IN THE MISSOURI SUPREME COURT

SC93769

SHELBY E. WATSON, PLAINTIFF/APPELLANT,

V.

WELLS FARGO HOME MORTGAGE, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, DEFENDANTS/RESPONDENTS

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL CIRCUIT COURT,
THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

BRIEF OF NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE

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STATEMENT OF INTEREST

Amicus Curiae The National Consumer Law Center ("NCLC") is a national non-profit research and advocacy organization focusing on the needs of consumers. It was founded in 1969 at Boston College School of Law, and is a legal aid organization under Section 501(c)(3) of the Internal Revenue Code. For over 40 years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policymakers, consumer and business reporters, and consumer and low income community organizations across the nation have turned for legal answers, policy analysis, and technical legal support.

NCLC has been referred to as the "leading non-profit low-income consumer advocacy organization in the country." *Mazola v. May Dept. Stores Co.*, 1999 WL 1261312 at *4 (D. Mass. 1999). This Court has previously recognized NCLC's role as a national expert in consumer law. *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 n.13 (Mo. 2007) (citing NCLC as a "national expert" on the proposition that privity is not required in consumer protection law). And this Court has previously accepted briefing from the NCLC in *CACH, LLC v. Askew*, SC Case No. 91780.

NCLC is the author of the widely praised twenty-volume Consumer Credit and Sales Legal Practice Series, including *Unfair and Deceptive Acts and Practices* (8th ed. 2012), *Fair Debt Collection* (7th ed. 2011), *Collection Actions* (2d ed. 2011), *Mortgage Lending* (2012), *Foreclosures* (4th ed. 2012), *Automobile Fraud* (4th ed. 2011), and *Repossessions* (8th ed. 2013). The United States Supreme Court has relied upon NCLC's

treatise on debt collection practices. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 593 n.12, 598 n.16 (2010) (also at 605, J. Breyer, concurring).

NCLC staff members have served on the Federal Reserve Board's Consumer Advisory Council and testified frequently before the Federal Trade Commission and Congress regarding debt collection and unfair and deceptive practices. NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before trial and appellate courts and does so in cases that promote NCLC's goals, including protection of low-income and other potentially vulnerable groups.

NCLC respectfully submits this *amicus* brief to provide its expertise in the interpretation and application of consumer protection statutes. NCLC has been monitoring the development of case law interpreting Missouri's Merchandising Practices Act ("MMPA") with keen interest, in particular recent decisions by one District of the Missouri Court of Appeals that reject the application of the MMPA to post-sale abuse and deceit relating to consumer finance contracts. NCLC believes the decisions are contrary to the plain terms of the MMPA and this Court's precedent, and to the interpretations of other states' courts of their own, similar consumer protection statutes. NCLC writes as an aid to this Court in interpreting and applying the MMPA for its fundamental purpose of protecting Missouri consumers from the abuses proscribed by the MMPA.

ARGUMENT

I. Introduction

"Unfair" and "deceptive" acts and practices against consumers, both of which are expressly prohibited by the Missouri Merchandising Practices Act ("MMPA"), are not

limited to pre-sale frauds that induce purchases. Schemes to unfairly treat or deceive consumers include all manner of post-sale misconduct. In fact, as Professor Michael M. Greenfield of the Washington University School of Law has accurately described:

> Deception occurs primarily (though not exclusively) at the formation state of a contract. Conversely, unfairness occurs primarily (though not exclusively) with respect to the substance or performance of a contract.

Michael M. Greenfield, *Consumer Law: A Guide for Those Who Represent Sellers, Lenders, and Consumers* § 4.1, at 161 (1995).

Myriad consumer transactions involve long-term or deferred performance by merchants and finance companies. For example, consumers purchase long-term service contracts for durable goods like vehicles, and ongoing performance contracts like home loan or credit card financing. Indeed, with many consumer credit arrangements such as credit cards, essentially all obligations arise, and performance only occurs, after the initial sale, and may last years, even decades. For an enormous variety of consumer contracts, the seller's obligations only just begin at the time the contract is executed.

The Federal Consumer Financial Protection Bureau ("CFPB") compiles information about the abuses American consumers report in their financial services. In the two years from July 2011 through June 2013, the CFPB received over 175,000 consumer complaints, including the handling of mortgages (85,200 complaints), credit cards (36,300), bank accounts and services (25,700), and credit reports (14,200). Consumer Response: A Snapshot of Complaints Received, July 2013, p.4, at http://www.consumerfinance.gov/reports/a-snapshot-of-complaints-received-3/ (last

reviewed January 23, 2014). Among the most frequent complaints are those involving, like the case at bar, mortgage modifications and foreclosures. *Id.* at p. 10. Also prevalent are complaints about loan servicing and the handling of escrow accounts. *Id.*

Among the most problematic areas of consumer finance is debt collection. The Federal Trade Commission receives "more complaints about the debt collection industry than any other specific industry," totaling over 125,000 complaints in 2012. Fair Debt Collection Practices Act, March 20, 2013, p. 14, available at http://www.consumerfinance.gov/reports/annual-report-on-the-fair-debt-collection-practices-act/ (last reviewed January 23, 2014). The majority of complaints involved "third party" debt collectors who act as agents for the creditors. *Id.* at p. 15. Forms of abusive conduct complained about include unauthorized assessment of charges, all manner of telephone harassment, false statements about the character or amount of the debt, false threats to sue the debtor, refusals to verify the debt, violations of confidentiality, and even threats of violence to the borrower. *Id.* at 16.

In the instant lawsuit, plaintiff Shelby Watson alleges, *inter alia*, that she was led along by the defendants in bad faith mortgage modification negotiations, which were intended to, and did, keep her from seeking alternative financing remedies; that a loan modification agreement was actually reached between the parties; but that the finance company foreclosed on her home anyway, and without the required notice. NCLC respectfully urges this Court to hold that the plaintiff states a claim under the MMPA, and more broadly and most appropriately, that the MMPA applies to post-sale performance and debt collection-related misconduct in consumer finance transactions.

II. The MMPA's Language

In the MMPA, the Missouri General Assembly recognized the breadth of potential marketplace misconduct, and accordingly declared "unlawful" "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… whether committed before, during *or after the sale*, advertisement or solicitation." Mo. Rev. Stat. § 407.020.1 (emphasis added). The language "whether committed before, during or after the sale" was added to the statute in 1985 to broaden its reach. The MMPA's plain terms thus expressly cover "unfair practices," which as noted above occur frequently, or even typically, after the initial sale, along with any of the other listed kinds of misconduct that occur "after the sale" of consumer contracts.

