ORIGINAL

In the Supreme Court of Ohio

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

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INTRODUCTION

GMAC casts itself as a victim, claiming that "mortgage servicers have been under attack as part of the so-called 'foreclosure crisis.'" Br. at 3. The company brushes off any suggestion of serious flaws in its foreclosure procedures, admitting only that "*potential* issues about execution of affidavits filed in foreclosure cases [have] c[o]me to light." *Id.* (emphasis in original). And it characterizes the Attorney General's complaint under the Consumer Sales Practices Act ("CSPA") as an "attempt to generate sympathy for homeowners who, for whatever reason, have not kept their promise to pay back the money loaned to them." *Id.*

GMAC has it all backwards. First, what GMAC glibly terms the "so-called foreclosure crisis" is a real and tragic occurrence for many Ohioans—over 85,000 homeowners faced the loss of their homes in 2010 alone. Second, mortgage servicers are not besieged. To the contrary, the country's taxpayers have shelled out $17.2 billion in bailouts to keep GMAC afloat over the past few years. See Greg Gardner, *Getting GMAC's House in Order*, Detroit Free Press, March 14, 2010, at B1. Third, the Attorney General has not obstructed or objected to GMAC's ability to *lawfully* institute foreclosure proceedings. The company is free to foreclose on and evict any homeowner who defaults on his monthly loan payment, provided that it complies with all applicable laws and procedures.

But that did not occur. In congressional testimony, court affidavits, and deposition appearances, GMAC officials have admitted that the company prepared false and fraudulent foreclosure affidavits and assignments. GMAC employees signed these documents under oath despite having no personal knowledge of their contents. GMAC then used these documents to initiate foreclosure proceedings against countless homeowners. Although GMAC's brief minimizes the errors as "*potential* issues about execution of affidavits," the company's chief executive officer has correctly apologized for these "entirely unacceptable" practices. Test. of

Thomas Marano, Hearing Before the House Comm. on Fin. Servs. (111th Cong. Nov. 18, 2010), *available at* http://financialservices.house.gov/Media/file/hearings/111/Marano111810.pdf (last visited Jan. 6, 2012).

This Court must now determine whether the CSPA has anything to say about GMAC's conduct. The answer is "yes." Under the statute's plain language, mortgage servicing is a "consumer transaction" (because it involves the transfer of services to consumers), GMAC is a "supplier" (because the company brings these services to consumers), and GMAC's conduct (the preparation of false and fraudulent documents) was a deceptive and unconscionable act "in connection with" its servicing activities. GMAC is therefore liable under the CSPA.

GMAC first responds with a parade of excuses—it performs mortgage servicing on behalf of someone else, its servicing obligations to homeowners are outlined in contractual agreements with those third parties, and the homeowner has no say over how it performs these obligations. But none of these observations have anything to do with the CSPA's operation, and no court has ever limited the statute's scope using these rationales.

GMAC also asserts that the common law Witness Immunity Rule shields it from liability for any fraudulent conduct committed in the foreclosure proceedings. Not so. The U.S. Supreme Court has long stated that witness immunity "d[oes] not extend to complaining witnesses, who . . . set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992). Because GMAC was the complaining witness in the foreclosure proceedings, it has no common law immunity from a CSPA claim.

And finally, GMAC intones that "pure real estate transactions" are exempt from the CSPA. True enough, but—as GMAC readily acknowledges—it was not involved in any real estate transaction with its homeowners. Its mortgage servicing activities are several steps removed

from the "pure real estate transaction" between the seller and the buyer, and no court has expanded the exemption to reach such transactions.

The plain language of the CSPA, this Court's pronouncements on the statute, and lower court decisions applying the statute all point to one conclusion—that the Attorney General has adequately alleged a CSPA claim against GMAC. The Court should confirm that and instruct the federal court to proceed on this state law claim.

ARGUMENT

To advance a CSPA claim, the Attorney General must allege three elements: (1) a "consumer transaction," (2) a "supplier," and (3) an unfair, deceptive, or unconscionable "act or practice in connection with a consumer transaction." R.C. 1345.02(A), 1345.03(A), 1345.031(A). The Attorney General's complaint does just that.

A. Mortgage servicing is a "consumer transaction."

Because servicers like GMAC "transfer . . . a service" to residential homeowners, they engage in "consumer transactions." R.C. 1345.01(A).

