IN THE SUPREME COURT OF OHIO

WELLS FARGO FINANCIAL OHIO 1, INC., Defendant-Appellant, vs. **LILLIE ALEXANDER,** individually and on behalf of all others similarly situated, Plaintiff-Appellee.	:	Case No. 2008-0905 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-07-089277

MERIT BRIEF OF APPELLEE, LILLIE ALEXANDER

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STATEMENT OF FACTS

The Complaint in this matter alleges that Wells Fargo violated Ohio's mortgage-release statute, R.C. 5301.36, and asks for the $250 in statutory recovery for each of Wells Fargo's late-filings (and non-filings) of mortgage releases. The only issue before this Court is whether an arbitration clause referenced by the promissory note applies to the issue of Wells Fargo's violation of the statutory obligation to timely file a mortgage release.

Wells Fargo posits that this as an unresolved issue, requiring this Court to

> resolve whether a dispute that would not exist but-for the contract or the relationship created by the contract arises out of or relates to the contract.

Wells Fargo Memorandum in Support of Jurisdiction at p. 4 (emphasis added).

That asks this Court to overturn *Academy of Medicine of Cincinati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 189, 2006-Ohio-657, because the "but-for" standard was advocated by the *Aetna* dissent and rejected by this Court's majority. There is no basis under *stare decisis* to do so. The standard followed in Ohio for determining whether a dispute is covered by an arbitration clause is "whether the action could be maintained without reference to the contract or relationship at issue." *Aetna* at ¶30.

Using that standard, the Court of Appeals did not err.

Plaintiff executed a note and a separate arbitration clause. After all payments were made, the note was discharged. More than 90 days elapsed and Wells Fargo took no action. This fact would not be relevant except that the Plaintiff gave Wells Fargo a mortgage on her home. Under R.C. 5301.36, if there is a mortgage, it must be timely released or Wells Fargo must pay the consumer $250.

Plaintiff filed this suit alleging a violation of R.C. 5301.36. The suit raises no dispute regarding the terms of the note. The note is not consulted in proving the suit. The evidence in these kinds of cases (and there have been dozens) is the defendant's record of the mortgage satisfaction date and the county recorder's record of the release date. This is because only two facts are relevant to prove a violation of the statute relating to a mortgage: (1) the date the mortgage was satisfied; and (2) the date the release was recorded.

R.C. 5301.36 in pertinent part provides:

> (B) Within ninety days from the date of the satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor, recover the cost of the fees required for the recording of the satisfaction by the county recorder.
>
> (C) If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor.

Lillie Alexander filed this action as a class on behalf of herself and all persons who at any time since February 2, 2000 paid off an Ohio residential mortgage where Wells Fargo was listed as the mortgagee or was the owner of the mortgage, and a mortgage release was not timely recorded.

Instead of filing an Answer, Wells Fargo filed a motion seeking arbitration, or a stay or dismissal of the proceedings. The arbitration provision Wells Fargo relied-on was a separate document signed concurrently with the promissory note and only referencing the promissory note. It did not incorporate the mortgage. The trial court granted Wells Fargo's motion in a one-paragraph entry.

On appeal, the Eighth District Court of Appeals reversed, holding that the arbitration clause did not apply to the instant dispute. *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 8th Dist. No. 89277, 2008-Ohio-1402 at ¶ 16 ("it cannot be said that Wells Fargo's statutory duty to timely release the mortgage lien is related to the arbitration clause set forth in the note at issue"). The Eighth District was correct in determining that the arbitration clause does not apply to Wells Fargo's statutory duty to timely release the mortgage lien, and its decision should be affirmed.

Proposition of Law 1
A party to an arbitration agreement cannot be compelled to arbitrate disputes the party did not agree to arbitrate and that fall outside the scope of the arbitration provision.

1. Public Policy considerations favoring arbitration do not override the fundamental principle that a party cannot be compelled to arbitrate a dispute it did not agree to arbitrate and which falls outside the scope of the arbitration provision.

