

No. SC93769

IN THE
SUPREME COURT OF MISSOURI

SHELBY E. WATSON,

Plaintiff/Appellant,

v.

WELLS FARGO HOME MORTGAGE, INC., and
FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants/Respondents.

Appeal from the Twenty-Second Judicial Circuit Court
The City of St. Louis, Missouri
The Honorable Bryan L. Hettenbach, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL

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INTEREST OF THE AMICUS

The Attorney General submits this brief as amicus curiae under Rule 84.05(f)(4). At issue in this case is the scope and meaning of the Missouri Merchandising Practices Act. § 407.010 et seq. The Missouri Merchandising Practices Act charges the Attorney General with the duty to police the marketplace and “to preserve fundamental honesty, fair play and right dealings in public transactions.” *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. W.D. 1973). Decisions from this Court that interpret and apply key provisions of the Act, such as the “in connection with” language of § 407.020, will directly affect the scope of future enforcement actions by the Attorney General.

ARGUMENT

Introduction

The trial court's grant of summary judgment against this private litigant seeking relief from abusive foreclosure practices is a puzzling result. The trial court agreed that a residential mortgage is "merchandise" as defined by § 407.010, RSMo. The court did not question that Watson raised a genuine issue of material fact as to the unlawfulness of defendants' conduct; indeed, Watson alleges such a well-known "unlawful practice" that the abuse has come to have its own name—"dual tracking."¹ And, above all, there is no dispute that she has suffered one of the most devastating losses any individual consumer can endure, the loss of one's home due to foreclosure. Yet, the trial court concluded that defendants somehow had slipped the net of the Missouri Merchandising Practices Act ("MMPA"), even though this remedial statute is

¹ "Dual tracking" is "when a lender moves ahead with foreclosure while at the same time negotiating a loan modification. Dual [tracking] is expressly prohibited by the National Mortgage Settlement." *In re Morrow*, 495 B.R. 378, 390 fn. 5 (N.D. Ill. 2013). Watson actually raises a genuine issue of material fact as to a particularly abusive step in dual tracking—where a foreclosure occurs on one track despite a fully executed modification agreement on the other.

designed to “cover every practice imaginable and every unfairness to whatever degree.” *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

The trial court reached this drastic result by relying on *State ex rel. Koster v. Prof. Debt Mgmt., LLC*, 351 S.W.3d 668 (Mo. App. E.D. 2011) and its companion case, *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo. App. E.D. 2011). In the *Portfolio* cases,² the Court of Appeals, Eastern District, held that a party who acquires the right to collect a debt by assignment is not subject to the reach of the MMPA because that party is not “in connection with” the initial sale of merchandise. *Prof. Debt*, 351 S.W.3d at 671. The decisions’ outcome is an outlier among state courts, who with broad agreement have found debt collection abuses to be within the scope of their own “little F.T.C. acts.”³

² As the holding and analysis of *Portfolio* and *Professional Debt* are essentially identical, this brief will cite and refer to them as “the *Portfolio* cases.”

³ *State ex rel. Miller v Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 526-7 (Ia. 2005); *People ex rel. Daley v. Datacom Sys. Corp.*, 585 N.E.2d 51, 64 (Ill. 1991); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Liggins v. The May Co., et al.*, 337 N.E. 2d 816, 818 (Ohio 1975); *State v. Midwest Ser. Bureau of Topeka, Inc.*, 623 P.2d 1343, 1347-49 (Kan. 1981);

Recently, in *Peel v. Credit Acceptance Corporation*, the Western District examined the Eastern District's *Portfolio* decision and found it "less than persuasive." 408 S.W.3d 191, 207-8 (Mo. App. W.D. 2013). The Western District noted that the decisions appeared to be in conflict with *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo. App. S.D. 2006), and this Court's decision in *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 (Mo. 2007). However, as *Peel* could be factually distinguished, the Western District restrained itself from creating an outright conflict among the districts, electing to note its criticism in dicta. *Peel*, 408 S.W.3d at 209.

