

ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2011-0908

ON REVIEW OF CERTIFIED QUESTIONS OF
STATE LAW FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.
U.S. DIST. CASE NO. 3:09CV2335

SONDRA ANDERSON,

Plaintiff-Respondent

v.

**BARCLAYS CAPITAL REAL ESTATE, INC.
D.B.A. HOMEQ SERVICING,**

Defendant-Petitioner.

**RESPONDENT SONDRA ANDERSON'S
PRELIMINARY MEMORANDUM UNDER RULE 18.6**

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Now comes Plaintiff-Respondent Sondra Anderson and submits her memorandum addressing the questions of law certified by the United States District Court pursuant to S.Ct. Prac.R. 18.

I. PRELIMINARY STATEMENT

This case involves fallout from the exotic practices in the securitized mortgage industry and the effects of leaving industry participants completely unregulated. During the boom years of the previous decade, exotic new residential mortgages were created, marketed, sold, resold, packaged and repackaged at an incredible rate. Ohio is still digging out from the consequences of the unprecedented collapse of mortgage backed securities. Securitization splintered the roles of the traditional mortgage lender creating new players with new roles and responsibilities. One of the by-products is the “mortgage servicer,” the entity responsible for all contacts with the borrower during the term of the mortgage loan. All payments, disputes, questions and customer service issues of any kind are handled exclusively by the mortgage servicer. The servicing rights of mortgage loans are bought and sold separately from the ownership of the mortgage loan.

One consequence of securitization is the growing importance of “mortgage servicers.” Generally, the servicer collects payments from the borrower and applies them to the borrower’s mortgage obligations. The mortgage servicer exercises considerable discretion in situations in which the borrower is delinquent or in default on her mortgage. It is the servicer who analyzes the loan for compliance with insurance and force places the borrower if not in compliance. In the world of securitized mortgages, the servicer is the only entity dealing directly with the mortgage borrower. The servicer is responsible for substantive decisions about how to proceed when a borrower has difficulty making her payments, including whether to modify a loan or file a foreclosure action. All communications to and from a borrower about her mortgage loan are

with the mortgage servicer. In short, servicers are the customer service face of the mortgage loan. The servicer is responsible for and is compensated for its interaction with the borrower and the borrower's account.

This case presents the question of whether mortgage servicers who commit unfair or unconscionable practices can be sanctioned under the Ohio Consumer Sales Practices Act, Ohio Revised Code §1345 ("CSPA"). This case affects both servicer liability to private plaintiffs as well as the ability of the State, through the Attorney General, to take enforcement action against unscrupulous servicers.

The CSPA is a remedial statute which defines key terms such as "supplier" and "consumer transaction" broadly. A mortgage servicer is a supplier under the CSPA as a person engaged in the business of effecting consumer transactions. The servicing of a residential mortgage loan is a consumer transaction, as it is the provision of a service to an individual for a primarily personal, family or household purpose. HomeEq, the defendant mortgage servicer, has not pointed to any exception or exclusion that would remove its activity from the scope of the CSPA.

This case reaches the Supreme Court of Ohio because the United States District Court for the Northern District of Ohio, Western Division certified two questions of law in connection with a motion to dismiss. First, the District Court asks this Court to determine whether the servicing of a residential mortgage loan constitutes a "consumer transaction" as defined by R.C. § 1345.01(A). Second, the District Court asks whether mortgage servicers, such as HomeEq, are "suppliers... engaged in the business of effecting or soliciting consumer transactions" as defined by R.C. § 1345.01(C).

Taken together, the two questions certified to this Court ask whether mortgage servicers are allowed to commit unfair, deceptive, and unconscionable acts or practices in collecting and applying mortgage payments in Ohio, or whether they are prohibited from doing so by the CSPA. The plain language of the statute clearly addresses this question. Mortgage servicers are prohibited from committing unfair, deceptive, and unconscionable acts against Ohio consumers under the CSPA.

