

IN THE SUPREME COURT OF OHIO

Case No. 2011-0908

*ON REVIEW OF CERTIFIED QUESTIONS
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.
U.S. DIST. CASE NO. 3:09-CV-02335-JGC*

SONDRA ANDERSON
Plaintiff-Respondent

v.

BARCLAYS CAPITAL REAL ESTATE, INC. d.b.a. HOMEQ SERVICING
Defendant-Petitioner.

**MERIT BRIEF OF
RESPONDENT SONDRA ANDERSON**

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I. INTRODUCTION AND STATEMENT OF THE CASE

The United States District Court asks the Court to consider whether stand-alone mortgage servicers, relatively new entities charged with effecting and implementing Ohio home loans, are exempt from the state's primary consumer protection scheme. In the context of securitized loans, mortgage servicers are tasked with handling all customer-relations issues for the life of the loan. The mortgage servicer is the only point of contact for a consumer involved in a mortgage transaction. While Petitioner attempts to reduce the servicer's role to merely collecting payments and forwarding them to the noteholder, the servicer's involvement is far more extensive. Servicers are responsible for applying payments, handling disputes and responding to customer inquiries. In each of these areas, mortgage servicers exercise considerable discretion.

When borrowers fall behind, the power of the servicer increases significantly. It is often the servicer that decides which borrowers receive loan modifications or forbearance agreements and which borrowers end up in foreclosure. These decisions are made long after the underlying purchase and financing of a home. When servicers display a pattern of incompetence, inefficiency and delay, Ohio homeowners are often left without a remedy.

Ohio's Consumer Sales Practices Act ("CSPA" or "the Act"), codified at R.C. § 1345.01 *et seq.*, broadly prohibits "suppliers" to a "consumer transaction" from committing unfair, deceptive and unconscionable practices. This certification process effectively asks the Court to decide whether these prohibitions allow Ohio homeowners, and indeed the state itself, to challenge unscrupulous practices when they concern a consumer's most valuable possession: her home.

II. FACTUAL AND PROCEDURAL BACKGROUND

Respondent Sondra Anderson is an Ohio homeowner. Shortly after Anderson financed the purchase of her home in Norwalk through a note and mortgage, Petitioner Barclays Capital Real Estate, Inc., d.b.a. HomEq Servicing (“HomEq”) began acting as the “servicer” of her loan.

Anderson raises several allegations of misconduct against HomEq. Generally, Anderson’s mortgage servicer failed to apply her payments in the manner required by her note and mortgage, failed to account for some of her payments at all (raising the inference that the servicer simply kept the money) and failed to accurately respond to Anderson’s repeated inquiries about her mortgage loan. Crediting the truth of the allegations in Anderson’s complaint, the District Court concluded that HomEq plausibly committed unfair, deceptive and unconscionable trade practices as defined by the CSPA. However, the District Court also concluded that Ohio lacked binding authority governing whether the CSPA applies to stand-alone “mortgage servicers” such as HomEq and certified questions to this Court intended to resolve the issue.

A. While adjudicating a motion to dismiss, the District Court agrees to certify questions of state law to this Court to determine whether the CSPA applies to mortgage servicers.

Anderson’s four-count complaint included allegations of unjust enrichment, conversion, violations of the federal Real Estate Settlement Procedures Act (RESPA) and violations of Ohio’s CSPA. In June 2010, the District Court declined to dismiss the two common law counts and held its decision in abeyance with respect to the RESPA¹ and CSPA claims. *Anderson v. Barclays Capital Real Estate, Inc.*, 2010 U.S. Dist. LEXIS 68327 (N.D. Ohio). The District

¹ The RESPA claim was held in abeyance pending the filing of a Second Amended Complaint detailing Anderson’s damages caused by the RESPA violation. The issue remains pending.

Court found that the servicer allegedly violated the CSPA in two distinct ways. First, HomEq's failure to properly apply and account for her payments, including the fact that \$2,500 is unaccounted for, constitutes unfair and deceptive acts and practices pursuant to R.C. § 1345.02 and unconscionable acts and practices in connection with a residential mortgage loan pursuant to R.C. §§ 1345.03 and 1345.031. Second, HomEq's response to Anderson's RESPA request fell short of the requirements of that statute, which is independently actionable pursuant to R.C. § 1345.02(F)(prohibiting "knowingly fail[ing] to make disclosures required by federal law"). The District Court held its decision on the CSPA count in abeyance pending certification of questions of state law to this Court pursuant to S.Ct.Prac.R. 18.

From the outset, Anderson expressed significant concerns about the timing and factual basis for such a certification. (See ECF # 48). Appearing before the District Court as *Amicus Curiae*, the Ohio Attorney General's Office initially shared many of the same reservations. (ECF # 38, 44). Most importantly, certification at an early stage of the litigation lacks the advantage of a factual record about what a "mortgage servicer" is and the role generally played by such an entity during the life of a consumer's mortgage. Frankly, Anderson was concerned that a certification order to this Court at the pleading stage may prompt a series of unfounded and un rebuttable assertions tending to minimize the interaction between a mortgage servicer and its consumer/borrower to merely ministerial functions. In fact, in the modern world of pooled and securitized mortgages, the servicer plays the lead role in customer relations and can make the lion's share of decisions regarding a typical consumer's loan. The ultimate loan-holder may do little beyond receiving a payment stream in return for an investment in a package of securitized mortgages. As *Amicus Curiae* Ohio Legal Services Programs *et al.* make clear, the servicer is often positioned to exploit both the inferior bargaining position of a distressed homeowner and

noteholders, who are often a diverse group of passive investors with little ability to involve themselves in the day-to-day operation of the loan.

