No. 120763

In the

Supreme Court of Illinois

THE PEOPLE EX. REL. LISA MADIGAN,
Attorney General of Illinois,

Plaintiff-Appellee,

v.

MATTHEW R. WILDERMUTH, GEORGE KLEANTHIS, Individually and as Managing Member of Legal Modification Network, LLC and LEGAL MODIFICATION NETWORK, LLC,

Defendants-Appellants.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-14-3592.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 11 CH 33666.
The Honorable **Diane J. Larsen**, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLANTS MATTHEW R. WILDERMUTH, GEORGE KLEANTHIS and LEGAL MODIFICATION NETWORK, LLC

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NATURE OF THE CASE

Appellant-Defendant Matthew R. Wildermuth ("Wildermuth") is an attorney licensed to practice law in Illinois continuously since 1989. (R. Vol. 6, C01326, ¶ 2.[1]) The remaining Appellants-Defendants, George Kleanthis ("Kleanthis") and Legal Modification Network, LLC ("LMN"), are non-attorney support staff. Wildermuth directly supervised and controlled Kleanthis and LMN at all times they provided administrative assistance to him during his provision of legal services to Illinois homeowners facing actual or imminent foreclosure on their mortgaged properties.[2] (R. Vol. 6, C01338-011399, ¶¶ 20-21.)

In September of 2011, the Illinois Attorney General (the "Attorney General") filed a three-count complaint (the "Original Complaint") against Defendants alleging that Defendants' representation of distressed homeowners violated provisions of the Illinois Mortgage Rescue Fraud Act ("MRFA"), 765 ILCS 940/55(a), the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), 815 ILCS 505/7(a), and the Federal Trade Commission's Mortgage Assistance Relief Services Rule ("MARS"), 16 C.F.R. 322.10.[3] (R. Vol. 1, C00003-00042.) As pertinent here, the Attorney General filed an amended complaint (the "Current Complaint") to include a fourth count ("Count IV") through which the Attorney General alleges that Defendants violated provisions of the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.*) ("IHRA"). The only provisions in the IHRA at issue in the Current Complaint are those

---

1 The record on appeal consists of nine volumes and is cited as "R. Vol. _, C___."

2 Wildermuth, Kleanthis and LMN are collectively referred to herein as the "Defendants."

3 Wildermuth's Motion for Partial Summary Judgment as to those three counts currently is pending before the circuit court. (R. Vol. 6, C01302-1325, Vol. 7. C01642.)

that prohibit unlawful discrimination in "real estate transactions" ("§ 3-102(b)"). (R. Vol. 5, C01128-01193.) Defendants moved to dismiss Count IV pursuant to 735 ILCS 5/2-615, on the grounds that, among other things, the IHRA's scope does not extend to attorneys' representation of individual clients pursuant to a written retainer agreement because it did not rise to the level of controlling or affecting the extension of credit to the client. (R. Vol. 6, C01388-C01392, C01431-1450.)

The circuit court denied Defendants' § 2-615 motion to dismiss Count IV and, thereafter, denied Defendants' subsequent motion to reconsider that denial. (R. Vol. 7, C01644, Vol.8, C01775.) The circuit court did, however, grant Defendants' motion to certify for interlocutory appeal a "novel issue" under Illinois law, namely whether and to what extent an Illinois state appellate court would recognize a "reverse redlining" theory of liability under the IHRA where the person or entity at issue neither "extended credit" nor influenced the terms and conditions of credit extended to the consumer in the first instance. (R. Vol. 8, C01775.)

Consistent with the circuit court's order and pursuant to Illinois Supreme Court Rule 308(b), on December 3, 2014, Defendants timely filed their Application for Leave to Appeal, which Application the First District Appellate Court granted on December 7, 2014 (R. Vol. 8, 01785.) On March 31, 2016, the First District Appellate Court issued its written opinion answering the certified question in the affirmative. (A3-A20, *People ex rel. Madigan v. Wildermuth*, 2016 IL App (1st) 143592.[4]) Defendants filed their timely Petition for Leave to Appeal on May 5, 2016, which Petition this Court granted on September 28, 2016.

[4] Herein, the Appellate Court's opinion is cited using the Illinois public domain citation, *People ex rel. Madigan v. Wildermuth*, 2016 IL App (1st) 143592.

ISSUE PRESENTED FOR REVIEW

Pursuant to Supreme Court Rule 308, the circuit court certified the following question: Whether the State may claim a violation under the Illinois Human Rights Act pursuant to a reverse redlining theory where it did not allege that the Defendants acted as a mortgage lender? (R. Vol. 8, C01775.)

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this interlocutory appeal pursuant to Illinois Supreme Court Rule 315(a). On July 1, 2014, the trial court denied Defendants' 2-615 Motion to Dismiss Count IV of the Complaint. (R. Vol. 7, C01679-1681.) Defendants timely filed a Consolidated Motion for Reconsideration of the July 1, 2014 Order Denying Defendants' Motion to Dismiss Count IV of the Plaintiff's Fourth Amended Complaint or, Alternatively, for Certification of a Question for Interlocutory Appeal. (R. Vol. 7, 1661-1677.) On November 19, 2014, the trial court denied Defendants' Motion to Reconsider but, pursuant to Illinois Supreme Court Rule 308(a), granted Defendants' alternative request to certify a discrete question of law for interlocutory review. (R. Vol. 8, C01775.) On December 3, 2014, Defendants timely filed their Application for Leave to Appeal which the appellate court granted on December 17, 2014. (R. Vol. 8, 01785.) On March 31, 2016, the appellate court issued its opinion answering the certified question in the affirmative and no petition for rehearing was filed. *Madigan*, 2016 IL App (1st) 143592. On May 5, 2016, Defendants timely filed their Petition for Leave to Appeal with this Court and leave was granted by order dated September 28, 2016.

