

ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA J. TAYLOR JARVIS,	:	CASE NO. 13-0118
	:	
Plaintiff-Appellee	:	
	:	
v.	:	
	:	
FIRST RESOLUTION INVESTMENT	:	On Appeal from the
CORP., et al.,	:	Summit County Court of Appeals
	:	Ninth Appellate District
Defendants-Appellants	:	Case No. CA26042

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REPLY BRIEF OF APPELLANTS CHEEK LAW  
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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....v

STATEMENT OF FACTS.....1

ARGUMENTS IN SUPPORT OF APPELLANTS’ PROPOSITIONS OF LAW.....2

**Propositions of Law Nos. I and II:** Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio when a consumer fails to make a required payment, and subsequent insufficient payments do not cure the breach. ....2

**A. Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.**.....3

    1. This Court’s decisions support that a credit card cause of action accrues where the consumer resides at the time of the breach.....3

    2. Federal and state cases which look to the place of wrongful conduct provide the more appropriate test to determine accrual for breach of a credit card contract.....5

**B. Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment, and subsequent insufficient payments do not cure the breach.** .....6

    1. The cause of action accrued prior to the borrowing statute’s effective date. ....6

    2. Because the cause of action accrued prior to the borrowing statute’s effective date, the borrowing statute does not apply. ....8

**Proposition of Law No. III:** A complaint for breach of a credit card contract may pray for a post-judgment interest rate that exceeds the statutory rate when there is evidence suggesting that the parties agreed to the higher interest rate. ....11

**Proposition of Law No. IV:** The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no “consumer transaction” or “supplier”. ....14

**A. The definition of “consumer transaction” explicitly does not include a transaction between a financial institution and its customer and, therefore, Jarvis cannot rely on the underlying credit card account as her basis for meeting the element of a consumer transaction.**.....15

**B. Filing a lawsuit is not a service under the CSPA.**.....18

C. Attorneys who collect debts are not engaged in a consumer transaction.....20

CONCLUSION .....20

## TABLE OF AUTHORITIES

### Cases

<i>Alberding v. Brunzell</i> (9th Cir. 1979), 601 F.2d 474 .....	5
<i>Anderson v. Barclay's Capital Real Estate, Inc.</i> (2013), 136 Ohio St.3d 31, 2013-Ohio-1933 .....	15, 20
<i>Arandell Corp. v. American Elec. Power Co., Inc.</i> (S.D. Ohio Sept. 15, 2010), No. 2:09-cv-231, 2010 WL 3667004 .....	10
<i>Argentieri v. Fisher Landscapes, Inc.</i> (D. Mass. 1998), 15 F.Supp.2d 55 .....	14
<i>Bandy v. Midland Funding, LLC</i> (S.D. Ala. Jan. 18, 2013), No. 12-00491-KD-C, 2013 WL 210730.....	12
<i>Bank One, Columbus, N.A. v. Palmer</i> (1989), 63 Ohio App.3d 491 .....	4
<i>Borowski v. State Chem. Mfg. Co.</i> (1994), 97 Ohio App.3d 635.....	12
<i>Brown v. Cosby</i> (1977), 433 F.Supp. 1331 .....	5
<i>Capital One Bank v. Rhoades</i> (Oct. 21, 2010), 8th Dist. No. 93968, 2010-Ohio-5127 .....	8
<i>Celebrezze v. United Research, Inc.</i> (1984), 19 Ohio App.3d 49.....	6
<i>Champaign Landmark, Inc. v. McCullough</i> (Nov. 27, 1990), 3d Dist. No. 6-89-17, 1990 WL 188002.....	11
<i>Colorado Nat'l Bank of Denver v. Story</i> (Mt. 1993), 261 Mont. 375.....	8
<i>Combs v. Int'l Ins. Co.</i> (E.D. Ky. 2001), 163 F.Supp.2d 686.....	4
<i>Cummings v. Groszko</i> (10th Dist. 1992), 76 Ohio App.3d 812.....	8
<i>Deere v. Javitch, Block &amp; Rathbone LLP</i> (S.D. Ohio 2006), 413 F.Supp.2d 886.....	11, 12, 13
<i>DeJohn v. Lerner, Sampson &amp; Rothfuss</i> (N.D. Ohio Dec. 11, 2012), No. 1:12CV1705, 2012 WL 6154800.....	18
<i>Discover Bank v. Cummings</i> (Apr. 13, 2009), 9th Dist. No. 08CA009453, 2009-Ohio-1711 .....	8
<i>Discover Bank v. Lammers</i> (July 17, 2009), 2d Dist. No. 08-CA-85, 2009-Ohio-3516 .....	12
<i>Dudek v. Thomas &amp; Thomas Attys. At Law, P.C.</i> (N.D. Ohio 2010), 702 F.Supp.2d 826 .....	9, 10
<i>Estate of Johnson v. Randall Smith, Inc.</i> (2013), 135 Ohio St.3d 440 .....	8, 9, 10
<i>Executone of Columbus, Inc. v. Inter-Tel Inc.</i> (S.D. Ohio 2009), 665 F.Supp.2d 899 .....	10
<i>Ferron v. Zoomego, Inc.</i> (S.D. Ohio July 3, 2007), No. 2:06-CV-751, 2007 WL 1974946 .....	17
<i>Foster v. DBS Collection Agency</i> (S.D. Ohio 2006), 463 F.Supp.2d 783 .....	14
<i>Frame v. Weltman, Weinberg, &amp; Reis</i> (N.D. Ohio, May 12, 2006), 2006 WL 1348176 .....	17, 18
<i>Gionis v. Javitch, Block &amp; Rathbone</i> (S.D. Ohio, 2005), 405 F.Supp.2d 856.....	16, 18
<i>Gregory v. Flowers</i> (1972), 32 Ohio St.2d 48 .....	10
<i>Harvey v. Great Seneca Financial Corp.</i> (6th Cir. 2006), 453 F.3d 324 .....	11, 12, 13, 14
<i>Heiges v. JP Morgan Chase Bank, N.A.</i> (N.D. Ohio 2007), 521 F.Supp.2d 641 .....	6
<i>Kilbreath v. Rudy</i> (1968), 16 Ohio St.2d 70 .....	9
<i>Kiser v. Coleman</i> (1986), 28 Ohio St.3d 259.....	9
<i>Kline v. Mortgage Electronic Sec. Systems</i> (S.D. Ohio Feb. 16, 2011), No. 3:08cv408, 2011 WL 1233582.....	17, 18