"Sale," in turn, is defined as "*any* sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash *or on credit*." Mo. Rev. Stat § 407.010(6) (emphasis added). The MMPA thus, by its terms, expressly applies to "credit" transactions. And "merchandise" is defined as "any objects, wares, goods, commodities, intangibles, real estate or *services*." Mo. Rev. Stat. § 407.010(5) (emphasis added). The express inclusion of "credit" and "services" make clear that consumer financial services fall within the Act.

The implementing regulations of the MMPA emphasize the inclusion of "good faith" "performance" of the contract within the Act's scope. The MMPA authorizes the Attorney General to "promulgate… all rules necessary to the administration and enforcement" of the MMPA. Mo. Rev. Stat. § 407.145. The Attorney General has duly

promulgated multiple rules relating to "unfair practices." Among these is 15 CSR 60-8.020, "Unfair Practice in General," which states:

> (1) An unfair practice is any practice which-
>
> (A) Either-
>
> 1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or
>
> 2. Is unethical, oppressive or unscrupulous; and
>
> (B) Presents a risk of, or causes, substantial injury to consumers.
>
> (2) Proof of deception, fraud, or misrepresentation is not required to prove unfair practices as used in section 407.020.1., RSMo. (*See Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Marshall v. Miller*, 276 S.E.2d 397 (N.C. 1981); Rest. 2d Contracts, §§ 364, 365).

Another is 15 CSR 60-8.040, "Duty of Good Faith," which states:

> (1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to violate the duty of good faith in solicitation, negotiation and performance, or in any manner fail to act in good faith (*see* Mo. Rev. Stat. § 400.2-103(1)(b); Rest. 2d Contracts § 205).

The inclusion of the requirement for "good faith" "performance" in connection with a sale necessarily and broadly implicates post-sale conduct.

Is unfair and deceptive conduct of a mortgage servicer foreclosing on a home mortgage "in connection with" the sale of goods or services within the meaning of those

terms in the MMPA? The plain language of the statute indicates "yes": there would not even be a mortgage to unfairly foreclose but for the initial sale of the mortgage. And far more than the MMPA's language alone reveals that the answer must be "yes."

III. This Court's Interpretations of the MMPA

As this Court has recognized, "The [MMPA's] fundamental purpose is the 'protection of consumers.'" *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. 2009). "The legislature intended [MMPA § 407.020] to 'supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions.'" *Id.* (quoting *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo.App.1973)).

Even with respect to "deceptive" practices, as opposed to the much broader "unfair" practices, this Court has emphasized the wide sweep of the MMPA:

> Sec. 407.020 does not define deceptive practices; it simply declares unfair or deceptive practices unlawful. This was done to give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions. This leaves to the court in each particular instance the determination whether fair dealing has been violated. It is the defendant's conduct, not his intent, which determines whether a violation has occurred. It is not necessary in order to establish "unlawful practice" to prove the elements of common law fraud.

Id. (quoting *State ex rel. Danforth*). And this Court has consistently underwritten the strengths of the MMPA. One example is the holding in *Huch* that "the public policy involved in Chapter 407 is so strong that parties will not be allowed to waive its benefits." *Id.* at 725 (quoting *Elec. & Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991)).

In analyzing claims under the MMPA, this Court has noted, "Absent a statutory definition, this Court considers the plain and ordinary meaning of the words themselves." *Ports Petroleum Co. Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001). "The literal words [of the MMPA] cover every practice imaginable and every unfairness to whatever degree." *Id.* "In short, Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices." *Huch*, 290 S.W.3d at 725.

This Court has singled out the MMPA's term "unfair practices" as adding particular breadth to the MMPA's reach. In *State v. Shaw*, 847 S.W.2d 78, 775 (Mo. banc 1993), the Court noted that most terms in § 407.020.1 stem from settled fraud-related concepts in the law, such as "fraud" itself, "deception," "false pretenses," "false promises," and "misrepresentations." But by contrast, the Court noted that "the inclusion by the legislature of the words 'unfair practices' signals a legislative intent to prohibit a much broader class of activities than those falling within the common law definition of fraud." *Id.*

This Court held in *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. 2007), that the MMPA applies not only to the seller from whom a person buys goods or services, but

also to upstream sellers whose misconduct affects the downstream buyer. As the Court stated, "privity is not required" between the plaintiff and defendant. *Id.* at 668. The Court hewed closely to both the plain language of the MMPA and the "spirit of the statute to further the ultimate objective of consumer protection." *Id.* at 670. The Court expressly took a dim view of "strained statutory construction" used to impose a "significant limitation" (in that case the "privity" requirement) on the protections afforded Missouri consumers under the MMPA.

The conduct of the remote sellers in *Gibbons* was actually *more* removed from the consumers' purchases than the conduct of the mortgage holders and servicers in this case. In *Gibbons* the defendant did not know of any particular subsequent-sale victim at the time of the misconduct, nor was there any contractual relationship with any such victim. Here the victim was not only known to the perpetrators, but the misconduct was aimed directly at her and only her. Further, there *was* a contractual connection here, with her mortgage assigned to one defendant and serviced by its agent, the second defendant. Perhaps most importantly, the products sold consisted largely of agreed-upon continuing labor (mortgage "servicing" with all of its duties and implications). Misconduct relating to the mortgage servicing was arguably misconduct *in the sale itself*, but it certainly was at a minimum misconduct "in connection with" the sale of the financial services.

More remains to be said on this in another section, below. Suffice it to note here that under *Gibbons* only a prohibited "strained statutory construction" would lead to holding that the mortgage servicing-related misconduct in this case was not "in connection with the sale" as a matter of law.