1. Mortgage servicing involves the "transfer of a service" to the homeowner.

As a mortgage servicer, GMAC performs day-to-day management of the homeowner's loan account. GMAC sets his payment schedule, determines applicable fees and interest rates, negotiates payment plans, and considers loan modifications if he falls behind on payments. *See* Amended Complaint ¶¶ 10-14, *State v. GMAC*, No. 3:10-cv-2537 (N.D. Ohio Dec. 3, 2010) ("Compl.") (attached to Atty. Gen. Merit Br.). The homeowner must direct any questions, disputes, or complaints regarding his account to GMAC. *See* Federal Trade Comm'n, Mortgage Servicing: Making Sure Your Payments Count (June 2010) ("The servicer is who you contact if you have questions about your mortgage loan account.").

These activities are "services" under the CSPA because GMAC provides them "for the benefit of another"—specifically, the homeowner. O.A.C. 109:4-3-01(C)(2). If further confirmation is needed, the Court need only look to testimony from GMAC's chief executive officer. Before Congress, he lauded the many services his company provides to homeowners: "GMAC Mortgage strives to find alternate solutions that avoid foreclosure and keep families in their homes, and we are proud of the 565,000 workout solutions we have found for customers since 2008." Test. of Thomas Marano, Hearing Before the House Comm. on Fin. Servs. (111th Cong. Nov. 18, 2010). He also stressed that "GMAC Mortgage reaches out to customers about alternatives to foreclosure that may preserve homeownership." *Id.* (GMAC has issued similar platitudes in affidavits to New Jersey courts. *See* Atty. Gen. Merit Br. at 8-9.)

As these statements reveal, GMAC provides "services" to homeowners—so much so that it considers them its "customers." GMAC is therefore engaging in "consumer transactions" under the CSPA.

In response, GMAC agrees that mortgage servicing is a "service," but claims that it is "a service that is performed on behalf of the owner of the loan." Br. at 8. That qualification is meaningless. The CSPA asks only if GMAC "transfer[ed] . . . a service . . . to an individual." R.C. 1345.01(A). The law does not care whether GMAC did so for its own benefit, or "on behalf of" someone else.

In fact, Ohio courts have consistently applied the CSPA to individuals who transfer services to consumers "on behalf of" someone else. Debt collectors track down consumers on behalf of lenders, yet their "debt collection actions . . . are subject to the provisions of the OCSPA." *Broadnax v. Green Credit Serv.*, 118 Ohio App. 3d 881, 893 (2d Dist. 1997). An employee provides services to consumers on behalf of her employer, but if that "individual

employee engages in unfair consumer acts and deals directly with the consumer, that person can be held personally liable" under the CSPA. *Stultz v. Artistic Pools, Inc.*, No. 20189, 2001 Ohio App. LEXIS 4561, at *10-11 (9th Dist. Oct. 10, 2001) (citation omitted). And a corporate officer delivers services to consumers on behalf of his corporation, but that "officer may be held individually liable for his acts which violate the Consumer Sales Practices Act." *Grayson v. Cadillac Builders Inc.*, No. 68551, 1995 Ohio App. LEXIS 3954, at *8 (8th Dist. Sept. 14, 1995).

The same principle holds here. GMAC may "service the [mortgage] loan on behalf of the owner," Br. at 7, but the company still provides a bundle of services—account management, payment collection, loan modification options, and the like—directly to homeowners. Accordingly, GMAC is engaging in "consumer transactions" under the CSPA.

2. The Servicing Agreements confirm that GMAC engages in "consumer transactions" under the CSPA.

GMAC looks past this plain statutory language. Whether "mortgage servicing" constitutes a "consumer transaction" under the CSPA, it says, "must be answered . . . in the context of the contractual agreements pursuant to which mortgage servicers acquire or retain the right to service residential mortgage loans." Br. at 9. It then urges the Court to study over 200 pages of servicing agreements and supplemental material. Br. at 10-15.

The Court need not indulge that invitation. This case tests only the legal sufficiency of the Attorney General's complaint against GMAC. The Court can resolve the question with two documents—a copy of the complaint and a copy of the CSPA.

But even if the Court expands its inquiry, GMAC's supplemental materials only serve to sink its case, not strengthen it. The servicing agreements confirm that GMAC engages in "consumer transactions" with homeowners.

For instance, in its 2001 Servicing Agreement with UBS Securities, GMAC agreed to service residential mortgage loans owned by UBS. GMAC Appx. at 78. GMAC pledged to "service the Mortgage Loans in accordance with Accepted Servicing Practices . . . *as set forth in the Fannie Mae Guide*."[1] *Id.* at 96 (emphasis added). The Fannie Mae Servicing Guide (available at https://www.efanniemae.com/sf/guides/ssg/svcgpdf.jsp) directs servicing companies like GMAC to provide an array of services to their homeowners. To name just a few:

- "All funds tendered by the borrower for application to a first-lien mortgage loan that Fannie Mae owns or securitizes (whether such loan is current or delinquent) must be applied as intended by the borrower." *Id.* at 301-1.

