IN THE SUPREME COURT OF MISSOURI

SC93951

DAVIS R. CONWAY AND SHERI D. CONWAY, PLAINTIFFS/APPELLANTS,

V.

CITIMORTGAGE, INC., AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, DEFENDANTS/RESPONDENTS

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT COURT,
ST. CHARLES COUNTY, MISSOURI
THE HONORABLE JON A. CUNNINGHAM, JUDGE

SUBSTITUTE BRIEF OF APPELLANTS

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Appellants Davis and Sheri Conway, husband and wife (hereinafter "the Conways"), filed suit against Respondents CitiMortgage, Inc. (hereinafter "CitiMortgage") and Federal National Mortgage Association ("hereinafter "FNMA") for violating the Missouri Merchandising Practices Act ("MMPA") by unlawfully foreclosing on their property in April 2011. The Conways alleged that CitiMortgage acted unfairly and breached its duty of good faith in that CitiMortgage refused to use the Conways' escrow funds to pay down the arrearage, and sent the foreclosure notice to an address where CitiMortgage knew the Conways did not reside.

On June 11, 2012, Respondents filed a motion to dismiss for failure to state a claim, arguing the MMPA did not apply because their alleged unlawful conduct did not occur "in connection with" the extension of the Conways' mortgage loan. On March 6, 2013, the trial court granted Respondents' motion, relying on *State ex rel. Koster v. Prof'l Debt Mgmt*, 351 S.W.3d 668, 674 (Mo.App. E.D. 2011), which holds that post-sale unlawful acts only violate the MMPA if they relate to claims or representations made before or at the time of the sale.

The Conways timely appealed the trial court's judgment to the Court of Appeals for the Eastern District of Missouri. On December 3, 2013, the Eastern District issued an Opinion affirming the trial court's judgment. (App. at A-3).

On February 4, 2014, the Conways applied to this Court for transfer, and the Court sustained their application on February 6, 2014.[1] Because the Court sustained the Conways' application for transfer pursuant to Rule 83.04 of the Supreme Court Rules, this Court has jurisdiction over the case pursuant to Art. V, Sec. 10 of the Missouri Constitution.

STATEMENT OF FACTS

In 2007, the Conways, husband and wife, purchased property located at 4156 Hueffmeier Road in Wentzville, Missouri ("the Hueffmeier Property") with the intention of remodeling the house and eventually making it their permanent residence (L.F. at 5). At the time of the purchase, the Conways were residing at 403 Quiet Field Court in St. Peters, Missouri ("the Quiet Field Property"). (L.F. at 4). The Conways financed the transaction by taking out a mortgage loan with Pulaski Bank for approximately $365.000.00. (L.F. at 5). The mortgage loan was backed by a deed of trust and serviced by Respondent CitiMortgage. (L.F. at 5). Upon information and belief, Pulaski Bank assigned the mortgage loan to Respondent, FNMA. (L.F. at 5).

The Conways continuously resided at the Quiet Field Property while remodeling the Hueffmeier Property. (L.F. at 5). In or around June 2008, the house

[1] This case involves the identical legal issue as *Watson v. Wells Fargo Home Mortgage, Inc.*, (Supreme Court No. SC93769), which was already pending before this Court at the time the Court granted transfer.

at the Hueffmeier Property, still under renovation, was damaged by a fire and had to be torn down. (L.F. at 5). The Conways filed a claim with their insurance carrier, Allstate, and notified CitiMortgage of the loss. (L.F. at 5). CitiMortgage referred the Conways to its loss mitigation department, who requested personal information from the Conways, including their address at the Quiet Field Property.

The Conways settled their insurance claim with Allstate for $150,000.00. (L.F. at 5). As work to the Hueffmeier Property progressed, Allstate cut checks payable to both the Conways and CitiMortgage. (L.F. at 5). The Conways would endorse the checks and forward them to CitiMortgage's loss mitigation department, which was responsible for distributing the funds. (L.F. at 5). Throughout this time, CitiMortgage had been sending insurance checks to the Conways at the Quiet Field address. (L.F. at 6).

As of August 1, 2009, Allstate had paid the insurance claim in full, and CitiMortgage was holding the last $15,000 in escrow. (L.F. at 5). In or around January 2011, the Conways were unable to continue making their regular mortgage payments on the Hueffmeier Property due to the poor economy, and fell delinquent on their loan. (L.F. at 5). Despite repeated requests by the Conways, CitiMortgage refused to release the remaining escrow funds pending completion of the remodeling job. (L.F. at 5).

