3 WAP 2015

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

Mary E. Glover, individually and on behalf of other similarly situated former and current homeowners in Pennsylvania,

Appellant,

v.

Udren Law Offices, P.C., a New Jersey Debt Collector

Appellee.

From the Decision of the Superior Court of Pennsylvania
dated April 23, 2014 (938 WDA 2012)
Affirming the June 13, 2012 Order Entered in the Court of Common Pleas of Allegheny County (GD-11-018015)

BRIEF AMICI CURIAE OF AARP, NATIONAL CONSUMER LAW CENTER, AND COMMUNITY LEGAL SERVICES OF PHILADELPHIA IN SUPPORT OF APPELLANT

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ISSUE ON APPEAL

Does the Loan Interest and Protection Law ("Act 6"), 41 P.S. § 502 provide a remedy, as the explicit language of the statute states, against a statutorily defined "person" collecting statutorily prohibited fees on behalf of residential mortgage lenders?

Amici respectfully suggest this question be answered in the affirmative.

STATEMENT OF INTEREST

Home ownership plays a vital role in American life and the economy making the foreclosure crisis economically and emotionally disastrous for families and entire communities.[1] For most families, their home is their single largest financial investment, which makes losing that home not only emotionally wrenching, but also financially devastating. Foreclosure irretrievably depletes familial wealth that is essential to sustain people throughout their lives and provide opportunity for future generations. It often forces people to seek assistance

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[1] *See* The Reinvestment Fund, *Research Brief: What if Pennsylvania Had Not Had HEMAP*? 4 (2012), *available at* http://bit.ly/1FELqU4 (noting findings by the Joint Economic Committee of the United States Congress (JEC) that "the total estimated financial impact per foreclosure is $77,395.13. Of that amount, $50,000 (64.6%) is borne by the lenders, $19,227 (24.7%) by the local government where the collateral property is located, $7,200 (9.2%) by the homeowner and $1,508 (1.9%) by neighbors in close proximity to the foreclosed property. In light of these data, [the JEC] argue, 'The high costs of foreclosures—up to $80,000 for all stakeholders combined—present a strong incentive to prevent them.'" (notes and citations omitted)).

through safety net programs to meet basic needs. Foreclosures also inflict harm on the community by reducing the property value of surrounding homes, leaving vacant properties that invite crime, and by increasing demand for public services, and correspondingly the pressure to raise property taxes, at a time when remaining homeowners can least afford to bear the extra cost burden.[2]

In light of the importance of homeownership in fulfilling the American dream and the waves of harm that foreclosures cause, legislatures have enacted numerous special protections—like those in Act 6—to prevent abusive practices that drive people into foreclosure.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In the years leading up to the recent financial crisis, many older Americans put their homes on the line to secure mortgages that later proved to be unsustainable and, in some cases, designed to

[2] The Reinvestment Fund, *Research Brief*, *supra* note 1, at n. 13.

fail. Abusive residential mortgage servicing practices that emerged as the foreclosure crisis heated up compounded the unscrupulous and predatory mortgage origination practices, forcing even more homeowners into foreclosure. The practice of charging inflated or prohibited fees makes it harder for homeowners to save their homes from foreclosure. AARP supports laws, such as Act 6, that offer protection and recourse from such abuses.

Since 1969, the nonprofit National Consumer Law Center ("NCLC") has worked for consumer justice and economic security for low-income and other disadvantaged people through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC has been closely involved with protecting consumers from predatory mortgage lending for decades, was a primary author of the model law used by many states to address the problem, and has a strong interest in preserving homeowners' abilities to challenge bad loans as a means to foster sustainable and affordable home ownership.

