

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO <i>EX REL.</i> MIKE | : | |
| DEWINE, ATTORNEY GENERAL, <i>et al.</i> , | : | |
| | : | Case No. 2011-0890 |
| vs. | : | |
| | : | |
| GMAC MORTGAGE, LLC, <i>et al.</i> | : | |

**PRELIMINARY BRIEF OF RESPONDENTS
GMAC MORTGAGE, LLC AND ALLY FINANCIAL, INC.**

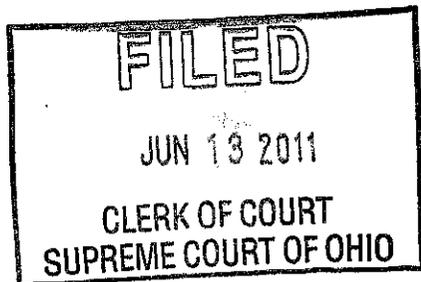
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I. INTRODUCTION.

The United States District Court for the Northern District of Ohio has certified three questions of state law to this Court and has asked this honorable Court to resolve them. Respondents GMAC Mortgage, LLC (“GMAC”) and Ally Financial, Inc. (“Ally”) respectfully request that this Court decline to answer the certified questions.

This request for certification arises out of two separate actions that have been consolidated for pretrial purposes. The first, State of Ohio ex rel. Mike Dewine, Attorney General v. GMAC Mortgage LLC, et al., is an action prosecuted by the Ohio Attorney General on behalf of certain Ohio residents who are in default on their residential mortgage loans, and who are defendants in foreclosure actions pending before Ohio common pleas courts. The second, Lois Blank, et al. v. Ally Financial, Inc., et al., is a private action seeking to represent a putative class of those Ohio residents who are in default on their residential mortgage loans, and who are defendants in foreclosure actions pending before Ohio common pleas courts.¹ In both actions, petitioners assert claims for alleged violations of the Ohio Consumer Sales Practices Act (“CSPA”). The CSPA claims are based on a single, narrow alleged course of activity: the submission of evidentiary, testimonial materials in support of foreclosure. The specific legal filings at issue are assignments of mortgages and notes and affidavits in support of summary judgment or default judgment. Each of these assignments and affidavits was filed during the course of a foreclosure proceeding pending before an Ohio common pleas court. No other types of activity are alleged as the basis for the CSPA claims. GMAC and Ally have filed motions to dismiss in both actions for failure to state a claim. Those motions are fully briefed, but the District Court has dismissed the motions without prejudice to refiling, pending the outcome of

¹ Respondent GMAC Mortgage, LLC is named as a defendant in both actions. Respondent Ally Financial, Inc. is a defendant only in the Blank action.

the certification of questions to this Court.

As set forth more fully below, this Court should decline to answer the certified questions for several reasons.

First, the certified questions are not true questions of law, and they are dependent on alleged facts specific to the pending actions, which have not been fully developed at this point.

Second, legal concepts essential to resolve the motions to dismiss are already clearly established as a matter of settled Ohio law. Specifically, under Ohio law, the CSPA does not apply to real estate transactions. The cases here involve a direct attempt to base a CSPA claim on steps taken in a foreclosure action to recover title to real estate. Under settled law, therefore, the definitions of “consumer transaction” and “supplier” in the CSPA do not cover the conduct at issue in these cases. Accordingly, no answer to the certified questions is necessary.

Third, answers to the first and third certified questions would be advisory, as those questions do not reflect the actual factual context presented in the cases pending in the United States District Court. It is well established that this Court does not issue advisory opinions, and this Court has declined to answer certified questions when the answers to those questions would not apply to the parties or conduct involved in the case giving rise to the questions.

II. THE CERTIFIED QUESTIONS.

The District Court has asked this Court to answer three questions:

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)?
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 Consumers Sales Practices Act, R.C. § 1345.01(C)?

Certification Order at 2.

As explained more fully below, accepting and answering these certified questions would be a dramatic departure from this Court's historical approach to certified questions from federal courts. These questions are not true questions of law, but are inherently intertwined with the specific facts alleged. Moreover, Ohio law is settled that the CSPA does not apply to real estate transactions, so there is no need to answer the questions certified. Finally, answering the certified questions would not resolve the issues raised by the motions to dismiss. Therefore, answering these certified questions would be tantamount to issuing an advisory opinion.