In February or March 2011, the Conways made a $2,500.00 payment to CitiMortgage, which reduced their arrearage to approximately $9,000.00. (L.F. at 6). The Conways considered selling the Hueffmeier Property and met with realtors

to discuss listing it. In early May 2011, the Conways learned that CitiMortgage had foreclosed on the Hueffmeier Property a month earlier. (L.F. at 6).

As a result of the foreclosure, the Hueffmeier Property reverted to FNMA. (L.F. at 6). The Conways also learned that CitiMortgage had sent a foreclosure notice to the Hueffmeier Property address, even though the Conways had continually resided at the Quiet Field Property address the entire time. (L.F. at 6). The Conways were puzzled by this, since CitiMortgage's loss mitigation department had been corresponding with them at the Quiet Field Property address for a significant period of time prior to the foreclosure. (L.F. at 6). At the time of the foreclosure, the Conways had equity in the Hueffmeier Property of approximately $200,000.00, plus personal property worth an estimated $50,000, which was never recovered. (L.F. at 6).

On December 21, 2011, the Conways filed suit against CitiMortgage and FNMA in St. Charles County Circuit Court to recover the value of the Hueffmeier Property, as well as their lost personal property items. The petition, which was subsequently amended, alleged CitiMortgage was the agent of FNMA, and was acting at all times within the course and scope of its authority on behalf of FNMA. (L.F. at 4). The Conways alleged a single count under the MMPA against both Respondents seeking actual and punitive damages, or alternatively specific performance, plus incidental and consequential damages, attorney's fees, and prejudgment interest from the date of the unlawful foreclosure. (L.F. at 8).

The Conways alleged that CitiMortgage violated the MMPA by (a) sending notice of the foreclosure sale to the Hueffmeier address, even though CitiMortgage had actual and constructive notice that Plaintiffs' permanent residence was at the Quiet Field address, thereby depriving Plaintiffs of the opportunity of redeeming the Hueffmeier property prior to foreclosure; (b) failing to act in good faith by refusing to apply the $15,000 escrow funds to pay down Plaintiffs' arrearage on the Hueffmeier Property rather than foreclosing; (c) failing to remit the $15,000 escrow balance to Plaintiffs after foreclosing on the Hueffmeier property; and (d) failing to provide proper notice of the foreclosure sale to Plaintiffs at their Quiet Field address in violation of § 443.325 RSMo. (L.F. at 7; App. at A-15).

On June 11, 2012, Respondents filed a motion to dismiss. (L.F. at 10). Respondents based their motion solely on *State ex rel. Koster v. Prof'l Debt Management*, 351 S.W.3d 668 (Mo.App. E.D. 2011), and alleged the Conways failed to state a claim "because the complained of conduct does not relate to the original financing of the property and the MPA requires that the alleged misrepresentations or unfair practices be connected with the advertisement or sale of the merchandise, property or service in question." (L.F. at 11). On March 6, 2013, the trial court granted Respondents' motion and held the MMPA does not apply to these facts because the alleged post-sale unlawful act did not relate to any claims or representations made at or prior to the sale, and because no allegation was made that Respondents were original parties to the loan. (L.F. at 28-29; App. at A-1).

The Conways timely appealed to the Court of Appeals for the Eastern District of Missouri on April 12, 2013. (L.F. at 30). On December 3, 2013, the Eastern District affirmed the trial court's judgment and held that under *Prof'l Debt*, the Conways failed to state a claim. (App. at A-3). The Conways then applied for, and were granted transfer to this Court.

The legal issue in the instant case is identical to the legal issue raised in *Watson v. CitiMortgage Home Mortgage, Inc.*,[2] which is currently pending before this Court. The Conways, like Ms. Watson, contest whether the phrase "in connection with" requires them to prove that an unlawful foreclosure relates to a "claim or representation" that was made at or prior to the initiation of the mortgage loan before they can state a claim under the MMPA. The Conways contend this is a restrictive interpretation of the MMPA that requires reversal by this Court.

[2] See, Supreme Court No. SC93769.

POINT RELIED ON

I. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENTS' MOTION TO DISMISS BECAUSE IT CONSTRUED THE MMPA 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 TO DISMISS BECAUSE IT CONSTRUED THE MMPA 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

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993). It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Id*. at 306, citing *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Id*. at 306. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id*. at 306.