Unfortunately, HomEq's opening brief has proved the initial concern by Anderson and the Attorney General's office to be well-founded. HomEq has attached portions of a 600-page pooling and servicing agreement to its briefing showing that the servicer has certain obligations to the noteholder and other participants in the financing and repayment process. Beyond the fact that this document is not properly part of the record before the District Court, HomEq's reliance on the pooling and servicing agreement is misguided. First, as a matter of law, this certification process must focus on the allegations in Anderson's complaint. In the District Court, HomEq specifically rejected the opportunity to delay certification until a factual record was developed through discovery. Second, the mere fact that HomEq also has contractual and other duties to the holder of Anderson's loan does not remove the servicer from the scope of the CSPA. This issue has long been resolved in Ohio: contractual privity is not required.

This review properly concerns the factual allegations set forth in the District Court's certification order. Anderson, HomEq and the Attorney General's Office spent the better part of a year discussing, and sometimes disputing, whether and when certification to this Court would be appropriate. Ultimately, HomEq stipulated that the allegations contained in Anderson's Second Amended Complaint regarding the nature and role of mortgage servicers must form the basis of any certification order. By agreement among the parties, these allegations are incorporated into the District Court's certification order.

As alleged in Anderson's Second Amended Complaint (and stated in the certified order) HomEq, and a mortgage servicer generally, performs some or all of the following functions:

- 1) accepts, applies and distributes mortgage loan payments and other fees, penalties and assessments, and in connection with so doing exercises discretion regarding the fees charged or applied to a particular mortgage loan account (Second Amended Complaint (“SAC”), District Court ECF Doc. No. 35, ¶ 71(a));
- 2) maintains customer service departments and call centers to which Ohio residents with loans being serviced by HomEq are directed to call with questions, concerns about their mortgage loans (SAC ¶ 71(b));
- 3) directs customers who are in default or danger of default to contact it for options concerning loss mitigation or loan modification and further holds itself out as having authority to make substantive decisions regarding which customers, if any, will receive loan modification agreements or loss mitigation assistance (SAC ¶ 71(c));
- 4) handles consumer disputes regarding their mortgage loans (SAC ¶ 71(d));
- 5) negotiates and executes loan modification, forbearance and other agreements directly with customers (SAC ¶ 71(e));
- 6) purchases homeowner’s insurance on behalf of, and at the expense of, consumers who HomEq believes not to have purchased insurance required by the note and mortgage (SAC ¶ 71(f));
- 7) makes customer service related promises on its website to which consumers are directed by the servicer (SAC ¶ 72 n.7); and
- 8) receives payment for its loan administration and other services from the payment stream generated by the consumers’ residential mortgages (SAC ¶ 71(g)).

In large part, these allegations are based upon information published on HomEq’s web page describing its own role as a mortgage servicer.

Within days, two federal district judges certified questions of state law concerning the applicability of the CSPA to mortgage servicers: the instant case (certified on May 26, 2011) and *State ex rel. Dewine v. GMAC Mortgage L.L.C.*, Dkt. No. 2001-890 (certified on May 24, 2011). This Court accepted both cases for review on August 24, 2011, but initially held this case in abeyance pending its resolution of *GMAC*. The companion case was fully briefed and argued when GMAC informed this Court of its bankruptcy on May 23, 2012, which resulted in an automatic stay. On June 20, the stay in this case was lifted and full briefing was ordered.

Although the questions of law certified in the two cases are similar, there is a critical difference. In *GMAC*, the allegations against the mortgage servicer appear to be limited to, or at least focused on, affidavits and other documentation filed in support of a lender's position in foreclosure litigation. That is, Anderson understands plaintiffs in the *GMAC* case to challenge the practice of "robo-signing," or executing documents falsely attesting to having reviewed information that the signer had not. While the authority vested in mortgage servicers during the foreclosure process is significant, litigation against borrowers represents only a small fraction of the extensive interaction between a mortgage servicer and a borrower. In contrast, the instant case deals more broadly with the day-to-day business of mortgage servicers: collecting and applying monthly payments and responding to borrowers' inquiries about their loans.

Although this Court should ultimately answer "yes" to the certified questions in both cases, this litigation flows more directly from the servicing activity that forms the fundamental nexus between borrower and mortgage servicer.

B. Anderson's specific factual allegations: HomeEq misappropriates her mortgage payments and fails to respond to her inquiries regarding what happened.

Because this certification procedure is intended to resolve supposedly purely legal issues, it does not focus on the specific circumstances surrounding Anderson's mortgage loan.

However, some background is useful to illustrate the range of activity that can give rise to a CSPA claim.