Wells Fargo first argues, as do *amici,* that public policy favors arbitration. *Amici* particularly argue the extent to which arbitration purportedly benefits consumers. But that is not relevant to the issue here.

As this Court explained in *Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 271, 2006 Ohio 906 at ¶28, "[w]hile the law may encourage parties to settle their contractual disputes expeditiously through arbitration, it remains a basic principle that 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"[1] In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 136, 2007 Ohio 4787, at ¶8, this Court explained that "[w]hile arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court." Similarly, the court in *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, 12th Dist. No. CA2006-07-021, 2007 Ohio 1655, at ¶9, noted that "[d]espite the strong policy in favor of arbitration, a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration." It is these two principles—that a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit' and that 'a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration'—upon which the resolution of this case depends, not Wells Fargo's and the *amici*'s general policy considerations.

2. The proper test to determine whether a dispute falls within the scope of an arbitration provision is whether an action could be maintained without reference to the contract or relationship at issue.

Wells Fargo next proposes a new test for determining whether a dispute falls outside the scope of an arbitration agreement. Wells Fargo posits that for a dispute to fall outside the scope of an arbitration agreement, the "events underlying a lawsuit must bear absolutely no relation to the contract providing for arbitration or the relationship it

[1] In support of this proposition, this Court cited *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582, 80 S.Ct 1347, 4 L.Ed.2d 1409; *AT&T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648; *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381; and *Council of Smaller Ent. v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665, 1998-Ohio-172, 687 N.E.2d 1352.

created. It must be merely 'fortuitous' that there was a contract." (Wells Fargo Merits Brief pages 10-11.) This is not the standard in Ohio.

Wells Fargo points-to the *Coors Brewing Co. v. Molson Breweries* (C.A. 10, 1995), 51 F.3d 1511, 1516 for its conclusion that the proper test is whether it was "merely fortuitous" that there was a contract.[2] Although *Coors* used the word "fortuitous," it was not as a test for arbitrability. For example, it is "fortuitous" that a victim of a slip-and-fall has a contract relationship with the tortfeasor. But the instant matter does not involve that type of situation. More important, that is not what *Coors* analyzed in deciding that the arbitration clause in *Coors* did not apply to the business dispute between the parties. In addressing whether a dispute falls within the scope of an arbitration agreement, *Coors* noted that "[a]n arbitration clause 'does not extend to all disputes of any sort . . . but only to disputes touching specified provisions of the agreement.'" *Id.* This Court recognized that distinction in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 189, 2006-Ohio-657 at ¶ 21 when it explained with regard to *Coors* that "[t]he existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable."

Wells Fargo's argument is the same as the one analyzed, and rejected, by the majority of this Court in *Aetna*. In *Aetna*, this Court contrasted *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386 (upon which Wells Fargo also now relies) and the *Coors Brewing* case. The *Fazio* plaintiffs were securities customers of Lehman and its salesman, Frank Gruttadauria. The customer account agreements contained a broad

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[2] *Coors Brewing* was discussed by this Court in *Aetna*.

arbitration clause. Since the claims in the lawsuit asserted "fraudulent activities [which] were a violation of the account agreements"[3], the claims were covered by the arbitration clause. By comparison, in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (C.A. 10, 1995), Coors and Molson had an ongoing Licensing Agreement containing a broad arbitration clause. Coors brought suit alleging that Molson entered into a business relationship with Miller Brewing which restraining trade and impacted the Coors Licensing Agreement with Molson. However, the federal court found that the suit was not subject to the arbitration clause because it did not depend on any of the terms of the Coors-Molson agreement. "The existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable." *Aetna* at ¶ 21.

