IN THE SUPREME COURT OF OHIO

WELLS FARGO FINANCIAL OHIO 1, INC.,	:	Case No. 2008-0905
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.	:	

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I. STATEMENT OF FACTS

On December 5, 2000, Plaintiff-Appellee, Lillie Alexander ("Alexander") took out a home mortgage loan with Defendant-Appellant Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo") for her house on Dove Avenue in Cleveland.[1] (Supp. 1, Affidavit of Janice Yori Edmondson "Affidavit," ¶ 2). Alexander signed both a Note and Security Agreement ("Loan Agreement") and a Mortgage in favor of Wells Fargo. (*Id.*)

Concurrent with executing the Loan Agreement and the Mortgage, Wells Fargo and Alexander also signed a separate Arbitration Agreement. (Affidavit, Exhibit 2).[2] The Arbitration Agreement is a freestanding, one page document that is written in easy to read English. Reflecting a desire for broad application of its terms, the Arbitration Agreement provides for arbitration of all disputes "arising out of or relating to [the] Loan Agreement," as well as any disputes involving any "prior or future dealings between us":

> 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.

(Affidavit, Exhibit 2, § 1).

The Arbitration Agreement reflects a desire for an inexpensive and expeditious resolution of disputes. Arbitration is conducted pursuant to the rules of the American Arbitration Association ("AAA"). (Affidavit, Exhibit 2, § 2). Either party may require the arbitrator to be a retired federal judge. (*Id.*) The arbitration would be held in the county of Alexander's residence. (*Id.*) If Wells Fargo institutes arbitration, it must pay the entire filing fee; if Alexander initiates

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[1] A copy of the Affidavit was attached to Wells Fargo's Motion to Stay or Dismiss Pending Arbitration ("Motion to Arbitrate") as "Exhibit A" (T.d. 4) and included in the Supplement of Appellant, Wells Fargo Financial Ohio 1, Inc. ("Supp.") at page 1; a copy of the Note and Mortgage is attached to the Affidavit as "Exhibit 1."

[2] A copy of the Arbitration Agreement is attached to the Affidavit as "Exhibit 2."

arbitration, Alexander's filing fee is capped at $125,[3] and Wells Fargo pays the rest. (Affidavit, Exhibit 2, § 3).

The Arbitration Agreement specifically describes the effect of arbitration:

> **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 . . . ; (C) YOU WILL NOT HAVE THE RIGHT TO HAVE ANY CLAIM ARBITRATED AS A CLASS ACTION. . . ; (D) THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING WITH LIMITED RIGHTS TO APPEAL . . . .**

(Affidavit, Exhibit 2, § 5 (emphasis in original)).

The Arbitration Agreement contains language emphasizing its importance to the transaction when it provides, in bold, capital-letter type:

> **READ THIS ARBITRATION AGREEMENT CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO HAVE A JURY TRIAL.**

(Affidavit, Exhibit 2 (emphasis in original)). Acknowledging the importance of arbitration to the transaction, the parties stipulated that Wells Fargo would not have entered into the transaction with Alexander if she did not sign the Arbitration Agreement. (Supp. 8, Stipulation, ¶ 4).

Alexander kept her Wells Fargo home loan for just a short time. On July 27, 2001 – not even eight months after she took out the loan – Alexander paid it off, "or otherwise satisfied" it. (T.d. 1).

On May 2, 2006, Alexander filed a purported class-action lawsuit against Wells Fargo in the Cuyahoga County Court of Common Pleas. In the Complaint, Alexander claimed that while she had paid off the Loan Agreement, Wells Fargo had not timely released the Mortgage. The Complaint alleged that Wells Fargo violated her statutory rights under R.C. 5301.36 ("Mortgage

[3] The court costs assessed when Alexander filed this action were $142.40.

Release Act") because Wells Fargo had not released the Mortgage within 90 days after she satisfied the Loan Agreement.

Consistent with the Arbitration Agreement that both parties signed, Wells Fargo filed a Motion to Compel Arbitration and Stay or Dismiss Proceedings ("Motion to Arbitrate"). (T.d. 4). Even though there was no evidence that Alexander had previously expressed concern that the AAA would treat her claim unfairly, Alexander opposed the Motion. (T.d. 10). Among other things, Alexander argued that the scope of the Arbitration Agreement – providing "any claim, dispute or controversy of any kind arising out of or relating to your Loan Agreement, or any prior or future dealings between us" – was not big enough to encompass her claim under the Mortgage Release Act. (T.d. 10). Wells Fargo stressed that routine application of the Federal Arbitration Act – which expresses a strong national policy favoring arbitration that has found a similar voice in the Ohio Arbitration Act – required that Alexander's claim be arbitrated. (T.d. 4). The Trial Court agreed:

> MOTION OF WELLS FARGO FINANCIAL OHIO 1, INC. TO COMPEL ARBITRATION AND STAY OR DISMISS PROCEEDINGS IS FOUND TO BE WELL-TAKEN AND THEREFORE GRANTED. 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; THE ARBITRATION AGREEMENT IS NEITHER SUBSTANTIVELY NOR PROCEDURALLY UNCONSCIONABLE IN VIOLATION OF PUBLIC POLICY. THEREFORE, THIS CASE IS HEREBY STAYED PENDING ARBITRATION PURSUANT TO THE ARBITRATION AGREEMENT.

