



Industry update: recent Ohio Supreme Court decision finds residential mortgage servicing is not covered by the Ohio Consumer Sales Practice Act

May 21, 2013

[Full text of the Court's opinion](#)

On May 14, 2013, the Ohio Supreme Court took a significant stance in favor of mortgage servicers. In *Anderson v. Barclay's Capital Real Estate*, Slip Opinion No. 2013-Ohio-1933, the Court answered two certified questions of state law: 1) whether the servicing of a borrower's residential loan constituted a "consumer transaction" under the Ohio Consumer Sales Practices Act (CSPA), R.C. § 1345.01(A); and 2) whether entities that service residential mortgage loans are "suppliers" within the meaning of the CSPA, R.C. 1345.01(C). The Court answered both questions in the negative.

The petitioner in this case and defendant in the underlying case, Barclay's Capital Real Estate Inc. dba HomEq Servicing (HomEq), is in the business of servicing residential mortgages. HomEq is not a bank or financial institution. HomEq is paid for its loan administration services from the payment stream generated by consumers' mortgages. As part of its loan administration services, HomEq does negotiate and communicate directly with borrowers.

The respondent, Ms. Anderson, contended that mortgage servicing was a “consumer transaction” under Ohio law because mortgage servicers like HomEq provide a number of services to borrowers that often include direct interaction. HomEq took the position that it renders services on behalf of financial institutions that it contracts with, and therefore, its transactions are commercial in nature.

Upon review of the language and purpose of Chapter 1345 of the Ohio Revised Code, the Court agreed with HomEq’s analysis, finding that mortgage servicing is a contractual agreement between the servicer and the financial institution that owns the note and mortgage. Given the absence of a contractual relationship between the mortgage servicer and the consumer, the Court did not find that there was a “consumer transaction.”

Additionally, the Court likened mortgage servicing to appraisals and title services, which are collateral to pure real estate transactions and are therefore not covered by the CSPA. The Court also noted that the legislature chose not to include mortgage servicing within the CSPA, and thus it was not within the province of the Court to so expand the protections of the act. Having determined that servicing of a residential mortgage is not a consumer transaction, the Court likewise found that mortgage servicers could not be “suppliers” within the meaning of the CSPA.

The decision was not unanimous, with Justices Pfeifer and O’Neill dissenting. In his dissenting opinion, Justice O’Neill found that the majority opinion favored structure over substance. Specifically, the dissenting opinion took issue with the focus on the nature of the underlying transaction rather than with the identity of the parties. One of the main criticisms in the dissent was that the majority opinion allowed non-exempted entities, such as mortgage servicers, to hide behind exempted entities, such as banks and financial institutions. The dissent favored a liberal application of the CSPA to increase protections for consumers.

The Court received several *amicus* briefs urging it to answer the certified questions in the affirmative, so it will be interesting to see how the state legislature reacts to the Court’s decision. For now, this decision constrains the boundaries of the CSPA and limits the type of liability to which mortgage servicers may be exposed.

