

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Nancy Rogers, Attorney General of Ohio,	:	Case No. 08-1451
	:	
	:	
Plaintiff-Appellee,	:	ON APPEAL FROM THE FRANKLIN
	:	COUNTY COURT OF APPEALS, TENTH
v.	:	APPELLATE DISTRICT
	:	
Midway Motor Sales, Inc., <u>et al.</u> ,	:	Court of Appeals
	:	Case No. 07AP-744
Defendant-Appellee,	:	
	:	
(General Motors Acceptance Corporation, n/k/a GMAC LLC,	:	
	:	
Defendant-Appellant).	:	

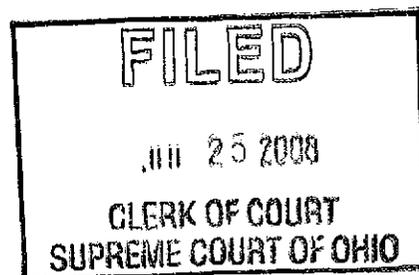
**MEMORANDUM OF AMICI CURIAE AMERICAN FINANCIAL SERVICES
ASSOCIATION AND ASSOCIATION OF CONSUMER VEHICLE LESSORS IN
SUPPORT OF JURISDICTION**

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

At the outset, Amici Curiae, trade organizations whose members routinely sell vehicles and complete Ohio odometer disclosure affidavits, will briefly address who they are so that this Court can better understand their interests in the present case.

Amicus Curiae American Financial Services Association (“AFSA”) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. For over 90 years, AFSA has provided services to its members. Among its major activities, AFSA deals with all aspects of the legal environment facing the consumer credit industry, including legislative issues, regulatory matters and litigation. One of AFSA’s subcommittees, the Law Committee, is dedicated to auto finance and leasing issues. AFSA encourages and maintains ethical business practices and supports financial education for consumers of all ages. AFSA represents more than 350 companies nationally operating more than 10,000 offices engaged in offering motor vehicle financing and leasing to consumers in the United States.

Amicus Curiae Association of Consumer Vehicle Lessors (“ACVL”) consists of the nation’s leading vehicle lessors. The ACVL has as its missions promoting retail automobile leasing, eliminating unfair and deceptive trade practices, increasing the effectiveness of members as competitors and enhancing the public understanding of and satisfaction with automobile leasing. The ACVL has provided leasing information to the Federal Reserve Board (“FRB”) that has been incorporated into the FRB’s consumer publications and web site materials. ACVL members originated an estimated 1.6 million leases totaling \$54 billion in 2007.

The implications of the Tenth District Court of Appeals’ (“Tenth District”) rulings go beyond just the leasing related operations of Appellant GMAC LLC (“GMAC”). The ruling could affect any person or entity reselling a car or truck, whether the person or entity obtained

title to the vehicle by purchase or repossession of the vehicle, assignment of the lease or otherwise. If, as the Tenth District's opinion suggests, an innocent, unknowing person or entity that engaged in no wrongdoing can be found strictly liable for odometer rollbacks perpetrated without its knowledge, there would be a negative impact on the ability and willingness of our constituents, including lessors, banks and finance companies, to do business involving vehicle transactions in the State of Ohio. The prospect of strict liability under the Ohio Odometer Rollback and Disclosure Act ("Odometer Act") in connection with the type of leasing arrangements prevalent in the industry makes this case critically important to the members of AFSA and ACVL, as well as to Ohio's business community as a whole.

