

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	Case No. 2008-1451
RICHARD CORDRAY	:	
ATTORNEY GENERAL OF OHIO,	:	
	:	On Appeal from the
Plaintiff-Appellee,	:	Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
MIDWAY MOTOR SALES, INC., et al.,	:	Court of Appeals Case
	:	No. 071APE-09-744
Defendant-Appellee,	:	
	:	
(GENERAL MOTORS ACCEPTANCE	:	
CORPORATION, n/k/a GMAC LLC,	:	
	:	
Defendant-Appellant).	:	

**MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO, ex rel.
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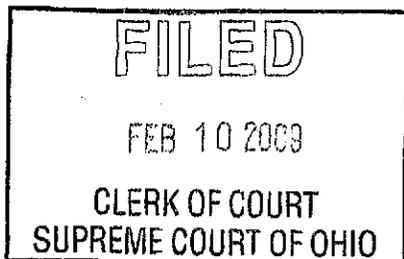
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INTRODUCTION

The core issue in this case is whether R.C. 4549.46 (the “Odometer Disclosure Law” or “Disclosure Law”), a consumer protection law that forbids anyone from transferring a motor vehicle without providing a true odometer disclosure, is a strict liability statute. Because the determination is a purely legal one, the Court need only examine the statute and decide whether strict liability applies. It need not consider the fact-based appeals to equity raised by Defendant-Appellant General Motors Acceptance Corporation (“GMAC”). If GMAC is somehow right on the law, and the Odometer Disclosure Law does not impose strict liability, then GMAC is entitled to reversal regardless of its appeals to equity. But if is wrong, and strict liability applies, then GMAC is strictly liable, because GMAC violated the Odometer Disclosure Law. That statute strictly commands that “[n]o transferor shall fail to provide the true and complete odometer disclosures” required by law, and GMAC indisputably provided odometer disclosures that listed false mileage. No mental state need be shown, and the courts below properly imposed strict liability on GMAC.

The Odometer Disclosure Law specifies no mental state and “plainly indicates a purpose to impose” strict liability, R.C. 2901.21(B), in several ways. First, the Law includes, after its broad prohibition against false disclosures, an express “previous-owner exception.” It negates liability if a car’s previous owner committed the odometer violation, and a later owner innocently provides false odometer reading statements when she resells the car. But that exception applies only if the seller does not “know[] of or recklessly disregard[] facts indicating the violation.” R.C. 4549.46. That exception shows that the general prohibition does not require a mental state of knowledge or even recklessness, as there would be no need to exempt one specified class of innocent sellers if, as GMAC says, *all* unknowing sellers escape liability under the general prohibition.

Second, the exclusion of a mental state in the Odometer Disclosure Law stands in stark contrast to the other provisions in the broader Odometer Rollback and Disclosure Act, R.C. 4549.41 to 4549.51, which do include mental-state requirements—showing that the omission in the Disclosure Law was deliberate. For example, the statute prohibiting the transfer of a car with a tampered odometer, R.C. 4549.45—as opposed to the Disclosure Law, R.C. 4549.46, which governs the false disclosure and not the sale itself—says that “No person shall transfer a motor vehicle if the person knows or recklessly disregards facts indicating that the odometer of the motor vehicle has been changed.” R.C. 4549.45(A). The contrasting omission of a mental state in the Disclosure Law shows that strict liability applies.

Third, the General Assembly enacted the Disclosure Law to protect consumers, and strict liability ensures that consumers have an avenue to be made whole, even if they must turn to a merely negligent or innocent intermediary seller rather than to the ultimate wrongdoer. If GMAC’s policy concerns justify different treatment—whether for all resellers who pass on false disclosures, or for the subset of titled owners who do not physically possess the cars, such as finance companies, or in any other scenario—the General Assembly should make any changes. The Assembly can craft a narrow exception, if any is needed, to exempt certain situations without creating a loophole that threatens to leave deceived consumers with no recourse.

Fourth and finally, GMAC fails in its attempt to import a knowledge requirement into the Disclosure Law by pointing to the Bureau of Motor Vehicles’ (“BMV’s”) blank form for odometer disclosures, which refers to the signer’s “knowledge.” That form is merely an administrative practice, not mandated by statute. An administrative practice cannot alter the meaning of a statute. Further, this argument cannot be reconciled with the statute because, as GMAC argues it, the BMV form imports a full-fledged *knowledge* element—not merely the

recklessness standard that R.C. 2901.21(B) supplies when strict liability is not indicated. But a global knowledge element clashes directly with the Disclosure Law's previous-owner exception, which negates liability for those set up by previous-owner tampering *unless* the later seller is knowing *or reckless* about discovering the violations. That exception-within-the-exception, which undoubtedly allows liability based on recklessness, cannot be reconciled with a heightened standard of knowledge for all violators.

Consequently, the Odometer Disclosure Law does impose strict liability. Beyond that, GMAC's other two Propositions of Law fail as well. First, the BMV form does not create "entrapment," because the State did not induce GMAC to perform an illegal act. It mandated filling out the form truthfully, not falsely. Even if Midway Motors—the company that rolled back the odometers—tricked GMAC, the *State* did not induce the illegal part of the act. Second, GMAC does not qualify for the previous-owner exception, even if Midway owned the vehicles before it transferred title to GMAC. The exception for a previous owner's tampering applies only when the tampering party owned the car *when it did the tampering*, and GMAC, not Midway, owned the vehicles when Midway tampered with the odometers.

For all these reasons, the Court should affirm the decision below, and it should hold GMAC liable for doing what the law says not to do: providing false disclosures.

STATEMENT OF THE CASE AND FACTS

This case turns solely on legal issues, and the parties do not dispute the relevant facts: that GMAC sold cars with inaccurate odometers; that it provided odometer disclosure statements containing inaccurate odometer readings; and that Midway, not GMAC, tampered with the odometers.

A. GMAC transferred vehicles with false disclosures.

Midway Motors, an auto dealer, initially owned the cars at issue, and it arranged to lease a fleet of cars and trucks (“vehicles” or “cars”) to another company (not a party here), Modern Builders Supply, Inc. (“MBS”). See *State ex rel. Rogers v. Midway Motor Sales, Inc.* (10th Dist.), 2008-Ohio-2799 (“App. Op.”) (attached to GMAC Brief (“Br.”) at Appendix A-5) ¶ 2. As part of the arrangement, Midway assigned the leases and ownership of the vehicles to GMAC. *Id.* GMAC thereby became the titled owner and remained so until it later sold the cars. *Id.* Under the agreement between GMAC and Midway, Midway transferred the titles of the vehicles to GMAC on the date that MBS signed a lease, or shortly after. *Id.* When MBS’s leases expired, MBS returned the cars to Midway. *Id.* Midway then rolled back the odometers and took the vehicles to auto auctions where GMAC, as the owner, sold the vehicles. *Id.* at ¶¶ 2, 3. GMAC sold the vehicles that did not go to auction to Midway. GMAC owned the vehicles when Midway tampered with the odometers. See Entry of June 1, 2006, Franklin County Court of Common Pleas (“Com. Pl. Liability Op.”) (attached to GMAC Br. at A-22) at 4.