STATUTES INVOLVED

775 ILCS 5/3-101:
Sec. 3-101. Definitions. The following definitions are applicable strictly in the context of this Article:

(A) Real Property. "Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(B) Real Estate Transaction. "Real estate transaction" includes the sale, exchange, rental or lease of real property. "Real estate transaction" also includes the brokering or appraising of residential real property and the making or purchasing of loans or providing other financial assistance:

(1) for purchasing, constructing, improving, repairing or maintaining a dwelling; or

(2) secured by residential real estate.

(C) Housing Accommodations. "Housing accommodation" includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged or designed to be used or occupied, as the home or residence of one or more individuals.

(D) Real Estate Broker or Salesman. "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property, or who negotiates or attempts to negotiate any of these activities, or who holds himself or herself out as engaged in these.

(E) Familial Status. "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with:

(1) a parent or person having legal custody of such individual or individuals; or
(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded by this Article against discrimination on the basis of familial status apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(F) Conciliation. "Conciliation" means the attempted resolution of issues raised by a charge, or by the investigation of such charge, through informal negotiations involving the aggrieved party, the respondent and the Department.

(G) Conciliation Agreement. "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

(H) Covered Multifamily Dwellings. As used in Section 3-102.1, "covered multifamily dwellings" means:

(1) buildings consisting of 4 or more units if such buildings have one or more elevators; and
(2) ground floor units in other buildings consisting of 4 or more units.

775 ILCS 5/3-102(B)

Sec. 3-102. Civil Rights Violations; Real Estate Transactions. It is a civil rights violation for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman, because of unlawful discrimination or familial status, to

(A) Transaction. Refuse to engage in a real estate transaction with a person or to discriminate in making available such a transaction;

(B) Terms. Alter the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(C) Offer. Refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

(D) Negotiation. Refuse to negotiate for a real estate transaction with a person;

(E) Representations. Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his or her attention, or to refuse to permit him or her to inspect real property;

(F) Publication of Intent. Print, circulate, post, mail, publish or cause to be so published a written or oral statement, advertisement or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which expresses any limitation founded upon, or indicates, directly or indirectly, an intent to engage in unlawful discrimination; or

(G) Listings. Offer, solicit, accept, use or retain a listing of real property with knowledge that unlawful discrimination or discrimination on the basis of familial status in a real estate transaction is intended.

STATEMENT OF FACTS

I. WILDERMUTH'S LAW PRACTICE AND THE RESIDENTIAL MORTGAGE CRISIS

Among other diverse practice areas, Wildermuth has represented and continues to represent individual distressed homeowners in actual or imminent default in negotiations with their respective mortgage lenders and loan servicers to seek non-foreclosure solutions where feasible. (R. Vol. 6, C01327-1329, ¶¶ 5-6.) In virtually all cases in which the individual borrower is subject to foreclosure proceedings in connection with the delinquent mortgage, Wildermuth's representation of the individual borrower includes defending the homeowners in the proceedings and pursuing resolution of the delinquency through a mutually binding agreement with the lender/servicer. (R. Vol. 6, C01329-1338, ¶¶ 8-20.) Under Wildermuth's direction and supervision, Kleanthis and LMN provided Wildermuth clerical and logistical support. (R. Vol. 6, C01338-1339, ¶¶ 20-21.)

Since the beginning of the residential mortgage crisis in or about 2008, delinquent borrowers seeking to obtain relief from the original terms of their note and mortgage have been faced with a dizzying array of potential options, lender criteria and guidelines that seemingly changed with the wind. (R. Vol. 6, C01329-1335, ¶¶ 7-17.) Among other possibilities, delinquent borrowers might qualify for a repayment agreement, a temporary forbearance agreement, a permanent forbearance agreement, an in-house mortgage modification, a "Making Home Affordable" modification, a short sale, a deed in lieu of foreclosure, a consent foreclosure or a bankruptcy reorganization or discharge. (*See* R. Vol. 6, C01333-1337, ¶¶ 14-19.) Wildermuth's determination regarding which specific form of relief may be available to and most suitable for an individual delinquent borrower

requires consideration of tangible and intangible elements too numerous to specify here. However, each such representation has at least the following four factual components in common:

1) The homeowner acquired or refinanced the property at issue on terms that were established with his or her lender many years before the homeowner consulted Wildermuth;

2) The delinquent homeowner cannot "pick and choose" among lenders to restructure the delinquent loan; rather, he or she can negotiate repayment or surrender terms only with the current holder of the indebtedness;[5]

3) A successful negotiation with the current debt holder to restructure the delinquent homeowner's existing indebtedness does not result in new credit being extended to the homeowner;[6] and

4) Wildermuth receives nothing from the lender, servicer or broker for representing individual homeowners in negotiations and foreclosure proceedings; rather, the only compensation Wildermuth receives is pursuant to the terms of the written retainer agreement he has with each individual client, under which agreement Wildermuth does not guarantee any particular outcome.

(R. Vol. 6, C01331-1333, ¶¶ 10-13.)

II. THE CURRENT COMPLAINT AND COUNT IV

Following a series of motions to dismiss by Defendants and corresponding amendments, the Attorney General filed the Current Complaint in February of 2014. (R. Vol. 5, C01128-01193.) The Current Complaint includes a new count, Count IV, in

---

[5] *See, e.g.*, What is a Mortgage Loan Modification? Banking Sense (Jun. 11, 2014), http://www.bankingsense.com/what-is-a-mortgage-loan-modification ("Unlike a refinance, modification takes place strictly with the same lender who already holds the mortgage.")

