

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sondra Anderson,	:	Supreme Court
	:	Case No. 11-0908
Plaintiff-Respondent,	:	
	:	On Review of Certified Questions
v.	:	From the United States District Court
	:	Northern District of Ohio,
Barclays Capital Real Estate Inc.	:	Western Division
d/b/a HomeEq Servicing,	:	
	:	N.D. Ohio Case No. 3:09-cv-02335-JGC
Defendant-Petitioner.	:	

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**I. THE CSPA SHOULD BE AMENDED ON BROAD STREET,
NOT ON FRONT STREET**

Respondent and her *amici curiae* try to squeeze the square peg of mortgage servicing into the round hole of existing statutory language and case law. But it just does not fit. They brush aside the Ohio Consumer Sales Practice Act (“CSPA”)’s threshold statutory definitions and argue that because mortgage servicers interact with homeowners to collect their mortgage payments, they must be subject to the CSPA. They make the overbroad assertion, flatly contradicted by the statute’s plain language, that “any business that makes money from consumers by handling money for consumers” is subject to the CSPA -- apparently forgetting about the many entities who are not subject to the Act by its plain terms. They bypass the dispositive point articulated in HomEq’s opening brief, which is that mortgage servicing is performed for the benefit of the noteholders with whom mortgage servicers enter into servicing agreements, and not for the benefit of individual homeowners. Finally, they confuse basic principles of applying statutory text, contending on the one hand that the Court should disregard HomEq’s alternative legislative history argument because the CSPA’s language is clear, while in the next breath arguing that the Court must “construe” the Act liberally in their favor.

It is the General Assembly, not the Court, that is tasked with amending the CSPA. The General Assembly took up its pen not long ago to amend the CSPA, making *only certain* “transactions in connection with residential mortgages” subject to the Act. In Am.Sub.S.B. No. 185 (Eff. 1/1/2007), the General Assembly made “transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers” subject to the Act. Respondent and her

amici curiae contend that this recent, legislative expansion of the CSPA for *certain* transactions in connection with residential mortgages was not enough. They ask this Court to take up *its* pen and *judicially* expand the Act still further, so that it covers still other, distinct entities – mortgage servicers. They do so even though the General Assembly did not address mortgage servicers in S.B. 185, and even though it also declined to do so in a later bill (House Bill 3) that some House members proposed (without success) to accomplish precisely that purpose. Instead of rewriting the CSPA to allow Respondent to plead yet another cause of action against HomEq on top of the common-law claims that she is already pursuing, this Court should answer the certified questions in the negative and confirm that mortgage servicing is not a “consumer transaction” under the Act; nor are mortgage servicers “suppliers” under the Act.

II. ARGUMENT

A. Respondent And Her *Amici Curiae* Ignore This Court’s Precedent In *Heritage Hills* By Focusing On The Lack Of An Express Exclusion For Mortgage Servicers In The CSPA.

Respondent and her *amici curiae* continue to focus on the lack of any express exclusion for mortgage servicers in the CSPA. (Anderson Br. at 10; Ohio Association for Justice Br. at 5.) Tellingly, neither Anderson nor any of her supporters address this Court’s *Heritage Hills* decision. In *Heritage Hills*, this Court held that the CSPA does not apply to residential lease transactions, despite “the Act [] not specifically exclud[ing] a lease of real property.” *Heritage Hills, Ltd. v. Deacon*, 49 Ohio St.3d 80, 82, 551 N.E.2d 125 (1990); *see also In re Midwest Eye Center*, 104 Ohio App.3d 215, 217, 661 N.E.2d 774 (10th Dist. 1995) (unnecessary to consider statutory exceptions where “threshold criterion” in statute was not met). As *Heritage Hills* teaches, the lack of an

express exclusion for mortgage servicers in the CSPA matters not where, as here, mortgage servicers simply do not fit within the threshold definitions in the statute.