In two cases, this Court has already treated post-sale conduct as subject to the MMPA. In *Huch*, *supra*, the plaintiffs alleged that the defendant cable television company "provided unsolicited merchandise to consumers in the form of the [TV] channel guide and then billed and collected, or attempted to collect, payment for the unordered merchandise." 290 S.W.3d at 727. This Court held, "[t]his conduct, if proven, is an unfair practice that is prohibited by the [MMPA]." *Id.* Because of the MMPA's express application to conduct "after" the sale, the application of the MMPA to post-sale misconduct in the collection of fees was so obvious in *Huch* as to be unquestioned. The *Huch* case bears many similarities to MMPA claims in consumer finance contracts: the misconduct involves deceptive or unfair conduct *after* the initial sale, during the ongoing performance in connection with the contract. Similarly, in *Ward v. West County Motor Company, Inc.*, 403 S.W.3d 82 (Mo.banc 2013), the plaintiffs alleged that they had placed deposits with the defendant dealership relating to planned purchases of cars, and that the refusal of the defendant to refund those deposits when the cars were not purchased violated the MMPA. This Court noted, *inter alia*, that the plaintiff's MMPA claims alleged that the defendant "failed to act in good faith" and "converted their funds." *Id.* at 86. The Court noted that plaintiffs' claim of lack of good faith was "supported by the definition of 'unfair practice' set forth in 15 CSR § 60–8.020 . . . and by 15 CSR § 60–8.040," and it readily held that the plaintiffs had stated claims under the MMPA. *Id.* Again, the exact timing of the misconduct – and whether the conduct occurred only post-sale - was apparently viewed as so irrelevant to such "not in good faith" claims that there was no discussion about whether the conduct was "in connection with" the sales.

IV. Appellate Decisions in the Southern and Western Districts Applying the MMPA to Post-Sale Conduct

Although this Court has not directly addressed the scope of the phrase "in connection with" in the MMPA, the Southern District applied this Court's precedents in interpreting the phrase in *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo. App. 2006). The parties there stipulated that the defendant had sold the consumer plaintiff a home air conditioning unit with a "lifetime warranty." They further stipulated that the defendant had duly serviced the unit for several years, but the defendant later moved its business location out of the area, and, as the Court of Appeals put it, "chose, for the sake of money and its convenience" to refuse to continue honoring the warranty. *Id.* at 231, 233.

The defendant argued on appeal that since it did not have an intent to default on the warranty until long after the sale, "the evidence failed to show a connection between the sale and some sort of 'unfairness' at the time of the transaction," so that there was no evidence to support an MMPA violation. *Id.* at 232. The Court of Appeals briskly held that this was "unavailing." *Id.* It pointed first to the "before, during, or after the sale" language in the statute, and then provided a thorough discussion of the "unfair practices" provisions in the MMPA and the Attorney General regulations, and the Missouri cases construing the MMPA. *Id.* at 232-4. It concluded that "the fact that the Defendant's refusal to honor the warranty came after the sale is of no consequence." *Id.* at 232.

The Western District, too, recently addressed the scope of "in connection with" in the MMPA. In *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. App. W.D. 2013), the consumer plaintiff purchased a car with a retail installment contract, and the contract was subsequently assigned to the defendant finance company. Even though the car dealer did not deliver the title to the plaintiff, the finance company demanded she make the monthly payments on the contract. *Id.* at 196. On appeal the defendant asserted that the plaintiff had not shown that its misconduct was "in connection with the sale."

The Western District found the MMPA's "in connection with" requirement was met for several reasons. First, it held that the verdict directing instruction, which required the jury to find the finance company had improperly demanded payments "under the sale contract," in effect required a finding that the misconduct was "in connection with the sale." *Id.* at 200. Next, it noted that by the finance company's "own admission," it was an assignee of the installment contract, and "the assignment of the sales contract to [the finance company] carries with it the responsibility of owning the contract." *Id.* at 205-06.

It then addressed head-on the conflicting authority from the Eastern District Court of Appeals, *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo. App. E.D. 2011). It discussed *Gibbons* and *Schuchmann*, and commented, "We find the analysis of *Portfolio Recovery* less than persuasive." *Peel*, 408 S.W.3d at 208.

The *Peel* court also discussed *Huffman v. Credit Union of Texas*, 2011 WL 5008309 at *5 (W.D. Mo. 2011), noting that *Huffman* held that "even if the finance company was not part of the original sale, it has liability for the actions it takes in

collection of the debt," and "the service of financing was in itself sufficiently connected to a sale such that it was within the reach of the [MMPA]." 408 S.W.3d at 209.

It concluded by following *Gibbons, Schuchmann,* and *Huffman* in holding that there was substantial evidence establishing that the finance company's actions were "in connection with" the sale. *Id.*

V. The Eastern District's *Portfolio* Decision and its Progeny

The holding in *State ex rel. Koster v. Portfolio Recovery Assoc., LLC,* 351 S.W.3d 661 (Mo. App. E.D. 2011) ("*Portfolio*")[1], that collection-related misconduct by account assignees is not "in connection with the sales" as a matter of law, has many problems:

1. It is gratuitously and improperly restrictive, contrary to the spirit and letter of this Court's MMPA jurisprudence.

2. Even using *Portfolio's* restrictive "relationship in fact" definition, unfair collection conduct *is* in connection with the sale; but for the sale, there would in fact *be* no collection conduct.

[1] The Eastern Division's companion case, *State ex rel. Koster v. Professional Debt Management, LLC,* decided the same day as *Portfolio*, is essentially identical. 351 S.W.3d 668 (Mo. App. E.D. 2011). References in this brief to "*Portfolio*" are in effect to both cases.

3. It sets up an astonishing contradiction: debt collectors and mortgage servicers claim standing to sue and collect *based on the sale*, yet *Portfolio* holds that their collection conduct as a matter of law is *not in connection with the sale*.

4. *Portfolio*, in distinguishing *Schuchmann*, adds a term to the MMPA: that to be covered, post-sale misconduct must be in connection with *claims or representations made before or at* the sale, not merely in connection with the sale.

5. *Portfolio* wholly ignores the ongoing nature of the parties' sale transactions, relationships, and duties in consumer finance transactions.

6. *Portfolio* ignores the implicit representation in every such contract that all activities relating to the contract will be carried out in good faith.

7. *Portfolio's* holding all but eliminates the critical intended coverage by the MMPA of post-sale "unfair" practices.

8. *Portfolio's* holding is a true outlier among decisions in courts across the country interpreting their states' "UDAP" statutes.

9. *Portfolio's* distinguishing of assignees from original creditors under the MMPA conflicts directly with *Gibbons*.

10. *Portfolio* simply erred when it attempted to distinguish *Fielder v. Credit Acceptance Corp.*, 19 F.Supp.2d 966 (W.D.Mo. 1998) (*vacated in part by Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031 (8th Cir.1999)). *Fielder* squarely held debt collection activities are covered under the MMPA.

11. *Portfolio* makes it extremely easy for an original creditor to "launder" its good faith duties under the MMPA merely by assigning the consumer contract; this conflicts

with *Huch* and the rule preserving consumers' rights, and with the law that assignees "step into the shoes" of their assignors.