[6] "A loan modification permanently restructures the terms of an existing mortgage loan. It is important to understand a loan modification is not a new loan, but a renegotiation of an existing loan. It does not satisfy or replace the existing note." *See, e.g.*, Mortgage Modifications, MyCreditUnion.gov., http://www.mycreditunion.gov/what-credit-unions-can-do/Pages/Mortgage-Modifications.aspx (last visited Nov. 22, 2016).

which the Attorney General alleged that Defendants' conduct in representing individual homeowners in negotiations with and litigation against the homeowners' respective mortgage lenders violated Illinois' Human Rights Act ("IHRA"). (*See* R. Vol. 5, C01191-1193.) Specifically, the Attorney General contends that Defendants discriminated against African-Americans and Latinos while engaging in "real estate transactions" and that such conduct violated § 3-102(B) of the IHRA. (*See* R. Vol. 5, C01191-1193.) In pertinent part, Section 3-102(B) of the IHRA states as follows:

> Civil Rights Violations; Real Estate Transactions. It is a civil rights violation for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman, because of unlawful discrimination or familial status, to
>
> * * *
>
> (B) Terms. Alter the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith.

775 ILCS 5/3-102(B). The IHRA defines a "real estate transaction" to include the:

> sale, exchange, rental or lease of real property [,] the brokering or appraising of residential real property and the making or purchasing of loans or providing other financial assistance: (1) for purchasing, constructing, improving, repairing or maintaining a dwelling; or (2) secured by residential real estate.

775 ILCS 5/3-101(B).

III. THE CIRCUIT COURT'S DECISION ON DEFENDANTS' MOTION TO DISMISS COUNT IV AND ITS CERTIFICATION OF THE QUESTION FOR INTERLOCUTORY APPEAL

On March 27, 2014, Defendants moved pursuant to 735 ILCS 5/2-615 to dismiss Count IV of the Current Complaint on the grounds that Count IV failed to set forth a cognizable claim against Defendants under § 3-102(b) of the IHRA. (R. Vol. 6, C01431-1450.) Defendants asserted, among other arguments, that Count IV of the Current

Complaint did not state a claim because the Attorney General failed to allege facts sufficient to plead that Wildermuth, Kleanthis or LMN engaged in "real estate transactions" as defined under the IHRA. (R. Vol. 6, C01436-1440.) Defendants' Motion to Dismiss further asserted that, to the extent Wildermuth's representation of these clients could be found to fall within the scope of Section 3-102(b) of the IHRA in the first instance, the Attorney General failed to allege facts that, even if taken as true, could support a claim of unlawful discrimination. (R. Vol. 6, C01440-01450.) The Attorney General opposed Defendants' Motion to Dismiss Count IV, contending that Defendants' conduct falls within the IHRA's definition of real estate transactions. (R. Vol. 7, C01557-01567.) The Attorney General also asserted that courts in federal housing discrimination cases arising under the Federal Fair Housing Act ("FHA") have recognized and applied a theory known as "reverse redlining" to satisfy the requirement that the claimant competently allege either intentional or disparate impact discrimination. (R. Vol. 7, C01567-01572.)

Defendants' Reply countered the Attorney General's arguments regarding the scope of the IHRA's definition of "real estate transactions." (R. Vol. 7, C01619-1622.) Defendants further explained that, even if the circuit court were to find that Defendants' conduct fell within the scope of the IHRA in the first instance, no court – state or federal – has recognized or applied this "reverse redlining" theory against any person or entity that did not lend money, extend credit or otherwise influence the terms or conditions of the mortgage loans the consumers obtained prior to retaining Wildermuth. (R. Vol. 7, C01622-1629.)

Following oral argument, the circuit court denied Defendants' Motion to Dismiss Count IV. (R. Vol. 7, C01679-1681.) The circuit court articulated its basis for denying Defendants' Motion to Dismiss Count IV as follows:

> **THE COURT:** The Court denies the motion to dismiss. The Court finds that the complaint in Count IV factually alleges that defendants are functioning as mortgage brokers in their activities of conducting short sale negotiations and loan modifications. The Court finds support for the reverse redlining theory against brokers in a case from Pennsylvania, and I will give both of you the case because it did inform the Court's analysis on this issue.
>
> **MS. HERNANDEZ:** Is this state court?
>
> **THE COURT:** It's a state court in Pennsylvania, so obviously it's not controlling in any sense.
>
> **MS. HERNANDEZ:** Right.
>
> **THE COURT:** But the Court looked at that case for its analysis and finds a similar analysis would be appropriately applied to the current complaint.

(R. Vol. 7, C01680.) The case the Court distributed to counsel at the July 1, 2014 hearing is captioned *McGlawn v. Pa. Human Rels. Comm'n,* 891A.2d 757, 2006 Pa. Commw. LEXIS 13 (Commonwealth Ct. of Pa. 2006), *reargument denied March 6, 2006, appeal denied by McGlawn v. Pa. Human Rels. Comm'n,* 588 Pa. 786, 906 A.2d 545, 2006 Pa. LEXIS 1683 (Pa. August 31, 2006). (R. Vol. 7, C01682-1702.) The Court's oral ruling was reflected in a written order dated July 1, 2014 denying Defendants' Motion to Dismiss Count IV and directing Defendants to answer or otherwise plead to Count IV. (R. Vol. 7, C01644.)

Defendants timely filed a Consolidated Motion for Reconsideration of the July 1, 2014 Order Denying Defendants' Motion to Dismiss Count IV of the Plaintiff's Fourth Amended Complaint or, Alternatively, for Certification of a Question for Interlocutory

Appeal. (R. Vol. 7, C01656-1660.) The circuit court denied Defendants' Motion to Reconsider but granted Defendants' alternative request to certify a discrete question of law pursuant to Supreme Court Rule 308:

> **MS. HERNANDEZ:** I mean, your Honor, this is just going delay this litigation.
>
> **THE COURT:** Well, my experience has been – and I don't certify questions very frequently at all. In fact, I've only -- in 16 years I've only certified four and [they've] taken three. So I don't do that lightly, but my observation has also been that when they take a certified question, it goes very quickly. It's a very expedited appeal because it really -- if they take it, it is a legal issue, and I think it does meet the requirements in the sense that this is the only case that I've been able to find in Illinois. The present case is a novel case in Illinois. I think there is support for the State's position, but I think it would be expeditious to have the appellate court determine in the first instance can you even state a claim, and then if you can, we'll get to the proofs later.

