

IN THE SUPREME COURT OF OHIO
Case No. 2011-0890

ON REVIEW OF CERTIFIED QUESTIONS OF STATE LAW
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.
U.S. DIST. CASE NO. 3:10-CV-02537; 1: 10-CV-02709

**STATE OF OHIO EX REL.
MICHAEL DEWINE, ATTORNEY GENERAL, et al.,**

Plaintiff-Respondent

v.

GMAC MORTGAGE, LLC, et al.

Defendant-Petitioner.

**REPLY BRIEF OF *AMICUS CURIAE* SONDRA ANDERSON
IN SUPPORT OF PETITIONER STATE OF OHIO EX REL.
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Now comes *Amicus Curiae* Sondra Anderson and respectfully submits the following brief reply in support of Petitioner State of Ohio, particularly addressing arguments raised Barclays Capital Real Estate, Inc. d/b/a HomEq Servicing's ("HomEq's") *Amicus* brief. Nothing about the legislative history of former HB 3 indicates that mortgage servicing is exempt from the Ohio Consumer Sales Practices Act ("CSPA"). Nor should HomEq now be permitted to distance itself from the day-to-day customer service aspects of its business for the purposes of litigation only.

A. The legislative history of cited by HomEq does not indicate that mortgage servicing was ever exempt from the CSPA.

As expected, HomEq delves into to legislative history of HB 3, a broad-ranging bill introduced in the 128th General Assembly, but never adopted. HomEq suggests the very introduction of HB 3 is evidence that mortgage servicing is exempt from the CSPA. For the reasons set forth in Anderson's opening brief, legislative history of HB 3 is a poor tool for construing the statute that has actually been on the books for years.

HomEq presents HB 3 as simply a proposal to transfer mortgage service from "outside" to "inside" the scope of the CSPA. The bill's failure, in HomEq's view, should be seen as evidence that mortgage servicing was never covered by the Act in the first place. The background of HB 3 is far more complicated. The proposed legislation amounted to an entire regulatory scheme directed toward perceived abuses in the mortgage industry, including: a six-month moratorium on certain foreclosure proceedings, a licensing and regulation package for mortgage servicers, creation of a mortgage servicing data and certain transparency requirements related to foreclosure proceedings. See: Committee Testimony of State Representative Mike Foley, annexed to HomEq's brief.

The General Assembly's former consideration of detailed, specific regulation of a particular industry does not answer the questions actually certified by two judges of the United

States District Court: whether the long-established general prohibition on unfair and unconscionable trade practices reaches the mortgage servicing industry. The legislative history cited by HomEq is, at best, ultimately ambiguous on this point. When the circumstances surrounding the consideration of HB 3 are viewed in their entirety, it is just as likely that the General Assembly was considering tightening and clarifying already existing regulations as it was bringing an exempt industry under the auspices of the CSPA for the first time.

“[N]o matter how ‘authoritative’ the [legislative] history may be *** one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted for sure was the text of the enactment; the rest is necessarily speculation.” *United States v. R.L.C.*, 503 U.S. 291, 309 (1992)(Scalia, J., concurring). Despite reaching as far into the bowels of the legislative history of HB 3 as the committee testimony of a single legislator, none of the “legislative history” identified by HomEq states that the existing CSPA (in its current form) does not reach mortgage servicers or that HB 3 was specifically intended to remedy that perceived problem.

This Court is ultimately left with the language enacted by the legislature, the persuasive authority of federal courts addressing an identical question and the construction afforded by the Attorney General. As the official designated by statute as responsible for implementing the CSPA, the Attorney General’s interpretation of the Act is entitled to deference, as this Court has previously held with respect to administrative rule-making authority. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717 at ¶ 26. The position taken by two successive Attorneys General in this and similar litigation is entitled to at least as much deference as the ambiguous legislative history.

The construction afforded the CSPA by federal courts is also persuasive. As set forth in Anderson's opening brief, all four federal courts¹ to consider the issue have concluded that "mortgage servicers" and "mortgage servicing" fall within the general definitions of "suppliers" to a "consumer transaction" contained in R.C. § 1345.01. *Dowling v. Litton Loan Servicing, L.P.*, 2006 U.S. Dist. LEXIS 87098 at **42-44 (S.D. Ohio); *Kline v. Mortgage Electronic Systems, Inc.*, 2011 U.S. Dist. LEXIS 60733 at *12 (S.D. Ohio); *Jent v. BAC Home Loans Servicing, LLC*, 2011 U.S. Dist. LEXIS 79652 at *9 (S.D. Ohio); *Munger v. Deutsche Bank*, 2011 U.S. Dist. LEXIS 77790 at *24 (N.D. Ohio). Although HomEq attacks these decisions as lacking in detailed analysis with respect to whether mortgage are "suppliers" to a "consumer transaction" as defined by R.C. § 1345.01(A), the argument appears to have been presented and decided to at least some of these cases. See, e.g. *Jent*, 2011 U.S. Dist. LEXIS 79652 at *10 ("it is clear that Defendant is a 'person engaged in the business of effecting consumer transactions,' and is therefore subject to the OCSPA.").