When GMAC sold the vehicles, it completed Odometer Disclosure Statements or Certifications (“Affidavits”), required by R.C. 4505.06 (the “Affidavit Requirement”). The Affidavits stated that the vehicles’ odometers indicated the actual mileage that they had been driven. See Sample Affidavit, GMAC Supplement (“Supp.”) at 153. GMAC says that the Affidavits reflected what it thought was true at the time, though it does not dispute that the

disclosures were, in fact, inaccurate. See App. Op. at ¶ 39. Because the Affidavits' content was inaccurate, the Affidavits did not constitute "true and complete odometer disclosures" under R.C. 4549.46, the "Odometer Disclosure Law." That law provides that "[n]o transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code."

After the cars were sold to dealers at auction or back to Midway, they were sold to retail purchasers. See Com. Pl. Liability Op. at 4. Those purchasers did not know that they were buying vehicles with rolled-back odometers.

B. The trial court found GMAC liable, but suspended the penalty

The Attorney General, charged with enforcing Ohio's consumer laws, investigated and sued both Midway and GMAC in the Franklin County Court of Common Pleas. App. Op. at ¶ 2. Midway was sued as the party that actually committed the tampering, in violation of R.C. 4549.42, the statute that prohibits tampering with odometers. Midway could not be charged under the separate statute at issue here, forbidding false odometer disclosures, because it was not the cars' owner and did not issue the false odometer disclosures. GMAC was the owner and provided the false Affidavits, so it was sued as the defendant that violated that separate law.

The trial court granted the State's Motion for Partial Summary Judgment, finding GMAC strictly liable for its role in selling the cars and signing the false odometer statements in the Affidavits. See Com. Pl. Liability Op. at 10-12. The law allows for penalties in the amount of actual damages or \$1,000 per violation, that is, per car sold. R.C. 4549.48(B). The maximum penalty is \$100,000, regardless of the number of cars or actual damage. *Id.* The trial court chose to suspend the penalty, so that GMAC was charged nothing. See Entry of August 15, 2007, Franklin County Court of Common Pleas ("Com. Pl. Damages Op.") (attached to GMAC Br. at A-36) at 3.

The court also found that GMAC could have discovered the problem if it had checked paperwork that it could have obtained from General Motors. Specifically, the trial court noted that GMAC did not check warranty records for the vehicles and that such due diligence would have revealed mileage discrepancies before resale. See Com. Pl. Damages Op. at 2.

C. GMAC conducted remediation efforts outside of this lawsuit. That remediation is irrelevant, and the parties dispute the characterization of that process.

As GMAC notes, it chose to remediate by buying back the cars from the consumers or settling with them. See GMAC Br. at 8. That remediation is irrelevant to this case, as it was not court-ordered, and it was never part of this lawsuit. Nevertheless, because GMAC makes much of that remediation, and because GMAC seems to portray its view of events as undisputed facts, the Attorney General notes that it strongly disputes GMAC's description.

Specifically, the Attorney General disputes GMAC's statement that the Attorney General "expressly and unconditionally endorsed and encouraged GMAC to continue its remediation efforts." GMAC Br. at 8. GMAC cites the Attorney General's responses to GMAC's requests for admissions, but those responses do not support the proposition for which they are cited. As the responses plainly state, the Attorney General "did not object to or approve the remediation plan of GMAC. Plaintiff further states that, as the primary protector of consumer interests in the State of Ohio, Plaintiff does not typically discourage remediation efforts by suppliers." See State's Response to GMAC's First Request for Admissions at Admissions 11 and 12.

GMAC's remediation effort was not court-ordered, or part of any settlement in this case, or in any way a component of this litigation, so it is not at issue in this appeal.

D. The appeals court affirmed, agreeing with other courts that the Odometer Disclosure Law is a strict liability provision and holding that GMAC did not qualify for the “previous owner” exclusion.

The Tenth District Court of Appeals affirmed the trial court’s decision, rejecting all of GMAC’s arguments. See App. Op. First, the appeals court agreed with a long line of Ohio appellate cases finding that the Odometer Disclosure Law is a strict liability statute. *Id.* at ¶¶ 9-17; *id.* at ¶ 14 (noting “plethora of cases interpreting R.C. 4549.46(A) as a strict liability statute”). Second, the court rejected GMAC’s argument that the Affidavit Requirement, by requiring an affidavit with standard “best of [the signer’s] knowledge” language, undercut the strict liability holding, see *id.* at ¶¶ 15-17, and it rejected the idea that requiring such an Affidavit amounted to entrapment, *id.* at ¶¶ 18-19.

Finally, after rejecting other arguments that essentially restated GMAC’s strict liability argument, see *id.* at ¶¶ 20-22, the appeals court rejected GMAC’s attempt to invoke the statute’s “previous owner” exclusion. That exclusion says that a transferor does not violate the law if a previous owner did the tampering and the innocent transferor did not know about it. See R.C. 4549.46(A). The appeals court acknowledged that Midway was technically a previous owner, in that it owned the cars before transferring title to GMAC at the beginning of the leases, but the court found that Midway’s pre-tampering ownership did not trigger the exclusion, as the court read the law to refer to ownership at the time of tampering. *Id.* at ¶¶ 23-29. In other words, the appeals court did, in one factual sense, describe Midway as “a previous owner,” but it expressly held that Midway was not a “previous owner” as a matter of law under this statute. Thus, it is not “undisputed” that Midway is a “previous owner,” of the vehicles at issue, at least not as that term is used in the statute, nor is it “undisputed” that such “status is controlling to GMAC’s ‘previous owner’ defense under O.R.C. 4549.46(A).” See GMAC Br. at 6 n.2.

This Court granted review to resolve whether strict liability applies, to address GMAC's entrapment argument, and to determine whether the previous-owner exclusion applies when the tampering party once owned a vehicle issue, but did not own it at the time of tampering.

ARGUMENT

The issues before the Court are all purely issues of law, so the facts of GMAC's story are irrelevant. If GMAC's situation exposes a perceived unfairness of strict liability in some situations, or demonstrates the desirability of changing the previous-owner exception, those are matters for the General Assembly. In particular, the lease situation, in which a titled owner might never have physical possession, while on the other hand the car's possessor does not trigger the "owner"-specific language in the statutes, may be an area worthy of reform. But none of that is before the Court.

First, the Odometer Disclosure Law is a strict liability statute, as the statute's text and structure plainly indicate the General Assembly's intent to make this a strict liability offense. Second, GMAC's claim that it was "entrapped" because it had to fill out an odometer disclosure form does not negate its strict liability here. Finally, the previous-owner exclusion in the statute applies only when the tampering party *was the owner* when it did the tampering, so it does not apply to GMAC's situation with Midway here.