(R. Vol. 8, C01775, Vol. 9, 00019-20.) Consistent with the circuit court's order and pursuant to Supreme Court Rule 308(b), on December 3, 2014, Defendants timely filed their Application for Leave to Appeal, which the First District Appellate Court granted on December 17, 2014. (R. Vol. 8, 01785.)

IV. THE APPELLATE COURT PROCEEDINGS AND RULING

Before both lower courts, the Attorney General consistently argued for application of the "reverse redlining" theory of intentional discrimination to support its claim that Defendants violated provisions of the IHRA. At the July 1, 2014 hearing on Defendants' Motion to Dismiss Count IV of the Current Complaint ("Motion to Dismiss Count IV"), the Attorney General described its "core argument" as follows:

> Now, with respect to our discrimination claim, we are arguing both intentional and disparate impact. ***But the core of our argument is the intentional targeting of African-American and Latino homeowners***...there is no case law out there that limits the application of reverse redlining or targeting [to mortgage lenders].

(R. Vol. 7, C01680) (emphasis added)[7]; *see also* (R. Vol. 7, C01567-1571.) The Attorney General further expressly argued that Defendants' representation of clients in mortgage restructuring negotiations on behalf of distressed borrowers was tantamount to Defendants acting as "mortgage brokers" whose conduct thus fell within the scope of the IHRA's definition of "real estate transactions":

> [L]oan modifications are basically tantamount to brokering, mortgage brokering. And this is an activity that has been held encompassed by the Fair Housing Act which is basically -- the federal case law is what we are using to interpret the Illinois Human Rights Act simply because there isn't a lot of case law out there.

(R. Vol. 7, C01680.) As reflected in its explanation for denying Defendants' Motion to Dismiss Count IV, the circuit court expressly adopted the Attorney General's "reverse redlining" theory, in part based on the Attorney General's claim that Defendants were acting as "mortgage brokers":

> The Court denies the motion to dismiss. The Court finds that the complaint in Count IV factually alleges that defendants are functioning as **mortgage brokers** in their activities of conducting short sale negotiations and loan modifications. The Court finds support for the reverse redlining theory against [mortgage] brokers in a case from Pennsylvania ...

(R. Vol. 7, C01680) (emphasis added).[8] The circuit court reached this conclusion despite the fact that the Current Complaint neither uses the term "mortgage broker" anywhere

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[7] The certified copy of the July 1, 2014 report of proceedings included in the record by the Circuit Court Clerk includes only the odd numbered pages of the document. (R. Vol. 9, 00005-00013.) A complete copy of the report of proceedings for the July 1, 2014 hearing was attached to Defendants' Consolidated Motion for Reconsideration as an exhibit. (R. Vol. 7, C01679.) Accordingly, when citing to the July 1, 2014 report of proceedings, Defendants cite to the complete version at R. Vol. 7, C01679-1681.

[8] The *McGlawn* decision to which the circuit court referred above considered the conduct of individuals and entities licensed as mortgage brokers in Pennsylvania who had the

within its 66 pages of allegations nor includes a definition of "mortgage broker." (*See* R. Vol. 5, C01128-1193.)

Thereafter the Attorney General has expressly embraced and adopted the circuit court's determination that Count IV stated a viable claim for unlawful discrimination under IHRA Section 3-102 because the "reverse redlining" theory applied to Defendants as "mortgage brokers." (R. Vol. 7, C01730-1735.)

This is significant, because, on two prior occasions, the circuit court expressly rejected the Attorney General's contention that Defendants were acting as "real estate brokers" under the IHRA. The first instance occurred when the trial court dismissed the Attorney General's original version of Count IV on January 30, 2014. (R. Vol. 6, C01457.) The second occurred, on July 1, 2014, when the trial court denied Defendants' Motion to Dismiss Count IV but did so based on its express determination - as urged by the Attorney General - that Defendants were functioning as "mortgage brokers" - ***not as*** "real estate brokers." *Compare* (R. Vol. 6, C01457) *and* (R. Vol. 7, C01680), *with* (R. Vol. 5, C01091-1093) *and* (R. Vol. 7, C01561-01572.) As to the Attorney General's substantive discrimination claims under the IHRA, the trial court expressly found the Attorney General's intentional and disparate impact discrimination claims to be "conclusory" and "not well pleaded" when it dismissed the Attorney General's first iteration of Count IV. (R. Vol. 6, C01457.)

In addressing the certified question, the appellate court first outlined the rules of statutory construction. *Madigan*, 2016 IL App. (1st) 143592, ¶ 14. The appellate court acknowledged that the fundamental rule of statutory construction is to ascertain and give

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ability to directly affect the terms and conditions under which credit was extended to individual consumers in the first instance. *McGlawn*, 891 A.2d 757.

effect to the legislature's intent and the language of the statute is the best indication of legislative intent. *Id.* Further, the court recognized that statutory language should be given its plain and ordinary meaning and that the court may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Id.* The appellate court also described the IHRA as remedial legislation and therefore reasoned that it must be construed liberally to give effect to its purpose. *Id.* at ¶ 15. The appellate court acknowledged that Illinois courts interpreting the IHRA have looked to federal case law interpreting comparable provisions of the FHA and other civil right statutes to divine the legislature's likely intent. *Id.* Finally, in addressing the certified question, the appellate court conceded the lack of existing controlling law on the issue. *Id.* at ¶ 24.

In analyzing the certified question, the appellate court reiterated that it was construing the IHRA broadly and notes that:

> [t]he plain language of the statute does not require a defendant alleged to have violated section 3-102 to be a mortgage lender. To the contrary, the plain language of this section merely requires that the entity engage in a real estate transaction, which includes 'providing other financial assistance *** for maintaining a dwelling.