Community Legal Services of Philadelphia (CLS) helps low-income Philadelphia residents obtain equal access to justice by providing them with advice and representation in urgent civil legal matters; advocating for their legal rights; and conducting community education about the legal issues that affect them. Created by the Philadelphia Bar Association in 1966, CLS helped more than 20,400 Philadelphians in 2014. Since its founding, CLS has served well over a million individuals. CLS provides direct representation to low-income homeowners facing mortgage foreclosure due to abusive and illegal lending practices. CLS also provides advice and referral services for homeowners at risk of foreclosure, while working with a coalition of community groups and policymakers to ensure laws and programs are in place to protect homeowners from predatory lending and to assist those who have already been victimized. As of March 19, 2015, CLS was actively representing 279 homeowners in residential mortgage foreclosure matters.

Amici are interested in this case because of the impact it will have on preserving the financial security of homeowners. Amici's participation in this case will assist this Honorable Court in its consideration of the issues presented in this appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The largest and most important investment most American families make is the purchase of a home. Kermit Baker, et. al., *Housing America's Older Adults: Meeting the Needs of an Aging Population* 16, Joint Center for Housing Studies of Harvard University (2014), *available at* http://bit.ly/1umYrKY (describing housing as the lynchpin of well-being). But homeowners increasingly are at risk of losing their biggest investment and the financial stability homeownership affords because high housing costs consume a disproportionate share of their income. *See id.* at 1 ("As the single largest item in most household budgets, housing costs directly affect day-to-day financial security as well as the ability to accrue wealth to draw upon later in life.").

Homeownership is widely recognized as a critical step to financial stability and achievement of the American Dream. Decades of bipartisan support underscore the national policy to encourage and protect homeownership. President Clinton expressed the national consensus that "more Americans should own their own homes, for reasons that are economic and tangible, and reasons that are emotional and intangible, but go to the heart of what it means to harbor, to nourish, to expand the American Dream." U.S. Dep't of Hous. and Urban Devel., *Homeownership and Its Benefits*, Urban Pol. Brief, Number 2 (1995), *available at* http://bit.ly/1AzFo2X. Similarly, Ronald Reagan recognized that homeownership "supplies stability and rootedness" and Lyndon Johnson promoted homeownership as part of a strategy for addressing the urban ills of the 1960s, declaring that "owning a home can increase responsibility and stake out a [person's] place in [the] community....The [person] who owns a home has something to be proud of and reason to protect and preserve it." *Id*.

The Pennsylvania General Assembly has also sought to prevent the devastation of foreclosure, including by enacting Act 6, Loan Interest and Protection Law, 41 P.S. § 101, *et seq*., and Act 91, Homeowner's Emergency Mortgage Act, 35 P.S. § 1680.401c *et seq*. Pennsylvania courts recognize that "[t]he purpose of these two Acts is … to prevent the loss of one's home without proper notice and protections as provided by law." *Bennett v. Seave*, 554 A.2d 886, 892 (Pa. 1989) (J. Nix, concurring).

"[A]buses perpetrated by brokers, . . . appraisers, lenders[,] and loan servicers" all contribute to fueling the current foreclosure crisis. Ira Goldstein, et al., *Mortgage Foreclosure Filings in Pennsylvania: A Study by The Reinvestment Fund for the Pennsylvania Department of Banking* 75-76, The Reinvestment Fund (2005), *available at* http://bit.ly/1Fw7mRg [hereinafter "*Mortgage Foreclosure Filings in Pennsylvania*"]. As demonstrated in this case, homeowners continue to be charged inflated interest and unearned attorney's fees that violate Act 6 prohibitions. *See also Johnson v. Phelan Hallinan & Schmieg, LLP*, No. GD 12-005395 (C.P. Allegheny Jul. 17, 2012) (alleging homeowner charged fees prohibited by Act 6); *Davis v. Bank of America, N.A.*, No. 2:13-cv-04396-PBT, (E.D. Pa. Aug. 11, 2014), ECF No. 58 (Order granting in part & denying part Def. Mot. to Dismiss) (same). Such charges increase the cost and difficulty for homeowners struggling to avert foreclosure, contrary to legislative intent.