In any case, and with all due respect, detailed analysis is not necessarily required to conclude that a mortgage servicer provides a "service" within the meaning of R.C. § 1345.01(A).

¹ The single case cited by HomEq for the proposition that "the CSPA did not cover any transactions in connection with a mortgage loan" did no such thing. See HomEq br. at p. 14 (emphasis in the original). In fact, the Southern District of Ohio held that the CSPA was not applicable in the case cited by HomEq because the mortgage in question involved rental property. See *Torrance v. CitiFinancial Mortg. Co.*, 2008 U.S. Dist. LEXIS 123415 (S.D. Ohio) at **6-8, report and recommendation adopted by 2009 U.S. Dist. LEXIS 24936. Moreover, the *Torrance* case made no distinction between the mortgage lender and servicer, a critical issue here. Finally, the *Torrance* case is unpersuasive because it involved a *pro se* plaintiff advancing a less than coherent legal theory. Mr. Torrance himself was ultimately declared by this Court to be a "vexatious litigator" pursuant to S.Ct.Prac.R. XIV(5)(B). See *Torrance v. Cincinnati Metro. Housing Auth.*, S.Ct.Dkt. No. 2009-1518, October 26, 2009.

B. HomEq's should not be permitted to distance itself from its customer service business for litigation purposes.

HomEq next suggests that even if it is providing a service, it is providing one mostly to the owner or holder of the mortgage. This would come as a surprise to an Ohio consumer who deals exclusively with the servicer with respect to his or her mortgage loan. As set forth in Anderson's opening brief, and in the certification order entered by the District Court in her case, HomEq, as servicer, is responsible for nearly all of the post-origination interaction with the borrower/consumer. The servicer handles customer disputes, maintains call centers for borrowers to contact, negotiates and executes loan modifications and other loss mitigation options and generally deals directly with the borrower with respect to the loan. In short, HomEq holds itself out as being the entity for the consumer to contact for answers about his or her mortgage loan. Every month, the servicer sends the borrower a statement asserting that it has the right to receive money from him or her.

Having represented to its consumer/customers that it is responsible for answering questions and collecting payments loans, it is now disingenuous for the HomEq to back away from the customer service aspect of its business by asserting that it acts mostly on behalf of the lender. An entity cannot have it one way for its day-to-day business operation and another for litigation purposes.

HomEq attempts to distance itself from its customers by first claiming to interact with its customers on behalf of the lender and then citing to a series of cases in which a court rejected a CSPA claim founded on a business-to-business relationship. See HomEq br. at pp. 6-7. HomEq ignores its fundamental role as intermediary between lender and borrower. This is the core of the mortgage servicing business.

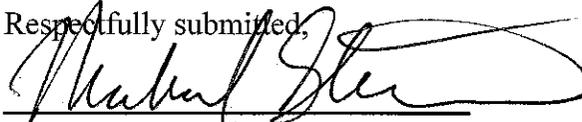
While this approach would undoubtedly prove persuasive in a dispute between HomEq and the underlying lender, it is inapplicable in the instance litigation between a mortgage servicer and a consumer/borrower. If taken to its logical end, HomEq's suggestion that it should be exempt from the CSPA because it interacts with a consumer "on behalf" of some other business entity could be used by almost any supplier in the chain of commerce to escape the Act's prohibition on unfair, deceptive and unconscionable trade practices. A retailer could easily assert that it is not a supplier to a consumer transaction because it sells products to consumers "on behalf" of the underlying manufacturer. In turn, the same manufacturer could escape the Act by claiming that its business primarily involves manufacturing products "on behalf" of a retailer for sale to the consumer. Both assertions would be rejected out of hand.

Ultimately, the question presented is straightforward. A mortgage servicer is a "supplier," as defined by R.C. § 1345.01(C), to a "consumer transaction," as defined by R.C. § 1345.01(A), because it provides a service to consumers. The nature of this service is detailed in the District Court's certification order in the *Anderson* case. Because none of the exceptions to the CSPA apply to this situation, the Act prohibits HomEq and other mortgage servicers from committing unfair, deceptive and unconscionable trade practices.

C. Conclusion

For the reasons stated herein and in Anderson's opening brief, this Court should answer the certified questions of state law in the affirmative. Mortgage servicing is an activity covered by the CSPA.

Respectfully submitted,



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