Id. at ¶ 25. In support of this proposition, the appellate court cited to allegations that Defendants made "unreasonable assurances to clients about the likelihood of success in modifying the clients' home mortgage loans, carelessly or never performed the touted services, and charged the clients exorbitant and nonrefundable fees for services of little or no value." *Id.* at ¶ 26. The appellate court further held that the Attorney General adequately asserted that Defendants, "because of unlawful discrimination, altered the terms, conditions or privileges in the furnishing of facilities or services in connection with real estate transactions." *Id.* The court

explained:

> [c]learly, defendants' alleged conduct interfered with consumers' ability to obtain a particular type of financial assistance – residential loan modifications – for maintaining their homes against the risk of foreclosure. This conduct may be construed as providing other financial assistance for maintaining a dwelling, especially in light of the allegation that defendants charged consumers fees in connection with these services.

Id. at ¶ 27. The appellate court concluded that the Attorney General's "allegations concerning defendants' residential loan modification services are neither too far removed from transactions in the residential real estate market nor lacking any connection to the financing of residential real estate." *Id.* The appellate court reasoned that Defendants' conduct thus fell within § 3-101's definition of a real estate transaction encompassing "other financial assistance for maintaining a dwelling" and within the § 3-102(B) requirement concerning the "furnishing of facilities or services in connection with a real estate transaction that alters the terms, conditions or privileges of such a transaction based on unlawful discrimination." *Id.* ¶¶ 27-28.

As support for its interpretation, the appellate court cited to "persuasive federal case law interpreting a comparable provision of the FHA – section 3605 of the FHA – which closely parallels the language of sections 3-101 and 3-102(b) of the [IHRA]." *Id.* ¶ at 28. Specifically, the appellate court contended that the holdings in *National Association for the Advancement of Colored People v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) and *United States v. Massachusetts Industrial Finance Agency*, 910 F. Supp. 21 (D. Mass. 1996) supported the conclusion that Defendants' alleged conduct with respect to representation of borrowers in loan modification negotiations brings them within the definition of real estate transaction. *Id.* The

appellate court then considered the facts and holdings in *Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862 (N.D. Ohio 2001), in which an entity that collected payments on behalf of the mortgage lender provided "financial assistance" for purposes of § 3605. The appellate court concluded that the Defendants here also provided "financial assistance" and, thus, "reject[ed] the premise that a section 3-102(B) claim against a defendant must allege the defendant was a mortgage lender." *Id.* at ¶ 29.

The appellate court also cited *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995) for the proposition that courts have applied reverse redlining theories to alleged discrimination by parties other than mortgage lenders in the context of FHA claims involving the issuance and cancellation of property insurance policies. *Id.* at ¶ 34. The appellate court extrapolated the Sixth Circuit's ruling in *Cisneros* to find that the operative provisions of the FHA are not restricted only to "mortgage lenders." As a result, the appellate court found that Defendants could be brought within the scope of the FHA and, by analogy, under the IHRA because its application is not limited too "mortgage lenders." *Id.* at ¶ 34. Finally, the appellate court sought to distinguish *Davis v. Wells Fargo Bank*, 685 F. Supp. 2d 838 (N.D. Ill. 2010), a recent district court decision from the Northern District of Illinois, because the court in *Davis* "construed the similar language of section 3605 of the FHA as applying only to transactions involving the making or purchasing of loans." *Id.* at ¶ 35. Finding that the *Davis* decision did not directly address the plaintiff's § 3605 claim, the appellate court dismissed the Illinois district court's analysis in *Davis* as mere *dicta*. *Id.* at ¶ 37.

STANDARD OF REVIEW

On November 19, 2014, the trial court denied Appellants' Motion to Reconsider but granted Appellants' alternative request to certify a discrete question of law pursuant to Supreme Court Rule 308. (R. Vol. 8, C01775.) On December 3, 2014, Appellants filed their Application for Leave to Appeal which was granted by the appellate court on December 17, 2014. (R. Vol. 8, 01785.) On March 31, 2016, the appellate court issued its opinion answering the certified question in the affirmative. *Madigan*, 2016 IL App (1st) 143592. Because the appeal concerns a question of law certified by the circuit court and appellate court pursuant to Supreme Court Rule 308, this Court's review is *de novo*. *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 266 (2003).

ARGUMENT

The instant dispute presents a matter of first impression under Illinois law. To resolve it, this Court must consider significant public policy considerations regarding, among other things: (a) the scope of Illinois' regulation of prohibited discrimination under the IHRA in property-related transactions (and potentially in other circumstances involving members of a protected class); and (b) whether an interpretation of the IHRA that empowers the Attorney General to regulate the conduct of licensed attorneys in bona fide attorney-client relationships with respect to alleged "discrimination" can be reconciled with the Illinois Constitution's mandate that the powers delegated among the three branches of government remain separate and sovereign in their respective spheres. Illinois Constitution, Article II, Section I; *In re Day*, 181 Ill. 73 (1899).