- "It is the servicer's responsibility to ensure that its payment collection and posting processes enable the timely crediting of borrowers' accounts." *Id.* at 301-1.

- "Additional principal payments identified by the borrower as such (curtailments) must be deposited to the P&I custodial account by the next business day after they are received." *Id.* at 301-6.

- "When the borrower's deposit account does not have enough funds to cover a particular expense, the servicer should notify the borrower and then advance the funds necessary to pay the particular expense in a timely manner." *Id.* at 301-11.

- "At the beginning of each year, the servicer must send the borrower a statement of activity in his or her mortgage account during the past year." *Id.* at 301-12.

- "When the servicer places a mortgage under military indulgence, it agrees to accept payments of less than the usual monthly installment . . . It must be granted to any eligible servicemember." *Id.* at 301-18, 301-19.

- "The servicer of an ARM or GPARM must notify the borrower before the effective date of any change in the mortgage loan interest rate or the monthly payment." *Id.* at 404-1.

- "Once ARM adjustment errors are identified, Fannie Mae expects the servicer to take prompt action (within 60 days) to correct them and to notify the borrower about the effect of the correction." *Id.* at 405-1.

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[1] GMAC's other attachment—its 2002 Servicing Agreement with now-defunct Lehman Brothers—contained similar language: GMAC's servicing activities should be "consistent with the Ginnie Mae Credit and Collection Policy" and "Customary Servicing Procedures." GMAC Appx. at 46.

- "The servicer must make every reasonable effort to contact the borrower and to cure the delinquency through Fannie Mae's special relief provisions or foreclosure prevention alternatives before referring a mortgage loan to the foreclosure attorney (or trustee)." *Id.* at 801-1.

The UBS Servicing Agreement and the Fannie Mae Servicing Guide thus validate what the Attorney General has alleged all along—that GMAC maintains a traditional business-to-consumer relationship with homeowners, its "customers." GMAC services the homeowner's loan in exchange for a percentage of his monthly payment. See GMAC Appx. at 112 ("As compensation for its services hereunder, the Servicer shall be entitled to withdraw from the Custodial Account or to retain from interest payments on the Mortgage Loans the amounts provided for."). This "transfer of . . . a service . . . to an individual" is a "consumer transaction" under the CSPA. R.C. 1345.01(A).

GMAC's insistence that the servicing agreements do not involve "a sale or other transfer of a service to a consumer" rings hollow. Br. at 10. The servicing agreements set up an arranged marriage between GMAC and the homeowners: GMAC agrees to service the homeowner's loan, administer his account, handle his payments, and resolve his disputes. The homeowner, in turn, submits a monthly check to GMAC, which takes a cut and transmits the rest to the owners of the loan. This exchange of services for money between GMAC and its customers is, in every sense, a "consumer transaction" under the CSPA.

3. GMAC's remaining arguments misapply the CSPA's language and misstate the Attorney General's position.

GMAC advances three other arguments for why no "consumer transaction" exists between mortgage servicers and their homeowners. None is persuasive.

First, GMAC's brief (at page 15) invokes a federal district court opinion in *Flex Homes v. Ritz Craft Corp.*, 721 F. Supp. 2d 663 (N.D. Ohio 2010). There, the Green Family purchased a pre-fabricated house from Flex Homes, which in turn "purchase[d] the components of a pre-

fabricated house from Ritz-Craft." *Id.* at 665. Ritz-Craft delivered the components of the house and hired a third company—Citadel—to "assemble[] the components . . . on-site." *Id.* at 666. Upon discovering defects in the house, the Greens filed suit against Citadel under the CSPA. *Id.*

The district court dismissed the claim, finding no "facts sufficient to support the existence of a 'transaction' between the Greens and Citadel . . . for purposes of the OCSPA." *Id.* at 675. That decision was sensible: The building contract in *Flex Homes* "d[id] not indicate that . . . Citadel . . . perform[ed] services for the ultimate purchaser of a Ritz-Craft pre-manufactured home." *Id.* The record also revealed "a simple payment-for-service relationship between Ritz-Craft and Citadel," but no payment relationship between the Greens and Citadel. *Id.*

This case is a far cry from *Flex Homes*. Whereas the plaintiffs there "d[id] not allege a 'transaction' of any kind" with the defendant, *id.* at 674, the Attorney General's complaint here describes in detail the many services GMAC provides to its homeowners. *See* Compl. ¶¶ 10-13. Furthermore, the applicable legal instruments—the servicing agreements and the Fannie Mae Servicing Guide—confirm that GMAC provides an array of services to its homeowners. Finally, a direct payment-for-service relationship exists. The homeowners submit monthly checks to GMAC, which retains its share and remits the rest to the loan owner. *Id.* ¶ 14.

