ORIGINAL

IN THE SUPREME COURT OF OHIO

SONDRA ANDERSON,	)	Case No. 2011-0908
Plaintiff-Respondent,	)	
v.	)	On Review of Certified Questions of State Law from the United States District Court for the Northern District of Ohio, Western Division
BARCLAYS CAPITAL REAL ESTATE, D.B.A. HOMEQ SERVICING,	)	
Defendant-Petitioner.	)	U.S. Dist. Case No. 3:09-cv-2335

BRIEF OF AMICI CURIAE OHIO LEGAL SERVICES PROGRAMS, COALITION ON HOMELESSNESS AND HOUSING IN OHIO, TOLEDO FAIR HOUSING CENTER, MIAMI VALLEY FAIR HOUSING CENTER, AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT SONDRA ANDERSON

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INTEREST OF THE AMICI CURIAE

All of Ohio's civil legal services programs,[1] the Coalition on Homelessness and Housing in Ohio, the Toledo Fair Housing Center, the Miami Valley Fair Housing Center, and the National Consumer Law Center join in submitting this brief supporting the Respondent Sondra Anderson's position that the Ohio Consumer Sales Practices Act applies to mortgage servicers. Amici have been on the forefront of the foreclosure crisis, coordinating litigation and non-litigation efforts to help Ohio's low- and moderate-income citizens retain home ownership, or working nationwide to shape the national dialog and promote consumer protections for consumers and homeowners. The Ohio civil legal services programs are partners in Save the Dream Ohio, the statewide foreclosure intervention initiative, which is a partnership of state,

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[1] Advocates for Basic Legal Equality (ABLE) and Legal Aid of Western Ohio are nonprofit civil legal service providers with the mission of providing high quality legal assistance to low-income persons in thirty-two counties in northwest and west central Ohio.

The Legal Aid Society of Cleveland is the law firm for low-income families in northeast Ohio. Its mission is to secure justice and resolve fundamental problems for those who are low-income and vulnerable by providing high quality legal services and working for systemic solutions that empower those it serves.

The Legal Aid Society of Columbus is similarly committed to assisting low-income persons and seniors with legal problems in a variety of cases, including housing, consumer, public benefits, domestic relations, as well as basic life necessities, in a six-county area of central Ohio.

Community Legal Aid Services, Inc. serves eight counties in northeast Ohio. Its mission is to protect the rights of the poor and better their condition. CLAS represents the low-income in a variety of cases, including consumer and housing issues.

The Legal Aid Society of Southwest Ohio, LLC, an affiliate of the Legal Aid Society of Greater Cincinnati, provides a broad range of civil legal services to low-income persons in southwest Ohio.

Southeastern Ohio Legal Services is an LSC-funded legal services program whose mission is to act as general counsel to a client community residing throughout thirty rural counties in southeast Ohio and, as such, provide the highest quality of legal services to its clients toward the objective of enabling poor people to assert their rights and interests.

Pro Seniors is a nonprofit civil legal service provider with the mission of providing legal assistance to seniors in southwest Ohio, as well as legal advice to any senior statewide.

The Ohio Poverty Law Center, a nonprofit limited liability corporation, provides assistance and consulting to the Ohio legal services community through project management, policy advocacy, litigation support, training, specialty assistance and consulting, task forces, publications and other activities.

local, and public interest resources. Since they became Save the Dream partners in 2008, the legal services programs have provided direct representation to over 16,500 homeowners in every county in Ohio at all levels of services. They and their volunteer attorney partners have participated in over 1,850 court-supervised foreclosure mediations.

In addition to direct representation, legal aid lawyers have participated in multiple borrower outreach events co-sponsored by the U.S. Treasury and the ten largest home loan servicers, including JPMorgan Chase Bank, N.A., and Bank of America, N.A. They have worked closely with local common pleas courts statewide to implement foreclosure mediation, and worked with those same courts to develop local rules and policies regarding mortgage foreclosures. They have worked closely with the Ohio Attorney General's Consumer Protection Section to uncover mortgage servicing abuses and the use of fraudulent affidavits in foreclosure filings.

The Coalition on Homelessness and Housing in Ohio (COHHIO) has a comprehensive approach to housing those most in need. Understanding that stable housing is the basis for opportunity, COHHIO supports a range of housing assistance services in Ohio, including homeless prevention, emergency shelters, transitional housing and permanent affordable housing with linkages to supportive services as needed. COHHIO strives for permanent, systemic change to increase the availability of affordable and supportive housing environments; and responds quickly to legislation that threatens our state's vulnerable and disenfranchised populations, including consumer and voter protection and foreclosure reform. In addition, COHHIO facilitates productive working relationships between nonprofit homeowner counselors and the Ohio Housing Finance Agency's "$570 million Restoring Stability Initiative," resulting in more streamlined foreclosure prevention efforts for thousands of homeowners across the state.

The Toledo Fair Housing Center is a nonprofit public interest fair housing agency formed under the laws of the State of Ohio. They work to eliminate housing discrimination in the State of Ohio and to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. They also work with homeowners in their area that are at risk of foreclosure. In this role they frequently are in contact with lenders and servicers on behalf of their clients.

The Miami Valley Fair Housing Center (MVFHC) is a nonprofit fair housing organization with a mission to eliminate housing discrimination and to ensure equal housing opportunity for all people in its region. As part of this, MVFHC's Predatory Lending Solutions project educates the legal community about foreclosure prevention and defenses and provides resources and legal representation to homeowners facing foreclosure to ensure civil rights enforcement and to combat the history of discrimination in its region.