(T.d. 15, Appx. 18).

The Court of Appeals for the Eighth Appellate District reversed. (Appx. 4, "Opinion"). Citing this Court's decision in *Pinchot v. Charter One Bank*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, two of the three judges found that the failure to timely release a mortgage after payoff of the underlying loan was not an "integral part" of the lending process, and that this meant that Alexander's claims were not within the purview of the Arbitration Agreement. Employing this "integral part" analysis, the Eighth District held that Alexander's claim for failure to release the Mortgage after payoff of the Loan Agreement did not "arise out of or relate" to the Loan Agreement. (Opinion, at ¶¶ 15-16).

Citing to its prior decision in *Bluford v. Wells Fargo Fin. Ohio 1, Inc.*, 176 Ohio App.3d 500, 2008-Ohio-686, 892 N.E.2d 920, the Eighth District also found that the Arbitration Agreement expired when the Loan Agreement was satisfied. (Opinion, at ¶¶ 15-16). Because the Loan Agreement had been paid, and "Wells Fargo's statutory duty to release the mortgage lien arose thereafter," the Eighth District found that the dispute neither "arose" from nor was "related to" the Loan Agreement, nor was within the "future dealings" coverage of the Arbitration Agreement. (*Id.* at ¶ 16).

Judge Stewart dissented. Judge Stewart initially pointed out that the Eighth District had confused the *Pinchot* preemption test with the test for determining arbitrability:

> The majority relies on *Pinchot, [supra]*, 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.

(Opinion, at ¶21). Judge Stewart pointed out that the Eighth District's "integral part" analysis simply ignored the relationship created by the Loan Agreement:

> 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). Judge Stewart also criticized the new "expiration" rule:

> 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).

On May 9, 2008, Wells Fargo petitioned the Court to accept jurisdiction of its appeal from the Eighth District. On September 10, 2008, the Court agreed to hear this appeal.

II. ARGUMENT

<u>Proposition of Law I</u>

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.

A. <u>Public policy favors arbitration.</u>

To promote efficiency and predictability in resolving disputes with its thousands of customers, Wells Fargo carefully drafted the Arbitration Agreement. Foreseeable customer disputes arising from or related to loan agreements were intended to be resolved through arbitration. The Eighth District gutted the parties' agreement and declared that broad swaths of consumer finance law are off-limits to arbitration. The Eighth District's new rules not only frustrate the intentions expressed within the Arbitration Agreement, but will also make it more expensive for any consumer-oriented business to operate in the State of Ohio. This Court should adopt Wells Fargo's first proposition of law because it is consistent with this Court's precedent and with federal precedent, and because it will promote predictability and consistency of results.

Arbitration is desirable because it tends to be more efficient than litigation. See generally, Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 Ohio St. J. on Disp. Resol. 633 (2001). In practice, "[t]he arbitration process is intended to be informal and inexpensive. Accordingly, pleadings can be short and conclusory with a one-sentence statement of claim being sufficient to initiate proceedings." *Id.*, at 634. In arbitration, the most expensive litigation tasks are generally eliminated: "[d]epositions are more limited in arbitration than in court, and for good reason. Depositions are one of the largest expense items at the pre-trial stage, and arbitration is designed to minimize costs." *Id.*, at 635. In fact, with respect to three goals of litigants, arbitration is superior to litigation: (1) speed, (2) cost, and (3) privacy. *Id.*, at 639-40.

The gains in efficiency realized in arbitration, however, do not translate into an uneven playing field for plaintiffs: "Empirical evidence demonstrates that plaintiffs[4] prevail ***more often*** in arbitration than in court." Rogers, at 637 (emphasis added) (citing Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998) (AAA survey of employment arbitration cases from 1993-1995 indicated 63% success rate for employees; survey of U.S. district court records for 1994 indicated 14.9% success rate)).

Courts are required to approach arbitration agreements as they approach contracts generally and cannot impose special requirements on arbitration agreements. *Doctor's Assoc. v. Casarotto* (1996), 517 U.S. 681. The highest goal is efficiency and the minimization of the transaction costs. Judge Posner has said: "The goal of a system, methodology, or doctrine of contract interpretation is to minimize transaction costs . . . ." Richard A. Posner, *The Law and*

[4] Rogers addresses employment as opposed to consumer arbitrations. Nevertheless, there is no reason to think that results for consumers would differ. In any event, Rogers' conclusions support the notion that individuals should not fear arbitrating claims against businesses.