What is more, the *Flex Homes* defendant "had no actual relationship with Plaintiffs." 721 F. Supp. 2d at 674. By contrast, GMAC has extensive, ongoing relationships with its homeowners. Once a homeowner executes a mortgage loan, the lender drops out of the picture. GMAC swoops in to handle all payments, inquiries, and disputes. *See* Compl. ¶ 13. Because GMAC is nothing like the *Flex Homes* defendant, it can find no solace in that decision.

Second, GMAC describes the nature of its services to the banks that originated the mortgage loans. It invokes various servicing and pooling agreements with the banks, details

their terms, and describes the rights and responsibilities of each party. Br. at 10-15. According to GMAC, these agreements "indicate that the transaction is commercial in nature." Br. at 19.

To be sure, GMAC provides an assortment of services to banks. And the CSPA does not apply to such transactions. *See Griffin v. Crestview Cadillac*, No. 09AP-278, 2009-Ohio-6569, ¶ 21 (10th Dist.) (transactions "for primarily business purposes are not 'consumer transactions'" under the CSPA). But this litigation has nothing do with GMAC's business dealings with other financial institutions, and GMAC's myopic focus on these relationships is misguided.

This litigation implicates the other side of GMAC's servicing business—its relationships with consumers. As discussed above, GMAC provides all sorts of services—account management, payment collection, loan modification, and the like—to homeowners. The suggestion that this relationship is "commercial" in nature lacks all credibility. GMAC provides these services to consumers with *residential* mortgage loans—and "the word 'residential' implies the exclusion of the word 'commercial.'" *Maggiore v. Kovach*, 101 Ohio St. 3d 184, 2004-Ohio-722, ¶ 18. Because homeowners acquire and maintain mortgage loans for reasons "that are primarily personal, family, or household," R.C. 1345.01(A), the CSPA plainly applies.

Third, GMAC references the Attorney General's educational publication—"Complying with Ohio Consumer Law: A Guide for Businesses"—and notes that it "*does not even mention* mortgage servicing practices." Br. at 31 (emphasis in original). "This silence," GMAC asserts, "speaks volumes as to the Attorney General's actual understanding of whether the CSPA applies to mortgage servicing." Br. at 32.

This argument is baseless. The Attorney General tailored his 30-page publication (*see* GMAC Appx. at 141) to Ohio's *small business owners*, identifying common issues they might encounter and listing the consumer protection statutes they should consult in order to ensure

compliance with the law. The publication did not address mortgage servicing because the servicing companies—large out-of-state financial institutions, with considerable assets, and coteries of attorneys—fell outside its target audience.

In short, GMAC's authorities and supplemental materials all validate the Attorney General's central point—that the servicing of a residential mortgage loan is a "transfer of . . . a service . . . to an individual" and, therefore, a "consumer transaction" under the CSPA.

B. GMAC is a "supplier" of consumer transactions.

For the second element of a CSPA claim, the Attorney General must identify a "supplier"—a "person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. 1345.01(C). As the Tenth District has observed, this plain language broadly "define[s] 'supplier' a[s] sellers, lessors, or people engaged in consumer business transactions." *Bungard v. Dep't of Job & Family Serv.*, No 07AP-447, 2007-Ohio-6280, ¶ 13 (10th Dist.).

Without a doubt, GMAC is "engaged in the business of effecting . . . consumer transactions." The company supplies an assortment of services—account management, payment processing, dispute resolution, and loan modification—to homeowners with outstanding loans. In GMAC's dictionary parlance, GMAC "brings" these services to its homeowners. *See* Merriam Webster's Dictionary (2011) (defining "effecting" as "to bring into existence").