III. LAW AND ARGUMENT.

A. **The Certified Questions Presented Are Not True Questions of Law, as They Inherently Depend on the Specific Facts Alleged.**

The certified questions presented by the District Court should not be accepted for resolution. They are not true questions of law, but instead depend on the specific facts alleged in the pending actions. Rule 18.1 of the Supreme Court Rules of Practice provides that the "Supreme Court may answer a question of law certified to it by a court of the United States." S.Ct. Pract. R. 18.1. Indeed, this Court has declined to answer certified questions when the questions are fact-specific. In Copper v. Buckeye Steel Castings (1993), 67 Ohio St.3d 563, the Court of Appeals for the Sixth Circuit certified the question: "Whether an employer's discharge of an employee for failing to file request for leave forms pursuant to an established medical leave policy violated Ohio Rev. Code § 4123.90 where the employer is aware that the employee's work-related injury was the cause of his continued absence from work." Id. The Court declined to answer the question "because it is not appropriate for this court to answer certified questions of state law that are so factually specific in nature." Id.

Questions about mortgage servicing cannot be answered in the abstract, but are fact-

specific. The alleged “servicing” activity at issue here is the prosecution of foreclosure actions to recover title to real estate in Ohio common pleas courts, and the filing of evidentiary and testimonial documents in support of summary judgment or default judgment in those foreclosure actions. It is not the general servicing activities undertaken by a mortgage servicer, i.e., the collection or application of mortgage payments from borrowers, or the contacting of borrowers regarding their payments.

Whether the alleged activities fall within the scope of the CSPA’s definition is an inherently fact-specific issue. Indeed, historically, the cases in which this Court has considered whether the CSPA is applicable have been on appeal from lower state courts, and there has been a factual record available to this Court. GMAC and Ally have been unable to locate any prior case in which this Court even received, let alone answered, certified questions from a federal court relating to the scope of the CSPA’s coverage.

Moreover, here, as in Copper, the certified questions are specific to the alleged facts of the pending action and are not true questions of law. All three of the certified questions would involve specific factual determinations as to what acts fall within the scope of “servicing” residential mortgage loans, because the label “servicing” is not capable of uniform definition. Any determination of whether the CSPA’s definitions of “consumer transaction” and “supplier” are satisfied would require consideration of the specific mortgage servicing activities alleged in each case. The certified questions, therefore, are factually specific, and are not questions of law under Rule 18.1 of the Rules of Practice. Thus, the Court should decline to answer them.

B. Settled Ohio Law Resolves the Issues Pertinent to the Motions to Dismiss.

In addition, there is no need to answer the certified questions because settled Ohio law pertinent to the motions to dismiss exists. This Court has declined to answer certified questions

of state law when the applicable law is settled. See Dunn v. Ethicon, Inc., 2005-Ohio-5146, 106 Ohio St.3d 1531 (“The court declines to answer the certified question because the applicable law is settled in Ohio.”).

Here, Ohio law is settled. This Court has long held that pure real estate transactions are not subject to the CSPA. See Brown v. Liberty Clubs, Inc. (1989), 45 Ohio St.3d 191, 193 (“All parties correctly agree that the Consumer Act has no application in a ‘pure’ real estate transaction.”). Applying Ohio law, federal courts have held that the signing of a note and conveyance of a residential mortgage is a “pure real estate” transaction that is not subject to the CSPA. See Hanlin v. Ohio Builders & Remodelers, Inc., 212 F. Supp. 2d 752, 757 (S.D. Ohio 2002) (granting mortgage lender EquiCredit Corporation of America summary judgment on borrowers’ CSPA claims because loan was pure real estate transaction not subject to CSPA; “closing services” provided by the lender were “part and parcel of the real estate transaction,” so the lender could not be held liable under the CSPA for actions performed in rendering those services). See also Smith v. ABN AMRO Mortg. Group, Inc., 2007 U.S. Dist. LEXIS 26585, *35 (S.D. Ohio Mar. 27, 2007) (dismissing plaintiffs’ CSPA claim against various defendants, including mortgage lenders, based on alleged loan “flipping” scheme because allegations related to a pure real estate transaction). The litigation conduct that is the subject of the complaints, which is intended to obtain a decree in foreclosure and recover title to the subject real estate, is an extension of the underlying pure real estate transaction, and therefore is not a consumer transaction under settled Ohio law.

Moreover, the specific activities alleged to be at issue here were not in connection with any “consumer transaction” as defined by the CSPA. The CSPA defines a “consumer transaction” as “a 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, or solicitation to supply any of these things.” R.C. §1345.01(A). The conduct alleged to violate the CSPA in the pending actions—the filing of evidentiary and testimonial documents during the course of a foreclosure proceeding pending before an Ohio common pleas court—clearly is not a consumer transaction because it is not “a sale, lease, assignment, award by chance, or other transfer” of anything. The CSPA defines a “supplier” as “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer.” R.C. §1345.01(C). Because the litigation-related conduct alleged in the complaints is not a consumer transaction under the clear language of the statute, GMAC and Ally are not “engaged in the business of effecting or soliciting consumer transactions,” and therefore are not suppliers.