II. STATEMENT OF THE CASE AND FACTS

A. Anderson's factual allegations: HomEq misapplied and will not explain what it did with her mortgage payments.

Sondra Anderson, the Plaintiff in this action, is an Ohio homeowner who purchased a home financed through a note and mortgage. The note and mortgage clearly set forth an order of priority for application of the borrower's payments. (Cmplt.¹ at ¶¶ 14-15). In Anderson's case, mortgage payments must be applied in the following order: first toward interest due under the note; second to principal due under the note; and third to specifically defined escrow items. (*Id.*) Payments may be applied to other purposes only after interest, principal and escrow. (Cmplt. at ¶ 17). Defendant Barclay Capital Real Estate, Inc. d.b.a HomEq Servicing ("HomEq") began acting as the "servicer" of Anderson's loan shortly after origination. (Cmplt. at ¶ 13). As servicer, HomEq collected Anderson's monthly payments and decided how to disburse and apply them, including forwarding the appropriate portion to the holder of her note and mortgage. (Cmplt. at ¶¶ 16-17). HomEq was required to forward the great majority of these payments to

¹ Refers to Anderson's Second Amended Complaint, Order, Dist. Ct. doc. # 35. This is the current, effective, pleading in that case and referenced in the District Court's order certifying a question of law to this Court.

the owner/holder of Anderson's note and mortgage after application according to the terms of those documents.²

For a number of reasons not directly related to this review, Anderson began questioning HomEq's use of her mortgage payments. On her own, and with the assistance of counsel, Anderson repeatedly requested and reviewed information from HomEq regarding the application of her mortgage payments. (Cmplt. at ¶ 19). Among other items, Anderson inquired about payments applied to court costs and attorney fees apparently related to a foreclosure case filed by HomEq against her. (*Id.*) Despite these inquiries, HomEq could not or would not account for all of Anderson's payments. (Cmplt. at ¶ 20).

Finally, using a procedure available to borrowers under the Real Estate Settlement Procedures Act ("RESPA"), Anderson formally inquired about how HomEq applied her mortgage payments. (Cmplt. at ¶ 21) Although HomEq provided Anderson with a payment history, the servicer did not provide a substantive response to the majority of her inquiries. (Cmplt. at ¶¶ 22, 62). Further, a professional audit of HomEq's payment history shows a portion of Anderson's payments were applied to vague categories such as "addl payment" and "other." (Cmplt. at ¶ 23). These applications were improper because her note and mortgage required these funds to be applied first to interest and principal. In addition, HomEq did not account for approximately \$2500 of Anderson's payments at all. (Cmplt. at ¶ 24). In other words, the payment history provided by HomEq shows that the servicer received \$2500 more in

² HomEq has variously identified as "Deutsche Bank" and "Morgan Stanley Home Equity Loan Trust 2005-2 Pass Through Certificates, Series 2005-2" as the current holder of Anderson's note and mortgage.

payments than it applied to any discernable purpose, even after accounting for monies attributed to unauthorized categories such as “addl payment” and “other.”

HomEq’s misapplication of Anderson’s payments, and failure to completely and accurately respond to her inquiries, including her Real Estate Settlement Procedure Act, 12 U.S.C. §2605 (“RESPA”) request, violate the CSPA. Anderson advances two distinct theories for relief under the CSPA. First, HomeEq’s failure to properly apply and account for her payments, including the fact that \$2500 is completely unaccounted for, constitutes unfair and deceptive acts and practices pursuant to R.C. § 1345.02 and unconscionable acts and practices in connection with a residential mortgage loan pursuant to R.C. §§ 1345.031. HomEq’s misapplication amounts to collection of unlawful fees. Second, HomEq’s response to Anderson’s RESPA request fell short of the requirements of that statute, which is actionable pursuant to R.C. § 1345.02(F), which prohibits “knowingly fail[ing] to make disclosures required by federal law.”

B. Procedural History: the District Court concludes that if Anderson’s allegations are true, HomEq committed unfair, deceptive and unconscionable acts and practices as defined by the CSPA.