In response, GMAC first says that "the verb 'effect' implies the initiation of a consumer transaction." Br. at 42. And because GMAC did not have "anything to do with the initiation of any underlying consumer transaction," it is not a "supplier." *Id.*

This argument ignores both the language and the structure of the CSPA. The statute defines supplier as any "person engaged in the business of effecting . . . consumer transactions." R.C. 1345.01(C). GMAC's attempt to redraft this language—replacing the term "effecting" with

the term "initiating"—is inappropriate. *See Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-4362, ¶ 7 ("In interpreting statutes, 'it is the duty of this court to give effect to the words used, not . . . to insert words not used.'"). What is more, the CSPA explicitly covers "assignees" and "purchasers" of mortgage loan rights if they themselves commit unfair, deceptive, or unconscionable acts against consumers. R.C. 1345.091(A). "Assignees" and "purchasers" have no role in initiating the underlying mortgage transaction; they instead acquire rights over the mortgage loan from the originating bank. The CSPA nevertheless classifies "assignees" and "purchasers" as "suppliers" in these settings.

To be sure, only the bank and the homeowner execute the loan documents. But like any "assignee" or "purchaser," GMAC then steps into the picture and provides services to the homeowner. When the company does this, it becomes a "supplier" under the CSPA.

Second, GMAC observes that the CSPA omits the word "'enforcing' from the definition of supplier" in R.C. 1345.01(C). Br. at 44.

But the General Assembly did not need to use the word "enforce" to extend the CSPA's reach to mortgage servicers. The current definition of "supplier" suffices. As GMAC acknowledges, Ohio courts have long "concluded that 'a collection agency is a 'supplier'" under the CSPA. Br. at 41 (quoting *Celebrezee v. United Research, Inc.*, 19 Ohio App. 3d 49, syl. ¶ 3 (9th Dist. 1984)); *accord Schroyer v. Frankel*, 197 F.3d 1170, 1177 (6th Cir. 1999); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 976 (N.D. Ohio 2009); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 952 (S.D. Ohio 2005); *Smith v. A.B. Bonded Locksmith, Inc.*, 143 Ohio App. 3d 321, 331 (1st Dist. 2001); *Gatto v. Frank Nero Auto Lease*, No. 74894, 1999 Ohio App. LEXIS 1571, at *8 (8th Dist. Apr. 8, 1999); *Broadnax*, 118 Ohio App. 3d at 893 (2d Dist.). After all, a debt collector "is a person engaged in the business of effecting consumer

transactions (*i.e.*, payment) and, as such, is a supplier pursuant to R.C. 1345.01(C)." *United Research*, 19 Ohio App. 3d at 51.

GMAC and the other servicers are, in essence, debt collectors. Through account management, payment collection, and loan modification services, they work with homeowners to enforce and ensure satisfaction of their debt obligations. In this role "of effecting consumer transactions (*i.e.*, payment)," GMAC is a "supplier" under the CSPA.

C. GMAC committed unfair, deceptive, and unconscionable acts "in connection with" a consumer transaction.

The third (and final) element of the CSPA is straightforward: A plaintiff must allege an unfair, deceptive, or unconscionable act or practice taken "in connection with" a consumer transaction. R.C. 1345.02(A), 1345.03(A), 1345.031(A).

In this case, GMAC employees executed thousands of affidavits, mortgage assignments, and documents despite lacking personal knowledge of their contents and making no effort to validate their authenticity. *See* Compl. ¶¶ 23-39. Those documents affirmed that GMAC was the servicer of a particular loan, that the homeowner was in default, and that GMAC afforded proper notices and protections. *Id.*, Exs. A & B. GMAC then used those fraudulent documents to initiate foreclosure proceedings against its homeowners. *Id.* ¶ 15. In the words of GMAC's chief executive officer, these practices were "entirely unacceptable." Test. of Thomas Marano, Hearing Before the House Comm. on Fin. Servs. (111th Cong. Nov. 18, 2010).

These allegations easily satify the CSPA's third prong: GMAC's conduct was "deceptive" and "unconscionable," and GMAC undertook this conduct "in connection with" a consumer transaction—its mortgage servicing activities.[2]

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[2] GMAC criticizes the Attorney General for "not cit[ing] a single case applying the CSPA to conduct undertaken in the course of a foreclosure action" (Br. at 39), but that attack is an empty one. The CSPA's applicability to the mortgage servicing industry is an open question under

GMAC responds that the common law "Witness Immunity Rule" undercuts any claim "that actions taken by parties and attorneys in a pending court case . . . [are] actionable under the CSPA." Br. at 36. This invocation is procedurally improper and substantively flawed.

