

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>ex rel.</i>	:	Supreme Court
Michael DeWine,	:	Case No. 11-0890
Attorney General of Ohio, et al.,	:	
	:	On Review of Certified Questions
Petitioners,	:	From the United States District Court
	:	Northern District of Ohio,
v.	:	Eastern Division
	:	
GMAC Mortgage, LLC, et al.,	:	Case Nos. 3:10-cv-02537-JZ
	:	1:10-cv-02709-JZ
Respondents.	:	

**MERIT BRIEF OF AMICUS CURIAE
 BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING
 IN SUPPORT OF RESPONDENTS GMAC MORTGAGE, LLC ET AL.**

James D. Curphey (0015832)
 (COUNSEL OF RECORD)
 Kathleen M. Trafford (0021753)
 L. Bradfield Hughes (0070997)
 Michael A. Wehrkamp (0084942)
 PORTER WRIGHT MORRIS & ARTHUR LLP
 41 South High Street
 Columbus, OH 43215
 (614) 227-2096 (phone)
 (614) 227-2100 (facsimile)
 jcurphey@porterwright.com

Benjamin B. Klubes (PHV 1659-2011)
 (pro hac vice motion pending)
 Robyn C. Quattrone (PHV 2128-2011)
 (pro hac vice motion pending)
 Victoria Holstein-Childress (PHV 1658-
 2011) (pro hac vice motion pending)
 BUCKLEY SANDLER LLP
 1250 24th Street N.W., Suite 700
 Washington, D.C. 20037
 (202) 349-8000 (phone)
 (202) 349-8080 (facsimile)
 bklubes@buckleysandler.com

COUNSEL FOR AMICUS CURIAE
 BARCLAYS CAPITAL REAL ESTATE INC.
 D/B/A HOMEQ SERVICING
 IN SUPPORT OF RESPONDENTS

David A. Wallace (0031356)
 (COUNSEL OF RECORD)
 Barton R. Keyes (0083979)
 Jeffrey A. Lipps (0005541)
 CARPENTER LIPPS & LELAND LLP
 280 North High Street, Suite 1300
 Columbus, OH 43215
 (614) 365-4100 (phone)
 (614) 365-9145 (facsimile)
 wallace@carpenterlipps.com

COUNSEL FOR RESPONDENTS
 GMAC MORTGAGE, LLC AND
 ALLY FINANCIAL, INC.

Khary L. Hanible (0077095)
 (COUNSEL OF RECORD)
 Richard M. Kerger (0015864)
 KERGER & HARTMAN LLC
 33 South Michigan Street, Suite 100
 Toledo, OH 43604
 (419) 255-5990 (phone)
 (419) 255-5997 (facsimile)
 khanible@kergerlaw.com

COUNSEL FOR RESPONDENT
 STEPHAN

FILED
 NOV 28 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

R. Michael DeWine (0009181)
OHIO ATTORNEY GENERAL
Susan A. Choe (0067032)
(COUNSEL OF RECORD)
Jeffrey R. Loeser (0082144)
OFFICE OF THE OHIO ATTORNEY GENERAL
CONSUMER PROTECTION SECTION
14th Floor, 30 East Broad Street
Columbus, OH 43215
(614) 466-1305 (phone)
(614) 466-7900 (facsimile)
susan.choe@ohioattorneygeneral.gov

COUNSEL FOR PETITIONERS STATE OF
OHIO AND MICHAEL DEWINE, OHIO
ATTORNEY GENERAL

John T. Murray (0008793)
(COUNSEL OF RECORD)
Leslie O. Murray (0081496)
Michael J. Stewart (0082257)
MURRAY & MURRAY CO. LPA
111 E. Shoreline Drive
Sandusky, OH 44870
(419) 624-3000 (phone)
(419) 624-0707 (facsimile)
jotm@murrayandmurray.com

COUNSEL FOR AMICUS CURIAE
SONDRA ANDERSON IN SUPPORT OF
PETITIONERS

Phillip F. Cameron (0033967)
(COUNSEL OF RECORD)
4300 Carew Tower
441 Vine Street
Cincinnati, OH 45202
(513) 421-4343 (phone)
pfclaw@gmail.com

Richard E. Hackerd (0055306)
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(440) 526-8780 (phone)
(866) 201-0249 (facsimile)
richard@hackerd.com

COUNSEL FOR PETITIONERS BLANK,
LAWSON, BLAIR RITZE, BRANDON
RITZE, AND STROBLE

Linda I. Cook (0038743)
(COUNSEL OF RECORD)
OHIO POVERTY LAW CENTER
555 Buttles Avenue
Columbus, OH 43215
(614) 221-7201 (phone)
(614) 221-7625 (facsimile)
lcook@ohiopoverlylaw.org

COUNSEL FOR AMICI CURIAE OHIO
LEGAL SERVICES PROGRAMS IN
SUPPORT OF PETITIONERS

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Barclays Capital Real Estate Inc. d/b/a HomEq Servicing (“HomEq”) is the defendant in another certified-question case that this Court has accepted and “held” for the outcome of this one, *Anderson v. HomEq*, Sup. Ct. Case No. 11-0908, and as such has a keen interest in this case. Before Barclays Capital Real Estate Inc. sold HomEq Servicing in September 2010, HomEq serviced residential mortgage loans. HomEq’s obligations as a mortgage servicer were set forth in various contracts called Pooling and Service Agreements. These Agreements were not made between HomEq and any individual Ohio consumers who obtained mortgage loans, but instead between HomEq and the entities that own the mortgage loan notes. Those noteholders – not the individual borrowers – contracted with HomEq so that HomEq would service the loans for the noteholders.

This Court has been asked by the U.S. District Court for the Northern District of Ohio to determine the scope of Ohio’s Consumer Sales Practices Act (“CSPA”) vis-à-vis mortgage servicers like HomEq. The Court is asked whether the CSPA reaches behind (and beyond) the initial transaction between an individual borrower and his or her mortgage lender (a transaction that *itself* has never been subject to the CSPA, unless that transaction is with a *nonbank* mortgage lender, loan officer, or mortgage broker) to regulate the entity that later *services* the mortgage loan. The Court’s answers to the certified questions here and in *Anderson* will be dispositive not only in the cases pending before the certifying courts, but also in all state and federal actions in which mortgage servicers like HomEq are alleged to have violated the CSPA. For the reasons that follow, the Court should reject the invitations of Petitioners and their amici to judicially rewrite the CSPA and hold that the CSPA does not apply to mortgage servicers.

PROPOSITION OF LAW: MORTGAGE SERVICERS ARE NOT SUBJECT TO OHIO'S CONSUMER SALES PRACTICES ACT BECAUSE MORTGAGE SERVICING IS A COLLATERAL SERVICE ASSOCIATED WITH THE SALE OF REAL ESTATE AND IS THUS NOT SUBJECT TO THE ACT. MORTGAGE SERVICING ALSO IS NOT A "CONSUMER TRANSACTION" AS DEFINED IN THE ACT BECAUSE IT IS PERFORMED PURSUANT TO AGREEMENTS WITH NOTEHOLDERS, NOT INDIVIDUAL HOMEOWNERS, AND BECAUSE THOSE AGREEMENTS ARE NOT TRANSACTIONS THAT ARE "PRIMARILY PERSONAL, FAMILY, OR HOUSEHOLD" IN NATURE. NOR ARE MORTGAGE SERVICERS "SUPPLIERS" IN THE BUSINESS OF "EFFECTING OR SOLICITING CONSUMER TRANSACTIONS." R.C. 1345.01(A) & (C), APPLIED.

A. This Court Applies Statutes As They Are Written, Resorting To Interpretive Aids Only When Needed To Resolve Ambiguities.

This Court adheres to its constitutional role in *applying* – not rewriting – the laws enacted by the General Assembly. As the Court previously noted in another certified-question case, the Court's "duty *** is to give effect to the words used in a statute, not to delete words used or to insert words not used." *Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 80, 2001-Ohio-270, 742 N.E.2d 127; see, also, *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236, 741 N.E.2d 121 (noting the "fundamental principle of statutory construction that where the meaning of a statute is clear and definite, it must be applied as written."). The Court has applied these principles in other cases concerning the meaning and scope of consumer-protection statutes. In *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, for example, the Court recently declined the Attorney General's invitation to hold that a statute governing odometer-disclosure violations is a strict-liability statute. *Id.* at ¶27. In doing so, the Court invoked its well-established rule that "if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Id.* at ¶15 (internal quotation omitted).

