16. Then applying its month old decision in *Bluford v. Wells Fargo Financial Ohio I, Inc.*, Cuyahoga Cty. App. Case. No. No. 89491, 2008-Ohio-686[1], the Eighth District held that because the release of a mortgage lien was not an "integral part" of the loan agreement, claims for failing to timely release the mortgage were not subject to arbitration. Opinion, at ¶16. Under the Eighth District's rationale, if the conduct giving rise to the claim was not an "integral part" of the contract's performance, claims based on that conduct do not arise from or relate to the contract and are not arbitrable. Opinion, at ¶¶16, 17.

[1] As noted above, the *Bluford* case is pending before this Court as Case No. 2008-0635.

The Eighth District's analysis directly conflicts with this Court's decision in *Acad. of Med. v. Aetna Health, Inc.* (2006), 108 Ohio St. 3d 185, 2006-Ohio-657, 842 N.E.2d 488, *cert. denied*, 127 S. Ct. 74, where the Court determined that Ohio law – consistent with federal law — requires arbitration of claims under a broadly-worded arbitration agreement unless the action could be maintained "without reference to the contract *or relationship* at issue." *Aetna Health* at ¶6 (quoting *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386) (emphasis added). In other words, a claim only falls outside the scope of a broadly-worded arbitration agreement if "it is simply fortuitous that the parties happened to have a contractual relationship," *Aetna Health* at ¶23 (quoting *Coors Brewing Co. v. Molson Breweries* (10th Cir. 1995), 51 F.3d 1511).

Here, Wells Fargo loaned money to Plaintiff, and filed a mortgage to perfect its interest in the collateral securing that loan. Plaintiff filed suit against Wells Fargo for allegedly failing to release the mortgage in a timely manner after she paid the loan. Plaintiff's claim would not have existed but for the Loan Agreement and the relationship it created; proof of this claim necessarily requires reference to the Loan Agreement. Because the Arbitration Agreement expressly provides for arbitration of "*any* claim...*arising out of* or relating to your Loan Agreement, or any prior or future dealings between us," and because Plaintiff's claim would not have existed but for the Loan Agreement and the relationships which they created, it was subject to arbitration.

The Eighth District created a new and conflicting standard. Both federal law and this Court's precedent have focused not on whether the conduct was an "integral part" of the performance of the underlying contract, but rather on whether the claims would have existed without reference to the underlying agreement *or the relationship which it created, i.e.*, whether the claims would have existed "but for" the agreement. In her dissent, Judge Stewart accurately described the inherent contradiction in the Eighth District's rationale:

> A mortgage cannot exist without the underlying debt. Without a loan agreement there would be no need to record a mortgage satisfaction or a real estate lien release. It follows that [Wells Fargo's] failure to file a mortgage satisfaction arises from the loan agreement and is therefore subject to the arbitration provisions.

Opinion at ¶26; see also, *Coleman v. Am. Gen. Fin. Servs.*, Cuyahoga Cty. App. Case No. 89311, 2008-Ohio-1403, at ¶¶17-18 (Stewart, J, dissenting).

In September, 2007, the United States District Court for the Northern District of Ohio was faced with a consumer class action filed against Wells Fargo Bank N.A., asserting a claim under R.C. 5301.36 (the same claim asserted here) in a case involving an arbitration agreement that uses the same "arising from and related to" language used in this case. That Court flatly rejected the Eighth District's rationale:

> [The consumer] also contends the recording of a mortgage satisfaction is not an integral part of the lending process, since it occurs after the debt and the extension of credit are extinguished. Wells Fargo counters, and the Court agrees, [the consumer's] claim does implicate the obligations of both Wells Fargo Bank and [the consumer] under the Loan, as well as the mortgagee-mortgagor relationship between them; and the claim cannot be maintained without reference to her loan. *But for* the Loan and the mortgagor-mortgagee relationship, there would be no obligation placed on the bank to record a satisfaction upon full payment. The Court is not persuaded by Howard's citation to *Pinchot*, [supra], which concerns the issue of federal preemption -- a different and quite distinguishable analysis from a determination of arbitrability.

