No. SC93951

IN THE
SUPREME COURT OF MISSOURI

DAVIS R. CONWAY and SHERI D. CONWAY

Plaintiffs/Appellants,

v.

CITIMORTGAGE, INC. and
FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants/Respondents.

Appeal from the Eleventh Judicial Circuit Court,
St. Charles County, Missouri
The Honorable Jon A. Cunningham, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL

CHRIS KOSTER
Attorney General

JAMES R. LAYTON (Mo. Bar 45631)
Solicitor General

BRIAN T. BEAR (Mo. Bar 61957)
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-7007

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INTEREST OF THE AMICUS

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

ARGUMENT

Introduction

Much like *Watson v. Wells Fargo Home Mortgage* ("Watson") the companion to this case, there is no dispute that the Conways allege they were subjected to an unlawful practice by their mortgage servicer when their mortgage servicer gave deficient notice of foreclosure. There is no dispute that the loan used to build their home is "merchandise" as defined by § 407.020. There is also no dispute that the Conways have sufficiently alleged that they suffered an ascertainable loss, with the foreclosure of their home, the disappearance of $50,000 of personal property and the servicer's refusal to remit $15,000 held in escrow. Despite these allegations, which are taken as true, the trial court dismissed the Conways' suit, finding that their mortgage servicer could not be held liable under the Missouri Merchandising Practices Act ("MMPA"), even though this remedial statute is designed to "cover every practice imaginable and every unfairness to whatever degree." *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

Like the dismissal by the trial court in *Watson,* the Conways' action was dismissed solely on the Court of Appeals, Eastern District's opinions of *State ex rel. Koster v. Prof. Debt Mgmt., LLC,* 351 S.W.3d 668 (Mo. App. E.D. 2011) and *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo.

App. E.D. 2011); (L.F. 28).[1] In the *Portfolio* cases the Eastern District, held that a party who acquires the right to collect a debt by assignment is not subject to the reach of the MMPA because that party is not "in connection with" the initial sale of merchandise. *Prof. Debt*, 351 S.W.3d at 671. The decisions' outcome is an outlier among state courts, who with broad agreement have found debt collection abuses to be within the scope of their own "little F.T.C. acts."[2]

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[1] As the holding and analysis of *Portfolio* and *Professional Debt* are essentially identical, this brief will cite and refer to them as "the *Portfolio* cases."

[2] *State ex rel. Miller v Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 526-7 (Ia. 2005); *People ex rel. Daley v. Datacom Sys. Corp.,* 585 N.E.2d 51, 64 (Ill. 1991); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Liggins v. The May Co., et al.,* 337 N.E. 2d 816, 818 (Ohio 1975); *State v. Midwest Ser. Bureau of Topeka, Inc.*, 623 P.2d 1343, 1347-49 (Kan. 1981); *Penn. Bankers Ass'n v. Com., Bureau of Consumer Protection*, 427 A.2d 730, 733 (Pa. 1981); *Baird v. Norwest Bank*, 843 P.2d 327, 334 (Mont. 1992); *Schubach v. Household Fin. Corp.,* 376 N.E.2d 140, 141 (Mass. 1978); *see also Wiginton v. Pacific Credit Corp.*, P.2d 111, 118 (Hawaii App. 1981); *Attorney General v. United Research, Inc.*, 482 N.E.2d 1260, 1262 (Ohio App. 1984);

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

No such prudential concerns should restrain this Court "in the abolition of a precedent not sustainable in reason, and in contravention of the terms of the statute relied upon to support it." *State ex rel. May Depart. Stores Co. v. Haid*, 38 S.W.2d 44, 53 (Mo. 1931). The Eastern District's decision has been profoundly destructive to consumer rights and the Attorney General's ability to police the marketplace. As shown by this case and *Watson*, the *Portfolio* cases

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Bank of New Orleans and Trust Co. v. Phillips, 415 So.2d 973, 975 (La. App. 1982); *First Nationwide Collection Agency, Inc. v. Werner*, 654 S.E.2d 428, 431 (Ga. Ct. App. 2007); *In re Scrimpsher*, 17 B.R. 999, 1016 (Bkrtcy. N.Y. 1982).

effectively immunize the entire modern mortgage industry for practically all abuses that homeowners may suffer after the closing of their mortgage loans. This Court should expressly overrule the *Portfolio* cases, and in their place articulate a more flexible "in connection with" test—one that gives "broad scope to the meaning of the statute to prevent evasion because of overly meticulous definitions." *State ex rel. Webster v. Areaco Inv. Co.,* 756 S.W.2d 633, 635 (Mo. App. 1988).