<i>Knighthen v. Palisades Collections, LLC</i> (S.D. Fla. 2010), 721 F.Supp.2d 1261 .....	8
<i>Kuria v. Palisades Acquisition XVI, LLC</i> (N.D. Ga. 2010), 752 F.Supp.2d 1293 .....	13
<i>Lamb v. Javitch, Block &amp; Rathbone</i> (S.D. Ohio, Jan. 24, 2005), No. 1:04-CV-520, 2005 WL 4137786.....	16
<i>Lewis v. ACB Business Services, Inc.</i> (6th Cir. 1998), 135 F.3d 389 .....	17, 18
<i>Martin v. Law Offices Howard Lee Schiff</i> (D.R.I. Dec. 10, 2012), No. 11-484S, 2012 WL 7037743.....	5
<i>Matrix Acquisitions, L.L.C. v. Swope</i> (Jan. 13, 2011), 8th Dist. No. 94943, 2011-Ohio-111 .....	12, 14
<i>Matrix Acquisitions, LLC v. Hooks</i> (5th Dist. 2011), 2011-Ohio-3033.....	5
<i>McCollough v. Johnson, Rodenburg &amp; Lauinger, LLC</i> (9th Cir. 2011), 637 F.3d 939.....	13
<i>Meekison v. Groschner</i> (1950), 153 Ohio St. 301 .....	3, 4
<i>Minster Farmers Coop. Exchange Co., Inc. v. Meyer</i> (2008), 117 Ohio St.3d 459 .....	11
<i>Ohio Valley Mall Co. v. Hoang</i> (Dec. 22, 2010), 7th Dist. No. 10 MA 71, 2010-Ohio-6510 .....	11, 12
<i>Payne v. Kirchwehm</i> (1943), 141 Ohio St. 384 .....	3, 4
<i>Prephan v. NCO Financial Systems, Inc.</i> (N.D. Ohio June 29, 2011), No. 3:11CV434, 2011 WL 2579817.....	18
<i>Ristow v. Threadneedle</i> (1998), 220 Wis.2d 644.....	5
<i>Rollins v. Portfolio Recovery Associates, LLC</i> (W.D. Mo. Apr. 25, 2010), No. 11-00665-CV-W-GAF, 2012 WL 6051999 .....	8
<i>Scherer v. Hellstrom</i> (2006), 270 Mich.App. 458 .....	5
<i>Seeger v. AFNI, Inc.</i> (7th Cir. 2008), 548 F.3d 1107.....	11
<i>Siemientkowski v. Bank One Columbus, N.A.</i> (Nov. 23, 1994), 8th Dist. No. 66531, 1994 WL 663483.....	8
<i>Slack v. Cropper</i> (11th Dist. 2001), 143 Ohio App.3d 74 .....	8
<i>Smith v. Palasades Collection, LLC</i> (N.D. Ohio Apr. 3, 2007), No. 1:07CV176, 2007 WL 1039198.....	7
<i>Smither v. Asset Acceptance, LLC</i> (Ind. Ct. App. 2010), 919 N.E.2d 1153 .....	7, 8
<i>Sonic Auto., Inc. v. Chrysler Ins. Co.</i> (S.D. Ohio Sept. 13, 2011), No. 1:10-cv-717, 2011 WL 4063020.....	10
<i>Sosa v. DirecTV</i> (9th Cir. 2006), 437 F.3d 923 .....	14
<i>State ex rel. Barber v. Rhodes</i> (1956), 165 Ohio St. 414.....	5, 6
<i>State ex rel. Hawley v. Industrial Commission</i> (1940), 137 Ohio St. 332.....	4, 5, 6
<i>State v. LaSalle</i> (2002), 96 Ohio St.3d 178.....	9
<i>Surace v. Wuliger</i> (1986), 25 Ohio St. 3d 229.....	14
<i>Van Fossen v. Babcock &amp; Wilcox Co.</i> (1988), 36 Ohio St.3d 100 .....	9
<i>Watson v. Citi Corp.</i> (S.D. Ohio Jan. 22, 2009), No. 2:07-CV-0777, 2009 WL 161222 .....	6
<i>Weaver v. Edwin Shaw Hosp.</i> (2004), 104 Ohio St.3d 390 .....	16
<i>Wess v. Storey</i> (S.D. Ohio Apr. 14, 2011), No. 2:08-cv-623, 2011 WL 1463609.....	17

<i>Williams v. Boston Scientific Corp.</i> (N.D. Ohio Mar. 27, 2013), No. 3:12CV1080, 2013 WL 1284185.....	17
<i>Willits v. Peabody Coal Co.</i> (6th Cir. Sept. 1, 1999), Nos. 98-5458, 98-5527, 1999 WL 701916.....	4
<i>Winn v. Unifund CCR Partners</i> (D. Ariz. Mar. 30, 2007), No. CV06-447-TUC-FRZ, 2007 WL 974099.....	14

**Statutes**

15 U.S.C. 1692f.....	11, 12
15 U.S.C. 1692i.....	6
R.C. 1.48.....	9
R.C. 1309.102.....	7
R.C. 1343.03.....	11
R.C. 1345.01.....	15, 16, 18
R.C. 1345.02.....	14
R.C. 1345.03.....	14
R.C. 2305.03.....	6
R.C. 2305.06.....	1
R.C. 2305.07.....	1
R.C. 2305.08.....	8
R.C. 4710.....	18, 19
R.C. 5725.01.....	17

**Other Authorities**

Am. Sub. S.B. No. 185.....	16
Federal Deposit Ins. Corp.'s Bank Finder.....	17

**Rules**

Ohio R. Civ. P. 11.....	12
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**Constitutional Provisions**

Section 28, Article II.....	9, 10
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## STATEMENT OF FACTS

Although Appellee Sandra Taylor-Jarvis (“Jarvis”) includes more facts than are necessary in her brief,<sup>1</sup> a few important facts must be noted. First, Jarvis has lived in Ohio at all times relevant in this case.<sup>2</sup> Second, Jarvis concedes she used her Chase Bank USA, N.A. credit card for purchases.<sup>3</sup> Third, Jarvis concedes that she failed to make her minimum monthly payment on her Chase Bank USA, N.A. credit card account on January 1, 2005 and she never made a minimum payment thereafter.<sup>4</sup> On February 7, 2005, her account was noted as delinquent.<sup>5</sup>

Appellant First Resolution Investment Corporation (“FRIC”) eventually acquired the account and retained Appellants Cheek Law Offices, LLC and Attorney Parri Hockenberry (collectively referred to as “Cheek”) to file suit against Jarvis.<sup>6</sup> On March 9, 2010, Cheek filed a Complaint in the Summit County Court of Common Pleas on FRIC’s behalf against Jarvis.<sup>7</sup> If Ohio’s statute of limitations applies, the Complaint was clearly timely.<sup>8</sup>

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<sup>1</sup> The Amicus briefs likewise include more facts than are necessary, focusing on alleged abuses throughout the debt collection industry. While some debt collectors may have committed abuses, those cases are not before this Court. This specific case involves a Complaint which was filed within Ohio’s statute of limitations and which prayed for relief based upon readily apparent facts. The issues in this case center on whether Ohio’s limitations period applied and whether a party is permitted to seek interest in excess of the statutory rate when it has good grounds to do so. The fact that the trial and appellate courts held differently exemplifies that the issues in this case are unsettled. Alleged abuses by other debt collectors simply are not relevant in this case.

<sup>2</sup> Transcript of Docket and Journal Entries for the Summit Cty. Common Pleas Ct. (“Doc.”) No. 61, Cheek’s MSJ, Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as “C 1 of 21” through “C 21 of 21”. (Supplement 797, 805 – 825) (“S.”).

<sup>3</sup> Jarvis Merit B. p. 3.

<sup>4</sup> Jarvis Merit B. p. 8-9; Doc. No. 61, Cheek’s MSJ, Ex. B, Jarvis Resp. to Req. for Admis. Nos. 7-8, 10-15 and statements attached as C 3, 4, 6, and 8 of 21 (S. 797, 807, 808, 810, 812).

