IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF APPELLANT

Mitchell B. Stoddard, MBE # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 *tel*
(314) 692-2002 *fax*
mbs@clalaw.com

Attorneys for Appellant

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On June 24, 2010, two days after Respondent, Wells Fargo Home Mortgage, Inc., approved Appellant's application for a loan modification, it foreclosed on her home and sold it to Respondent, Federal National Mortgage Association ("FNMA"). Appellant brought suit under the Missouri Merchandising Practices Act ("MMPA") and obtained a Temporary Restraining Order to prevent the further sale of her home. Appellant was successful until November 1, 2012, when the trial court granted Respondents' motion for summary judgment. Appellant was subsequently evicted from her home in May, 2013.

Appellant timely appealed the trial court's judgment to the Court of Appeals for the Eastern District of Missouri. On August 27, 2013, the Eastern District affirmed the trial court in a Memorandum Opinion.

On November 6, 2013, Appellant filed her application for transfer with this Court because the questions involved are of general interest and importance, and because the Memorandum Opinion of the Eastern District is contrary to previous decisions of appellate courts of this state, and contrary to previous decisions of this Court. On December 24, 2013, this Court sustained Appellant's application for transfer. Because the Court sustained Appellant's application for transfer pursuant to Rule 83.04 of the Supreme Court Rules, the Court has jurisdiction over this case pursuant to Art. V, Sec. 10 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Shelby Watson (hereinafter "Watson") purchased a loft condominium unit located at 1136 Washington Avenue in the City of St. Louis, Missouri on August 25, 2006. (L.F. at 215). Watson secured a mortgage loan through Mortgage Resources in the Midwest for $183,350.00. (L.F. at 117, 215). Watson simultaneously executed a Deed of Trust as security for the mortgage loan. (L.F. at 122). Watson's monthly mortgage payments amounted to just over $1,400.00. (L.F. at 215). Wells Fargo took over as the loan servicer on February 1, 2007. (L.F. at 63).

In 2007, Watson's income decreased when she had to give up a second job in order to accept a promotion at work. (L.F. at 216). Watson thereafter had difficulty keeping up with her monthly mortgage payments. (L.F. at 216). Watson defaulted on her loan in or around August 2007. (L.F. at 216).

In February 2009, Watson applied to Wells Fargo for a loan modification so she could reduce her monthly mortgage payments. (L.F. at 216). In August or September 2009, Wells Fargo approved Watson's application for a loan modification, but never told Watson about it. (L.F. at 216). Watson did not find out about the modification approval until after the deadline had elapsed. (L.F. at 216). Wells Fargo then invited Watson to apply for a second loan modification. (L.F. at 216). At this point, Wells Fargo refused to accept further mortgage payments from Watson. (L.F. at 216).

On June 8, 2010, Wells Fargo agreed to modify Watson's loan. (L.F. at 216). Wells Fargo sent a Loan Modification Agreement ("LMA") to Watson and told her to sign it. (L.F. at 41, 216; App. at A-16). The deadline for returning the signed LMA was June 22, 2010. (L.F. at 201 – Pg:31, lines 9-13). Watson signed the LMA on June 18, 2010, and sent it to Wells Fargo by facsimile and Federal Express. (L.F. at 43, 216). Terry Katzman, Wells Fargo's Vice President of Loan Documentation, received the LMA and ratified it on behalf of Wells Fargo on June 22, 2010. (App. at A-18). At this point, Watson had a valid, binding and ratified LMA with Wells Fargo.

Despite Watson's acceptance of the LMA on June 18th, and Terry Katzman's ratification of the LMA on June 22nd, Wells Fargo nevertheless foreclosed on Watson's home on June 24, 2010. (L.F. at 191, 219).