The so-called “clear majority of Ohio trial courts” upon which Respondent and her *amici* rely (Anderson Br. at 17; State Br. at 5) have made similar analytical errors, bypassing threshold definitions in the CSPA to focus on inapplicable exclusions. In the *Dowling* case, for example, the district court jumped to an analysis of activities expressly *excluded* from the CSPA without first analyzing whether mortgage servicers are “suppliers” who undertake “consumer transactions.” *See Dowling v. Litton Loan Servicing, LP*, S.D. Ohio No. 2:05-CV-0098, 2006 WL 3498292, at *13 (Dec. 1, 2006). District Judge Carr explained *Dowling*’s inapplicability in a decision in the underlying case. *See Anderson v. Barclays Capital Real Estate, Inc.*, N.D. Ohio No. 3:09-CV-2335, 2010 WL 2541807, *9, fn. 7 (June 18, 2010). He pointed out that in *Dowling*, “the mortgage servicer argued that although it did not fall within the definition of ‘financial institution’ – institutions which were by statute exempt from the OCSPA – it should also be exempted.” *Id.* “Here, however, [HomEq] does not argue that it falls within an exemption to the statute, but rather that the statute does not, and never did, apply to mortgage servicers. *Dowling* interpreted the scope of an exemption to OCSPA, not the scope of OCSPA itself.” *Id.* (Emphasis added).

Other cases cited by Respondent and her supporters for the proposition that a “clear majority” of Ohio cases apply the CSPA to mortgage servicers rely almost entirely on *Dowling* and contain no meaningful discussion of the threshold statutory definition of “consumer transaction[s]” subject to the CSPA. *See, e.g., State v. Barclays Capital Real Estate, Inc.*, Montgomery C.P. No. 2009CV10136, unreported (Sept. 16, 2010) (relying on *Dowling*); *Jent v. BAC Home Loans Servicing, LLC*, S.D. Ohio No. 1:10-CV-

00783, 2011 WL 2971846, at *3 (July 21, 2011) (relying on *Dowling*); *Munger v. Deutsche Bank*, N.D. Ohio No. 1:11-CV-00585, 2011 WL 2930907 (July 18, 2011) (relying on *Dowling* and mis-citing District Judge Carr for the proposition that mortgage servicers are not exempt from the CSPA); *Kline v. Mortgage Electronic Registration Systems, Inc., et al.*, S.D. Ohio No. 3:08-cv-408, 2011 WL 1233642, at *5 (Mar. 29, 2011) (“Moreover, the Plaintiffs have not alleged that Barclays is a financial institution, insurance company, or credit union. Therefore, there is no basis for presently concluding, as a matter of law, that Barclays falls within the class of persons whose business dealings with consumers do not constitute ‘consumer transactions’ under the OCSPA.”) These cases, in bypassing the CSPA’s threshold definitions to focus on statutory exemptions, are not persuasive – much less authoritative – on the questions that have been certified to this Court about those threshold definitions.

B. A Proper Focus On The Definitions Of “Consumer Transaction” And “Supplier” Confirms That Mortgage Servicers Do Not Fit.

As HomEq demonstrated in its opening brief, HomEq is not engaged in a “consumer transaction” as defined by the CSPA when, pursuant to its Pooling and Servicing Agreements *with noteholders – not consumers* – it services mortgage loans *for the benefit of those noteholders*. HomEq’s agreement with the noteholder to service Anderson’s mortgage may indeed constitute a “transfer of *** a service” *to the noteholder*, but that does not equate to “a transfer of *** a service” to Anderson. The plain language of HomEq’s Pooling and Servicing Agreement (“PSA”) states that HomEq performs mortgage services “for and on behalf of the Certificateholders” and not for the benefit of individual homeowners like Anderson.

As for the CSPA's definition of "supplier" in R.C. 1345.01(C), the General Assembly has said that "suppliers" must be engaged in the business of either effecting or soliciting consumer transactions. Mortgage servicers do neither. Respondent rejects what she calls the "hollow distinction" that HomEq drew between the verbs "effect" and "affect" (Anderson Br. at 10), even though this Court has recognized the same distinction in its Style Manual (at p. 111), and even though the General Assembly instructs courts to apply the meaning of words used. R.C. 1.42. Acknowledging that the CSPA definition of "supplier" incorporates the verb "effect," Respondent contends that the activities undertaken by mortgage servicers "effect[]***consumer transactions." (Anderson Br. at 10.) But mortgage servicers do not bring about consumer transactions, or cause them to come into being. They merely facilitate or administer the parties' performance under previously effected residential mortgages that are *themselves excluded* from the CSPA, unless they fall within one of the narrow categories added by the General Assembly in 2007 (transactions between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers). Put another way, mortgage servicers are hired by noteholders not to solicit new consumer transactions with individual homeowners, but rather to administer transactions that have already taken place, and that are in most cases excluded from the Act's purview.