HomEq moved to dismiss Anderson’s entire complaint³ pursuant to Fed.R.Civ.P. 12(b)(6). The District Court declined to do so in June 2010. With respect to Anderson’s CSPA claims, the District Court concluded that, Anderson’s allegations that HomEq misapplied and failed to account for Anderson’s mortgage payments do constitute unfair and unconscionable acts and practices. (Order, Dist. Ct. doc. # 26 at pp. 14-15). The only question is whether the

³ Anderson filed her initial complaint in the Huron County Court of Common Pleas. HomEq removed the action on the basis of both federal diversity jurisdiction, 28 U.S.C. § 1332, and the so-called “Class Action Fairness Act,” 28 U.S.C. § 1332(d). After the parties exchanged limited discovery, Plaintiff filed a First Amended Complaint, which HomEq moved to dismiss.

Ohio consumer protection statute protects homeowners from unfair and unconscionable acts by out-of-state mortgage servicers. That is the question before this Court. The District Court also declined to dismiss Anderson's class-action allegations under common law theories of unjust enrichment and conversion.⁴ The question of whether HomEq adequately responded to Anderson's RESPA inquires, and therefore violated the CSPA at R.C. § 1345.02(F), remains pending in the District Court.⁵ (Order, Dist. Ct. doc. # 26 at pp. 15-16).

C. The parties and the Attorney General's Office spend nearly one year disputing whether to certify a question of law to this Court.

Although the District Court held that HomEq's treatment of Anderson, if her allegations are proven true, amount to unfair and deceptive acts, it declined to answer the question as to whether the CSPA covers mortgage servicers. The District Court cited an absence of definitive Ohio authority and proposed to certify the issue to this Court pursuant to S.Ct. Prac.R. 18.

From the outset, Plaintiff has expressed significant reservations about the timing and factual basis for such a certification. Appearing before the District Court as an Amicus Curiae, the Office of the Ohio Attorney General expressed many of the same concerns. These concerns centered in two broad areas. First, Anderson and the Attorney General's Office initially objected to the potential for long delay and possible stays that a certification to this Court may entail.

Furthermore, Anderson opposed certification over the lack of an established factual record in this case. In response to Plaintiff's concerns, HomEq agreed to stipulate to the facts

⁴ In total, Anderson brought three claims for relief: 1) class allegations of unjust enrichment; 2) class allegations of conversion; 3) individual claims under RESPA; and 4) individual claims under the CSPA.

⁵ The District Court concluded that Anderson's First Amended Complaint did not sufficiently detail the damages she suffered as a result of the alleged RESPA violation, but granted leave to file a Second Amended Complaint fleshing out these details. (Order, Dist. Ct. doc. # 26 at p. 13). The District Court has not yet ruled on HomEq's motion to dismiss the Second Amended Complaint.

alleged in Plaintiff's Second Amended Complaint (and are stated in the certified order) for purpose of certifying these questions to this Court. Anderson has alleged that that a "mortgage servicer" performs a wide variety of consumer-related functions and exercises considerable discretion over all aspects of a mortgage borrower's account. (Cmplt. at ¶ 71). Specifically, HomEq: 1) exercises discretion about fees charged to Anderson's account; 2) maintains call centers to which borrowers with concerns about their mortgages; 3) is empowered to make substantive decisions loss mitigation or loan modification; 4) handles consumer disputes about mortgage loans; 5) negotiates and executes loan modification agreements; 6) in some circumstances, purchases homeowner's insurance at the expense of the borrower; and 7) receives compensation for its services from the payment stream generated by a consumers' residential mortgage. (*Id.*) The Plaintiff bases these allegations on information published by HomEq itself. The information is targeted at the public, its customers and potential customers outlining its functions, capabilities and roles as a mortgage servicer.

The parties and the Attorney General's Office spent a better part of a year discussing, and sometimes disputing, the timing and appropriateness of certification of questions of law to this Court. Ultimately, the District Court certified questions based on the allegations in Anderson's Second Amended Complaint.

Within days of each other, two District Judges certified questions concerning the applicability of the CSPA to residential mortgage servicers. In addition to the instant case, the District Court certified questions of law addressing the narrower question of whether a mortgage servicer violates the CSPA by filing deceptive affidavits in connection with a foreclosure action. See: *State ex rel. Dewine v. GMAC Mortgage, LLC*, S.Ct. Docket No. 2011-0890.