1. *Portfolio's* holding is gratuitously and improperly restrictive, contrary to the spirit and letter of this Court's MMPA jurisprudence.

The *Portfolio* decision summarizes the issue thus: "The threshold issue to be addressed in this appeal is whether the broad reach of the MMPA extends to unfair or deceptive debt collection activities that are alleged to have occurred [1] after the initial sale of merchandise, and [2] by a third-party debt collector who was not a party to the original consumer transaction." *Id.* at 664. *Portfolio* then holds as a matter of law that such misconduct is not "in connection with the sale," and so not covered by the MMPA.

As the discussion in preceding sections of this brief shows, nothing at all in the MMPA stood in the way of a holding that the unfair and deceptive collection conduct of the *Portfolio* defendants was "in connection with" the sales under the MMPA. Further, it would not only provide desperately-needed protection for consumers, but it would also support financial institutions that want to compete honorably, in that it would penalize those that compete using unfair and dishonest practices.

An Iowa Supreme Court decision illustrates the analysis that the *Portfolio* court should have followed. The decision, *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005), was cited approvingly by this Court in *Gibbons*, 216 S.W.3d at 670, fn. 13.

Cutty's is a case under the Iowa consumer protection statute, which, like the MMPA, prohibits "the act, use or employment by a person of an unfair practice… in connection with the… sale… of any merchandise." Iowa Code § 714.16(2)(a). Notably, that statute does *not* have the "before, during or after the sale" language found in the MMPA. In *Cutty's*, the Iowa Attorney General sued a "camping club" entity that engaged in collection practices claimed to be "unfair" under that state consumer law. A "developer" had sold shares in a camping facility to consumer purchasers, and the "camping club" entity, which was assigned rights stemming from the sales, pressed collection of greatly inflated "dues" it imposed on the consumers, as long as 16 years after the initial sales. The developer argued that the post-sale collection of club dues was "later conduct . . . unrelated to the sale" and thus not "in connection with" the sale. 694 N.W.2d at 524-25.

The Iowa Supreme Court, in a detailed opinion, rejected that argument. The Court first noted that, "Nothing in the phrase 'in connection with' constrains the Act's scope to only those business practices occurring prior to or at the time of the sale." *Id.* at 526. It went on to note that "'in connection with' is commonly defined as 'related to, linked to, or associated with.'" *Id.* (cites omitted) It then held, "To show an unfair practice is 'in connection with' the sale of merchandise, then, the attorney general need only show some relation or nexus between the two." *Id.* Analyzing the importance and breadth of the "unfair" practices prohibition, the court quoted Professor Michael Greenfield's passage (cited *supra*) regarding unfair practices occurring primarily with respect to the substance or performance of a contract, and commented that interpreting "in connection with" to

bar coverage of post-sale conduct would "eviscerate much of the statute's protection against unfair practices." *Id.* at 527. Turning to the specific conduct alleged, the court held, "The connection between the sale and the collection campaign is plain. All of [the camping club's] rights . . . continue to this day on account of that transaction." *Id.* at 528-9.

The Iowa Supreme Court cogently stated all of these conclusions *without* the presence of the "before, during or after" language that is in the MMPA.

2. Even using *Portfolio's* restrictive "relationship in fact" definition, unfair collection conduct *is* in connection with the sale; but for the sale, there would in fact be no collection conduct.

While *Portfolio's* particular choice of one of several *Merriam-Webster Online* definitions seems odd to begin with (cf. *Cutty's*, *supra*), and its use of the definition for the single word "connection" instead of a definition of the phrase "in connection with" seems yet more odd (again cf. *Cutty's*), even this definition would leave plenty of room for a finding that the sweeping collection misconduct alleged in *Portfolio* was "in connection with" the sales. Yes, there was a "relationship in fact": the original sale was the very *basis* for the collection actions. Moreover, these accounts were assigned to the collectors, who therefore "stood in the shoes" of the original creditors, as noted by *Peel*, *supra*.

3. *Portfolio* sets up an astonishing contradiction: debt collectors and mortgage servicers claim standing to sue and collect *based on the sale*, yet *Portfolio* holds that their collection conduct as a matter of law is *not in connection with the sale*.

It appears that a rather grotesque irony was missed by the *Portfolio* court: These collectors that so assiduously, and abusively, claimed rights to collect under the consumer sales contracts, at the same time claimed vociferously (and successfully) that their conduct had no connection with those sales. This is exactly the sort of anti-consumer construction of the MMPA that undercuts its central purpose.

A collector's or servicer's collection activities are *admissions* that their conduct is in connection with the original consumer sales – which indeed is explicit in their collection activities. If nothing else, such conduct should be accepted as powerful, indeed conclusive, evidence that the conduct is covered under the MMPA.

4. *Portfolio* adds a term to the MMPA: that to be covered, post-sale misconduct must be in connection with *claims or representations made before or at* the sale, not merely in connection with the sale.

When the discussion in *Portfolio* turns to the effect of the "before, during or after the sale" language in § 407.020.1, the opinion discusses *Schuchmann's* strong holding that the MMPA applies to unfair post-sale conduct even if there were no misconduct at the time of the sale. *Portfolio* tries to distinguish *Schuchmann* by saying that in *Schuchmann* the post-sale misconduct related to "warranties . . . made in connection with the sale," 351 S.W.3d at 667, where in *Portfolio* supposedly no such sale warranties or

representations were made that connected with the collection. The *Portfolio* court spells out its position: "We are not persuaded that actions occurring after the initial sales transaction, which do not relate to *any claims or representations made before or at the time of* the initial sales transaction . . . are actions made "in connection with" the sale." *Id.* (emphasis added).

There it is: this is adding a restrictive term to the MMPA, purely and simply. Post-sale misconduct need only be in connection with the *sale* under the wording of the statute. In a closing paragraph the *Portfolio* decision says "we cannot undertake a legislative role and write into the MPA language that simply does not exist." *Id.* at 668. The *Portfolio* court erred by doing exactly that.

5. *Portfolio* wholly ignores the ongoing nature of the parties' sale transactions, relationships, and duties in consumer finance transactions.