Appellee Attorney General's Proposition of Law No. 1:

The Odometer Disclosure Law, R.C. 4549.46, is a strict liability statute and does not contain a knowledge requirement in its general prohibition. Knowledge is relevant only to the application of the statute's previous-owner exception.

The Odometer Disclosure Law is a strict liability statute, so it does not require any mental state to be shown to prove a violation. In determining whether a particular statute imposes strict liability, the Court starts with R.C. 2901.21(B), which tells courts to impose strict liability when a statute "plainly indicates" a purpose to do so: "When the section defining an offense does not specify any degree of culpability, and *plainly indicates a purpose to impose strict criminal liability* for the conduct described in the section, then culpability is not required for a person to

be guilty of the offense.” R.C. 2901.21(B) (emphasis added); *State v. Fairbanks*, 117 Ohio St. 3d 543, 2008-Ohio-1470, ¶ 13; *State v. Collins*, 89 Ohio St. 3d 524, 529-30, 2000-Ohio-231.

The Court’s cases applying the strict liability test demonstrate that such a “plain indication” requires more than just silence as to mental state, but less than an express statement that “strict liability applies here.” Those cases further demonstrate what the Court has found to be indicia of “plain indication” to impose strict liability. See, e.g., *Fairbanks*, 2008-Ohio-1470 at ¶ 14 (holding that absence of mental state indicated strict liability when different part of same statute included mental state); *State v. Schlosser* (1997), 79 Ohio St. 3d 329, 331-32 (finding strict liability indicated by “plain language of the statute, the legislative intent and public policy considerations behind the statute, and the varying culpable mental states necessary for the predicate offenses”).

Here, as detailed below, the statute “plainly indicates” the General Assembly’s intent to impose strict liability. First, the plain text shows such intent, as the Assembly included a “previous owner” exception that makes sense only if the baseline prohibition is a strict liability offense. The exception negates liability for later resellers who have no knowledge of, or are not reckless regarding, a previous owner’s alteration of an odometer. If, as GMAC insists, *all* unknowing sellers are immune, then this exception for one category of unwitting resellers would be superfluous and makes no sense. Second, the precise statute here, the Odometer Disclosure Law, is part of the broader Odometer Rollback and Disclosure Act, which includes several violations that *do specify mental states*, showing that the absence here was deliberate. Third, the law is meant to protect the general public from buying cars based on false odometer readings, and strict liability reinforces that goal.

Finally, GMAC's counter-argument, which ignores the above points and relies exclusively on a form prescribed by the BMV's registrar, does not overcome the case for strict liability. The BMV form merely reflects an administrative act, not mandated by statute, so it cannot trump the General Assembly's statutory intent. Further, the form-based argument conflicts head-on with the previous-owner exclusion, as GMAC says that the form imports a higher *knowledge* standard into *all* applications of the Law, while even the previous-owner exclusion imposes liability on later resellers if they are merely *reckless* as to a previous owner's tampering.

For those and other reasons, it is not surprising that ten of Ohio's twelve appellate districts agree that the statute is a strict liability one. See App. Op. at ¶¶ 13-14 (noting "plethora of cases"); *Baek v. City of Cincinnati* (1st Dist.), 43 Ohio App. 3d 158; *Hammock v. Lozan*, (2nd Dist.), 1987 Ohio App. Lexis 5962; *Prickett v. Foreign Exchange, Inc.* (2nd Dist. 1990), 68 Ohio App. 3d 236; *Hughes v. Miller* (3rd Dist. 1991), 72 Ohio App. 3d 633; *State v. Burrell* (3rd Dist.), 2008 Ohio App. Lexis 1535, 2008-Ohio-1785; *Harrel v. Talley* (4th Dist.), 2007-Ohio-3784; *Ryan v. Matthews Ford Sandusky* (6th Dist. 1986), 1986 Ohio App. Lexis 8729; *Stover v. Auto & Home Center, Inc.* (6th Dist.), 1987 Ohio App. Lexis 9771; *Diakonis v. Reno* (6th Dist.), 1991 Ohio App. Lexis 2871; *Celebrezze v. Calautti* (7th Dist.), 1989 Ohio App. Lexis 3440; *Noble v. Atomic Auto Sales* (8th Dist.), 2008 Ohio App. Lexis 209, 2008-Ohio-233; *Flint v. Ohio Bell Tel. Co.* (9th Dist. 1982), 2 Ohio App. 3d 136; *Falasco v. Bishop Motors* (9th Dist.), 1990 Ohio App. Lexis 4938; *Triplett v. Voros* (9th Dist. 1996), 114 Ohio App. 3d 268; *Hubbard v. Bob McDorman Chevrolet* (10th Dist. 1995), 104 Ohio App. 3d 621; *Baker v. Hurst Buick* (12th Dist.), 1988 Ohio App. Lexis 1663.

This Court should affirm that the appeals court here, and all the districts that have addressed the issue, got it right.

- A. **The plain text of the Odometer Disclosure Law indicates that strict liability applies, as the narrow “previous owner” exclusion, which includes a mental state requirement, would be meaningless if the baseline offense already required a mental state.**

The plain text of Odometer Disclosure Law shows that the General Assembly intended this statute as a strict liability offense. The full statute provides:

No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this division requiring a true odometer reading if the odometer reading is incorrect due to a previous owner’s violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of or recklessly disregards facts indicating the violation.

4549.46(A) (emphasis added). The first sentence states the baseline prohibition without any mental state requirement. It says no transferor “shall fail to provide” a true disclosure; it does not say “shall knowingly fail to provide,” or “recklessly fail,” or include any other mental-state requirement. Of course, that absence of a mental state is not enough. See *Collins*, 89 Ohio St. 3d at 530. The Court must look to the rest of the statute, or to indications outside the statute, for a plain indication to impose strict liability. See *Fairbanks*, 2008-Ohio-1470 at ¶ 14 (contrasting absence of mental state in one provision with express mental state in other part of statute); *State v. Wac* (1981), 68 Ohio St. 2d 84, 86-87 (same); *State v. Maxwell* (2002), 95 Ohio St. 3d 254, 2002-Ohio-2121, ¶¶ 24-29, 30 (same, and confirmed by “other indications outside the statute that plainly indicate a purpose to impose strict liability,” such as strong policy against prohibited acts).

Here, several plain indications exist, and the strongest one is the previous-owner exception, contained in the statute’s second sentence. That exception makes no sense unless the baseline prohibition imposes strict liability. If the baseline prohibition already excluded *all* parties who unknowingly provide false disclosures, as GMAC contends, then there would be no need to exempt selectively one sub-class of innocent resellers.