I. Despite the Appellate Court's Attempt to Distinguish its Decision, the Portfolio *Cases are Contrary to Precedent and the Plain Meaning of the MMPA*

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

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce…in or from the state of Missouri, is declared to be an unlawful practice.

Sec. 407.020.1.

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

The Eastern District declined to find such "a relationship in fact" between "the extension of credit," the merchandise at issue in that case, and abusive debt collection practices. First, the court claimed that "[t]he unfair practices as detailed in the Petition [were] not alleged to have been made before or at the time of the advertising or purchase of the merchandise." *Portfolio,* 351 S.W.3d at 665. And second, the Eastern District reasoned that

the defendant was "not alleged to have been a party to or have had any involvement with the initial sales transaction between the buyer and seller." *Portfolio,* 351 S.W.3d at 665. Both of these conclusions are contrary to the plain language of the MMPA and this Court's precedent.

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

This is precisely the result that the Southern District avoided in *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo. App. 2006). In *Schuchmann,* the plaintiff brought an MMPA action against the seller of an air conditioner because that seller repudiated a life-

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

The appellate court opinion below attempts to distinguish *Schuchmann*, by stating that the "conduct, failing to honor a lifetime warranty, occurred after the sale, but was clearly 'in connection with' the sale of the lifetime warranty that was purchased at the same time as the air conditioning unit." *Op.* at 9. This misconstrues the *Schuchmann* opinion. First, the Southern District did not separate the plaintiff's transaction into two separate sales, that of the air conditioner and that of the lifetime warranty. By distorting the Southern District's opinion in this way, the Eastern District attempts to cast the focus of *Schuchmann* on the discrete representations as to the warranty.

That is not so. The Southern District's analysis was purely centered on association of the wrongful act (the repudiation of the lifetime warranty) and the sale of the air conditioner, a focus that supports a broader and more permissive conception of any required association, relationship or connection between the wrongful conduct and the sale. *See* 199 S.W.3d at 233. Second, the appellate opinion in this case artificially reads the *Portfolio* cases' holding into *Schuchmann*. Nowhere does the Southern District state that the phrase "in connection with" requires that alleged conduct relate to specific representation made *only* "before or at" the time of sale. The attempts by the Eastern District to shoehorn the *Portfolio* cases into accord with *Schuchmann* are simply not availing as noted by the Western District in *Peel,* 408 S.W.3d at 207-8. Simply put, post-sale conduct is actionable under the MMPA regardless of whether the defendant makes an express claim germane to the conduct at the consummation of the transaction at issue.

The second *Portfolio* rationale is also contrary to statute—that acts are not "in connection with" the sale of merchandise when a defendant is "not alleged to have been a party to or have had any involvement with the initial sales transaction between the buyer and seller." *Portfolio,* 351 S.W.3d at 665. This Court specifically rejected this requirement in *Gibbons v. J. Nuckolls, Inc.,* 216 S.W.3d 667 (Mo. banc 2007). In that case, the plaintiff had purchased

a car from a dealership that told him that the car had never been in an accident. *Gibbons,* 216 S.W.3d at 668. The dealership had acquired the car from an automobile wholesaler, who had failed to disclose to the dealership that the car actually had been in an accident. *Id.* After discovering this fact, the plaintiff brought an action under the MMPA against the wholesaler for "failing to disclose the accident to the dealership." The trial court had dismissed the plaintiff's case based on a "lack of privity between Gibbons and [the wholesaler]." *Id.* at 668. This Court held that the plaintiff could maintain an action against the wholesaler who concealed this fact from the dealership even though the plaintiff had no direct interaction with the wholesaler during vehicle sales transaction. *See id.* at 668.

Portfolio's holding that a "relationship in fact" requires a defendant "to have been a party to or have had... involvement with the initial sales transaction between the buyer and seller" is simply a privity requirement by another name. *Portfolio,* 351 S.W.3d at 665. Indeed, "privity" is defined as "[t]he relationship between the parties to a contract." BLACK'S LAW DICTIONARY (9th ed. 2009). In *Gibbons*, this Court expressly rejected any such requirement. 216 S.W.3d at 668; *see also Peel*, 408 S.W.3d at 208. Missouri precedent has always found that so-called "strangers" to the initial consumer sales transaction may be held accountable for their own unlawful acts under

the MMPA. *State v. Polley*, 2 S.W.3d 887, 891 (Mo. App. W.D. 1999) (finding that it was of no consequence that the consumer "did not enter into a contract directly with [the defendant], nor did he pay for [defendant's] services directly... [or that] the transaction was conducted through [plaintiff's] builder").

