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In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. MICHAEL DEWINE, ATTORNEY GENERAL, et al.	:	Case No. 2011-0890
Petitioners,	:	On Review of Certified Questions from the United States District Court for the Northern District of Ohio
v.	:	
GMAC MORTGAGE, LLC, et al.	:	U.S. District Court Case Nos. No. 3:10-cv-02537, 1:10-cv-02709
Respondents.	:	

PRELIMINARY MEMORANDUM OF PETITIONER STATE OF OHIO IN RESPONSE TO THE CERTIFICATION ORDER

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INTRODUCTION

Over the past several years, GMAC and other mortgage companies employed "robosigners" to draft foreclosure affidavits and mortgage assignments. These employees drafted thousands of documents each month, attesting that GMAC had custody of a particular mortgage note, that the homeowner was in default, that GMAC had issued all required notices, and that the homeowner still owed an amount on the principal. And they executed these documents "under oath" on the basis of "personal knowledge."

This was all a charade. One GMAC employee, Jeffrey Stephan, signed thousands of affidavits without personal knowledge of their contents. He did not bother to verify any facts about the identity of the mortgage holder, the conduct of the homeowner, or the validity of the required notices. In some cases, Stephan failed to even read the affidavit or review the attached exhibits. Yet GMAC filed his affidavits in an untold number of Ohio foreclosure cases and, ultimately, secured judgments that uprooted the lives of countless Ohio homeowners.

Two federal district courts in the Northern District of Ohio have now asked this Court to confirm whether the Ohio Consumer Sales Practices Act, R.C. Chapter 1345 ("CSPA"), covers mortgage servicers

This Court should accept this request for assistance. The CSPA's applicability to the mortgage servicing industry is an open question; no Ohio court has addressed the matter. The federal courts therefore lack any assurance that they can "properly apply state law" in this litigation. *Scott v. Bank One Trust Co.* (1991), 62 Ohio St. 3d 39, 43.

Furthermore, no Ohio court will ever get the opportunity to address the CSPA's applicability in this setting, as the out-of-state mortgage servicers are removing CSPA lawsuits to

federal court on diversity grounds under 28 U.S.C. § 1441. Absent certification, this Court will be deprived of its constitutional role of issuing authoritative interpretations of Ohio law.

Finally, the CSPA's applicability to the mortgage servicing industry is of tremendous importance to the State of Ohio and its citizens. Foreclosures have displaced hundreds of thousands of Ohioans from their homes in recent years. GMAC and other companies used false and fraudulent affidavits to evict homeowners from their properties. This litigation will determine whether these evicted Ohioans have recourse under the CSPA for such unfair, deceptive, and unconscionable acts. The answer will provide a measure of finality to all parties involved.

For these reasons, the Court should accept the certification request.

STATEMENT OF THE CASE AND FACTS

A. GMAC finances and services thousands of residential mortgages in Ohio.

GMAC Mortgage, LLC, finances and services residential mortgage loans in Ohio and many other states. As part of this business model, GMAC initiates foreclosure actions in state courts when homeowners default on their monthly mortgage payments. See Amended Complaint ¶ 4, *State v. GMAC*, No. 3:10-cv-2537 (N.D. Ohio Dec. 3, 2010) ("Compl.").

GMAC acquires a servicing interest in a mortgage in one of two ways. In many cases, GMAC holds both components of the mortgage—the homeowner's promissory note (the loan) and the security interest in the homeowner's property. GMAC then retains the servicing rights, and acts as "the servicer," of these loans, "collecting payments . . . from consumer borrowers and applying them as required by the applicable documents; communicating with the consumer borrowers about insurance and tax payments . . . negotiating with the consumer borrowers over late fees, other fees and loan modifications; initiating and pursuing foreclosure proceedings . . .

obtaining affidavits and assignments of mortgage . . . and selling properties of the consumer borrowers that have been foreclosed upon." *Id.* ¶ 10.

In other cases, GMAC acts as "the servicer or sub-servicer for a trustee," who holds the mortgage in a trust for investors. *Id.* ¶ 11. GMAC services these mortgages in the same fashion—collecting payments, communicating with borrowers, negotiating with borrowers, pursuing foreclosure proceedings, and selling foreclosed properties. *Id.* ¶ 12.