The National Consumer Law Center, Inc. (NCLC) is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues, including mortgage related subjects, and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 40 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers and homeowners. Within the past several years, NCLC has filed extensive comments to federal bank regulators on mortgage and servicing regulations. NCLC frequently has been granted leave to appear as amicus curiae in consumer law cases by courts around the country.

NCLC's twenty-five attorneys write and edit an eighteen-volume Consumer Credit and Sales Legal Practice Series, including one on "Unfair and Deceptive Acts and Practices" (7th ed. 2008 and 2012 Supp.). These treatises are relied on by consumer law practitioners throughout the United States, and have cited by courts, including the U.S. Supreme Court. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 1618 n. 12 (U.S.2010) (FDCPA treatise).

Consequently, the amici are well situated to provide the Court with information about the interaction between homeowners and loan servicers, and the role of servicers in the loan modification, loss mitigation, and foreclosure processes.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the Statement of the Case and the Factual and Procedural Background as set forth in Respondent's brief.

ARGUMENT

I. Introduction

This case comes before the Court from the United States District Court for the Northern District of Ohio, Western Division, on two certified questions of state law. Those questions are, briefly, whether servicing a residential mortgage loan constitutes a consumer transaction, and whether the entities that service residential mortgage loans are suppliers, both as defined by the Ohio Consumer Sales Practices Act, R.C. 1345.01(A) and (C).

Based on the plain language of the Ohio Consumer Sales Practices Act, the structure and function of the mortgage servicing industry, evidence of the multiple interactions between homeowners and mortgage servicers, statements from the industry itself, including the facts from the Second Amended Complaint to which Relator Barclay's Capital Real Estate Inc., d.b.a. HomEq Servicing, stipulated in the Certification Order, the answers this Court should arrive at are "Yes."

The damage to Ohio families and communities from mortgage servicers failing to perform residential mortgage servicing functions properly and competently, and the lack of adequate consumer protections and remedies under the current federal regulatory scheme, should further persuade this Court to confirm that Ohio consumers are protected from abusive servicers and servicing practices by the Consumer Sales Practices Act.

II. The effect of the foreclosure crisis on Ohio communities and families.

Mortgage servicers play a vital role within the broader mortgage lending market by undertaking the day-to-day management of mortgage loans on behalf of lenders or investors. Given the nature of servicer activities, they can have a direct and profound impact on borrowers. The failure of mortgage servicers to competently maintain homeowner accounts and engage homeowners in meaningful loss mitigation and loan modification activities—all crucial to meeting mortgage obligations and maintaining homeownership—is evidenced by the continuing high rates of new foreclosure filings.

Although new foreclosure filings in Ohio dropped from the record high of more than 89,000 in 2009 to 71,556 in 2011, RealtyTrac reported that new foreclosure filings in the first half of 2012 were up 8.6 percent from the same period a year ago, meaning one in every 106 housing units in Ohio had a foreclosure filed. Rick Rouan, "Foreclosures in Central Ohio, state soar in first half," Business First (July 12, 2012) http://www.bizjournals.com/columbus/news/2012/07/12/foreclosures-in-central-ohio-soar-in.html (accessed Sept. 20, 2012). For example, the City of Akron ranked thirteenth among the nation's cities with populations of 200,000 or higher, with a 66 percent increase in foreclosure rates from July 2011. RealtyTrac, "July 2012 U.S. Foreclosure Market Report" (Aug. 9, 2012), http://www.realtytrac.com/content/foreclosure-market-report/july-2012-us-foreclosure-market-report-7332 (accessed Sept. 20, 2012).

Additionally, other indictors related to housing foreclosures and mortgage delinquencies in Ohio remain grim. More than 520,000 Ohio mortgages are underwater, with debt exceeding current value, at an average per home of more than $30,000. Policy Matters Ohio, "Home Insecurity: Foreclosure Growth in Ohio 2012" (Apr. 3, 2012) 6, http://www.policymattersohio.org/wp-content/uploads/2012/04/Foreclosure_April20121.pdf (accessed Sept. 20, 2012). In 2011, 8.42 percent of all Ohio mortgages were either actively engaged in foreclosure or past due in their payments by at least 90 days. Id. at 5.

A. The foreclosure crisis has devastated Ohio communities.

Studies have shown that a single foreclosure on a home lowered the value of other nearby homes by an average of 0.9%. Center for Responsible Lending, "Subprime Spillover: Foreclosures Cost Neighbors $223 Billion; 44.5 Million Homes Lose $5,000 on Average" (Nov. 13, 2007) 5, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/subprime-spillover111307.pdf (accessed Sept. 26, 2012). Furthermore, each additional foreclosure in a neighborhood lowers nearby home values by an additional 0.9%. Id. In short, foreclosures increase housing supply—which depresses housing values—and erode property tax bases, which results in higher taxes or decreased services. Adam J. Levitin and Tara Twomey, "Mortgage Servicing," 28 Yale J. on Reg. 5, 6 (2011).

The damage on Ohio's communities is unprecedented. In Cleveland, an estimated 15,000 of the 84,000 single-family houses are vacant and deteriorating. Christopher L. Peterson, "Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System," 78 U.Cin.L.Rev. 1359, 1360 (2010). Cumulative foreclosures translated into an estimated loss of $2.8 billion in Ohio home values in 2008–2009. Center for Responsible Lending, "Updated Projections of Subprime Foreclosures in the United States and Their Impact in Home Values and Communities" (August 2008) 2, http://www.responsiblelending.org/mortgage-lending/research-analysis/updated-foreclosure-and-spillover-brief-8-18.pdf (accessed Sept. 20, 2012).