The protection provided by Act 6 is as important now—and arguably more so, given the unprecedented number of foreclosures over the last decade—as when it was enacted. Indeed, the rate of foreclosure filings in Pennsylvania "rose by more than 18 percent in 2013" and continues to rise. Joel Mathis, *Foreclosures Rise in Pennsylvania, New Jersey: Bucking National Trends*, Philadelphia Magazine (Jan. 24, 2014 5:33 PM), *available at* http://bit.ly/1BMTUWf (comparing foreclosure filing rates in Pennsylvania against the national rate, which has slowed to a "relatively small 5.9 percent" annual increase).

Under the Superior Court's unduly narrow interpretation, the prohibitions of Act 6 are too easily evaded by residential mortgage lenders who can—and usually do—hire third party vendors, particularly attorneys to conduct foreclosures for them. *See Glover v. Udren Law Offices, P.C.*, 92 A.3d 24, 37 (Pa. Super. Ct. 2014)

(J. Wecht, dissenting) ("In effect, the majority interprets Act 6 to vest in residential borrowers a right not to be saddled with certain unreasonable interest rates and costs while denying them a remedy for that conduct when it is carried out by a lender's surrogates."). The overly narrow interpretation fails to account for the current structure of the mortgage industry, in which "[t]he majority of all home loans in recent years were securitized." Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 763 (2011). "In today's mortgage market, the individual (or entity) that made the loan to the borrower is oftentimes not the entity responsible for collecting the monthly payments." *Mortgage Foreclosure Filings in Pennsylvania* at 82. Each stage of the mortgage process is now handled by a different entity. *See id.* at 80-82; Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 Hous. Pol. Debate 753, 756–58 (2004) (describing "atomization" of the mortgage lending industry as a result of securitization).

This Court should interpret the prohibitions and remedial provisions of Act 6 broadly to ensure they effectively prevent harmful practices that the General Assembly clearly intended to prohibit. No carve out should be permitted to allow third party vendor attorneys to do what their residential mortgage lender clients may not do. The decisions of the lower courts should be reversed and remanded because such a narrow interpretation of Act 6 defeats the protection homeowners were granted by the Pennsylvania General Assembly.

ARGUMENT

I. ACT 6 WAS ENACTED TO PROTECT HOMEOWNERS AGAINST PRACTICES THAT INCREASE THE COST OF SAVING THEIR HOME FROM FORECLOSURE.

The Pennsylvania General Assembly sought to help homeowners prevent foreclosures by prohibiting certain practices that increase the sum necessary to cure a mortgage default. Specifically, Act 6 requires residential mortgage lenders to inform the homeowner of the exact amount of their delinquency by sending notice at least 30 days prior to accelerating a delinquent mortgage loan and commencing foreclosure proceedings in court. *See* 41 P.S. § 403(c)(3); *Wells Fargo Bank N.A. v. Spivak*, 104 A.3d 7, 14 (Pa. Super. Ct. 2014) ("An Act 6 notice enables a financially troubled residential homeowner to learn exactly what sum of money is necessary to cure the mortgage default."). Act 6 strictly limits the amount of attorney's fees and interest that may be charged prior to or during the 30 day notice period because, as the General Assembly found, such fees significantly increase the cost and difficulty for homeowners working to prevent the foreclosure. *See* 41 P.S. § 406. For example, higher fees may make it impossible for a homeowner to qualify for a refinanced loan or bankruptcy restructuring because the fees may increase the cost of the loan to more than the value of the property, exceed the permissible debt to income ratios, or make the new loan payments unaffordable. *See* Thompson, *supra*, at 763 (discussing unsustainable refinancing practices).