When a homeowner defaults on his mortgage payments, GMAC initiates a foreclosure action in state court, seeking transfer of the legal and equitable title to the mortgaged property. As part of that proceeding, GMAC submits affidavits showing that (1) GMAC has custody of, or is the loan-servicing agent for, the disputed note and the mortgage; (2) the note and mortgage are in default because the homeowner failed to make required monthly payments; (3) the property owner failed to cure the default; and (4) GMAC provided adequate notice to the homeowner. See *id.*, Ex. A & B. Occasionally, GMAC must prepare additional documents ("Assignments of Mortgage") to establish ownership over the mortgage and note. *Id.* ¶ 19.

GMAC's affidavits and documents constitute "essential material proof" of its allegations, *id.* ¶ 15, and courts rely on those affidavits during the foreclosure proceeding, *id.* ¶ 29.

B. GMAC prosecuted foreclosure actions in Ohio with false and improper affidavits.

In the past two years, GMAC submitted hundreds of foreclosure affidavits to courts in Ohio and elsewhere. *Id.* ¶ 26. Jeffrey Stephan, a "limited signing officer" in GMAC's foreclosure department, signed each of these affidavits "on the basis of personal knowledge" after "being duly sworn according to law." See *Id.*, Ex. A & B.

In 2009, parties in Florida foreclosure litigation deposed Stephan about his affidavits. Stephan indicated that he signed "approximately 10,000 affidavits and assignments" each month. *Id.* ¶ 23. He further stated "that he did not sign the affidavits based on his personal knowledge,"

and "that his team did not verify the accuracy of the information." *Id.* ¶ 24. Of particular note, Stephan signed affidavits without "ascertain[ing] who the current promissory note-holder was," and executed Assignments of Mortgage "even though he did not have the authority . . . to assign a note to any party." *Id.* ¶¶ 25, 27. Finally, Stephan admitted that he "signed hundreds of affidavits outside the presence of a notary public."[1] *Id.* ¶ 29.

In 2010, Stephan repeated these admissions in foreclosure litigation in Maine. He disclosed that "he signed the affidavits outside the presence of a notary," that he did "not inspect any exhibits attached to" his summary judgment affidavits, that "he did not read every paragraph of the summary judgment affidavits he signed," and that his conduct was "in accordance with the policies and procedures required . . . by GMAC Mortgage." *Id.* ¶ 39.

During this period, Stephan executed similar affidavits in a number of Ohio courts, giving the Attorney General reasonable cause to believe that GMAC was using the same fraudulent procedures and practices to foreclose on residential property in Ohio. *Id.* ¶¶ 26, 27, 41.

C. The Attorney General sued GMAC for violations of the Ohio Consumer Sales Practices Act and common law fraud.

The Attorney General filed suit in the Lucas County Court of Common Pleas, alleging that GMAC and Stephan violated the Ohio Consumer Sales Practices Act, R.C. 1345.02, 1345.03, and 1345.031, by committing unfair, deceptive, and unconscionable acts against Ohio consumers. Compl. ¶¶ 56-57. The Attorney General also alleged common law fraud, asserting that GMAC and Stephan intentionally misled trial courts and opposing parties in foreclosure proceedings. *Id.* ¶¶ 60-63.

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[1] The State also alleges that Stephan falsely represented that GMAC had provided adequate notice and complied with other obligations, as specified by Federal Housing Administration and Veterans Administration rules. Compl. ¶ 28.

The Attorney General requested injunctive relief, monetary damages, and civil penalties. GMAC removed the case to the United States District Court for the Northern District of Ohio.[2]

Once in federal court, GMAC filed a motion to dismiss, asserting that the Attorney General failed to state a claim under the CSPA. In particular, GMAC argued that the Attorney General had failed to allege the existence of a "consumer transaction" or a "supplier."

Finding "no controlling precedent on this issue," the district court certified three questions to this Court under S.Ct. Prac. R. 18: (1) "Does the servicing of a borrower's residential mortgage loan constitute a 'consumer transaction' as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?"; (2) "Does the prosecution of a foreclosure action by a mortgage servicer constitute a 'consumer transaction' as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?"; and (3) "Is an entity that services a residential mortgage loan, and prosecutes a foreclosure action, a 'supplier... engaged in the business of effecting or soliciting consumer transactions' as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(C)?" Certification Order, at 2, *State of Ohio v. GMAC Mortgage, LLC*, No. 2011-0890 (filed May 24, 2011).

The Attorney General's common law claim, addressing GMAC's fraudulent scheme to mislead Ohio trial courts and opposing litigants, is still pending before the federal district court.