Foreclosures have also strained budgets of local governments around the country. A 2010 survey of mayors found that 63 percent of cities experienced an increase in the number of vacant and abandoned properties due to mortgage foreclosures. The United States Conference of Mayors, "Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities: A 77-City Survey" (June 2010) page 3, www.usmayors.org/publications/2010%20VAP%20Report.pdf (accessed Sept. 20, 2012). Violent crime is three times more likely in areas with high foreclosure rate. G. Thomas Kinsley, Robin Smith, and David Price, "The Impact of Foreclosures on Families and Communities," The Urban Institute (May 2009) 18, http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf (accessed Sept. 20, 2012).

Estimates put the cost of each foreclosure to a municipality at $20,000. Id. at 21. A study of eight Ohio cities identified nearly $64 million in costs to local jurisdictions related to vacant and abandoned properties. Community Research Partners and Rebuild Ohio, "$60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities" (Feb. 2008) v, http://greaterohio.org/files/policy-research/FullReport_Nonembargoed.pdf (accessed Sept. 20, 2012). This included nearly $15 million in city service costs such as code enforcement, boarding, demolition, maintenance, and police and fire services, and over $49 million in lost tax revenues from demolitions and tax delinquencies. Id. School districts are facing the greatest impact of tax loss since school districts receive about two-thirds of real property tax revenue. Id.

B. The impact of the foreclosure crisis on families and children.

Families displaced by foreclosure suffer not only from housing instability, but also financial insecurity and economic hardship, personal and family stress, disrupted relationships, and ill health. G. Thomas Kingsley, Robin Smith, and David Price, "The Impact of Foreclosures on Families and Communities," The Urban Institute (May 2009) 3, http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf (accessed Sept. 20, 2012).

A recent study from the University of Pennsylvania found that nearly 60 percent of homeowners who were delinquent on their mortgage payment had skipped or delayed a meal because they could not afford food, and nearly half could not fill a prescription in the previous year because of the expense. Craig Evan Pollack and Julia Lynch, "Health Status of People Undergoing Foreclosure in the Philadelphia Region," American Journal of Public Health, Vol. 99, No. 10 (1999), 1835, 1836, http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2009.161380 (accessed Sept. 20, 2012). The study found that people undergoing foreclosure had "significantly higher" rates of hypertension and heart disease than others in the community, even when adjusting for demographic and financial factors. Id. at 1835.

These significant foreclosure-related problems extend to children. A report from Case Western University found that children displaced by foreclosures have long-term lower academic achievement, slower growth, and increased mental health issues. Claudia Coulton, "Understanding the Impact of Foreclosures on Children, Families and Neighborhoods in Cuyahoga County," Case Western University's Schubert Center for Child Studies, Policy Brief 17, Oct. 2009, http://schubertcenter.case.edu/en-US/SYN/9426/Templates/DocumentDownloadTemplate.aspx (accessed Sept. 20, 2012). One-third of children who experience homelessness do so specifically because of a foreclosure. National Association for the Education of Homeless Children and Youth (NAEHCY) and First Focus, "A Critical Moment: Child and Youth Homelessness in Our Nation's Schools," (July 2010) 2, http://www.firstfocus.net/—sites/default/files/HomelessEd_0.pdf (accessed Sept. 20, 2012). Additional studies by First Focus estimate that 176,000 Ohio children have been affected by foreclosure of loans originated between 2004 and 2008. Julia B. Issacs, "The Ongoing Impact of Foreclosures on Children," First Focus (Apr. 2012) 5, http://www.firstfocus.net/library/reports/the-ongoing-impact-of-foreclosures-on-children (accessed Sept. 20, 2012). Because foreclosures are often highly concentrated in certain neighborhoods, children living in or near foreclosed homes may suffer the consequences of living in neighborhoods with more vacant houses, higher crime rates, lower social cohesion, and a lower tax base. Id.

In the midst of the above statistics, this Court should not lose sight of the fact that foreclosures happen to one family and one household at a time. The first priorities of this Court should be to preserve the integrity of the lending and servicing system and to guarantee that borrowers have effective and meaningful recourse against abusive practices. As explained in Section V, the protections of the CSPA play a critical role in the balancing of interests and power between mortgage servicers and the homeowner consumers they serve.

III. The servicing of a borrower's residential mortgage loan is a consumer transaction.

The Consumer Sales Practices Act prohibits unfair, deceptive, and unconscionable acts by a supplier in connection with a consumer transaction. R.C. 1345.02; R.C. 1345.03. Since the Act is a remedial law designed to compensate for traditional and inadequate consumer remedies, it must be construed to promote its object and assist the protected parties in obtaining justice. *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990); R.C. 1.11.

At issue in this case is whether the transaction between Sondra Anderson and her servicer is a service, to an individual as defined by R.C. 1345.01(A). HomEq argues that servicing activities are merely an extension of a pure real estate transaction and, therefore, exempt from the Act. Merit Brief of Petitioner at 6–9. This argument does not accurately reflect the functions of mortgage servicers, the realities of the mortgage lending marketplace, and the close interactions between homeowners and their mortgage servicers. Since Ms. Anderson fully addressed the legal arguments concerning this and the other certified questions, the intention of this brief is to supplement Ms. Anderson's arguments with information about the way mortgage servicing functions from the perspective of those who know servicers the best: homeowners, housing counselors, and the attorneys who defend homeowners from foreclosure.