<sup>5</sup> Doc. No. 61, Cheek’s MSJ, Ex. C, FRMC Resp. to Interrog. No. 23 (S. 827).

<sup>6</sup> Jarvis Merit B. p. 3; Doc. No. 1, FRIC’s Compl. (S. 37 – 41).

<sup>7</sup> Doc. No. 1 (S. 37 – 41).

<sup>8</sup> All parties appear to agree that the earliest the cause of action accrued was January 1, 2005. In Ohio, the statute of limitations applicable to contract actions is fifteen years for express contracts or six years for implied contracts. *See* R.C. 2305.06, 2305.07. Thus, the Complaint was timely filed if Ohio’s limitations period applied.

The Complaint alleged, “upon information and belief,” that Jarvis owed the charged-off balance, accrued interest, and future interest at 24.00% and prayed for that amount.<sup>9</sup> Attached to the Complaint was an account statement reflecting a 24.99 percent interest rate on the account.<sup>10</sup>

It is important to note the facts which are not in the record. There is no evidence that the credit card was used in Delaware, or that Jarvis was in Delaware when she breached her payment obligations. There is no evidence that the credit card agreement required payments to be made only in Delaware, as opposed to locations in Ohio. In fact, at least one of Jarvis’ statements directed payment to Illinois,<sup>11</sup> and several statements allowed payment electronically or telephonically.<sup>12</sup> Finally, there is no evidence, or even an allegation, that Jarvis did not agree to a written cardholder agreement<sup>13</sup> providing for interest in excess of Ohio’s statutory rate.

#### **ARGUMENTS IN SUPPORT OF APPELLANTS’ PROPOSITIONS OF LAW**

**Propositions of Law Nos. I and II:** Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio when a consumer fails to make a required payment, and subsequent insufficient payments do not cure the breach.

Jarvis asks this Court to adopt the proposition of law that a credit card cause of action accrues in the state where payments are due.<sup>14</sup> Jarvis contends that this rule applies even if “a bank reserve[s] the right to change the place of payment and performance from time to time,” arguing that “this reserved power should not alter the result that when a consumer fails to pay on the date specified at the place designated, a cause of action accrues then and there.”<sup>15</sup> When coupled with Jarvis’ contention on the second proposition in this case – “if a consumer fails to

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<sup>9</sup> Doc. No. 1, ¶3 (S. 37).

<sup>10</sup> *Id.*

<sup>11</sup> See Doc. No. 56, Jarvis MSJ, Horrigan Aff. ¶ 7, Ex. B (S. 223, 435).

<sup>12</sup> See Doc. No. 61, Cheek’s MSJ, Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as C 7, 9, 10, 11, and 13 of 21 (S. 797, 811, 813 – 815, 817).

<sup>13</sup> Although no cardholder agreement has been admitted, Jarvis concedes that a cardholder agreement did apply to her account. Doc. No. 19, FACACC ¶¶56-59 (S. 51).

<sup>14</sup> Jarvis Merit B. p. 20.

<sup>15</sup> *Id.* p. 25.

make an installment payment on a credit card...a cause of action accrues with respect to that installment only”<sup>16</sup> – Jarvis’ proposed propositions of law result in an absurd outcome in credit card cases. If the credit card invoice shows payment due in Delaware, and the consumer fails to pay, then the next invoice shows payment due in Illinois, and the consumer fails to pay, then under Jarvis’ reasoning, there would be two separate causes of action, each with a different statute of limitations. Fortunately, neither the law nor logic dictates such an outcome. The more prudent and legally supportable rule for determining accrual in credit card cases is that a cause of action accrues in the state in which the consumer resides on the date the consumer breaches the contract by first failing to make a minimum required payment.

**A. Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.**

Jarvis rejects this proposition of law and argues that a cause of action for breach of a credit card contract accrues where payment is due. Jarvis contends that her proposition is supported by three of this Court’s decisions, as well as non-Ohio case law. Jarvis Merit B. p. 22-23, citing *Alropa Corp. v. Kirchwehm* (1941), 138 Ohio St. 30; *Payne v. Kirchwehm* (1943), 141 Ohio St. 384; *Meekison v. Groschner* (1950), 153 Ohio St. 301.

**1. This Court’s decisions support that a credit card cause of action accrues where the consumer resides at the time of the breach.**

While Jarvis insists that all contract cases are alike, each of this Court’s decisions relied upon by Jarvis is readily distinguishable. *Alropa*, *Payne*, and *Meekison* involved promissory notes for a set amount of indebtedness which was explicitly payable at a certain location *from the contract’s inception*. In contrast, a credit card contract, from its inception, has no certain amount due, no certain due date, and no certain place of payment. In other words, while *Alropa*, *Payne*,

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<sup>16</sup> *Id.* p. 37.

and *Meekison* involved contracts which existed at one moment in time, with a certain amount lent, a certain amount due, a certain payment date, and a certain payment place, and never changed thereafter, a credit card contract perpetually evolves – with varying amounts due based upon the consumer’s purchases, varying dates of payment based upon whether there is a balance due, and varying places of payment based upon a bank’s chosen payment processing center<sup>17</sup>. Thus, unlike the contracts at issue in *Alropa*, *Payne*, and *Meekison*, a credit card contract exists upon issuance and *use* of the card, not upon the signature on an application. *Bank One, Columbus, N.A. v. Palmer* (1989), 63 Ohio App.3d 491, 493, 579 N.E.2d 284, 285.

This inherently variable quality renders a credit card contract more appropriately analogized to the fact patterns in *Willits v. Peabody Coal Co.*<sup>18</sup> and *Combs v. International Insurance Co.*<sup>19</sup>, in which the Sixth Circuit looked to the place of wrongful conduct (the payor’s location) to determine accrual because the payor was required to make payment “regardless of the [payee’s] location.” This Court has adopted similar tests in the past which, if applied here, would result in the debtor’s place of residence serving as the place of accrual. *See State ex rel. Hawley v. Industrial Commission* (1940), 137 Ohio St. 332, 335 (“His alleged right, his claimed wrong, and the relief which he demands – the elements of his alleged cause of action which makes necessary the action itself – are all centered in the commission and its failure or refusal to act...[A] cause of action ‘arises’ at the place where the facts creating the necessity for bringing

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<sup>17</sup> In this case, this last fact is evidenced by at least one statement showing Illinois as the place of payment and several statements allowing for electronic or telephonic payments. Doc. No. 56, Jarvis MSJ, Horrigan Aff. ¶7, Ex. B, monthly statement for December 10, 2003 to January 8, 2004 (S. 223, 435); Doc. No. 61, Cheek’s MSJ, Ex. B, Jarvis Resp. to Req. for Admis. No. 7 and statements attached as C 7, 9, 10, 11, and 13 of 21 (S. 797, 811, 813 – 815, 817).

<sup>18</sup> *Willits v. Peabody Coal Co.* (6th Cir. Sept. 1, 1999), Nos. 98-5458, 98-5527, 1999 WL 701916, \*13.

<sup>19</sup> *Combs v. Int’l Ins. Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, 692, aff’d, 354 F.3d 568 (6th Cir. 2004).

the action occur”) (emphasis added); *State ex rel. Barber v. Rhodes* (1956), 165 Ohio St. 414, 421 (focusing on the “locus of the debt” to determine where the cause of action arose).