In every respect, *Portfolio's* definition of "in connection with" is in conflict with prior precedent. This Court should reject the *Portfolio* cases outright, keeping the door open to the full relief that the MMPA promises.

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

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

Nearly all U.S. residential mortgages are immediately sold after being signed or "originated." Hunt, et. al, *Rebalancing Public and Private in the Law*

of Mortgage Transfers, 62 Am. U. L. Rev. 1529, 1531 (August 2013). The vast majority of residential mortgages, totaling some $6.97 trillion, change ownership multiple times, as they are bundled together and sold to investors as mortgage backed securities. Levitin and Twomey, *Mortgage Servicing,* 28 YALE J. ON REG. 1, 12-14 (Winter 2011). In 2009 alone, this represented about 90% of all U.S. residential mortgages originated. *Id.* at 16. For various practical reasons, all securitized mortgages require a third party, known as a "servicer," to collect monthly payments, negotiate modifications, and if necessary, institute foreclosure. *Id.* at *13.* "The mortgage servicer performs all the day-to-day tasks related to the mortgages" and is often the sole point of contact for the consumer. *Id.* at 23.

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

But the implication is worse, and it extends well past the realm of real estate and mortgages. Should the *Portfolio* cases be allowed to stand, the

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

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

the ultimate objective of consumer protection." *Gibbons*, 216 S.W.3d at 670. The MMPA cannot effectively function as long as the *Portfolio* cases stand. A new test is needed.

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

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

694 N.W.2d at 526 (citing *Metro. Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co.,* 793 N.E.2d 1252, 1255 (Mass. 2003); *Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 930 (2d Cir. 1998)).[3]

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

IV. Application of the Test to the Foreclosure Abuse Alleged in the Petition

The first question for the Court is to identify the sale of merchandise at

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

issue. The terms "sale" and "merchandise" are specifically defined by § 407.010 to embrace a wide variety of terms:

> (4) "Merchandise", any objects, wares, goods, commodities, intangibles, real estate or services;
>
> ...
>
> (6) "Sale", any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit.

A residential mortgage would fall within this definition, as it is "an extension of credit." *Peel,* 408 S.W.3d at 209; *In re Shelton*, 481 B.R. 22, 31 (W.D. Mo. 2012) (holding that a mortgage is merchandise under the MMPA). Often, a single "sale" can include multiple types of merchandise. *Peel,* 408 S.W.3d at 207-0; *see also Huffman v. Credit Union of Texas*, 2011 WL 5008309, * 5 (W.D. Mo. 2011) (noting that in financing of auto sale, the automobile and the extension of credit to purchase the automobile were both "merchandise" under the MMPA). In this case, the respondents instituted foreclosure based on the Conways' purported default on their mortgage loan. Thus, the Conways' MMPA claim should not be dismissed if the wrongful conduct alleged is "in connection with" their mortgage loan.

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

taking the "sale of merchandise" to mean that the wrongful conduct must be related to "claims or representations made before or at the time of the initial sales transaction." *Portfolio,* 351 S.W.3d at 667. This is an "overly meticulous" approach that invites "evasion" of the statute. *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 900 (Mo. App. E.D. 2003). First, requiring a granular showing of an explicit representation effectively grafts elements of common law fraud (along with its heightened pleading requirements) onto the Conways' MMPA unfair practice claims, in violation of the precedent that an MMPA claim does not require pleading all the elements of common law fraud. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007); *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. App. W.D. 2009).

Additionally, requiring that the alleged wrongful conduct related to specific "claims or representations made before or at the time of the initial sales transaction" excludes several theories of liability that are expressly under the MMPA. For instance, the statute declares the "concealment, suppression, or omission of any material fact" to be an unlawful practice. § 407.020.1. Under the logic of the *Portfolio* cases, bringing an MMPA claim under an "omission" theory would be practically impossible, because the entire gravamen of the action is premised on the defendant failing to make a "claim or representation before or during" the initial negotiation and sale of

merchandise.

Requiring conduct to be tied to discrete representations also ignores that an MMPA theory may be premised on litany of implied terms, covenants, and duties imposed by operation of law that require no express contractual term, or representation from a seller. These would include good faith and fair dealing, warranty of merchantability, and fiduciary obligations.