The General Assembly knows how to change the definitions of "consumer transaction" and "supplier," just as it did in S.B. 185 when it made subject to the CSPA only three specific entities and categories of transactions in connection with residential mortgage loans. The General Assembly easily could have added mortgage servicers to S.B. 185 (or a subsequent act), making them subject to the CSPA, but it did not.

C. The Court Should Not Accept Or Follow The Debt-Collector Cases.

At oral argument in the *GMAC* certified-question case, this Court questioned the parties relating to whether mortgage servicers are akin to debt collectors, and whether mortgage servicers should thus be deemed “suppliers” under the CSPA. The Attorney General responded that the “best line of cases” in support of its position that mortgage servicers are encompassed within the CSPA is the line of debt-collector cases. Here, Anderson and her *amici curiae* continue to rely on the line of debt-collector cases stemming from *Celebrezze v. United Research, Inc.*, 19 Ohio App.3d 49, 482 N.E.2d 1260 (9th Dist. 1984), to argue that mortgage servicers must be “suppliers” engaging in “consumer transactions” under the CSPA. (Anderson Br. at 14-16; State Br. at 5-6, 15.)

In *Celebrezze*, the Ninth District Court of Appeals held that a seller of educational materials could not “relieve itself of its duty to act fairly by assigning its claim to an agent or assignee and having that assignee conduct practices prohibited by the Act.” *Celebrezze*, 19 Ohio App.3d at 51. As such, the Ninth District concluded, with very little discussion, that the assignee credit bureau/debt collection agency to whom the seller sold the consumer’s debt was a “supplier” subject to the CSPA. *Id.* Although the *Celebrezze* decision has never been cited, much less approved, by this Court in the nearly thirty years since it was decided, and although this Court has never *itself* held that debt collectors are subject to the CSPA, *Celebrezze* has become rotely cited by Ohio appellate and federal courts for the proposition that debt collectors are subject to the Act. Respondent and the State predictably seize on this line of cases. *E.g.*, *Broadnax v. Green Credit Serv.*, 118 Ohio App.3d 881, 893 (2d Dist. 1997) (citing *Celebrezze* for the proposition that debt collection actions are subject to the CSPA); *Kline, supra*, 2011 WL

1233642 at *4 (citing *Celebrezze* for the proposition that Ohio courts have “long held” that entities engaging in the collection of consumer debts are “suppliers” under the Act).

Celebrezze, however, did not properly analyze the statutory definitions of “consumer transaction” and “supplier” and, therefore, reached an erroneous result. There was no question in *Celebrezze* that the original seller of the goods was a supplier subject to the CSPA. That is because the original seller solicited and effected a sale of goods to the consumer. There is no analysis or explanation in *Celebrezze*, however, concerning how the debt collector, to whom the debt for payment of the goods was assigned, ever engaged in a transaction that constituted a “transfer of *** a service *** to an individual for purposes that are primarily personal, family, or household, ***” as R.C. 1345.01(A) expressly requires. Debt collectors do not transfer services *to* individuals – they collect debts *from* them. Similarly, there was no explanation in *Celebrezze* of how it could be found that the debt collector “was engaged in the business of soliciting or effecting consumer transactions,” as the definition of “supplier” expressly requires. By the time the debt collector entered the picture, the consumer transaction had already been solicited and consummated by the sales contract between the seller and buyer, and the goods had been sold and transferred. The *Celebrezze* court’s failure to address these critical statutory prerequisites calls into question the validity of its conclusions.

