OHIO SUPREME COURT

American General Financial Services, Inc. Defendant–Appellant v. Shelton Coleman Plaintiff–Appellee	S. Ct. No. 2008-1009 Appeal from Ohio 8th District Appeals Court Cuyahoga App. No. CA–07–089311

MERIT BRIEF OF APPELLEE SHELTON COLEMAN

Brian Ruschel (0046631)
(Counsel of Record)
925 Euclid Ave Ste 660
Cleveland OH 44115-1405
(216) 621-3370
Fax (216) 621-3371

(For Plaintiff–Appellee)

Barbara Friedman Yaksic (0014338)
Monica Levine Lacks (0078649)
Richard A. Freshwater (0080762)
McGlinchey Stafford, PLLC
25550 Chagrin Bl Ste 406
Cleveland OH 44122-4640
(216) 378-9905
Fax (216) 378-9910

(For Defendant–Appellant)

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STATEMENT OF FACTS

This case is about defendant American General Financial Services, Inc. (AGF) not terminating UCC-1 financing statements as required by Ohio law. The complaint alleges that:

- plaintiff Shelton Coleman was named as the debtor in a financing statement filed in Ohio covering consumer goods, where AGF was the secured party (and the secured party of record);
- as of a certain date, there was no obligation to AGF secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value ("the payoff date");
- AGF violated R.C. 1309.513(A) & (B) by not timely filing a termination statement for the financing statement within one month after the payoff date; and
- Coleman and other class members are entitled to $500 in statutory damages against AGF by R.C. 1309.625(E) for each violation of the above requirement.

AGF filed a motion to (1) order Coleman to submit his individual claim to binding arbitration, (2) stay the court proceeding (including all discovery), and (3) dismiss the class claims. The trial court denied AGF's motion. AGF appealed, and the Eighth District Court of Appeals affirmed in *Coleman v. Am. Gen. Fin. Servs.*, 8th Dist No. 89311, 2008-Ohio-1403, noting at ¶12 that "the dispute between Coleman and AGF regarding the filing of the termination statement was not subject to arbitration."

The only issue before this Court is whether an arbitration clause contained in paperwork signed at the time of the loan applies to this claim concerning AGF's violation of its statutory obligation to timely file a termination statement. The courts below correctly concluded that it does not.

That question is decided by determining whether this claim for late release can be decided without reference to the loan agreement and that relationship. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657 ("*Aetna*"). That is really the only question presented.

AGF posits to this Court—as it did to the trial court and the appeals court—two points. First, AGF argues that the Court must look at the "underlying documents" to determine whether a security interest has been "created and perfected." AGF Merit Brief at 5. Second, AGF argues that whether there was a payoff and when it was can, also, only be determined by "analyzing" the terms of the note. *Id.* at 6. As the lowers courts were plainly able to recognize, these arguments are false. The determination of whether a security interest has been timely filed is made entirely by consulting the public records of the county recorder or secretary of state. Next, the determination of payoff is made by consulting AGF's records, which contain an entry indicating the payoff/satisfaction date for the transaction.

The parties and attorneys litigating the R.C. 1309.513 claim do not look at the note. The claim is proven using only two records: (1) the date in the bank's record of satisfaction; and (2) the date in the county or state record of filing the release of the security interest. The date of satisfaction is not in the note: it is in the bank's records. The fact of filing the security interest is not in the terms of the note: it is in government public records.

The basis of Coleman's claim is the statutory obligation to timely file a termination statement. Coleman's claim is not related to the loan agreement but instead arises out of AGF's separate statutory duty to file a termination statement after a loan has been paid off. The fact of payoff is not disputed—and liability is automatic and based on AGF's failure to timely file a termination statement.

It is improper for AGF to try to create issues that are not indicated anywhere in the record. In fact, there is no dispute that the loan was paid off, and that no termination was timely filed. AGF's own paperwork has stamped on it, "PAID 1 JUL '03." Joint Supp. at 20. See also the Affidavit of AGF's employee, Michael L. Liszewski, stating at ¶4 that "In July 2003, Mr. Coleman's loan was paid in full." Joint Supp. at 14.

The standard followed in Ohio for determining whether a dispute is covered by an arbitration clause is "whether the action could be maintained without reference to the contract or relationship at issue." *Aetna* at ¶30. Using that standard, the Court of Appeals did not err.