Economics of Contract Interpretation, 83 Tex. L. Rev. 1581, 1583 (2005). Accordingly – consistent with the overriding goals of contract law in general and arbitration in particular – courts should avoid injecting ambiguity into contract terms, especially ambiguity that begs for further litigation (and an increase in society's transaction costs).

Federal law mandates enforcement of arbitration agreements. *Southland Corp. v. Keating* (1984), 465 U.S. 1; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (1983), 460 U.S. 1; *Stout v. J.D. Byrider* (6th Cir. 2000), 228 F.3d 709, 714, *cert. denied*, 531 U.S. 1148 (2001). "The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone,* 460 U.S. at 24-25.

Ohio law also favors arbitration. *ABM Farms v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574; *McCann v. New Century Mortg. Corp.*, Cuyahoga Cty. App. No. 82202, 2003-Ohio-2752. "Arbitration is favored because it provides the parties thereto with a relatively expeditious and economical means of resolving a dispute . . . [and] . . . has the additional advantage of unburdening crowded court dockets." *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 29, 1993-Ohio-56, 623 N.E.2d 39 (internal citations omitted). The General Assembly has expressed a "strong policy" favoring arbitration of disputes. *Taylor Bldg. Corp. of Am. v. Benfield* (2008), 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 24, citing R.C. 2711.01(A).

B. <u>The scope of a broadly-worded arbitration agreement embraces everything that is not "fortuitously" related to the business relationship</u>.

"[A]rbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration." *Acad. of Med. v. Aetna Health, Inc.* (2006), 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14, *cert. denied*, 127 S. Ct. 74, quoting *AT &*

T Technologies, Inc. v. Communications Workers of America (1986), 475 U.S. 643, 648-649, quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582. However, because public policy favors arbitration, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Aetna Health,* 108 Ohio St.3d at 186, quoting *AT & T Technologies,* 475 U.S. at 650; *Warrior & Gulf,* 363 U.S. at 582-588 and *Council of Smaller Enters. v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 687 N.E.2d 1352.

Here, the Arbitration Agreement requires arbitration of all disputes "arising out of or related to your Loan Agreement." The Court construed this phrase in the context of an arbitration agreement in *Aetna Health,* 108 Ohio St.3d at 188-89: "An arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered 'the paradigm of a broad clause.'" *Id.*, citing *Collins & Aikman Prods. Co. v. Building Sys.* (2d Cir. 1995), 58 F.3d 16, 20; *ADR/JB, Corp. v. MCY III, Inc.* (E.D.N.Y. 2004), 299 F. Supp. 2d 110, 114.

The Court has construed similar "arising out of" language in other contexts:

> The term arising out of in a liability insurance policy affords very broad coverage. This court has held that arising out of means flowing from or having its origin in . . . . The term arising out of has also been defined to mean originating from, growing out of, or flowing from . . . . The term arising out of does not require that the conduct be the proximate cause of the injury, only that it be causally related.

Stickovich v. City of Cleveland (2001), 143 Ohio App.3d 13, 37, 757 N.E.2d 50. Given the breadth of the phrase "arising out of" an insurer must provide a defense when the allegations of a complaint are merely "arguably" or "potentially" within the scope of coverage. *Id.* Maintaining the natural breadth of the term "arising out of" is critical to the reliable and predictable interpretation of arbitration agreements. Artificially narrowing the scope of the term is a recipe for instability, unpredictability, litigation and higher transaction costs.

The Court in *Aetna Health* drew on the federal system's "acid test" for the scope of arbitration agreements and the related standard for determining arbitrability of claims. *Aetna Health,* 108 Ohio St.3d, at 186-88, 190, citing the decision by the United States Court of Appeals for the Sixth Circuit in *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386. In *Fazio*, a stockbroker engaged in a massive fraud, stealing at least $54 million of his clients' funds. The clients sued the broker's employer, who sought arbitration pursuant to arbitration agreements within the clients' account agreements. The trial court held that the plaintiffs were not required to arbitrate because "given the nature of the fraud, the [account] agreements were void *ab initio* and there were effectively no accounts ... [or alternatively,] the fraud alleged here was not covered by the arbitration clauses." *Fazio*, 340 F.3d at 392. The Sixth Circuit reversed, holding:

> A proper method of analysis here is to ask if an action could be maintained without reference to the contract ***or relationship*** at issue. If it could, it is likely outside the scope of the arbitration agreement. Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. Even real torts can be covered by arbitration clauses "if the allegations underlying the claims 'touch matters' covered by the agreement."

Id. at 395 (emphasis added, internal citations and quotations omitted). The Sixth Circuit held that an arbitrator should resolve the fraud claims because the stock broker's conduct simply could not be explained without referring to the plaintiffs' account agreements and the relationship that they created. *Id.*

In *Aetna Health*, a group of medical providers alleged that the HMO's that controlled a majority of the health-care market in the Cincinnati area colluded to illegally fix reimbursement rates to medical practitioners. The HMO's argued that the antitrust allegations fell within the scope of arbitration clauses found in provider agreements. In discussing *Fazio*, this Court approvingly quoted an analogy used by the Tenth Circuit:

> For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, ***it is simply fortuitous*** that the parties happened to have a contractual relationship.