On July 2, 2010, Watson filed a verified petition with the trial court alleging Wells Fargo violated the MMPA by: (1) negotiating with Plaintiff in bad faith, in that Wells Fargo intended to foreclose on the property all along, even though it gave Plaintiff the impression it was willing to do a loan modification, thereby precluding Plaintiff from seeking alternative remedies; (2) promising Plaintiff to postpone foreclosure proceedings while determining whether to grant the loan modification, but nevertheless proceeding with foreclosure even after telling Plaintiff the loan modification had been approved; (3) using its heightened bargaining power to dictate the terms of the loan modification agreement without giving Plaintiff a reasonable opportunity to negotiate the terms, thereby obtaining

Plaintiff's signature on an adhesive document through duress; (4) failing to provide notice of the foreclosure sale in violation of § 443.325 RSMo; and (5) falsely stating that Plaintiff rescinded the loan modification agreement after accepting it, so that Wells Fargo could justify proceeding with the foreclosure sale when it had no lawful right to do so. (L.F. at 13).

Watson also applied for a TRO to prevent the further sale of her home. (L.F. at 9). The TRO was granted on July 6, 2010. (L.F. at 9). Watson subsequently amended her verified petition two more times. The first time, Watson brought FNMA into the lawsuit as a party-defendant. (L.F. at 21). The second time, Watson clarified the fact that the "sale" at issue involved the extension of credit, not the purchase of her house. (L.F. at 32). Watson subsequently attempted to amend her verified petition a third time to include a count for specific performance, but Watson's motion for leave to amend was denied by the trial court. (L.F. at 275).

On May 4, 2012, Respondents filed a motion for summary judgment. (L.F. at 60). The sole issue raised by Respondents' was whether Wells Fargo's unlawful foreclosure occurred "in connection with" the extension of credit to Watson. (L.F. at 67). The trial court agreed with Respondents and entered summary judgment in Respondents' favor on November 1, 2012. (L.F. at 278). In reaching its decision, the trial court noted that "while [Wells Fargo's actions] may be unfair and deceptive," these unfair and deceptive acts did not violate the MMPA because they did not occur "in connection with the sale or advertisement of any

merchandise." (L.F. at 284). According to the trial court, Watson apparently was required to allege (1) that the unlawful conduct occurred before or at (but not after) the initial loan extension, and (2) that Wells Fargo was a party to, or had some involvement in the initial transaction in order to survive summary judgment. (L.F. at 284). Watson does not believe that either of these allegations is necessary to state a claim under the MMPA, and has thus launched this appeal.

POINT RELIED ON

I. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE IT CONSTRUED THE PHRASE "IN CONNECTION WITH" TOO NARROWLY, THEREBY EXEMPTING POST-SALE UNLAWFUL ACTS FROM COVERAGE, CONTRARY TO THE MMPA'S PLAIN LANGUAGE STATING THE MMPA APPLIES TO ACTS OCCURRING "BEFORE, DURING OR *AFTER*" THE SALE, AND THEREBY ALLOWING THIRD PARTIES TO ESCAPE LIABILITY UNDER THE MMPA, CONTRARY TO THIS COURT'S HOLDING IN GIBBONS V. J. NUCKOLLS, INC.

Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667 (Mo. 2007)

Schuchmann v. Air Services Heating & Air Condition, Inc., 199 S.W.3d 228 (Mo.App. S.D. 2006)

Koster v. Professional Debt Mgmt. Co., 351 S.W.3d 668 (Mo.App. E.D. 2011)

In Re Shelton, 481 B.R. 22 (W.D. Mo 2012)

Section 407.020.1 RSMo

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE IT CONSTRUED THE PHRASE "IN CONNECTION WITH" TOO NARROWLY, THEREBY EXEMPTING POST-SALE UNLAWFUL ACTS FROM COVERAGE, CONTRARY TO THE MMPA'S PLAIN LANGUAGE STATING THE MMPA APPLIES TO ACTS OCCURRING "BEFORE, DURING OR *AFTER*" THE SALE, AND THEREBY ALLOWING THIRD PARTIES TO ESCAPE LIABILITY UNDER THE MMPA, CONTRARY TO THIS COURT'S HOLDING IN GIBBONS V. J. NUCKOLLS, INC.