The issue presented in this case is well framed and applicable to all borrowers whether they are current, delinquent, in default, or in foreclosure. This Court should answer the questions certified herein. If the Court is inclined to accept only one case for review, it should consider the instant case because it presents a broader picture of the activities of mortgage servicers and an answer to the questions presented here will provide greater clarification of the law as it affects Ohio homeowners and the mortgage industry as a whole.

III. LAW AND ARGUMENT IN SUPPORT OF CERTIFIED QUESTIONS

The CSPA is a remedial statute that contains broad definitions of the terms “supplier” and “consumer transaction.” Applying the plain meaning of these definitions, HomEq’s conduct as a mortgage servicer is actionable under the CSPA. HomEq has not pointed to any exception that may apply to non-bank mortgage servicers. Instead, in the District Court briefing, HomEq pointed to a prior version of the CSPA and amendments proposed, but not enacted, by the last General Assembly. The plain language in the definitions of “consumer transaction” and “supplier” is controlling. This Court should stand by the rules of statutory construction and not allow HomEq to confuse the issue with reference to bills introduced that were never enacted.

A. Trial courts to consider the issue have universally concluded that mortgage servers are “suppliers” to a “consumer transaction” as defined by the CSPA.

As an initial matter, at least three Ohio trial courts have already ruled that mortgage servicers are subject to the CSPA. *Dowling v. Litton Loan Serving, L.P.*, 2006 U.S. Dist. LEXIS 87098 at **42-44 (S.D. Ohio 2006) (“If the legislature intended to exempt all loan servicing agents from coverage under the CSPA, it would have done so. This Court will not extend the CSPA’s exemption beyond its clear and unambiguous meaning. For that reason, the Court finds that the CSPA applies to Defendant in this case”). See also: *Kline v. Mortgage Electronic Systems, Inc.*, S.D. Ohio Docket No. 3:08cv408 (March 29, 2011); *State v. Barclays Capital*

Real Estate, Inc., Montgomery County Common Pleas Docket No. 2009CV10136 (Sept. 16, 2010), relying on *Dowling*.

To date, HomEq has not identified a court that reached a contrary conclusion under the present version of the CSPA.

B. The definitions of “supplier” and “consumer transaction” included in the CSPA are sufficiently broad to encompass activities by mortgage servicers such as HomEq.

HomEq claims that it is not a “supplier” and does not engage in “consumer transactions,” and is therefore not covered by the CSPA. That argument has no merit. Both terms are defined broadly by the statute and contain only limited exceptions, none of which apply to HomEq. The mortgage servicer simply argues that it does not participate in the world of consumer transactions.

The CSPA defines a supplier as a “person engaged in the business of effecting or soliciting consumer transactions, whether or not that person deals directly with the consumer.” R.C. § 1345.01(C). Within the plain language of the CSPA a “person” unquestionably includes corporations, and therefore includes HomEq. R.C. § 1345.01(B). The definition of “supplier” is broadly descriptive and does not list every commercial entity that could fall within its scope. Accordingly, HomEq’s argument that the term “supplier” does not include entities acting purely as mortgage servicers is baseless. Simply because a particular industry is not named in the definition of “supplier” does not mean that it is not covered by the CSPA. To the contrary, HomEq easily meets the broad definition of “supplier” with respect to Anderson’s loan. HomEq collected her payments and made substantive decisions about their application. (Cmplt. at ¶¶ 16-17, 71). HomEq is charged with the responsibility to interact with Anderson, a consumer, by responding to her concerns and inquiries about her mortgage. HomEq, as servicer, was

responsible for responding to Anderson's RESPA request, but failed to do so. (Cmplt. at ¶¶ 62-63, 71). These activities clearly constitute "effecting...consumer transactions," under the CSPA's definition of a "supplier." HomEq took receipt of all Anderson's payments on her residential mortgage loan and was responsible for accounting for those payments in accordance with the terms of the Note and Mortgage. Controlling the payments, including the accounting and the application of the payments definitely "effects" a customer transactions.