No such prudential concerns should restrain this Court "in the abolition

Penn. Bankers Ass'n v. Com., Bureau of Consumer Protection, 427 A.2d 730, 733 (Pa. 1981); *Baird v. Norwest Bank*, 843 P.2d 327, 334 (Mont. 1992); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978); *see also* *Wiginton v. Pacific Credit Corp.*, P.2d 111, 118 (Hawaii App. 1981); *Attorney General v. United Research, Inc.*, 482 N.E.2d 1260, 1262 (Ohio App. 1984); *Bank of New Orleans and Trust Co. v. Phillips*, 415 So.2d 973, 975 (La. App. 1982); *First Nationwide Collection Agency, Inc. v. Werner*, 654 S.E.2d 428, 431 (Ga. Ct. App. 2007); *In re Scrimpsheer*, 17 B.R. 999, 1016 (Bkrtcy. N.Y. 1982).

of a precedent not sustainable in reason, and in contravention of the terms of the statute relied upon to support it.” *State ex rel. May Depart. Stores Co. v. Haid*, 38 S.W.2d 44, 53 (Mo. 1931). The Eastern District’s decision has been profoundly destructive to consumer rights and the Attorney General’s ability to police the marketplace. This Court should expressly overrule the *Portfolio* cases, and in their place articulate a more flexible “in connection with” test—one that gives “broad scope to the meaning of the statute to prevent evasion because of overly meticulous definitions.” *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). The MMPA reaches the abuses Watson alleges; the trial court’s grant of summary judgment should be reversed.

I. The Portfolio Cases were Contrary to Precedent and the Plain Meaning of the MMPA.

As it was in the *Portfolio* cases, at issue in this matter is Sec. 407.020.1, the core provision of the MMPA, which addresses practices “in connection with” sales of merchandise:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in

trade or commerce...in or from the state of Missouri, is declared to be an unlawful practice.

Sec. 407.020.1.

The *Portfolio* cases were the first instance where a Missouri court sought to define the phrase “in connection with” as it appears in the MMPA. Noting that the phrase had no specific statutory definition in Chapter 407, the Eastern District examined the definition of the single word “connection.” *Portfolio*, 351 S.W.3d at 665. Although the online dictionary selected had nearly a dozen different definitions, the Eastern District decided, without any explanation, to define “connection” as requiring a “relationship in fact.” *Portfolio*, 351 S.W.3d at 665 (citing *Merriam–Webster Online Dictionary*, (available at <http://www.merriam-webster.com/dictionary/connection>) (accessed March 3, 2011)). Based on this definition, the Eastern District claimed that a plaintiff under the MMPA must identify and prove “a ‘relationship in fact’ between the advertising and sale of the merchandise at issue and the unfair practices alleged.” *Id.*

The Eastern District declined to find such “a relationship in fact” between “the extension of credit,” the merchandise at issue in that case, and abusive debt collection practices. First, the court claimed that “[t]he unfair practices as detailed in the Petition [were] not alleged to have been made

before or at the time of the advertising or purchase of the merchandise.

Portfolio, 351 S.W.3d at 665. And second, the Eastern District reasoned that the defendant was “not alleged to have been a party to or have had any involvement with the initial sales transaction between the buyer and seller.”

Id. Both of these conclusions are contrary to the plain language of the MMPA and this Court’s precedent.

There is no requirement in the MMPA that the unlawful practice be “alleged to have been made before or at the time of the advertising or purchase of the merchandise.” *Portfolio*, 351 S.W.3d at 665. Indeed, “by its own terms, the MMPA applies to abuses that occur ‘before, during or *after*’ the sale.” *Peel*, 408 S.W.3d at 208 (citing §407.020.1) (emphasis added). As exemplified in this case, a defendant may make ongoing misrepresentations or modify the performance that was contemplated by the parties at the outset of the transaction. These are no less actionable under the plain language of the MMPA, and yet, the Eastern District would exclude these from the statute’s coverage. Effectively, this would be reading the “in connection with the sale of merchandise” provision of the MMPA in such a way that it would effectively place post-sale conduct beyond the statute’s reach.

This is precisely the result that the Southern District avoided in *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228

(Mo. App. 2006). In *Schuchmann*, the plaintiff brought an MMPA action against the seller of an air conditioner because that seller repudiated a life-time warranty on the item. 199 S.W.3d at 230. The defendant argued that the plaintiff's MMPA claim was precluded because "there [was] no evidence of deception, or fraud, or false pretense, or false promise, or misrepresentation, or unfair practice at the time the unit was sold; consequently, no MMPA violation was proven." *Id.* at 232. That defendant repeatedly "focus[ed] on the fact that there was no evidence of 'unfairness' at the time of the sale... singling out the 'in connection with the sale' language of section 407.020.1" to support his argument. *Id.* However, the Southern District concluded that such reasoning "is simply wrong... [as] there was no need to show that there was any misrepresentation, unlawfulness or intent present at the time of sale" related to the unilateral breach. *Id.* at 232.

