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LENDERS AND COLLECTORS BEWARE: MISSOURI EXPANDS COVERAGE OF CONSUMER PROTECTION ACT

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In companion opinions issued on August 19, 2014, the Supreme Court of Missouri held that unfair practices associated with residential foreclosures occur "in connection with" the original sale of a mortgage loan and therefore fall within the scope of the Missouri Merchandising Practices Act ("MMPA"). *See Conway v. CitiMortgage, Inc.*, — S.W.3d —, No. SC 93951, 2014 WL 4086671 (Mo. banc Aug. 19, 2014); *Watson v. Wells Fargo Home Mortg., Inc.*, — S.W.3d —, No. SC 93769, 2014 WL 4086486 (Mo. banc Aug. 19, 2014). In *Watson*, however, the court also held that unfair practices associated with loan modification negotiations between a lender and borrower do not occur "in connection with" the original sale and cannot form the basis for an MMPA claim.

The MMPA is a consumer fraud statute that provides both the Missouri Attorney General and consumers the right to bring actions against individuals who engage in unfair or deceptive practices "in connection with" the sale or advertisement of merchandise. *See* R.S. Mo. § 407.010, *et seq*. The statute permits consumers to recover damages for "ascertainable losses," as well as punitive damages and attorneys' fees.

In *Conway* and *Watson*, the Supreme Court of Missouri considered whether mortgage lenders may violate the MMPA by virtue of either: (1) their foreclosure-related practices, or (2) their loan modification negotiations with borrowers. In *Conway*, the court concluded that, with respect to mortgage loans, the original "sale" continues throughout the life of the loan by virtue of the long-term relationship between the parties and the duties imposed upon each party by the loan documents. As a result, the court held that any unfair practices associated with residential foreclosures occur "in connection with" the original sale even when the foreclosure occurs years afterward. Furthermore, the court held that third parties who did not originate the loan, but only acquired the loan years later, could still be held liable under the MMPA.

In *Watson*, by contrast, the court considered a borrower who alleged that her lender had not negotiated a loan modification in good faith and otherwise committed unfair practices during the modification process. The court held that the loan modification negotiations, by contrast, were not "in connection with" the original sale of the loan because they did not relate to any duties under the

loan documents and therefore could not support a claim under the MMPA. The court reserved ruling whether a loan modification might constitute a new transaction that is subject to the MMPA.

The Court also discussed prior lower court decisions which held the debt collection activities do not satisfy the "in connection with" requirement and noted that these opinions lack authority to the extent they are inconsistent with *Conway*. *See, e.g., State ex rel. Koster v. Prof'l Debt Mgmt., LLC*, 351 S.W.3d 668 (Mo. App. 2011); *State ex rel. Koster v. Portfolio Recovery Assocs., LLC*, 351 S.W.3d 661 (Mo. App. 2011). *Conway* explains that "there is no compelling reason to interpret 'in connection with' to apply only when the entity that engaged in the misconduct was a party to the transaction at the time the transaction was initiated as *Professional Debt* and *Portfolio Recovery Associates* require." The lower appellate courts in those decisions, however, did not ground their interpretation of the MMPA on privity and acknowledged prior Missouri Supreme Court precedent that privity is not required under the MMPA. Thus, the extent to which these cases remain good law is unclear although we expect debtor attorneys to rely on *Conway* in bringing MMPA claims in debt collection lawsuits.

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