By choosing to grant an exception only for the limited previous-owner scenario, the Assembly *declined* to grant exceptions for other seemingly innocent sellers who are victimized by third-party violators. Surely the General Assembly could have foreseen other scenarios in which a third party victimizes an innocent owner, even if those scenarios are unlikely (such as the repair shop mechanic, see GMAC Jur. Mem at 1 n.1, or the customer on an extended test drive or a rental customer, see NADA Amicus Jur. Mem. at 2). But it singled out only one scenario for an exception, showing that it kept the others on the hook. The Assembly surely knew how to exempt *all* parties who unknowingly provide false disclosures. Indeed, as detailed below at Part B, it did so in the nearby statute prohibiting the *knowing (or reckless) transfer* of a car that has an altered odometer (without notifying the transferee of the alteration)—but it did not do so in the separate Disclosure Law. Compare R.C. 4549.45 and 4549.46.

Moreover, by *adding a mental-state requirement* to the previous-owner exception, the General Assembly confirmed that no mental state is required for the general prohibition. That is, a later reseller is not automatically “off the hook” merely because a previous owner committed the violation; the reseller is back “on the hook” if he knew about the violation or recklessly disregarded facts indicating the problem. Thus, not only did the Assembly expressly add mental states to other provisions in the broader Odometer Rollback and Disclosure Act (see Part B below), but it also included a mental state in the specific Odometer Disclosure Law, and that contrast shows that the exclusion of a mental state is deliberate.

The contrasting use of a mental state in the Law’s second sentence puts this case squarely under the reasoning and holdings of *Wac*, *Fairbanks*, and other cases in which the Court concluded that strict liability applied when mental states were absent in the clause at issue, but were included in other provisions within the same statute. In *Wac*, the Court explained that a

gambling statute, R.C. 2915.02(A)(1), provided that no person shall “[e]ngage in bookmaking, or *knowingly* engage in conduct that facilitates bookmaking.” *Wac*, 68 Ohio St. 2d at 86. The Court reasoned that “[t]he General Assembly included the culpable mental state of ‘knowingly’” in the one clause, but excluded it in the other, so the “exclusion ‘plainly indicates a purpose to impose strict criminal liability.’” *Id.* (quoting R.C. 2901.21(B)).

The Court applied the same reasoning to a second gambling statute in *Wac*. In that statute, the provisions with and without a mental-state requirement were in adjacent numbered subsections within a statutory section. R.C. 2915.03 provides that no owner, or other person controlling any premises, shall:

- (1) Use or occupy such premises for gambling in violation of section 2915.02 of the Revised Code;
- (2) *Recklessly* permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code.

Id. at 87 (emphasis in original). The Court reasoned that the exclusion of a mental state in subsection (1), in contrast to the use of “recklessly” in subsection (2), amounted to a “plain indication” that subsection (1) imposed strict liability.

The Court has continued to apply this principle, repeatedly holding that the presence of a mental state in a separate clause or subsection plainly indicated that strict liability applied to the clause or subsection that did not specify any mental state. See *Fairbanks*, 2008-Ohio-1470 at ¶ 14 (“Because the General Assembly specified the culpable mental state of willfulness in R.C. 2921.331(B), but excluded mention of any mental state in the accompanying enhancement provision, R.C. 2921.331(C)(5)(a)(ii), this omission ‘plainly indicates a purpose to impose strict criminal liability’ with respect to that provision.”); *Maxwell*, 2002-Ohio-2121, ¶ 27 (reasoning that, in the statute at issue, “knowledge is a requirement only for the discrete clause within which it resides,” so knowledge was not required for other clause in the statute). Thus, *Wac* and its

progeny control here: the express use of a mental state in the Odometer Disclosure Law's previous-owner exception, coupled with the exclusion of a corresponding mental state in the baseline prohibition, plainly indicates that strict liability applies.

In addition, the previous-owner exception shows not only why strict liability applies, but also, as detailed further in Part D below, that GMAC's argument about the BMV affidavit, by which GMAC seeks to import a full-fledged knowledge requirement, does not work. In arguing for a knowledge requirement, and not merely R.C. 2901.21(B)'s default recklessness standard, GMAC would have the Court establish an internal conflict within the Disclosure Law. A knowledge requirement would immunize *all* those who are merely reckless in their disclosures, yet the previous-owner exception plainly imposes liability on the reckless.

Notably, GMAC not only fails to explain how this absurdity could possibly be reconciled, but equally important, it fails entirely to address how the previous-owner exception can be squared with its view of the baseline prohibition. GMAC discusses the previous-owner exception only in its Third Proposition, in which it seeks refuge within the exception, but it never explains how to square the exception with its argument against strict liability. GMAC instead puts all its eggs, as to overcoming strict liability, in the basket of its BMV-form argument. GMAC's studious avoidance of the previous-owner exception in its strict liability argument, in contrast with its alternative attempt to rely on that exception, is telling.

B. The General Assembly requires differing mental states in several other provisions of the broader Odometer Rollback and Disclosure Act, showing that the exclusion of a mental state in the Disclosure Law is intentional.

The General Assembly plainly indicated that the Odometer Disclosure Law is a strict liability offense, because the absence of a mental state in the Disclosure Law contrasts sharply with the use of express mental states in defining *every other violation* of the Odometer Rollback and Disclosure Act. The entire Act runs from R.C. 4549.41 to R.C. 4549.51. The first section,

R.C. 4549.41, establishes definitions, and the final five sections, R.C. 4549.47-51, provide remedies and penalties. In between, six sections, from R.C. 4549.42 to R.C. 4549.46, define the various violations. With the sole exception of the Disclosure Law, every violation in the Act requires a mental state. These violation-defining provisions read as follows:

4549.42 Tampering with or disconnection of odometers.

(A) *No person shall adjust, alter, change, tamper with, advance, set back, disconnect, or fail to connect, an odometer of a motor vehicle, or cause any of the foregoing to occur to an odometer of a motor vehicle with the intent to alter the number of miles registered on the odometer.*

(D) *No person shall intentionally remove or alter the notice required by division (C) of this section.*

4549.43 Sale or use of fraudulent odometer.

(A) *No person, with intent to defraud, shall advertise for sale, sell, use, or install on any part of any motor vehicle or an odometer in any motor vehicle any device that causes the odometer to register any mileage other than the actual mileage driven by the motor vehicle. For the purpose of this section, the actual mileage*

4549.44 Operating with disconnected or nonfunctional odometer.

(A) *No person, with intent to defraud, shall operate a motor vehicle on any public street, road, or highway of this state knowing that the odometer of the vehicle is disconnected or nonfunctional.*

A person's intent to defraud under this section may be inferred from evidence of the circumstances of the vehicle's operation

4549.45 Written notice of tampering or nonfunction.

(A) *No person shall transfer a motor vehicle if the person knows or recklessly disregards facts indicating that the odometer of the motor vehicle has been changed, tampered with, or disconnected, or has been in any other manner nonfunctional, to reflect a lesser mileage or use, unless that person gives clear and unequivocal notice of the tampering or nonfunction or of the person's reasonable belief of tampering or nonfunction, to the transferee in writing prior to the transfer. In a prosecution for violation of this section, evidence that a transferor or the transferor's agent has changed, tampered with, disconnected, or failed to connect the odometer of the motor*

vehicle *constitutes prima-facie evidence of knowledge* of the odometer's altered condition.