While the Court can wait for another case to properly address the deficiencies in *Celebrezze* in the context of debt collectors, it should not rely on the incomplete analysis in *Celebrezze* to now hold that mortgage servicers are “engaged in the business of soliciting or effecting consumer transactions.” They are not. Mortgage servicers provide their services to commercial entities to assist those entities in conducting their business. Mortgage servicers do not “transfer a service” to individuals for personal use. Mortgage

servicers are not “engaged in the business of soliciting or effecting consumer transactions.” Even in those limited situations where a residential mortgage loan may now be found to be a “consumer transaction” due to the 2007 amendments to the CSPA, the transaction is solicited and effectuated by the mortgagee in advance of any engagement of a mortgage servicer by the noteholders. The mortgage servicer simply is not in the “supplier” chain. It does not solicit the mortgage, it does not execute the mortgage, and it does not supply any goods or services that the mortgagee requires to transfer the mortgage loan to the consumer.

For similar reasons, *Estep v. Johnson*, 123 Ohio App.3d 397, 704 N.E.2d 58 (10th Dist. 1998) does not provide persuasive or helpful analysis. *Estep* concerned a car that was impounded by the Ohio State Highway Patrol, then towed and stored by a towing company after the driver’s arrest for driving while intoxicated. The Tenth District concluded in *Estep* that “the bailment of appellant’s automobile, albeit statutorily mandated and not a voluntary transaction on the part of appellant, falls within the definition of a ‘consumer transaction’ for services as defined in the Act.” *Estep*, 123 Ohio App.3d at 319. The court itself recognized that it was dealing with “peculiar circumstances” – circumstances not contemplated by the CSPA. *Id.* at 320. Thus again, it is not surprising that the *Estep* conclusion is impossible to square with the definition of “consumer transaction” in R.C. 1345.01(A). A company that tows and stores an impounded vehicle against a driver’s will is hardly engaged in the “transfer of *** a service *** to an individual.” Like a debt collector, such a company is taking something *from* an individual, not transferring a service *to* an individual based on any solicitation or sale. Likewise, a tow truck company is engaged by governments or property owners to provide a service *to them* – removing unlawfully parked cars from their streets or

property; tow truck companies are not engaged in the business of soliciting or effecting consumer transactions. In any event, the *Estep* court based its analysis on the existence of a distinct legal relationship – a bailment – between the driver and towing company. There is no bailment or any other sort of distinct legal relationship created as a matter of law between mortgage servicers and homeowners. As such, like the debt-collector cases, *Estep* is inapplicable here.

Respondent and her *amici* also cite *Estep* and other decisions for the proposition that the CSPA does not require “privity of contract” between suppliers and consumers. This argument adds nothing to the analysis. HomeEq is not arguing that it is not subject to the CSPA because of a lack of privity with the mortgagor. It is not a “supplier” of a “consumer transaction” because it does not engage in the business of soliciting or effecting transfers of a service to consumers. Unlike entities that commonly appear up or down in the supply chain, mortgage servicers do not occupy any space in the supplier chain when a house is sold or a residential mortgage loan is made. The privity cases are inapposite here, because in each case the entity was engaged in the business of supplying goods or services, directly or indirectly, to a consumer, and not to a third party. See *Hinckley Roofing, Inc. v. Motz*, 9th Dist. No. 04CA005-M, 2005-Ohio-2404 (residential roofing company transferring roofing services to an individual through a contractor); *Miner v Jayco, Inc.*, 6th Dist. No. F-99-001, 1999 WL 651945 (Aug. 27, 1999) (the manufacturer of the trailer bought by a consumer based on the manufacturer’s warranty and promise of repair); *Carter v. Taylor*, 4th Dist. No. 99CA10, 1999 WL 1256344 (Dec. 9, 1999) (employee of a construction company working under a home-improvement contract may be found to be a “supplier” in addition to his employer); *Garner v. Borcharding Buick, Inc.*, 84 Ohio App.3d 61, 616 N.E.2d 283 (1st

Dist. 1992) (a supply-chain case holding that companies purchasing “total loss” vehicles from insurance companies could be liable under the CSPA to the ultimate purchasers).

D. Respondent And Her Amici’s Interpretation Of The Real Estate/Collateral Service Exception To The CSPA Makes No Sense.

As HomEq explained in its opening brief, because real estate is neither a good, service, franchise, or intangible, it has long been the rule that the CSPA has no application to a pure real estate transaction. Multiple Ohio courts have concluded that based on the “pure real estate” exclusion from the CSPA, collateral services associated with the sale of real estate are also properly excluded from the Act’s purview. Servicing a mortgage is collateral to a real estate transaction because it is necessary to facilitate the repayment of mortgage loan notes that are used to purchase real estate.