A. Standard of Review

The Court reviews the entry of summary judgment *de novo*. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 362 (Mo. 2012); *Business Bank of St. Louis v. Apollo Investments, Inc.*, 2012 WL 1610221, 2 (Mo.App. E.D. 2012). The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially. *Id.* This Court reviews the record in the light most favorable to the party against whom judgment was entered. *Id*. The propriety of a summary judgment is purely a question of law, and the standard of review on appeal is essentially de novo. *Buehne v. State Farm Mut. Auto. Ins. Co.*, 232 S.W.3d 603, 606 (Mo.App. E.D. 2007). Summary judgment will be upheld on appeal only if the reviewing court determines that no genuine issue of material fact

exists and that the movant has a right to judgment as a matter of law. *Newell v. State Farm Fire and Cas.*, 901 S.W.2d 133, 136 (Mo.App. W.D. 1995).

B. Introduction

Although it is not obligatory for this Court to re-visit *State ex rel. Koster v. Prof'l Debt Mgmt., LLC*[1] in deciding this case, as a practical matter it is inevitable. In the wake of *Prof'l Debt*, numerous courts have begun scaling back the MMPA in dramatic fashion. Where it was once considered well settled that the MMPA does not require privity,[2] *Prof'l Debt* now carves out an exception for people who are "strangers" to the initial transaction. Similarly, where it seemed beyond dispute that the MMPA applies to any unlawful act occurring "after" the sale,[3] *Prof'l Debt* suggests that MMPA liability for post-sale unlawful acts is confined to claims like "actions relating to warranties." *Id*. at 674.

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[1] 351 S.W.3d 668 (Mo.App. E.D. 2011). *Prof'l Debt* is a companion case to *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo.App. E.D. 2011). The two cases are virtually indistinguishable.

[2] See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. 2007)

[3] The MMPA provision at issue states: "Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation." § 407.020.1 RSMo. (App. at A-10).

Here, the trial court relied heavily on *Prof'l Debt* in granting Wells Fargo's motion for summary judgment. Even though the trial court expressly found that Wells Fargo's actions "may be unfair and deceptive," it nevertheless held the MMPA does not apply because (1) the unlawful acts did not occur "before or at the time of the extension of the loan," and (2) Wells Fargo "is not alleged to have been a party to or have had any involvement with the initial mortgage loan." (L.F. at 284). Watson avers these are new elements to an MMPA claim, and ones which were never intended by the legislature.

C. The MMPA is a Broad, Remedial Statute that Requires a Liberal Interpretation to Give the Maximum Possible Protection to Missouri Consumers

The pertinent language of the MMPA states:

> 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 . . . is declared to be an unlawful practice . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

§ 407.020.1 RSMo (App. at A-10) (emphasis added).

The MMPA was drafted to "preserve fundamental honesty, fair play and right dealings in public transactions." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. 2013). The MMPA covers every practice imaginable and every unfairness to whatever degree. *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001). The legislature intentionally drafted the MMPA broadly to prevent evasion by "overly meticulous definitions." *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 716 (Mo.App. E.D. 2008). The MMPA is not merely "remedial" but "paternalistic" legislation. *Electrical and Magneto Service Co. Inc. v. AMBAC Intern. Corp.*, 941 F.2d 660, 663 (8th Cir. 1991). Above all else, the purpose of the MMPA "is to protect consumers." *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009).

Both Missouri case law and the plain language of the MMPA required the trial court to consider Wells Fargo's post-sale conduct in determining whether an MMPA violation occurred. In so doing, the trial court was expected to apply the MMPA expansively, so as to protect Watson from "every unfairness to whatever degree." *Ports Petroleum*, 37 SSW.3d at 240. Instead, the trial court placed the greatest weight on the most restrictive provision of the MMPA, gave that provision the narrowest possible interpretation, and deprived Watson of the ability to protect her home from unlawful foreclosure. Thus, the trial court's grant of summary judgment was unfounded and should be reversed as a matter of law.

D. The Trial Court's Narrow Interpretation of "in connection with" Essentially Nullifies the MMPA's Applicability to Unlawful Acts that Occur After the Sale

By including the phrase "in connection with" in the MMPA, the legislature undoubtedly intended to ensure the existence of a "link" between the unlawful act and the sale. However, equal significance must also be given to the fact that the MMPA applies to unlawful acts that occur before, during or *after* the sale. Here, the trial court did not try to weigh each provision equally, but instead picked winners and losers. As a result, the trial court's interpretation of "in connection with" largely abrogates "after the sale," and thus insulates post-sale unlawful acts from MMPA liability.