Aetna Health, 108 Ohio St.3d at 190 (quoting *Coors Brewing Co. v. Molson Breweries* (10th Cir. 1995), 51 F.3d 1511, 1516) (emphasis added). This Court approved the *Fazio* test on the grounds that "[i]t prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement." *Aetna Health*, 108 Ohio St.3d at 191. The Court held that the Court of Appeals could rely on the *Fazio* test to decide that the plaintiffs' allegations of price fixing and anticompetitive behavior "did not even presume the existence of an underlying provider agreement." *Id.*, at 186-87.

Similarly, in *Shumaker v. Saks, Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393, a consumer claimed to have been defrauded by a "personal shopper" at a department store, which sought arbitration based upon a credit card agreement. The court rejected that assertion, explaining: "Under appellants' theory, even a slip and fall on store property would somehow be an event 'relating to' [a credit card] account with Saks." *Id.*, at 177. The *Shumaker* court recognized that the plaintiff's claim of consumer abuse was completely unrelated to the underlying credit agreement – the fact that there was a credit agreement at all was simply fortuitous. The test, then, that emerges from *Aetna Health* and *Fazio*, and that was applied in *Shumaker*, means that to fall ***outside*** the scope of a broadly worded arbitration agreement, the events underlying a lawsuit must bear absolutely no relation to the contract providing for arbitration or the relationship which it created. It must be merely "fortuitous" that there was a contract.

C. Any failure to timely release the Mortgage is not merely "fortuitously" related to the Loan Agreement.

Here, Wells Fargo loaned money to Alexander under the Loan Agreement and filed the Mortgage to perfect its interest in the collateral securing that loan. Alexander filed suit against Wells Fargo for allegedly failing to release the Mortgage in a timely manner after she satisfied the Loan Agreement. The Loan Agreement, Mortgage and Arbitration Agreement between Alexander and Wells Fargo are not fortuitously connected to Alexander's claim, but are rather part and parcel of Alexander's claims.

If Alexander never had a Loan Agreement with Wells Fargo, she would never have had a claim. If Alexander had not signed the Mortgage, she would never have had a claim. In fact, to prove her claim, she necessarily must prove that (a) she paid off the Loan Agreement; and (b) Wells Fargo did not timely release the Mortgage.

Alexander'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. As Judge Stewart artfully reasoned below: "A mortgage cannot exist without the underlying debt. Without a [L]oan [A]greement there would be no need to record a mortgage satisfaction... It follows that [Wells Fargo's] failure to file a mortgage satisfaction arises from the [L]oan [A]greement and is therefore subject to the arbitration provisions." Opinion, at ¶ 26.

If there were any doubt on these issues — and there should not be – those doubts must be resolved in favor of arbitration. *Aetna Health, supra.* Even if it were a close call whether a Mortgage Release Act claim is related to the Loan Agreement, Mortgage and Arbitration Agreement (and it is not), the Court should err on the side of finding arbitrability and adopt

Wells Fargo's First Proposition of Law and reinstate the Trial Court's Decision to grant the Motion to Arbitrate.

D. The Eight District's "integral part" test creates bad law and conflicts with this Court's holdings.

The Eighth District ignored this Court's decision in *Aetna Health* and the public policy favoring arbitration, and adopted a rule that arbitration is only required if the dispute related to an "integral part" of the underlying agreement. Citing *Pinchot* for the proposition that the release of a mortgage lien was not an "integral part" of the Loan Agreement, and applying its month-old decision in *Bluford*, the Eighth District held that claims for failing to timely release the Mortgage were not subject to arbitration because they were not integral to the Loan Agreement. Opinion, at ¶ 16. There are five problems with this analysis.

1. *Pinchot* only dealt with preemption – not arbitration.

The first problem with the Eighth District's analysis is that the issue in *Pinchot* had nothing to do with the scope of an arbitration clause, but rather with the breadth of federal preemption. *Pinchot* addressed whether the federal Home Owners' Loan Act ("HOLA") and the regulations implementing HOLA completely occupy the field of lending regulation – including the regulation of mortgage releases – so as to preempt the application of the Mortgage Release Act to federal savings associations. To answer the question, the Court had to decide whether mortgage satisfaction is an activity related to the extension of credit for mortgage loans (it is not). The *Pinchot* court did not address the analysis required by *Fazio* and *Aetna Health*, namely, whether a claim under the Mortgage Release Act would exist without the relationship created by the underlying agreement. Other lower courts recognize this distinction:

> [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 [the consumer'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). Judge Stewart also articulated the flaw in the Eighth District's reliance on *Pinchot:*

> The majority relies on *Pinchot, [supra]*, 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.