Among its delegated powers, this Court and its inferior courts determine the scope and application of legislation signed into law. In matters of statutory construction, precedent has yielded a consistent analytical framework designed to adduce the legislature's intentions and give them effect. *Land v. Bd. of Educ.*, 202 Ill. 2d 414, 426 (2002). Among other tools, a court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *People v. Zimmerman*, 239 Ill. 2d 491, 497 (2010). Defendants respectfully submit that the means by which the lower courts derived their expansive interpretation of the scope and application of the IHRA deviates significantly from the well-accepted framework employed in Illinois generally and specifically as applied by federal and state courts examining virtually identical language in parallel regulatory schemes. When subjected to appropriate substantive scrutiny, the lower courts' opinions leave the reader with the impression that the analysis employed was a

"self-fulfilling prophesy," i.e., influenced by a desire to accomplish a particular outcome (here, to find potential liability against the Defendants) and gave little or no weight to the implications of construing the IHRA to apply to virtually any person or entity that has any connection to a "real estate transaction" as they defined it. The fact that the allegations of the Current Complaint cannot reasonably be read to assert facts supporting the proposition that Defendants' conduct was akin to a "mortgage broker" undermines the notion that the lower courts initiated the analysis by reading the allegations of the Current Complaint against the express language of the IHRA provisions at issue. Moreover, it appears that neither court gave meaningful thought to the broader implications of their rulings, as the logical extensions of the courts' interpretations of the IHRA would expand the authority of the Department of Human Rights and the Attorney General well beyond the boundaries of the authority delegated to them by law and well into the spheres of authority of numerous other State entities and agencies, including this Court.

Ultimately, Defendants respectfully submit that it was neither necessary nor appropriate for the courts below to exert such effort to identify (or create) scenarios under which the Defendants could face liability under the IHRA. As discussed in greater detail herein, by Constitutional decree, this Court has exercised exclusive authority to regulate the conduct of Illinois-licensed attorneys, including but not limited to imposing discipline where warranted for actions that are determined to be discriminatory. *See, e.g.*, Illinois Constitution, Article II, Section 1; Illinois Rules of Professional Conduct, Rule 8.4(a)(9) (2010 version). No matter how one reads the IHRA, there is no basis on which to find that the legislature intended through this legislation to disrupt the constitutionally mandated separation of powers among the Executive, Legislative and Judicial Branches.

See Illinois Constitution, Article II, Section 1. Indeed, to do so would render the construction of the statute "absurd." Hence, with respect, the decisions of the courts below are not based on existing precedent, do not adhere to fundamental rules of statutory construction and otherwise are not logically sound. Defendants therefore respectfully request this Court to reverse the decisions of the circuit court and the appellate court and remand this matter to the circuit court with directions to dismiss Count IV of the Current Complaint against all Defendants with prejudice.

I. The IHRA and Reverse Redlining

A. Interpreting the Provisions of the IHRA

The object of legitimate statutory construction is to divine the intent of the legislature in crafting the legislation under consideration and to discern wherever possible from the face of the statute the nature and purpose of the provisions enacted. *People v. Eppinger*, 2013 IL 114121, ¶ 21. A statute must be construed as a whole so as to give effect to the intention of the legislature. *People v. Jones*, 223 Ill. 2d 569, 580-581 (2006). Courts must avoid a statutory construction which would render any portion of the legislation meaningless. *Id. at 581.* In construing a statute, courts presume that the General Assembly, in the enactment of legislation, did not intend absurdity, inconvenience, or injustice. *Mich. Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000). As summarized by this Court:

> A court must view the statute as a whole, construing words and phrases in light of **other relevant statutory provisions** and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. The court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, **and the consequences of construing the statute one way or another**. Also, a

> court presumes that the General Assembly, in its enactment of legislation, did not intend **absurdity, inconvenience, or injustice**.

People v. Brown, 2013 IL 114196 (emphasis added) (citing *People v. Gutman*, 2011 IL 110338, ¶ 12; *Zimmerman*, 239 Ill. 2d at 497)).

The IHRA "is intended to secure for all individuals in Illinois freedom from unlawful discrimination in connection with employment, real estate transactions, access to financial credit, and availability of public accommodations." *Blount v. Stroud*, 232 Ill. 2d 302, 309 (2009) (internal citations omitted). The IHRA first became law in 1979 and was substantively amended thereafter to create the Department of Human Rights and the Illinois Human Rights Commission, thereby eliminating the existing "patchwork of antidiscrimination law" administered by multiple distinct state agencies. *Id.* at 309-10. Although it repealed prior acts addressing prohibited discriminatory conduct, including but not limited to the Fair Employment Practices Act, the Illinois Fairness in Lending Act and the Illinois Equal Opportunity in Employment Act, the IHRA was intended to incorporate the preceding acts' "principal design, purpose or intent." *Id.* As noted above, there are only a handful of reported decisions that address the IHRA generally and no cases that interpret the specific provisions at issue here.

B. The Historical Development of the Redlining and Reverse Redlining Theories of Liability

"Redlining" refers to circumstances in which lenders deny credit outright to applicants in certain "undesirable" demographics. *See United Cos. Lending Corp. v. Sargeant*, 20 F. Supp.2d 192, 203 n. 5 (D. Mass. 1998) (Redlining is "the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents"); *see also Crawford v. Signet Bank*, 179 F.3d 926, 928 n. 4 (D.C. Cir. 1999) ("[R]edlining is the practice of financial institutions intentionally not

lending to certain neighborhoods or parts of a community.") (quoting H.R. Rep. No. 104193 at 177 (1995)), *cert. denied* 120 S. Ct. 1002 (2000)). The "redlining" theory of liability gets its name from an early case in which the evidence disclosed that executives at the lender in issue literally drew a red line or circle around the geographic area where the lender decreed that no credit was to be extended to consumers. *Sargeant*, 20 F. Supp. 2d at 203 n. 5.

The term "reverse redlining" describes the practice of targeting a specific geographic area based on racial, ethnic or income characteristics and extending credit to consumers meeting those criteria, but doing so on terms that are materially less favorable than similarly situated consumers outside the "red line." *Sargeant*, 20 F. Supp.2d at 203 n. 5. Federal courts have long recognized that reverse redlining violates civil rights laws, including the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. ("FHA"). *See Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000). To that end, courts subsequently developed the following four-part test to determine whether the proponent of the reverse redlining claim had sufficiently pleaded its elements:

> The plaintiff must allege: (1) that she is a member of a protected class; (2) that she applied and was qualified for a loan; (3) that the loan was given on grossly unfavorable terms; and (4) that the lender either intentionally targeted her for unfair loans or currently makes loans on more favorable terms to others.