Ohio law is settled with respect to the conduct allegedly supporting a CSPA claim here. As noted above, the alleged conduct is involved with the attempt to recover title to real estate in foreclosure actions in Ohio common pleas courts. It is thus an extension of a pure real estate transaction, and therefore is not a consumer transaction under the CSPA. Moreover, the statutory definition of “consumer transaction” on its face does not include the conduct allegedly giving rise to the CSPA claims. Given the existence of settled Ohio law on this issue, it is not necessary for the Court to answer the certified questions.

C. Answers to the First and Third Certified Questions Would Be Advisory.

Finally, answering the first and third certified questions would not address the issues raised in the pending motions to dismiss. Answers to the first and third questions therefore would be advisory. As this Court has held, “Every court must refrain from giving opinions on abstract propositions and avoid the imposition by judgment of premature declarations or advice upon

potential controversies. It is well-settled law that this court will not issue such advisory opinions.” Arbino v. Johnson & Johnson, 2007-Ohio-6948, ¶84, 116 Ohio St.3d 468 (internal citations omitted) (declining to answer one question certified by United States District Court regarding constitutionality of state statute because that statute did not apply to plaintiff).

It is important to consider the context of the cases from which the certified questions arise. In both cases, petitioners assert claims for alleged violations of the CSPA. In both cases, GMAC and Ally are alleged to have brought and maintained residential mortgage foreclosure actions in state courts. The only conduct alleged to violate the CSPA was the filing of evidentiary and testimonial documents in support of summary judgment or default judgment in foreclosure actions to recover title to real estate in Ohio common pleas courts. The pending cases implicate no other aspects of the servicing of mortgage loans.²

Thus, answering the first certified question would only indicate whether “the servicing of a borrower’s residential mortgage loan” in general could give rise to the CSPA claim. The answer would not address whether the filing of evidentiary and testimonial materials in foreclosure actions pending before Ohio common pleas judges could give rise to a CSPA claim. Likewise, to

² Indeed, in this regard, GMAC and Ally proposed two certified questions that would have furthered the resolution of the issues raised in the motions to dismiss, to the extent the District Court believed settled Ohio law did not already answer those questions. Those questions were:

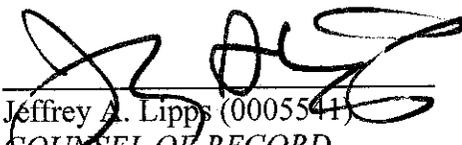
1. Does the prosecution of a foreclosure action and the obtaining and filing of affidavits and assignments of mortgages or notes constitute a “consumer transaction” as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?
2. Is an entity that prosecutes a foreclosure action, a “supplier . . . engaged in the business of effecting or soliciting consumer transactions” as defined in the Ohio Consumers Sales Practices Act, R.C. § 1345.01(C)?

Position Of Ally Financial, Inc. And GMAC Mortgage, LLC With Respect To Draft Certification Order, Proposed Certification Order at 2 (Docket # 43), filed in State of Ohio, et al. v. GMAC Mortgage, LLC, et al., Nos. 3:10-cv-02537-JZ, 1:10-cv-02709-JZ (N.D. Ohio).

the extent the third certified question asks whether an “an entity that services a residential mortgage loan” is a “supplier” under the CSPA, it too involves generalized mortgage servicing conduct that is not at issue here. Answering that question would not address whether the filing of evidentiary and testimonial materials in foreclosure actions pending before Ohio common pleas judges could give rise to a CSPA claim. Therefore, to the extent the first and third certified questions focus on mortgage servicing activity in general, as opposed to the specific conduct alleged in the complaints, answers to those certified questions would be advisory.

III. CONCLUSION.

For the reasons above, answering the certified questions would be contrary to this Court’s approach to answering certified questions of state law. Accordingly, GMAC and Ally respectfully request that this Court decline to answer the questions certified by the District Court.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Preliminary Brief Of Respondents GMAC Mortgage, LLC And Ally Financial, Inc. was served via ordinary U.S. mail, postage prepaid, this 13th day of June, 2011, upon the following:

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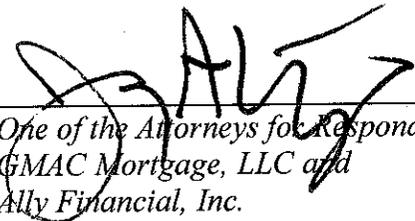
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