B. Mortgage Servicing Is A Collateral Service Associated With The Sale Of Real Estate And Is Not Subject To Ohio's Consumer Sales Practices Act.

As Petitioner State of Ohio concedes, because real estate is not a good, service, franchise, or intangible, the CSPA “has no application in a ‘pure’ real estate transaction.” *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, 193, 543 N.E.2d 783; see, also, Merit Brief of Petitioner Ohio Attorney General Michael DeWine at 9. Multiple Ohio courts have noted that included in the “pure real estate” exclusion from the CSPA are “collateral service[s] associated with the sale of real estate.” *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, 809 N.E.2d 689, at ¶34 (holding that escrow services were collateral to the real estate transaction and therefore not subject to the CSPA), quoting *Colburn v. Baier Realty & Auctioneers*, 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, at ¶13 (holding that an auctioneer’s service in connection with the sale of real estate was a pure real estate transaction); see, also, *Hanlin v. Ohio Builders and Remodelers, Inc.* (S.D. Ohio 2002), 212 F. Supp. 2d 752, 757 (holding that “closing services” provided by a mortgage lender were “part and parcel of the real estate transaction” and therefore not subject to the CSPA). Mortgage servicing is akin to closing services, auctioneer services, and escrow services, all of which Ohio courts have previously held are collateral to a real estate transaction and, therefore, not subject to the CSPA. In short, HomEq – who performed its services pursuant to an agreement with the noteholder – acted merely as a facilitator of mortgage loan payments. Therefore, mortgage servicing is a collateral service associated with a pure real estate transfer and not subject to the CSPA.

C. Mortgage Servicing Is Not A “Consumer Transaction” Under The Plain Language Of R.C. 1345.01(A).

Even assuming that the “pure real estate transaction” exclusion does not apply, mortgage servicing is not a “consumer transaction” as that term is defined in R.C. 1345.01(A). Not every transaction is a “consumer transaction” subject to regulation under the CSPA. Indeed, in the opening lines of the Act in R.C. Chapter 1345, the General Assembly carefully circumscribes the limited number of transactions that are “consumer transactions” subject to the CSPA, saying:

(A) “Consumer transaction” means 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). This threshold definition containing multiple necessary elements is followed by a list of exceptions, such as transactions between attorneys and their clients.

Id. It is undisputed that mortgage servicing is not a “sale,” “lease,” “assignment,” or “award by chance.” And it is also undisputed that no “item of goods,” “franchise,” or “intangible” is exchanged in the context of mortgage servicing. In order to qualify as a “consumer transaction,” then, mortgage servicing must be a “transfer of *** a service *** to an individual for purposes that are primarily personal, family or household.” For the following reasons, though, it is not.

- 1. Mortgage servicing is performed for the benefit of the noteholders with whom HomeEq enters into Pooling and Service Agreements and does not constitute a “transfer of *** a service *** to an individual” under R.C. 1345.01(A).**

First, mortgage servicing does not constitute a “transfer of *** a service *** to an individual” as R.C. 1345.01(A) requires. Mortgage servicers like HomeEq enter into service agreements with noteholders, not with individual homeowners like Anderson.

HomEq's mortgage service obligations are set forth in lengthy and complex Pooling and Service Agreements, which are commercial agreements. These agreements are between HomEq and *other business entities* – the owners of the mortgage loan notes – not between HomEq and individual homeowners like Anderson. (See *Anderson v. Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing* (Aug. 10, 2010), N.D. Ohio No. 3:09-CV-2335, Second Amended Complaint, at ¶16.) Anderson does not allege that HomEq originated her loan or that HomEq is a party to her Note or Mortgage. Nor does Anderson allege that HomEq ever owned or held the Note. HomEq's agreement with the noteholder to service Anderson's mortgage may constitute a "transfer of *** a service" *to the noteholder*, but that does not equate to a "transfer of *** a service" to Anderson. Under Petitioner State of Ohio's definition of "services," HomEq performed services "for the benefit of" the noteholders, not for the benefit of the individual homeowners. See Ohio Adm. Code 109:4-3-01(C)(2).

Two well-reasoned opinions from Minnesota illustrate this principle. In *Rossbach v. FSB Mortgage Corp.* (Apr. 7, 1998), Minn. Ct. App. No. C3-97-1622, 1998 WL 156303, the Court of Appeals of Minnesota concluded that a mortgage servicer was not subject to claims by a mortgagor under that State's Consumer Fraud Act. *Id.* at paragraph one of the syllabus. The mortgage servicer in *Rossbach*, like HomEq, "collected various escrow fees from [the homebuyer] including hazard insurance, property taxes, and private mortgage insurance (PMI) premiums and forwarded them to the requisite agencies." *Id.* at *2. Affirming the trial court's grant of summary judgment to the mortgage servicer on the plaintiff's consumer claim, the Court of Appeals explained that the mortgage servicer, which had acquired the servicing rights to the plaintiff's mortgage eight years after her home purchase, was "acting only as a facilitator

of payments” and “did not provide services directly to *** [the borrower];” any service that the loan servicer “provided was according to the service contract and for the benefit of [the noteholder].” *Id.* at *3.

In another case, *Independent Glass Assn., Inc. v. Safelite Group, Inc.* (Aug. 26, 2005), D.Minn. No. 05-238 ADM/AJB, 2005 WL 2093035, a federal judge in Minnesota followed *Rosbach* and held that no suit arose under Minnesota’s Consumer Fraud Act against Safelite, which provides third-party administrator services to insurance companies for auto glass repairs, saying “Safelite provides the service for the benefit of the insurance companies, rather than the benefit of the car owner. *** Any ‘services’ Safelite performed as third party administrator were performed as an intermediary and for the benefit of its insurance company clients.” *Safelite*, 2005 WL 2093035, at *7-8.

The same applies here, and the Court should adopt the reasoning of these Minnesota state and federal courts. Just as the services performed by Safelite were “for the benefit of its insurance company clients,” the services performed by mortgage servicers like HomEq are for the benefit of their noteholder clients – the businesses with which they have contractual agreements. Thus, mortgage servicing does not constitute a “transfer of *** a service *** to an individual” as the definition of “consumer transaction” requires under the plain language of R.C. 1345.01(A).

2. **HomEq’s agreements with noteholders – not individual homeowners – to perform mortgage servicing obligations pursuant to Pooling and Service Agreements are not transactions that are “primarily personal, family, or household” as R.C. 1345.01(A) requires.**

Even where individual consumers are involved in a given transaction, Ohio courts have cautioned that the CSPA simply does not apply to transactions that are *not* “for

purposes that are primarily personal, family or household.” In *Yo-Can, Inc. v. The Yogurt Exchange, Inc.*, 149 Ohio App.3d 513, 2002-Ohio-5194, 778 N.E.2d 80, for example, individual franchise owners tried to bring a CSPA claim against the officers of the franchisor corporation after their franchise failed in only two years. As the court of appeals noted, although the term “franchise” indeed appears in R.C. 1345.01(A), “[n]ot only must the thing sold or transferred fit into one of the listed categories, it must also be for purposes that are primarily personal, family, or household.” *Id.*, 2002-Ohio-5194, at ¶15. “A sale or transfer *** of the right to operate a yogurt-selling store under the name of The Yogurt Exchange is not ‘for purposes that are primarily personal, family, or household.’” *Id.*; see, also, *Barazzotto v. Intelligent Sys., Inc.* (1987), 40 Ohio App.3d 117, 120-121, 532 N.E.2d 148 (refusing to apply CSPA where individual purchased computer system and accounting software that “by its very nature, is only suitable for business applications.”); *Kremen v. Ohio Expositions Comm.* (Ct. Cl. 1996), 81 Ohio Misc.2d 29, 33, 673 N.E.2d 1028 (declining to apply CSPA to individual who leased space at state fair to display painting and sell items).