**2. Federal and state cases which look to the place of wrongful conduct provide the more appropriate test to determine accrual for breach of a credit card contract.**

Without addressing *Hawley* and *Barber*, Jarvis looks to decisions in other state and federal law cases for support. First, Jarvis makes the claim that every credit card case dealing with where a cause of action on a credit card accrues looks to the place of payment.<sup>20</sup> This is not a significant statement, considering that Jarvis could cite only five cases, including two from the same state, and one which contained a distinction the Court explicitly acknowledged<sup>21</sup>. Moreover, at least one case in this State applied Ohio law in a credit card case. *See Matrix Acquisitions, LLC v. Hooks* (5th Dist. 2011), 2011-Ohio-3033. Contrary to Jarvis’ assertion, the Court in *Hooks* did recognize that the bank was a Delaware corporation and billing statements originated in Delaware. *Id.* at ¶10. Despite these facts, the Court held that the plaintiff lacked evidence to show that the cause of action accrued in Delaware. *Id.* at ¶15.

Next, Jarvis points to various cases which purportedly rely on the place of performance to determine the place of accrual. None of these cases address credit card contracts and many are outdated. Nonetheless, Appellants recognize that different courts have adopted different rules, and Appellants have already pointed to cases which favor their position<sup>22</sup>. The question for this Court is what test it will apply in Ohio in the specific context of a credit card cause of action.

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<sup>20</sup> Jarvis Merit B. p. 25.

<sup>21</sup> *See Martin v. Law Offices Howard Lee Schiff* (D.R.I. Dec. 10, 2012), No. 11-484S, 2012 WL 7037743, \*4 (acknowledging that the “claim did not accrue or arise in Rhode Island because Plaintiff did not move to Rhode Island until after she was already delinquent.”).

<sup>22</sup> *See, e.g., Ristow v. Threadneedle* (1998), 220 Wis.2d 644; *Brown v. Cosby* (1977), 433 F.Supp. 1331; *Alberding v. Brunzell* (9th Cir. 1979), 601 F.2d 474; *Scherer v. Hellstrom* (2006), 270 Mich.App. 458.

The tests pressed by Jarvis and as applied by the Court of Appeals<sup>23</sup> are inherently flawed in the context of credit card cases.<sup>24</sup> On the other hand, the test sought by Appellants is consistent with this Court's decisions in *Hawley* and *Barber*, consistent with federal cases out of the Sixth Circuit, and contains no inherent logical or practical flaws. To the contrary, in most cases, it will set a credit card cause of action's accrual in the place it most reasonably belongs -- the State where the consumer resides when the wrong (failure to pay) is committed and the State where the consumer must be sued if an action is brought. See 15 U.S.C. § 1692i; *Celebrezze v. United Research, Inc.* (1984), 19 Ohio App.3d 49, 50. For these reasons, Appellants urge this Court to extend the *Hawley/Barber* accrual test to credit card causes of action, and hold that a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.

**B. Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment, and subsequent insufficient payments do not cure the breach.**

**1. The cause of action accrued prior to the borrowing statute's<sup>25</sup> effective date.**

Much of Jarvis' argument on the issue of when the cause of action accrued in this case is dependent upon her contention that a credit card contract is an installment contract. Contrary to Jarvis' assumption, "credit card accounts are unlike promissory notes or installment loans, such as mortgages, student loans, and car loans." *Smither v. Asset Acceptance, LLC* (Ind. Ct. App.

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<sup>23</sup> The Court of Appeals used the "most significant relationship" test to determine accrual. Although Cheek disagrees with the use of that test to determine accrual, even if that test is the one this Court applies, the proper result utilizing that test should have been in Appellants' favor. See Cheek Merit B. pp. 17-20; *Heiges v. JP Morgan Chase Bank, N.A.* (N.D. Ohio 2007), 521 F.Supp.2d 641 (holding that Ohio law applied to Chase Bank credit card account under "most significant relationship" test); *Watson v. Citi Corp.* (S.D. Ohio Jan. 22, 2009), No. 2:07-CV-0777, 2009 WL 161222 (same for Citibank credit card account).

<sup>24</sup> See discussion, Cheek Merit B. pp. 11-15.

<sup>25</sup> R.C. 2305.03.

2010), 919 N.E.2d 1153, 1159.<sup>26</sup> While an installment loan contains a “total amount of indebtedness and a defined schedule of repayment...from the outset,” the issuer of a credit card “sends monthly statements to the debtor indicating the amount of that month’s required minimum payment, which may vary...” *Id.* Thus, credit cards more closely resemble open accounts. *Id.* Accordingly, and contrary to Jarvis’ assumption, “it is not clear” that a suit on an open account “ought to incorporate the law regarding optional acceleration clauses.” *Id.* at 1160.

Unlike with installment contracts, the invocation of an acceleration clause should have no bearing on the accrual of a credit card action. In the case of an installment contract, the entire cause of action will eventually accrue on a certain date – the predetermined date for the last installment due. Thus, even if an acceleration clause is never invoked, the cause of action on every installment will eventually accrue. Conversely, a credit card debt has no end date and no predetermined amount due each month. Waiting for an acceleration date to determine the date of accrual for the entire debt would simply allow a credit card issuer to indefinitely “delay the running of the statute of limitations.” *See id.* Indeed, under Jarvis’ theory, if the credit card issuer simply stops sending statements with new minimum payments due, the issuer would thereby stop the remainder of the debt – or any future “installments” as Jarvis calls them – from accruing at all. Thus, viewing the minimum payment due each month as a separate cause of action until the debt is accelerated is simply unworkable in a credit card case.

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<sup>26</sup> See also R.C. 1309.102(A)(47)(b) (excluding from the definition of “instruments”, which includes notes, “writings that evidence a right to payment arising out of the use of a credit or charge card”); *Smith v. Palasades Collection, LLC* (N.D. Ohio Apr. 3, 2007), No. 1:07CV176, 2007 WL 1039198, \*6 (“His [FDCPA] cause of action is based upon the *flawed* premise that a credit card agreement is equivalent to a promissory note.”) (emphasis added).

Not surprisingly, then, courts look to the last payment on a credit card to determine the date of accrual. *See, e.g., id.*<sup>27</sup> However, these courts did not address whether the “last payment” was the last minimum payment or a partial payment. That is the question in this case.

Appellants contend that this Court should look to the last minimum payment made or the next payment due date thereafter, because Jarvis was perpetually in breach from that date forward.<sup>28</sup> Partial payments simply toll the statute of limitations, and do not address when the debtor was first in breach and when the cause of action first accrued.<sup>29</sup> Jarvis failed to make a minimum payment in January of 2005 and did not subsequently make any minimum payments.<sup>30</sup> Accordingly, the cause of action accrued prior to the borrowing statute’s effective date.

**2. Because the cause of action accrued prior to the borrowing statute’s effective date, the borrowing statute does not apply.**

Jarvis raises the argument that, even if the cause of action accrued prior to the borrowing statute’s effective date, the borrowing statute nonetheless applies. In support of this contention, Jarvis cites this Court’s recent decision in *Estate of Johnson v. Randall Smith, Inc.* (2013), 135 Ohio St.3d 440, and urges this Court to extend that decision to the borrowing statute. Jarvis’ position is unsupported and her reliance on *Johnson* is misplaced.