A more balanced approach would attempt to reconcile "in connection with" with "after the sale." For example, in *Schuchmann v. Air Services Heating & Air Condition, Inc.*, 199 S.W.3d 228 (Mo.App. S.D. 2006), the court had to consider whether the breach of a lifetime warranty, which did not occur until five years after the sale, nevertheless occurred in connection with the sale. In *Schuchmann*, there was no allegation *whatsoever* of any unlawful act occurring before or at the time of the sale. In fact, the defendant sought reversal based on this fact in itself. *Id*. at 232. However, the court rejected this argument and held that the "lifetime" nature of the obligation is what linked the unlawful act to the sale. *Id*. at 233. Thus, the court gave equal weight to the phrases "in connection with" and "after

the sale," and did not simply find that one "modified" or "provided context for" the other.

Here, the trial court made no attempt to link the unlawful act to the sale. Rather, the trial court granted summary judgment to Respondents based on its finding that "the unfair practices alleged pertaining [sic] the loan modification are not alleged to have been made before or at the time of the extension of the loan . . ." (L.F. at 284; App. at A-7). Under this standard, no unlawful act occurring after the sale will ever violate the MMPA. Thus, the trial court's judgment is untenable in light of the plain language of the MMPA, stating that violations occur regardless of whether the unlawful act occurs before, during or *after* the sale.

E. The Trial Court Failed to Follow This Court's Holding in Gibbons v. J. Nuckolls, Inc. when it Attached Significance to the Fact that Respondents were not Alleged to have been Parties to, or had any Involvement with the Initial Transaction

In *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. 2007), this Court settled the issue of whether a non-party to a sale could violate the MMPA. Specifically, the Court held that an automobile wholesaler can violate the MMPA by failing to disclose a vehicle's accident history prior to selling it to a dealership, who subsequently sells it to a consumer. *Id.* at 668-669. "The statute's plain language does not contemplate a direct contractual relationship between plaintiff and defendant." *Id.* at 669. "To hold otherwise would undermine the fundamental

purpose of the [MMPA]: the protection of consumers." *Id.* at 669. (Emphasis added).

Here, the trial court based its decision, in part, on its finding that "Wells Fargo is not alleged to have been a party to or have had any involvement with the initial mortgage loan." (L.F. at 284; App. at A-7). In light of *Gibbons*, it is difficult to see how this statement has any relevance to Watson's claim.

In *Conway v. CitiMortgage, Inc.*, 2013 WL 6235864 (Mo.App. E.D. 2013), the court attempted to clarify the significance of a non-party's relation to the sale by stating that the lack of a direct connection is merely "evidence" that the defendant's unlawful act did not occur "in connection with" the sale. *Id.* at fn[3]. However, this analysis treats third-parties differently from original parties, and creates an inference (if not a "presumption") that unlawful acts committed by third-parties are not subject to MMPA liability. Moreover, treating "strangers" differently from original parties violates the rule that assignees "stand in the shoes" of the assignor. *Branstad v. Kinstler*, 166 S.W.3d 134, 136 (Mo.App. W.D. 2005); see also, *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 206 (Mo.App. W.D. 2013) ("The general rule is that the assignee of a non-negotiable obligation occupies exactly the same position with respect thereto that his assignor occupied"). Whether or not the party committing the unlawful act was "original" or "subsequent" should have no bearing on the party's liability under the MMPA.

The MMPA specifically applies to "[t]he act, use or employment by any person . . ." and not simply to persons directly involved in the sale. § 407.020.1. This

language could not be clearer, as is the interpretation given it by this Court in *Gibbons*.

F. The Trial Court Based its Ruling on Koster v. Prof'l Debt Mgmt., LLC, Which Essentially Treats the MMPA like an Action for Common Law Fraud

In *Prof'l Debt*, the court interpreted "in connection with" to mean a "relationship in fact" between the unlawful act and the sale. *Prof'l Debt*, 351 S.W.3d at 672. However, the court then went on to define "relationship in fact" as an unlawful act that occurs before or during (but not after) the sale. *Id*. at 672. In other words, the sale would not have occurred *but for* the unlawful act. This is clearly a common law fraud standard, and should be rejected by this Court.