Finally, the artificial restriction to only specified "claims or representations" before or at the consummation of the sale ignores that a "sale of merchandise" may evolve well after the consummation of the sale. As the parties perform under an agreement, a defendant (or his or her agent or assignee) attempts to expand the subject matter of the transaction, making additional representations to the consumer. Drawing harsh judicial boundaries around the MMPA, as the *Portfolio* cases attempted, only creates unnecessary difficulties and frustrates the MMPA's ability to protect consumers.

This Court should analyze the transaction as a whole, and look at the essential characteristics of the transaction at issue. When a sale of merchandise spans multiple documents and interactions that "constitut[e] one complicated interdependent transaction," the scope and meaning should be "determined from the entire transaction and not simply from isolated portions

of a particular document." *Norcomo Corp. v. Franchi Const. Co., Inc.*, 587 S.W.2d 311, 317 (Mo. App. E.D. 1979). That means looking at whether the transaction or sale necessarily contemplates future performance, such as the collection of payments, honoring of covenants, contractual terms, or remedies that could be exercised (and abused) by a participant in the relationship. In the context of a 30-year mortgage, the most complex transaction in the consumer market place, this necessarily means that the MMPA will reach a wide array of abusive conduct, and it would certainly reach abuse that occurs before a home's construction is completed and is able to be occupied by the homeowner.

Next, the Court should examine the "unlawful practices" alleged by the plaintiff to the suit. Here, the appellant has adequately pled that the respondents engaged in an "unfair practice" when they tendered deficient statutory notice of the foreclosure to the partially completed home, despite defendants' knowledge that the Conways resided in another temporary residence. § 443.325, (RSMo 2012). The Conways also sufficiently allege other theories of "unfair practice" within their petition related to withholding of escrow funds. "Whether [the alleged] practice[s] [are ultimately] unfair or deceptive is a question of fact." *Jackson v. Hazelrigg Automotive Service Center, Inc.* --- S.W.3d ----, 2014 WL 282761, *6 (Mo. App. S.D. Jan. 27, 2014).

The Conways should be allowed to develop the facts surrounding their unfair practice theories through normal discovery.

Finally, the Court should analyze whether the unlawful practice is logically "related to, linked to, or associated with" some essential characteristic or aspect of any of the various merchandise that are at issue. A foreclosure of a residence, along with the attendant statutory duties imposed by operation of law, is necessarily bound up with the underlying mortgage, the merchandise at issue in this case. There need not be an express "claim or representation" made to the consumer during the consummation of the mortgage, that should a mortgagee elect to exercise the remedy of foreclosure, it will follow the statutory requirements set forth in the Revised Code. This conduct is "related to, linked to, or associated with" the Conways' residential mortgage.

If a "little F.T.C. act," like MMPA, covers mortgage transactions, the weight of authority holds that it applies to mortgage servicing abuses, like those alleged here. Carol and Sheldon, *Unfair and Deceptive Acts and Practices,* NATIONAL CONSUMER LAW CENTER PRACTICE, 50 (8th ed. 2012); *In re Shelton,* 481 B.R. at 31. If this Court goes against this trend, and finds that abusive foreclosure practices are not "related to, linked to or associated with" the underlying residential mortgage, then it invites the troubling question as to what acts could possibly meet such a stringent test. It could effectively

grant blanket immunity to the mortgage industry at a time when many consumers have been subjected to severe foreclosure and modification abuse. And at worst, this could even be extended into other industries where the obligations do or could change hands rapidly on a secondary market. This is not a path the Court should take. Rather, this Court should reaffirm, by rejecting the *Portfolio* cases, that the MMPA has the flexibility and scope required for the Attorney General, as well as private plaintiffs, to continue to protect Missouri consumers.

CONCLUSION

The trial court's dismissal should be reversed.

Respectfully Submitted,

CHRIS KOSTER
Attorney General

/s/ James R. Layton
JAMES R. LAYTON (Mo. Bar 45631)
Solicitor General
james.layton@ago.mo.gov

/s/ Brian T. Bear
BRIAN T. BEAR (Mo. Bar 61957)
Assistant Attorney General
brian.bear@ago.mo.gov

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on February 24, 2013, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and that a true and correct copy of the foregoing brief was mailed electronically to:

Mitchell B. Stoddard
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
mbs@clalaw.com

Attorney for Appellants

and

Amy Jo Thompson
Bryan Cave, L.L.P.
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102

Attorney for Respondents

I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,433 words.

/s/ Brian T. Bear
Brian T. Bear (Mo. Bar 61957)
Assistant Attorney General