THE COURT SHOULD ACCEPT REVIEW OF THE CERTIFIED QUESTIONS

This Court answers certified questions when doing so "further[s] the state's interests and preserve[s] the state's sovereignty." *Scott*, 62 Ohio St. 3d at 42. Measured by this standard, the Court should answer the questions presented here for three reasons: First, the federal courts need

[2] The district court consolidated this action with *Blank v. GMAC Mortgage* (N.D. Ohio), No. 1:10-cv-2709. In *Blank*, a group of homeowners and former homeowners sued GMAC in state court under similar statutory and common law theories.

guidance. This Court has never defined a mortgage servicer's duties and liabilities under the CSPA. Second, the Ohio courts have not had, and will not get, an opportunity to grapple with these issues because GMAC and other large mortgage companies typically remove such lawsuits to federal court. Certification is the only conduit by which state courts—and this Court—retain their ability to interpret state law. Third, resolution of this litigation is of great interest to many Ohioans. The recent housing crisis has inflicted considerable pain on a number of homeowners, and this case presents an appropriate vehicle to define what, if any, remedies these citizens have against mortgage companies that secured foreclosure judgments through unfair, deceptive, and unconscionable conduct.

A. The Consumer Sales Protection Act's applicability to mortgage servicers is an open question under Ohio law.

Under the CSPA, no supplier shall commit an unfair, deceptive, or unconscionable act in connection with a consumer transaction, R.C. 1345.02(A), 1345.03(A), R.C. 1345.031(A). An unfair, deceptive, or unconscionable act is unlawful regardless of "whether it occurs before, during, or after the transaction." *Id.*

The CSPA's statutory language is capacious. A "consumer transaction" refers broadly to any "sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household." R.C. 1345.01(A). A "supplier" includes "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions." R.C. 1345.01(C).

The district court's first and second questions implicate the scope of the former term—whether GMAC's servicing of a residential mortgage, and its subsequent initiation of a foreclosure action, qualify as a "consumer transaction." The third question addresses the latter

term—whether GMAC became a "supplier" under the CSPA when it serviced a residential mortgage loan.

As the district court correctly observed, no Ohio appellate court has addressed the statute's applicability to the mortgage servicing industry. A second federal court recently reached the same conclusion. It too found "no controlling precedent on th[e] issue" and asked this Court for guidance. See Certification Order at 4, *Anderson v. Barclays Capital Real Estate*, No. 2011-0908 (filed May 26, 2011). The fact that *two* federal courts have now requested assistance on the exact same dispute confirms the need for this Court's involvement.

Moreover, this Court is well positioned to answer the questions presented. In recent years, the Court has adjudicated a number of disputes over the scope and substance of the CSPA, giving it a unique familiarity with and understanding of the law. See, e.g., *Williams v. Spitzer Autoworld Canton, LLC*, 122 Ohio St. 3d 546, 2009-Ohio-3554; *Charvat v. Ryan*, 116 Ohio St. 3d 394, 2007-Ohio-6833; *Whitaker v. M.T. Auto, Inc.*, 111 Ohio St. 3d 177, 2006-Ohio-5481; *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St. 3d 5, 2006-Ohio-2869.

Simply put, the lack of controlling precedent and this Court's familiarity with the CSPA's statutory scheme support acceptance of the certified questions.

B. Absent certification, the state courts will lack any opportunity to address these issues.

Certification is also appropriate given the posture of this case. As discussed above, the Attorney General initially sued GMAC in the Lucas County Court of Common Pleas. Invoking its rights under 28 U.S.C. § 1441, GMAC removed the case to federal district court. That court is now seeking assistance in interpreting Ohio law.

Two other cases have proceeded along the same route. In *Blank v. GMAC Mortgage* (N.D. Ohio), No. 1:10-cv-2709, a group of homeowners and former homeowners sued GMAC in the

Ashtabula Court of Common Pleas for common law fraud and violations of the CSPA. GMAC immediately removed the case to federal court. In *Anderson v. Barclays Capital Real Estate* (N.D. Ohio), No. 3:09-cv-2335, the plaintiff sued another mortgage servicer in the Huron Court of Common Pleas, alleging similar statutory and common law violations. The servicer promptly removed the case to federal court.

This sequence is likely to recur many times over. Mortgage servicers like GMAC are not Ohio residents. Accordingly, they have the right to flee to federal court under 28 U.S.C. § 1441 whenever an Ohio homeowner files suit against them in state court. That sequence creates an intractable conundrum. The federal courts are bound to follow the Ohio courts' interpretation of Ohio law. See *Kurczi v. Eli Lilly & Co.* (6th Cir. 1997), 113 F.3d 1426, 1429. But the mortgage servicers' practice of removing CSPA cases to federal court deprives the state courts of any opportunity to interpret the statute. The federal courts therefore lack authoritative guidance on the CSPA's applicability to the mortgage servicing industry.