As to procedure, the federal district court certified only the question whether the Attorney General's complaint adequately alleges the three elements of a CSPA claim. If the answer is "no," his claim disappears. If the answer is "yes," this case returns to federal court, where GMAC is free to raise any affirmative defense—including the Witness Immunity Rule—as a shield to liability. But whether or not GMAC will prevail on that defense has no bearing on whether the Attorney General's complaint articulates a CSPA claim. "[T]he fact that [a defendant] may be entitled to an affirmative defense of immunity *does not nullify the statutory cause of action*." *Morrow v. Reminger & Reminger Co., LPA*, 183 Ohio App. 3d 40, 2009-Ohio-2665, ¶ 19 (10th Dist.) (emphasis added). This Court should therefore answer the district court's certified questions and leave GMAC's immunity claims for another day.

But even if the Court does grapple with the Witness Immunity Rule, GMAC's argument fails. In GMAC's cited decisions (Br. at 35-36), courts determined that a witness's false testimony in an earlier proceeding could not give rise to a separate civil action against that witness, the party calling that witness, or the attorney who elicited the false testimony. One crucial distinction separates this case from that lot: *In the foreclosure proceedings, GMAC was the complaining witness.* Both the U.S. Supreme Court and the Sixth Circuit have made clear that the Witness Immunity Rule "d[oes] not extend to complaining witnesses, who . . . set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992). "At common law, witnesses testifying in court received absolute immunity, but

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Ohio law because GMAC and the other servicers usually remove CSPA complaints to federal court, thereby depriving the Ohio courts of the opportunity to address the issue.

complaining witnesses—those swearing to the facts in the initial complaint—did not." *Adams v. Hanson*, 656 F.3d 397, 408 (6th Cir. 2011) (citations omitted).

Case law further confirms that the Witness Immunity Rule provides no protection to GMAC. Ohio appellate courts have long applied the CSPA to businesses that file deceptive legal claims against consumers. *See, e.g.*, *Broadnax*, 118 Ohio App. 3d at 893; *United Research*, 19 Ohio App. 3d at 51; *Gatto*, 1999 Ohio App. LEXIS 1571, at *13. The same is true for Ohio's federal courts, which regularly entertain CSPA claims against parties who file "deceptive lawsuits to collect a debt." *Delawder*, 443 F. Supp. 2d at 953; *accord Turner v. Lerner, Sampson & Rothfuss*, 776 F. Supp. 2d 498, 510 (N.D. Ohio 2011) ("[T]he filing of deceptive lawsuits violates the Ohio Consumer Protection Act."); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 393 (S.D. Ohio 2008) (certifying class action under the CSPA against collection agency that "fil[ed] garnishment affidavits . . . without undertaking a proper investigation"). Against this backdrop, no court has ever concluded that the Witness Immunity Rule defeated an otherwise viable CSPA claim. Quite the opposite, the courts have stated that witness immunity does not apply in this setting. *See, e.g.*, *Hartman v. Asset Acceptance Corp.*, 467 F. Supp. 2d 769, 780 (S.D. Ohio 2004); *Delawder*, 443 F. Supp. 2d at 954.

The same analysis holds here: GMAC's fraudulent foreclosure affidavits and documents "set the wheels of government in motion" against an untold number of consumers. *Wyatt*, 504 U.S. at 164. Because GMAC undertook this conduct "in connection with" a consumer transaction, the CSPA's third element is satisfied. And because GMAC was the "complaining witness" in its foreclosure proceedings, the Witness Immunity Rule affords it no protection.

D. The "real estate exemption" does not defeat the Attorney General's CSPA claim.

Having alleged all three elements of the CSPA, the Attorney General is entitled to his day in court. GMAC nevertheless attempts one last defense—the "real estate exemption." Br. at 21.

This Court has indicated that the CPSA "has no application in a 'pure' real estate transaction." *Brown v. Liberty Clubs, Inc.*, 45 Ohio St. 3d 191, 193 (1989). True enough, but a "pure" real estate transaction involves two individuals—the seller and the buyer.[3] GMAC is not a party to that transaction, nor does it have any involvement in that transaction. As GMAC concedes, "[t]he real estate transaction has already occurred when the servicing work begins." Br. at 43. For this reason, a mortgage servicer cannot claim that its servicing activities are part of a "pure real estate transaction" and, therefore, immune from the CSPA.

In response, GMAC argues that the exemption covers more than pure real estate transactions. It asserts that "collateral services arising out of the transfer of an interest in real estate" are also immune from the CSPA. Br. at 22. Because "mortgage servicing is part and parcel of the underlying pure real estate transaction," GMAC disclaims all liability. Br. at 23.