Howard v. Wells Fargo (N.D. Ohio, September 21, 2007, Boyko, J.), No. 1:06CV2821, 2007 U.S. Dist. LEXIS 70099, at *8 (emphasis in original).

While the Court in *Aetna* announced that "a state court in Ohio may base [a] determination on [arbitrability using the] federal standard that inquires whether the action could be maintained without reference to the contract or relationship at issue," lower courts are unable to apply that standard, with two courts reaching differing conclusions on identical facts. The Eighth District's Opinion creates a rift in how arbitration agreements will be treated in this state, and enforcement of arbitration provisions in Ohio now depends on the Ohio court in which a

case is filed. In the Eighth District, the only claims that will be subject to arbitration will be those that are later deemed to be an "integral part" of the performance of the contract, while other courts applying this Court's precedent (and federal law) follow the rule that claims that would not exist but for the underlying contract *or* the *relationship* that it created are subject to arbitration.[2] The Court should accept jurisdiction to clarify the proper analysis of the broadly-worded standard language used in virtually all arbitration agreements in this State.

[2] Appellees in the *Bluford* case argued that the law was settled in *Aetna* and that the Eighth District in *Bluford* merely applied the well settled law to determine that claims arising after the satisfaction of an underlying obligation do not "arise from" or "relate to" the agreement. *Memorandum Opposing Jurisdiction*, Case No. 2008-0635, p. 3-5. What the *Bluford* appellees failed to acknowledge is that the Eighth District's application of *Aetna* in *Bluford* (to the extent that there was one) is in direct contradiction with the court's application in *Howard*.

Proposition of Law No. II

A statutory claim that would not exist but for the relationship created by a loan agreement "arises out of and is related to" the loan agreement creating the original indebtedness.

In the Opinion, the Eighth District reaffirmed its holding in *Bluford* that a statutory claim for damages is not subject to arbitration if the defendant was under a statutory (as opposed to contractual) duty to release a lien. This issue is novel, new, and subject to conflicting precedent in Ohio; the Court should accept jurisdiction to conclusively resolve the issue.

Wells Fargo acknowledges that some statutory claims may be subject to special treatment regarding arbitrability. *Stout v. J.D. Byrider* (6th Cir. 2000), 228 F.3d 709, 714, *cert. denied*, 531 U.S. 1148 (2001)("if federal statutory claims are asserted, [the court] must consider whether Congress intended those claims to be nonarbitrable."). Conceivably, congressional intent may preclude arbitration of certain claims.

In *Bluford*, the Eighth District created a new line of analysis, and then extended its theory in the Opinion. In *Bluford,* the court was faced with whether an arbitration agreement applied to claims under R.C. 1309.625(E). The Eighth District held that arbitrability of a claim was based on whether the duty at issue arose pursuant to statute or the contract; if the duty is statutory, the Eighth District held that a claim for violation of the duty was not subject to arbitration. *Bluford* at ¶29. In this case, the Eighth District expanded its holding in *Bluford* to also apply to claims under R.C. 5301.36. The Eighth District held that: "it cannot be said that Wells Fargo's statutory duty to timely release the mortgage lien is related to the arbitration clause set forth in the note at issue," and, therefore refused to enforce the arbitration agreement. Opinion, at ¶16. The Eighth District's analysis focuses not on whether the statutory claim arose from the "contract or relationship" that it created, but rather on whether the duty at issue was based on contract or on a statute.

The Eighth District's holding, when logically extended, will preclude arbitration of *any* consumer statutory claim. Under the Truth in Lending Act and the Home Ownership and Equity Protection Act, lenders are required to make certain disclosures by statute, not contract; under the Eighth District's rationale, claims for violation of these statutes would not be subject to arbitration, as they involve statutory and not contractual duties. This would be true even though courts addressing the issue have held that such claims are subject to arbitration.[3] Similarly, claims under the Real Estate Settlement Procedures Act involve mandated statutory disclosures; these claims are routinely sent to arbitration,[4] arbitrations that would no longer occur in light of the Eighth District's holding. Claims under the Ohio Consumer Sales Practices Act that were once routinely sent to arbitration[5] would now be exempt.