Opinion, at ¶ 21.

2. <u>The "integral part" test is irreconcilable with *Aetna Health.*</u>

As Judge Stewart reasoned, the Eighth District's analysis directly conflicts with *Aetna Health* in which 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*, 108 Ohio St.3d at 186 (quoting *Fazio, supra* (emphasis added)). The law does not ask whether the alleged conduct was an "integral part" of the performance of the underlying contract, but rather whether articulation of the claims requires reference to the agreement or the relationship that it created.

3. The "integral part" test ignores federal and state policies that *favor* arbitration.

The Eighth District's rationale directly conflicts with the federal (and Ohio) policies favoring arbitration. By permitting arbitration of only those claims that a court later finds to be an "integral part" of the underlying agreement, the Eighth District *disfavors* arbitration, and presumes that there will not be arbitration unless it falls into a narrow portion of an underlying agreement. Both federal and Ohio law stand for the opposite.

4. The "integral part" test is unworkable.

The Eighth District's rule is impractical in application and will create uncertainty. The Eighth District offered no criteria to determine when a dispute is "integral" to the underlying contract and when it is not. Moreover, given the facts of this case—where the two elements of the claim (payoff and failure to release a mortgage) cannot be proven without evidence of the underlying agreement itself—it will be impossible for lower courts to apply the Eighth District's "integral part" rule.

5. The "integral part" test eviscerates arbitration agreements in Ohio.

The Eighth District's rule drastically limits the scope of thousands – if not millions – of arbitration agreements in the State of Ohio, and establishes Ohio as a fiercely anti-business jurisdiction. Every major arbitration institution in this country recommends that businesses draft arbitration agreements using the *very language* at issue in this case. 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").

By refusing to give effect to this customary (and *standard*) language for arbitration, the Eighth District creates instability at an already unstable moment in business history. No business in Ohio would have reasonably anticipated that the scope of broadly-phrased arbitration agreements would be restricted as severely as the Eighth District now has. The Eighth District's rule is bad law, bad logic and bad policy. The Court should adopt Proposition of Law I and reject the Eighth District's "integral part" test.

Proposition of Law 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.

The Eighth District also held that Wells Fargo's (allegedly neglected) duty did not arise from the underlying contract, but rather from a statute, and that Alexander's claim was not subject to arbitration. In its month-old decision in *Bluford*, the Eighth District held that arbitrability of a claim depended on whether the duty at issue arose pursuant to statute or the contract; the Eighth District held that, if the duty is statutory, a claim for violation of the duty was not subject to arbitration. *Bluford*, at ¶ 29. The Eighth District then expanded its holding in *Bluford* to apply to claims under R.C. 5301.36, holding 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. This rationale is also flawed.

If a statutory claim arises from a contract that is subject to arbitration, then as a general rule, both contract and statutory claims must be arbitrated. For example, under the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA"), lenders are required to make certain disclosures by statute, not contract; nonetheless, courts routinely hold that these claims are subject to arbitration. *Stout*, 228 F.3d at 716 (Truth in Lending claims are subject to arbitration); *Large v. Conseco Fin. Servicing Corp.* (D.R.I. 2001), 167 F. Supp.2d 203, 206 ("TILA claims are indeed subject to arbitration...[In accord with] the liberal spirit of the FAA . . . unless a statute 'evinces an intention to preclude a waiver of judicial remedies', claims arising under that statute are subject to arbitration."); *Gray v. Conseco, Inc.* (C.D. Cal., September 29, 2000), No. SA CV 00-322, 2000 U.S. Dist. LEXIS 14821, at *18-19 (submitting claims under TILA, HOEPA and the Real Estate Settlement Procedures Act ("RESPA") to arbitration: "Statutory claims may be subject to arbitration . . . . The United States Supreme Court has held that federal statutory claims are not arbitrable when 'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'").

Similarly, claims under RESPA involve mandated statutory disclosures; these claims are regularly sent to arbitration. *Blount v. National Lending Corp.* (S.D. Miss. 2000), 108 F. Supp. 2d 666, 670-71; *Gray v. WMC Mortg. Corp.* (S.D. Miss., June 28, 2000), Case No. 3:00CV211BN, 2000 U.S. Dist. LEXIS 19986, at *8-10. Claims under the Consumer Sales Practices Act are also arbitrable as a matter of course. *Stout*, 228 F.3d at 716; *Marshall v. United States Home Corp.* Summit Cty. App. No. 20573, 2002-Ohio-821; *Smith v. Ohio State Home Servs.* (Summit Cty., May 25, 1994), Nos. 16441, 16445, 1994 Ohio App. LEXIS 2270, at *6 ("her consumer sales practices [act] claims are claims which ***arise out of the contract*** and are subject to the arbitration clause" (emphasis added)).