Sondra Anderson is an Ohio homeowner who took out a loan to purchase a home in 2005. The note and mortgage clearly set forth an order of priority for application of the borrower's payments. (SAC² at ¶¶ 14-15). In Anderson's case, mortgage payments must be applied in the following order: first toward interest due under the note; second to principal due under the note; and third to specifically defined escrow items. *Id.* Payments may be applied to other purposes only after interest, principal and escrow. (SAC at ¶ 17). Although it never lent Anderson money, HomEq began acting as the "servicer" of Anderson's loan shortly after origination. (SAC at ¶ 13). During the course of Anderson's loan, she dealt almost exclusively with HomEq. As servicer, HomEq collected Anderson's monthly payments and decided how to disburse and apply them, including forwarding the appropriate portion to the holder of her note and mortgage. (SAC at ¶¶ 16-17). Under the terms of those documents, HomEq was required to forward the great majority of these payments to the owner/holder of Anderson's loan.³

Anderson began questioning HomEq's use of her mortgage payments following a period of financial hardship caused by a reduction in income. On her own, and with the assistance of counsel, Anderson repeatedly requested and reviewed information from HomEq regarding the application of her mortgage payments. (SAC at ¶ 19). Among other items, Anderson inquired about payments applied to court costs and attorney fees apparently related to an aborted

² Refers to Anderson's Second Amended Complaint, Second Amended Complaint, Dist. Ct. ECF doc. # 35. This is the current, effective pleading in that case and referenced in the District Court's order certifying a question of law to this Court. Although discovery is underway, the federal case has proceeded slowly during this certification process.

³ At the outset of this litigation, HomEq has variously identified as "Deutsche Bank" and "Morgan Stanley Home Equity Loan Trust 2005-2 Pass Through Certificates, Series 2005-2" as the holder of Anderson's note and mortgage.

foreclosure case filed by HomEq against her. *Id.* Despite these inquiries, HomEq could not or would not account for all of Anderson's payments. (SAC at ¶ 20). Simply put, Anderson never received the same answer from HomEq two times in a row when she asked what happened to her mortgage payments and why certain line items appeared on her monthly statement.

Using a procedure available to borrowers under the Real Estate Settlement Procedures Act ("RESPA"), Anderson formally inquired about how HomEq applied her mortgage payments. (SAC at ¶ 21). See: 12 USC § 2605. Although HomEq provided Anderson with a payment history, the servicer did not provide a substantive response to the majority of her inquiries. (SAC at ¶¶ 22, 62). Further, an audit of HomEq's payment history shows a portion of Anderson's payments were applied to vague categories such as "addl payment" and "other." (SAC at ¶ 23). These applications were improper because her note and mortgage required these funds to be applied first to interest, principal and escrow. That is, HomEq was required to transfer the payments to the holder of Anderson's loan, but wrongfully moved itself to the head of the line.

In addition, HomEq did not account for approximately \$2,500 of Anderson's payments at all. (SAC at ¶ 24). In other words, the payment history provided by HomEq shows that the servicer received \$2,500 more in payments than it applied to any discernible purpose, even after accounting for monies attributed to unauthorized categories such as "addl payment" and "other." These funds appear to be simply missing from Anderson's account.

The District Court declined to dismiss her common-law claims for conversion and unjust enrichment and concluded that Anderson was entitled to proceed with her CSPA claims if this Court answers the certified questions in the affirmative.

III. LAW AND ARGUMENT

The CSPA contains broad definitions of the terms “supplier” to a “consumer transaction.” Despite HomEq’s arguments to the contrary, the broad range of payment collection and servicing activities outlined in the District Court’s certification order fall easily within these definitions. Even more starkly, for borrowers in trouble, servicers such as HomEq regularly make independent decisions regarding the application of payments, the modification of loans and whether to ultimately initiate the foreclosure process. These decisions, which often directly benefit the servicer at the expense of the borrower, unquestionably “effect” a consumer transaction as defined by the Act and sometimes result in the formation of an entirely separate contract. Because none of the narrow statutory exceptions apply, this Court must answer both certified questions in the affirmative.

A. “Mortgage Servicing,” as defined by the District Court’s certification order, falls within the CSPA’s general definitions of “supplier” and “consumer transaction.”

The CSPA embraces a broad range of consumer-oriented activities that fall within the Act’s statutory definition of “supplier” to a “consumer transaction.” The combination of typical activities described in the District Court’s certification order easily fall under this umbrella.

1. Answer to Certified Question No. 2: HomEq is a “supplier” as defined by O.R.C. § 1345.01(C).

HomEq claims that it may never be a “supplier” to a “consumer transaction” as those terms are defined by the statute. That argument has no merit. Both terms are defined broadly by the statute and contain only limited exceptions, none of which apply to a stand-alone mortgage servicer.⁴ Such entities unquestionably participate in the world of consumer transactions.

⁴ At least with respect to this certification procedure, HomEq acknowledges that none of the exceptions addressing banks and other financial institutions defined by R.C. § 5725.01 apply here.

The CSPA defines a "supplier" as a "person engaged in the business of effecting or soliciting consumer transactions, whether or not that person deals directly with the consumer." R.C. § 1345.01(C). Within the plain language of the CSPA a "person" unquestionably includes corporations, and therefore includes HomEq. R.C. § 1345.01(B). The definition of "supplier" is broadly descriptive and does not list every commercial entity that could fall within its scope. Simply because a particular industry is not named in the definition of "supplier" does not mean that it is not covered by the CSPA. To the contrary, an entity is included unless specifically excluded. A mortgage servicer engaged in only some of the activities enumerated in the certification order easily meets the broad definition of a "supplier" contained in the CSPA. A servicer such as HomEq collects the borrower's payments and makes substantive decisions about their application. Many servicers are charged with the responsibility to directly interact with the consumer by responding to her concerns and inquiries about her mortgage loan. In Anderson's case, HomEq took receipt of all her payments on her residential mortgage loan and was responsible for accounting for those payments in accordance with the terms of her note and mortgage. Controlling the funds, including the accounting and the application of the payments, clearly "effects" a consumer transaction. The servicer is the only entity charged by law with responding to a borrower's RESPA requests. Even considered independent from one another, each activity clearly constitutes "effecting...consumer transactions." When considered collectively, there can be no dispute that mortgage servicers "effect" consumer transactions.