To be clear, GMAC has the right to invoke the diversity jurisdiction of the federal courts. Yet that practice is forcing the federal courts to "guess" at how the Ohio courts would construe a vitally important consumer protection statute. *Scott*, 62 Ohio St. 3d at 43. Attempting to extricate itself from that cycle, the federal court here is reaching out to this Court for guidance. This Court should heed its request and agree to answer the certified questions.

C. These issues are of great importance to many Ohio homeowners.

As this Court is well aware, the mortgage foreclosure crisis has inflicted tremendous pain on many Ohioans.

Ohio courts have witnessed over 80,000 new foreclosure filings in each of the past four years. As of March 31, 2011, 8.32 percent of Ohio mortgage holders were past due on their payments, and 5.09 percent of mortgage holders (or one in twenty homeowners) were in

foreclosure proceedings. Mortgage Bankers Association, National Delinquency Survey Q1 2011 (March 31, 2011), at 4. For this reason, one Federal Reserve official recently characterized Ohio as "the epicenter of the foreclosure crisis." Teresa Dixon Murray, "Housing outlook here worse than Nation's, Federal official says" (Sept. 3, 2010), Cleveland Plain Dealer, at C1 (quoting Federal Reserve Bank President Sandra Pianalto).

Judicial foreclosure proceedings are an admittedly difficult, but necessary process. Our state courts impose minimal evidentiary burdens on GMAC and its competitors, requiring them to establish possession of the mortgage, default by the homeowner, and the issuance of proper notices to the homeowner. These requirements preserve the legitimacy of the judicial proceeding. Without such factual assurances, courts may displace some homeowners prematurely or, worse yet, incorrectly from their properties.

As the Attorney General's complaint alleges, GMAC flouted these minimal evidentiary requirements in its foreclosure prosecutions. Under oath, the affiant (Jeffrey Stephan in this case) swore that his company possessed the mortgage loan and the note, that the homeowner was in default, that his company issued proper notices, and that the homeowner still owed a specified amount due. Stephan executed thousands of these affidavits despite having no personal knowledge of, and making no effort to verify, the attested-to facts.

At best, this conduct injects an intolerable risk of error into the foreclosure process. The affidavit is the factual predicate for the foreclosure proceeding. If the affidavit is falsified, any judgment loses its integrity. Recognizing this dilemma, several common pleas courts now require mortgage servicer attorneys (over their strong objections) to certify the content of every foreclosure affidavit under threat of Civ. R. 11 sanctions. See Complaint in Prohibition, *Sassano v. Honorable John F. Bender*, No. 2010-2239 (dismissed Apr. 6, 2011). Such steps are

necessary, the trial courts say, because "many documents submitted in residential foreclosures have not been properly authenticated" and "additional safeguards are necessary to protect the validity of any judgment that might ensue." *Id.*, Aff. of David Cliffe, Ex. A.

At worse, this conduct invites outright fraud by mortgage servicers and their agents. One national news outlet recently uncovered a company that created thousands of forged affidavits. Its employees scribbled pseudonyms on 350 documents per hour, and then transferred them to dozens of different mortgage companies for use in foreclosure proceedings. See Scott Pelley, Mortgage Paperwork Mess: Next Housing Shock (Apr. 1, 2011), CBS 60 Minutes, available at http://www.cbsnews.com/stories/2011/04/01/60minutes/main20049646.shtml (last visited June 10, 2011).

Going forward, consumer advocates, state attorneys generals, and state court judges can police the mortgage servicers and deter such conduct. But such vigilance does not address the damage already inflicted on those citizens who, due to a sham affidavit, packed up their belongings, moved out of their homes, and upended their families.

The CSPA is designed to do just that. The statute is "a remedial law," and courts have "liberally construed" its provisions to cover consumer relationships of all stripes. *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (1990). Two district courts have now asked this Court to confirm whether the Act's broad protections reach the chief consumer crisis now gripping this State. The Attorney General urges the Court to accept the invitation.

CONCLUSION

For these reasons, the Court should answer the certified questions.

Respectfully submitted,

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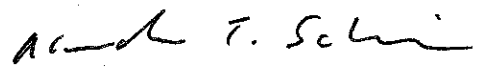

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Preliminary Memorandum of Petitioner State of Ohio in Response to the Certification Order was served by U.S. mail this 13th day of June, 2011 upon the following:

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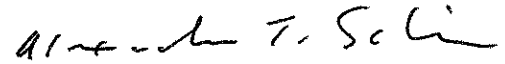

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