There are, however, exceptions to the rule requiring arbitration of statutory claims. "[I]f federal statutory claims are asserted, [the court] must consider whether Congress intended those claims to be nonarbitrable." *Stout*, 228 F.3d at 714. Congressional intent, however, does not exist merely because the statute refers to a consumer obtaining a remedy in a "civil action": that language does not shield a statutory claim from arbitration. *Stout*, 228 F.3d at 716 (just because Truth in Lending Act refers to an "action . . . in any United States district court" does not mean that claims are exempt from arbitration). See also *Marshall, supra* (stating that, even though R.C. 1345.09 enables a consumer to bring an "individual action," claims under the CSPA must be arbitrated).

Here, there is no evidence that Congress (or the General Assembly) intended to shield Mortgage Release Act claims from arbitration. The fact that the statute provides for a recovery in an "action" does not mean these claims are exempt from arbitration. *Stout, supra; Marshall, supra*. Accordingly, the fact that there is a statutory duty to release a mortgage within 90 days of payoff is simply not a reason to ignore an arbitration agreement.

Besides being incorrect, the Eighth District's rule, along with its *Bluford* decision, is simply bad policy. Arbitration panels routinely handle all forms of disputes, and nothing suggests that they are incapable of handling statutory claims. To the contrary, the speed and efficacy of arbitration are perhaps best suited for consumer disputes, which may involve nominal sums and relatively simple issues.

In addition to being bad law, the Eighth District's rule will make Ohio an outcast. In addition to the federal courts which hold that statutory claims are arbitrable, at least twenty other states routinely send their statutory consumer claims to arbitration: Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New York, South Carolina, Tennessee and Washington.[5] Until this case, both state and federal Ohio courts did the same.

The Eighth District's rule will make Ohio unique, discouraging businesses that seek expeditious resolution of consumer disputes from locating or transacting business here. If a business seeks to resolve disputes with its customers through the inexpensive resolution offered by arbitration, it will know to stay away from Ohio. This Court should reverse the Eighth District and adopt the Second Proposition of Law to undo the damage that has already been done.

<u>**Proposition of Law III**</u>

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

The final rationale that the Eighth District offered for refusing to enforce the Arbitration Agreement was that the Loan Agreement was terminated by its payoff, which the Eighth District

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[5] *Patriot Mfg. v. Jackson* (Ala. 2005), 929 So.2d 997; *Rocz v. Drexel Burnham Lambert, Inc.* (Ariz. App. 1987), 154 Ariz. 462, 743 P.2d 971; *Rains v. Found. Health Sys. Life & Health* (Colo. App. 2001), 23 P.3d 1249; *Edelist v. MBNA Am. Bank* (Del. Super. Ct. 2001), 790 A.2d 1249; *Orkin Exterminating Co. v. Petsch* (Fla. App. 2004), 872 So.2d 259; *Results Oriented, Inc. v. Crawford* (Ga. App. 2000), 245 Ga. App. 432, 538 S.E. 2d 73; *Borowiec v. Gateway 2000, Inc.* (Ill. 2004), 209 Ill.2d 376, 808 N.E.2d 957; *Walker v. DaimlerChrysler Corp.* (Ind. App. 2006), 856 N.E.2d 90; *Conseco Fin. Servicing Corp. v. Wilder* (Ky. App. 2001), 47 S.W.3d 335; *Walther v. Sovereign Bank* (Md. 2005), 386 Md. 412, 872 A.2d 735; *Mongeon v. Arbella Mut. Ins. Co.* (Mass. Super. Ct. 2002), 15 Mass. L. Rep. 619; *Abela v. GMC* (Mich. 2004), 469 Mich. 603, 677 N.W.2d 325, *cert. denied*, 543 U.S. 870; *Swain v. Auto Servs.* (Mo. App. 2003), 128 S.W.3d 103; *Russell v. Performance Toyota, Inc.* (Miss. 2002), 826 So.2d 719; *Kloss v. Edward D. Jones & Co.* (Mont. Dist. 2000), 2000 ML 2705; *Gras v. Assocs. First Capital Corp.* (N.J. Super. 2001), 346 N.J. Super. 42, 786 A.2d 886; *Tsadilas v. Providian Nat'l Bank* (N.Y. 2004), 13 A.D.3d 190, 786 N.Y.S.2d 478; *Munoz v. Green Tree Fin. Corp.* (S.C. 2001), 343 S.C. 531, 542 S.E.2d 360; *Rosenberg v. BlueCross BlueShield of Tenn., Inc.* (Tenn. App. 2006), 219 S.W.3d 892; *Garmo v. Dean, Witter, Reynolds, Inc.* (Wash. 1984), 101 Wn.2d 585, 681 P.2d 253.

reasoned effectively eliminated the Arbitration Agreement. Again applying its holding in *Bluford*, the Eighth District held that "Alexander satisfied the [Loan Agreement] by payment in full," and that the completion of her performance under the Loan Agreement obviated any obligation to arbitrate. Opinion, at ¶ 16. This exception to arbitration not only (again) turns established law on its head, the exception will devour the rule of arbitrability.