The *Portfolio* decision confuses a "sale" for something like a chair or a ream of paper with a "sale" of a consumer finance contract. With a sale of a chair or a ream of paper, normally the sale is the end of the matter. But a consumer signing a credit card agreement, as well as the bank, understand that the contracting bank is agreeing to advance credit in the future, transaction by transaction, *and* to provide regular statements accounting for those transactions, *and* to correctly account for all charges and all payments, *and* to assess finance charges and other fees only as they are accrued and pursuant to the exact terms of the agreement, and a host of other undertakings. To say that collection of payments under that sale agreement is not "in connection with the sale"

makes no sense. In fact, a fair argument would be that each new advance is a "sale," or that the "sale" is in a constant state of adjustment and creation unless and until the account is finally paid off and closed.

With home mortgages, the ongoing nature of the relationship is only higher-stakes and longer-term, with just as many ongoing duties for the mortgage holder and servicer. Again, conduct in connection with the sale should be deemed not to end unless and until the mortgage is paid off and the account closed.

6. *Portfolio* ignores the implicit representation in every such contract that all activities relating to the contract will be carried out in good faith.

Portfolio distinguishes *Schuchmann* on the ground that there were representations made at the time of the sale in *Schuchmann* that related to the later unfair conduct by the defendant. *Portfolio* doesn't expressly say so, but it clearly presumes that there were no representations made at the time of the sales that related to the subsequent unfair conduct by the defendant.

But a number of express undertakings *are* made by the contracting financial institution in both credit card and mortgage transactions, as has been mentioned. Breaches of any such express undertakings – overcharging contract late fees, say – should come under MMPA coverage, even under the holding of *Portfolio*.

And the undertakings are not merely the explicit ones. Clearly there is an undertaking, implied as a matter of law under the MMPA and its regulations, and implied

by common practice, that the handling of all of the collections and other activities on the finance contract will be in good faith.

Consider: If a bank offered a credit card contract to a consumer, but represented that if the consumer fell behind in payment it would then harass the consumer with late-night threatening phone calls to the consumer's family members and abusive calls to the consumer's place of work, and it would sue the consumer for amounts above those owed, even after statutes of limitations had run – what consumer would sign such a contract? It is clear, rather, that in every contract with continuing relationships there are implicit representations by the creditor that the continuing conduct will be in good faith, and not unfair and abusive.

There is no principled distinction under the MMPA between an express promise made at the time of sale as in *Schuchmann*, and an implied promise of good faith and fair dealing. Ironically, *Portfolio* itself articulates the critical nature of this implied promise: It states, "The entire thrust of the Merchandising Practices Act is that consumers rely upon the fair dealing of those selling merchandise and services." *Portfolio*, at p. 668, quoting *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 637 (Mo.App. E.D.1988). Yet the *Portfolio* court eviscerated the MMPA's obligation of good faith.

7. *Portfolio's* holding all but eliminates the critical intended coverage by the MMPA of post-sale "unfair" practices.

The *Portfolio* decision appears to betray a lack of awareness of the wide world of "unfair practices" as conceived by the MMPA, this Court, other states' UDAP statutes,

and commentators such as Professor Greenfield. The very sweep intended by "unfair practices" – emphasizing post-sale misconduct – is cut down to miniscule proportions by *Portfolio*. It would be hard to envision how the legislature could have been any more emphatic or specific about this intended sweep of the MMPA than by adding the "whether before, during for after the sale" language. This brief is being submitted exactly because of the huge importance of such protection for consumers, and particularly for lower-income consumers.

8. *Portfolio's* holding is a true outlier among decisions in courts across the country under states' "UDAP" statutes.

A separate section in this brief, below, provides detailed discussion on this point.

9. *Portfolio's* distinguishing of assignees from original creditors under the MMPA conflicts directly with *Gibbons*.

Portfolio repeatedly makes reference to the defendants as "acquiring the debt after the sale" and "having no involvement in the initial sales transaction," as if this has any significance at all to the analysis of coverage under the MMPA. The Eastern District discussed this in its subsequent decision *Conway v. Citimortgage, Inc.*, 2013 WL 6235864 (Mo.App. E.D. 2013), a case that is very similar to the instant case and that relies heavily on *Portfolio*. *Conway* explains the supposed relevance of the defendant's assignee position:

> The significance of the fact that the alleged unfair practices were done by someone who was not a party to the original transaction is that this is evidence that the actions were not "in connection with" the advertisement or sale of merchandise. It does not mean that an assignee of a party to the original transaction could not be liable under the MPA.

Id. at p. 5, fn.3.

But the debt servicer's position downstream from the original creditor is significant *because* the assignee or servicing agent stands in the shoes of the original creditor. There is irony in the *Portfolio* court holding that being an assignee or agent destroys the "connection" to the sale, because instead downstream assignees and their agents *are* in privity with the consumer. The *Portfolio* decision stands *Gibbons* on its head: where *Gibbons* held privity is not required, *Portfolio* demands a kind of *super*-privity, namely that the conduct be by the original seller of the contract.

10. *Portfolio* simply erred when it attempted to distinguish *Fielder v. Credit Acceptance Corp.*, 19 F.Supp.2d 966 (W.D.Mo. 1998) (*vacated in part by Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031 (8th Cir.1999)). *Fielder* squarely held debt collection activities to be covered under the MMPA.

The Attorney General cited *Fielder* in the *Portfolio* case as supporting the application of the MMPA to debt collection activities by third-party assignees. But the *Portfolio* decision, at p. 666, distinguished *Fielder*, saying:

> *Fielder* nevertheless offers no support for the State's position here because the alleged wrongful conduct in *Fielder* related to the initial consumer transaction, i.e. inducing consumers to enter into the financing transaction by deceptively stating "the original terms of payment" in the retail installment sales contract. *Fielder* is distinguished from the case at bar because the purchasers in *Fielder* were not alleged to have encountered any deceptive or unfair practice in connection with the subsequent debt collection activities.

(citing *Fielder* at p. 978).

That statement in is in error: the *Portfolio* court addressed only the part of the *Fielder* decision relating to the "official fees class." But there was a second class in the *Fielder* decision, the "post-maturity interest class," addressed at p. 983. That portion of *Fielder* clearly supported applying the MMPA to unfair and deceptive debt collection conduct by a third-party assignee:

> Plaintiffs also argue that CAC's misrepresentation to debtors, in false affidavits and petitions filed with the courts, of the interest owing is in violation of section 407.020. CAC argues that it has not violated section 407.020 because it did not do anything "in connection with the sale or advertisement of any merchandise in trade or commerce." The Court could not find any Missouri cases dealing with extension of credit and whether misrepresentations about that credit would trigger section 407.020. This issue seems to be one of first impression and the Court believes that the

legislature intended to include CAC's actions under this statute. Therefore, Plaintiffs are granted summary judgment under this section for misrepresentations about the post-maturity interest rates.