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<sup>27</sup> *See also Colorado Nat’l Bank of Denver v. Story* (Mt. 1993), 261 Mont. 375, 378, 862 P.2d 1120, 1122; *Knighten v. Palisades Collections, LLC* (S.D. Fla. 2010), 721 F.Supp.2d 1261, 1269; *Rollins v. Portfolio Recovery Associates, LLC* (W.D. Mo. Apr. 25, 2010), No. 11-00665-CV-W-GAF, 2012 WL 6051999, \*5.

<sup>28</sup> *See, e.g., Siemientkowski v. Bank One Columbus, N.A.* (Nov. 23, 1994), 8th Dist. No. 66531, 1994 WL 663483, \*1; *Capital One Bank v. Rhoades* (Oct. 21, 2010), 8th Dist. No. 93968, 2010-Ohio-5127, ¶23; *Discover Bank v. Cummings* (Apr. 13, 2009), 9th Dist. No. 08CA009453, 2009-Ohio-1711, ¶36.

<sup>29</sup> *See* R.C. § 2305.08; *Slack v. Cropper* (11th Dist. 2001), 143 Ohio App.3d 74, 84; *Cummings v. Groszko* (10th Dist. 1992), 76 Ohio App.3d 812, 817.

<sup>30</sup> Doc. No. 61, Cheek’s MSJ, Ex. B, Jarvis Resp. to Req. for Admis. No. 7-8, 11, 13, 14 and statements attached as C 3, 4, 6, and 8 of 21 (S. 797, 807, 808, 810, 812).

Section 28, Article II of the Ohio Constitution provides: “The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts...” Revised Code section 1.48 “establishes an analytical threshold which must be crossed prior to inquiry under Section 28, Article II.” *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106 (superceded by statute on other grounds)<sup>31</sup>. Thus, where “there is no clear indication of retroactive application, then the statute may only apply to cases which *arise* subsequent to its enactment.” *Id.* at 106 (emphasis added), *quoting Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262; *Johnson*, 135 Ohio St.3d at 444 (same). If, however, the statute does meet the threshold test for retroactive application, the court then must inquire whether it contravenes Section 28, Article II. *Van Fossen*, 36 Ohio St.3d at 106. A statute contravenes this provision when it “impairs or takes away vested rights,” or “affects an accrued substantive right.” *Id.* at 106-07. However, “laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.” *Johnson*, 135 Ohio St.3d at 445, *quoting Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, syllabus para. 2.

As it relates to the threshold issue, “[n]othing in the language of O.R.C. §2305.05(B) demonstrates that the Ohio General Assembly intended the statute to apply retroactively.” *Dudek v. Thomas & Thomas Attys. At Law, P.C.* (N.D. Ohio 2010), 702 F.Supp.2d 826, 836; *see also Van Fossen*, 36 Ohio St.3d at 106 (involving a statute clearly intended to apply retroactively when it expressly provided that it applied “to cases pending on the effective date of the statute, which includes causes of action which arose prior to the statute’s effective date...”). Even if the legislature did intend the statute to apply to causes of action arising prior to its effective date, which the plain language does not support, applying the statute retroactively in this case would

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<sup>31</sup> *See also State v. LaSalle* (2002), 96 Ohio St.3d 178, 181.

impair an accrued substantive right. *See Gregory v. Flowers* (1972), 32 Ohio St.2d 48, syllabus para. 3 (“When the retroactive application of a statute of limitation operates to destroy an accrued substantive right [right to file workers’ compensation claim], such application conflicts with Section 28, Article II of the Ohio Constitution.”); *Dudek*, 702 F.Supp.2d at 838 (refusing to apply Ohio’s borrowing statute to cause of action which accrued prior to effective date)<sup>32</sup>.

*Johnson* does not change this analysis. *Johnson* involved a statute which prohibited the admissibility of “sympathetic” statements in any civil action brought after its effective date. 135 Ohio St.3d at 443. This statute had absolutely no effect on any cause of action or any substantive right. The plaintiffs in the case were still permitted to bring the same cause of action, in the same limitation period, regardless of whether the cause of action accrued before or after the effective date of the statute. They were simply limited in the type of evidence they could present to prove their claim. The statute, by its terms and by its effect, was purely remedial.

Conversely, as it relates to statutes of limitation, this Court has recognized that a change in the statute of limitations to claims which have already accrued would have a retroactive effect and does impair a substantive right. *See Flowers*, 32 Ohio St.2d at syllabus para. 3. Accordingly, *Johnson* is of no consequence in this case. The two-step approach discussed above is applicable. In following that approach, it is clear that the borrowing statute does not, by its plain language, and cannot, by its effect, apply to claims which accrued prior to its effective date.

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<sup>32</sup> Other cases have held similarly. *Executone of Columbus, Inc. v. Inter-Tel Inc.* (S.D. Ohio 2009), 665 F.Supp.2d 899, 918 (same); *Sonic Auto., Inc. v. Chrysler Ins. Co.* (S.D. Ohio Sept. 13, 2011), No. 1:10-cv-717, 2011 WL 4063020, \*7 (“North Carolina law is only relevant to the extent that Sonic’s breach of contract claim accrued on or after April 7, 2005.”); *Arandell Corp. v. American Elec. Power Co., Inc.* (S.D. Ohio Sept. 15, 2010), No. 2:09-cv-231, 2010 WL 3667004, \*6 (“As the face of the Complaint provides that the claims accrued before the borrowing statute was enacted in 2005, the Court declines to apply Ohio’s borrowing statute.”).

**Proposition of Law No. III:** A complaint for breach of a credit card contract may pray for a post-judgment interest rate that exceeds the statutory rate when there is evidence suggesting that the parties agreed to the higher interest rate.

Jarvis continues to push the argument that Appellants have failed thus far to prove, by admissible evidence, that the credit card agreement provided for an interest rate in excess of the statutory rate. But this argument masks the actual issue in this case. The actual issue is not whether Appellants proved that the credit card agreement provided for a higher rate but, rather, whether Appellants were permitted to *pray* for the higher interest rate under Ohio and federal law in the absence of an admissible copy of the credit card agreement.<sup>33</sup>

Although Jarvis argues that the contract in this case was formed in Delaware<sup>34</sup> and the cause of action accrued in Delaware<sup>35</sup>, she changes course on this issue, arguing that Ohio law controls the applicable interest rate<sup>36</sup>. Nonetheless, Ohio law does not save Jarvis' claim. Under Ohio law, interest in excess of the statutory rate is explicitly allowed if a written contract provides for such. *See* R.C. §1343.03(A). A party may prove that such a written contract existed without producing the contract itself.<sup>37</sup> Thus, under Ohio law, a party may pray for interest in

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<sup>33</sup> Jarvis cites to the Seventh Circuit's decision in *Seeger v. AFNI, Inc.* (7th Cir. 2008), 548 F.3d 1107, for the contention that Appellants must prove they are entitled to 24 percent interest to avoid liability under 15 U.S.C. 1692f(1) of the FDCPA. *Seeger* involved a debt collection letter demanding payment from the debtor, not a complaint filed in court. 548 F.3d at 1110. Moreover, *Seeger's* analysis focused on whether Wisconsin law allowed the demand being made. *Id.* at 1111. As *Harvey* and *Deere* recognize, an FDCPA action premised on a complaint requires more than an allegation that those who filed the complaint did not have the evidence on hand to prove the complaint. Moreover, Ohio law *does* allow recovery of interest and permits plaintiffs to pray for such interest if they have good grounds for doing so.