The definition of "consumer transaction" is similarly broad. A "consumer transaction" is defined 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 those things." R.C. § 1345.01(A). As HomEq accepted, applied and distributed Anderson's payments and was charged with the company is clearly performing labor for the benefit of the consumer, which constitutes providing "services" as referenced in R.C. § 1345.01(A).

As with the definition of "supplier," the definition of "consumer transaction" does not enumerate those industries, entities, or professions included within its scope, but does contain several specific exemptions. None of these exceptions applies to HomEq—and notably, HomEq does not claim that they do. Among the transactions exempted from the CSPA are those between individuals and their accountants, attorneys, physicians, dentists, veterinarians, public utilities, financial institutions, dealers in intangibles, and insurance companies. See R.C. § 1345.01(A). The only exemptions that could conceivably apply to HomEq are those for financial institutions and dealers in intangibles. HomEq concedes that it is neither financial institution nor a dealer in intangibles. The District Court explicitly included this concept in its certification

order. For the purposes of this review, it is undisputed that HomEq is not a financial institution nor a dealer in intangibles.

In addition, the General Assembly has specifically exempted certain participants in the residential mortgage industry from the definition of “supplier”—but mortgage servicers, such as HomEq, were not exempted. The definition of “supplier” provides that: “If the consumer transaction is in connection with a residential mortgage, ‘supplier’ does not include an assignee or purchaser of the loan for value.” R.C. § 1345.01(C). The canon of statutory construction “expression unius est exclusion alterius” controls here—the expression of one thing implies the exclusion of the other – and it prevents the Court from creating “an additional statutory exclusion not expressly incorporated into this statute by the legislature.” *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d. 390, 2004-Ohio-6549 at ¶20. That is, where the General Assembly excluded certain residential mortgage participants, such as purchasers for value, from the definition of supplier, but did not exclude mortgage servicers, this Court should not judicially create an exemption for mortgage servicers as HomEq requests.

While HomEq maintains that the CSPA should not be construed as broadly as its plain language indicates, that interpretive question has long been resolved in Ohio. This Court has repeatedly endorsed a broad construction of the CSPA: “The Consumer Sales Practices Act prohibits unfair or deceptive acts and unconscionable acts and practices by suppliers in consumer transactions....[I]t is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. § 1.11.” *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29; *Whitaker v. M.T. Auto, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481 at ¶ 30 (the CSPA is a remedial law that must be construed in favor of the consumer).

Finally, HomEq also argued that it is not a supplier because it claims little or no legal relationship with Anderson. Not so. Under the CSPA, it is well established that privity is not required between the supplier and the consumer. The supplier need not have a contractual relationship with the consumer. See, e.g., *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 64 (“However, we do not interpret the statutes as requiring privity of contract between the consumer and defendant”); *Hinckley Roofing, Inc. v. Motz*, 9th Dist. No. 04CA0055M, 2005-Ohio-2404 at ¶8 (“As the CSPA does not require privity of contract as a prerequisite of damages...”). The CSPA does not require that there be a sale or solicitation between the supplier and consumer. See, e.g., *Estep v. Johnson* (1998), 123 Ohio App.3d 307, 319-20 (finding that a towing company which towed a consumer’s car after being hired by the local police department committed a consumer transaction). Moreover, as set forth above, the CSPA should be interpreted liberally in favor of consumers. See *Einhorn*, 48 Ohio St.3d at 29. Anderson’s Second Amended Complaint, and the District Court’s certification order, detail a broad range of activities involving direct contact with, and authority to make decisions about, Anderson’s mortgage loan. HomEq is engaged in a relationship with Anderson on her mortgage loan. HomEq’s servicing activity on the account is effecting the consumer transaction and HomEq therefore has a sufficient relationship pursuant to the CSPA definition to be a “supplier.”

In short, the CSPA is an intentionally broad remedial statute with limited, specific exemptions—none of which apply to HomEq. Accordingly, HomEq is bound by the CSPA.