The only other argument by AGF is that the lower court decisions improperly break up the "entire" secured transaction. AGF argues that the relationship created by the underlying note is indispensible for the possibility of a violation down the road. AGF points to *Howard v. Wells Fargo* (N.D. Ohio 2007), 2007 WL 2778664 as authority for this, insisting that "Ohio and federal law must be uniform." With due respect, the "but-for" test followed by *Howard* is not a law in Ohio. It is the position taken by the dissent, but rejected by the majority, in the seminal Ohio case on this issue, *Aetna.*

Coleman signed a note and a separate arbitration clause. After all payments were made, the note was discharged. AGF did not timely file a termination statement. Under

R.C. 1309.513, if there was a financing statement filed, then it must be timely released or AGF is liable to the borrower for $500.

Shelton Coleman filed this action as a class on behalf of himself and all persons who at any time since May 16, 2000 paid off a loan where AGF was secured with a financing statement filed in Ohio, and a termination statement was not timely filed.

AGF filed a motion seeking arbitration, or a stay or dismissal of the proceedings. The arbitration provision relied on by AGF was a separate document signed concurrently with the promissory note. It did not incorporate the financing statement—and the financing statement did not incorporate the arbitration clause.

The trial court denied AGF's motion in a one-paragraph entry, finding that "the arbitration clause at issue has no effect on the cause of action arising after the completion of the contract." On appeal, the Eighth District Court of Appeals affirmed, holding that the arbitration clause did not apply to the instant dispute. *Coleman v. Am. Gen. Fin. Servs.*, 8th Dist. No. 89311, 2008-Ohio-1403 at ¶12 ("the dispute between Coleman and AGF regarding the filing of the termination statement was not subject to arbitration"). The Eighth District was correct in determining that the arbitration clause does not apply to AGF's statutory duty to timely release the mortgage lien, and its decision should be affirmed.

Proposition of Law 1
A party to an arbitration agreement cannot be compelled to arbitrate disputes the party did not agree to arbitrate and that fall outside the scope of the arbitration provision.

Proposition of Law 2
A matter that is independent of an underlying contract containing an arbitration clause, and which can be asserted independently without reference to the contract, falls outside the scope of the arbitration clause.

1. Public Policy considerations favoring arbitration do not override the fundamental principle that a party cannot be compelled to arbitrate a dispute it did not agree to arbitrate and that falls outside the scope of the arbitration provision.

AGF argues that the decisions below finding AGF's statutory violations to be outside the scope of the arbitration provision contained in the loan paperwork impermissibly split up a secured transaction. AGF's focus is misplaced. Coleman's recorded UCC-1 financing statement never mentions any loan, and does not refer to arbitration. Here, Coleman's claim is not related to the loan agreement but instead arises out of AGF's separate statutory duty to timely file a termination statement after a loan has been paid off. Liability is automatic and based on AGF's failure to timely file a termination statement. AGF does not dispute that the loan was paid off or that a termination statement was never timely filed. There is no "dispute" to arbitrate—only a claim that should be paid. Still, AGF insists in its Merit Brief at 8 that "this matter should be referred to arbitration."

The courts below did not "split-up" a secured transaction: they determined the scope of an arbitration provision contained in loan paperwork as related to a completely independent statutory requirement.

AGF first argues, as do *amici,* that public policy favors arbitration. *Amici* particularly argue the extent to which arbitration purportedly benefits consumers. But that is not relevant to the issue here. Further, AGF and *amici* ignore that there is no "dispute" needing to be arbitrated—only claims that AGF would like not to pay.

As this Court explained in *Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 271, 2006-Ohio-906 at ¶28, "[w]hile the law may encourage parties to settle their contractual disputes expeditiously through arbitration, it remains a basic principle that 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"[1] In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 136, 2007 Ohio 4787, at ¶8, this Court explained that "[w]hile arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court." Similarly, *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 12th Dist. No. CA2006-07-021, 2007-Ohio-1655, at ¶9, noted that "[d]espite the strong policy in favor of arbitration, a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration." It is these two principles—that a party cannot be required to submit to arbitration any dispute he or she has not agreed so to submit, and that a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration—upon which the resolution of this case depends, not AGF's and the *amici*'s general policy considerations.

2. The proper test to determine whether a dispute falls within the scope of an arbitration provision is whether an action could be maintained without reference to the contract or relationship at issue.