Here, as in these cases, the fact that individual borrowers interact with HomEq or other mortgage servicers as they make mortgage payments does not convert *the business arrangement between HomEq and the noteholder* (which involves hundreds or even thousands of mortgages subject to Pooling and Service Agreements) into the type of “primarily personal” transaction subject to the CSPA. Just as the business-to-business agreements at issue in *Yo-Can*, *Barazzotto*, and *Kremen* were properly not subject to the CSPA, the business-to-business mortgage servicing agreements between HomEq and mortgage noteholders are likewise not subject to the Act.

D. Mortgage Servicers Are Not “Suppliers * Engaged In The Business Of Effecting Or Soliciting Consumer Transactions” Under R.C. 1345.01(C).**

As explained above, mortgage servicing is not a “consumer transaction” under R.C. 1345.01(A) because it does not constitute a “transfer of *** a service *** to an individual” as the plain language of R.C. 1345.01(A) requires. Nor are a mortgage servicer’s contractual arrangements with noteholders “primarily personal, family or household” as R.C. 1345.01(A) also requires. And because the definition of “supplier” in R.C. 1345.01(C) includes only those entities in the business of effecting or soliciting “consumer transactions,” HomeEq and other mortgage servicers are not “suppliers” under the plain language of the Act. Where there is no “consumer transaction,” there can be no “supplier” under the plain meaning of R.C. 1345.01(C).

It is also noteworthy that the definition of “supplier” in R.C. 1345.01(C) embraces only those entities “effecting” or soliciting consumer transactions. The General Assembly’s choice of the term “effecting” (and not the broader term, affecting) is a meaningful one. One can imagine many ways that an entity might “affect” an individual’s residential mortgage loan, even if that entity were not a party to the mortgage loan itself. Arguably, even mortgage servicers “affect” the parties’ performance under a mortgage loan by facilitating that performance. But to “effect” something means something quite different – it means “*to bring about; to make happen.*” Black’s Law Dictionary (9th Ed. 2009) 592; see, also, R.C. 1.42 (“Words *** shall be read in context and construed according to the rules of grammar and common usage.”). Mortgage servicers do not “bring about” or “make happen” the loan transactions between individual Ohio borrowers and their mortgage lenders. As HomeEq did in Anderson’s case, mortgage servicers – pursuant to subsequent agreements with

noteholders, not individual borrowers – receive scheduled periodic payments from borrowers and apply them toward principal, interest, and other obligations, and perform other payment-related processing services. Accordingly, mortgage servicers are not engaged in the business of “effecting” or soliciting any “consumer transaction” subject to the CSPA. For that reason, mortgage servicers are not “suppliers” subject to the Act.

Petitioner Blank posits that “entities engaging the collection of debts” are considered “suppliers” under the CSPA, thereby suggesting that mortgage servicers should be, too. (Merit Brief of Petitioner Lois M. Blank, et al. at 16.) But the District Court has asked the Court whether *mortgage servicers* – not debt collectors – are subject to the CSPA. (See Certification Order at 2; see, also, *Anderson v. HomeEq* (May 24, 2011), Sup. Ct. Case No. 11-0908, Certification Order at 3-4.) Mortgage servicers and debt collectors are distinct. *Wadlington v. Credit Acceptance Corp.* (C.A.6, 1996), 76 F.3d 103, 106-108 (holding that the defendant loan servicer was not a “debt collector” under the Fair Debt Collection Practices Act (“FDCPA”) and therefore not subject to a FDCPA claim because the loan servicer acquired contracts at the time of sale, and therefore before default); *Kevelighan v. Trott & Trott, P.C.* (E.D.Mich. 2010), 771 F. Supp. 2d 763, 772-773 (dismissing FDCPA claims against mortgage servicer defendants); *Scott v. Wells Fargo Home Mortg. Inc.* (E.D.Va. 2003), 326 F. Supp. 2d 709, 717-718 (granting summary judgment for mortgage servicer defendants on FDCPA claim). The case law cited by Petitioner Blank is distinguishable and irrelevant and does not control this Court’s responses to the questions certified. See *Kline v. Mortgage Electronic Security Systems* (S.D.Ohio 2009), 659 F. Supp. 2d 940, 953 (involving a law firm acting as a debt collector – not a mortgage servicer); *Celebrezze v. United*

Research, Inc. (1984), 19 Ohio App.3d 49, 49, 482 N.E.2d 1260 (involving a “credit bureau and collection agency responsible for billing and processing accounts receivable and taking action to collect such accounts” from customers who had purchased “educational materials such as encyclopedias, bibles, children’s books and cookbooks” – not a mortgage servicer).

E. Petitioners And Their Amici Bypass The Threshold Definitions Of “Consumer Transaction” And “Supplier” In R.C. 1345.01(A) And Rely On Inapposite Cases.

Instead of carefully analyzing the threshold definitions of “consumer transaction” and “supplier,” as HomEq has set forth above, Petitioners and their amici (particularly Anderson) focus on arguing that mortgage servicing is not expressly included among the statutory *exemptions* to the CSPA. Thus, they argue, mortgage servicers – not being expressly listed among the named exemptions – must be covered by the CSPA. Put another way, Anderson contends that everyone and everything is subject to the Act unless expressly exempted. (See, e.g., Merit Brief of Amicus Curiae Sondra Anderson at 10 (“an entity is included [in the CSPA’s coverage] unless specifically excluded.”); see, also, *id.* at 11 (“None of these exceptions applies to a stand alone mortgage servicer.”).)

As this Court has explained, however, that is simply not how the Court analyzes the scope and application of the CSPA. See, e.g., *Heritage Hills, Ltd. v. Deacon* (1990), 49 Ohio St.3d 80, 82, 551 N.E.2d 125. There, this Court held that the CSPA does not apply to residential lease transactions despite “the Act [] not specifically exclud[ing] a lease of real property.” *Id.*, 49 Ohio St.3d at 82; see, also, *In re Midwest Eye Center* (1995), 104 Ohio App.3d 215, 217, 661 N.E.2d 774 (finding it unnecessary to consider exceptions to statute regarding reviewability determinations of Department of Health where “threshold criterion” in statute defining “reviewable activities” was not met). The

fact that remedial laws such as the CSPA are to be liberally construed pursuant to R.C. 1.11 does not mean that courts are to sweep the General Assembly's threshold definitional requirements under the rug and focus only on certain listed exceptions.

In the *Dowling* case relied upon by Petitioners and their amici, the court did what Anderson and her counterparts attempt to do here; that is, the court in *Dowling* jumped to an analysis of activities expressly *excluded* from the CSPA without first analyzing whether mortgage servicers are “suppliers” who undertake “consumer transactions.” See *Dowling v. Litton Loan Servicing, LP* (Dec. 1, 2006), S.D. Ohio No. 2:05-CV-0098, 2006 WL 3498292, at *13. Other cases cited by Petitioners are similarly flawed and contain no meaningful discussion of the threshold statutory definition of “consumer transaction[s]” subject to the CSPA. See, e.g., *State v. Barclays Capital Real Estate, Inc.* (Sept. 16, 2010), Montgomery C.P. No. 2009CV10136, unreported (relying on *Dowling*); *Jent v. BAC Home Loans Servicing, LLC* (July 21, 2011), S.D. Ohio No. 1:10-CV-00783, 2011 WL 2971846, at *3 (relying on *Dowling*); *Munger v. Deutsche Bank* (July 18, 2011), N.D. Ohio No. 1:11-CV-00585, 2011 WL 2930907 (relying on *Dowling* and mis-citing District Judge Carr for the proposition that mortgage servicers are not exempt from the CSPA). Petitioners' focus on the statutory exemptions, if adopted by the Court, would render superfluous the threshold statutory definitions of “supplier” and “consumer transaction,” which must be met before the CSPA applies to a given entity or act. See R.C. 1.47(B) (“In enacting a statute, it is presumed that *** [t]he entire statute is intended to be effective[.]”).

Petitioner Blank cites two non-controlling and distinguishable decisions from a case before the U.S. District Court for the District of Kansas. (See Merit Brief of Petitioner Lois M. Blank, et al. at 11-12, citing *Bethea v. Wells Fargo Bank, N.A.* (Nov.