Respondent and the State misunderstand the collateral-services exception and apparently desire a sea change in the way collateral-service providers are treated under the CSPA. Neither Respondent nor the State explain how mortgage servicing is not collateral to a pure real estate transaction under the case law HomEq offered in its merit brief. But for the pure real estate transaction funded by a mortgage loan, the need for mortgage services would not arise. Mortgage services are thus collateral to pure real estate transactions because they are “performed in support of a real estate transaction” and “solely associated with the sale of real estate.” *Milner v. Biggs*, S.D. Ohio No. 2:10-cv-904, 2012 WL 1188274, *12 (Apr. 6, 2012) (citations/internal quotations omitted).

The State argues that mortgage servicing is not necessary to a pure real estate transaction because mortgages are a mere “convenience” that makes real estate transfers “more accessible.” (State Br. at 8.) But the State fails to explain how mortgage servicing is any less “necessary” than auctioneering services and title services, which

Ohio courts have deemed to be covered by the collateral-services exception. It is not necessary for a real estate owner to choose an auctioneer to sell his real estate; he could choose a listing agent instead. Yet auctioneering services are not subject to the CSPA because they are collateral to a real estate transaction when an auction is the method by which a real estate owner decides to sell. *See Colburn v. Baier Realty & Auctioneers*, 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, 2003 WL 22931379, ¶ 13. If an owner chooses to sell real estate by auction, then auctioneering services are necessary to that transaction. Likewise, title services are not “necessary” to every real estate transaction, but that has not prevented courts from concluding that title services are collateral services associated with the sale of real estate. *U.S. Bank v. Amir*, 8th Dist. No. 97438, 2012-Ohio-2772, 2012 WL 2355620, ¶ 43. The same is true for mortgage services, which are necessary and collateral to a real estate transaction if a buyer decides to finance the transaction with a mortgage loan.

The State argues that because a subset of “transactions” in connection with residential mortgages – specifically, those between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers – now fall within the definition of “consumer transaction,” mortgage servicing cannot be a “collateral service.” (State Br. at 8.) Even if the underlying transaction is subject to the CSPA following the 2007 amendments, mortgage servicing is still not subject to the CSPA because mortgage servicers do not effect the residential mortgage loan, which was already consummated between the mortgagor and mortgagee. Moreover, in cases both predating and postdating the 2007 amendments to the CSPA, Ohio courts have found services performed in connection with residential mortgage loans to be collateral to real estate transactions and not subject to the CSPA. *Hanlin v. Ohio Builders and Remodelers*,

Inc., 212 F.Supp.2d 752, 757 (S.D.Ohio 2002) (predating the 2007 amendments and holding that closing services performed “in connection with [the plaintiffs’] mortgage” were collateral and not subject to the CSPA); *Amir, supra*, 2012-Ohio-2772, 2012 WL 2355620, ¶ 8, 43 (postdating the 2007 amendments and holding that appraisal services performed in connection with the homebuyer’s mortgage loan request were collateral and not subject to the CSPA).

Respondent and the State rely on the decisions in *Brown v. Liberty Clubs, Inc.* and *DeLutis v. Ashworth Home Builders, Inc.* *Brown* laid the groundwork for the collateral-services exception, but its facts have no bearing on this case and instead illustrate why mortgage servicing satisfies the exception. In *Brown*, a real estate developer used direct-mail solicitation to promise “gifts” – which turned out to be a set of steak knives – in return for a visit to a property for sale. *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, 193, 543 N.E.2d 783 (1989). The Court said that this solicitation, standing alone, violated the CSPA because it was a deceptive consumer transaction that violated the “prize rule” found in Ohio Adm. Code 109:4-3-06. *Id.* at 193-194. Again, mortgage servicing is not part of the solicitation that leads to the culmination of a residential mortgage; mortgage servicing enters the process only after a mortgage has been executed, *i.e.* only after the loan has been transferred to the consumer.