A. The servicers are the sole point of contact for communications and interactions with borrowers.

HomEq takes the position that its contacts with homeowners are merely incidental to the contract obligations it undertakes for the benefit of mortgage lenders or other entities that hold or own residential mortgages. Merit Brief of Petitioner at 8, 13. HomeEq's arguments do not accurately reflect the realities of mortgage servicing, the fee structures that incentivize foreclosure rather than modification, and the multiplicity of interactions between the servicer and the homeowner.

As its name implies, a servicer provides services to homeowners to the benefit of the homeowner. The servicer stands in for the beneficial owner of a mortgage loan "in virtually all dealings with homeowners." Diane Thompson, "Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications," 86 Wash.L.Rev. 755, 765 (2011). In more than half of all mortgage loans, the servicer is not affiliated with the originating lender. Id. Since servicing rights are often transferred several times during the course of a standard thirty-year mortgage, the homeowner has no idea what company will service a loan when obtaining that loan. Adam J. Levitin and Tara Twomey, "Mortgage Servicing," 28 Yale J. on Reg. 1, 55 (2011).

Servicers are in two lines of business: processing monthly payments and handling defaulted loans. Id. at 25–26. It is these two lines of business that are important to understanding that servicing is a consumer transaction. In good times, most of what a servicer does is routine and automated. Thompson, 86 Wash.L.Rev. at 765, 767. For example, the servicer accepts and processes monthly mortgage payments, and pays property taxes and homeowner's insurance from the client's escrow account. Id.; Levitin, 28 Yale J. on Reg. at 23. This work "involves little discretion, expertise, or manpower," Id. at 25, but the homeowner benefits from these services.

When a homeowner becomes delinquent with his or her mortgage payments, the servicer's work becomes less automated and the servicer begins exercising its discretion in a number of areas. Id. Among other decisions, the servicer decides whether the loan should be modified and on what terms, and what real estate broker to hire if the property goes through the foreclosure process. Id. at 28; Thompson, 86 Wash.L.Rev. at 765. The servicer must also "contact borrowers, collect and verify data, obtain home value estimates, determine whether the borrower has suffered a temporary or permanent setback, coordinate actions with second-lien holders, and calculate net present value estimates of loss mitigation alternatives." Levitin, 28 Yale J. on Reg. at 28 quoting Larry Cordell, "The Incentives of Mortgage Servicers: Myths and Realities," Fed. Reserve Bd., Fin. & Econ. Discussion Series, Working Paper No. 2008-46. For the millions of homeowners who have loans insured by the Federal Housing Administration, the servicer must attempt to meet with the homeowner in person to attempt to cure the default. 24 C.F.R. 203.604. Thus, in contrast to the routine processing of payments, "handling defaulted loans through loss mitigation involves tremendous discretion, expertise, and manpower." Levitin, 28 Yale J. on Reg. at 28. When and how this is done profoundly affects homeowners.

Servicers earn fees through a complex structure that incentivizes them to keep defaulted homeowners in default. Id. at 70. The myriad of fees that servicers can charge include fees for late payments, title searches, property upkeep, inspections, appraisals, and legal services. Id. at 45. Servicers recoup these fees as first in line if or when a house proceeds through foreclosure and before the remaining proceeds are distributed to the investors or mortgagee. Id. at 70.

"Because servicers are permitted to retain ancillary fees, they have an incentive to charge borrowers as much in fees as they can, even if the fees are not provided for by the mortgage loan documents or a direct contract." Id. at 43. This means servicers have no incentive to keep costs down; instead, servicers have an incentive to inflate costs. Id. at 70. At the same time, it is difficult for borrowers to challenge these fees. Id. at 43. Two examples show how fees can be lucrative. First, in 2010, one major servicer, Ocwen, reported $32.8 million in revenue from late fees alone, representing nine percent of its total revenue. Ocwen Financial Corp, Form10-K Filing with United States Securities and Exchange Commission (Feb. 28, 2011) 30, http://www.sec.gov/Archives/edgar/data/873860/000101905611000277/ocn_10k.htm. Second, before Countrywide collapsed and was bought by Bank of America, late fees covered the company's entire servicing operating costs, leaving servicing fees and other charges as pure profit. Levitin, 28 Yale J. on Reg. at 42.

A homeowner is not only directly affected by which company servicers his or her mortgage loan in relation to the fees the servicer assesses. The company that happens to service a loan also greatly affects the loss mitigation options available for the homeowner. For example, HSBC, which services $36.6 billion in mortgage loans on behalf of other mortgagees, does not participate in the federal government's Home Affordable Modification Program. Epstein, "Jobs at Risk in HSBC Deal," Buffalo News (May 7, 2012). In other words, if a homeowner happened to have a loan originated by a mortgage company that transferred its servicing rights to HSBC, then he or she will not be considered for a loan modification under the program that Congress has made the industry standard. 15 U.S.C. 1639a(c).