A study commissioned by the General Assembly bears out its judgment that "the Act 6 provisions limiting legal fees can be an effective means to keep costs down for borrowers going into foreclosure." *Mortgage Foreclosure Filings in Pennsylvania* at 75-76 (finding, on average, attorney's fees were a "dramatic" $3,417 higher for foreclosure of properties not protected by Act 6 and that the difference in costs are "significant and real"). This study further confirmed that unearned attorney's fees and interest make it significantly more difficult for a homeowner to avoid foreclosure. *See id.* at 77 (finding, based on empirical evidence, that increasing the loan amount covered by Act 6 will result in a "a significant drop [for a large number of Pennsylvania residents] in the cost of curing their mortgage delinquency. Undoubtedly, this will save some homeowners from the Sheriff Sale—the exact numbers of which can't be known at this time."). In 2008, the General Assembly extended the Act 6 threshold to cover a greater number of homeowners in recognition of the important protection the prohibition on charging attorney's fees provides. *See* Act of July 8, 2008, Loan Interest and Protection Law, 2008 Pa. Laws SB 483.

The harm to homeowners who are not protected from being charged prohibited attorney's fees is starkly demonstrated in this case; Ms. Glover borrowed $9,997.00 in 2002. *See* Pl. App., at A7-A8, ¶7. After an injury caused her a significant loss of income, she fell briefly behind on her mortgage payments. She contacted her servicer to make arrangements to pay the delinquency, then amounting to only $559.17 in mortgage payments and late fees. *See* Pl. App., at A8, ¶10. The servicer agreed to consider modifying her loan, but then instituted foreclosure proceedings instead. *See* Pl. App., at A8-A9, ¶12. Soon thereafter, she received an Act 6 notice from Defendant Udren, who served as the third party vendor for her loan servicer, informing her that she would have to pay $3,397.28 immediately to prevent a foreclosure—a shocking 1/3 of her outstanding principal loan balance. Of that amount, $1,697.28—amounting to more than three times her actual delinquency—was for attorney's fees. *See* Pl. App., at A9, ¶13; A49.

Ms. Glover's complaint illustrates clearly the harm the General Assembly sought to prevent: it is highly unlikely that any homeowner who is struggling to pay a mere $559.17 to keep her mortgage current would be able to come up with three times that amount ($1,697.28) in attorney's fees, especially on top of $1,140.83 in other additional fees needed to save her home.

Indeed, in 1983, the General Assembly reiterated the importance of limiting the imposition of pre-foreclosure charges when it enacted the Homeowner's Emergency Mortgage Act, 35 P.S. § 1680.401c *et seq.*, to establish an emergency mortgage assistance payment fund. Consistent with the goals of Act 6, "[t]he purpose of Act 91 was to institute a program to avert extensive mortgage foreclosures and distress homes sales resulting from default caused by conditions beyond the control of homeowners." *Beneficial Consumer Disc. Co. v. Vukman*, 77 A.3d 547, 554 (Pa. 2013) (J. Saylor, concurring). The General Assembly found that the imposition of attorneys and other mortgage related fees prior to accelerating the mortgage and initiating foreclosure proceedings would significantly increase the cost to avoid a foreclosure and deplete the precious resources in the fund. *See* 1983 House Leg. J. 944-45 (June 29).

II. THE SUPERIOR COURT'S UNDULY NARROW INTERPRETATION OF ACT 6 FRUSTRATES ACCOMPLISHMENT OF THE STATUTE'S REMEDIAL GOALS, AND FAILS TO ACCOUNT FOR THE COMPLEXITY OF THE SECURITIZED MORTGAGE INDUSTRY.

As fully discussed in the Appellant's Brief, the Superior Court "reject[ed] the notion that by use of the term 'person' in section 502, the Legislature inferentially expanded the scope of potential violators of section 406 of the Act[.]" *Glover v. Udren Law Offices, P.C.,* 92 A.3d 24, 30 (Pa. Super. Ct. 2014). The court further determined that the definition of "person" as used in section 502 could not be interpreted to include attorneys—even those hired as third party vendors by residential mortgage lenders—despite the statute defining the term "person" explicitly to "include but not be limited to residential mortgage lenders[.]" *Id.* (quoting 41 P.S. § 101 (2014)).