The second *Portfolio* rationale is also contrary to statute—that acts are not "in connection with" the sale of merchandise when a defendant is "not alleged to have been a party to or have had any involvement with the initial sales transaction between the buyer and seller." *Portfolio*, 351 S.W.3d at 665. This Court specifically rejected this requirement in *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007). In that case, the plaintiff had purchased a car from a dealership that told him that the car had never been in an

accident. *Gibbons*, 216 S.W.3d at 668. The dealership had acquired the car from an automobile wholesaler, who had failed to disclose to the dealership that the car actually had been in an accident. *Id.* After discovering this fact, the plaintiff brought an action under the MMPA against the wholesaler for “failing to disclose the accident to the dealership.” The trial court had dismissed the plaintiff’s case based on a “lack of privity between Gibbons and [the wholesaler].” *Id.* at 668. This Court held that the plaintiff could maintain an action against the wholesaler who concealed this fact from the dealership even though the plaintiff had no direct interaction with the wholesaler during vehicle sales transaction. *See id.* at 668.

Portfolio’s holding that a “relationship in fact” requires a defendant “to have been a party to or have had... involvement with the initial sales transaction between the buyer and seller” is simply a privity requirement by another name. *Portfolio*, 351 S.W.3d at 665. Indeed, “privity” is defined as “[t]he relationship between the parties to a contract.” Black’s Law Dictionary (9th ed. 2009). In *Gibbons*, this Court expressly rejected any such requirement. 216 S.W.3d at 668; *See also Peel*, 408 S.W.3d at 208. Missouri precedent has always found that so-called “strangers” to the initial consumer sales transaction may be held accountable for their own unlawful acts under the MMPA. *State v. Polley*, 2 S.W.3d 887, 891 (Mo. App. W.D. 1999) (finding

that it was of no consequence that the consumer “did not enter into a contract directly with [the defendant], nor did he pay for [defendant’s] services directly... [or that] the transaction was conducted through [plaintiff’s] builder”).

In every respect, *Portfolio*’s definition of “in connection with” is in conflict with prior precedent. This Court should reject that holding, keeping the door open to the full relief that the MMPA promises.

II. *The Portfolio Cases Could Effectively Eviscerate the MMPA, Creating a Method by which Many Participants Could Avoid Liability for Their Unfair and Deceptive Practices*

In addition to being contrary to law and precedent, the *Portfolio* holding is problematic because of its impact on consumers in the modern marketplace. Debt obligations and other consumer financial products are routinely sold multiple times on secondary markets to entities that have no express role in forming the initial transaction. Indeed, nowhere is this more apparent than in the very subject of this case, the mortgage industry.

Nearly all U.S. residential mortgages are immediately sold after being signed or “originated.” Hunt, et. al, *Rebalancing Public and Private in the Law of Mortgage Transfers*, 62 Am. U. L. Rev. 1529, 1531 (August 2013). The vast majority of residential mortgages, totaling some \$6.97 trillion, change

ownership multiple times, as they are bundled together and sold to investors as mortgage backed securities. Levitin and Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 12-14 (Winter 2011). In 2009 alone, this represented about 90% of all U.S. residential mortgages originated. *Id.* at 16. For various practical reasons, all securitized mortgages require a third party, known as a “servicer,” to collect monthly payments, negotiate modifications, and if necessary, institute foreclosure. *Id.* at 13. “The mortgage servicer performs all the day-to-day tasks related to the mortgages” and is often the sole point of contact for the consumer. *Id.* at 23.

Thus, for the majority of U.S. homeowners, *every* other party to a mortgage becomes a “stranger” to the initial transaction before the ink is dry on their loan document. If *Portfolio* is to be the law, the natural evolution of the consumer marketplace, where performance of obligations to the consumer is increasingly fragmented amongst numerous entities all over the country, will erode the MMPA away into nothingness—already it would immunize practically the entire mortgage industry.