4549.451 Auctioneer's statement of disconnected or nonfunctional odometer.

(A) *No auctioneer* licensed under Chapter 4707. of the Revised Code *shall advertise for sale* by means of any written advertisement, brochure, flyer, or other writing, *any motor vehicle the auctioneer knows or has reason to believe has an odometer that has been changed,* tampered with, or disconnected, or in any other manner has been nonfunctional

4549.46 Written odometer disclosure statement.

(A) *No transferor shall fail to provide the true and complete odometer disclosures* required by section 4505.06 of the Revised Code. The transferor of a motor vehicle is not in violation of this division requiring a true odometer reading if the odometer reading is incorrect due to a previous owner's violation of any of the provisions contained in sections 4549.42 to 4549.46 of the Revised Code, unless the transferor knows of or recklessly disregards facts indicating the violation.

R.C. 4549.42-.46 (emphases added).

As the italicized clauses show, not only does every violation other than the Disclosure Law provide an express mental state, but also, those mental states vary from violation to violation. Some refer to "intent to alter" or "intent to defraud"; one is triggered if the person "knows or recklessly disregards facts," and another asks if a person "knows or has reason to believe." Further, some even specify what evidence may be used to establish the requisite mental state. In this context, the General Assembly's choice to *omit* a mental state in the Disclosure Law was surely not accidental; instead, it plainly indicates that no mental state is required for a disclosure violation.

Moreover, a comparison of the Disclosure Law to R.C. 4549.45, which forbids the transfer of a car without notifying the transferee of tampering—but only if the transferor is knowing or reckless—is especially telling. That is so because, unlike the violations involving an auctioneer, or selling products used to tamper, or even the actual act of tampering, the violation based on transfer without notice will *always coincide with a disclosure violation by the same party*. That

is, a party transferring a car without notice of a problem will always commit the parallel act of providing a false disclosure. The false disclosure is not a lesser *included* offense, as it requires the element of the false disclosure statement, but it is a parallel offense, in that one cannot transfer a car without also providing the statement (unless the party provides no statement at all, which would be a violation).

The two statutes make perfect sense if the Disclosure Law provides strict liability, while the actual transfer statute requires knowing or reckless culpability. A non-reckless, unknowing transferor will be liable only for the disclosure violation, but not for the transfer. But if *both* statutes require knowing or reckless culpability, then the two violations will run together. And more implausibly, if the Disclosure Law somehow requires knowledge, as GMAC says, and is not satisfied by recklessness, then the Disclosure Law requires *more* in terms of culpability than the transfer law, even though the latter is the one that actually states a culpability standard.

In sum, the exclusion of a mental state in the Disclosure Law, when compared to the inclusion of mental states in the remainder of the Odometer Rollback and Disclosure Act, plainly indicates a purpose to impose strict liability.

C. The strict liability standard protects the public interest in accurate odometer statements, and policy-based arguments for changes or exceptions are a matter for the General Assembly.

In addition to the plain statutory indications detailed above, the policy goals of the Disclosure Law further support a strict liability standard, as strict liability is needed to protect the public welfare. As the Court has explained, the Assembly's policy goals, although not enough to impose strict liability without other indications, *Collins*, 89 Ohio St. 3d at 530, may be an important part of the total showing of plain indication, *Maxwell*, 2002-Ohio-2121 at ¶ 30. In particular, the Court has explained that strict liability can be indicated when the prohibited acts

are “*mala prohibita*, i.e., the acts are made unlawful for the good of the public welfare regardless of the state of mind.” *Schlosser*, 79 Ohio St. 3d at 333.

Indeed, the *Flint* court also noted that the Assembly may, and often does, enact strict liability statutes to ensure that consumers or others are protected, noting that courts have applied strict liability for unfair or deceptive acts in violation of Consumer Sales Practice Act. “The legislature may enact statutes which prohibit certain behavior without requiring an element of knowledge or intent. For example, evidence of intent to deceive is not required in action for an unfair or deceptive consumer sales practice act under R. C. 1345.02.” *Flint*, 2 Ohio App. 3d at 137 (internal citation omitted). The Odometer Rollback and Disclosure Act is not just similar to the Consumer Sales Practice Act; the odometer law is really a more specific type of consumer sales law—a comparison this Court has made. See *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71, 72.

The *Flint* court identified other factors that contribute to a finding of strict liability under the Disclosure Law. It noted that “intent is not required where the accused had the means of knowledge relating to the facts of the violation, or, where because of substantial and significant public interest involved, the accused had a duty to ascertain the facts of the violation.” *Id.* Because of the difficulties inherent in determining subjective intent in these circumstances, a recklessness requirement would make the statute virtually unenforceable. *Id.*

The *Flint* court also recognized the substantial public interest in the accurate disclosure of odometer readings in the transfer of motor vehicles. 2 Ohio App. 3d at 137. In fact, motor vehicle laws are one of eight areas specifically identified by the United States Supreme Court as appropriate for imposing strict liability. *Morrisette v. United States* (1952), 342 U.S. 246, 262.

Thus, the strict liability standard was properly placed into the Odometer Disclosure Law because of the significant public interest at stake in providing true odometer disclosures.

The General Assembly's imposition of strict liability is the only way to protect consumers—who are truly the innocent victims—from being left holding the bag when they buy cars with tampered odometers from innocent or negligent intermediaries, and the guilty parties have long left the scene. As GMAC notes, Midway was the underlying wrongdoer here. But just as Midway is the missing guilty party, so, too, is there another missing party at the other end: the innocent consumers who buy altered cars after the cars have passed through innocent, or even negligent or reckless, resellers along the way. Even assuming that GMAC was not even negligent—something that the Attorney General disputes, but it is irrelevant here—GMAC cannot deny that some resellers in its role might at least be negligent. Strict liability is the only way to allow consumers to seek recourse against negligent resellers, by seeking damages or rescission of a sale, etc. Those resellers may perhaps recover from the ultimate guilty parties, but if the resellers are cut out of the equation, the consumer will be left to track down the tampering party—who may, as here, be bankrupt—or be left with no remedy.

Thus, when it is impossible to make the Midways of the world bear all the cost of making consumers whole, it makes sense for the General Assembly to impose costs on intermediate resellers rather than on consumers. That may be because of a sense of relative *culpability*, in that some resellers may be at least negligent, or because of intermediary sellers' greater *ability* to discover odometer tampering and prevent resale.

For example, the trial court here noted that GMAC could have discovered the problem if it had performed better due diligence by obtaining warranty records from General Motors, which would have revealed the mileage discrepancies. See Com. Pl. Damages Op. at 2. To be sure, as

GMAC says, those records belonged to GM, not GMAC, and it would have taken an administrative step to obtain them. But GMAC was better equipped to obtain those records than the consumers were, and if strict liability provides GMAC an incentive to do so, that benefits consumers.