23, 2010), D.Kan. No. 10-1264-JAR, 2010 WL 4868180; *Bethea v. Wells Fargo Bank, N.A.* (July 6, 2011), D.Kan. No. 10-1264-JAR, 2011 WL 2650580.) First, the *Bethea* case is fundamentally different than the *GMAC* and *Anderson* certified-question cases before the Court because, in *Bethea*, the parties did not dispute “that a mortgage loan transaction falls within the definition of ‘consumer transaction’ under the KCPA.” 2010 WL 4868180, at *5. In Ohio, however, residential mortgage loan transactions are “consumer transactions” in only three limited (and inapplicable) instances, as discussed below. Second, unlike in the *Bethea* case – which involved interactions between the holder of the mortgage and the homeowner – HomEq is a third party that merely services loans between noteholders and homeowners, per the agreements between those parties.

Although Petitioners also cite some non-binding decisions for the proposition that the CSPA does not require “privity of contract” between suppliers and consumers, these cases are distinguishable, contain no facts resembling mortgage servicing, and do not require this Court to ignore the General Assembly’s threshold requirement in R.C. 1345.01(A) that a “consumer transaction” include the “transfer of *** a service *** to an individual.” In *Hinckley Roofing, Inc. v. Motz*, 9th Dist. No. 04CA005-M, 2005-Ohio-2404, for example, the court addressed whether the trial court erred when it dismissed one of the plaintiffs in the case, not whether a party was or was not subject to the CSPA under the “consumer transaction” and “supplier” definitions. See 2005-Ohio-2404, at ¶8-13. In fact, in *Hinckley*, unlike here, there was no dispute that the counterclaim-defendant roofing company was a “supplier” that had engaged in a “consumer transaction” subject to the CSPA – the jury simply concluded that no CSPA violations

occurred, and the court of appeals did not disturb that finding. *Id.* at ¶13. As such, *Hinckley* has no bearing on the issues before the Court.

In another unreported case cited by Petitioners, *Miner v Jayco, Inc.* (Aug. 27, 1999), 6th Dist. No. F-99-001, 1999 WL 651945, a couple who purchased a defective trailer from a dealership brought a CSPA claim against the dealership's supplier, Jayco, whose "Owner Relations Coordinator" had *promised in writing* to make certain repairs that were never made to the plaintiffs' satisfaction. Jayco argued that the CSPA did not apply to it because the dealership – not Jayco – sold the trailer to the plaintiffs, but the court of appeals disagreed, noting Jayco's liability as the manufacturer, warrantor, and repair facility for the trailer. *Miner*, 1999 WL 651945, at *6. Petitioners' other non-binding "privity" cases are likewise inapplicable. See, e.g., *Carter v. Taylor* (Dec. 9, 1999), 4th Dist. No. 99CA10, 1999 WL 1256344 (neither party disputed that home-improvement contract was a "consumer transaction;" issue of fact remained whether employee of construction company was a "supplier" in addition to his employer); *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 616 N.E.2d 283 (cited in both *Miner* and *Carter*; a supply-chain case holding that companies purchasing "total loss" vehicles from insurance companies could be liable under the CSPA to the ultimate purchasers). *Jayco*, *Carter*, and *Garner* thus each relate to entities that were in so-called "vertical privity" with the CSPA plaintiff. No such privity exists here.

F. If The Court Finds R.C. 1345.01(A) Or (C) Ambiguous, The Rules Of Statutory Construction Confirm That The General Assembly Never Intended To Regulate Mortgage Servicers Under The Act.

If the Court finds that the CSPA is ambiguous as to whether mortgage servicing is a "consumer transaction," then the Court should "turn to other considerations to determine the intent of the General Assembly, as permitted by R.C. 1.49." *Griffith v.*

City of Cleveland, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157, at ¶14. R.C. 1.49 sets forth a non-exclusive list of factors for the Court to consider when interpreting an ambiguous statute. See *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶37-43. Above all, however, “[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.” *In re Estate of Roberts*, 94 Ohio St.3d 311, 317, 2002-Ohio-791, 762 N.E.2d 1001 (citations and internal quotations omitted).

1. **“Former statutory provisions” and “laws upon the same or similar subjects” demonstrate that the General Assembly did not intend for the CSPA to apply to mortgage servicing.**

From its inception through January 1, 2007, the CSPA did not cover any transactions in connection with residential mortgage loans. See *Torrance v. Cincinnati Mortgage Co. Inc.* (Mar. 25, 2009), S.D. Ohio No. 1:08-CV-403, 2009 WL 961533, at *3-4, citing *Lewis v. ACB Business Services* (C.A.6, 1998), 135 F.3d 389, 412. The CSPA specifically excluded from the term “consumer transaction” all transactions with financial institutions and “dealers in intangibles,” *including mortgage lenders*. See R.C. 5725.01; *Torrance*, 2009 WL 961533, at *3-4 (“This exclusion applied universally to mortgage lenders[.]”), citing *Zanni v. Stelzer*, 174 Ohio App.3d 84, 2007-Ohio-6215, 880 N.E.2d 967, at ¶12 (“[U]nder the plain language of the CSPA, one who engages in the business of buying or selling mortgages qualifies as a ‘dealer in intangibles’ and is exempt from the Act.”).

Effective January 1, 2007, the General Assembly expanded the scope of the CSPA to make subject to the CSPA three carefully delineated transactions and entities relating

to residential mortgage loans: “transactions in connection with residential mortgages *between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers.*” (Emphasis added.) See Am.Sub.S.B. No. 185, Section 1345.01(A) (2006) (Appx. A-02); see, also, Am.Sub.S.B. No. 185, Final Analysis at 1 (2006) (Appx. A-06) (stating that Am.Sub.S.B. 185 “[e]xpand[ed] the application of the [CSPA] to include certain consumer transactions in connection with a residential mortgage.”); *Torrance*, 2009 WL 961533, at *3-4. All other transactions in connection with residential mortgage loans – including mortgage servicing – remained outside the scope of the CSPA, as they had been for more than three decades. Indeed, “loan officers, mortgage brokers, or nonbank lenders” are all individuals or entities involved in the purchase and sale of mortgage loans and do not include individuals or entities like HomeEq that merely service a loan on behalf of the true owner of the mortgage. See R.C. 1345.01(H), (J), and (K).

The January 1, 2007 amendments to Chapter 1345 were the General Assembly’s first foray into the world of residential mortgages in the context of the CSPA. For example, the General Assembly amended R.C. 1345.02, unfair or deceptive acts or practices, by adding subsection (F) to specifically address “consumer transaction[s] in connection with a residential mortgage.” The General Assembly amended R.C. 1345.03, unconscionable consumer sales acts or practices, by adding subsection (C), stating that R.C. 1345.03 “does not apply to a consumer transaction in connection with a residential mortgage.” And the General Assembly enacted R.C. 1345.031 to specifically and separately apply to certain residential mortgage loan transactions, *but not ones involving mortgage servicers*. None of these residential-mortgage-related amendments to Chapter 1345 apply to mortgage servicing and mortgage servicers because, as

discussed above, mortgage servicing is not a “consumer transaction” and mortgage servicers are not “suppliers” under the CSPA. Had the General Assembly desired to add mortgage servicers to the list of “loan officers, mortgage brokers, or nonbank mortgage lenders,” whose transactions would thereafter be subject to the CSPA, it could have easily done so.

The State’s argument that the General Assembly “exempted certain participants in the residential mortgage industry – but not mortgage servicers – from the CSPA” is based on the faulty premise that all participants in the residential mortgage industry were subject to the CSPA in the first place. (Merit Brief of Petitioner Ohio Attorney General Michael DeWine at 11-12.) In fact, the opposite is true. The General Assembly originally excluded *all* transactions related to residential mortgages from the CSPA, then “[e]xpand[ed] the application” of the CSPA to include only three specific transactions related to residential mortgages: “transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers.” See Am.Sub.S.B. No. 185, Final Analysis at 1, 5 (2006) (Appx. A-06, A-08). This modest and carefully limited expansion of the application of the CSPA did not capture mortgage servicers like HomEq.