B. Introduction

As a direct result of *State ex rel. Koster v. Prof'l Debt Mgmt., LLC,* 351 S.W.3d 668 (Mo.App. E.D. 2011), and its companion case, *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo.App. E.D. 2011), Missouri consumers have been deprived of the ability to invoke the MMPA to protect their homes from unlawful foreclosure. These cases have real-world implications, and will directly affect thousands of Missouri consumers for decades to come. A home foreclosure (lawful or otherwise) is one of the most significant events that will ever befall a consumer and (if unlawful), is precisely the type of event for which the MMPA was enacted. *Prof'l Debt* has now been cited in at least eight separate opinions, where consumers were told they could find no relief from the MMPA, even though it was assumed the foreclosure was *unlawful*.[3] For many of these consumers, the ship has now sailed. Even were this Court to overrule *Prof'l Debt*,

[3] These cases are: (1) *Hinten v. Midland Funding, LLC*, 2013 WL 5739035 (E.D. Mo. 2013); (2) *Hutsler v. Wells Fargo Home Mortgage, Inc.*, 2013 WL 5442559 (E.D. Mo. 2013); (3) *Reitz v. Nationstar Mortgage, LLC*, 2013 WL 3282875 (E.D. Mo. 2013); (4) *Wivell v. Wells Fargo Bank, N.A.*, 2013 WL 2089222, fn 5 (W.D. Mo. 2013); (5) *Barnes v. Fed. Home Loan Mortgage Corp.*, 2013 WL 1314200 (W.D. Mo. 2013); (6) *Ball v. Bank of New York*, 2012 WL 6645695 (W.D. Mo. 2012); (7) *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191 (W.D. Mo. 2012); and (8) *Willis v. US Bank NA*, 2012 WL 3043023 (E.D. Mo. 2012).

these consumers have permanently lost their MMPA claims (if not their homes). By overruling *Prof'l Debt* however, this Court can *at least* stop the tide and prevent this list from growing even longer.

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-13) (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 CitiMortgage'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 the Conways 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 the Conways of the ability to seek redress for the unlawful foreclosure of their property. Thus, the trial court's dismissal was unfounded and should be reversed as a matter of law.

D. *The Trial Court's Narrow Interpretation of the MMPA Largely Nullifies the Statute's Ability to Protect Missouri Consumers from Unlawful Acts that Occur After the Sale*

The trial court relied exclusively on *Prof'l Debt* in granting Respondents' motion to dismiss, and held that post-sale conduct can violate the MMPA only if it relates "to claims or representations made before or at the time of the transaction." (L.F. at 28; App. at A-1). This language tracks the *Prof'l Debt* court's definition of "in connection with," even though the trial court did not use that phrase in its Judgment. By relating post-sale conduct to pre-sale "claims or representations," the trial court was effectively excluding *stand-alone* post-sale unlawful acts from MMPA liability.

While there is no disagreement that the legislature intended to link unlawful acts to a sale as a condition of MMPA liability, the legislature also expressly wanted the MMPA to apply to unlawful acts that occur *after* the sale. By conditioning post-sale unlawful acts on "claims or representations" made at or prior to the sale, the trial court made no attempt to harmonize these two concepts. Rather, the trial court picked winners and losers, and relegated post-sale unlawful acts to a type of *second-class* status, in that post-sale unlawful acts are now dependent on the existence of a pre-sale claim or representation to be viable.

A more balanced approach would not simply limit post-sale unlawful acts to claims or representations occurring at or before the sale, but look for a continuum

(i.e., a "connection") between the unlawful act and 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 claim or representation occurring before or at the time of the sale. In fact, the defendant sought reversal based on this fact. *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, as was the case in *Prof'l Debt*. *Prof'l Debt*, 351 S.W.3d at 674.

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 Original Parties to the Loan

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 the Conways failed to state a claim because they never alleged that Respondents were "original parties to their loan." (L.F. at 29; App. at 2). In light of *Gibbons*, it is difficult to see how this statement has any relevance to the Conways' claim. The Eastern District apparently realized this discord and tried to temper the trial court's obviously erroneous statement when it held the lack of a party's involvement in a sale is merely *evidence* that its actions had no connection to the sale. *Conway v. CitiMortgage, Inc.*, 2013 WL 6235864, fn.3 (Mo.App. E.D. 2013) (App. at A-8). However, even this distinction lacks merit, and is little more than an unavailing attempt to evade *Gibbons*.