The Opinion, along with the *Bluford* decision, has the potential to nullify all agreements to arbitrate any consumer dispute in Ohio. The far reaching implications of that result are as consequential as they are obvious. The Court should accept jurisdiction of this case and reconcile Ohio law.

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[3] *Stout, supra* at 716; *Large v. Conseco Fin. Servicing Corp.* (D.R.I. 2001), 167 F. Supp. 2d 203; *Gray v. Conseco, Inc.* (C.D. Cal., September 29, 2000), No. SA CV 00-322, 2000 U.S. Dist. LEXIS 14821.

[4] *Blount v. National Lending Corp.* (S.D. Miss. 2000), 108 F. Supp. 2d 666, 670-71; *Gray, supra*; *Gray v. WMC Mortg. Corp.* (S.D. Miss., June 28, 2000), Case No. 3:00CV211BN, 2000 U.S. Dist. LEXIS 19986, at *8-*10.

[5] *Stout, supra* at 716; *Marshall v. United States Home Corp.* (Summit Cty., February 27, 2002), C.A. 20573, 2002-Ohio-821, 2002 Ohio App. LEXIS 791; *Smith v. Ohio State Home Servs.* (Summit Cty., May 25, 1994), Nos. 16441, 16445, 1994 Ohio App. LEXIS 2270.

Proposition of Law No. III

The completion of performance of a contract providing for arbitration does not preclude arbitration of disputes arising from or related to the contract.

Again applying its holding in *Bluford*, the Eighth District also decided that Plaintiff's claim under R.C. 5301.36 did not fall within the scope of the Arbitration Agreement because Plaintiff had fully performed the Loan Agreement. It held that the Loan Agreement was satisfied when Plaintiff completed her performance by paying the Note "in full," and that the completion of performance of the Loan Agreement terminated any arbitration agreement. Opinion, at ¶16. This holding not only conflicts with this Court's precedent, it creates massive loopholes in provisions for arbitration.

The law is well-established that an arbitration agreement is an entity wholly separate from the contract to which it relates. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395; *ABM Farms v. Woods* (1998), 81 Ohio St. 3d 498, 502, 692 N.E.2d 574. This Court has held:

> Because the arbitration clause is a ***separate entity***, it only follows that an alleged failure of the contract in which it is contained does not affect the provision itself. It remains as the vehicle by which the legitimacy of the remainder of the contract is decided.

Id. at 502, 692 N.E.2d at 577 (emphasis added). In *ABM Farms*, this Court held that the fraudulent inducement of the plaintiff to enter into an underlying contract had no effect on the enforcement of a related arbitration agreement. Applying these principles to the issues at hand, Judge Boyko noted:

> [T]he United States Supreme Court has held a dispute, "although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 249, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977).

Howard, supra, at *8.

Here, the Arbitration Agreement requires arbitration of "any claim" arising from the Loan Agreement, or "*any future dealings*" between Wells Fargo and Plaintiff. Plaintiff's completion of performance by paying off her Loan Agreement did not extinguish her agreement to arbitrate. Rather, the promise to arbitrate is treated as a free standing agreement. Accordingly, and contrary to the Eighth District, the termination of the underlying agreement does not terminate the obligation to arbitrate. Again, in the dissent, Judge Stewart pointed out the flaw in its logic:

> What the majority in this case and in *Bluford* fail to acknowledge is that the statutory duties cannot arise unless and until the loan agreements are extinguished by full payment of the notes. In other words, the precise reason the court gives for finding that the claims are not subject to arbitration – namely full payment of the loan – is precisely what must happen before the claimed duties manifest.

Opinion, at ¶24.

The Eighth District's holding will create a massive loophole in arbitration agreements across the state. If a party's performance of the underlying contract terminates the arbitration agreement, then parties could avoid arbitration merely by asserting that the underlying agreement had been performed. The recalcitrant party would then be free to assert *in court* claims that directly "arose from or were related to" the agreement or the relationship that it created, using the Eighth District's logic that the arbitration obligation in the underlying agreement has been "satisfied" by performance of the underlying contract.

