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## Ohio Supreme Court to Decide If Mortgage Servicers Are Subject to Ohio Consumer Laws and Penalties

Are mortgage servicers subject to the Ohio Consumer Sales Practices Act, O.R.C. § 1345.01, *et seq.* (“CSPA” or “Act”)? Two federal judges have recently asked the Ohio Supreme Court to decide this question, and Ohio’s top court announced today that it would accept certification. The CSPA exempts many financial institutions – including banks – from its coverage, but there is still controversy as to whether this exemption applies to non-bank mortgage servicers. The controversy is important since the CSPA could add considerable difficulty to mortgage servicers’ efforts to prosecute foreclosure actions. Now that the federal courts have referred this dispute directly to the Ohio Supreme Court, mortgage servicers will be watching closely to see how the Court deals with the matter.

### Brief Background of the CSPA

The CSPA is a powerful tool for consumers and plaintiffs’ counsel. The Act broadly prohibits “unfair and deceptive practices,” and does not limit what a court may find fits this description. If an “unfair and deceptive practice” is proven, the consumer can choose between rescinding (undoing) the transaction or recovering damages, and may also obtain an award of attorney fees. In some instances the consumer may even recover treble damages.

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For the Act to apply, the defendant must be a “supplier” who committed the unfair or deceptive act “in connection with a consumer transaction.” The consumer does not have to prove that the seller intended to commit an “unfair” or “deceptive” act; rather, the seller must prove by a preponderance of the evidence that his error was “*bona fide*,” which means that the error occurred “notwithstanding the maintenance of procedures reasonably adopted to avoid” it.

The CSPA exempts transactions with “financial institutions” from its definition of “consumer transaction,” and though “financial institutions” certainly include most banks, the exemption does not expressly include non-bank mortgage servicers. A mortgage servicer that maintains an office in Ohio may qualify for exemption from the CSPA under the “dealers in intangibles” provision, but without an office in Ohio this possible exemption would not apply. The Ohio General Assembly left this question open when it broadened the definition of “consumer transaction” in 2007 to include many non-bank actors – including loan officers, mortgage brokers, and non-bank lenders. To increase the confusion, the CSPA now specifically lists several mortgage-related practices as prohibited

“unconscionable” actions, but exempts assignees for value of residential mortgages from some CSPA liability.

There is no appellate precedent on the issue. Five years ago a federal trial court held that the CSPA applied to a loan servicing agent,<sup>1</sup> but such precedent is not conclusive on a matter of state law. Although state trial courts have reached the same conclusion,<sup>2</sup> Ohio trial court decisions likewise do not resolve the question.

### **Two Federal Judges Ask the Ohio Supreme Court for Guidance**

Recently, federal courts wrestling with these unsettled issues of state law have asked the Ohio Supreme Court for clarification pursuant to their authority to certify unresolved questions of Ohio law. Judge Jack Zouhary in Toledo, presiding over a CSPA action brought by the Ohio Attorney General against GMAC Mortgage, LLC,<sup>3</sup> has certified the following three questions:

- Does the servicing of a borrower’s residential mortgage loan constitute a “consumer transaction” as defined in the Ohio Consumer Sales Practices Act?
- Does the prosecution of a foreclosure action by a mortgage servicer constitute a “consumer transaction” as defined in the Ohio Consumer Sales Practices Act?
- Is an entity that services a residential mortgage loan, and prosecutes a foreclosure action, a “supplier. . . engaged in the business of effecting or soliciting consumer transactions” as defined in the Ohio Consumer Sales Practices Act?

Federal Judge James Carr, also based in Toledo, presiding over a suit against Barclays Capital Real Estate Inc. (“Barclays”),<sup>4</sup> has certified two parallel questions:

- Does the servicing of a borrower’s residential mortgage loan transaction constitute a “consumer transaction” as defined in the Ohio Consumer Sales Practices Act?

<sup>1</sup> *Dowling v. Litton Loan Servicing, L.P.*, 2006 U.S. Dist. LEXIS 87098 (S.D. Ohio 2006).

<sup>2</sup> *Kline v. Mortgage Electronic Systems, Inc.*, Case No. 3:08-cv-408 (S.D. Ohio, March 29, 2011); *State v. Barclays Capital Real Estate, Inc.*, Case No. 2009-cv-10136 (C.P. Montgomery County, September 16, 2010).

<sup>3</sup> *State of Ohio ex rel. Dewine, v. GMAC Mortgage, LLC, et al.*, N.D. Ohio Case No. 3:10-cv-02537.

<sup>4</sup> *Anderson v. Barclays Capital Real Estate Inc.*, N.D. Ohio Case No. 3:09-cv-02335.



- Are entities that service residential mortgage loans “suppliers. . . engaged in the business of effecting or soliciting consumer transactions” within the meaning of the Ohio Consumer Sales Practices Act?

Judge Carr’s questions do not directly relate to foreclosure actions, since he has not asked the Ohio Supreme Court to rule on whether bringing a foreclosure action alone qualifies as a “consumer transaction” under the CSPA. And, Judge Zouhary has asked the Supreme Court to decide whether an entity that both services a residential mortgage loan and brings a foreclosure action is a “supplier” under the CSPA, while Judge Carr’s equivalent question relates only to entities which service loans.

**Today, the Ohio Supreme Court Accepted The Questions Certified By Judge Zouhary and Judge Carr**

Today, the Ohio Supreme Court announced that it has accepted review of all of the questions certified by both federal judges. In the suit against Barclays (involving Judge Carr’s questions), both Barclays and Plaintiff Sondra Anderson had asked the Court to answer the questions presented. In the Ohio Attorney General’s suit against GMAC (involving Judge Zouhary’s questions), the Attorney General had asked the Ohio Supreme Court to hear the questions, while Defendants GMAC and Ally Financial had opposed the request and Barclays had filed an *amicus* brief asking the Court to hear all of the questions presented by both judges.

Now that the Ohio Supreme Court has accepted review, there will be an opportunity for merits briefing by the parties and for the submission of further *amicus* briefs by other businesses or organizations with a stake in the outcome. Any decision by the Ohio Supreme Court on this matter will almost certainly have an important bearing on consumer law, mortgage servicing, and foreclosure procedure for years to come, and carefully crafted *amicus* briefs – perhaps focusing on the ramifications of the Court’s decisions on the entire industry as opposed to the specific parties – may be critical in helping to resolve these questions. Accordingly, mortgage companies and their trade associations should keep a close eye on the progress of this litigation. Ulmer & Berne will be closely monitoring these cases and the related pleadings. If you have any questions or would like to discuss the issues raised by these cases further, please contact Frances Goins or Richik Sarkar directly.