While the *Prof'l Debt* court *did* acknowledge that post-sale unlawful conduct is covered by the MMPA's plain language, the court nevertheless held that the phrase "after the sale" merely *modifies* "in connection with."[4] *Id*. at 674. Presumably, the court meant that post-sale unlawful acts are covered under the MMPA only when another, similar unlawful act occurred before or at the time of

[4] The Eastern District apparently believes the phrase "after the sale" can either only *modify* or *eliminate* the phrase "in connection with." *Id*. at 674. The Eastern District failed to consider that both phrases can co-exist with *equal* significance.

the sale. This is an "overly meticulous" interpretation of the MMPA, as warned against by the *Zmuda* court, supra.

In contrast, a broad interpretation of the MMPA requires that "after the sale" be given its plain and ordinary meaning. In such cases, a consumer, who was completely satisfied with the transaction at its inception, and who had no complaint about the sale or the seller, even in retrospect, can still bring an MMPA claim if the seller or its successor were to commit an unlawful act at some unforeseen time in the future (i.e., "after the sale"). This interpretation gives much greater protection to consumers than the *Prof'l Debt* court's interpretation, without distorting (but in fact reinforcing) the plain language of the statute.

G. *Even Assuming this Court Disagrees and Finds There must be a "Relationship in Fact" Between the Unlawful Act and the Sale, Watson has Satisfied this Requirement*

One of the allegations raised by Watson in her petition is that Wells Fargo violated the MMPA by offering her a loan modification when it intended to foreclose all along, thereby negotiating the loan modification in bad faith.[5] (L.F. at 35). This Court recently held that the violation of the duty to act in good faith

[5] Watson also alleged Wells Fargo used duress, which likewise states a claim under the MMPA by virtue of the Attorney General's regulations pertaining to "unfair practices." See, 15 CSR 60-8.050. (App. at A-15).

states a claim under the MMPA. *Ward v. W. Cnty. Motor Co., Inc.*, 403 S.W.3d 82, 86 (Mo. 2013). Clearly, the obligation to act in good faith, just like the obligation to honor a lifetime warranty,[6] arises at the time of the sale.

In many instances, a seller's breach of its duty of good faith will not occur until long after the terms of the sale are finalized. In *Ward*, the defendant unlawfully refused to refund the plaintiffs' automobile deposits within days, or in some cases weeks after they signed a contract. *Id.* at 83. However, there is no reason the outcome would have been any different if the refusal to refund had occurred months, or even years after the sale. The obligation to act in good faith should have no expiration date.

H. The Trial Court Erred by Failing to Consider the Nature of the Merchandise, and the Parties' Relationship to the Merchandise, when Determining Whether a Link Exists Between the Unlawful Act and the Sale

Even though the legislature intended the MMPA to have a broad reach, it nevertheless restricted its application to "unlawful practice[s]" that occur "in connection with" the sale (or advertisement) of "*merchandise*." § 407.020.1.

There is no dispute that "merchandise" includes extensions and servicing of credit.[7], *Prof'l Debt*, 351 S.W.3d at 673. In order to trigger MMPA liability,

[6] See, *Schuchmann*, supra.

Watson must show that some aspect of the merchandise involved in the sale (i.e., the extension and servicing of her mortgage loan) is the same as that involved in the unlawful practice (i.e., the unlawful foreclosure of her home). Watson has met this burden by pleading she purchased a mortgage loan from Ohio Savings Bank (which was subsequently assigned to Wells Fargo), and that Wells Fargo unlawfully foreclosed on the deed of trust that secured the same mortgage loan. (L.F. at 33-34).

In *In Re Shelton*, 481 B.R. 22 (Bankr. W.D. Mo 2012)[8], another unlawful foreclosure case, the court noted that the deed of trust created "a long-term relationship between the parties (and their successors) and expressly encompasses the possibility of such events as default and the exercise of rights on default." *Id.* at 32. Although *Shelton* also involved an allegation that the defendant breached various HUD regulations, the court did not restrict its MMPA analysis solely to instances where HUD regulations apply.