<sup>34</sup> Jarvis Merit B. p. 7.

<sup>35</sup> Jarvis Merit B. p. 22.

<sup>36</sup> Jarvis Merit B. p. 43, 48.

<sup>37</sup> *See, e.g., Champaign Landmark, Inc. v. McCullough* (Nov. 27, 1990), 3d Dist. No. 6-89-17, 1990 WL 188002; *Ohio Valley Mall Co. v. Hoang* (Dec. 22, 2010), 7th Dist. No. 10 MA 71, 2010-Ohio-6510, ¶13; *see also Minster Farmers Coop. Exchange Co., Inc. v. Meyer* (2008), 117 Ohio St.3d 459, 463 (recognizing that existence of a contract providing for a higher rate could be proven without producing the contract).

excess of the statutory rate in the absence of the written contract, so long as the party has “good grounds” to support the prayer, even if the party is ultimately unsuccessful in proving its case.<sup>38</sup>

Although Ohio law clearly allowed Appellants to pray for interest in excess of the statutory rate, Jarvis maintains that Appellants’ alleged failure to prove their case (which they long ago dismissed) entitles her to relief under the FDCPA. She asserts that Appellants “attempted to collect an amount that they were not entitled to collect” and that the Sixth Circuit’s decision in *Harvey v. Great Seneca Financial Corp.* (6th Cir. 2006), 453 F.3d 324, does not apply to such claims.<sup>39</sup> Jarvis is incorrect, for her claim is precisely the type of claim to which *Harvey* would apply. See *Bandy v. Midland Funding, LLC* (S.D. Ala. Jan. 18, 2013), No. 12-00491-KD-C, 2013 WL 210730, \*4, \*9 (applying *Harvey* to claim under section 1692f(1) of the FDCPA).<sup>40</sup>

*Harvey*’s protection applies to a complaint that is filed “without the means of proving that [the debtor] actually owed a debt to [the debt collector] in the specified amount.” *Harvey*, 453 F.3d at 327. The entire crux of Jarvis’ claim is that Appellants sought the higher rate in their prayer “without producing, possessing, or ever having access to a contract authorizing a higher rate.”<sup>41</sup> Just as in *Harvey* and *Deere*, she does not allege “that anything in the state court complaint was false, or that the complaint was baseless.” *Deere*, 413 F.Supp.2d at 890-91.

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<sup>38</sup> See Ohio R. Civ. P. 11; *Borowski v. State Chem. Mfg. Co.* (1994), 97 Ohio App.3d 635, 647; *Hoang*, 2010-Ohio-6510, ¶13 (concluding that landlord complied with Ohio Rules and upholding default judgment even though “an actual copy of the lease agreement [showing the 18 percent interest rate] was never submitted for the record”); *Discover Bank v. Lammers* (July 17, 2009), 2d Dist. No. 08-CA-85, 2009-Ohio-3516, at ¶25 (holding there was no violation of Ohio Rules even though the cardholder agreement was never introduced into evidence); *Matrix Acquisitions, L.L.C. v. Swope* (Jan. 13, 2011), 8th Dist. No. 94943, 2011-Ohio-111, ¶¶17-18 (rejecting FDCPA and OCSPA claims based upon prayer for 25 percent interest).

<sup>39</sup> Jarvis Merit B. p. 47.

<sup>40</sup> See also *Deere v. Javitch, Block & Rathbone LLP* (S.D. Ohio 2006), 413 F.Supp.2d 886 (applying *Harvey*’s reasoning to sections 1692d, 1692e, and 1692f of the FDCPA).

<sup>41</sup> Doc. No. 19, ¶162 (S. 74); see also ¶¶88-89, 91, 94-101, 161-174 (S. 57 – 60, 74 –76).

Rather, Jarvis attempts to step outside *Harvey*'s protection by alleging that Appellants prayed for a higher rate when they did not "ever hav[e] access to a contract authorizing" such a rate.<sup>42</sup>

However, this distinction does not place Appellants outside *Harvey*'s protection. As discussed above, Appellants were not required to have access to the contract authorizing the higher rate in order to pray for or prove that such a contract existed. This is not a *coulda, woulda*<sup>43</sup> argument – Jarvis did not allege that no such contract *ever existed* and, thus, Appellants could never prove its existence under any circumstances (i.e. that their claim was false or baseless<sup>44</sup>); rather, Jarvis alleged that Appellants did not have access to the contract providing for such at the time of summary judgment (i.e. they did not have the means of proving their claim)<sup>45</sup>. It must be noted that discovery was not yet closed in the case.<sup>46</sup> Because Appellants' quick access to such a contract does not determine the propriety of their prayer and is not the exclusive means of proving their claim under Ohio law, Jarvis' claim falls squarely in *Harvey*'s ambit: she is simply alleging that Appellants did not possess the best evidence to prove their claim. *Harvey* rejects FDCPA liability under such circumstances.<sup>47</sup> 453 F.3d at 333; *see also Swope*, 2011-

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<sup>42</sup> Jarvis also attempts to distinguish *Harvey* by citing to the Ninth Circuit's decision in *McCullough v. Johnson, Rodenburg & Lauinger, LLC* (9th Cir. 2011), 637 F.3d 939, 950. In *McCullough*, the court distinguished *Harvey* by asserting that the debt collectors failed to present admissible evidence establishing entitlement to fees "at the time of the summary judgment motion [on the FDCPA claim] – not at the time it filed suit [in the underlying state court action]." This is a bizarre and inapt distinction. In *Harvey*, the FDCPA case was dismissed for failure to state a claim; thus, such an FDCPA claim should never reach summary judgment because requiring debt collectors to prove by admissible evidence a complaint they have already dismissed is exactly what *Harvey* prevents.

<sup>43</sup> Jarvis Merit B. p. 48, n. 268.

<sup>44</sup> *See, e.g., Kuria v. Palisades Acquisition XVI, LLC* (N.D. Ga. 2010), 752 F.Supp.2d 1293, 1301-02 (distinguishing *Harvey* and *Deere* because plaintiff alleged he never owed the debt).

<sup>45</sup> Incidentally, Jarvis was able to make this allegation because Appellants openly revealed this fact in the Complaint – the very document Jarvis now attacks.

<sup>46</sup> Doc. No. 64, Order on Status Conference, p. 2.

<sup>47</sup> Jarvis claims that Appellants' argument below was simply that the "Chase invoices sufficed to establish entitlement to 24%" and that many of Appellants' argument on this issue

Ohio-111, ¶¶17-18 (rejecting identical FDCPA and OCSPA claim because “the court was to determine the proper interest rate at trial.”); *Argentieri v. Fisher Landscapes, Inc.* (D. Mass. 1998), 15 F.Supp.2d 55, 61-62 (holding that prayer for attorney’s fees in collection complaint did not violate section 1692f even where credit agreement did not specifically authorize such fees)<sup>48</sup>. Such a pleading is likewise protected by a litigation privilege.<sup>49</sup>

**Proposition of Law No. IV:** The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no “consumer transaction” or “supplier”.