HomEq also relies on a hollow distinction between the verbs "effect" and "affect," contending that the latter implies a broader meaning than the former. As an initial matter, the transitive verb "effect" has multiple accepted meanings: "1) to cause to come into being; 2a) to bring about often by surmounting obstacles ***; 2b) to put into operation <the duty of the

legislature is to effect the will of the citizens.>” MERIAM-WEBSTER’S COLLEGIATE DICTIONARY, available at: <http://www.merriam-webster.com/dictionary/effect>. HomEq and other servicers exist specifically to “put into operation” residential mortgage loans by collecting payments, interacting with borrowers and handling the day-to-day operations of these loans. With respect to allegedly delinquent borrowers, servicers “cause to come into being” any number of contractual and other obligations separate and apart from the underlying mortgage loan, such as loan modifications, loss mitigation plans, forbearance agreements and reinstatement agreements. This Court has already held that at least one such agreement, an agreement to reinstate a defaulted loan for consideration, can create a separate contractual obligation, in a separate transaction, from the underlying mortgage loan. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306 at ¶19. Servicers, at their own discretion, often can and do negotiate separate repayment agreements with borrowers in distress. Each such arrangement constitutes a “consumer transaction.”

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

exclude mortgage servicers, it is reasonable to conclude that the legislature did not intend to exclude mortgage servicing.

If the legislature intended to exclude “mortgage servicers” from those entities covered by the CSPA, it could have easily done so. It did not.

2. Answer to Certified Question No. 1: The broad panoply of activities described in the District Court’s certification order constitute “consumer transactions” as defined by R.C. § 1345.01(A).

The statutory definition of “consumer transaction” is similarly broad. A “consumer transaction” is defined as “a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of those things.” R.C. § 1345.01(A). A servicer such as HomEq accepts, applies and distributes a borrower’s payments. Such a company is clearly performing labor for the benefit of the consumer, which constitutes providing “services” as referenced in R.C. § 1345.01(A). In fact, HomEq acknowledges that, on occasion, it “answered a question or resolved a dispute in favor of a borrower, or executed an agreement on that avoided default ***.” HomEq. Br. at p.3. In these instances, HomEq is unquestionably performing a “service” on behalf of the borrower.

As with the definition of “supplier,” the definition of “consumer transaction” does not enumerate those industries, entities, or professions included within its scope, but does contain several specific exemptions. None of these exceptions applies to a stand-alone mortgage servicer—and notably, HomEq does not claim that they do. Among the transactions exempted from the CSPA are those between individuals and their accountants, attorneys, physicians, dentists, veterinarians, public utilities, financial institutions, dealers in intangibles, and insurance companies. See R.C. § 1345.01(A). The only exemptions that could conceivably apply to a

stand-alone mortgage servicer are those for financial institutions and dealers in intangibles. For the purposes of this certification order, HomEq concedes that it is neither a financial institution nor a dealer in intangibles. The District Court explicitly included this concession in its certification order and the issue is not disputed with respect to these certification proceedings.

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

B. HomEq’s relationship with the owner/holder of Anderson’s mortgage is irrelevant to whether the CSPA applies.

Relying largely on provisions of the pooling and servicing agreement between itself and the noteholder, HomEq argues that a mortgage servicer cannot be a “supplier.” Not so. Under the CSPA, it is well established that privity of contract is not required between the supplier and the consumer. As long as the supplier is “effecting” a consumer transaction, the Act applies.

A supplier need not have a contractual relationship with the consumer. See, e.g., *Garner v. Borcharding Buick, Inc.* (1992), 84 Ohio App.3d 61, 64 (“However, we do not interpret the statutes as requiring privity of contract between the consumer and defendant”); *Hinckley Roofing, Inc. v. Motz*, 9th Dist. No. 04CA0055M, 2005-Ohio-2404 at ¶8 (“As the CSPA does not require privity of contract as a prerequisite of damages...”). See also: *Garner v. Borcharding Buick, Inc.*, 84 Ohio App.3d 61, 64 (1992)(the supplier must have some connection to the

consumer transaction at issue, but privity of contract is not required); *Carter v. Taylor*, 4th Dist. No. 99-CA-10, 1999 Ohio App. LEXIS 6607 at *8 (an employee responsible for dealing with a consumer can be a supplier under the CSPA even if he is not a party to any contract); *Haynes v. George Ballas Buick-GMC Truck*, 6th Dist. L-89-198, 1990 Ohio App. LEXIS 5661 at **49-50; *Milner v. Jayco, Inc.*, 6th Dist. No. F-99-1, 1999 Ohio App. LEXIS 3944 at *14.