Coors Brewing Co. v. Molson Breweries (C.A. 10, 1995), 51 F.3d 1511, 1516, discussed by this Court in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 189, 2006-Ohio-657 at ¶ 28, noted that "[a]n arbitration clause 'does not extend to all disputes of any sort . . . but only to disputes touching specified provisions of

[1] In support of this proposition, this Court cited *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582, 80 S.Ct 1347, 4 L.Ed.2d 1409; *AT&T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648; *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381; and *Council of Smaller Ent. v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665, 1998-Ohio-172, 687 N.E.2d 1352.

the agreement.'" This Court recognized that distinction in *Aetna* at ¶21 when it explained with regard to *Coors* that "[t]he existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable."

AGF's argument is the same as the one analyzed, and rejected, by the majority of this Court in *Aetna*. In *Aetna*, this Court contrasted *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386 (upon which AGF also now relies) and *Coors Brewing*. The *Fazio* plaintiffs were securities customers of Lehman and its salesman, Frank Gruttadauria. The customer account agreements contained a broad arbitration clause. Since the claims in the lawsuit asserted "fraudulent activities [which] were a violation of the account agreements," the claims were covered by the arbitration clause. By comparison, in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (C.A. 10, 1995), Coors and Molson had an ongoing Licensing Agreement containing a broad arbitration clause. Coors brought suit alleging that Molson entered into a business relationship with Miller Brewing which restraining trade and impacted the Coors Licensing Agreement with Molson. But the federal court found that the suit was not subject to the arbitration clause because it did not depend on any of the terms of the Coors-Molson agreement. "The existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable." *Aetna* at ¶21.

In *Aetna*, this Court concluded that "a proper method of analysis *** is to ask if an action could be maintained without reference to the contract or relationship at issue." *Id.* at ¶24 (ellipses *sic*), citing *Fazio*, 340 F.3d at 395. See also, *Hussein v. Hafner & Shugarman Enters.*, 176 Ohio App.3d 127, 134, 2008-Ohio-1791 at ¶26 ("[i]n order to determine whether a claim labeled as a tort or statutory claim is, in reality, a cause of action based upon the contract, the court is to ask whether the cause of action could be maintained without reference to the contract"); *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, *supra* at ¶14 ("if the action could be maintained without reference to the contract or relationship at issue, it was likely outside the scope of the arbitration agreement"); *ProMedica Health Sys. v. Blanchard Valley Health Ass'n*, 6th Dist. No. L-06-1163, 2006-Ohio-6185, at ¶32 ("the test for determining whether an issue is subject to arbitration is 'whether the action could be maintained without reference to the contract or relationship at issue'").

3. Plaintiff's claims for violations of Ohio's financing-statement-release statute fall outside the scope of the arbitration agreement.

AGF argues that the arbitration clause is broad enough to include the claims in this lawsuit. That is also argued in the *Aetna* dissent:

> The provider agreements constitute the alleged anti-competitive instruments that gave the physicians standing to sue. *** They are at the core of the Valentine Act claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint. The antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute 'about the business relationship' between the physicians and [defendant].

Aetna, dissent, at ¶38.

The *Aetna* majority rejected that approach and established what the standard now is in Ohio. Where the lawsuit arises from an obligation independent from paperwork having the arbitration provision (and is not determined by the provisions of the contract), the dispute is not covered by the arbitration provision. Here, the statute only applies where a lender has filed a lien using a UCC financing statement. The claim here only relates to the separate, untimely-released, lien.

In *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, ¶46, this Court explained the relationship of R.C. 5301.36 to lending versus real estate titles.

> 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.

A loan can sometimes originate with a note contract. That note is ended and extinguished when the debt is paid. No statute exists to govern that situation.

Under R.C. 1309.513(B)(1), the lender must release the UCC lien "within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value"—which here is undisputed to have occurred in July 2003 when the loan was paid off and marked as such in AGF's records.

As this Court held in *Pinchot,* the recording of a mortgage satisfaction is no part of the lending process. It occurs after the debt is satisfied and the extension of credit is extinguished.

When the Court of Appeals in this case cited *Pinchot,* it did not offend this Court's *Aetna* test in any way—i.e., requiring the analysis to look-to whether the action could be maintained without reference to the note.