But the implication is worse, and it extends well past the realm of real estate and mortgages. Should the *Portfolio* cases be allowed to stand, the unscrupulous have a ready path to intentionally circumvent the MMPA. A prospective defendant can simply assign all of its sales of merchandise to a

separate, distinct corporate entity in exchange for valuable consideration. If a consumer is abused after this assignment, the originating party claims that he never engaged in the unlawful practice. In turn, the assignee claims that because she was a “stranger” to the original transaction, the *Portfolio* cases immunize her from any liability under the MMPA. In substance, the *Portfolio* cases created a mechanism for the unethical to circumvent the core statutory authority that has ensured “fundamental honesty, fair play and right dealings in public transactions” for more than a century through a corporate organizational shell game. *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. 2013)

Of course, if a party attempted to achieve this outcome directly through contractual language (a release of liability under the MMPA) such a term would be expressly against public policy and unenforceable. *Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 725-26 (Mo. banc 2009). The *Portfolio* cases reach this same result in a far more destructive way: the consumer has no express notice of the immunization during the sale’s consummation. This is not the outcome intended by the legislature. Judicial “precedent [should] consistently [reinforce] the plain language and spirit of the statute to further the ultimate objective of consumer protection.” *Gibbons*, 216 S.W.3d at 670.

The MMPA cannot effectively function as long as the *Portfolio* cases stand. A new test is needed.

III. The Proper Definition of “In connection with” is Broader and More Expansive than that Embraced by the Portfolio Cases.

The Court should first give an appropriate construction to the phrase “in connection with” as it appears in the statute. The MMPA has always been a remedial statute and given a liberal construction in order to meet its purpose of preserving “fundamental honesty, fair play and right dealings in public transactions.” *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001). Part of the error in *Portfolio* was the Eastern District’s decision to define the single word “connection” in isolation. The phrase “in connection with” has a plain meaning that is distinct from the single word “connection” and the phrase is “notable for its ‘vagueness and pliability.’” *U.S. v. Loney*, 219 F.3d 281, 283-4 (3d Cir. 2000) (citing FOWLER’S MODERN ENGLISH USAGE 172 (R.W. Burchfield ed., 3d ed. 1996)); *see also Cameron Mut. Ins. Co. v. Skidmore*, 633 S.W.2d 752, 753 (Mo. App. S.D. 1982) (noting breadth of the phrase compared to other language choices). Thus, as a phrase, “in connection with” is commonly defined as ‘related to, linked to, or associated with.’” *Miller*, 694 N.W.2d at 526 (citing *Metro. Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins.*

Co., 793 N.E.2d 1252, 1255 (Mass. 2003); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir. 1998)).⁴

In short, the phrase “in connection with” as used in the MMPA requires the Court to ask whether the wrongful conduct alleged by plaintiff is “related to, linked to, or associated with” the “sale of merchandise.” When this conduct occurs is immaterial, because as shown in *Schuchmann*, “in connection with” does not demand a temporal connection. And, as shown in *Gibbons*, the identity or nominal role of the wrongdoer in the transaction is also immaterial to the reach of the statute. The key is comparing the *act* the person engages in, and not the person himself, to the transaction at issue. In doing so, this Court should conclude that abusive foreclosure and modification practices are “in connection with” the appellant’s home mortgage and thus actionable under the MMPA.

IV. Application of the Test to Mortgage Servicing Abuse

The first question for the Court is to identify the sale of merchandise at issue. The terms “sale” and “merchandise” are specifically defined by Sec. 407.010 to embrace a wide variety of terms:

⁴ The *Miller* decision was cited with approval by this Court in *Gibbons*, 216 S.W.3d at 670 fn. 13.

(4) "Merchandise", any objects, wares, goods, commodities, intangibles, real estate or services;

...

(6) "Sale", any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit.

A residential mortgage would fall within this definition, as it is “an extension of credit.” *Peel*, 408 S.W.3d at 209; *In re Shelton*, 481 B.R. 22, 31 (W.D. Mo. 2012) (holding that a mortgage is merchandise under the MMPA). Often, a single “sale” can include multiple types of merchandise. *Peel*, 408 S.W.3d at 207-0; *see also Huffman v. Credit Union of Texas*, 2011 WL 5008309, * 5 (W.D. Mo. 2011) (noting that in financing of auto sale, the automobile and the extension of credit to purchase the automobile were both “merchandise” under the MMPA). In this case, the Respondent offered a “modification” of the terms of the mortgage. This could also be construed to be merchandise under the MMPA as it is a “service” or an “intangible.” §407.010.4. Thus, Watson’s MMPA claim should survive summary judgment if the wrongful conduct is “in connection with” either her residential mortgage or the modification agreement.