GMAC cannot deny that its view would leave consumers unprotected in cases such as this one, while imposing liability makes consumers whole. GMAC touts its remediation effort in this case, arguing that it has already paid to make consumers whole, so that it is unfair to charge GMAC again. First, as a procedural matter, GMAC's voluntary effort was outside this lawsuit, so it is not relevant, and the trial court's suspension of the statutory penalty means that GMAC did not pay twice. But to the extent GMAC's remediation effort is relevant, it shows why strict liability is valuable, as it demonstrates what a court *could* order as a remedy in an appropriate case. As the Court has noted, the odometer laws and other "consumer protection acts must be interpreted in a manner calculated to provide the courts with flexibility in fashioning remedies intended by the General Assembly to redress the wrong committed and reimburse the loss occasioned." *Celebrezze*, 18 Ohio St. 3d at 75. But as broad as a court's remedial powers are, it can only exercise those powers if it first finds a violation. A court can order rescission, to undo a consumer's purchase from a reseller, but not if that reseller is not a party. And of course, where appropriate, a court can always tailor the extent of its remedy, and the burden on a reseller, to reflect factors such as the reseller's lesser culpability, the availability of a remedy from the most culpable party, the harm suffered by consumers, and so on. That is what the trial court did here in suspending the statutory penalties. But if resellers, even if negligent, are unavailable, the court can do nothing for consumers. That is not what the General Assembly intended.

Consequently, policy considerations support the retention of strict liability—and if countervailing policy concerns call for lifting that strict liability in some situations, that task is best left to the General Assembly. The Attorney General acknowledges that some of GMAC’s concerns, or those of GMAC’s amici, seem sympathetic. In particular, GMAC’s situation shows potential problems with the statute’s focus on titled ownership, as opposed to actual possession. That is true both as to the baseline prohibition, which imposes liability on titled owners who never possess the cars, and as to the previous-owner exception, which does not extend to cover tampering by previous *possessors* who never held title.¹

But these are precisely the type of issues that the General Assembly can best assess. The Assembly might want to keep things as they are,² so that even finance companies and other resellers have an incentive to catch tampered cars before they reach consumers. Or, if the Assembly wishes to offer relief to some such parties, the Assembly could narrowly tailor an exception, as it did with the previous-owner exception, to cover leasing scenarios, or miscreant mechanics, or whatever situations call for reform.² But if the Court wipes out liability for all

¹ The non-owning possessor issue remains a concern for the previous-owner exception even if Midway somehow qualifies as a previous owner here, based on its pre-lease ownership of the cars (although Midway does not trigger the exception, as explained in Proposition No. 3 below). Surely other lessees exist who have never owned the vehicles that they possess under a lease. Beyond lessees, however, the threat of other third-party tamperers seems remote or non-existent. Odometer tampering requires both means and motive, and few if any parties other than owners, or long-term possessors, have both. In today’s computerized cars, tampering requires sophisticated contraband tools and software, not just a screwdriver. So the dangers of tampering by a mechanic, or by a short-term renter looking to cover up over-limit mileage, or a valet who seeks to conceal an extended joyride, are farfetched. But more important, the Assembly can best decide whether these rare scenarios call for any reform, and if so, can decide how to craft a narrow exception to cover these situations without creating loopholes that exposes many or all consumers to harm.

² The General Assembly is best suited to address the issues raised by GMAC’s amici, as well as those raised by GMAC, and in particular, the Assembly can better weigh whether these concerns even exist to any appreciable degree. For example, the amici car dealers stress the threat of criminal liability, as opposed to the civil liability at issue here, yet they cite only one criminal

such resellers who unknowingly provide false disclosure statements, it would immunize all manner of negligent resellers, and it would leave consumers unprotected, and that is not what the Assembly intended.

GMAC's policy arguments are also at the heart of its purported distinctions of *Flint* and the other appeals court cases finding strict liability, and they should be rejected. GMAC argues that *Flint* and other cases involved facts different from GMAC's facts, so that those cases do not apply here. See GMAC Br. at 18-20. For example, GMAC stresses that it did not possess the cars, but that the liable owner in *Hubbard* did. GMAC Br. at 19, citing *Hubbard*, 104 Ohio App. 3d 621. And it says that knowledge, or lack thereof, was irrelevant in *Flint* and *Baek* because those violators did have knowledge. GMAC Br. at 18, citing *Flint*, 2 Ohio App. 3d 136; GMAC Br. at 19, citing *Baek*, 43 Ohio App. 3d 158. But those purported distinctions are irrelevant, and are really just disguised policy arguments. In all those cases, the appeals courts found strict liability based on the *statutory text* of the Odometer Disclosure Law and on the overall global policy concerns underlying the law, see, e.g., *Flint*, 2 Ohio App. 3d at 137-38, not on whether it was fair policy to impose strict liability on the specific facts of those cases. Consequently, what GMAC offers are not legal distinctions, but policy-based reasons for an exception *on its facts*. But again, any policy-based exceptions, such as for owners who do not possess the cars they own, must be enacted by the General Assembly, as it did with the previous-owner exception.

case, in decades of the law's existence, that imposed strict liability. Amici Curiae National Automobile Dealers Association and Ohio Automobile Dealers Association Brief at 3-4. The dealers also worry that innocent dealers will lose their dealers' licenses or their franchises, but again, they cite no example of that ever happening. *Id.* at 4. And they cite a class action against American Honda Motor Company as a situation illustrating the alleged unfairness of strict liability. *Id.* at 3-4. But the Honda situation does not seem to implicate the Odometer Disclosure Law at issue, as that case involved a mechanical error in the odometers' original design and manufacture, not a violation of Ohio's Disclosure Law. But again, the Assembly can best assess the legitimacy of these claims and can best tailor an appropriate response.

D. The BMV's form affidavit does not alter the Disclosure Law's meaning, because an administrative act, not mandated by statute, cannot overcome statutory intent, and further, an actual knowledge requirement cannot be squared with the statute.

As noted above, GMAC does not address the core reasoning behind the appellate court consensus, including in the decision below: that the Odometer Disclosure Law's plain text indicates that strict liability applies. Instead, GMAC focuses exclusively on a different argument, namely, that a BMV form affidavit, which uses the term "knowledge," means that a knowledge element is required for violations of the Disclosure Law. According to GMAC's chain of reasoning: (1) the Disclosure Law cross-references R.C. 4505.06, which directs the BMV to provide a form affidavit for disclosures; (2) the BMV exercised that authority to issue a form that includes language attesting that the mileage is true to "the best of [the signer's] knowledge; therefore (3) the Disclosure Law applies only to false statements made with *knowledge* of the falsity, not strict liability. GMAC's BMV-form argument fails for several reasons.