Nor does the CSPA require that there be a sale or solicitation between the supplier and consumer. See *Estep v. Johnson* (1998), 123 Ohio App.3d 307, 319-20 (finding that a towing company which towed a consumer's car after being hired by the local police department committed a consumer transaction). Moreover, as set forth above, the CSPA should be interpreted liberally in favor of consumers. See *Einhorn*, 48 Ohio St.3d at 29. Here, the Second Amended Complaint and the District Court's certification order detail a broad range of activities involving direct contact with, and authority to make decisions about, the borrower's mortgage loan. HomEq is responsible for responding to consumer disputes and deciding how to apply funds. Anderson has alleged that HomEq fell down on the job with respect to each of these issues. In other contexts, Ohio courts have long held that the pattern of inefficiency, incompetence, delay and deception allegedly displayed by HomEq in this process violates the CSPA. See, e.g.: *Dennie v. Hurst Constr., Inc.*, 9th Dist. No. 06CA009055, 2008-Ohio-6350 at ¶ 12; *Mohme v. Deaton*, 12th Dist. No. CA2005-12-133, 2006-Ohio-7042 at ¶ 19; *Brown v. Lyons*, 43 Ohio Misc. 14 (1972).

HomEq responds by attaching a section of the pooling and servicing agreement between itself and a number of other entities, which fairly describes as a "lengthy and complex commercial agreement[]." HomEq then argues that the "fundamental purpose of mortgage serving *** is to facilitate mortgage loan repayment for the benefit of the noteholders." HomEq

Br. at p. 10. True or false, this statement makes no difference. As set forth above, the scope of the CSPA is established by broad statutory definitions, not a “predominate purpose test” as apparently advocated by HomEq.

Even if such a test mattered, HomEq underrepresents its interaction with borrowers. Like many such agreements, the pooling and servicing agreement in this case contains many obligations, including the right to directly assess fees and charges against the borrower for HomEq’s own benefit. See, by way of example, HomEq Br. at pp. A-29-30 (distinguishing between funds that to be held in Collection Accounts “[o]n behalf of the trustee” and “payments in the nature of late payment charges, NSF fees, reconveyance fees *** and other similar fees and charges *** [that] shall, upon collection, belong to the applicable servicer as additional compensation for its servicing activities.”). As set forth in Anderson’s complaint and the District Court’s certification order, HomEq exercises considerable discretion with respect to fees charged on a mortgage loan account. In large part, Anderson’s claims arise from precisely these areas. With respect to a the assessment and collection of late fees, these funds are never forwarded to the noteholder. In a significant part of the misconduct giving rise to this case, HomEq acted for its own benefit.

More importantly the relationship between HomEq and the noteholder is simply not relevant to this case or the certified questions. While the servicer may have initially become involved with Anderson’s loan as part of a complex financial transaction memorialized by a 600-page pooling and servicing agreement, it allegedly violated the CSPA when it misappropriated an individual Ohio homeowner’s monthly mortgage payments and then was unable or unwilling to account for the funds. In this sense, HomEq’s reliance on its duties to the noteholder is clearly misplaced. Almost any commercial entity could escape CSPA liability on a similar basis. For

example, merely by attaching its franchise agreement with General Motors to its brief, an auto dealer could escape the CSPA by claiming that its “primary purpose” is to sell cars “on behalf of GM.” Such an argument would be laughed out of court. Liability under CSPA is not dependent on a particular entity’s position in the stream of commerce, but attaches to the entity committing the “unfair,” “deceptive,” or “unconscionable” trade practices, as long as the defendant meets the broad statutory definitions of “supplier” to a “consumer transaction” enacted by the legislature. This Court should reject HomeEq’s invitation to inquire beyond these broad statutory definitions into whether a particular defendant’s self defined role in the industry prioritizes more on consumers versus other commercial entities. The CSPA protects consumers from deceptive acts conducted by all suppliers, not just suppliers who proclaim a preference for meeting its obligations to the consumer.

Ohio state and federal courts have long held that a close cousin of a mortgage servicer, a third-party debt collector, is a “supplier” and collection activities constitute “consumer transaction” under the Act, even if the underlying transaction is not.

A bank customer has other adequate remedies if a bank should engage in deceptive or unfair conduct in making a loan or issuing a credit card. But if the financial institution sells a past due or defaulted debt at a deep discount to an unrelated party, whose only business is debt collection, the sound policy for the financial institution exemption evaporates.

Midland Funding LLC v. Brent, 644 F.Supp.2d 961, 976 (N.D. Ohio 2009), quoting *Lee v.*

Javitch, Block & Rathbone, LLP, 484 F.Supp.2d 816, 821 (S.D. Ohio 2007).⁵ Entities such as HomeEq present essentially the same situation. A mortgage servicer often enters the scene after

⁵ See also: *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 891-892 (1997), citing *Celebrezee v. United Research, Inc.*, 19 Ohio App.3d 49 (1984); *Gionis v. Javitch, Block & Rathbone, LLP*, 238 Fed.Appx. 24, 25-26 (6th Cir. 2007); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F.Supp.2d 961, 976 (S.D. Ohio 2005); *Smith v. A.B. Branded Locksmith, Inc.*, 143 Ohio Ap..3d 321, 331 (2001); *Schroyer v. Frankel*, 197 F.3d 1170, 1177 (6th Cir. 1999).

the fact and without the consumer's specific knowledge or consent. Contrary to the picture painted by HomEq, a servicer is not merely a neutral intermediary between homeowner and noteholder. Instead, the servicer often acts on its own behalf, with its own profit motive when assessing and applying the borrower's payments.

In short, the CSPA is an intentionally broad remedial statute with limited, specific exemptions—none of which apply to a stand-alone mortgage servicer. Accordingly, such an entity is bound by the CSPA.

C. HomEq ignores the growing Ohio authority that the CSPA applies to mortgage servicers in favor unpersuasive cases addressing other statutes.