DeLutis is likewise of no help to Respondent and the State, and in fact supports HomEq’s position. In that case, homebuyers purchased an existing house, entered into a home warranty and a repair agreement in connection with the house, and entered into an additional agreement for further improvements to be made by the seller. *DeLutis v. Ashworth Home Builders, Inc.*, 9th Dist. No. 24302, 2009-Ohio-1052, at ¶ 2-3. The Ninth District Court of Appeals held that the homebuyers “failed to demonstrate that

reasonable minds could have concluded that their claims against [the seller] were based on a contract to provide services that fell within the CSPA.” *Id.* at ¶ 16. The court said that the additional agreement for further improvements “arguably” would have been subject to the CSPA, but no improvements were made pursuant to it. *Id.* at ¶ 13-14. Most importantly for this case, the court in *DeLutis* rejected the homebuyers’ argument “that a home warranty or repair agreement, executed in connection with the sale of an existing house, somehow transforms a pure real estate transaction into one that falls within the CSPA.” *Id.* at ¶ 15. Mortgage servicing – which like a home warranty and repair agreement is part and parcel of a pure real estate transaction – cannot transform a pure real estate transaction (excluded from the Act) into one that falls within the Act.

Again relying on *DeLutis*, Respondent suggests one of the policy reasons for the exclusion of pure real estate transactions from the CSPA is the doctrine of *caveat emptor*. (Anderson Br. at 20-21.) According to Respondent, because a homebuyer does not select her mortgage servicer, just as a yet-to-be-built house purchaser cannot inspect the house, that justifies making mortgage servicers subject to the CSPA. Once again, Respondent misunderstands the collateral-services exception. Whether a homebuyer selects the entity performing collateral services is inconsequential. For example, in *Amir*, the homebuyer “never met or spoke to” the appraiser whose appraisal services the court deemed “collateral services solely associated with the sale of real estate” and therefore not subject to the CSPA. *Amir*, 2012-Ohio-2772, ¶ 8, 43. In *Hanlin*, the homeowner did not select the mortgage lender who performed the closing services that the court deemed were “part and parcel of the real estate transaction” and therefore not subject to the CSPA. *Hanlin*, 212 F.Supp.2d at 753, 757. Respondent’s assertion that “[s]he did not have an opportunity to select HomEq as a servicer or to shop for a more

competent vendor,” (Anderson Br. at 21), is simply irrelevant to the collateral-services analysis. Its relevance, if any, is that it parallels the fact that *the noteholders* selected HomEq as their vendor, and it supports the conclusion that HomEq engaged in the business of transferring its services *to those noteholders* (commercial entities), not to individual consumers.

E. HomEq’s Minnesota Authority Illustrates Why Mortgage Servicers Are Not Performing Services For The Benefit Of Homeowners.

In its opening brief, HomEq cited decisions from Minnesota to support its view that its servicing agreements with noteholders do not subject it to consumer claims by individual homeowners. (HomEq Br. at 11, citing *Rossbach v. FSB Mortgage Corp.*, Minn.Ct.App. No. C3-97-1622, 1998 WL 156303 (Apr. 7, 1998) and *Independent Glass Assn., Inc. v. Safelite Group, Inc.*, D.Minn. No. 05-238 ADM/AJB, 2005 WL 2093035 (Aug. 26, 2005).) Respondent and the State dismiss these Minnesota cases based on differences between the language of the CSPA and Minnesota’s consumer protection statute. (Anderson Br. at 18-19; State Br. at 12.)

Of course the Ohio and Minnesota statutes are not identical. But the State paints a misleading picture of the differences between them, asserting that “the Minnesota statute limits consumer transactions to ‘the sale of any merchandise,’ *** while Ohio includes the sale or transfer of services or goods.” (State Br. at 12.) As Anderson acknowledges in a footnote, contrary to the suggestion otherwise by the State, Minnesota’s consumer protection statute *does* reach those performing “services” for consumers – not just those selling goods. (Anderson Br. at 18, n.6, citing Minn. Stat. § 325F.68.) And contrary to the State’s speculation that the Minnesota statute is narrower because it “arguably excludes transaction[s] with no direct consumer-seller