Subsequent actions of the Ohio General Assembly likewise demonstrate its belief that the CSPA does not apply to mortgage servicing and mortgage servicers. In May 2009, for example, the Ohio House of Representatives of the 128th General Assembly passed House Bill 3, which, among other things, *if enacted*, would have required mortgage servicers to register with the State and would have made the CSPA applicable to mortgage servicers. See Am.Sub.H.B. No. 3, Section 1323.361 (as passed by the House, May 20, 2009), lines 1855-1864, at 61 (Appx. A-12). On January 12, 2010, in his

testimony before the Senate Finance & Financial Institutions Committee, House Bill 3's sponsor, Representative Mike Foley, compared House Bill 3 to the January 1, 2007 amendments and enactments to the CSPA and explained that the CSPA would apply to mortgage servicers if the General Assembly enacted House Bill 3:

House Bill 3 seeks to introduce best practices and necessary standards to servicers that are not already substantially regulated through their connection to a state or federally chartered lending institution. *By the authority of language similar to that which the legislature applied to mortgage brokers in Senate Bill 185 of the 126th General Assembly, the Department of Commerce and Attorney General would ensure that servicers meet professional standards of operation and engage in appropriately robust efforts to modify mortgages and maintain homeownership when it is reasonably possible and equitable. Moreover, licensed servicers would be subject to Ohio's Consumer Sales Protection [sic] Act.*

(Emphasis added.) HB 3 Sponsor Testimony, State Representative Mike Foley (Jan. 12, 2010) (Appx. A-14).

Sponsor Foley's testimony is significant in at least two ways. First, it analogizes House Bill 3 to Senate Bill 185 of the 126th General Assembly, also known as the Ohio Homebuyers' Protection Act. As discussed above, Senate Bill 185 "[e]xpand[ed] the application of the [CSPA] to include certain consumer transactions in connection with a residential mortgage" by revising the definition of "consumer transaction" to "expressly include[] transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers[.]" In other words, House Bill 3 – *if enacted* – would have expanded the application of the CSPA to include mortgage servicing within the definition of "consumer transaction," just as Senate Bill 185 had previously expanded the scope of the CSPA to include transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers. Second, Sponsor Foley's testimony

states that under House Bill 3, mortgage servicers “*would be* subject to Ohio’s Consumer Sales Protection [sic] Act” (emphasis added), implying that mortgage servicers are not presently subject to the CSPA. House Bill 3, however, was never passed by the General Assembly and thus never became law.

The Court considers pending and failed legislation in determining legislative intent. See, e.g., *Heritage Hills, Ltd. v. Deacon* (1990), 49 Ohio St.3d 80, 82-83, 551 N.E.2d 125. In *Heritage Hills*, on its way to holding that the CSPA does not apply to residential lease transactions, the Court relied on the General Assembly’s rejection of a bill that would have specifically included the lease of real property within the definition of “consumer transaction” as evidence that residential lease transactions are not “consumer transactions” under the CSPA. See 49 Ohio St.3d at 82-83. In the same way that the Court in *Heritage Hills* considered failed legislation in its analysis, the Court in this case should consider the rejected House Bill 3 as evidence that the General Assembly does not intend for the CSPA to apply to mortgage servicers.

Anderson asserts that the General Assembly’s failure to enact House Bill 3 has “absolutely no bearing” on whether the CSPA applies to mortgage servicers. (Merit Brief of Amicus Curiae Sondra Anderson at 14.) She quotes the Tenth District’s opinion in *Porter v. Saez*, 10th Dist. No. 03AP-1026, 2004-Ohio-2498, for the proposition that “silence is rarely, if ever, an effective barometer of legislative intent.” (Id., quoting *Porter*, at ¶66.) To be sure, there are cases when courts have been reluctant to assign interpretive weight to legislative inaction. But if the Court concludes that the applicable statutes are ambiguous, then *Porter* should not dissuade it from considering the compelling legislative history detailed above by HomEq. If anything, the *Porter* case cited by Anderson is a prime example of an appellate court doing precisely what HomEq

asks this Court to do here; that is, declining to expand an unambiguous statute (one already specifying the entities to which it applies) to include still other, unspecified ones. See *Porter*, 2004-Ohio-2498, at ¶52 (declining to add girlfriends to the list of statutory “insiders” in Ohio’s version of the uniform fraudulent transfer act). And because the *Porter* court found the statute in question to be unambiguous, thereby rendering unnecessary any resort to legislative history or other modes of statutory interpretation, any discussion in that opinion about “legislative inaction” as an unreliable means to glean legislative intent is pure *dicta* and should not inform this Court’s assessment of the legislative history HomeEq describes above.

In sum, the failure of the Senate to pass House Bill 3 does not diminish the importance of House Bill 3 as evidence of the General Assembly’s intent surrounding the CSPA. See *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 137-138, 106 S.Ct. 455, 88 L.Ed.2d 419 (although “chary” of ascribing significance to Congress’s failure to act, the Supreme Court unanimously assigns significance to Congressional rejection of proposed House bill that would have narrowed the definition of “waters” subject to jurisdiction of the Army Corps of Engineers under the Clean Water Act.) Since the CSPA’s passage in 1972, the General Assembly has amended the CSPA seven times – including addressing certain residential mortgage loan transactions – but has never altered the CSPA’s scope to encompass mortgage servicers. House Bill 3 was a proposed alteration of the scope of the CSPA, as Sponsor Foley testified that mortgage servicers “would be” subject to the CSPA, and the General Assembly declined to adopt it.

2. “The consequences of a particular construction” demonstrate that the General Assembly did not intend for the CSPA to apply to mortgage servicing.

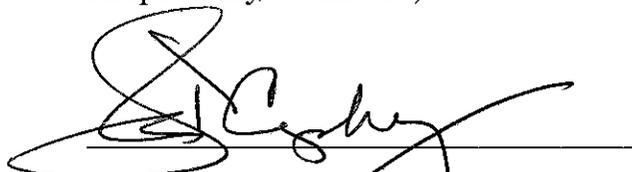
Petitioners and their amici are asking the Court to construe the CSPA in a way that would render superfluous the definitions of “consumer transaction” and “supplier.” Of course, the General Assembly intended for the definitions of “consumer transaction” and “supplier” to have meaning. If the Court construed the CSPA to cover mortgage servicers, anyone or anything that has any contact with a potential consumer would be subject to the CSPA, unless one of the exceptions applied. This was not the intent of the General Assembly when it enacted the CSPA. See R.C. 1.47(B); see, also, *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶26 (answering question certified from the N.D. Ohio regarding whether statute vested local boards of health with plenary authority to adopt any regulations deemed necessary for the public health, and noting that “words in statutes should not be construed to be redundant, nor should any words be ignored. *** No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” (citations and internal quotations omitted)).

CONCLUSION

For the foregoing reasons, amicus curiae Barclays Capital Real Estate Inc. d/b/a HomEq Servicing respectfully asks the Court to answer the questions certified by the Northern District of Ohio both here and in *Anderson* to confirm that mortgage servicers and mortgage servicing are not regulated by the CSPA – a conclusion compelled by the plain language of R.C. 1345.01(A) & (C), as well as the canons of statutory construction set forth in R.C. 1.49. And for the reasons more fully set forth in HomEq’s Preliminary

Memorandum, because the CSPA allegations here in *GMAC Mortgage* focus on foreclosure activities, while Ms. Anderson's allegations against HomeEq focus on mortgage servicing activities, HomeEq respectfully renews its request that the Court ensure that its answers to the questions certified are dispositive in both factually distinct cases.