Wells Fargo also cites *Shumaker v. Saks, Inc.*, 163 Ohio App.3d 173, 2005 Ohio 4391, in support of its "fortuitous" argument. But that opinion never discusses "fortuitous." *Shumaker* notes that "[d]espite the strong public policy in favor of arbitration, 'it is basic law that a party cannot be required to arbitrate that which has not been agreed as a subject of arbitration.'" *Id.* at ¶21. Rather than supporting Wells Fargo, *Shumaker* is directly counter to Wells Fargo's proposed new rule. The *Shumaker* lawsuit—similar to the present matter—dealt with parties whose relationship originated under a contract, but a statutory claim that did not relate to that contract or that relationship. See, page 12, below.

This Court has explained that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is

[3] *Aetna* at ¶ 28.

not susceptible of an interpretation that covers the asserted dispute." *Aetna*, 108 Ohio St.3d at 188, 2006-Ohio-657 at ¶14. Rather than trying to analyze "fortuity," this Court concluded that "a proper method of analysis *** is to ask if an action could be maintained without reference to the contract or relationship at issue." *Id.* at ¶24 (ellipses *sic*), citing *Fazio*, 340 F.3d at 395. See also, *Hussein v. Hafner & Shugarman Enters.*, 176 Ohio App.3d 127, 134, 2008-Ohio-1791 at ¶26 ("[i]n order to determine whether a claim labeled as a tort or statutory claim is, in reality, a cause of action based upon the contract, the court is to ask whether the cause of action could be maintained without reference to the contract"); *Northland Ins. Co. v. Palm Harbor Homes, Inc.*, *supra* at ¶14 ("if the action could be maintained without reference to the contract or relationship at issue, it was likely outside the scope of the arbitration agreement"); *ProMedica Health Sys. v. Blanchard Valley Health Ass'n*, 6th Dist. No. L-06-1163, 2006-Ohio-6185, at ¶32 ("the test for determining whether an issue is subject to arbitration is 'whether the action could be maintained without reference to the contract or relationship at issue'").

3. Under the applicable law, Plaintiffs' claims for violations of Ohio's mortgage-release statute fall outside the scope of the arbitration agreement contained in the promissory note.

Wells Fargo next argues that the promissory note originated the parties' relationship and the violation therefore would not have occurred without the note.

However, that is the *Aetna* dissent:

> The provider agreements constitute the alleged anti-competitive instruments that gave the physicians standing to sue. *** They are at the core of the Valentine Act claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint. The antitrust conspiracy claims relate to the

> provider contracts that contain the broad clauses requiring arbitration of any dispute "about the business relationship" between the physicians and [defendant].

Aetna, dissent, at ¶38.

The *Aetna* majority rejected that approach and established what the standard now is in Ohio. Where the lawsuit arises from an obligation independent from the contract containing the arbitration provision and is not determined by the provisions of the contract, the dispute is not covered by the arbitration provision.

It is not disputed that the R.C. 5301.36 claim is not decided by the provisions of the promissory note. The promissory note is not even consulted in litigating these cases. Wells Fargo therefore argues that it rather is the "relationship" (i.e., can the action be maintained without reference to the contract or relationship at issue?). That is wrong. Not every note has a mortgage. The statute only applies where the parties have undertaken a mortgagee/mortgagor relationship. Does that dispute relate to the promissory note—a lending agreement, or to the mortgage—a real estate lien?

In *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, ¶46, this Court explained the relationship of R.C. 5301.36 to lending versus real estate titles.

> The recording of a mortgage satisfaction or real estate lien release is not an integral part of the lending process, as it occurs after the debt is satisfied and the extension of credit is extinguished. Such a recording requirement cannot even begin until the mortgage has already been terminated. It does not center around the essential reasons lenders issue home loans, for it has nothing to do with charging and collecting interest or any other lending or credit-related function.

A loan can sometimes originate with a note contract. That note is ended and extinguished when the debt is paid. No statute exists to govern that situation. But where parties have a separate mortgage contract which has been satisfied, a statute does govern. Under R.C. 5301.36, the bank must release that recorded mortgage within 90 days. As this Court held in *Pinchot*, the recording of the mortgage satisfaction is no part of the lending process. It occurs after the debt is satisfied and the extension of credit is extinguished. As is most pertinent to the present inquiry, the R.C. 5301.36 obligation does not depend-on or arise out of any language, term, or provision of the note. The suit alleging it does not present a dispute about any of the terms or provisions of the note.