This Court dismissed that "collateral services" theory in *Brown v. Liberty Clubs*, where a land developer solicited prospective homeowners with various gifts. 45 Ohio St. 3d at 192. The homeowners accepted the gifts and entered land-sale contracts. *Id.* They later sued the developer under the CSPA, claiming that the solicitations were deceptive. Although the developer's solicitations and the pure real estate transaction "were so inextricably intertwined," this Court concluded "that the Consumer Act must be applied." *Id.* at 194. Critically, the Court examined the developer's solicitations in isolation: "[O]ffering to transfer or award goods to a

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[3] The "pure real estate transaction" sometimes involves three parties—a home seller, a home buyer, and an intermediary. In *Hurst v. Enter. Title Agency*, 157 Ohio App. 3d 133, 2004-Ohio-2307, ¶ 4 (11th Dist.), the buyer and seller retained an escrow agent to receive and disburse the buyer's payment. And in *Colburn v. Baier Realty & Auctioneers*, No. 2002-161, 2003-Ohio-6694, ¶ 5 (11th Dist.), the seller hired an auctioneer to sell his home. Because the escrow agent and auctioneer "merely were acting as an intermediary" between two parties in the transaction, *Hurst*, 2004-Ohio-2307, at ¶ 35, the Eleventh District reasoned that the "real estate exemption" applied. That holding, even if correct, provides no support to GMAC. Unlike an escrow agent or auctioneer, GMAC had no involvement as an intermediary in the underlying real estate transaction.

consumer will usually, in and of itself, constitute a consumer transaction for the purpose of R.C. 1345.01, *regardless of the nature of the underlying transaction.*" *Id.* at 195 (emphasis added).

Lower courts have also dismissed this "collateral services" theory, applying the CSPA to companies that offer collateral services to parties in a real estate transaction. For instance, agencies that provide mortgage broker servicers to homeowners are liable under the statute. *See, Equicredit Corp. of Am. v. Jackson*, No. 03-MA-191, 2004-Ohio-6376, ¶ 46 (7th Dist.). Courts have also held that "[t]he CSPA does apply to title companies in the productions of the closing documents" for a real estate transaction. *Prop. Asset Mgmt. v. Shaffer*, No. 14-08-06, 2008-Ohio-4645, ¶ 11 (3d Dist.); *accord ABN AMRO Mortgage Group, Inc. v. Arnold*, No. 20530, 2005-Ohio-925, ¶ 33 (2d Dist.). Finally, developers who agree to sell a parcel of real estate and simultaneously construct a dwelling on that parcel are liable for any defects in construction. *See, e.g., Frazier v. Rodgers Builders*, No. 91987, 2010-Ohio-3058, ¶ 43 (8th Dist.); *Saraf v. Maronda Homes, Inc.*, No. 02AP-461, 2002-Ohio-6741, ¶ 41 (10th Dist.); *Fesman v. Berger*, No. 940400, 1995 Ohio App. LEXIS 5327, at *10-11 (1st Dist. Dec. 6, 1995); *Keiber v. Spicer Constr. Co.*, 85 Ohio App. 3d 391, 396 (2d Dist. 1993).

All these activities arise out of a real estate transfer, yet none of these courts invoked the "real estate exemption." To the contrary, the courts had little trouble finding that a mortgage broker, a title company, or a developer "fit[] the definition of a supplier and its agreement to provide . . . servicers constitute[d] a 'consumer transaction' under the terms of the [CSPA]." *Equicredit Corp.*, 2004-Ohio-6376, at ¶ 46.

To that end, GMAC's refrain—that mortgage servicing "is part and parcel of an underlying real estate transaction" (Br. at 21-23)—is immaterial. Under *Brown*, the Court must determine whether GMAC's mortgage servicing business "*in and of itself*, constitute[s] a consumer

transaction" under the CSPA. 45 Ohio St. 3d at 195 (emphasis added). And it must do so "*regardless of the nature of the underlying transaction.*" *Id.* (emphasis added).

As explained above (in Section A), mortgage servicing is, in and of itself, a "consumer transaction." The CSPA therefore applies to GMAC, regardless of the fact that its servicing activities relate to a real estate transaction.

E. Amicus HomEq's legislative history invocations are misplaced.

Another large servicer, HomEq Servicing Corporation, has filed an amicus brief supporting GMAC's position.[4] For the most part, HomEq recycles the same arguments and authorities: It invokes the "real estate exemption" (HomEq Br. at 3); it claims that mortgage servicing is not a "consumer transaction" (*id.* at 4-7); and it asserts that servicers are not "suppliers" (*id.* at 8-9). The Attorney General addressed these issues in earlier sections.