There is also a wide variance in outcomes for homeowners through HAMP depending on who their servicer is. An August 2012 study of the federal Home Affordable Modification

Program found a "substantial" difference across servicers "in terms of their response to HAMP, with a few large servicers offering modifications at half the rate of others." Sumit Agarwal, Gene Amromin, and Itzhak Ben-David, "Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program," National Bureau of Economic Research August 2012 at 5, http://ssrn.com/abstract=2138314. Some servicers modified loans at a rate that is more than four times the rate of others, a variation that carries over to non-HAMP loan modifications and extends beyond differences in servicer contracts with investors, regional characteristics, or borrowers. Id. at 26. Because of these servicer shortcomings, 800,000 homeowners who should have received loan modifications through HAMP did not. Id. at 5.

Similarly, a study of loan modifications among a wide-array of servicers found that 47 servicers modified a negligible fraction or none of the mortgage loans in foreclosure while another servicer modified thirty-five percent of such loans. Alan White, "Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications," 41 Conn.L.Rev. 1107, 1117 (2009). For one servicer, only nine percent of homeowners in foreclosure received a loan modification that reduced the monthly payment. Id. For another servicer, eighty-nine percent of such homeowners had their monthly payments lowered. Id. One servicer wrote off interest or principal in forty-two percent of its loan modifications while almost all other servicers did so for zero percent of their loans. Id.

Thus, the evidence is clear that servicing mortgage loans—especially the more than 113,000 mortgage loans that were in default in Ohio in the second quarter of 2012—is not a routine action, and whether a homeowner has a particular servicer greatly affects his or her ability to work out a resolution to stay in the house. Mortgage Banker Association, "National

Delinquency Survey Q2 2012," http://s3.documentcloud.org/documents/408515/ mbaforeclosures.pdf (accessed Sept. 12, 2012).

B. The servicers call the shots in interactions with homeowners and make the substantive decisions on loan processing and responses to borrower defaults

As mentioned above, the servicing rights and the ownership rights in a mortgage loan are distinct. Thompson, 86 Wash.L.Rev. at 764. Since the vast majority of mortgage loans are owned by securitized trusts that have hundreds of investors, it is nearly impossible—and completely impractical—to have the investors take action against a servicer based on its decisions. Id. at 768. As a result, servicers call the shots in foreclosure litigation—directing the course of litigation, mediating the cases through the mediation programs encouraged by this Court, and negotiating with homeowners to settle the case.

The servicers—not the mortgagee or investor—control the foreclosure litigation. Id. at 769-770; *CWCaptial Asset Management, LLC v. Chicago Properties, LLC*, 610 F.3d 497, 501 (7th Cir. 2010) (finding that "It is thus the servicer, under the agreement, who has the whip hand; he is the lawyer **and** the client * * *."). (Emphasis sic.) For example, servicers—not an investor or a mortgagee—hire the attorney for the lawsuit and answer discovery requests. Levitin, 28 Yale J. on Reg. at 27; Daniel Bahls & Katherine Hunt, "Abhorring a Forfeiture: The Importance of Equitable Jurisdiction in a Foreclosure Crisis," 41 Stetson L.Rev. 779, 791 (2012) (discussing role of servicers in discovery process).

This deep relationship between the servicer and the foreclosure litigation has never been clearer than this year's $25 billion settlement between the five largest mortgage servicers with the Department of Justice and 49 state attorneys general over their systematic use of false affidavits in foreclosure lawsuits. "National Mortgage Settlement," http://nationalmortgage settlement.com/about (accessed Sept. 7, 2012). The servicers—not the mortgagees who owned the mortgage loans—executed the false documents as a part of the foreclosure litigation. Id. The servicers—not the mortgagees who owned the mortgage loans or the attorneys who actually filed the false documents in court—were required to pay the $25 billion settlement, which was the largest joint state-federal settlement in history. National Association of Attorneys General, "State attorneys general, feds reach $25 billion settlement with five largest mortgage servicers on foreclosure wrongs," http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php (accessed Sept. 7, 2012).

Since servicers are in charge of the foreclosure litigation, it is unsurprising that servicers direct the mediation process for foreclosing plaintiffs and the negotiation process with homeowners. When a mediator requires a person with settlement authority to appear at mediation, it is always a representative from the servicer. Geoff Walsh, "The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide," 44 Suffolk U.L.Rev. 139, 160-164 (2011) (discussing the roles of servicers in mediation programs in various states). State mediation programs generally require servicers—not the mortgagee—to offer a loss mitigation application. Id. at 160–161. If mediation is unsuccessful and a case proceeds to a sheriff's sale, it is the servicer—not the mortgagee—who the United States Department of the Treasury requires, as a part of the federal Home Affordable Modification Program, to certify that loss mitigation alternatives could not be reached and a non-foreclosure outcome could not be reached. Making Home Affordable Program, "Handbook for Servicers of Non-GSE Mortgages," v.4.0, Chapter II, Section 3.4.3 ("MHA Handbook").

Servicers are also the entity with which homeowners and their attorneys or housing counselors speak to attempt to resolve defaults. For example, Ohio's Restoring Stability program, a $570 million foreclosure prevention program run by the Ohio Housing Finance

Agency, involves participation by servicers, not mortgagees. Ohio Housing Finance Agency, "Restoring Stability Servicer List," http://ohiohome.org/restoringstability/RS-servicerlist.pdf (accessed Sept. 5, 2012). The identity of the mortgagee is irrelevant for purposes of determining whether a homeowner is eligible for assistance through Restoring Stability. Ohio Housing Finance Agency, "Restoring Stability Frequently Asked Questions," https://www.restoring stability.org/rfv-94.aspx (accessed Sept. 5, 2012) (discussing the role of servicers in the Restoring Stability process). The federal Home Affordable Modification Program has the same requirements. Servicers sign a contract with the federal government to participate in the program, and all negotiations are between the homeowner and the servicer—not between the homeowner and the mortgagee. MHA Handbook, Chapter I, Section 1.1.