The clear majority of Ohio trial courts to address the issue have concluded that the CSPA can reach mortgage servicers. Nearly six years ago, the U.S. District Court for the Southern District of Ohio held that mortgage servicers are not generally exempt from the Act. *Dowling v. Litton Loan Servicing, L.P.*, 2006 U.S. Dist. LEXIS 87098 at **42-44 (S.D. Ohio, Marbley, J.) (“If the legislature intended to exempt all loan servicing agents from coverage under the CSPA, it would have done so. This Court will not extend the CSPA’s exemption beyond its clear and unambiguous meaning. For that reason, the Court finds that the CSPA applies to Defendant in this case”).

In the intervening years, Ohio trial courts have nearly universally held that mortgage servicing generally falls within the scope of the CSPA. *Kline v. Mortgage Electronic Systems, Inc.*, 2011 U.S. Dist. LEXIS 60733 at *12 (S.D. Ohio, Rice, J.); *State v. Barclays Capital Real Estate, Inc.*, Montgomery County Common Pleas Docket No. 2009CV10136 (Sept. 16, 2010, O’Connell, J.), relying on *Dowling*; *Jent v. BAC Home Loans Servicing, LLC*, 2011 U.S. Dist. LEXIS 79652 at *9 (S.D. Ohio, Spiegel, J.); *Munger v. Deutsche Bank*, 2011 U.S. Dist. LEXIS 77790 at *24 (N.D. Ohio, Gwin, J.).

Although this Court has accepted certification on the basis that Ohio law is either unclear or underdeveloped on the subject, there is a growing consensus in the state's trial courts that the Act applies to mortgage servicers. In its brief, HomEq does not identify a single Ohio court to agree with its position. In fact, each court to address the issue has either concluded that CSPA applies to stand-alone mortgage servicers such as HomEq or has determined that the law was not sufficiently developed and certification to this Court is appropriate.

HomEq also fails to account for the Attorney General's position that the CSPA reaches mortgage servicers. The Attorney General is the state official specifically charged with enforcing the CSPA and defining unfair, deceptive and unconscionable conduct under the Act. R.C. §§ 1345.04 - 1345.08. "Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Ohio Consumers' Counsel v. PUC*, 111 Ohio St. 3d 384, 2006-Ohio-5853 at ¶ 41, quoting *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15, 17-18 (2000). Notably, two successive Attorneys General from diverse political parties have rejected the interpretation advocated by HomEq.

Instead, HomEq relies upon sparse caselaw from other jurisdictions holding that consumer protection statutes enacted in those states did not reach mortgage servicers. See HomEq Br. at pp. 10-12. Because these cases address different statutes, they are of little persuasive value. For example, the Minnesota Consumer Fraud Act prohibits deceptive conduct in connection with "the sale of any merchandise." Minn. Stat. § 325F.69.⁶ It is not surprising, therefore, that Minnesota courts have held that mortgage servicing falls outside of the scope of

⁶ Pursuant to Minn. Stat. § 325F.68, "merchandise" includes services. However, the plain language of that state's enactment requires a "sale," which is a significant distinction from Ohio's statute which reaches a far broader range of conduct. R.C. § 1345.01(A).

that state's consumer protection statute. *Rossbach v. FBS Mort. Corp.*, 1998 Minn.App. LEXIS 374 at **3-4.

D. The CSPA applies to the “services” portion of a mixed real estate transaction, including those provided by HomEq.

HomEq next attempts to avoid the CSPA by asserting that “mortgage serving,” as the servicer itself defines the term, constitutes a “pure” real estate transaction. To the contrary, this Court has long held that the CSPA is applicable to the “personal property or services portion of a mixed transaction involving both the transfer of personal property or services.” *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, 195 (1989). This is “true even though a major portion of the instant transaction is the sale of real estate.” *Id.*

The CSPA applies to any portion of the transaction that involves the provision of services. *DeLutis v. Ashworth Home Builders, Inc.*, 9th Dist. No. 2302, 2009-Ohio-1052 at ¶ 13. Thus, this Court must determine whether HomEq's servicing activities as alleged in Anderson's complaint “in and of themselves constitute a consumer transaction.” *Brown*, 45 Ohio St.3d at 195. The Court must evaluate whether the missapplication of payments and repeated failure to answer borrower inquiries or account for funds are “part and parcel” of the underlying real estate transaction as suggested by HomEq. Notably, the conduct challenged here occurred years after Anderson purchased her home. Beyond arising from a loan on the same property, the allegations of servicing abuse have little to do with the underlying purchase.

Ohio courts have long carefully circumscribed the underlying real estate transaction from separate services provided in conjunction with the purchase. For example, the CSPA reaches real estate title companies that commit unfair or unconscionable practices during the perpetration of closing documents or the closing process. *Prop. Asset Mgmt. v. Shaffer*, 3d Dist. No. 14-08-06, 2008-Ohio-4645 at ¶ 11; *ABN AMRO Mortgage Group, Inc. v. Arnold*, 2d Dist. No. 20530,

2005-Ohio-925 at ¶ 33. In an earlier stage of proceedings relied upon by HomEq, U.S. District Judge Graham held that a complaint against a title agency “specif[ing] that irregularities in the provision of appraisal, title, closing, and other services existed[,] among other things” would fall within the scope of the CSPA. *Milner v. Biggs*, 2011 U.S. Dist. LEXIS 61173 at *17 (S.D. Ohio), citing *Prop. Asset Mgmt.*, 2008-Ohio-4645 at ¶ 6. In the *Milner* case, Judge Graham dismissed the CSPA claim against the title company based on insufficient factual allegations, which hardly constitutes a weighty precedent regarding the questions certified here.