The rationale adopted by Eighth District's Opinion in this case and in *Bluford* threatens to eviscerate arbitration agreements in Ohio. This Court should accept jurisdiction to clarify the law.

CONCLUSION

The language at issue in this case is the standard for defining the scope of arbitration agreements across the state. When a claim "arises from or is related to" the agreement, *i.e.*, if the claim would not exist "but for" the underlying agreement or relationship it created, then the claim is subject to arbitration, even if the claim arose from a statutory duty, and even if the underlying agreement has been fully performed.

The Eighth District's contrary conclusions in the Opinion have and will continue to come as a shock to lenders and any other business that deals with consumers in the State of Ohio. It takes little imagination to use the Eighth District's analysis to void arbitration agreements for all statutory claims, or to any agreement where one party claims to have fully performed. The Court should accept jurisdiction of this case to define the contours of this important area of law in Ohio.

Respectfully submitted,

Scott A. King (#0037582)
Terry W. Posey, Jr. (#0078292)
THOMPSON HINE LLP
2000 Courthouse Plaza, N.E.
P.O. Box 8801
Dayton, OH 45401-8801
Telephone: (937) 443-6560
Facsimile: (937) 443-6830
E-mail: Terry.Posey@Thompsonhine.com
Scott.King@Thompsonhine.com

William C. Wilkinson (#0033228)
THOMPSON HINE LLP
One Columbus
10 West Broad Street
Columbus, OH 43215-3435
Telephone: (614) 469-3266
Facsimile: (614) 469-3361
E-mail: William.Wilkinson@Thompsonhine.com

Counsel for Defendant-Appellant,
Wells Fargo Financial Ohio 1, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 9th day of May, 2008.

Patrick J. Perotti, Esq.
60 South Park Place
Painesville OH 44077

Brian G. Ruschel, Esq.
925 Euclid Avenue
Suite 660
Cleveland OH 44115-1405

Terry W. Posey, Jr.

523162.2

APR 7 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89277

LILLIE ALEXANDER

PLAINTIFF-APPELLANT

vs.

WELLS FARGO FINANCIAL OHIO 1, INC.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-590622

BEFORE: Kilbane, P.J., Stewart, J., and Dyke, J.

RELEASED: March 27, 2008

JOURNALIZED: APR 7 2008

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ATTORNEYS FOR APPELLANT

Brian G. Ruschel
660 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1405

Patrick J. Perotti
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

ATTORNEYS FOR APPELLEE

Chad D. Cooper
Scott A. King
Thompson Hine, LLP
2000 Courthouse Plaza, N.E.
P.O. Box 8801
Dayton, Ohio 45401-8801

FILED AND JOURNALIZED
PER APP. R. 22(E)

APR 7 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR 27 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

On May 2, 2006, plaintiff-appellant Lillie Alexander ("Alexander") filed a class action complaint against defendant-appellee Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo") alleging violation of R.C. 5301.36, namely, that Wells Fargo failed to file an entry of satisfaction of mortgage with the Cuyahoga County Recorder within ninety days of full payment of the mortgage.

Alexander seeks to represent a class of all persons who, from February 2, 2000, paid residential mortgages in full where Wells Fargo, among other named banks, did not file an entry of satisfaction of mortgage with the Cuyahoga County Recorder's office within ninety days of loan payoff.

On June 5, 2006, Wells Fargo filed a "motion to compel arbitration and stay or dismiss proceedings." On December 22, 2006, the trial court granted Wells Fargo's motion to compel arbitration and held:

> **"Plaintiff's claims are arbitrable for the following reasons: her claims would not exist but for the transaction that is the subject of the arbitration agreement and therefore not outside the scope of the arbitration agreement; agreement is neither substantively nor procedurally unconscionable in violation of public policy. Therefore, the case is hereby stayed pending arbitration pursuant to the arbitration agreement."**

The facts giving rise to the instant action began on December 5, 2000, when Alexander, Henry Alexander, and Wells Fargo entered into a loan

agreement and an arbitration agreement pertaining to real property located at 10305 Dove Avenue in Cleveland, Ohio. The arbitration agreement is entirely separate from the loan agreement and is signed by Henry and Lillie Alexander and by Wells Fargo Bank and reads in part:

> "(1) **RIGHT TO ELECT TO ARBITRATE: Any party covered by this Agreement may elect to have any claim, dispute or controversy ("Claim") of any kind (whether in contract, tort, or otherwise) arising out of or relating to your Loan Agreement, or any prior or future dealings between us, resolved by binding arbitration. A Claim may include, but shall not be limited to the issue of whether any particular Claim must be submitted to arbitration, or the facts and circumstances involved with your signing of this Agreement, or your willingness to abide by the terms of this Agreement or the validity of this Agreement. Any such election may be made any time both parties agree that neither party has to initiate an arbitration proceeding before exercising remedies of self-help repossession, non-judicial foreclosure, replevin or other similar remedies. The filing of a lawsuit or the pursuit of other self-help remedies does not mean that either party has waived the right to subsequently elect to submit a Claim to arbitration.**
>
> ***
>
> (5) **LIMITATION OF RIGHTS: IF ARBITRATION IS ELECTED BY EITHER PARTY UNDER THIS AGREEMENT: (A) YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR TO HAVE A JURY TRIAL; (B) YOU WILL NOT HAVE THE RIGHT TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED IN THE RULES; (C) YOU WILL NOT HAVE**

THE RIGHT TO HAVE ANY CLAIM ARBITRATED AS A CLASS ACTION UNDER THE RULES OR UNDER ANY OTHER RULES OF CIVIL PROCEDURE *."**

Wells Fargo recorded the corresponding mortgage on December 13, 2000. Alexander paid the mortgage in full on or about July 27, 2001. Wells Fargo filed the entry of satisfaction of judgment on January 11, 2002.

On January 10, 2007, Alexander appealed and asserted one assignment of error for our review: "The trial court erred in granting Defendant's Motion to Stay or Dismiss Pending Arbitration."

"Initially, we note that this court does not agree upon the standard of review applicable to a trial court's decision denying a stay of proceedings and referral to arbitration. Several panels have held that questions regarding whether the parties have made an agreement to arbitrate is a question of law requiring de novo review, while others have held that the appropriate standard is whether the trial court abused its discretion in rendering its decision." *Shumaker v. Saks, Inc.*, Cuyahoga App. No. 86098, 163 Ohio App.3d 173, 2005-Ohio-4391.

Ohio public policy favors arbitration. R.C. 2711.01(A) reads as follows:

"A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the

> **contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."**

Furthermore, both the United States Code and the Ohio Revised Code contain arbitration provisions:

> **"There are four pertinent statutes that relate to the enforcement of arbitration agreements: Sections 3 and 4 of the Federal Arbitration Act ("FAA") contained in Title 9, U.S. Code, R.C. 2711.02 and 2711.03. Section 3 of the FAA and R.C. 2711.02 apply to motions to stay proceedings pending arbitration. Section 4 of the FAA and R.C. 2711.03 apply to motions to compel arbitration." *Pyle v. Wells Fargo Financial et al.*, Franklin App. No. 05AP-644, 2005-Ohio-6478.**

Here, the arbitration agreement is governed by the FAA and not the Ohio Revised Code. Wells Fargo based its motion to compel arbitration and stay or dismiss based upon the same. "[T]he Ohio Supreme Court has found that Section 3 of the FAA 'closely resembles' R.C. 2711.02, and Section 4 of the FAA is 'very similar' to R.C. 2711.03, and that the procedural requirements under these statutes are the same ***." *Pyle,* supra; see, also, *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465.

Where a court determines that a case is referable to arbitration pursuant to an arbitration agreement, a court shall, upon application by one of the parties, stay the proceedings until arbitration is complete. 9 U.S.C. § 3 (2003). Where the making of the arbitration agreement is not at issue, the court shall direct the parties to proceed to arbitration pursuant to agreement. 9 U.S.C. § 4 (2003).

Alexander, however, argues that the trial court erred in granting Wells Fargo's motion for the following reasons: first, the case sub judice is beyond the scope of the arbitration agreement; second, the arbitration agreement is void as against public policy; and third, the arbitration agreement is unconscionable.