11. *Portfolio* makes it extremely easy for an original creditor to "launder" its good faith duties under the MMPA merely by assigning the consumer contract; this conflicts with *Huch* and the rule preserving consumers' rights, and with the law concerning assignees "stepping into the shoes" of their assignors.

The *Portfolio* decision is devastating to consumer rights particularly because it empowers bad actors in the marketplace to immunize themselves from their misconduct merely by the ruse of transferring rights from an original seller to one or more assignees or agents. It immunizes all manner of post-sale abuse and fraud through the simple shell game of a transfer of interests.

This rewards chicanery, and punishes the innocent and powerless. Supposing one were to set aside concern for these victims, and for honest financial businesses trying to compete fairly and in good faith, even a cold analysis of "efficient markets" and large-scale economics would fault such a rule of law.

V. The National Landscape of Consumer Protection Decisions

Like the Missouri General Assembly, state legislatures across the country have adopted consumer protection laws—commonly referred to as Unfair and Deceptive Acts and Practices ("UDAP") statutes—that prohibit false statements and other unfair or unlawful conduct in the consumer marketplace. A review of those statutes, and of the

court decisions interpreting them, illustrates two important points about the MMPA: *First*, it is among the most consumer-protective UDAP statutes in the nation, in that it *expressly* prohibits, among other things, "any" "unfair practice," "whether committed before, during or after the sale." In contrast, as discussed further below, most state UDAP statutes lack Missouri's express coverage for *all* temporal possibilities, and some UDAP statutes are limited to deceptive practices rather than extending also to "unfair" practices. *Second*, it appears that in *all* of the other states with UDAP statutes expressly covering both "unfair practices" and conduct "before, during or after" the sale, collection-related conduct is covered; and that the great majority of the UDAP decisions in the other states *also* deem collection-related conduct to be covered.

A. Consumer Statutes Expressly Applicable to Post-Sale Misconduct

Other courts interpreting state UDAP statutes with express terms for post-sale conduct have uniformly held that they apply to post-sale misconduct concerning financing contracts.

The Kansas statute, like the MMPA, expressly applies to "any unconscionable act or practice *in connection with* a consumer transaction… whether it occurs *before, during or after* the transaction." K.S.A. § 50-627(a) (emphasis added). Interpreting Kansas's UDAP law to apply to post-sale debt collection activity, its Supreme Court held, "A debt collector is obviously engaged in enforcing a consumer transaction." *State ex rel. Miller v. Midwest Serv. Bureau of Topeka*, 623 P.2d 1343, 1345 (Kan. Sup. 1981). Likewise, a debt collector is obviously engaged in enforcing a consumer "sale" under the MMPA.

Ohio's UDAP statute similarly prohibits "an unfair or deceptive act or practice *in connection with* a consumer transaction… whether it occurs *before, during, or after* the transaction." Oh. Rev. Code § 1345.02(A) (emphasis added). Ohio's state and federal courts alike interpret that language to include post-sale misconduct in finance contracts. In *Celebrezze v. United Research, Inc.*, 482 N.E.2d 1260 (Ohio App. 1984), the Ohio Appeals court held that the state UDAP law prohibits creditors from filing collection suits against debtors in the wrong venue, because doing so is an "unfair" practice. The court held that the statute "prohibits the supplier from employing unfair practices from the initial contact with the consumer until the debt is paid." *Id.* at 1262. *Accord Turner v. Lerner, Sampson & Rothfuss*, 776 F.Supp.2d 498, 509-510 (N.D. Ohio 2011) (Ohio UDAP also applies to attorneys filing suit in wrong venue to collect debt).

The Utah UDAP statute prohibits any deceptive act or practice "*in connection with* a consumer transaction … whether it occurs *before, during, or after* the transaction." Utah Code § 13-11-4(1) (emphasis added). The Tenth Circuit Court of Appeals held that Utah's statute applies to post-sale collection efforts in finance contracts. *Heard v. Bonneville Billing and Collections*, 216 F.3d 1087 (10th Cir. 2000) (unpublished); *accord Brown v. Constantino*, 2009 WL 3617692 at *2-4 (D. Utah 2009) (applying Utah's UDAP to attorneys' misconduct in collection of consumer debt).

In the face of these multiple decisions interpreting statutes like the MMPA, containing *both* the "in connection with" *and* "before, during, or after" language, the Eastern District's decisions stand in stark isolation.

B. Consumer Statutes Lacking Express Post-Sale Protection

But even where a state's UDAP statute does not expressly state that it applies to post-sale conduct, courts across the country interpret otherwise similar consumer protection statutes to apply to it, including conduct concerning finance contracts.[2] Despite lacking express inclusion of post-sale conduct, these statutes have in the great majority of cases been interpreted to apply to the performance and enforcement of consumer finance contracts in order to achieve the over-arching objective of protecting consumers from unfair and deceptive practices.

The Iowa *Cutty* decision has already been discussed in detail, above. It is among the more salient of such decisions from other states.

The Alaska UDAP statute prohibits "unfair or deceptive acts or practices in the conduct of trade or commerce." Alaska Stat. § 45.50.471(a). The Alaska Supreme Court

[2] A number of states' UDAP laws have protections expressly for consumer finance contracts, so determining whether those states' generally applicable consumer protection statutes cover such contracts is not helpful here. Md. Code, Com. Law § 13-301(14)(iii); 940 Mass. Code Regs. §§ 7.01-7.10; N.M. Stat. § 57-12-2(D); N.C. Gen. Stat. §§ 75-50 to 75-56; 15 Okla. Stat. Ann. § 753(31)-(32); Or. Rev. Stat. § 646.639; Vt. Consumer Fraud Rules, 06-031-004 Vt. Code R. § 104; W. Va. Code § 46A-2-122 to 46A-2-129. A number of other states' UDAP statutes have not been interpreted in the context of post-sale performance and enforcement of consumer finance contracts.

observed more than three decades ago that post-sale misconduct in consumer finance contracts had become a serious problem:

> In recent years, unscrupulous acts and practices of independent debt collection agencies have come under increasing scrutiny from both the public and private sector. Consumer groups, state law enforcement agencies, private industry, and former members of the debt collection profession itself have collectively called for protection for consumers from unfair collection practices, including use of obscene or profane language, threats of violence or imprisonment, telephone calls at unreasonable hours, misrepresentation of consumer's legal rights, disclosure of consumer's financial status to third parties, and feigned use of legal process.