HomEq’s reliance on Judge Graham’s later conclusion that services provided by the residential realtors during the actual purchase of their home were “collateral” to the purchase is misplaced. See HomEq Br. at p. 7, citing *Milner v. Biggs*, 2012 U.S. Dist. LEXIS 48824 at **32-34 (S.D. Ohio). The *Milner* case addressed misconduct occurring closely in time and circumstance to the actual transfer of real estate. This proximity is also apparent in the another Ohio case strongly relied upon by HomEq, *U.S. Bank v. Amir*, 8th Dist. No. 97438, 2012-Ohio-2772. Again, the alleged misconduct in *Amir* occurred at the time of the underlying real estate purchase and the defendants were all at least arguably acting as agents of one of the parties to the transaction. Even accepting that these cases are correctly decided, the instant case concerns misconduct far removed from the time and purpose of Anderson’s purchase of a home.

HomEq neglects to mention that at least one Ohio court specifically rejected its argument regarding a “pure real estate” transaction. *Jent*, 2011 U.S. Dist. LEXIS 79652 at *10 (S.D. Ohio). Instead, mortgage servicing “involve[s] a provision of servicing and payment collection services, to which the OSCPA applies.” *Id.*

One of the primary policy reasons for the “real estate” exception to the CSPA, the doctrine of *caveat emptor*, also points strongly toward viewing the type of post-origination

servicing undertaken by HomEq as distinct from a real estate transaction. Ohio courts have repeatedly held that the CSPA applies to the “construction” part of a common transaction in which developer simultaneously both sells real estate and contracts to construct a home. *Frazier v. Rogers Builders*, 8th Dist. No. 91987, 2010-Ohio-3058 at ¶ 43; *Keiber v. Spicer Constr. Co.*, 85 Ohio App.3d 391, 392 (1993). Courts cite the opportunity to inspect the property as one of the underlying reasons for the distinction between the sale of an existing home and the purchase of new construction:

buyers of existing homes have the opportunity to inspect their purchases and evaluate the quality and extent of construction services and goods provided, whereas buyers of construction services have nothing to inspect at the time of the purchase and occupy the same position as homeowners buying construction goods and services, who are protected by the [CSPA]

DeLutis, 2009-Ohio-1052 at ¶ 8, quoting *Keiber*, 85 Ohio App.3d at 392. Anderson’s relationship with HomEq in this case is nearly identical. She did not have an opportunity to select HomEq as a servicer or to shop for a more competent vendor. HomEq was simply assigned to Anderson and began mishandling her loan.

Moreover, as this Court has already held, at least one contractual agreement commonly arrived at between a servicer and a homeowner, an agreement to reinstate a loan allegedly in default, is separate and apart from the underlying purchase transaction. *Wilborn*, 2009-Ohio-306. The longstanding “American Rule” on attorney’s fees prevents a lender from including a fee-shifting provision in the original loan documents, however public policy does not prohibit the same fee-shifting provision in a reinstatement agreement after the loan is in default. *Id.* at ¶ 19. That is, one type of agreement commonly executed by servicers falls outside of the traditional common-law protections afforded homeowners. If a reinstatement agreement falls outside of the

common-law protections normally attaching to the underlying note and mortgage, it necessarily follows that such an agreement cannot be “part and parcel” of the same transaction.

E. The Court cannot turn to the legislative history proposed by HomEq when the statutory language is clear.

HomEq relies on unsuccessful proposals to modify the CSPA to impose specific additional requirements on mortgage servicers as evidence that the current version of the act does not apply to it. Legislative history is irrelevant where the statutory language is clear, as it is here. *State v. Maxwell*, 95 Ohio St. 3d 254, 2002-Ohio-2121 at ¶10 (“We first consider the words of the statute to determine legislative intent... In determining legislative intent, our duty is to give effect to the words used, not to delete words used or insert words not used.”) (Internal citations omitted). HomEq’s “legislative history” arguments do not withstand scrutiny.

In the District Court, HomEq pointed to House Bill 3, a proposed amendment to the CSPA considered, but not enacted by the General Assembly in 2009. H.B. 3 was a broad, seventy page, bill that addresses a number of areas related to the foreclosure crisis. Part of the bill would create a regulatory scheme for mortgage servicers, which would be overseen primarily by the Department of Commerce. H.B. 3 § 1323 *et seq.* Another section of the bill states that servicers shall not commit any act that is unfair, deceptive, or unconscionable under the CSPA, and declares that several regulatory violations should be considered unfair and deceptive under the CSPA. H.B. 3 § 1323.361. Nothing in this proposed and unenacted section implies that servicers were previously exempt from the general definitions under the CSPA, but simply proposed a number of specific additional provisions applicable only to mortgage servicers.

HomEq also relies on two additional proposals more recently introduced in the legislature as additional evidence that the current CSPA does not reach mortgage servicers: House Bill 187 and Senate Bill 14. Both bills were proposed in the current, 129th General Assembly. Again,

neither of these proposals contains any statement or other indication that the current CSPA does not reach servicers. Moreover, these bills were introduced at time after mortgage servicers such as HomEq were vigorously contesting the Act's applicability to themselves.⁷ These two bills could easily represent the reaction of certain legislators to the persistent, but erroneous, attempts by servicers to escape liability under the Act. In the end, there is no way to divine legislative intent from anything short of a legislative enactment.