Regarding Alexander's argument that the instant dispute is beyond the scope of the arbitration agreement, the trial court must first determine whether the parties agreed to arbitrate the issue in dispute. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614. We have held that, "An arbitration clause may be legally unenforceable if the clause is not applicable to the matter at hand ***." *Schwartz v. Alltel Corp.*, Cuyahoga App. No. 86810, 2006-Ohio-3353.

Furthermore, "Despite the strong public policy in favor of arbitration, it is basic law that a party cannot be required to arbitrate that which has not been

agreed as a subject of arbitration." *Shumaker,* supra. In *Shumaker*, we found that:

> **"Appellants argue, however, that Shumaker's claim is related to Caputo's credit account because 'the relationship between the goods Mrs. Caputo financed and this case is undeniable – if Mrs. Caputo has not made those purchases, there would be no claim of unconscionable sales practices.' We make no such connection. The absurdity of appellants' preposterous argument is demonstrated by defense counsel's concession at oral argument that if Caputo had purchased the goods with her Mastercard, the case could proceed without arbitration. Moreover, appellants' argument, taken to its logical conclusion, would require that every tort claim against Saks by one of its credit card holders be arbitrated. Under appellants' theory, even a slip and fall on store property would somehow be an event 'relating to' an account with Saks.**
>
> **Appellee is not making any claim relating to Caputo's account or even the goods and services purchased on that account. Rather, he is claiming that appellants'conduct in preying on a lonely, elderly lady, even after they were asked to stop, was an unconscionable sales practice in violation of Ohio Consumer Sales Practices Act. Such a claim is not even remotely related to Caputo's account with Saks."**

More specifically, Alexander cites to case law in support of her contention that the recording of a mortgage satisfaction or real estate lien release is not part of the lending process because it necessarily occurs after satisfaction of the debt. See *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122. The *Pinchot* court held:

> **"The recording of a mortgage satisfaction or real estate lien release is not an integral part of the lending process, as it occurs after the debt is satisfied and the extension of credit is extinguished. Such a recording requirement cannot even begin until the mortgage has already been terminated. It does not center around the essential reasons lenders issue home loans, for it has nothing to do with charging and collecting interest or any other lending or credit-related function. And such a recording requirement cannot be realistically connected to lending practices or to the operations of savings associations because it has no concrete significance to whether and how loans are made. The mortgage is taken to secure the loan and filed to perfect the lien. When the loan is paid, the mortgage is satisfied, leaving a cloud on the title to the realty until the satisfaction is recorded."**

We agree, and find that in the case sub judice, Alexander satisfied the note by payment in full. Wells Fargo's statutory duty to release the mortgage lien arose thereafter. See *Charles L. Bluford, et al. v. Wells Fargo Financial Ohio 1, Inc.* (Feb. 21, 2008), Cuyahoga App. No. 89491. Thus, it cannot be said that Wells Fargo's statutory duty to timely release the mortgage lien is related to the arbitration clause set forth in the note at issue. Id.

Because the arbitration provision at issue does not apply to this dispute, we need not address whether the arbitration agreement is void as against public policy or whether the arbitration agreement is unconscionable. Id.

After reviewing the entire record, in applying the law to the facts of this case, we find that the trial court erred by granting Wells Fargo's motion.

Alexander's sole assignment of error is sustained. Accordingly, we reverse the judgment of the trial court, and we remand this matter for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., CONCURS IN JUDGMENT ONLY
MELODY J. STEWART, J., DISSENTS (SEE DISSENTING OPINION)

MELODY J. STEWART, J., DISSENTING:

I respectfully dissent from the majority opinion.

The majority relies on *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, in holding that Wells Fargo's duty to timely release the mortgage lien arose after the note was satisfied, and thus was not a part of the lending process. *Pinchot*, however, is distinguishable from this case. *Pinchot* specifically addresses whether federal law preempts the application of R.C.