When the Court of Appeals in this case cited *Pinchot*, it did not offend this Court's *Aetna* test in any way—i.e., requiring the analysis to look-to whether the action could be maintained without reference to the note.

R.C. 5301.36 in pertinent part provides:

> (B) Within ninety days from the date of the satisfaction of a residential mortgage, the mortgagee shall record the fact of the satisfaction in the appropriate county recorder's office and pay any fees required for the recording. The mortgagee may, by contract with the mortgagor, recover the cost of the fees required for the recording of the satisfaction by the county recorder.
>
> (C) If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor.

To be entitled to recover from a mortgagee under R.C. 5301.36(C), a mortgagor need only prove two things: (1) the date the mortgage was satisfied; and (2) the date the mortgage release was recorded. The date of mortgage satisfaction is not contained in the note or the mortgage: it is in the records of the bank. The date the release is recorded is in the records of the county recorder. A violation R.C. 5301.36 is established independently, without reference to the note or the terms of that relationship. Thus, Plaintiffs' late release claims are not covered by the arbitration provision.

This is not a novel principle. The court in *Henry v. Great Lakes Nat'l Mtg. Co.*, 8th Dist. No. 87405, 2006 Ohio 6166, at ¶43, observed that "when a matter is clearly independent of and outside the scope of an arbitration agreement, a stay of proceedings pending arbitration is unwarranted." The court in *Hollinger v. Keybank Nat'l Ass'n*, 9th Dist. No. 22147, 2004-Ohio-7182, at ¶10, reached a similar conclusion when it explained that "claims that may be asserted independently, without reference to the contract, fall outside the scope of an arbitration provision." So did the court in *Complete Pers. Logistics, Inc. v. Patton*, 8th Dist No. 86857, 2006 Ohio 3356, discretionary review denied 112 Ohio St.3d 1407, 2006-Ohio-6447, at ¶15, when it concluded that "claims that may be asserted independently, without reference to the contract, fall outside the scope of the arbitration provision."

Wells Fargo raises several other arguments criticizing the decision of the Eighth District below. None of these is well taken.

First, Wells Fargo argues that *Pinchot* dealt with preemption and not arbitration, and is therefore inapplicable to this case. *Pinchot* articulates Ohio law on the difference between the relationship arising from a lending agreement and the statutory obligation to release a real estate mortgage lien. That is pertinent here.

Next, Wells Fargo argues that the Eighth District created an "integral part" test that is irreconcilable with this Court's opinion in *Aetna.* Like Wells Fargo's false "fortuity" argument, the Eighth District did not. The Eighth District's only mention of the word "integral" was from this Court's opinion in *Pinchot*. The Eighth District adhered to *Aetna*, concluding, "in the case sub judice, Alexander satisfied the note by payment in full. Wells Fargo's statutory duty to release the mortgage lien arose thereafter. Thus, it cannot be said that Wells Fargo's statutory duty to timely release the mortgage lien is related to the arbitration clause set forth in the note at issue." *Alexander* at ¶16 (citations omitted).

Wells Fargo attempted to convince the lower appellate court to believe that *Aetna* only differentiates between tort and contract actions. "Alexander did not slip and fall on a Wells Fargo property, or have a car accident with a Wells Fargo employee." Wells Fargo Court of Appeals Brief at pp. 7-8. But the appeals courts have done just fine applying *Aetna* to business issues. These cases are situations like the present matter—an existing contractual, business relationship with an arbitration provision, being held not applicable to litigation between the same parties. If the "but-for" standard argued by Wells Fargo (and the dissent in *Aetna*) were the rule, each of these cases would have required arbitration. Instead, they rejected it.