Had the trial court here given a broad interpretation to the MMPA, as it was supposed to do, it would have ascertained that the merchandise involved in the sale was the same as the merchandise involved in the unlawful act, and that the

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[7] "Merchandise" is defined by the MMPA as "any objects, wares, goods, commodities, intangibles, real estate or services." § 407.010(4). (App. at A-9). The extension of credit is considered to be a "service" for MMPA purposes. *Conway v. CitiMortgage, Inc.*, 2013 WL 6235864 (Mo.App. E.D. 2013).

[8] App. at A-19.

parties had a "long-term relationship" which revolved around the same merchandise. In other words, the trial court would have established the "link" necessary to satisfy the "in connection with" requirement of the MMPA.

I. The Loan Modification Agreement Itself is a Separate "Sale," which Constitutes its own Independent "Link" to Wells Fargo's Unlawful Foreclosure

The MMPA defines "sale" as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit." § 407.010(6)[9]. Here, Wells Fargo offered, and Watson accepted, a loan modification in accordance with the terms set forth in the Loan Modification Agreement ("LMA"). (App. at A-16 – A-18). The LMA required Watson to make monthly payments of $1,154.35, exclusive of escrow payments, at a yearly interest rate of 5.500 percent, for a total overall payment of $191,939.76. (App. at A-16).

Wells Fargo's Vice President of Loan Documentation, Terry Katzman, signed the LMA on June 22, 2010, thereby ratifying the sale. (App. at A-18). Two days later, Wells Fargo foreclosed on Watson's home. Thus, there are actually two separate sales that directly "link" to Wells Fargo's unlawful foreclosure, either of which meets the "in connection with" test established by the trial court.

[9] App. at A-9.

J. This Court Should Give Strong Consideration to Overruling Prof'l Debt; Otherwise, Prof'l Debt will Continue to be relied on by Some Courts to Insulate Third-Parties from MMPA Liability

Recent court decisions, both at the state and federal level, have interpreted *Prof'l Debt* to insulate third parties who commit unlawful acts from liability under the MMPA. The "new rule" is that the MMPA now only applies to original parties who were in some way involved in the initial sale or transaction, and that the alleged unlawful act must have occurred before or during (but not after) the sale. These cases, which are growing monthly, include the following:

Conway v. CitiMortgage, Inc., supra, ("[the MMPA] does not apply to actions that occur after the initial sales transaction that do not relate to any representations or claims made before or at the time of the initial sales transaction"); *Hinten v. Midland Funding, LLC*, 2013 WL 5739035 (E.D. Mo. 2013) ("Because plaintiffs fail to allege that defendant was a party to the original transaction and fail to allege deceptive conduct relating to the initial extension of credit, defendant's motion to dismiss is sustained in this regard"); *Hutsler v. Wells Fargo Home Mortgage, Inc.*, 2013 WL 5442559 (E.D. Mo. 2013) ("None of this alleged misconduct, however, 'relates to the sale or advertisement of merchandise,' particularly the loan refinancing that Wells Fargo performed in 2001. Rather, the misconduct relates to the foreclosure process initiated in 2012"); *Reitz v. Nationstar Mortgage, LLC*, 2013 WL 3282875 (E.D. Mo. 2013) ("Missouri law holds that a MMPA claim may not be brought against a third-party that was not part of the original