State v. O'Neill Investigations, Inc., 609 P.2d 520, 523 (Alaska 1980) (citing numerous state and federal legislative and congressional hearings). The *O'Neill* court held that the UDAP law must be interpreted liberally to effectuate its remedial objectives, *id.* at 528, and applied it to post-sale collection of consumer debts, *id.* at 535-36. *Accord Pepper v. Routh Crabtree, APC*, 219 P.3d 1017 (Alaska 2009) (applying state UDAP to law firm's debt collection conduct).

California's chief UDAP statute prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The statute lacks express provision for post-sale misconduct, yet the California supreme court held over four decades ago that post-sale misconduct related to consumer finance contracts was covered. *Barquis v. Merchants Collection*

Ass'n of Oakland, Inc., 496 P.2d 817 (Cal. 1972) (citations to UDAP statute are to prior numbering system); *accord Yu v. Signet Bank/Va.*, 69 Cal.App.4th 1377 (Cal. App. 1999).

The Connecticut UDAP statute likewise contains no express temporal breadth, but merely prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Stat. § 42-110b. Yet the statute has been interpreted to apply to post-sale misconduct in the enforcement of a consumer finance contract. *Pabon v. Recko*, 122 F.Supp.2d 311 (D. Conn. 2000) (applying UDAP to collection agency and individual employee of collection agency).

Florida's UDAP statute prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," Fla. Stat. § 501.204(1), and defines "trade or commerce" to mean "advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service," Fla. Stat. § 501.203(8). The Florida statute does not expressly list post-sale performance in the definition of "sale" or "commerce"—yet the Florida courts succinctly interpret their UDAP to include post-sale performance and enforcement of consumer finance contracts. *E.g.*, *Schauer v. Gen. Motors Acceptance Corp.*, 819 So.2d 809, 812 (Fla. App. 2002). Missouri's MMPA, by expressly including misconduct "after" the sale, even more obviously applies post-sale.

The Georgia UDAP statute prohibits "unfair or deceptive acts or practices in the conduct of consumer transactions." Ga. Code § 10-1-393(a). In *1st Nationwide Collection Agency, Inc. v. Werner*, the debt collector argued that its conduct "was in no way *related* to the sale or offer for sale of goods and services." 654 S.E.2d 428, 431 (Ga. App. 2007) (emphasis added). That is like the argument embraced by the court in *Portfolio*, where it

found no "relationship" to the original sale. The Georgia court squarely rejected the argument, finding an adequate relationship in the fact that the debt collector was attempting to collect the original debt, and holding the consumer protection law applied.

Hawaii's UDAP law likewise prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Haw. Rev. Stat. § 480-2(a). The statute defines "sale" as including "contract to sell, lease, contract to lease, license, and contract to license." Haw. Rev. Stat. § 480-1. The statute omits any express temporal scope. Yet the Hawaii Supreme Court held it would be "absurd" to conclude that debt collectors—who were not original parties to the underlying debt and had no role in the original provision of the credit—would not be subject to the UDAP statute. *Flores v. Rawlings Co., LLC*, 177 P.3d 341, 352 (Haw. 2008) (holding UDAP applies to debt collection activity, but finding at p. 357 that plaintiffs had no injury where their complaint was that debt collector merely had not registered as a debt collector as required); *accord Wiginton v. Pac. Credit Corp.*, 634 P.2d 111 (Haw. App. 1981) (applying state UDAP to debtor's claim against assignee debt collector for misstating amount due).

Idaho's UDAP statute prohibits various misconduct in "trade or commerce," defined as "the advertising, offering for sale, sale, or distribution of any good or services, directly or indirectly affecting the people of this state." Idaho Code §§ 48-602(2), 48-603. That definition is notably similar to the MMPA's definition of "sale," but lacking the MMPA's express application to conduct "after" the sale. Looking to the Federal Trade Commission's interpretation of the FTC Act, the Idaho Supreme Court held that "collection of a debt arising out of a sale of goods or services is subject to the provisions

of the [UDAP], even when the collection of the debt is by a third party who has purchased the debt from the seller." *In re Western Acceptance Corp., Inc.*, 788 P.2d 214, 216 (Idaho 1990).

The Illinois UDAP law prohibits "any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact… in the conduct of any trade or commerce." 815 Ill. Comp. Stat. § 505/2. It defines "trade" or "commerce" to mean "advertising, offering for sale, sale, or distribution" of services or property. 815 Ill. Comp. Stat. § 505/1(f). In *People ex rel. Daley v. Datacom Systems Corp.*, the Illinois Supreme Court held that the statute applied to a debt collector hired by the City of Chicago to collect unpaid parking tickets. 585 N.E.2d 51, 63-64 (Ill. 1991). Like the Idaho decision, the Illinois court looked to FTC construction of the federal FTC Act. *Id.*

Louisiana's UDAP law prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," La. Rev. Stat. § 51:1405(A), and defines trade or commerce as "the advertising offering for sale, sale, or distribution of any services and any property," La. Rev. Stat. § 51:1502(9). Louisiana courts have repeatedly held that wrongful seizure of property that secures a consumer contract is covered by that UDAP statute. *E.g. Slayton v. Davis*, 901 So.2d 1246, 1254 (La. App. 2005) (citing precedents). Likewise, at least one Maine court has applied its UDAP law to wrongful repossession. *Newcombe v. Mooers*, 2000 WL 33675662 at *2 (Main Super. Ct. 2000). The Maine statute prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," 5 Me. Rev. Stat. § 207, and defines trade or commerce as "the advertising,

offering for sale, sale or distribution of any services and any property," 5 Me. Rev. Stat. § 206.3.

The Montana Supreme Court, deciding whether debt collection activity fell within its state UDAP law, wrote, "Only an artificially narrow construction would hold that the statute applies broadly to practices utilized to effect a sale, but cannot reach the practice utilized in its financing." *Baird v. Norwest Bank*, 843 P.2d 327, (Mont. 1992) (quoting *Garland v. Mobil Oil Corp.*, 340 F.Supp. 1095, 1099 (N.D. Ill. 1972)). The *Baird* court held that the UDAP statute applied to "the lending and collecting of" consumer loans. *Id.* at 334; *accord Entriken v. Motor Coach Fed. Credit Union*, 845 P.2d 93 (Mont. 1992) (applying UDAP law to repossession of the collateral for a consumer contract).