Respectfully submitted,

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James D. Curphey (0015832)
(COUNSEL OF RECORD)
Kathleen M. Trafford (0021753)
L. Bradfield Hughes (0070997)
Michael A. Wehrkamp (0084942)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
(614) 227-2096 (phone)
(614) 227-2100 (facsimile)
jcurphey@porterwright.com

Benjamin B. Klubes (PHV 1659-2011)
(pro hac vice motion pending)
Robyn C. Quattrone (PHV 2128-2011)
(pro hac vice motion pending)
Victoria Holstein-Childress (PHV 1658-
2011) (pro hac vice motion pending)
BUCKLEY SANDLER LLP
1250 24th Street N.W., Suite 700
Washington, D.C. 20037
(202) 349-8000 (phone)
(202) 349-8080 (facsimile)
bklubes@bucklesandler.com

COUNSEL FOR AMICUS CURIAE
BARCLAYS CAPITAL REAL ESTATE INC.
D/B/A HOMEQ SERVICING
IN SUPPORT OF RESPONDENTS GMAC
MORTGAGE, LLC ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae Barclays Capital Real Estate Inc. d/b/a HomEq Servicing in Support of Respondents GMAC Mortgage, LLC et al. was sent by first class mail, postage prepaid, this 28th day of November, 2011 to the following:

R. Michael DeWine (0009181)
OHIO ATTORNEY GENERAL
Susan A. Choe (0067032)
(COUNSEL OF RECORD)
Jeffrey R. Loeser (0082144)
OFFICE OF THE OHIO ATTORNEY GENERAL
CONSUMER PROTECTION SECTION
14th Floor, 30 East Broad Street
Columbus, OH 43215

COUNSEL FOR PETITIONERS STATE OF
OHIO AND MICHAEL DEWINE, OHIO
ATTORNEY GENERAL

David A. Wallace (0031356)
(COUNSEL OF RECORD)
Barton R. Keyes (0083979)
Jeffrey A. Lipps (0005541)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215

COUNSEL FOR RESPONDENTS
GMAC MORTGAGE, LLC AND
ALLY FINANCIAL, INC.

Phillip F. Cameron (0033967)
(COUNSEL OF RECORD)
4300 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Richard E. Hackerd (0055306)
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113

COUNSEL FOR PETITIONERS LOIS
BLANK, REBECCA LAWSON, BLAIR
RITZE, BRANDON RITZE, AND
WILLIAM STROBLE

Khary L. Hanible (0077095)
(COUNSEL OF RECORD)
Richard M. Kerger (0015864)
KERGER & HARTMAN LLC
33 South Michigan Street, Suite 100
Toledo, OH 43604

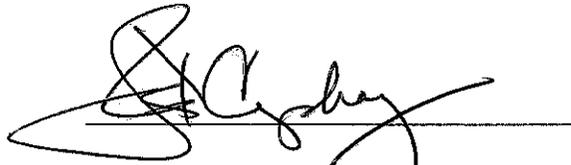
COUNSEL FOR RESPONDENT
JEFFREY STEPHAN

John T. Murray (0008793)
(COUNSEL OF RECORD)
Leslie O. Murray (0081496)
Michael J. Stewart (0082257)
MURRAY & MURRAY CO. LPA
111 E. Shoreline Drive
Sandusky, OH 44870

COUNSEL FOR AMICUS CURIAE
SONDRA ANDERSON IN SUPPORT OF
PETITIONERS

Linda I. Cook (0038743)
(COUNSEL OF RECORD)
OHIO POVERTY LAW CENTER
555 Buttles Avenue
Columbus, OH 43215

COUNSEL FOR AMICI CURIAE OHIO
LEGAL SERVICES PROGRAMS IN
SUPPORT OF PETITIONERS

A handwritten signature in black ink, appearing to read "J. Curphey", is written over a horizontal line. The signature is stylized and cursive.

James D. Curphey (0015832)
(COUNSEL OF RECORD)

APPENDIX

AN ACT

To amend sections 109.572, 1321.57, 1322.02, 1322.03, 1322.031, 1322.04, 1322.041, 1322.051, 1322.06, 1322.061, 1322.062, 1322.07, 1322.10, 1322.11, 1322.99, 1343.011, 1345.01, 1345.02, 1345.03, 1345.05, 1345.07, 1345.09, 1349.25, 1349.27, 1349.31, 3953.23, 4735.05, 4763.03, 4763.05, 4763.06, 4763.12, 4763.13, and 4763.99 and to enact sections 1321.541, 1322.063, 1322.064, 1322.074, 1322.075, 1322.081, 1345.031, 1345.091, 1349.271, 1349.41, 1349.43, 1349.44, 1349.71, 1349.72, 3953.30, 3953.32, 3953.33, 3953.35, and 4763.19 of the Revised Code to modify the application of the Consumer Sales Practices Act and the Consumer Credit Mortgage Loan Law; to generally prohibit the appraisal of real estate for a mortgage loan without state certification or licensure; to require that a national criminal background check be conducted on all applicants for a mortgage broker certificate of registration, loan officer license, or real estate appraiser certificate or license; to modify the Mortgage Broker/Loan Officer Law with respect to disclosure of information, duties and standards of care, prohibited acts, record keeping, educational requirements, and pre-licensure examination; to modify the Title Insurance Agent Law; to establish the Consumer Education Finance Board; and to make other changes relative to mortgage lending.

Be it enacted by the General Assembly of the State of Ohio:

receive either directly or indirectly from a seller or buyer of real estate any discount points in excess of two per cent of the original principal amount of the residential mortgage. This division is not a limitation on discount points or other charges for purposes of section 501(b)(4) of the "Depository Institutions Deregulation and Monetary Control Act of 1980," 94 Stat. 161, 12 U.S.C.A. 1735f-7a.

~~(C) Residential~~ (1) Except as provided in division (C)(2) of this section, residential mortgage obligations contracted for on or after November 4, 1975, may be prepaid or refinanced without penalty at any time after five years from the execution date of the mortgage. Prior to such time a prepayment or refinancing penalty may be provided not in excess of one per cent of the original principal amount of the residential mortgage.

(2)(a) No penalty may be charged for the prepayment or refinancing of a residential mortgage obligation of less than seventy-five thousand dollars that is made or arranged by a mortgage broker, loan officer, or nonbank mortgage lender, as those terms are defined in section 1345.01 of the Revised Code, and that is secured by a mortgage on a borrower's real estate that is a first lien on the real estate.

(b) The amount specified in division (C)(2)(a) of this section shall be adjusted annually on the first day of January by the annual percentage change in the consumer price index for all urban consumers, midwest region, all items, as determined by the bureau of labor statistics of the United States department of labor or, if that index is no longer published, a generally available comparable index, as reported on the first day of June of the year preceding the adjustment. The department of commerce shall publish the adjusted amounts on its official web site.

Sec. 1345.01. As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means 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. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.

(C) "Supplier" means 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. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

(F) "Natural gas service" means the sale of natural gas, exclusive of any distribution or ancillary service.

(G) "Public telecommunications service" means the transmission by electromagnetic or other means, other than by a telephone company as defined in section 4927.01 of the Revised Code, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing. "Public telecommunications service" excludes a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(H) "Loan officer" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include an employee of a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; an employee of a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an employee of an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect

to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(I) "Residential mortgage" or "mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and includes such an obligation on a residential condominium or cooperative unit.

(J) "Mortgage broker" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration; or an employee of any such entity.

(K) "Nonbank mortgage lender" means any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(L) For purposes of divisions (H), (J), and (K) of this section:

(1) "Control" of another entity means ownership, control, or power to vote twenty-five per cent or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

(2) "Credit union service organization" means a CUSO as defined in 12 C.F.R. 702.2.