HomEq also advances several arguments tethered to legislative history, but this effort is misplaced. As a threshold matter, the definitions of "consumer transaction" and "supplier" in the CSPA are simple, straightforward, and unambiguous—the Court must "apply them rather than construe them." *State ex rel. Canales-Flores v. Lucas County Bd. of Elections*, 108 Ohio St. 3d 129, 2005-Ohio-5642, ¶ 28. "No . . . examination of the legislative history is warranted," as HomEq fails to identify any ambiguity in the CSPA's language. *Id.*

On substance, HomEq's legislative history pursuits are equally unpersuasive.

First, HomEq references a 2007 amendment to the CSPA. HomEq Br. at 14. For many years, the CSPA exempted all "transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers." Former R.C. 1345.01(A) (2005). Any entity

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[4] A group of homeowners has filed a class action suit against HomEq, alleging that the company violated the CSPA by mishandling their monthly loan payments. HomEq removed the case to federal court, which certified two CSPA-related questions to this Court. The Court has stayed all proceedings pending a decision in this case. *See Anderson v. HomEq*, No. 2011-908.

listed in R.C. 5725.01—licensed banks, savings associations, dealers in intangibles, and insurance companies—escaped liability. Because mortgage lenders "engage[] . . . in a business that consists primarily of lending money" and "discounting, buying or selling . . . mortgages," R.C. 5725.01(B)(1), they were "dealers in intangibles" and immune from the statute.

In Senate Bill 185 (126th G.A. 2007), the General Assembly narrowed the exemption for R.C. 5725.01 entities. Currently, the CSPA "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*." R.C. 1345.01(A) (new language in italics). Previously immune under Section 5725.01, these lending entities are now liable for deceptive or unconscionable conduct when engaged in consumer transactions.

But as the federal courts made clear, GMAC and HomEq are not banks, licensed financial institutions, dealers in intangibles, insurance companies, or any other person listed in R.C. 5725.01. *See* GMAC Certification Order at 1 ("GMAC is not an entity defined in R.C. 5725.01"); HomEq Certification Order at 2 ("HomeEq is not a bank, financial institution, or any entity defined in O.R.C. § 5725.01."). At no point did these companies qualify for an exemption to the CSPA under R.C. 5725.01. Accordingly, the General Assembly's 2007 decision to narrow the exemption for R.C. 5725.01 entities sheds no light on the CSPA's applicability to mortgage servicers.

In its second attempt at legislative history, HomEq references a piece of failed legislation. In 2010, the House passed House Bill 3, which would have imposed a moratorium on all foreclosure proceedings, required licensing of mortgage servicers, and prohibited servicers from

engaging in any unfair, deceptive, or unconscionable acts under the CSPA. *See* Am.Sub.H.B. 3, at 61 (128th G.A. 2010) (attached to HomEq Appx. at 12). The bill later died in the Senate.

HomEq now spotlights this failed bill as the centerpiece of its legal argument: "[T]he 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." HomEq Br. at 18.

This strategy ignores the Court's clear admonishment that failed legislation is irrelevant to its legal analysis: "The act of refusing to enact a law . . . has utterly no legal effect, and thus has utterly no place in a serious discussion of the law." *Rice v. CertainTeed Corp.*, 84 Ohio St. 3d 417, 421 (1999) (alteration in original and citation omitted). The Court's rationale is simple: "A bill may fail for numerous unexpressed reasons that are unrelated to the merit or content of any one proposed provision." *Id.*

In this case, HomeEq blindly assumes that the General Assembly's failure to pass House Bill 3 "demonstrate[d] its belief that the CSPA does not apply to mortgage servicing and mortgage servicers." HomEq Br. at 16. But the opposite inference is equally plausible: The General Assembly might have concluded that the CSPA already covered mortgage servicers and House Bill 3's proposed reforms were unnecessary and over-the-top. It is impossible to discern the General Assembly's hidden intent here because "[a] legislature does not . . . express its will by *failing* to legislate." *Wallace v. Ohio Dep't of Commerce*, 96 Ohio St. 3d 266, 2002-Ohio-4210, ¶ 29 n.8 (emphasis in original).

The Court should cast aside HomEq's attempt to muddy the waters with irrelevant and ill-explained assertions about legislative history. Whether or not the CSPA extends to mortgage servicers turns on a plain reading of the words in R.C. Chapter 1345, nothing more.

CONCLUSION

The Court should answer "yes" to the certified questions and confirm that the Attorney General's complaint adequately alleges a CSPA claim against GMAC.

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