For example, in *Hollinger v. Key Bank Nat'l Assn*, 2004-Ohio-7182, 2004 WL 3017223 (9th Dist.), Key Bank insisted that the Ohio court should follow "the federal Arbitration Act which has held that it is the subject matter of the claim, not how it is characterized by a plaintiff, that determines arbitrability." *Id.* at ¶11. The court noted, "that is not the case presented in this matter." *Id.* The plaintiffs in *Hollinger* had accounts with Key Bank containing an arbitration provision. The accounts admittedly had been opened "as a result of the fraudulent scheme" alleged in the lawsuit. In denying arbitration, the appeals court emphasized that the underlying claim did not relate to any of the provisions in the account agreement. None of the account agreement terms had to be analyzed to decide the claim. "Appellees' claims may be asserted independently, without reference to their contract with Appellant." *Id.* at 12. The court reiterated that in making their claim, "[plaintiffs] had never alleged that [defendant] committed misconduct regarding the accounts, such as improperly transferring funds." *Id.* at 12.

The court in *Shumaker v. Saks, Inc.*, 163 Ohio App.3d 173 (Cuy. Cty. App. 2005) likewise rejected Wells Fargo's arguments. Again, plaintiff had an account agreement with the merchant containing an arbitration clause. Suit was brought, not under the account agreement or its terms, but under the Ohio Consumer Sales Practices Act. It alleged that the defendant opened an account for the plaintiff and then sold her thousands of dollars of goods despite the "obvious fact that she did not need or use the items she purchased and could not afford to purchase this." Saks tried to rely on the "business relationship" approach, using the same argument that Wells Fargo convinced our trial judge to follow in this case—"but-for" the account, there would be no claim or lawsuit. The appeals court rejected that argument:

> Here, however, Shumaker does not challenge [the] credit agreement with Saks or any balance on that account. Rather, he alleges that appellant's sales practices were unconscionable and a violation of Ohio's Consumer Sales Practices Act. Because his claim is unrelated to [the] credit account with Saks, his claim falls outside the definition of a 'claim' that must be arbitrated.
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> Appellants argue, however, that Shumaker's claim is related to [the] credit account because 'the relation between the goods [] financed and this case is undeniable—if [plaintiff] had not made those purchases, there would be no claim of unconscionable sales practices.' We make no such connection.

Id. at 15.

The appeals court found Saks' but-for argument to be "absurd," stating that the claim was not "even remotely related" to the account agreement. *Id.* *Shumaker* deals with the same kind of issue as in the present case: a claim for statutory liability that does not question the terms or rights under the contract (the account agreement in *Shumaker*/the promissory note in the present *Alexander* matter).

Complete Personnel Logistics, Inc. v. Patton, 2006-Ohio-3356, 2006 WL 2243075 (Cuy. Cty. App.) also rejected the kind of argument made by Wells Fargo here. Defendant CBG had a written contract with Complete Personnel Logistics to administer Logistics' employee benefit plans. The contract included provisions that pertained to "any insurance, stop-loss, or reinsurance contract, including, but not limited to, filing for claims thereunder." *Id.* at ¶4. The plaintiff gave Logistics money to obtain this insurance, but Logistics pocketed the money. The lawsuit was brought on various grounds, including fraud. The activities of Logistics in obtaining the insurance would not have occurred but-for the existence of the contract. Despite that, the appeals court found that the lawsuit was not subject to the arbitration provision in the contract. The claims of the lawsuit did not turn on the language of the contract, and could be asserted "without reference to the contract." Instead of using the but-for approach argued by Wells Fargo, the appeals court looked at "the complaint, compared with the agreement containing the arbitration provision." The court noted that "the insurance was not provided pursuant to the agreement." *Id.* at ¶15. The court likewise noted that "premiums were not collected pursuant to the agreement." *Id.* at ¶15. In the present case, the mortgage release is not filed pursuant to the note, or any of its provisions. The obligation to file, and liability for failure to file, is also not "pursuant to any provision of the note" but entirely pursuant to a statute in the Real Estate Code, Title 53.