This is not a novel principle. The court in *Henry v. Great Lakes Nat'l Mtg. Co.*, 8th Dist. No. 87405, 2006 Ohio 6166, at ¶43, observed that "when a matter is clearly independent of and outside the scope of an arbitration agreement, a stay of proceedings pending arbitration is unwarranted." The court in *Hollinger v. Keybank Nat'l Ass'n*, 9th Dist. No. 22147, 2004-Ohio-7182, at ¶10, reached a similar conclusion when it explained that "claims that may be asserted independently, without reference to the contract, fall outside the scope of an arbitration provision." So did *Complete Pers. Logistics, Inc. v. Patton*, 8th Dist No. 86857, 2006 Ohio 3356, discretionary review denied 112 Ohio St.3d 1407, 2006-Ohio-6447, at ¶15, when it concluded that "claims that may be asserted independently, without reference to the contract, fall outside the scope of the arbitration provision."

Shumaker v. Saks, Inc., 163 Ohio App.3d 173 (Cuy. Cty. App. 2005) likewise rejected AGF's arguments. Again, the plaintiff there had an account agreement with the merchant containing an arbitration clause. Suit was brought, not under the account agreement or its terms, but under the Ohio Consumer Sales Practices Act. It alleged that the defendant opened an account for the plaintiff and then sold her thousands of dollars of goods despite the "obvious fact that she did not need or use the items she purchased and could not afford to purchase this." Saks tried to rely on the "business relationship" approach, using the same argument that AGF convinced our trial judge to follow in this case—"but-for" the account, there would be no claim or lawsuit. The appeals court rejected that argument:

> Here, however, Shumaker does not challenge [the] credit agreement with Saks or any balance on that account. Rather, he alleges that appellant's sales practices were unconscionable and a violation of Ohio's Consumer Sales

> Practices Act. Because his claim is unrelated to [the] credit account with Saks, his claim falls outside the definition of a 'claim' that must be arbitrated.
>
> Appellants argue, however, that Shumaker's claim is related to [the] credit account because 'the relation between the goods [] financed and this case is undeniable—if [plaintiff] had not made those purchases, there would be no claim of unconscionable sales practices.' We make no such connection.

Id. at 15.

The appeals court found Saks' but-for argument to be "absurd," stating that the claim was not "even remotely related" to the account agreement. *Id.* *Shumaker* deals with the same kind of issue as in the present case: a claim for statutory liability that does not question the terms or rights under the contract (the account agreement in *Shumaker*/the promissory note in the present *Alexander* matter).

Complete Personnel Logistics, Inc. v. Patton, 2006-Ohio-3356, 2006 WL 2243075 (Cuy. Cty. App.) also rejected the kind of argument made by AGF here. Defendant CBG had a written contract with Complete Personnel Logistics to administer Logistics' employee benefit plans. The contract included provisions that pertained to "any insurance, stop-loss, or reinsurance contract, including, but not limited to, filing for claims thereunder." *Id.* at ¶4. The plaintiff gave Logistics money to obtain this insurance, but Logistics pocketed the money. The lawsuit was brought on various grounds, including fraud. The activities of Logistics in obtaining the insurance would not have occurred but-for the existence of the contract. Despite that, the appeals court found that the lawsuit was not subject to the arbitration provision in the contract. The claims of the lawsuit did not turn on the language of the contract, and could be asserted "without reference to the contract." Instead of using the but-for approach argued by AGF, the appeals court looked at "the complaint, compared with the agreement containing the arbitration provision." The court noted that "the insurance was not provided pursuant to the agreement." *Id.* at ¶15. The court likewise noted that "premiums were not collected pursuant to the agreement." *Id.* at ¶15. In the present case, the mortgage release is not filed pursuant to the note, or any of its provisions. The obligation to file, and liability for failure to file, is also not "pursuant to any provision of the note" but entirely pursuant to a statute in Title 13.