C. Mortgage servicing is not exempted from the CSPA by the legislative history of the act.

In the District Court, HomEq attempted to use “legislative history” in its effort to persuade the Court that mortgage servicers are not subject to the CSPA. But legislative history is irrelevant where the statutory language is clear, as it is here. *State v. Maxwell*, 95 Ohio St. 3d

254, 2002-Ohio-2121 at ¶10 (“We first consider the words of the statute to determine legislative intent...In determining legislative intent, our duty is to give effect to the words used, not to delete words used or insert words not used.” (internal citations omitted)). HomEq’s arguments do not withstand scrutiny.

In the District Court, HomEq pointed to House Bill 3, a proposed amendment to the CSPA considered, but not enacted, by the last General Assembly. H.B. 3 was a broad, seventy page bill that addresses a number of areas related to the foreclosure crisis. Part of the bill would create a regulatory scheme for mortgage servicers, which would be overseen primarily by the Department of Commerce. H.B. 3 § 1323 *et seq.* Another section of the bill states that servicers shall not commit any act that is unfair, deceptive, or unconscionable under the CSPA, and states that several regulatory violations should be considered unfair and deceptive under the CSPA. H.B. 3 § 1323.361. Nothing in this proposed and unenacted section implies that servicers were previously exempt from the general definitions under the CSPA, but simply proposed a number of specific additional provisions applicable only to mortgage servicers.

HomEq’s “legislative history” argument rests upon its unsupported assertion that provisions in a proposed, but not enacted, bill are meritorious points in favor of its position. HomEq argues that the provisions contained in proposed H.B. 3, at one time introduced to the General Assembly, demonstrates the CSPA does not currently cover mortgage servicing. HomEq’s inclusion of H.B. 3 is not a statement of the law or of precedent, but a factual statement of legislation formerly pending before the legislature. As such, it has absolutely no bearing on whether the current version of the CSPA applies to mortgage servicers. Moreover, the legislature’s consideration of H.B. 3 cannot be used to determine the intent of the legislature as it is merely one among numerous proposed bills introduced but never enacted. This Court

should not try to divine the legislature's intent when it has not yet acted. See, e.g. *Porter v. Saez*, 10th Dist. No 03AP1026, 2004-Ohio-2498 at ¶66 (“[S]ilence is rarely, if ever, an effective barometer of legislative intent”). Taken to its logical end, if this Court rules that bills introduced in the legislature, but not passed, can be utilized and considered in statutory interpretation, any number of legislators may start introducing bills with the sole goal of impacting future court decisions without actually enacting the law.⁶ The Ohio legislature is a deliberative body that speaks through the laws it enacts. HomEq's construction of a bill once introduced, but not enacted, is simply not persuasive in light of the plain language of the CSPA.

The mere proposal of H.B. 3 cannot be reasonably interpreted as changing the plain meaning of the CSPA, which does not exempt mortgage servicers like HomEq.

IV. CONCLUSION

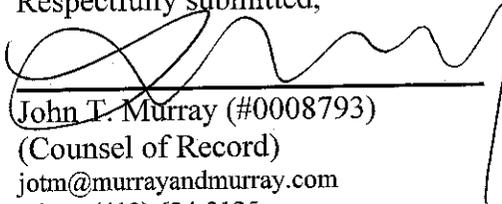
At its core, the questions presented to this Court are whether mortgage servicers are permitted in Ohio to commit deceptive, unfair and unconscionable acts against Ohio homeowners. The plain language of the statute clearly indicates that the answer is no. Mortgage servicers are prohibited from committing deceptive and unconscionable acts in Ohio.

The issue of whether the CSPA provides a cause of action against mortgage servicers is unquestionably of great public importance in the current economic climate. Although Anderson continues to have reservations about deciding this issue in the absence of a developed factual record, on balance, the issue presented here is timely, important and worthy of review.

⁶ If the Court does view H.B. 3's passage by the House as evidence that the House believes that the CSPA does not cover mortgage servicing, the Senate's failure to pass the bill could just as easily be seen as evidence that the Senate believes servicing is already covered.

This Court should accept the instant matter instead of, or in addition to, similar questions of state law certified in *State ex rel. Dewine v. GMAC Mortgage, LLC*, S.Ct. Docket No. 2011-0890. This case presents a broader picture of the activities of mortgage servicer and an answer to the questions presented here will provide greater clarification of the law in this area.

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