Interpreting the statute in this overly narrow manner, contrary to common sense and without taking into account the realities of the securitized mortgage industry, frustrates accomplishment of the remedial goals of Act 6. *See, e.g.*, *Dechert LLP v. Commonwealth*, 998 A.2d 575, 584 (Pa. 2010) (rejecting the argument that failure to include "canned computer software" in an expansive list required a finding that it was excluded because that interpretation would render meaningless the phrase "included but not limited to"); *Klein v. Allegheny Cnty. Health Dep't*, 269 A.2d 647, 651 (Pa. 1970) (strict construction of Rent Withholding Act did not require the statute to be construed as narrowly as possible, or so literally and without common sense that its obvious intent is frustrated). This narrow interpretation should be rejected.

A. Attorneys should not be exempt from the prohibitions and remedies provided by Act 6.

Exempting attorneys—hired to conduct foreclosures—from the definition of "residential mortgage lender" defies common sense and frustrates accomplishment of the remedial goals of Act 6. The Superior Court's interpretation wrongly assumes, without support, that the term "residential mortgage lender" excludes actions taken by their attorneys merely because the definition does not explicitly include them. The intent to protect homeowners cannot be achieved unless attorneys are subject to the Act 6 prohibitions because law firms, such as Udren's, are essential to carry out foreclosures. *See, e.g., In re Taylor*, 407 B.R. 618, 627 (Bankr. E.D. Pa. 2009) (describing the highly automated process by which residential mortgage servicers refer foreclosure and other loss mitigation services to specialized foreclosure law firms).[3]

To the extent the statutory language may be considered ambiguous, Pennsylvania law requires that a court's interpretation effectuate the legislative

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[3] "The Udren Firm . . . specializes in foreclosures, bankruptcies and other **legal services required by the more than fifty residential mortgage lenders** in its client base." *In re Taylor*, 407 B.R. at 627 (emphasis added) (describing the outsourcing arrangements and automated systems by which mortgage servicers routinely dole out delinquency assignments to a waiting assembly line of attorneys and "provides the attorney with the precise information it is coded to produce to perform the given task.").

intent. *See* 1 P.S. § 1921 (unless the text is "free from all ambiguity" then "the object of all interpretation and construction…is to ascertain and effectuate the intention of the General Assembly."); *see also Dechert LLP v. Commonwealth*, 998 A.2d 575, 584 (Pa. 2010) (holding that where a statute includes the phrase "included but not limited to" it must be read expansively, not exclusionary). There is no evidence that the General Assembly intended an exemption in Act 6 for attorneys performing the obligations of residential mortgage lenders. For example, in *Roethlein v. Portnoff Law Assocs*., 81 A.3d 816, 823-24 (Pa. 2013), involving Act 6 claims brought against an attorney for charging prohibited fees while collecting tax liens, this Court did not suggest that an attorney is exempt from the strictures of Act 6; rather, the holding merely recognized that Act 6 applies only to claims involving "the loan or use of money." *Id.*

Exempting attorneys hired by mortgage lenders from the remedial provisions of Act 6 permits, and may even incentivize, the evasion of Act 6. Indeed, in other contexts, Pennsylvania courts have recognized the importance of preventing evasion of the law by holding attorneys to the same obligations as their clients. Legislative goals "might be readily defeated should the [ ] creditor and its counsel be permitted to distinguish their respective roles . . . though their respective interests as attorney and client were co-terminus." *First Fed. S&L Ass'n v.*

Keisling, 746 A.2d 1150, 1156-57 (Pa. Super. Ct. 2000) (recognizing that "because the attorney-client relationship of [lender] and [attorney] … *could* be used to [evade judicial scrutiny], [lender] had effective control over the disposition of the property. Consequently, the need for judicial oversight recognized by the [Deficiency Judgment] Act remained. . .").

B. The Court must interpret "person" and "residential mortgage lender" in the context of the securitized residential mortgage lending industry.

The statutory definition of a "residential mortgage lender" must be construed in light of the real world structure of the securitized mortgage lending industry. In the years since Act 6 was enacted, the mortgage industry has become significantly more complicated, particularly as a result of widespread loan securitization. The term "residential mortgage lender" no longer refers to a single entity.