By way of background, it is standard practice for companies engaging in lease remarketing (i.e., the resale and transfer of vehicles after expiration of a lease) to obtain title to leased vehicles but never have possession or control of the vehicles. This is how the members of AFSA and ACVL do business on a regular basis. And, this is how GMAC does business with dealerships. In this case, the dealership, Midway Motor Sales ("Midway"), leased vehicles to its customer, took possession of them at lease end and rolled back their odometers. GMAC, unaware of the odometer rollbacks, sold the affected vehicles at dealer-only auctions and the purchasing dealers subsequently transferred the vehicles to consumers in the stream of commerce. When GMAC completed the State-mandated odometer disclosure affidavits at the time of vehicle transfer, it indicated to the best of its knowledge (i) the physical odometer reading appearing on the vehicle (which, unbeknownst to GMAC, had been altered) and (ii) the reliability of the reading. The disclosures in these affidavits were, in fact, true. As explained more thoroughly in GMAC's Memorandum In Support Of Jurisdiction, the Tenth District ignored the knowledge element in O.R.C. § 4549.46(A) of the Odometer Act and concluded that

GMAC and other transferors could, by virtue of completing the odometer disclosure affidavit to the best of their knowledge, be found strictly liable for inaccurate odometer readings resulting from an odometer rollback scheme perpetrated without their knowledge. Holding individuals or companies strictly liable simply because they are in the chain of title would place undue burdens on downstream transferors and subject innocent transferors to penalties for violations that would be impossible to avoid.¹

The economic implications of the holdings below are just as significant as the legal implications. For example, (i) companies may raise the price of used vehicles because of costly changes to procedures and/or potential legal liability in connection with lease-end sales, resulting in higher prices for consumers; (ii) companies may reconsider the viability of doing business in Ohio or possibly title cars in other states to avoid problems in Ohio, depriving the State of Ohio of taxes, title fees and jobs; and/or (iii) companies may be less willing to engage in financing arrangements with dealers in Ohio, which also could reduce tax and fee revenue and diminish job opportunities in Ohio. What affects Ohio's business community affects the economy of Ohio and necessarily will be of public and great general interest.

Legal and economic effects aside, suing innocent individuals and companies and holding them strictly liable for odometer disclosure violations discourages whistle-blowing for any strict liability offense and encourages needless litigation. In the end, strict liability will not make any

¹ The trial court suggested that GMAC could have detected fraud by checking warranty records. Even if such procedures were required by law (and they are not), checking warranty records is impractical at best and impossible at worst. Accessing and analyzing such records would be prohibitively time-consuming, expensive and often fruitless, as odometer fraud is not necessarily evident from the face of warranty records. Many companies engaging in lease remarketing, such as banks, have no access to manufacturer warranty records at all. In reality, virtually all innocent individual sellers will lack the information and resources needed to detect odometer fraud. Because O.R.C. § 4549.46 does not differentiate between different types of transferors, if a company like GMAC is held strictly liable, other transferors will be held to the same standard.

appreciable difference in preventing odometer fraud from occurring in the first place.

The Attorney General's decision to sue GMAC under these facts will have a chilling effect on whistle-blowing, and that effect will not be limited to whistle-blowing by companies selling used cars or even to violations of the Odometer Act. Any person who transfers title to a vehicle potentially could be caught by the strict liability interpretation of O.R.C. § 4549.46, even though the individual provided a true and complete odometer disclosure to the best of his or her knowledge. More broadly, if the judgment against GMAC is allowed to stand, any person could reasonably fear being prosecuted for a strict liability offense after reporting possible wrongdoing to the Attorney General. Other affected entities may in the future decide not to report odometer tampering so as to avoid a costly lawsuit that could lead to strict liability and civil penalties on top of settlements paid directly to consumers, not to mention litigation expenses, reputational damage, loss of community good will and other related expenses.

Indeed, companies will be unlikely to report such activities if their reward for being good corporate citizens is to have the authorities turn on them and sue them for strict liability. Companies should not be forced to choose between (i) reporting fraud and exposing themselves to extra liability or (ii) keeping silent and potentially avoiding that liability. Ohio law should seek to encourage, not discourage, the reporting of odometer tampering to the authorities as GMAC admirably did.

This chilling effect would have unfortunate repercussions on odometer fraud enforcement and other areas where whistle-blowers, like GMAC, commonly have access to specialized information or expertise that could assist law enforcement. Without the assistance of the affected company, the burden on law enforcement agencies will increase and the true wrongdoers may escape punishment altogether.