Giving fair reading to the Eastern District's point, any unlawful act by a non-party is presumed *not* to have occurred in connection with the advertisement or sale of merchandise. Thus, a defendant need only establish s/he was a "non-party" to a transaction in order to benefit from this presumption. This would mean, for example, that any unlawful act by an assignee is presumed not to be "in connection with" a sale, even though the primary (if not the only) way to "connect" the assignee to the sale is through the assignment. Obviously, the Eastern District's point can lead to absurd results.

Notwithstanding, a consumer could conceivably overcome this presumption by producing evidence that the defendant's unlawful act *did* occur in connection with the sale. However, short of proving the defendant was *involved* in the sale, it is difficult to imagine how this burden could be met. In all likelihood, a consumer would have to resort to proving the defendant was a *party* to the transaction, even though *Gibbons* holds otherwise. Thus, the Eastern District's point is circular as well.

The MMPA's plain language states the statute applies to "[t]he act, use or employment by any person . . ." § 407.020.1. (Emphasis added). The phrase "any person" does not leave many stones unturned. It would seemingly apply to parties, non-parties, original parties, strangers, assignees, successors, and every other entity, human or otherwise, that exists upon the earth.[4]

[4] The term "person" is defined by the MMPA as: "any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof. § 407.010(5) RSMo. (App. at A-12).

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 Eastern District 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" to mean the unlawful act must directly relate to claims and representations made before or during (but not after) the sale. *Id*. at 672. In other words, the sale would not have occurred *but for* some unlawful pre-sale 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 went on to restrict this coverage to "claims or representations made before or at the time of the initial sales transaction . . ." Presumably, the court meant that post-sale unlawful acts are covered under the MMPA only when another, related unlawful act occurred before or at the time of 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, could 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, the Conways have Satisfied this Requirement

One of the allegations raised by the Conways in their petition is that CitiMortgage violated the MMPA by "failing to act in good faith by using the $15,000 escrow money to pay down Plaintiffs' arrearage on the Hueffmeier property rather than foreclosing." (L.F. at 7). This Court recently held that the violation of the duty to act in good faith 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,[5] 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

[5] See, *Schuchmann*, supra.

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. (App. at 13).

There is no dispute that "merchandise" includes extensions and servicing of credit.[6], *Prof'l Debt*, 351 S.W.3d at 673. In order to trigger MMPA liability, the Conways must show that some aspect of the merchandise involved in the sale (i.e., the extension and servicing of their mortgage loan) is the same as that involved in the unlawful practice (i.e., the unlawful foreclosure of their property). The Conways have met this burden by pleading they purchased a mortgage loan from

[6] "Merchandise" is defined by the MMPA as "any objects, wares, goods, commodities, intangibles, real estate or services." § 407.010(4) RSMo. (App. at A-12). 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).

Pulaski Bank (which was serviced by CitiMortgage), and that CitiMortgage unlawfully foreclosed on the deed of trust that secured the same mortgage loan. (L.F. at 5-6).

In *In Re Shelton*, 481 B.R. 22 (Bankr. W.D. Mo 2012)[7], 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 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.

[7] App. at A-17.

I. Other Courts have Considered this Issue and Determined that Post-Sale Unlawful Foreclosures Occur "in connection with" the Sale of Merchandise

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.[8] The court rejected 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

[8] 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 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. (App. at A-27).

of any merchandise or real estate."[9] The court found that they were and overruled the defendant's motion to dismiss.

The Conways are not asking this Court to "buck the trend" when it comes to applying consumer protection laws to unlawful foreclosures. Rather, it is the Eastern District that has "bucked the trend" by straining to find a way to *prevent* the MMPA from assisting Missouri consumers.

CONCLUSION

The Conways respectfully request this Court to reverse the trial court's dismissal of their first amended petition, and to remand this case for further proceedings consistent with the Court's Opinion. The Conways further urge the Court to overrule *Prof'l Debt* and *Portfolio* as being inconsistent with the purpose and objective of the MMPA, which is to protect Missouri consumers.

[9] 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. (App. at A-28).

Respectfully Submitted,

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CERTIFICATION

The undersigned certifies that on this 24th day of February 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: Amy J. Thompson, Attorney for Respondents, One Metropolitan Square, 211 N. Broadway, Ste 3500, St. Louis, Missouri 63102.

The undersigned further certifies this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 5,363 words.

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