> When we talk about loan modifications and foreclosures, colloquially over coffee or in court cases, we tend to refer to a "lender," who is presumed both to own the loan, with a corresponding risk of loss if the loan does not perform, and to exercise control over the decision to foreclose or modify. This simplistic terminology does not reflect the reality of most home loans.

Thompson, *supra,* at 764.

In the securitized mortgage industry, the mortgage broker is often distinct and independent from the mortgage originator that underwrites and extends the loan funds. *See* Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on

Reg. 1, 23 (2011). The originator typically sells the mortgages on the secondary market, where the loan may be securitized and held in trust for pools of investors. *See id*. at 12. The investors hire mortgage servicers to collect payments and perform loss mitigation services on behalf of the owner of the loan. *See id*. at 7. Loss mitigation "include[s] prosecuting foreclosures and attempting to mitigate investors' losses. Some servicers have 'captive,' or in-house, loss mitigation units, including collateral inspection teams and foreclosure attorneys; others outsource these functions." *Id*. at 23.

When the housing bubble burst, mortgage servicers found they had more work than their largely automated administrative systems could handle. "Many servicers began subcontracting out much of their duties to so-called 'foreclosure mills,' contractors that had significant incentives to move foreclosures along quickly." Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* 10 (2010), *available at* http://1.usa.gov/1B66qg9; *see* Thompson, *supra*, at 765-68. The "atomized" mortgage industry results in law firms like Defendant Udren's being the primary actor interacting with the homeowners in the foreclosure process. *See* Eggert, *supra*, at 756–58. Hired guns that stand in the shoes of servicers should be subject to the same obligations as servicers when they are performing the obligations applicable to residential mortgage lenders.

If the lawyers to whom the foreclosure tasks are delegated cannot be held responsible for failing to comply with legal requirements protecting homeowners, there is no one else that could be held responsible. Not only will homeowners have no remedy, but the law will be effectively unenforceable. "It cannot be that all the parties involved can insulate themselves from responsibility by the use of such a system. In the end, we must hold responsible the attorneys who have certified to the court [ ] the representations they are making . . ." *In re Taylor*, 655 F.3d 274, 285-86 (3d Cir. 2011) (upholding sanctions entered by bankruptcy court against Udren law firm and lender, finding that the automated system established to foreclose on delinquent properties was rife with errors and "permits parties at every level of the filing process to disclaim responsibility for inaccuracies.").

A lender's outsourcing of various activities associated with foreclosing upon a mortgage does not alter the lender's statutory obligation to comply with Act 6 and should not limit the remedies available to the homeowners. It should be statutorily irrelevant that the mortgage lender hired a third party, in this case an attorney, to manage the servicer's notice obligations to the homeowner. The residential mortgage lender retains "effective control over the disposition of the property" and directs the attorney to act. *First Fed. S&L Ass'n v. Keisling*, 746 A.2d 1150, 1157 (Pa. Super. Ct. 2000).

The facts of this case clearly demonstrate the absurdity of exempting the attorney from complying with the statutory prohibitions. Notwithstanding years of court proceedings and attempts to reach an agreement on a loan modification, Ms. Glover ultimately was offered the opportunity to refinance her mortgage. As a condition of refinancing, the full amount of the unearned attorney's fees and excess interest she was charged were rolled into her refinanced mortgage loan and increased her principal balance. Thus it is clear that the prohibited fees were related to and charged by the residential mortgage lender.

This Honorable Court should not permit the important protections of Act 6 to be eviscerated by an unrealistic and narrow interpretation of "residential mortgage lender."

CONCLUSION

This Court should interpret Act 6 broadly to fulfill the clear legislative intent to protect homeowners facing foreclosure from abusive and excessive attorney's fees and reverse and remand the decisions of the lower courts.

March 20, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March 2015, a true and correct copy of the foregoing Brief of Amici Curiae of AARP, NATIONAL CONSUMER LAW CENTER, AND COMMUNITY LEGAL SERVICES OF PHILADELPIA were served by prepaid first class mail on the following parties:

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