First, the BMV form, as an exercise of administrative discretion that is not mandated by statute, cannot alter the meaning of a *statute*, namely, the Disclosure Law. GMAC does not assert, nor could it, that R.C. 4505.06(C)(1) requires the registrar to include the "to the best of my knowledge" language in the form that the registrar provides. The statute merely authorizes the registrar to create a form, but other than mandating that it include a "true odometer reading" (and true selling price), the statute does not prescribe any content such as a knowledge requirement: "The registrar shall prescribe an affidavit in which the transferor shall swear to the true selling price and, except as provided in this division, the true odometer reading of the motor vehicle." R.C. 4505.06(C)(1). This presents no conflict with a strict liability requirement as it refers to "*the true* odometer reading," i.e., actual truth, not perceived truth or best-guess or some

other notion. Thus, the two statutes do not conflict; the Court does not need to harmonize two divergent *statutes*. A statute cannot be altered even by an agency's formally adopted rules. *Hoffman v. State Med. Bd.*, 113 Ohio St. 3d 376, 2007-Ohio-2201, ¶ 17 ("an administrative rule may not add to or subtract from a legislative enactment."). So it follows that a mere agency practice cannot alter a statute. Thus, GMAC is right in saying, in general, that administrative agencies may promulgate rules with the force of law. See GMAC Br. at 15, citing *Lyden Co. v. Tracy* (1996), 76 Ohio St. 3d 66, 69. But that is so only when the administrative authority is "pursuant to statutory authority," *id.*, not when the administrative act deviates from statute. *Hoffman*, 2007-Ohio- 2201 at ¶ 17. So if GMAC cannot win on the terms of the Disclosure Law itself, then it is not helped by the BMV's form.

Second, as the appeals court here and other courts have noted, the form affidavit has existed for decades alongside the courts' strict-liability reading of the Odometer Disclosure Law, without triggering any changes by the General Assembly. See App. Op. at ¶ 16 (citing cases). In particular, as the court noted, the Assembly did amend the Disclosure Law in 1987, and it left the interplay between the Disclosure Law and R.C. 4505.06 untouched. ("In fact, the language in the affidavit at issue here has also been in use both before and after the 1987 amendment of R.C. 4549.46.") GMAC argues that the Assembly's inaction, in the face of the continued use of the form affidavit, shows a legislative endorsement of a knowledge standard, as derived from the form. GMAC Br. at 15. But, as the appeals court here noted, that inaction, in light of the courts' continued application of a strict liability standard, is equally likely to show a legislative endorsement of that strict liability, coupled with a view that the form presents no conflicts. App. Op. at 15.

Finally, GMAC's BMV-form argument cannot possibly be right, as it creates a full-fledged "knowledge" requirement that cannot be reconciled with the Odometer Disclosure Law's express provision of liability for the lower standard of recklessness under the previous-owner exception. This is so because GMAC does not argue for mere absence of strict liability, leaving R.C. 2901.21 to fill the void by imposing the default standard of recklessness. Instead, GMAC plainly argues that the term "knowledge" in the BMV form leads to importing an actual knowledge requirement into the Disclosure Law. As GMAC puts it, "O.R.C. § 4505.06, and the State of Ohio's actions thereunder, create an express *knowledge* element with respect to odometer disclosures." GMAC Br. at 11 (emphasis in original). But a global knowledge requirement squarely conflicts with—and improperly alters—the recklessness standard for the previous-owner scenario.

GMAC offers no sound way to reconcile its plea for an actual knowledge standard with the use of the recklessness standard in the previous-owner exemption, and all three logical possibilities are untenable. GMAC cannot fall back and accept a recklessness standard in all cases, as its sole argument against strict liability is based on the word "knowledge" in the BMV form, so it offers no way to reach recklessness. Nor can GMAC reasonably argue (although it seems to) that a knowledge element applies to *all* false disclosure cases, even under the previous-owner exception. That approach would conflict with the express recklessness standard, which not only would violate the general rule that all words in a statute have meaning, but it would more specifically render meaningless the General Assembly's 1987 amendment, which added recklessness to knowledge within the previous-owner exception. See *Prickett*, 68 Ohio App. 3d at 239-40 (explaining amendment); *Hughes*, 72 Ohio App. 3d at 636-37 (same); *Celebrezze*, 18 Ohio St. 3d at 75 ("the General Assembly is not presumed to do a vain or useless thing, and that

when language is inserted in a statute, it is inserted to accomplish some definite purpose.”) Finally, GMAC cannot plausibly argue for two different standards, whereby mere recklessness would be enough to ensnare those who provide false disclosures after a previous owner’s violation, while full knowledge is required for those in all other cases. That is perhaps the most absurd of all options, as the previous-owner exception was plainly meant to offer a break to those trapped by a previous owner’s violation, but this two-tier view would single out such parties for *greater* exposure to liability.

Consequently, the form affidavit does not create a knowledge element under the Odometer Disclosure Law, nor does it otherwise water down the strict liability that the Disclosure Law imposes.

Appellee Attorney General's Proposition of Law No. 2

The imposition of strict liability and the use of the affidavit form prescribed pursuant to R.C. 4505.06(C)(1) is not misleading and does not lead to constitutional entrapment.

GMAC argues, as its first alternative to overcoming strict liability, that its liability is negated because it was entrapped, but it cannot satisfy the elements of entrapment. Neither of GMAC's two theories—that the BMV form forced it to make the disclosures that turned out to be false, and that the Attorney General allegedly encouraged GMAC's remediation efforts—amounts to entrapment.

First, the BMV form did not create entrapment because the entrapment doctrine applies only when the government induces *illegal* action, and here, the form invites legal, truthful reporting; the government does not seek to have car sellers fill out the form falsely. As the Court has explained, the “defense of entrapment is established where the criminal design originates with officials of the government, and they implant in the mind of the innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute.” *State v. Doran* (1983), 5 Ohio St. 3d 187, syllabus ¶ 2. GMAC's scenario fails on several of the *Doran* elements. Here, the State did not seek to induce GMAC to commit an illegal act, as happens when a government agent encourages someone, for example, to buy or sell illegal drugs. The State mandated that GMAC fill out the forms, but it sought to have GMAC do it truthfully. The Affidavit requirement requires the transferor to swear to “the *true odometer reading* of the motor vehicle.” R.C. 4505.06(C)(1) (emphasis added). To the extent that GMAC was “trapped” or tricked into false disclosures, as opposed to providing the true disclosures that the State insisted on, GMAC was trapped by Midway, not the State. As the appeals court noted, “GMAC was not induced by the state of Ohio to set forth untrue odometer readings.” App. Op. at ¶ 19. Further, the BMV did not set up this entire process “in order to prosecute” GMAC.

Second, the Attorney General's discussions with GMAC about its remediation efforts, even if they amounted to the approval and encouragement that GMAC claims, cannot constitute entrapment for the simple reason that those talks occurred long *after* the violations occurred. By definition, entrapment can cause a violation only when the trapping occurs *before* the violations. GMAC fails to explain how later events—even if they somehow endorsed earlier violations—can go back in time and *cause* the earlier violations. And of course, even if the Attorney General endorsed the cleanup efforts (and it did not), it never endorsed the original violations themselves.