The ultimate question within this proposition is: where is the consumer transaction? The Ohio Consumer Sales Practices Act (“CSPA”) prohibits “suppliers” from committing unfair, deceptive, or unconscionable acts in connection with a “consumer transaction” whether they occur before, during, or after the transaction. R.C. 1345.02(A), R.C. 1345.03 (A). Thus, Appellants must have been acting in connection with a defined consumer transaction. Jarvis and the State of Ohio contend that the collection of a debt is a consumer transaction in this case because (1) the so-called “financial institution exemption” does not extend to Appellants, (2) collecting a debt is a service under the CSPA and, therefore, a consumer transaction, and (3) this

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have been forfeited. Jarvis Merit B. pp. 42, 48. This is not true. In its Motion for Summary Judgment and its Appellate Brief, Cheek cited *Argentieri*, *Harvey*, and *Swope* for the proposition that “insufficient documentation supporting a state court lawsuit not actionable under FDCPA.” See Doc. No. 61, Cheek MSJ, pp. 22-23 (S. 749-750); Transcript of Docket and Journal Entries Ninth District Ct. App. (“App. Doc.”) No. 18, Cheek App. Brief, pp. 10-11 (S. 927-928). Appellants are certainly permitted to further explain these cases and arguments, which necessarily requires a discussion of whether Ohio law permitted the prayer for interest. If Ohio law did not allow the prayer, then *Harvey* would arguably be inapplicable. See *Harvey*, 453 F.3d at 332-33; see, e.g., *Foster v. DBS Collection Agency* (S.D. Ohio 2006), 463 F.Supp.2d 783, 802 (allowing FDCPA claim where Ohio law forbade recovery of attorneys’ fees).

<sup>48</sup> *Accord Winn v. Unifund CCR Partners* (D. Ariz. Mar. 30, 2007), No. CV06-447-TUC-FRZ, 2007 WL 974099.

<sup>49</sup> See *Surace v. Wuliger* (1986), 25 Ohio St. 3d 229 (state law privilege); *Sosa v. DirecTV* (9th Cir. 2006), 437 F.3d 923, 929 (First Amendment privilege). Although Jarvis contends the litigation privilege argument is forfeited (Jarvis Merit B. pp. 48-49), Cheek’s Reply to Jarvis’ Counterclaim raised this defense (Doc. No. 23, Reply to Countercl. p. 13 (S. 111)).

Court's decision in *Anderson*<sup>50</sup> is inapplicable. These arguments reflect a fundamental misunderstanding of, and refusal to adhere to, the plain language of the CSPA. The credit card transaction cannot serve as the basis for the consumer transaction, the act of collecting on a debt is not itself a consumer transaction, and this Court's decision in *Anderson* is clearly applicable.

As a preliminary matter, it must be noted that Jarvis' entire claim is based upon the original complaint filed in this case, not on activities preceding the lawsuit. Neither Jarvis nor the State argues that Appellants Cheek and Hockenberry attempted to modify or otherwise negotiate the debt; rather, they filed a complaint in state court. As the next sections illustrate, the filing of a complaint, absent some consumer transaction, is not itself a consumer transaction.

**A. The definition of "consumer transaction" explicitly does not include a transaction between a financial institution and its customer and, therefore, Jarvis cannot rely on the underlying credit card account as her basis for meeting the element of a consumer transaction.**

The State does not argue that attorneys or law firms, such as the Appellants here, are subject to the CSPA. Rather, the State argues that the "financial-institutions exemption immunizes entities, not transactions."<sup>51</sup> This argument completely ignores the text's very clear language, which is contained in the definition of "consumer transaction" as follows:

"Consumer transaction" does not include *transactions* between persons, defined in sections 4905.03 and 5725.01 of the Revised Code [financial institutions], and their customers, except for *transactions* involving loans made pursuant to sections 1321.35 to 1321.48 of the Revised Code and *transactions* in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers;...

R.C. § 1345.01 (A) (emphasis added). The placement of this exemption is important. If it was truly a "financial institution exemption", rather than a "financial institution transaction

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<sup>50</sup> *Anderson v. Barclay's Capital Real Estate, Inc.* (2013), 136 Ohio St.3d 31.

<sup>51</sup> State Merit B. p. 7.

exemption,” then the exemption would appear in the definition of “supplier,” not the definition of “consumer transaction.”

Moreover, contrary to the State’s contention<sup>52</sup>, the portion of the definition concerning “transactions in connection with residential mortgages” actually illustrates that the financial institution exemption is, indeed, a transaction exemption, not an entity exemption. The General Assembly added this exception to the exemption in 2006. *See* Am. Sub. S.B. No. 185. A review of the definitions of “loan officers,”<sup>53</sup> “mortgage brokers,”<sup>54</sup> and “nonbank mortgage lenders,”<sup>55</sup> shows that these terms were defined to exclude financial institutions and their employees. In other words, while financial institutions engaged in residential mortgages continue to have their transactions exempt, these specific non-financial institutions no longer enjoy the same protection “in connection” with these otherwise exempt transactions. There is no similar exception for “transactions in connection with credit accounts between debt collectors and debtors.”

In construing a statute, a court “must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged...” *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390, 393. By its plain language, a consumer transaction does not include a transaction between a financial institution and its customer. This is a transaction exemption, not an entity exemption. Thus, a credit card account – a transaction between a financial institution and its customer – does not qualify as the consumer transaction in a claim under the CSPA.<sup>56</sup>

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<sup>52</sup> State Merit B. p. 7.

<sup>53</sup> R.C. § 1345.01 (H)(2).

<sup>54</sup> R.C. § 1345.01 (J)(2).

<sup>55</sup> R.C. § 1345.01 (K).

<sup>56</sup> *See, e.g., Gionis v. Javitch, Block & Rathbone* (S.D. Ohio, 2005), 405 F.Supp.2d 856, 869 (credit card contract outside the scope of a consumer transaction); *Lamb v. Javitch, Block & Rathbone* (S.D. Ohio, Jan. 24, 2005), No. 1:04-CV-520, 2005 WL 4137786, \*4 (credit card

Jarvis argues that Appellants should not be able to rely on this exception to the definition of “consumer transaction” in the statute because there is no evidence that Chase Bank USA N.A. is a financial institution.<sup>57</sup> This argument is a red herring. Chase Bank USA N.A. is a “national bank”<sup>58</sup>, which R.C. 5725.01(A)(1) explicitly defines as a financial institution. Moreover, Jarvis has the burden of proving the existence of a “consumer transaction”: “[T]he Ohio Consumer Sales Practices Act requires the Plaintiff to prove that the transaction falls within the definition of a ‘consumer transaction,’ that the defendant was a ‘supplier,’ and that the plaintiff was a ‘consumer.’ Plaintiff also must be successful in avoiding the exclusions from the Act to ensure coverage.” *Wess v. Storey* (S.D. Ohio Apr. 14, 2011), No. 2:08-cv-623, 2011 WL 1463609, \*4.<sup>59</sup> After Cheek filed its Motion for Summary Judgment raising this issue<sup>60</sup>, Jarvis failed to raise this defense, and failed to present any evidence that Chase Bank was not a financial institution or that the credit card account constituted a consumer transaction<sup>61</sup>. Indeed, she has admitted that Chase Bank USA, N.A. extended her credit on a credit card account.<sup>62</sup> Case law supports that credit

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contract not covered by the OCSA); *see also Lewis*, 135 F.3d at 412 (American Express not a supplier); *Frame v. Weltman, Weinberg, & Reis* (N.D. Ohio, May 12, 2006), 2006 WL 1348176, \*2, (Discover credit card bank not a supplier).