The Amici's members strive to comply with all relevant laws and uphold industry best practices, which should include reporting of odometer fraud without fear of facing civil (and even criminal) liability for unknowingly selling vehicles with rolled back odometers. Lessors and lease remarketers, including GMAC and the Amici's members, are necessarily key allies of law enforcement in the fight against odometer fraud. Holding such allies to unrealistic requirements regarding odometer disclosures undermines what could be a powerful partnership in the fight against fraud. Moreover, as discussed below, research has shown that voluntary private remediation efforts with consumers are more effective at compensating affected consumers than law enforcement actions. Accordingly, the Attorney General's action against GMAC was not only unfair and unwarranted, but also counterproductive.

Moreover, upholding summary judgment against GMAC will reward the Attorney General for squandering scarce enforcement resources pursuing a whistleblower who voluntarily shouldered the Attorney General's investigatory burden and the \$1.2 million cost of another company's odometer fraud. In exchange for reporting Midway's fraud and handing over critical evidence, the Attorney General "rewarded" GMAC by instituting this lawsuit. Presumably, the Attorney General was motivated by the desire to obtain civil penalties from GMAC's deep pockets. Do we want the consequences of a good corporate citizen's cooperation in the fight against fraud to be a lawsuit? Surely not.

In sum, review by this Court would provide guidance in this unsettled area of the law to ensure that innocent, unknowing companies and individuals are not getting ensnared in a strict liability trap simply because their names appear in the chain of title for a vehicle. Accepting jurisdiction would benefit not only companies like GMAC involved in lease remarketing, but other participants in the motor vehicle industry and also the public as a whole. In issuing the

decision from which GMAC seeks to appeal, the Tenth District expressly opined that the resolution of this issue may “rest[] with a higher court of law.” Opinion at 9 (emphasis added). Given the public and great general interest at stake here and the Tenth District’s suggestion that this Court should resolve the conflict between the case law and the statutory law, Amici Curiae urge this Court to accept jurisdiction over GMAC’s appeal.

STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the Statement Of The Case And Facts in GMAC’s Memorandum In Support Of Jurisdiction.

To further aid in this Court’s understanding of the implications of this issue for the industry, Amici Curiae direct this Court’s attention to the details of a National Highway Traffic Safety Administration (“NHTSA”) study on odometer fraud. See Preliminary Report: The Incidence Rate of Odometer Fraud (April 2002), *available at* www.nhtsa.dot.gov/cars/rules/regrev/evaluate/pdf/809441.pdf (“NHTSA Report”). According to this report, odometer fraud is one of the top crimes against property in the United States, with an average cost of over \$1 billion per year (\$2,336 per case and 452,000 cases per year). NHTSA Report at vii. Unquestionably, then, odometer fraud is a prevalent and costly practice that should be prevented.

The most successful tool in deterring odometer fraud, according to the report, is victim notification. NHTSA Report at 72. Victims are routinely notified as part of federal odometer investigations, and this practice has increased public awareness of odometer fraud and benefited consumers who purchased affected vehicles. Id. In regard to benefits, the study indicates that victims commonly return to the dealers who sold the affected vehicles. Id. Such dealers, who rarely were involved in the fraud, will normally settle with the victims to protect their reputation

in community. Id. For example, following victim notification by the NHTSA, an innocent auto auction voluntarily paid \$1.4 million to settle with 398 victims of odometer fraud. Id. That averages out to \$3,500 per victim, which is significantly greater than the \$230 average restitution obtained as a result of federal investigations between 1990 and 2001. Id. at 69. Moreover, the NHTSA indicates that an odometer fraud investigation takes about a year to complete. NHTSA Report at 68. Thus, consumers may get faster results and greater compensation from remediation efforts like the one initiated by GMAC than they would from enforcement actions. This evidence strongly suggests that efforts by companies to notify and settle with consumers likely will have a greater impact on deterring odometer fraud and compensating consumers than the Attorney General's unnecessary action seeking to hold GMAC strictly liable for the odometer rollbacks perpetrated without its knowledge and involvement. Moreover, the Attorney General's "enforcement" action against GMAC inefficiently allocated state funds to pursue a lawsuit against an ally who had already "conceded" involvement in the chain of title and surrendered all the evidence the Attorney General needed to make a case against it.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: O.R.C. § 4549.46(A) is not a strict liability statute inasmuch as it expressly and unambiguously incorporates the odometer disclosure requirements set forth in O.R.C. § 4505.06, which mandates the Registrar of the State of Ohio to promulgate a mandatory odometer affidavit disclosure form that vehicle transferors must complete and the form requires disclosures to the best of the transferor's knowledge.