Sec. 1345.02. (A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an



Final Analysis

*Jennifer A. Parker
Daniel M. DeSantis
Amber Hardesty*

Legislative Service Commission

Am. Sub. S.B. 185
126th General Assembly
(As Passed by the General Assembly)

- Sens.** Padgett, Schuring, Roberts, Carey, Amstutz, Armbruster, Brady, Dann, Fedor, Fingerhut, Grendell, Hagan, Harris, Jacobson, Miller, Prentiss, Spada, Zurz, Mumper, Clancy, Cates, Wilson, Kearney, Miller, D.
- Reps.** Coley, Smith, G., Wagoner, Hagan, Schneider, Evans, C., Patton, T., White, Smith, S., Stewart, J., Stewart, D., Allen, Healy, Koziura, Bocchieri, Widener, Aslanides, Barrett, Beatty, Blessing, Book, Chandler, Collier, DeBose, DeGeeter, Distel, Dolan, Domenick, Driehaus, Evans, D., Fende, Fessler, Flowers, Garrison, Gilb, Hartnett, Harwood, Hughes, Key, Kilbane, Martin, Mason, McGregor, J., McGregor, R., Mitchell, Oelslager, Otterman, Patton, S., Perry, Peterson, Redfern, Reidelbach, Sayre, Schaffer, Schlichter, Skindell, Strahorn, Sykes, Ujvagi, Widowfield, Williams, Woodard, Yates, Yuko

Effective date: September 21, 2006; Sections 1 and 2 effective January 1, 2007

ACT SUMMARY

- Expands the application of the Consumer Sales Practices Act to include certain consumer transactions in connection with a residential mortgage.
- Generally prohibits the appraisal of real estate for a mortgage loan without state certification or licensure.
- Prohibits any person from corrupting or improperly influencing the independent judgment of a real estate appraiser with respect to the value of the dwelling offered as security for a mortgage loan.
- Requires that a national criminal background check be conducted on all applicants for a real estate appraiser certificate or license, a mortgage broker certificate of registration, or a loan officer license.
- Modifies the Mortgage Brokers/Loan Officers Law, including with respect to pre-licensure education and examination, disclosure of

CONTENT AND OPERATION

Consumer Sales Practices Act

Background

(R.C. Chapter 1345.)

The Consumer Sales Practices Act (CSPA) prohibits "unfair or deceptive acts or practices" by suppliers in connection with consumer transactions, such as falsely representing the characteristics of a product, falsely indicating that a specific price advantage exists, misrepresenting a warranty, or falsely indicating the need for a repair.¹ The CSPA also prohibits "unconscionable acts or practices" in consumer transactions, such as taking advantage of a person's inability to understand the transaction's terms, making misleading statements on which a consumer is likely to rely, selling goods when the supplier knows the consumer cannot pay in full, or selling services to a consumer who is unable to receive a substantial benefit from the purchase.²

The CSPA authorizes the Attorney General to investigate alleged violations and to seek civil penalties and remedies.³ It also provides consumers with a private right of action.⁴ In an individual action, a consumer generally may rescind the transaction or recover the individual's damages. In certain circumstances, the consumer may recover three times the amount of actual damages or \$200, whichever is greater, or may recover damages or other appropriate relief in a class action. The CSPA also permits consumers to seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that constitutes a violation. The court may award to the prevailing party a reasonable attorney's fee if the consumer brought an action that is groundless and filed the action in bad faith or the violation was knowingly committed.

¹ R.C. 1345.02.

² R.C. 1345.03.

³ R.C. 1345.07.

⁴ R.C. 1345.09.

Scope of "consumer transaction" and "supplier"

(R.C. 1345.01)

For purposes of the CSPA, "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 these things. Transactions *excluded* from the definition of "consumer transaction" include transactions between public utilities and their customers; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between financial institutions, dealers in intangibles, or insurance companies and their customers.⁵

Under the act, "consumer transaction" expressly *includes* transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers, despite the exemptions described above. For these purposes:

--"Residential mortgage" or "mortgage" is defined as an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within Ohio containing two or fewer residential units or on which two or fewer residential units are to be constructed, and includes such an obligation on a residential condominium or cooperative unit.

--"Loan officer" has the same meaning as in the Mortgage Brokers/Loan Officers Law (R.C. 1322.01(E)), *except* that it does not include an employee of (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, or (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift

⁵ A "dealer in intangibles" is a person with an office in Ohio who engages in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities. Financial institutions, insurance companies, and institutions used exclusively for charitable purposes are not considered dealers in intangibles. (R.C. 5725.01(B).) "Financial institution" is defined in R.C. 5725.01(A).



Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration.

--"**Mortgage broker**" has the same meaning as in the Mortgage Brokers/Loan Officers Law (R.C. 1322.01(G)), *except* that it does not include (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration, or (4) an employee of any such entity.

--"**Nonbank mortgage lender**" means any person that engages in a consumer transaction in connection with a residential mortgage, *except* for (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, or (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration.

--"**Control**" of another entity means ownership, control, or power to vote 25% or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

--"**Credit union services organization**" has the same meaning as "CUSO" in the Code of Federal Regulations, 12 C.F.R. 702.2.

Under ongoing law, "**supplier**" is defined 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. The act adds that, if the consumer transaction is in connection with a residential mortgage, "**supplier**" excludes an assignee or purchaser of the loan for value,



except as otherwise permitted (see "Assignee liability," below) and "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

Unfair or deceptive acts or practices

(R.C. 1345.02)

As mentioned above under "Background," the CSPA prohibits suppliers from committing unfair or deceptive acts or practices and lists several deceptive acts or practices of general application. For example, continuing law states that it is deceptive for a supplier to represent that a specific price advantage exists, if it does not. The act specifies two additional deceptive acts for consumer transactions in connection with a residential mortgage. These are knowingly failing to provide disclosures required under Ohio and federal law and knowingly providing a disclosure that includes a material misrepresentation.

Unconscionable acts or practices

(R.C. 1345.03 and 1345.031; Section 3(B))

Continuing law generally sets forth prohibited acts or practices that are considered unconscionable under the CSPA. The act specifies that these provisions do not apply to consumer transactions in connection with a residential mortgage. Instead, the act indicates a separate list of unconscionable acts or practices for consumer transactions in connection with a residential mortgage. The following acts or practices of a supplier in connection with such a transaction are unconscionable, whether they occur before, during, or after the transaction:

--Arranging for or making a mortgage loan that provides for a higher interest rate after default than before default. This excludes higher interest rates allowed for judgments applicable to the mortgage loan and also excludes interest rate changes in a variable rate loan transaction otherwise consistent with the provisions of the loan documents.

--Engaging in a pattern or practice of providing consumer transactions to consumers based predominantly on the supplier's realization of the foreclosure or liquidation value of the consumer's collateral without regard to the consumer's ability to repay the loan in accordance with its terms, provided that the supplier may use any reasonable method to determine a borrower's ability to repay.

--Making a consumer transaction that permits the creditor to demand repayment of the outstanding balance of a mortgage loan, in advance of the original maturity date, unless the creditor does so in good faith due to the consumer's failure to abide by the material terms of the loan.



As Passed by the House

128th General Assembly

Regular Session

2009-2010

Am. Sub. H. B. No. 3

Representatives Foley, Driehaus

Cosponsors: Representatives Heard, Skindell, Stewart, Yuko, Hagan, Harris, Williams, B., Williams, S., Yates, Luckie, Patten, Slesnick, Ujvagi, Letson, Harwood, Boyd, Weddington, Winburn, Pryor, Murray, Mallory, Domenick, DeBose, Brown, Chandler, DeGeeter, Dyer, Gerberry, Koziura, Lundy, Pillich

A BILL

To amend sections 109.572, 1181.05, 1181.21, 1321.52, 1
1322.05, and 5713.03 and to enact sections 2
1323.01, 1323.02, 1323.04 to 1323.11, 1323.20 to 3
1323.36, 1323.361, 1323.37, 1323.99, 2303.33, 4
2308.01, 2308.02, 2308.021, and 2308.03 of the 5
Revised Code to declare a six-month moratorium on 6
mortgage foreclosures, to require registration of 7
residential mortgage servicers, to regulate 8
residential mortgage servicers, to establish a 9
database to track foreclosures, to adopt 10
procedures and requirements related to residential 11
foreclosure actions, to adopt civil and criminal 12
penalties for violations of the bill's provisions, 13
and to terminate the moratorium provisions of this 14
act six months after its effective date by 15
repealing section 2308.03 of the Revised Code on 16
that date. 17

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

(7) Causing a telephone to ring or engaging any person in a 1845
telephone conversation repeatedly or continuously, or at unusual 1846
times or times known to be inconvenient, with the intent to annoy, 1847
abuse, oppress, or threaten any person at the called number. 1848
1849

(B) The requirements set forth in this section are in 1850
addition to any other requirement set forth in federal or state 1851
law regulating the conduct of collection activities, including the 1852
Federal Fair Debt Collection Practices Act, 91 Stat. 874 (1977), 1853
15 U.S.C. 1692 et seq. 1854