Hafiz v Greenpoint Mtge. Funding, Inc., 652 F. Supp. 2d 1039, 1045-46 (N.D. Cal. 2009); *Matthews v New Century Mtge. Corp.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002). Courts applying the reverse redlining analysis have further distilled the test to the following key elements:

1) the perpetrator's lending practices and loan terms were 'unfair' and 'predatory'; **and**

2) the perpetrator either intentionally targeted prospective borrowers on the basis of race or there is a disparate impact on the basis of race.

Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 18 (D. D.C. 2000) (emphasis added); *see also Sargeant*, 20 F. Supp. 2d at 200-01 (D. Mass. 1998) (finding that there are two major prongs to a test for reverse redlining: "The first is establishing an unfair or predatory loan. The second prong is discrimination.").

II. The Established Framework Articulated by Other Courts

When construing statutes as to which there is little or no Illinois precedent, Illinois courts are directed to consult federal authority addressing the same or similar provisions. *See, e.g., Fitzgerald v. Chicago Title & Trust Co.*, 46 Ill. App. 3d 526, 528 (1st Dist. 1977). The IHRA is modeled upon the federal FHA and there is little or no applicable precedent within Illinois' case law. (R. Vol. 9, 00019.) Where, as here, the circuit court and appellate court confronted a novel issue under the IHRA, those courts and this Court should consult and give significant weight to federal district and appellate court decisions interpreting the FHA. *See, e.g., Szkoda v. Ill. Human Rights Comm'n*, 302 Ill. App. 3d 532, 539-40 (1st Dist. 1998) (relying on federal court decisions interpreting the FHA to interpret comparable provisions of the IHRA); *Bd. of Tr. of S. Ill. University v. Knight*, 163 Ill. App. 3d 289, 294 (1st Dist. 1987) (interpreting the IHRA by referencing comparable standards applicable to claims brought under Title VII of the Civil Rights Act of 1968).

Instead of examining the legion of decisions Defendants cited in which predecessors courts had already done all the "heavy lifting" on the proper analytical framework for such claims, the appellate court largely ignored decisions from federal and

sister courts interpreting statutes parallel to the IHRA statute at issue here. Over the past two decades, courts have developed baseline principles pertinent to the scope and function of statutes prohibiting discrimination in transactions involving residential real property. Specifically, federal court interpretations of §§ 3604 and 3605 of the FHA and its amendments consistently treat each of these provisions as having its own distinct focus and application because to find otherwise would render one of the two provisions superfluous – an outcome to be avoided when construing a statute. *See, e.g., N.A.A.C.P. v. American Family Mut. Ins. Co.,* 978 F.2d 287, 298 (7th Cir. 1992). Hence, while some degree of overlap in the provisions is acknowledged (i.e., both prohibit discrimination in lending practices), courts consistently conclude that § 3604 and § 3605 address conduct occurring during distinct periods along the continuum of the loan transaction. *Id.* Specifically, § 3604 governs only conduct relating to a consumer's initial acquisition of or access to housing. *See Halprin v. Prairie Homes of Dearborn Park*, 388 F.3d 327, 328-29 (7th Cir. 2004)); *see also Matthews v. New Century,* 185 F. Supp. 2d 874, 885 (S.D. Ohio 2002); *King v. Metcalf 56 Homes Assn., Inc.*, No. 04-2192-JWL, 2004 U.S. Dist. LEXIS 22726, at *7-10 (D. Kan. Nov. 8, 2004). As explained in *King*, "Section 3604(b) of the FHA extends only to discrimination that impacts the *accessibility and availability* of housing, not to claims of discriminatory conduct related to the use and enjoyment of previously acquired housing." *King*, 2004 U.S. Dist. LEXIS 22726, at *7-10 (citing *Halprin* and *Matthews*) (emphasis added). In contrast, "§ 3605 applies only to transactions involving the 'making or purchasing of loans.'" *Davis v. Wells Fargo Bank*, 685 F.Supp.2d 838, 844 (N.D. Ill. 2010).

As applicable here, every single one of Defendants' clients had already procured housing long before retaining Defendants (R. Vol. 5, C01153-1163); as a result, cases to which the Attorney General cites that rely on interpretations of § 3604 of the FHA are inapposite. *Halprin*, 388 F.3d at 328. Thus, any analysis comparing provisions of the IHRA to provisions of the FHA must be confined to the cases decided under § 3605.

Section 3605 of the FHA reads as follows:

> (a) In general
>
> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (b) "Residential real estate-related transaction" defined As used in this section, the term "residential real estate-related transaction" means any of the following:
>
> 1) The making or purchasing of loans or providing other financial assistance—
>
> (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
> (B) secured by residential real estate.
>
> 2) The selling, brokering, or appraising of residential real property.
>
> (c) Appraisal exemption
>
> Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

42 U.S.C. § 3605.

A plain reading of § 3605(b)(1) and (2) discloses that the definition of "real estate-related transaction" applies in the following three circumstances:

- A person or entity makes or purchases loans or provides other financial assistance for purchasing, constructing, improving or maintaining a dwelling (§ 3605(b)(1)(A));
- A person or entity makes or purchases loans or provides other financial assistance secured by residential real estate (§ 3605(b)(1)(B)); or
- Selling, brokering or appraising residential real property (§ 3605(b)(2)).

Because the Attorney General does not plead any facts in its Current Complaint that could reasonably be construed as alleging that Defendants were selling, brokering, or appraising residential real property, § 3605(b)(2) is not implicated. Thus, the only provisions of the FHA pertinent to the instant matter are §§ 3605(b)(1)(A) and (B).