5301.36 to federal savings associations. The question raised in the present case is whether an arbitration clause applies to the filing of the termination of mortgage when the arbitration clause was contained in the promissory note and not the mortgage, not whether the recording of the mortgage satisfaction was part of the overall lending process. In any event, the arbitration clause would still apply regardless of whether the mortgage satisfaction was found to be part of the lending process because the language of the arbitration clause refers to any claim or dispute arising out of, or related to, the loan agreement.

While the promissory note and the mortgage are separate documents, these documents are considered part of one transaction and should be construed together. *Niswonger v. Gross* (Feb. 9, 1983), Montgomery App. No. 7936 (holding that the note did expressly incorporate the provisions of the mortgage by reference and that the note and the mortgage must be read and construed together). "Writings executed together as part of the same transaction should be read together, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361; *Edward A. Kemmler Mem. Found. v. 691/733 East Dublin-Granville Rd. Co.* (1992), 62 Ohio St.3d 494, 499, 584 N.E.2d 695; *Trowbridge v. Holcomb* (1854), 4 Ohio St. 38, 43 (a note and mortgage must be construed together; they refer to each other, and are

but parts of one contract). Therefore, the arbitration clause contained in the promissory note, that refers to the "Loan Agreement," should be applicable to the both the promissory note and the mortgage.

The majority further relies on *Shumaker v. Saks, Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, to establish that this case is beyond the scope of the arbitration agreement. In *Shumaker*, a personal shopper working for Saks allegedly visited an elderly woman on a continual basis and sold her goods and services. The woman's family informed the personal shopper's manager that the elderly woman could not afford the purchases and that the credit account was placing her in financial distress. Nonetheless, the charges continued to accrue until they amounted to over $100,000 worth of unused items. When the woman died, the administrator of her estate filed a claim against Saks alleging that the store's sales practices were unconscionable under the Ohio Consumer Sales Practices Act (OSCPA). Saks filed a motion to compel arbitration, based on the decedent's credit card agreement with the store that contained an arbitration clause. On appeal, we held that this claim was unrelated to the credit agreement between the decedent and the store, therefore arbitration could not be compelled. The administrator could still have a claim against the store even if the decedent did not have a credit account. This case is also distinguishable because the event giving rise to the dispute in the present case comes from, and

is intimately related to, the loan agreement that was signed by both Wells Fargo and the Alexanders. Without the loan agreement, this claim could not exist.

Finally, the majority cites to this court's recent decision in *Charles L. Bluford, et al. v. Wells Fargo Financial Ohio 1, Inc.*, Cuyahoga App. No. 89491, 2008-Ohio-686, in support of its position that, because appellee's duty to release the mortgage lien arose after the note had been paid in full, the mortgage release duty cannot be related to the arbitration clause in the note. *Bluford* further opines that although the arbitration agreement expressly provides that it extends to disputes arising out of future dealings, the court simply did not agree that the arbitration agreement was applicable to the claims filed pursuant to provisions of the Ohio Revised Code. What the majority in this case and in *Bluford* fail to acknowledge is that the statutory duties cannot arise unless and until the loan agreements are extinguished by full payment of the notes. In other words, the precise reason the court gives for finding that the claims are not subject to arbitration – namely full payment of the loan – is precisely what must happen before the claimed duties manifest.

Courts should enforce an arbitration provision in a contract "unless it may be said with positive assurance that the subject arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *Gujrati v. Dech* (Aug. 16, 1995), Summit App. No. 16966, unreported, citing *Neubrander*

v. Dean Witter Reynolds, Inc. (1992), 81 Ohio App.3d 308, 311, 610 N.E.2d 1089. Because of the strong presumption in favor of arbitration, a court must resolve any ambiguity in an arbitration clause in favor of resolving the dispute by arbitration. *Russell E. Toole & Sons Elec. v. Columbus Hous. Partnership* (Nov. 13, 1997), Franklin App. No. 97APG03-380.

A mortgage cannot exist without the underlying debt. Without a loan agreement there would be no need to record a mortgage satisfaction or a real estate lien release. It follows that appellee's failure to file a mortgage satisfaction arises from the loan agreement and is therefore subject to the arbitration provisions. For these reasons, I would affirm the trial court's decision granting appellee's motion to compel arbitration.