Sec. 1323.361. (A) No mortgage servicer, in conducting a 1855
mortgage servicer business, shall engage in any unfair, deceptive 1856
or unconscionable act in violation of Chapter 1345. of the Revised 1857
Code. Any violation of the sections set forth in division (H) of 1858
section 1323.33 or section 1323.34, 1323.35, or 1323.36 of the 1859
Revised Code is an unfair and deceptive act or practice in 1860
violation of section 1345.02 of the Revised Code. The attorney 1861
general may take enforcement action and a borrower may seek 1862
recovery under Chapter 1345. of the Revised Code for the 1863
violations set forth in this division. 1864

(B) A borrower injured by a violation of division (A) of this 1865
section may not recover damages, attorney's fees, and costs under 1866
Chapter 1345. of the Revised Code if the borrower has recovered 1867
damages in a cause of action initiated under section 1323.37 of 1868
the Revised Code and the damages sought under Chapter 1345. of the 1869
Revised Code are based on the same acts or circumstances as the 1870
damages awarded under section 1323.37 of the Revised Code. 1871

Sec. 1323.37. (A) A borrower injured by a violation of 1872
sections 1323.20 to 1323.37 of the Revised Code may recover 1873
damages in an amount not less than all improper charges or fees 1874

HB 3 Sponsor Testimony
State Representative Mike Foley
January 12, 2010

This comprehensive piece of legislation is aimed at providing much needed assistance to homeowners attempting to save their homes during this economic crisis; to help preserve wealth and property values for neighboring homeowners and communities and to also to correct some of the institutional flaws of our foreclosure process in Ohio. In drafting this legislation we worked closely with many interested parties. We also heard public testimony from 30 witnesses across 4 months of weekly committee hearings. In doing so we have taken aspects of some of the best foreclosure legislation throughout the country and placed them together in what we feel is the most aggressive piece of state legislation in the U.S. to address the foreclosure crisis. While a six-month moratorium may grab headlines, there are many more provisions in this legislation that we think are necessary changes to our foreclosure process.

This bill has four primary components:

- A conditional, six-month moratorium on certain foreclosure judgments;
- A licensing and regulation package for mortgage servicers;
- An information package, which includes a mortgage servicing database, foreclosure notification requirements, and transparency requirements during foreclosure proceedings;
- A foreclosure filing fee that would provide funding for database administration, community redevelopment, financial education, and credit and foreclosure counseling.

Limited Moratorium

House Bill 3's six-month moratorium would allow all foreclosure cases to be filed, but would prohibit final judgments in cases where the homeowner has requested to participate in the moratorium and continues to pay at least half of their monthly mortgage in addition to their tax and insurance escrow. Vacant homes, non-residential properties, and residential properties intended for three or more families are not eligible. The moratorium is tailored for households that have some source of income, and are perceived as having a good chance at finding a successful mortgage modification or payment plan or may be eligible for the Federal Home Affordable Modification Program (HAMP) plan.

A primary concern among opponents of HB3 is that the moratorium would draw out foreclosure proceedings, or force lenders to hold-on to investments that are not performing. However, because it only applies to occupied, engaged and responsive households who are able to pay at least half of their monthly mortgage for the six-month period, proponents feel that the moratorium would have a minimal impact on caseloads or portfolio performance. A majority of residential foreclosures will still come to bear swiftly through default judgments, in which homeowners are not present, or not

responsive, and many others will move forward because of the total loss of household income.

Additionally, mortgages held by Credit Unions and those depositories and community banks that are headquartered in Ohio, have total assets less than or equal to \$2.5 billion, and originate and service their loans are exempt from this moratorium. HB3 recognizes that these entities regularly engage in successful voluntary mortgage modifications, due to their unique connection to their borrowers and communities.

Servicer Licensing and Regulation

Mortgage servicers take many shapes. Some are actually divisions of a bank or lending institution, or act as subsidiaries or affiliates to lenders, while still more are completely independent businesses. Despite these differences, all mortgage servicers play a similar role in the mortgage industry: they collect, process, and relay mortgage payments from borrowers (homeowners) to lenders, investors, local governments, and insurance companies, who have an interest in the real estate value, principle, or interest represented by a mortgaged property.

Structurally, servicers are at the crux of the mortgage industry, being the only channel of communication between lenders and homeowners. Irregularities, deficiencies and a lack of oversight compound the difficulty that many servicers have in fulfilling their obligations in a state that processed over 85,000 foreclosures last year. Because of the critical role that servicers play, we ensure certain standards of conduct through licensing servicers at the state level.

House Bill 3 seeks to introduce best practices and necessary standards to servicers that are not already substantially regulated through their connection to a state or federally chartered lending institution. By the authority of language similar to that which the legislature applied to mortgage brokers in Senate Bill 185 of the 126th General Assembly, the Department of Commerce and Attorney General would ensure that servicers meet professional standards of operation and engage in appropriately robust efforts to modify mortgages and maintain homeownership when it is reasonably possible and equitable. Moreover, licensed servicers would be subject to Ohio's Consumer Sales Protection Act.

Information and Transparency

House Bill 3 seeks to give homeowners earlier notice of impending foreclosures, allowing for more time to craft payment workouts or mortgage modifications. Specifically, all lenders would be required to give notice with specified information to a homeowner 60 days prior to an initial foreclosure filing on any residential foreclosure.

In order to ensure accurate enforcement of servicers, to collect valuable information about foreclosures in Ohio, and to offer greater transparency during foreclosure proceedings, HB 3 creates a statewide foreclosure database and would require *all* lenders and servicers to enter information on each mortgage into the database prior to

filing any residential foreclosure. Foreclosing lenders and servicers would be required to report details such as loss mitigation efforts and must provide proof that this information has been entered at the time of filing.

Providing more information to our courts is not enough, however. Each party must be fully able to pursue all possible alternatives to foreclosure. Presently, it is rare for attorneys representing servicers or lenders in foreclosure proceedings to have the authority to compromise with homeowners. In fact, it is often difficult to identify exactly who owns a mortgage in order to open such a discussion. House Bill 3 requires that ownership of the note and mortgage are clear and unambiguous before action is filed. HB 3 then requires an affidavit of plaintiff's counsel that they directly represent and are authorized to negotiate on behalf of the responsible investor representative. No intermediary representation would be permitted.

Foreclosure filing fee

House Bill 3 would charge a \$750 foreclosure filing fee to lenders or servicers at the time of foreclosure filing. This fee could not be passed on to the homeowner. It would be collected and placed in the newly created Foreclosure Prevention Revolving Trust Fund and would be further allocated as follows:

- 37.5% to local government to be used toward community redevelopment, financial education and credit and foreclosure counseling.
- 37.5% to the Ohio Housing Trust Fund to fund statewide foreclosure programs, rescue grants and loans, and homeowner transition money.
- 10% to Division of Financial Institutions-Consumer Finance (DFI-CF) for education, enforcement and outreach in dealings with foreclosure, mortgage fraud, and foreclosure prevention fraud.
- 5% for the Attorney General's office to investigate illegal activities associated with mortgage fraud and foreclosure prevention fraud.
- 10% to the Ohio Supreme Court for database administration and mediation services.

The Foreclosure Prevention Revolving Trust Fund would be a new fund for the purpose of providing grants to foreclosure prevention counseling entities, individuals or counseling entities for providing emergency foreclosure prevention assistance, as well as similar state and local foreclosure prevention entities.

Similar to House Bill 3's moratorium provisions, those Credit Unions and community banks that were exempt would not be required to pay this fee, nor would it be applied to vacant properties.

In the end, this effort is about preserving housing values and trying to provide some stability to the housing market. There is no doubt that borrowers, lenders, investors, regulators and bond rating agencies made a lot of dumb decisions over the past several years. At a minimum, a lot of wishful thinking at a lot of different levels occurred.

We believe it's time we stop debating the cause of the foreclosure crisis and act quickly to diminish the further deterioration of our communities. This bill is a positive step

forward and will ensure that every effort is made to ensure borrowers and lenders alike make the best effort to prevent a worsening of this crisis.

Thank you for listening to our testimony, we would be happy to take any questions at this time.