An arbitration agreement is a wholly separate entity from the contract to which it relates. In other words, a valid arbitration agreement is severable from the contract which it accompanies, and it survives the expiration of the underlying contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395. 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.

ABM Farms, 81 Ohio St.3d at 502. 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. See also, *Taylor Bldg. Corp.*, *supra* (holding that question of conscionability of contract is determined separately from determination of conscionability of arbitration provision).

Courts have applied this reasoning to hold that termination of the underlying contract does not terminate the agreement to arbitrate disputes arising from it. *International Brotherhood of Teamsters, etc., Local Union 20 v. Toledo* (1988), 48 Ohio App.3d 11, 548 N.E.2d 257; *Cleveland Police Patrolmen's Ass'n v. City of Cleveland* (1994), 95 Ohio App.3d 645, 643 N.E. 2d 559; *Colegrove Co. v. Handler* (1986), 34 Ohio App.3d 142, 517 N.E.2d 979. Consistent with the presumption in favor of arbitrability, "the failure to expressly exclude from arbitration any contract disputes after termination gives rise to the presumption that a contended provision of an expired agreement is enforceable." *Cleveland Police Patrolmen's Ass'n,* 95 Ohio App.3d at 652, citing *International Brotherhood,* 48 Ohio App.3d at 14-15.

In *Howard, supra,* Judge Boyko applied this logic to a claim under the Mortgage Release Act. *Howard* required claims under this act to be arbitrated, even though the underlying loan agreement had been paid off. *Howard,* 2007 U.S. Dist. LEXIS 70099, at *8, citing *Nolde Bros. v. Bakery & Confectionery Workers Union* (1977), 430 U.S. 243, 249. The promise to arbitrate simply does not expire, even after a related agreement has ended.

Here, the Arbitration Agreement requires arbitration of "*any* claim" "arising from or related" to the Loan Agreement, regardless of whether it was based in "tort, contract or otherwise." The Arbitration Agreement goes further, agreeing to arbitrate disputes concerning "*any future dealings*" between Wells Fargo and Alexander. The plain terms of the Arbitration Agreement show that the parties intended it to apply to disputes which ripen both before and after one or both parties have performed the Loan Agreement. In any event, because the parties did not "expressly exclude from arbitration any contract disputes after termination," there is a "presumption that [the] contended provision" applies and provides for arbitration. *Cleveland Police Patrolmen's Ass'n*, 95 Ohio App.3d at 652.

If permitted to stand, the Eighth District's error 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. Even worse, the parties could simply delay raising an issue until one or both parties completed their performance. 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. Arbitration would become the exception — not the rule — and only be available while the performance of both parties remained incomplete.

As with its other restrictive rules, the Eighth District's termination rule will make Ohio an oddity. Other states routinely send disputes to arbitration, even if the underlying contract is terminated. See, *e.g.*, *De Lillo Constr. Co. v. Lizza & Sons, Inc.* (N.Y. 1959), 7 N.Y.2d 102, 164 N.E.2d 95; *Formigli Corp. v. Alcar Builders, Inc.* (3d Cir. 1964), 329 F.2d 79 (applying Pennsylvania law); *Post Tensioned Engineering Corp. v. Fairways Plaza Associates* (Fla. App. 1982), 412 So.2d 871; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum* (Tex. App. 1984), 666 S.W.2d 604; *U.S. Insulation v. Hilro Constr. Co.* (Ariz. App. 1985), 146 Ariz. 250, 705 P.2d 490; *Mid-America Surgery Ctr. v. Schooler* (Ind. App. 1999), 719 N.E.2d 1267; *The Redemptorists v. Coulthard Servs.* (Md. App. 2002), 145 Md. App. 116, 801 A.2d 1104.

The rationale adopted by the Eighth District's Opinion flies in the face of precedent from this Court, the United States Supreme Court and courts from other states. Its limitations on arbitration will effectively eliminate the use of arbitration agreements in Ohio. The Court should adopt Proposition of Law III, reverse the erroneous decision of the Eighth District and reinstate the Trial Court's Decision granting the Motion to Arbitrate.

III. CONCLUSION

Arbitration is a favored vehicle for dispute resolution, and both Ohio and federal law construe arbitration agreements as broadly as possible. The Arbitration Agreement uses standard language that requires arbitration over any claim that arises from or is related to the Loan Agreement or the relationship it created.

The Eighth District has deviated from Ohio law, creating a rule that narrowly—not broadly—construes arbitration clauses. The Eighth District's rule completely excludes from arbitration any statutory disputes, even if the disputes arise from and are related to the underlying contractual relationship. The Eighth District's "no arbitration after termination" rule effectively eliminates arbitration completely for any dispute that is not brought until one party claims to have terminated performance, even if the dispute admittedly arises from and is related to the underlying contract.