C. Servicers do not act in the best interest of the mortgagee.

HomEq claims that any service a servicer provides is to the mortgagee. Merit Brief of Petitioner at 10. The actions of servicers show otherwise. While a servicer directs the foreclosure litigation, mediation, and negotiations, its actions are quite often contrary to the interests of the mortgagee. Thompson, 86 Wash.L.Rev. at 770–771 (discussing how "servicers may refuse to modify loans even when modification would benefit investors"); Levitin, 28 Yale J. on Reg. at 76 (discussing the "very strong incentive [for mortgage servicers] to foreclose on defaulted loans rather than modify them, even if modification is in the best interest of the [investors]."); Goodman, "Homeowners and Investors May Lose, but the Bank Wins," New York Times (July 29, 2009), A3. The best financial outcome for a servicer is not to act in the best interest of either the mortgagee or the homeowner; instead, it is to keep the homeowner in "the nether-world status between a foreclosure and a modification." Thompson, 86 Wash.L.Rev. at 777. If a loan is modified, servicers are able to tack on the fees they incurred in servicing the loan during the default. *In re Parish*, 326 B.R. 708, 721 (Bankr.N.D.Ohio 2005) (holding that a lender or servicer has an obligation to keep a full and accurate accounting of payments made and charges accrued, explain the contractual basis for all charges, and document that the charges were incurred and paid); *Young v. Wells Fargo & Co.*, 671 F.Supp.2d 1006, 1039–1040 (S.D.Iowa 2006) (denying motion to dismiss civil racketeering claim where borrowers alleged servicer systematically charged unwarranted and improper fees). This outcome is consistent with the widespread belief that servicers unnecessarily delay the loss mitigation process. Levitin, 28 Yale J. on Reg. at 45; Thompson, 86 Wash.L.Rev. at 809; Goodman, "Lucrative Fees May Deter Efforts to Alter Loans," New York Times (July 29, 2009), A1; MHA Handbook at Chapter II, Section 9.5.1.

IV. The experience from the front lines—legal aid attorneys and housing counselors dealing with individual foreclosure cases

Legal aid advocates and housing counselors have extensive experience dealing with the complex nature of the servicing industry and the relationship between homeowners and loan servicers. This experience reveals that the interactions between the homeowners and loan servicers are properly construed as consumer transactions, that is, that the servicers are the sole point of contact and are making substantive determinations on how to proceed. To consider these interactions by services to be simply "collateral services associated with the sale of real estate," Merit Brief of Petitioner at 6, flies in the face of reality.

Legal Aid represented Darrell Craig and Teresa Easterling, who lost their home of 19 years due to their servicer's failure to fulfill its responsibilities to service their loan and assist them under FHA guidelines. Mr. Easterling was laid off from his job in 2009 and fell behind on his mortgage. The Easterlings contacted their current servicer, Taylor Bean & Whitaker (TBW), and negotiated a loan modification that would allow them to remain in their home and resume payments. Unfortunately, prior to the closing on that modification, TBW went into receivership and the Easterlings were unable to complete the agreement. The Easterlings contacted the new servicer, BAC Home Loans Servicing, LP (BAC), to discuss loss mitigation options; however, BAC informed them that it would not honor the previous offer from TBW and that they would need to submit a new loan modification application. Although the Easterlings submitted multiple applications, BAC filed a foreclosure action in July 2010. BAC continued to request additional loan modification documents and, finally, in 2011, informed the Easterlings that they did not qualify for a modification because, pursuant to FHA guidelines, they were more than one year behind in payments. *BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP v. Easterling,* Adams C.P. No. 2010 0376.

Legal Aid also represented Lucia and Dean Fultz, who are at risk of losing their home in Clyde to foreclosure because the servicer of their loan, which was originated by Beneficial Ohio, happens to be HSBC. The Fultzes started to have problems making their mortgage payments when Mr. Fultz was laid off from the factory he worked at for twenty years, their son suffered a spinal cord injury, and their daughter moved in with them since her husband was serving in the military in Iraq. As mentioned above, HSBC is the only large servicer that does not participate in HAMP. In fact, HSBC has refused to modify the mortgage without a down payment of $16,000, and refused to accept $25,000 in funds from Ohio's Restoring Stability program as the down payment. If any other large servicer serviced the loan, the Fultzes likely would have qualified for a loan modification and would be making payments. Instead, they face the likelihood that they will lose their home to foreclosure. *Beneficial Ohio, Inc. v. Fultz*, Sandusky C.P. No. 08 CV 1403.[2]

The housing counselors at Toledo Fair Housing Center and the attorneys at Miami Valley Fair Housing Center share these same experiences in dealing with servicers. The housing counselors and attorneys interact solely with the servicers when advocating on behalf of homeowners. The decades of collective experience of these housing counselors and fair housing attorneys in helping homeowners with the loss mitigation process has led them to conclude that servicers are the entities that are making substantive determinations on how to proceed on a loan, including whether to modify the terms of the mortgage loan and lowering the monthly mortgage payment.