In the *Portfolio* cases, the Eastern District misconstrued this step by

taking the “sale of merchandise” to mean that the wrongful conduct must be related to “claims or representations made before or at the time of the initial sales transaction.” *Portfolio*, 351 S.W.3d at 667. This is an “overly meticulous” approach that invites “evasion” of the statute. *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 900 (Mo. App. E.D. 2003). First, requiring a granular showing of an explicit representation effectively grafts elements of common law fraud (along with its heightened pleading requirements) onto Watson’s MMPA unfair practice claim, in violation of the clear precedent. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007); *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. App. W.D. 2009). It ignores the litany of implied terms, covenants, and duties imposed by operation of law that require no express contractual term, or representation from a seller, including good faith and fair dealing, warranty of merchantability, and fiduciary obligations. It ignores that a sale may evolve after the consummation of the sale, as the parties perform, make further representations, or attempt to expand the subject matter of the transaction. Drawing harsh judicial boundaries through the MMPA, as the *Portfolio* cases attempted, only creates unnecessary difficulties and frustrates the MMPA’s ability to protect consumers.

This Court should analyze the transaction as a whole, and look at the essential characteristics of the transaction at issue. When a sale of

merchandise spans multiple documents and interactions that “constitut[e] one complicated interdependent transaction,” the scope and meaning should be “determined from the entire transaction and not simply from isolated portions of a particular document.” *Norcomo Corp. v. Franchi Const. Co., Inc.*, 587 S.W.2d 311, 317 (Mo. App. E.D. 1979). That means looking at whether the transaction or sale necessarily contemplates future performance, such as the collection of payments, honoring of covenants, contractual terms, or remedies that could be exercised (and abused) by a participant in the relationship. In the context of a 30-year mortgage, the most complex consumer transaction in the market place, this necessarily means that the MMPA will reach a wide array of abusive conduct.

Next, the Court should examine the “unlawful practices” alleged by the plaintiff to the suit. Here, the appellant raises a genuine issue of material fact that the respondent engaged in an “unfair practice” when it entered into a written agreement to modify the terms and payment of her mortgage to avoid pending foreclosure, but continued the foreclosed anyway, before she had the chance to make a single payment under the modified terms. This is a breach of good faith and fair dealing, actionable as an “unfair practice” under the MMPA. *See Ward v. West County. Motor Co., Inc.*, 403 S.W.3d 82, 86 (Mo. 2013) (citing 15 C.S.R. 60-8.050); *see also Lueras v. BAC Home Loans*

Servicing, LP, 221 Cal. App. 4th 49, 85 (Cal. App. 2013) (“It is fraudulent or unfair for a lender to proceed with foreclosure after informing a borrower he or she has been approved for a loan modification.”)

Finally, the Court should analyze whether the unlawful practice is logically “related to, linked to, or associated with” some essential characteristic or aspect of any of the various merchandise that are at issue. If a “little F.T.C. act,” like MMPA, covers mortgage transactions, the weight of authority holds that it applies to mortgage servicing abuses, like those alleged here. Carol and Sheldon, *Unfair and Deceptive Acts and Practices*, NATIONAL CONSUMER LAW CENTER PRACTICE, 50 (8th ed. 2012); *In re Shelton*, 481 B.R. at 31.

If this Court goes against this trend, and finds that a breach of good faith and fair dealing related to the modification or foreclosure of a home mortgage is not “related to, linked to or associated with” the underlying mortgage, then it invites the troubling question as to what acts could possibly meet such a stringent test. It could effectively grant blanket immunity to the mortgage industry at a time when many consumers have been subjected to severe foreclosure and modification abuse. And at worst, this could even be extended into other industries where the obligations do or could change hands rapidly on a secondary market. This is not a path the Court should take.

It is time to end the rollback of consumer protection ushered into this

state by the *Portfolio* cases. This Court should reaffirm that the MMPA has the flexibility and scope required for the Attorney General, as well as private plaintiffs, to continue to protect Missouri consumers.

CONCLUSION

The trial court's grant of summary judgment should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on January 27, 2014, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and that a true and correct copy of the foregoing brief was mailed electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,975 words.

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