GMAC has consistently articulated clear and convincing reasons why O.R.C. § 4549.46 is not a strict liability statute. Amici agree. In the interest of brevity, Amici Curiae will only briefly summarize the legal arguments presented by GMAC in this case, which are set forth more fully in GMAC's Memorandum In Support Of Jurisdiction. In sum, (i) O.R.C. § 4549.46(A)

cannot be read as a strict liability statute by its very own terms, which specifically refer to and incorporate O.R.C. § 4505.06(C)(1), which, in turn, references the knowledge-based odometer disclosure affidavit issued by the Registrar of Ohio's Bureau of Motor Vehicles; (ii) there is simply no support in the statute or its legislative history for reading O.R.C. § 4549.46(A) as a strict liability statute; (iii) construing O.R.C. § 4549.46(A) as a strict liability offense leads to the unjust and unreasonable result of holding an innocent transferor liable for the wrongful activities of a third party, in violation of O.R.C. § 1.47(C), which directs us to presume that the Legislature intended a just and reasonable result; and (iv) if permitted to stand, the ruling of the Tenth District would perversely undermine the disclosure provided by any person or entity selling a car in Ohio, which must be based on their knowledge. For the reasons discussed above, such an interpretation of the law carries serious economic and law enforcement repercussions. This Court should accept review to make clear that individuals and companies doing business in Ohio can safely sell their vehicles in reliance on their truthful and complete odometer disclosures.

Amici, while in complete accord with GMAC's arguments based on civil actions for violation of O.R.C. § 4549.46, have an additional industry-based reason for concern about the standard that is being applied in this case, which is that this same statute could be used to impose criminal penalties. Although no criminal charges were filed against GMAC, O.R.C. § 4549.46 is a penal statute. Violation of O.R.C. § 4549.46(A) is an odometer disclosure violation, a felony of the fourth degree (or third degree for certain repeat offenders). O.R.C. § 4549.46(D). Interpreting O.R.C. § 4549.46 as a strict liability criminal offense is clearly contrary to fundamental principles of criminal law and current Ohio Supreme Court case law on strict liability. See, e.g., O.R.C. § 2901.21(B); State v. Collins, 89 Ohio St.3d 524, 2000-Ohio-231, 733 N.E.2d 1118; State v. Moody, 104 Ohio St.3d 244, 247, 2004-Ohio-6395, 819 N.E.2d 268;

State v. Young (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363.

Liberal construction of penal statutes is (i) not required under the general rules of construction in O.R.C. § 1.11 and (ii) not permitted under rules of construction for criminal laws in O.R.C. § 2901.04. Statutes defining criminal offenses or penalties must be construed strictly against the state and liberally in favor of the accused. O.R.C. § 2901.04(A). The argument that O.R.C. § 4549.46 is not a strict liability offense is even more compelling, because it is a criminal law that must be construed liberally in favor of the accused. The courts below did the opposite, liberally construing the law in favor of the state. However, when criminal sanctions are available, liberal construction in favor of the state is impermissible.

Although O.R.C. § 4549.46 is clearly not a strict liability offense, virtually all odometer disclosure violation cases hold otherwise on the strength of a single case: Flint v. Ohio Bell Telephone Co. (1982), 2 Ohio App.3d 136, 440 N.E.2d 1244, the applicability of which GMAC definitively distinguished in its Memorandum. The purported precedential value of Flint is even more dubious when viewed in the context of possible criminal proceedings. The Flint Court advanced several arguments for finding strict liability, none of which can withstand scrutiny. The cases following Flint—premised on the culpable odometer tamperers trying to find technicalities to allow them to avoid the consequences of their bad acts—have led O.R.C. § 4549.46 litigation down the wrong path. Simply because the strict liability standard has built up such momentum does not mean it is the right standard. In other words, this Court should not allow one inapposite and inadequately reasoned decision applying a strict liability standard to serve as a substitute for an open-minded review of the statutory language and clear legislative intent. Now is the time for the Ohio Supreme Court to correct odometer disclosure litigation by clarifying the proper legal standard for liability under O.R.C. § 4549.46.