transaction"); *Wivell v. Wells Fargo Bank, N.A.*, 2013 WL 2089222, fn 5 (W.D. Mo. 2013) ("It is firmly established that an MMPA claim cannot be brought against an entity that was not a party to the initial loan transaction but subsequently forecloses on the loan"); *Barnes v. Fed. Home Loan Mortgage Corp.*, 2013 WL 1314200 (W.D. Mo. 2013) ("An MMPA claim may not be brought against a third-party that was not part of the initial transaction"); *Ball v. Bank of New York*, 2012 WL 6645695 (W.D. Mo. 2012) ("Here, there is no allegation suggesting that the Defendants are anything but a stranger to the original transaction or that any unfair practice occurred at or before the time of sale . . . [t]hus . . . Plaintiffs have failed to state a claim under the Act"); *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191 (W.D. Mo. 2012) ("Absent a 'relationship in fact' between the advertisement or sale of the merchandise and the deceptive practices alleged by Plaintiff, the claim fails as a matter of law"); and *Willis v. US Bank NA*, 2012 WL 3043023 (E.D. Mo. 2012) ("In fact, the Complaint specifically notes that U.S. Bank was not a party to the initial purchase and supplied no money for the initial purchase. Because the alleged advertisement of the loan modification was some twenty years after the plaintiffs purchased the property, has nothing to do with the purchase, and U.S. Bank was not involved in the purchase, it cannot aid the plaintiffs in stating a claim under the MPA").

Should this Court reverse the trial court's summary judgment in the instant case while leaving *Prof'l Debt* undisturbed, it will invite continued misinterpretation of the MMPA by state and federal courts, to the adversity of Missouri consumers.

In contrast to the above cases, other courts have refused to follow *Prof'l Debt*, to wit: *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 207-208 (Mo.App. W.D. 2013) ("Contrary to the narrow analysis in *Portfolio Recovery*, our Supreme Court has addressed the legislature's use of the phrase "in connection with" in the MPA and construed it liberally . . . We find the analysis of *Portfolio Recovery* less than persuasive"); *In re Shelton*, supra, 481 B.R. 22, 33 (Bankr. W.D. Mo. 2012) ("While I recognize the apparent disconnect between the initial transaction and later breaches of promises, the statute expressly includes acts occurring after the initial sale . . ."); and *Huffman v. Credit Union of Texas*, 2011 WL 5008309 (W.D. Mo. 2011) ("While Defendant was not a party to the sale of the car, Plaintiff alleges Defendant was a party (*through its agent, Centrix*) to the provision of financing—and this is the transaction at issue in this case") (emphasis added).

Courts outside Missouri have similarly held that loan servicing activities, including foreclosures, occur "in connection with" the initial extension of credit. In *Narramore v. HSBC Bank USA, N.A.*, 2010 WL 2732815, 13 (D. Ariz. 2010), the court held that oral negotiations to restructure a consumer loan occurred "in connection with" the initial extension of credit.[10] The court rejected

[10] The Arizona statute at issue states: "[t]he act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in

the defendant's argument that there had to be an allegation of fraudulent behavior at the time of the sale. *Id.* at *13. Similarly, in *Beals v. Bank of America, N.A.*, 2011 WL 5415174, 16 (D.N.J. 2011), the issue was "whether the mortgage foreclosure modifications . . . are in connection with the sale or advertisement of any merchandise or real estate."[11] The court found that they were and overruled the defendant's motion to dismiss.[12]

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connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby ..." A.R.S. § 44–1522.

[11] The New Jersey Consumer Fraud Act ("CFA") states in pertinent part: "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby." N.J.S.A. 56:8–2.

[12] In a prior brief, Respondents attempted to distinguish the New Jersey CFA from the MMPA by noting the CFA specifically applies to "subsequent performance," while the MMPA does not. However, this is just a matter of semantics. In each case, the statute attempts to reach post-sale unlawful acts.

CONCLUSION

Watson asks this Court to reverse the trial court's entry of summary judgment, and to remand this case for further proceedings consistent with the Court's Opinion. Watson further asks the Court to overrule *Koster v. Professional Debt Management*, as being inconsistent with the purpose and objective of the MMPA, which is to protect Missouri consumers.

Respectfully Submitted,

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 *tel*
(314) 692-2002 *fax*
E-Mail: mbs@clalaw.com

Attorneys for Appellant

CERTIFICATION

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 the following: David T. Hamilton, Attorney for Respondents, 200 North Third Street, St. Charles, Missouri 63301.

The undersigned further certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 5,957 words.

/s/ Mitchell B. Stoddard
Mitchell B. Stoddard, # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
(314) 692-2001 tel
(314) 692-2002 fax
mbs@clalaw.com

Attorneys for Appellant