One such example of the servicer's control over the loss mitigation process is Ocwen Financial Corporation's "Shared Appreciation Program." The Shared Appreciation Program "reduces delinquent customers' principal owed but also compels them to share the appreciation with the mortgage's owner (not the servicer) if the house increases in value by the time they sell or refinance it." Ocwen Financial Corporation, "Ocwen Offering Mortgage Modifications That Restore Equity for Underwater Borrowers but Let Loan Investors Share in Appreciation When Market Recovers" (July 26, 2011), available at http://shareholders.ocwen.com/releasedetail.cfm ?ReleaseID=601517 (accessed Sept. 14, 2012) ("Ocwen Press Release"). This unique program, which is available only to homeowners who have a loan serviced by Ocwen, has a 2.6 percent

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[2] For further examples of servicers failing to fulfill their responsibilities to service a homeowner's loan, see *GMAC Mortgage, LLC v. Walton,* Montgomery C.P. No. 2008 CV 10287; *Deutsche Bank National Trust Co. as Trustee for Saxon Asset Securities Trust 2007-1 v. Bohl,* Lorain C.P. No. 10 CV 170183 (both discussed in the Brief of Amici Curiae Ohio Legal Services Programs in Support of Petitioner Ohio Attorney General Michael DeWine filed in this Court in *State ex rel. DeWine v. GMAC Mortgage LLC,* No. 2011-0890).

redefault rate that is substantially lower than the 40 to 50 percent rates during a similar time period for federal loss mitigation programs. Harney, "Ocwen Financial expands program for underwater borrowers," Los Angeles Times (Aug. 7, 2011). The program is also an example of how a homeowner who happens to have a loan serviced by Ocwen will uniquely benefit: Ocwen has produced 25 times more loan modifications per loan serviced as the servicing industry as a whole. Ocwen Press Release. If a homeowner had a loan owned by the same investor that was serviced by a different servicer, he or she would not be eligible for the same assistance.

The experience of the staff at Toledo Fair Housing Center and Miami Valley Fair Housing Center that servicers have wide control over the loss mitigation process manifests itself in other ways. From their experience, servicers have the ability to make decisions regarding interest rates on loan modifications. The attorneys at Miami Valley Fair Housing Center also see circumstances in which two servicers treat homeowners differently even though the pooling and servicing agreements that apply to the homeowners' loans are the same.

This accumulation of evidence leads to the conclusion that mortgage servicers provide unique services to homeowners, especially when the homeowner's mortgage loan is in default.

V. Residential mortgage loan servicer activities tend to elude limited statutory and common law protections.

Statutory law covering residential mortgage loan servicer activities is limited and differs in scope and substance from the activities covered by the CSPA. Neither statutory lending regulations nor common law provide remedies for consumers who are subject to abusive servicing practices. The CSPA does. When the CSPA was amended in 1978, the General Assembly stated its intent "to prevent unfair, deceptive, and unconscionable acts and practices, to provide strong and effective remedies, both public and private, to assure consumers will recover any damages caused by such acts and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices." *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio.St.3d 143, 144, 569 N.E.2d 464 (1991), quoting language from Am.Sub.H.B. No. 681, 137 Ohio Laws, Part II, 3219. The primary federal statutes governing mortgage servicers do not control the same mortgage servicer activities as the CSPA. "Neither RESPA [Real Estate Settlement Procedures Act] nor TILA [Truth in Lending Act] nor FDCPA [Fair Debt Collection Practices Act] give homeowners much protection when dealing with servicers." Levitin, 28 Yale J. on Reg. at 83.

The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2602, et seq., is the most comprehensive federal statute governing the mortgage servicing industry and it applies to virtually all mortgages except those made by individuals. 12 U.S.C. 2602(1). However, "RESPA's significance for servicing is not the rights it grants, but those it does not." Levitin, 28 Yale J. on Reg. at 55. RESPA governs four actions relating to mortgage servicers. First, RESPA requires lenders disclose to a mortgage loan applicant whether servicing of the loan will change while the loan is outstanding. 12 U.S.C. 2605(a). Second, RESPA requires servicers notify borrowers of a servicing transfer. 12 U.S.C. 2506(b)(3)(G). Third, RESPA regulates escrow accounts and requires servicers provide an escrow statement at closing and annually. 12 U.S.C. 2506(g); 12 U.S.C. 2609. Fourth, RESPA requires servicers respond to qualified written requests from borrowers for information regarding loan status and history, and to correct account errors. 12 U.S.C. 2605(e).

If a servicer fails to provide these notices or take the required action, RESPA provides for a limited private remedy. 12 U.S.C. 2605(f). However, under a safe harbor provision, a servicer avoids liability if it corrects a mistake within sixty days after discovering the error. 12 U.S.C. 2605(f)(4). Due to the limited consequences of violating RESPA, the servicer can retain funds to which it may not be entitled safe in the assumption that, if challenged, it may merely return the improper funds to the consumer. Id.

The Truth in Lending Act (TILA), 15 U.S.C. 1601, et seq., is a financing disclosure statute that does not apply to loan servicers unless the servicer also owned or owns the loan. 15 U.S.C. 1641(f)(1); *Yaldu v. Bank of Am. Corp.,* 700 F.Supp.2d 832, 841-842 (E.D. Mich.2010). Even if a servicer owned or owns the loan, the servicer is still not subject to TILA if it obtained ownership by an assignment merely for administrative convenience. 15 U.S.C. 1641(f)(2); *Hubbard v. Ameriquest Mtge. Co.,* 624 F.Supp.2d 913, 917-918 (N.D. Ill. 2008). Because mortgage servicers who only have a servicing interest in the loan are not subject to TILA, it is not effective to control servicer abuses.