The UDAP statute in Nebraska prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," Neb. Rev. Stat. § 59-1602, and defines trade or commerce as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State," Neb. Rev. Stat. § 59-1601(2). Nebraska federal courts have applied that statute to protect consumers from debt collection practices. *Hage v. Gen'l Serv. Bureau*, 306 F.Supp.2d 883, 889 (D. Neb. 2003); *Henggeler v. Brumbaugh & Quandahl, P.C.*, 2012 WL 2855104 at *3-4 (D. Neb. 2012).

New York's UDAP statute applies to "deceptive" practices, without mention of "unfair" practices or the like. N.Y. Gen. Bus. Law § 349(a). Despite no express provision for the temporal scope of the UDAP law, courts apply it to deceptive post-sale conduct in consumer finance transactions. *E.g., Sykes v. Mel Harris & Assoc., LLC*, 757

F.Supp.2d 413, 428 (S.D.N.Y. 2010); *Cyphers v. Litton Loan Serv., LLP*, 503 F.Supp.2d 547, 552-53 (N.D.N.Y. 2007).

The Pennsylvania UDAP law prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." 73 Pa. Stat. § 201-3. In *Trunzo v. Citi Mortgage*, the defendants argued that as assignees of finance contracts, they were immune from application of the UDAP statute because plaintiffs had not "purchased" anything from them. 876 F.Supp.2d 521, 543 (W.D. Pa. 2012). This argument is similar to the *Portfolio* court's statement that defendants were "not alleged to have been a party to or have had any involvement with the initial sales transaction." 351 S.W.3d at 665. The Pennsylvania court squarely rejected the argument and applied the UDAP law to debt collection: "a [court] should not limit the [UDAP's] application to only those circumstances where the unfair or deceptive conduct induced the consumer to make the initial purchase. Such a reading of the statute 'would insulate all kinds of practices from the [UDAP], such as debt collection, which occur after entering an agreement and which were not a basis for the original agreement.'" 876 F.Supp.2d at 543 (quoting *In re Smith*, 866 F.2d 576, 583 (3d Cir. 1989)).

South Carolina's UDAP statutes prohibit "unfair or deceptive acts or practices in the conduct of any trade or commerce," S.C. Code § 39-5-20(a), and they define trade and commerce to include "advertising, offering for sale, sale or distribution of any services and any property," S.C. Code § 39-5-10(b). Federal courts in South Carolina, looking to Federal Trade Commission interpretation of similar federal law for guidance,

have long interpreted this to apply to debt collection conduct. *E.g. In re Daniel*, 137 B.R. 884, 887 (D.S.C. 1992).

Texas law is especially illustrative here. *Bohls v. Oakes*, 75 S.W.3d 473 (Tx. App. 2002), was cited by this Court in *Gibbons* for the proposition that Missouri's MMPA does not require privity. *Gibbons*, 216 S.W.3d at 670 n.13. The Texas UDAP law contains no express temporal scope, but prohibits "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce," Tx. Bus. & Com. Code § 17.46(a), and defines "trade and commerce" to mean "advertising, offering for sale, sale, lease, or distribution of any goods or service," Tx. Bus. & Com. Code § 17.45(6). The Texas UDAP law also enumerates twenty-seven examples of unlawful conduct, *none* of which clearly involve post-sale conduct *except* the prohibition against "filing suit" to collect a debt in a county other than the one in which the debtor resides or executed the underlying contract. Tx. Bus. & Com. Code § 17.46(b)(23). In *Nelson v. Schanzer*, 788 S.W.2d 81 (Tx. App. 1990), a tenant whose goods were taken by a moving company pursuant to a forcible entry and detainer action brought suit against the mover under the UDAP law after some of his property was lost and damaged. The mover complained that the UDAP could not apply because "claims of loss or destruction of property did not arise from 'acquisition' of 'goods or services'" in that the mover acted pursuant to the constable's power. *Id.* at 86-87. The court disagreed, holding that despite no choice on the part of the tenant regarding the mover's role, the mover was an implied bailee and agent of the tenant, and that was a sufficient connection to form a "sale" under the UDAP's protection, reiterating Texas law that privity is not required. *Id.* The case exemplifies the

protective reach of consumer law even where no temporal scope is express, and even where the underlying transaction the consumer entered (in *Nelson*, a residential lease) was not with the defendant.

Finally, in demonstrating the liberal construction of consumer protection laws to effectuate their remedial purpose, the Supreme Court of Washington applied its UDAP statute to a debt collection agency's conduct in collecting an insurance company's subrogation claim against an underinsured motorist. *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 887 (Wash. 2009). The Washington statute prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Wash. Rev. Code § 19.86.020. "Trade" and "commerce" "includes" the "sale of assets or services, and any commerce directly or indirectly affecting the people of the state." Wash Rev. Code § 19.86.010(2). The debt collector argued the statute must be interpreted to at least require a consumer or business transaction. 204 P.3d at 890. The court disagreed, and held that the UDAP law applied because the term "commerce" required only a "connection between the wrongdoing (the wrongdoer) and the plaintiff." *Id.*

While the Washington statute differs in particulars from the MMPA, the Washington court's holding that the "connection" was sufficient in *Panag* illustrates the appropriate meaning and scope of the MMPA's requirement that the misconduct be in "connection" with the sale. The Eastern District's unduly restrictive view of "connection" as requiring that the misconduct occur "before or at the time of the advertising or purchase of the merchandise," and requiring that the Defendant "have been a party to or have had any involvement with the initial sales transaction," 351 S.W.3d at

665, stands in drastic contrast to the meaning that courts overwhelmingly ascribe to the term "connection."

VI. Conclusion

The NCLC urges this Court to reverse the trial court and hold that the plaintiff states a claim under the MMPA, and to expressly overrule *Portfolio* and its progeny and hold that collections and other servicing-related conduct on consumer finance contracts and accounts is generally "in connection with the sale" within the meaning of those terms in the MMPA.

Respectfully Submitted,

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CERTIFICATIONS

The undersigned certifies that on this 27th day of January 2014, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon counsel of record:

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The undersigned certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 10,510 words, calculated with the word-count function of Microsoft Word.

The undersigned certifies that this document was scanned and found to contain no viruses, using ESET NOD32 Antivirus version 7.0.302.26.

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