HomEq's "legislative history" argument rests upon its assertion that provisions in a proposed, but not enacted, bill are meritorious points in favor of its position. HomEq argues that the provisions contained in proposed H.B. 3, at one time introduced to the General Assembly, demonstrates the CSPA does not currently cover mortgage servicing. H.B. 3 is not a statement of the law or of precedent, but a factual statement of legislation formerly pending before the legislature. As such, it has absolutely no bearing on whether the current version of the CSPA applies to mortgage servicers. Moreover, the legislature's consideration of H.B. 3 cannot be used to determine the intent of the legislature as it is merely one among numerous proposed bills introduced but never enacted. This Court should not try to divine the legislature's intent when it has not yet acted. See, e.g. *Porter v. Saez*, 10 Dist. No 03AP1026, 2004-Ohio-2498 at ¶66 ("[S]ilence is rarely, if ever, an effective barometer of legislative intent"). Taken to its logical end, if this Court rules that bills introduced in the legislature, but not passed, can be utilized and considered in statutory interpretation, any number of legislators may start introducing bills with the sole goal of impacting future court decisions without actually enacting the law.⁸ The Ohio

⁷ The District Court in this case first proposed certifying questions to this Court on June 18, 2010.

⁸ If the Court does view H.B. 3's passage by the House as evidence that the House believes that the CSPA does not cover mortgage servicing, the Senate's failure to pass the bill could just as easily be seen as evidence that the Senate believes servicing is already covered. Moreover, the

legislature is a deliberative body that speaks through the laws it enacts. HomEq's construction of a bill once introduced, but not enacted, is simply not persuasive in light of the plain language of the CSPA.

HomEq's reliance on statements made by sponsors of proposed bills is even more tenuous. As an initial matter, even the statements quoted by HomEq indicate a prospective desire to ensure that the CSPA reached servicers and impose certain additional requirements, not statements that the current Act does not already apply. More importantly, the proposition that legislative intent with respect to the current version of the CSPA "can be ascertained on the basis of a statement by a single legislator speaking to a different statute" has long been viewed as "dubious" one. *EEOC v. New York*, 907 F.2d 316, 322 (2d Cir. 1990), citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, (1989) (Scalia, J., concurring).

The mere proposal of legislation cannot be reasonably interpreted as shedding light on the plain meaning of the CSPA, which never exempted mortgage servicers.

F. The availability of other remedies, however inadequate, does not impact the scope of the CSPA.

Finally, HomEq presents this Court with a laundry list of other state and federal that supposedly adequately regulate mortgage servicers. Thus, HomEq argues, the CSPA need not apply.

As a practical matter, HomEq ignores the scope of the problem of servicer abuse caused by the recent foreclosure crisis. As *Amicus Curiae Ohio Legal Services Programs et al.* make clear, there is significant variance in quality between individual servicers. Some servicers are far more effective at responding to their customers than others. Nonetheless, the problem of legislature's continued decision not to actually enact H.B. 3 or some equivalent could easily be viewed as a resounding belief that the CSPA already reaches servicers.

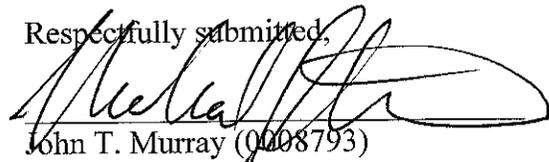
unresponsive or ineffective residential mortgage servicers remains a serious problem in this state. The other statutes and regulatory schemes identified by HomEq are not, by themselves, effective tools for addressing the problem.

As a matter of law, HomEq's reliance on the availability of other remedies is simply not relevant. The CSPA has not ever been the exclusive remedy available in any particular situation. See *Whitaker*, 2006-Ohio-5481 at ¶ 7 (CSPA combined with breach of contract, conversion, and fraud); *Reagans v. Mountainhigh Coachworks, Inc.*, 117 Ohio St. 3d 22, 2008-Ohio-271 at ¶ 1 (CSPA, breach of warranty "among other claims). As explained in Section A2, above, Ohio courts have consistently held that the CSPA provides an additional remedy against third party debt collectors, despite the fact that these entities are also closely regulated by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* See: *Brent*, 644 F.Supp.2d at 976 (N.D. Ohio). In fact, the General Assembly has explicitly provided an additional remedy under the CSPA for making false or misleading disclosures in connection with a residential mortgage, as defined by federal law. R.C. § 1345.02(F). If nothing else, the General Assembly clearly intended the CSPA to provide an additional remedy with respect to actors in the mortgage industry that violate federal law.

IV. CONCLUSION

For all of the reasons set forth above, Respondent respectfully urges this Court to answer both certified questions in the affirmative. Stand-alone mortgage servicers such as HomEq are "suppliers" to "consumer transactions" as those terms are broadly defined by the Act. None of the narrowly defined exceptions apply.

Respectfully submitted,



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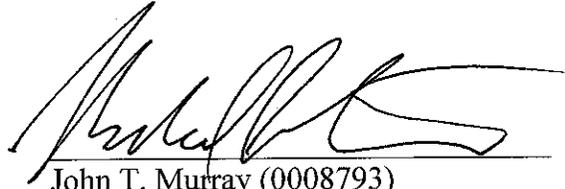
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