<sup>57</sup> Jarvis Merit B. p. 49.

<sup>58</sup> *See* Federal Deposit Ins. Corp.’s Bank Finder, relied upon by Jarvis (Jarvis Merit B. p. 7, n. 67), at

<http://research.fdic.gov/bankfind/detail.html?bank=23702&name=Chase Bank USA, National Association&searchName=Chase Bank&searchFdic=&city=&state=&zip=&address=&tabId=1> (accessed Aug. 22, 2013); *see also Kline v. Mortgage Electronic Sec. Systems* (S.D. Ohio Feb. 16, 2011), No. 3:08cv408, 2011 WL 1233582, \*4 (noting that court took “judicial notice of the fact that Wells Fargo is a national bank” and that transactions between such financial institutions and their customers are exempt from the definition of “consumer transaction”).

<sup>59</sup> *See also Ferron v. Zoomgo, Inc.* (S.D. Ohio July 3, 2007), No. 2:06-CV-751, 2007 WL 1974946, \*3; *Williams v. Boston Scientific Corp.* (N.D. Ohio Mar. 27, 2013), No. 3:12CV1080, 2013 WL 1284185, \*6.

<sup>60</sup> Doc. No. 61, Cheek’s MSJ, pp. 18-19 (S. 745-746).

<sup>61</sup> *See generally* Doc. Nos. 56, 65 (S. 171 – 231, 867 – 914).

<sup>62</sup> Doc. No. 56, Jarvis Aff. ¶¶8-10 (S. 225); Doc. No. 19, First Am. Countercl. ¶57 (S. 51).

card issuers are financial institutions exempt from the CSPA.<sup>63</sup> Additionally, regardless of Jarvis' relationship with Chase, she cannot prove a "consumer transaction" with Appellants.

**B. Filing a lawsuit is not a service under the CSPA.**

Jarvis and the State argue that FRIC engaged in a consumer transaction because a "solicitation" to "resolve [an] outstanding debt" is a "transfer of...a service" under the CSPA's definition of a consumer transaction. In support of this argument, the State strains to analogize a demand for payment of a debt to (a) a non-bank lender's loan modification offer, and (b) a third party's offer to compromise debts under R.C. 4710. Both analogies are off the mark.

The State's first analogy fails to recognize and analyze the plain language of the CSPA. The relevant language concerning "nonbank mortgage lenders" in the CSPA is contained in the definition of "consumer transaction" and reads as follows:

"Consumer transaction" does not include transactions between [financial institutions] and their customers, except for...transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers...

R.C. 1345.01 (A).

As a preliminary matter, the State has not cited any authority for its contention that "a loan modification...is a solicitation to 'transfer...a service'". Moreover, the State's contention that "[t]he analysis is no different if the loan modification involves credit-card debt instead of housing debt" is belied by the statute's plain language, which explicitly makes the two different.

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<sup>63</sup> *Lewis*, 135 F.3d at 412 (American Express not a supplier); *Frame*, 2006 WL 1348176, \*2, (Discover credit card bank not a supplier); *Gionis*, 405 F.Supp.2d at 869 (attorneys' collection efforts on behalf of Direct Merchants Credit Card Bank outside the purview of OCSA); see also *Kline*, 2011 WL 1233582, \*4 (noting that court took "judicial notice of the fact that Wells Fargo is a national bank" and that transactions between such financial institutions and their customers are exempt from the definition of "consumer transaction"); *Prephan v. NCO Financial Systems, Inc.* (N.D. Ohio June 29, 2011), No. 3:11CV434, 2011 WL 2579817, \*2 (**Chase Bank** is exempt financial institution under OCSA); *DeJohn v. Lerner, Sampson & Rothfuss* (N.D. Ohio Dec. 11, 2012), No. 1:12CV1705, 2012 WL 6154800, \*3 (same).

In the case of a mortgage loan modification, the statute specifically includes residential mortgage transactions within the definition of a “consumer transaction.” Thus, transactions which occur “before, during, or after” the specifically *included* residential mortgage transaction would fall within the definition of a consumer transaction. Conversely, credit card transactions are explicitly *excluded* from the definition of “consumer transaction” and, thus, it does not follow that a “modification” of a credit card debt would be analogous to the modification of a mortgage debt, assuming that any modification would be covered at all. This is to say nothing of the fact that a loan modification offer between a “nonbank mortgage lender[] and *their customers*” involves an ongoing relationship between the lender and the consumer. Conversely, a debtor, in this case Jarvis, is not the “customer” of FRIC or its attorneys.

The State’s second analogy, between FRIC and so-called “debt adjusters” under R.C. 4710, is inapt. Chapter 4710 covers persons “*providing services to debtors in the management of their debts...*” R.C. 4710.01(B) (emphasis added). In other words, R.C. 4710.01 covers third parties who engage debtors as clients and charge fees or accept contributions as payment for the services they provide to such clients. *See* R.C. 4710.02(A)(3). Appellants, on the other hand, have no such client relationship with Jarvis. Rather, these Appellants are an attorney and her law firm, who are alleged to have filed a lawsuit against Jarvis. Jarvis has never alleged that they attempted to arrange a payment plan with her, re-establish the customer relationship with Chase Bank, or otherwise engage in a client or customer relationship with her.

Jarvis must identify a consumer transaction upon which to base her CSPA claim. Simply put, Appellants did not engage with Jarvis in a “sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible.” Appellants simply filed a lawsuit, which does not itself meet the definition of a consumer transaction.

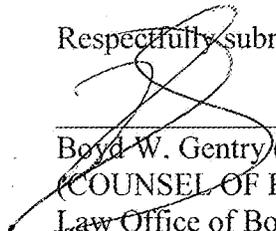
**C. Attorneys who collect debts are not engaged in a consumer transaction.**

This Court's decision in *Anderson v. Barclay's Capital Real Estate, Inc.* (2013), 136 Ohio St.3d 31 is instructive. *Anderson* held that transactions between mortgage-servicers – who “essentially function as collection agencies”<sup>64</sup> – and homeowners do not involve a “transfer of an item of goods, a service, a franchise, or an intangible, to an individual.” *Id.* at 35. A mortgage servicer may contract with a financial institution to service a loan, but it does not transfer a service to the borrower, “which is what would be required in order to trigger the CSPA.” *Id.* This is precisely the case here. Collection attorneys contract with the owner of a debt, not with the debtor. They are not providing any services to the debtor or transferring any item to the debtor. Simply put, as with mortgage servicers, there is no consumer transaction between collection attorneys and debtors.

**CONCLUSION**

For the reasons discussed above, the Appellants request that this court reverse the court of appeals' decision and adopt each of the four propositions of law as stated.

Respectfully submitted,

  
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<sup>64</sup> *Anderson*, 136 Ohio St.3d at 37-38.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on September 20, 2013, via U.S. regular mail to the following:

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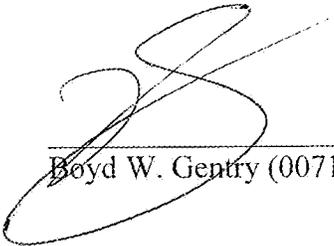
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