The Court should restore Ohio law and enforce the Arbitration Agreement in accordance with its terms. The dispute at issue arises from and is related to the Loan Agreement and the relationship which it created. The Court should reverse the Eighth District and reinstate the Trial Court's ruling, sending this matter to arbitration, where it belongs.

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IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT WELLS FARGO FINANCIAL OHIO 1, INC.

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Wells Fargo Financial Ohio 1, Inc.

Appellant Wells Fargo Financial Ohio 1, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-07-089277 on April 7, 2008.

This case is one of public or great general interest.

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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

APPX. 4

JOURNALIZED: APR 7 2008

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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
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BY ________ DEP.

CA07089277 50718457

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).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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.

42955697

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP

LILLIE ALEXANDER
Plaintiff

Case No: CV-06-590622

Judge: KENNETH R CALLAHAN

WELLS FARGO FINANCIAL OHIO 1, INC.
Defendant

N7

JOURNAL ENTRY

88 BANKRPT/C.O.A. STAY - FINAL

MOTION OF WELLS FARGO FINANCIAL OHIO 1, INC. TO COMPEL ARBITRATION AND STAY OR DISMISS PROCEEDINGS IS FOUND TO BE WELL-TAKEN AND THEREFORE GRANTED. 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; THE ARBITRATION AGREEMENT IS NEITHER SUBSTANTIVELY NOR PROCEDURALLY UNCONSCIONABLE IN VIOLATION OF PUBLIC POLICY. THEREFORE, THIS CASE IS HEREBY STAYED PENDING ARBITRATION PURSUANT TO THE ARBITRATION AGREEMENT.

Judge Signature   Date

RECEIVED FOR FILING
DEC 22 2006
GERALD E. FUERST, CLERK
By ________ Deputy

APPX. 18

- 88
12/20/2006

VOL 3754 PG0783

<u>9 U.S.C. § 2</u>

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

History:

(July 30, 1947, ch 392, § 1, 61 Stat. 670.)

R.C. 1345.09

§ 1345.09. Private remedies

For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02, 1345.03, or 1345.031 [1345.03.1] of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 [1345.03.1] of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) (1) Except as otherwise provided in division (C)(2) of this section, in any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(2) If a consumer transaction between a loan officer, mortgage broker, or nonbank mortgage lender and a customer is in connection with a residential mortgage, revocation of the consumer transaction in an action for rescission is only available to a consumer in an individual action, and shall occur for no reason other than one or more of the reasons set forth in the "Truth in Lending Act," 82 Stat. 146 (1968), 15 U.S.C. 1635, not later than the time limit within which the right of rescission under section 125(f) of the "Truth in Lending Act" expires.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment under this section becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

(G) As used in this section, "actual economic damages" means damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 1345. of the Revised Code and does not include damages for noneconomic loss as defined in section 2315.18 of the Revised Code.

(H) Nothing in this section shall preclude a consumer from also proceeding with a cause of action under any other theory of law.

History:

134 v H 103 (Eff 7-14-72); 137 v H 681. Eff 8-11-78; 151 v S 185, § 1, eff. 1-1-07; 151 v S 117, § 1, eff. 10-31-07*.

R.C. 2711.01

§ 2711.01. Provision in contract for arbitration of controversies valid; exceptions

(A) 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.

(B) (1) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate, with the following exceptions:

(a) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;

(b) Controversies involving the amount of rentals due under any lease;

(c) Controversies involving the determination of the value of improvements at the termination of any lease;

(d) Controversies involving the appraisal of property values in connection with making or renewing any lease;

(e) Controversies involving the boundaries of real estate.

(2) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving international commercial arbitration or conciliation that are subject to Chapter 2712. of the Revised Code.

History:

GC § 12148-1; 114 v 137; Bureau of Code Revision, 10-1-53; 126 v 304 (Eff 9-29-55); 136 v H 682 (Eff 7-28-75); 144 v H 221. Eff 10-23-91.

§ 5301.36. Entry of satisfaction

(A) Except in a county in which the county recorder has elected to require that all satisfactions of mortgages be recorded by separate instrument as allowed under section 5301.28 of the Revised Code, when recording a mortgage, county recorders shall leave space on the margin of the record for the entry of satisfaction, and record therein the satisfaction made on the mortgage, or permit the owner of the claim secured by the mortgage to enter such satisfaction. Such record shall have the same effect as the record of a release of the mortgage.

(B) Within ninety days from the date of the satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor, recover the cost of the fees required for the recording of the satisfaction by the county recorder.

(C) If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor.

(D) As used in this section, "residential mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and shall include such an obligation on a residential condominium or cooperative unit.

History:

RS § 4136; S&C 471; 34 v 19, § 2; GC § 8548; Bureau of Code Revision, 10-1-53; 135 v S 341; (Eff 12-17-73); 140 v S 304 (Eff 9-20-84); 140 v H 707. Eff 12-13-84.