Consequently, GMAC has not established an entrapment defense to negate liability here.

Appellee Attorney General's Proposition of Law No. 3

The previous-owner exemption in the Odometer Disclosure Law applies only when the tampering was performed by someone who owned the car at the time of tampering, not when any previous owner gains access to someone else's car and tampers with the odometer.

As explained above, the Disclosure Law is generally a strict liability one, but it does include one exception to strict liability: when the violation occurs due to a “previous owner’s” violation of the Odometer statute, and the innocent transferor did not know about it or was not recklessly disregarding facts indicating it. The defense is found in the second sentence of the Odometer Disclosure Law, and is the only defense to the strict liability of the section. GMAC argues that it qualifies for the exception, because Midway, long before the tampering, had owned the cars before transferring title to GMAC. GMAC is wrong. As the appeals court correctly held, the exception applies only when the previous owner tampered with the odometer *while it owned the vehicle*.

The appeals court and the trial court both applied the statute pursuant to its plain meaning and consistent with case law. As both courts noted, the court in *Hughes*, 72 Ohio App. 3d 633, properly recognized the legislative intent to hold the owners of motor vehicles strictly liable for a violation of the Odometer Disclosure Law when an odometer is altered during the course of their ownership of the vehicle. The court held that “[s]trict liability under R.C. 4549.46 applies to a transferor when a discrepancy in the odometer reading *occurs during their ownership of the vehicle*, unless the transferor properly discloses the discrepancy upon transfer.” *Id.* at 638 (emphasis added). The court further addressed the strict liability exception of the second sentence by stating:

The second sentence of R.C. 4549.46 places liability only on the transferor of a vehicle which has not had its odometer tampered with during his ownership, but the transferor nonetheless has actual knowledge of tampering with, or discrepancy in, the odometer reading.

Id. (emphasis added). It is undisputed that GMAC owned the motor vehicles when the odometer rollbacks occurred and later transferred them without true odometer disclosures. Physical possession is irrelevant. Therefore, GMAC was properly found strictly liable for violations of the Odometer Disclosure Law.

The Tenth District explained why GMAC's reading of the Law cannot be right:

Assume A is a transferor, B is a prior owner, C is an outside party, and D is a transferee. Unbeknownst to A, C, an outside party such as one performing maintenance of A's vehicle, alters the odometer of A's vehicle during A's ownership. A then transfers the vehicle with an odometer disclosure, such as the one at issue here, to D. A would be strictly liable for failing to provide a true odometer reading pursuant to R.C. 4549.46. However, if B, a prior owner, had performed the same act as C, i.e., altering the odometer during A's ownership of the vehicle, A would not be subject to strict liability pursuant to R.C. 4549.46. These anomalous results would occur despite the fact that in either instance the alteration of the odometer occurred during A's ownership and without A's knowledge.

App. Op. at ¶ 25. The court further explained that it would be "anomalous to think the legislature would intend a result such that a transferor is absolved of strict liability in one instance, *i.e.*, where a prior owner altered an odometer, but not in another, *i.e.*, where a third party altered an odometer, even though in either scenario the act took place during the transferor's ownership." *Id.* at ¶ 26. The appeals court acknowledged that Midway was a previous owner, in that it owned the cars before transferring title to GMAC at the beginning of the leases, but it read the law to refer to ownership at the time of tampering. *Id.* at ¶¶ 23-29.

Despite GMAC's assertions, the appeals court did not recognize Midway was a previous owner, as defined by the Law. Thus, GMAC is wrong when it insists that Midway's legal status as a "previous owner" in the statutory sense is somehow "undisputed." Specifically, GMAC says, "[i]t is undisputed that Midway is a 'previous owner' of the Affected Vehicles, which status is controlling to GMAC's 'previous owner' defense under O.R.C. 4549.46(A)." GMAC Br. at 6 n.2. The only thing that is undisputed is that Midway once owned the cars, but the

notion that such “status is controlling” under the law is not “undisputed,” but is one of the legal disputes before the Court.

By providing a sole exception for the previous-owner scenario, and not for other possible third-party tampering, the General Assembly recognized that a later owner cannot help what a prior owner did long ago, while an owner has more control over what happens while he owns a car. To be sure, an owner might be victimized when he lends his car, or entrusts it for repair or for another purpose, but those situations still involve a greater degree of control, or ability to prevent, as compared to a prior owner’s past acts. In other words, the Assembly focused not on a sense of moral culpability, but on the practical *ability* to prevent tampering. An owner is still liable for what happens “on his watch,” even if someone else commits the violation. But this logic does not apply when a long-ago owner, by coincidence, somehow gains custody of the car and causes harm. Such a prior owner is situated no differently from any other third-party, so it makes no sense to shoehorn that prior owner into this exception merely because of the coincidence of past ownership.

As with its case for eliminating strict liability entirely, GMAC’s case for expanding the previous-owner exception is best addressed to the General Assembly, which can, if it chooses, expand the exception to cover tampering by former owners at the time of tampering, or lessees, or other non-owners. But as the law stands now, ownership is a required element, and the logical reading of the statute is that ownership matters when the tampering occurred. This is not the case here, thus GMAC cannot take advantage of the Law’s exception.

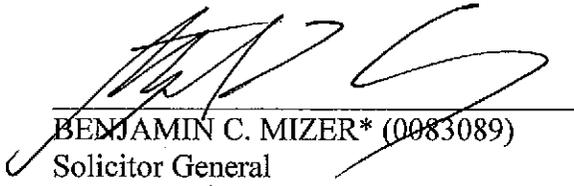
In the final analysis, the import of the previous-owner exception here is not that GMAC qualifies under it, because it does not, but that its existence shows that GMAC’s primary argument is wrong, and strict liability applies here.

CONCLUSION

For the above reasons, this Court should affirm the judgment below, which granted summary judgment in the Attorney General's favor against GMAC. If the Court reverses by finding that strict liability does not apply, it should remand the case to the trial court for application of whichever mental-state requirement the Court finds applicable. If the Court reverses by finding that GMAC falls within the previous-owner exception, it should remand to the trial court for application of that exception—that is, to determine whether GMAC was reckless or more regarding the odometer violations.

Respectfully submitted,

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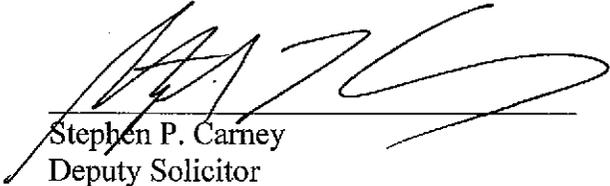
I certify that a copy of the foregoing Merit Brief of Plaintiff-Appellee State of Ohio, ex rel. Richard Cordray, Attorney General of Ohio was served by U.S. mail this 10th day of February 2008, upon the following counsel:

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