interface” (State Br. at 12), courts have applied the Minnesota consumer law under circumstances lacking privity. *E.g.*, *Church of the Nativity of our Lord v. Watpro, Inc.*, 474 N.W.2d 605 (Minn. App. 1991) (affirming jury award under Minnesota Consumer Fraud Act against original manufacturer of roofing material used by repair company that contracted with plaintiff); *Kinetic Co. v. Medtronic, Inc.*, 672 F.Supp.2d 933 (D. Minn. 2009) (allowing self-insured employer to proceed with claims under Minnesota Consumer Fraud Act against manufacturer of cardiac devices implanted in employees, even though manufacturer never sold devices to plaintiff). Thus, the statutes are indeed similar in the respects relevant here, and the value of the Minnesota decisions lies in the courts’ analyses of the relationships of the parties, and why mortgage servicers are not performing “services” for consumers. Like the mortgage servicer in *Rosbach*, or the third-party window-glass claims administrator in *Independent Glass*, HomeEq is an intermediary performing services for the benefit of the mortgage noteholder, not the homeowner, even though the mortgage servicer necessarily interacts at times with the homeowner. *See Rosbach*, 1998 WL 156303, at *3.

F. The State’s Out-Of-State Authority Is Unpersuasive.

The State cites *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 25 A.3d 1103 (2011) for the proposition that mortgage servicers are subject to the New Jersey Consumer Fraud Act (“CFA”). (State Br. at 12.) But New Jersey’s CFA starts from an entirely different place than Ohio’s CSPA. In New Jersey, the CFA expressly covers inducements “to make any loan.” *Id.* at 577, quoting N.J.S.A. 56:8-1(a) (emphasis in original.) Where a state consumer fraud act starts from the premise of regulating “any loan,” it is hardly surprising that it might be interpreted, as it was in *Gonzalez*, to regulate a brand-new loan negotiated post-foreclosure by a loan servicer. In Ohio, in

contrast, the CSPA starts from the premise of generally *excluding* loans from its purview. R.C. 1345.01(A). From its inception through January 1, 2007, the CSPA did not cover any transactions in connection with residential mortgage loans. *Torrance v. Cincinnati Mortgage Co. Inc.*, S.D. Ohio No. 1:08-CV-403, 2009 WL 961533 (Mar. 25, 2009), at *3-4. Although the General Assembly made three delineated “transactions in connection with residential mortgages” subject to the Act in 2007 amendments, it did not include transactions with mortgage servicers. Given these fundamental differences between the Ohio and New Jersey consumer laws, *Gonzalez* is not persuasive authority on the questions certified.

The State then cites *Vassalotti v. Wells Fargo Bank*, 732 F.Supp.2d 503 (E.D.Pa. 2010) for the proposition that servicers can be liable under the Pennsylvania Unfair Trade Practice and Consumer Protection Law (“UTPCPL”) (State Br. at 12.). But *Vassalotti* turned on whether the servicer’s activity fell within the so-called “catch-all” provision of the Pennsylvania UTPCPL, which prohibits “any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” *Id.* at 510, citing 73 Pa. Stat. Ann. § 201-2(4)(xxi). Plaintiffs proceed under the “catch-all” “by satisfying the elements of common-law fraud or by otherwise alleging deceptive conduct.” *Id.* There is no “catch-all” in the CSPA, and Respondent already has a common-law fraud claim pending before District Judge Carr. Judge Carr has asked this Court to determine whether mortgage servicing meets the “supplier” and “consumer transaction” definitions in the CSPA. *Vassalotti* does nothing to help answer those questions because the Pennsylvania law at issue in that case broadly prohibits unfair competition and deceptive acts or practices “in the conduct of any trade or commerce.” 73 Pa. Stat. Ann. § 201-1.