Proposition of Law No. II: Imposing strict liability on the basis of a State-issued and mandated odometer disclosure affidavit form that itself contains an express knowledge element violates due process, and amounts to entrapment.

By prescribing an odometer disclosure affidavit containing an express, unambiguous knowledge element, the Registrar, by way of its statutory authority, affirmatively notified all transferors of vehicles in Ohio that they would not be liable under the odometer laws so long as they gave disclosures that were to the best of their knowledge. Millions of cars have been transferred in Ohio with that understanding. By pursuing a lawsuit against a finance company like GMAC, however, the conduct of the State frustrated this reliance on the statutorily-prescribed form, and thereby resulted in an entrapment of GMAC. Under Ohio law, “the defense of entrapment is established where the criminal design originates with officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute.” State of Ohio v. Doran (1983), 5 Ohio St. 3d 187, Syllabus ¶ 2. Simply stated, the State of Ohio cannot tell vehicle transferors in its mandatory odometer disclosure affidavit forms that they only have to sign the form to the best of their knowledge, when, in fact, the State’s Attorney General enforces the underlying statute as a strict liability offense. Not only is this situation contrary to Ohio law, it violates the due process rights of every seller of a motor vehicle in this State. Any seller could be liable—even criminally liable—for odometer disclosure violations and there is no available defense for fully truthful disclosures or disclosures made in error. Such a situation clearly impinges upon federal and state constitutional rights to due process.

Individuals and companies selling cars in Ohio must now fear that the State-mandated odometer disclosure affidavits that they sign to the best of their knowledge could be the basis for a lawsuit brought by the State of Ohio against them. The State entraps vehicle transferors by

(i) planting in their minds the belief that they can comply with the law by setting forth an odometer reading that is to the best of their knowledge and then (ii) suing them based on strict liability. The resulting entrapment frustrates the industry practice whereby companies regularly obtain title to leased vehicles but never have possession or control of the vehicles and sell them with odometer disclosures indicating their beliefs about the odometer readings and the readings' reliability. The deleterious impact on the operations of companies doing business in Ohio and ordinary citizens selling cars in Ohio renders this an issue of public and great general interest.

CONCLUSION

For the foregoing reasons, Amici Curiae ask this Court to accept jurisdiction of this Appeal. This Court has the opportunity to give clarity to lessors doing business in Ohio and private citizens alike that, when they transfer a vehicle and identify the mileage on their odometer "to the best of [their] knowledge," they will not have their executed affidavit essentially altered by Ohio courts and be entrapped with strict liability. In addition, this Court has the opportunity to (i) establish the correct legal standard for O.R.C. § 4549.46 liability, (ii) encourage economically efficient allocation of enforcement resources, (iii) remove disincentives to whistle-blowing and (iv) avert the negative consequences that will result from placing undue burdens on the automobile sales and leasing industries and subjecting innocent transferors to penalties for unavoidable violations. Inasmuch as this is an area of great general and public interest in the State of Ohio, Amici Curiae respectfully urge this Court to take jurisdiction.

Respectfully Submitted,

Darrell L. Dreher, Counsel of Record

A handwritten signature in cursive script that reads "Darrell L. Dreher". The signature is written in black ink and is positioned above a horizontal line.

Vanessa A. Nelson

Attorneys For Amici Curiae American Financial
Services Association and Association of Consumer
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Of Amici Curiae American Financial Services Association and Association of Consumer Vehicle Lessors In Support Of Jurisdiction was served, this 25th day of July, 2008, upon the following via regular, U.S. mail:

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