Finally, the decision in *Dillard v. Fifth Third Bank*, 2005-Ohio-6341, 2005 WL 3219589 (Cuy. Cty. App.) is a good illustration of why courts reject Wells Fargo's but-for argument. The plaintiff had an IRA contract with Fifth Third containing a "broad arbitration clause" requiring all controversies concerning the IRA be submitted to arbitration. When the plaintiff then sought a business loan, Fifth Third advised that the IRA funds could be used as collateral with no tax consequences. But the plaintiff was then assessed more than $70,000 in tax liability. The appeals court denied Fifth Third's motion to compel arbitration. The "but-for" approach was rejected. Plainly, but-for the IRA agreement, the violation could not have occurred. But the appeals court noted that "no claims of misconduct are alleged with respect to the IRA agreement itself or with respect to the funds therein such as an improper transfer of funds." The court noted that at the time the contract containing the arbitration clause was entered (the IRA agreement), "the [wrongdoing] did not exist and the basis for this lawsuit was clearly not contemplated by the parties." In the instant case, at the time the promissory note with Wells Fargo was executed, the basis for this lawsuit did not exist.

Because the Eighth District did not develop some new "integral part" test and instead applied the law as already established by this Court in *Aetna*, the balance of Wells Fargo's arguments related to this "test" are unfounded.

There is a further, important reason against Wells Fargo's *sub silentio* invitation to overrule *Aetna*. The reason is *stare decisis*. A decision will be overruled if circumstances change and the reason for the decision no longer exists. No circumstances have changed since *Aetna.* The rule from *Aetna* has been comfortably applied with results that are just, fair, and logical. Wells Fargo's implication that "federal law" commands a different outcome is without merit. As already discussed, federal and Ohio policy favoring arbitration do not preclude the application of the fundamental principles that that a party cannot be required to submit to arbitration any dispute he has not agreed so to submit, and that a matter that does not fall within the ambit of an arbitration agreement should not be submitted to mandatory arbitration.

Proposition of Law 2

A matter that is independent of an underlying contract containing an arbitration clause, and which can be asserted independently without reference to the contract, falls outside the scope of the arbitration clause.

Wells Fargo next argues that statutory violations can be subject to arbitration. That is not disputed—and is equally not the issue here. Ohio law is not unclear, as Wells Fargo claims, about whether a cause of action arising by statute is subject to an arbitration clause. That specific question was already answered in *Aetna*:

> Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision. The over-arching issue is whether the parties agreed to arbitrate the issue. *** 'There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded in statutory rights.' ***

Aetna at ¶19.

Bringing a claim under a statute does not guarantee that it will be arbitrable, or not. Rather, the statutory claim undergoes the same analysis as any other type of claim:

> Statutory claims, including antitrust claims, are neither per se arbitrable or not arbitrable. Those claims must undergo

> the analysis that every other claim faces: whether the parties agreed to arbitrate the issue.

Aetna at ¶20.

Wells Fargo argues that even if an arbitration clause does not cover this lawsuit as "arising out of" disputes relating to the promissory note, it covers this matter as a "future dealings" of the parties. The use of all encompassing "all prior and future dealings" language does not alter the requirements for enforceability of an arbitration provision. An arbitration agreement is not a free-floating dragnet, but instead is based on a meeting of the minds between the parties relating to a particular business agreement. Ohio's standard under *Aetna* focuses on whether the lawsuit would turn on matters in the underlying contract or the relationship of the contract; or conversely, is the lawsuit determinable independently. An R.C. 5301.36 suit is determined independently.

Proposition of Law 3

Suits to enforce R.C. 5301.36's requirement to timely file a mortgage release which can be proven by bank records of the date of mortgage satisfaction and county records of the date of release filing are not covered by an arbitration clause applicable to the underlying promissory note.

Wells Fargo and the *amici* miss the point when they argue that termination of the underlying contract does not necessarily terminate the agreement to arbitrate disputes arising from the contract. In particular, their argument that parties could avoid arbitration altogether by merely terminating the contract first, then filing suit, is nonsense. If the dispute in question falls within the scope of the arbitration agreement, the fact that the parties have completed performance of the contract does not preclude arbitration.