Similarly, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692a, et seq., only applies selectively to servicers. In fact, the FDCPA provides a specific exemption for servicers unless the servicer acquired the account while it was in default. 15 U.S.C. 1692a(6)(F)(iii). In addition, the FDCPA exempts from coverage any servicers that were also the originators of the particular mortgage and servicers that are affiliated with the original creditor by common ownership or corporate control and not principally debt collectors. 15 U.S.C. 1692a(6)(F)(ii); 15 U.S.C. 1692a(6)(B). Because a servicer is only subject to the FDCPA if it is a debt collector that acquires a loan in default, and because the FDCPA has no express provision for declaratory or injunctive relief for individual consumers, 15 U.S.C. 1692k, it is not effective to control servicer abuses.

Mortgage servicers are also subject to limited regulations regarding consumer credit matters. The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, et seq., governs the actions of original furnishers of credit information to credit reporting agencies. A consumer may only pursue an action against a furnisher if the consumer has first invoked the FCRA's formal dispute investigation procedure with the credit reporting agency and the dispute process did not resolve the error. In addition, the FCRA protects servicers by giving them qualified immunity from specific tort liability for claims regarding defamation, invasion of privacy, or negligence in the reporting of credit information unless the consumer can also show that the servicer acted with malice or willful intent. 15 U.S.C. 1681h(e); *Love-Sawyer v. Equifax, Inc.*, M.D.Tenn. No. 3:09-0647, 2009 WL 3169679 at *4 (Sept. 28, 2009); *Olson v. Atl. Mtge. & Invest. Corp.*, 24 F.Supp.2d 976, 981 (D. Mich.1998).

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691, et seq., generally applies only to original creditors. ECOA protections only apply to servicers in so far as those servicers regularly participate in credit decisions, including setting terms of credit. 15 U.S.C. 1691a(e). As a result, the ECOA provides no protection to consumers from most servicer abuses.

The Electronic Funds Transfer Act (EFTA), 16 U.S.C. 1601, et seq., the Homeowners Protection Act (HPA), 12 U.S.C. 4902, and the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. 6801–6809, are all narrowly tailored statutes that effect only very specific aspects of the mortgage servicing industry and contain few remedies for servicer violations. EFTA only applies to servicers inasmuch as a servicer accepts electronic payments from borrowers. HPA applies only to the provision of private mortgage insurance on an account and exempts a servicer from liability if the servicer's failure to comply with the act is caused by the mortgage insurer or lender's failure to comply with the act. 12 U.S.C. 4907(c). The GLBA requires servicers to provide certain privacy notices and limits the sharing of information by a servicer; however, the GLBA contains no enforcement mechanism and courts continue to dismiss consumer actions brought under the GLBA by holding that Congress did not intend to provide a private right of action to enforce the GLBA. 15 U.S.C. 6801–6810; *Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 960 (8th Cir. 2007). Because these three federal laws affect only a small area of the overall mortgage servicing industry, they provide little protection for consumers.

Petitioner states that there is no need for consumer protection under Ohio's CSPA because the Consumer Financial Protection Bureau (CFPB) has proposed new regulations covering the mortgage serving industry. While the CFPB has proposed regulations, those regulations are currently open for public comment and subject to change. Even the CFPB, itself, recognizes that there may be a need for additional consumer protection from "potentially unfair, deceptive, or abusive acts or practices with respect to servicers' interactions with consumers" not governed by any specific federal statutes or regulations. Consumer Financial Protection Bureau, "Mortgage Servicing—Examination Procedures," http://www.consumerfinance.gov/guidance/ supervision/manual/mortgage-servicing-examination-procedures (accessed Sept. 26, 2012).

The activities of mortgage servicers also fall largely outside the scope of common law remedies. "The purpose of the CSPA is to protect consumers from 'unscrupulous suppliers' in a manner not afforded under the common law." *Elder v. Fischer*, 129 Ohio.App.3d 209, 214, 717 N.E.2d 730 (1st Dist. 1998). In most circumstances, a breach of contract claim does not lie against a mortgage servicer because there is no privity of contract between a mortgage servicer and homeowner. See *Shugart v. Ocwen Loan Servicing, LLC*, 747 F.Supp.2d 938, 942 (N.D. Ohio 2010). In addition, Ohio law only recognizes a tort action between parties to a contract where a duty exists between the parties independently of the performance of the contract. *Cairns v. Ohio Sav. Bank*, 109 Ohio App.3d 644, 649, 672 N.E.2d 1058 (8th Dist. 1996). Absent special circumstances, a servicer-homeowner relationship does not give rise to a fiduciary duty. Id. In Ohio, even a servicer acting as escrowee for a borrower's escrow account does not create a special relationship that gives rise to a fiduciary duty. Id. It is only the CSPA that provides remedies for consumers who fall victim to unfair, deceptive, and unconscionable acts by residential mortgage loan servicers when the same acts are not actionable under the common law.

CONCLUSION

As illustrated by the examples above, the services that mortgage servicers perform on behalf of homeowners profoundly affect the homeowners' experiences with loan processing and outcomes if a delinquency arises. The failure to perform these services competently can have a devastating impact on homeowners' abilities to remain in their homes. Because the conduct of mortgage loan servicers falls within the definition of a consumer transaction and mortgage servicers are not excluded from coverage by the plain language of the Consumer Sales Practices Act, and because the Act is a remedial statute entitled to liberal construction, this Court should find that the answer to both certified questions is "Yes."

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