The State also cites *Young v. Wells Fargo & Co.*, 671 F.Supp.2d 1006 (S.D. Iowa 2009) for the proposition that servicers can be liable under California’s Unfair Competition Law (“CLRA”). (State Br. at 12.) In fact, *Young* supports HomeEq’s position. *Young* was a class action filed in Iowa, centered around Wells Fargo’s use of a computer system that was allegedly programmed to assess excessive mortgage servicing fees after late payments. *Id.* at 1012. In a single Count in their First Amended Complaint, the *Young* plaintiffs asked the district court to conclude that Wells Fargo had violated consumer protection statutes from *thirty-nine different states, including Ohio*. In the decision cited by the State here, the district court derided this “laundry-list format,” noting that “[s]hotgun pleading’ is especially problematic *** because the type and degree of protection offered by the various state laws varies extensively.” *Id.* at 1016 (emphasis added). The *Young* plaintiffs thereafter filed a Second Amended Complaint, abandoning their claims based on Ohio’s CSPA, as well as their claims under the California Consumers Legal Remedies Act. *See generally* Second Amended Class Action Complaint, *Young v. Wells Fargo & Co.*, S.D.Iowa No. 4:08-cv-00507-RP-CFB (Dec. 14, 2009). A class action from Iowa in which the plaintiffs abandoned their Ohio CSPA claim after receiving a bad decision at the pleading stage is hardly one that should inform this Court’s interpretation of the CSPA.

Notably, in addressing the plaintiffs’ claims under California’s Unfair Competition Law – and *rejecting* them at the pleading stage – the court in *Young* quoted the California Supreme Court for the idea that ancillary services should not be used to incorporate otherwise *excluded* items into the reach of consumer legislation:

“[A]ncillary services are provided by the sellers of virtually all intangible goods—investment securities, bank deposit accounts, and *loans*, and so forth. The sellers of virtually all

these intangible items assist prospective customers in selecting products that suit their needs, and they often provide additional customer services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item. Using the existence of these ancillary services to bring intangible goods within the coverage of the [CLRA] would defeat the apparent legislative intent in limiting the definition of “goods” to include only “tangible chattels.” We conclude, therefore, that the ancillary services that insurers provide to actual and prospective purchasers of life insurance do not bring the policies within the coverage of the [CLRA].”

Young, 671 F.Supp.2d at 1025-26, quoting *Fairbanks v. Superior Court*, 46 Cal.4th 56, 205 P.3d 201, 206 (2009) (italics in original). As such, rather than supporting Respondent, *Young* supports HomeEq’s view that the services provided by mortgage servicers, which are ancillary to real estate mortgage loans, should not be bootstrapped into the CSPA in contravention of the General Assembly’s recently expressed intent to only narrowly expand the sorts of “transactions in connection with residential mortgages” that are subject to the Act.

The State also points to two Federal Trade Commission lawsuits and settlements, asserting that the FTC “has sued and settled with several mortgage servicers for the same conduct alleged here—misstating accounts and not properly applying payments.” (State Br. at 14.) But the CSPA points to federal law to help determine if a given act is *unfair or deceptive* – R.C. 1345.02(C) – not to determine if a given entity is a “supplier” or if a given activity is a “consumer transaction,” which are the dispositive issues to be decided here. As such, the FTC suits cited by the State (from Texas and Massachusetts, and nowhere citing the CSPA) are beside the point.

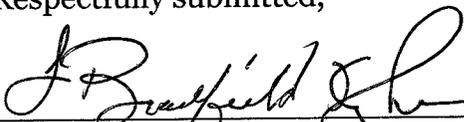
G. This Court Should Not Judicially Enact Failed Legislation.

Anderson relies on the Tenth District's opinion in *Porter v. Saez*, 10th Dist. No. 03AP-1026, 2004-Ohio-2498 to criticize HomEq's discussion of House Bill 3, which was intended to add mortgage servicers to the CSPA but was never passed by the Ohio Senate or enacted by the General Assembly. (Anderson Br. at 23.) To be sure, there are cases when courts have been reluctant to assign interpretive weight to legislative inaction. But if the Court concludes that the applicable statutes are ambiguous, then *Porter* should not dissuade it from considering the legislative history detailed by HomEq. Indeed, the *Porter* case is a prime example of an appellate court doing precisely what HomEq asks this Court to do here; that is, declining to expand an unambiguous statute (one already specifying the entities to which it applies) to include still other, unspecified ones. See *Porter*, 2004-Ohio-2498, ¶ 52 (declining to add "girlfriends" to the list of statutory "insiders" in Ohio's fraudulent transfer act).

CONCLUSION

For the foregoing reasons, for those stated in Petitioner's opening brief, and for those previously briefed and argued in the *GMAC* case, this Court should answer the questions certified by Judge Carr in the negative. The General Assembly, not this Court, is the proper forum in which to undertake the sea-change in statutory law sought here by Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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