That is not the issue.

The termination of the agreement, or the conclusion of the contractual relationship, is not the standard in determining whether a dispute falls within the scope of an arbitration provision. The Eighth District did not create a "new test" that hinges on that fact—as Wells Fargo and the amici argue. The appeals court here inquired whether this dispute falls within the scope of the separate arbitration provision referenced by the promissory note. Under this Court's holding in *Aetna,* it does not.

For example, in *International Brotherhood of Teamsters, etc., Local Union 20 v. Toledo* (1988), 48 Ohio App.3d 11, cited by Wells Fargo, the court concluded that a dispute over a provision in an expired collective bargaining agreement was subject to arbitration even though the agreement had expired. But the dispute arose over a provision of that agreement, and could not be resolved without reference to that agreement.

Another case cited by Wells Fargo, *Cleveland Police Patrolmen's Ass'n v. City of Cleveland* (1994), 95 Ohio App.3d 645 makes this distinction even more clear. The appeals court at p. 651 quoted the U.S. Supreme Court's language from *Litton Financial Printing v. Natl. Labor Relations Bd.* (1991), 501 U.S. 190, 205-206:

> A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

The factors set out in *Litton* demonstrate the fallacy of Wells Fargo's and the amici's arguments. In the instant case, the statutory violation involves facts and occurrences that arose *after* the payoff of the loan. The violation involves a right that accrued or vested under the mortgage-release *statute*, not the note, and it both accrued and vested *after* the loan was paid off. The right is a statutory right, not a contractual right, so survival of the right after expiration of the loan contract is not an issue. The action triggering the statute—non-release of the mortgage—does not "infringe a right which accrues or vested under the contract (the note)." This lawsuit is not about the note, let alone a "disputed contractual right" under the note.

The issue here is not whether the completion of performance of a contract per-se precludes arbitration. The issue here is whether Wells Fargo's violation of its statutory obligation to timely file a mortgage release falls outside the scope of the arbitration clause referred to in the note. The fact that the violation occurred and the cause of action accrued more than 90 days after the debt was paid is certainly a factor in making this determination. So is the fact that the violation is based on a statute, not the note. So is the fact that the statutorily-required recording of a mortgage satisfaction has nothing to do with the note, nor with the charging and collecting of interest or any other lending or credit-related function. So is the fact the claim for a violation of that statutory requirement is asserted independently, based solely on the date listed in the bank's records as the mortgage date, and the date listed in the recorder's office as the release filing date. Based on all these factors it may be said with positive assurance that the arbitration clause in this case is not susceptible of an interpretation that covers the R.C. 5301.36 violation alleged by Plaintiff and that Plaintiff's claim falls outside the scope of the arbitration provision.

CONCLUSION

The only issue before this Court is whether a separate arbitration clause referenced in the note applies to Alexander's claim for automatic statutory damages for Wells Fargo's violation of its statutory obligation to timely file a mortgage release. This is not a question of public policy, it is a question of whether the dispute falls outside the scope of the arbitration provision. Wells Fargo's effort to jettison the *Aetna* rule, announced less than three years ago, is meritless. The test under Ohio law is not "but-for." The test under Ohio law is whether the dispute can be cited without reference to the contract or relationship in the promissory note. That answer is plain in these mortgage release cases. R.C. 5301.36 suits pertain to the mortgage and not the terms of the note. The evidence to prove them is not contained in the note. It is the date in the bank's records of the mortgage satisfaction, and the date at the county recorder of the lien release.

Could Wells Fargo have included language in the mortgage indicating that it was subject to arbitration? Yes. But it did not. Could it have drafted the arbitration agreement to indicate that it encompassed not only the Loan Agreement, but also any claims arising related to the mortgage? Yes. But it did not.

The decision of the Eighth District Court of Appeals in this case should be affirmed.

Respectfully submitted,

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