Finally, the decision in *Dillard v. Fifth Third Bank*, 2005-Ohio-6341, 2005 WL 3219589 (Cuy. Cty. App.) is a good illustration of why courts reject AGF's but-for argument. The plaintiff had an IRA contract with Fifth Third containing a "broad arbitration clause" requiring all controversies concerning the IRA be submitted to arbitration. When the plaintiff then sought a business loan, Fifth Third advised that the IRA funds could be used as collateral with no tax consequences. But the plaintiff was then assessed more than $70,000 in tax liability. The appeals court denied Fifth Third's motion to compel arbitration. The "but-for" approach was rejected. Plainly, but-for the IRA agreement, the violation could not have occurred. But the appeals court noted that "no claims of misconduct are alleged with respect to the IRA agreement itself or with respect to the funds therein such as an improper transfer of funds." The court noted that at the time the contract containing the arbitration clause was entered (the IRA agreement), "the [wrongdoing] did not exist and the basis for this lawsuit was clearly not contemplated by the parties." In the instant case, at the time the promissory note with AGF was signed, the basis for this lawsuit did not exist.

First, AGF argues that *Pinchot* dealt with preemption and not arbitration, and is therefore inapplicable to this case. *Pinchot* articulates Ohio law on the difference between the relationship arising from a lending agreement and the statutory obligation to release a real estate mortgage lien. That is pertinent here.

Proposition of Law 3
Suits to enforce R.C. 1309.513's requirement to timely file termination statements—which claims are proven by lender's records showing when loans were extinguished and government records showing the dates termination statements were filed, are not covered by an arbitration clause applicable to the underlying promissory note.

The appeals court here inquired whether this dispute falls within the scope of the separate arbitration provision referenced in the loan-origination paperwork. Under this Court's holding in *Aetna*, it does not.

The statutory violation here involves facts and occurrences that arose *after* the undisputed payoff of the loan as reflected in AGF's records. The violation involves a right that accrued or vested under the lien-release *statute*, not the note, and it both accrued and vested *after* the loan was paid off. The right is a statutory right—not a contractual right—so survival of the right after expiration of the loan contract is not an issue. The—non-release of the lien—which triggers the claim—does not infringe a right accruing under the loan-origination paperwork. This lawsuit is not about the note—let alone a disputed contractual right under the loan-origination paperwork.

There is no dispute that a statutory violation occurred and that the claim accrued more than one month after the debt was paid. The violation is statutory—and is not based on loan-origination paperwork having the arbitration clause. The statutorily-required recording of a termination statement has nothing to do with the note, nor with the charging and collecting of interest or any other lending or credit-related function. The claim is made independently—based solely on the date listed in the bank's records as the stamped "PAID 1 JUL '03" payoff date, and government records showing no timely filing of a termination statement—or the defendant's own records showing no timely filing of termination statements.

CONCLUSION

The only issue before this Court is whether a separate arbitration clause applies to Coleman's claim for automatic statutory damages for AGF's violation of its statutory obligation to timely file a lien-termination-statement. This is not a question of public policy: it is a question of whether the claim falls outside the scope of the arbitration provision.

The operative statute, R.C. 1309.513 does not talk about determining "perfection" or otherwise. It looks only to the existence of a filed security interest (shown by the county or state records—not the note or its terms) and the obligation to file the release of that security interest when it is satisfied (shown by defendant's record of the satisfaction date, not the note and its terms). The evidence to make the claim is not contained in the note. It is the date in the defendant's own records showing loan satisfaction (stamped "PAID 1 JUL '03" date) and government records showing no timely filing of a termination statement—or AGF's own records showing that it did not timely file termination statements. This claim pertains to the untimely-terminated lien, and not the terms of the note.

The decision of the Eighth District Court of Appeals in this case should be affirmed.

Brian Ruschel (0046631)
(Counsel of Record)
925 Euclid Ave Ste 660
Cleveland OH 44115-1405
Telephone: (216) 621-3370
Facsimile: (216) 621-3371
E-mail: bruschel@aol.com

for plaintiff-appellee

PROOF-OF-SERVICE

A copy of this Merits Brief was served by regular mail on the following on January 13, 2009:

Barbara Friedman Yaksic
Richard A. Freshwater
McGlinchey Stafford, PLLC
25550 Chagrin Bl Ste 406
Cleveland OH 44122-4640

Patrick M. McLaughlin
Adrienne B. Kirshner
McLaughlin & McCaffrey, LLP
1111 Superior Ave Ste 1350
Cleveland OH 44114-2500

Alan S. Kaplinsky
Mark J. Levin
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market St—51st Fl
Philadelphia PA 19103

Kip T. Bollin
James L. DeFeo
Thompson Hine LLP
127 Public Sq—Ste 3900
Cleveland OH 44114-1291

Brian Ruschel

for plaintiff-appellee