The cases decided under § 3605 support the proposition that an Illinois court employing the traditional statutory construction rubric to construct § 3605 would conclude that an attorney representing an individual homeowner ***against*** the lender seeking to enforce its security interest against the delinquent homeowner does not fall within the scope of § 3605(b)(1)(A) or (B). Specifically, virtually every court that has construed the phrase "purchasing of loans or providing other financial assistance" has determined that its application is limited to circumstances in which the actors in question were lenders, brokers, or appraisers of mortgage loans or affiliates of the lender collecting loan payments, i.e., those who had the ability to affect the terms on which credit is extended to the borrower. *See, e.g.*, *N.A.A.C.P.*, 978 F.2d at 298; *Wells Fargo*, 685 F.Supp.2d at 844 ("§ 3605 applies only to transactions involving the 'making or purchasing of loans.'") (quoting 42 U.S.C. § 3605(b)); *Davis v. Fenton*, 26 F. Supp. 3d 727, 741 (N.D. Ill. 2014) ("section 3605 applies only to transactions involving defendants that are lenders, brokers, or appraisers of mortgage loans"); *Walton v. Diamond*, No. 12 C

4493, 2013 WL 1337334, at *5 (N.D. Ill. Mar. 29, 2013) (opining that plaintiff must allege defendant was a lender, broker or appraiser of mortgage loans or otherwise had meaningful direct contact with borrower during the process through which the borrower procured the loan at issue); *Jones v. Countrywide Home Loans, Inc.*, No. 09 C 4313, 2010 WL 551418, at *19-20 (N.D. Ill. Feb. 11, 2010) (granting motion to dismiss FHA § 3605 claim because the defendant was "neither the lender, nor the broker, nor the appraiser of [the plaintiff's] mortgage loan, nor did it provide any other financial assistance in the transaction.")

Courts interpreting § 3605(b)(1) – which the Attorney General agrees is virtually identical to § 3-102(B) (*See* R. Vol. 7, C01568 n. 4) – consistently hold that § 3605 is not a "catch-all" provision regarding real estate transactions; rather it applies only to those persons or entities that served as the lender, broker or appraiser of the loan at issue or otherwise provided financial assistance to the borrower. *See, e.g., Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529 (7th Cir. 2011); *Jones*, 2010 U.S. Dist. LEXIS 11846 at *19-21; *Davis v. Wells Fargo Bank*, 685 F.Supp.2d at 844. In other words, although § 3605 applies to conduct that occurs after the homeowner acquires the property (thus distinct from § 3604), it applies only to those persons or entities that were or are within the "pipeline" through which the homeowner obtains his/her funding for the real property at issue.

The Current Complaint contains no allegations that any Defendant was within the lending "pipeline" with respect to any homeowner client represented. (*See* R. Vol. 5, C01128-01193.) Likewise, the Attorney General cites no authority for the proposition that "loan modifications" or short sales – both of which by definition result in funds

going from the homeowner to the *lender* should be treated anything like the selective process of extending or denying credit to a homeowner. (R. Vol. 7, C01561-01567.) The closest the Attorney General has come is citing to *Beard v. Worldwide Mortgage Corp.*, 354 F.Supp.2d 789 (W.D. Tenn. 2005), an out-of-circuit district court decision standing for the proposition that a title agent participating in the closing of a home purchase was subject to potential liability under § 3604(b) of the FHA because the broker "provided services in connection with a real estate transaction." (R. Vol. 7, C01566-67.) Notably, the court in *Beard* relied on § 3604 of the FHA, which applies only to the acquisition of housing and thus has no import here. *Halprin,* 388 F.3d at 328. Moreover, the title agent participated in the part of the process through which the borrower obtained its funds to complete the original purchase of the property. *Id.* The Attorney General makes no such allegations against Defendants.

III. The Certified Question and The Circuit and Appellate Court's Deviation from the Established Framework to Answer that Question

Again, as pertinent here, the IHRA states as follows regarding real estate transactions:

> Sec. 3-102. Civil rights violations; real estate transactions. It is a civil rights violation for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman, because of unlawful discrimination or familial status, to
>
> (A) Transaction. Refuse to engage in a real estate transaction with a person or to discriminate in making available such a transaction;
> (B) Terms. Alter the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

775 ILCS 5/3-102. Section 5/3-101(B) provides:

> "Real estate transaction" includes the sale, exchange, rental or lease of real property. "Real estate transaction" also includes the brokering or

> appraising of residential real property and the making or purchasing of loans or providing other financial assistance: (1) for purchasing, constructing, improving, repairing or maintaining a dwelling; or (2) secured by residential real estate.

775 ILCS 5/3-101(B). Thus, three categories of "real estate transactions" exist under the IHRA:

> 1) The sale, exchange, rental or lease of real property;
> 2) the brokering or appraising of residential real property; and
> 3) the making or purchasing of loans or providing other financial assistance: (1) for purchasing, constructing, improving, repairing or maintaining a dwelling or (2) secured by residential real estate.

775 ILCS 5/3-101(B). The clause "sale, exchange, rental or lease of real property" is clear enough standing alone, and neither the circuit court nor the appellate court suggested any Defendant faced potential liability under that provision. (*See* R. Vol. 7, C01679-1681; *Madigan*, 2016 IL App (1st) 143592.) Similarly, neither lower court purported to hold that Defendants were involved in "the brokering or appraising of residential real property." (*See id.*) The critical language that appears in both § 3605 and § 3-101(b) of the IHRA (in parenthesis and *italics* where different for § 101(b) of the IHRA) reads: "residential real estate-related transaction" means (*"real estate transaction" includes*) (1) The making or purchasing of loans or providing other financial assistance … (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling […]."

The appellate court contended that it employed the "plain meaning" approach to statutory construction when interpreting § 3-101(b) and that the terms "other financial assistance" and "maintain a dwelling" reflect the legislature's intent to expand application of the IHRA to any individual or entity who facilitates the homeowner's

ability to perform upkeep on his property. *Madigan*, 2016 IL App (1st) 143592, ¶¶ 14, 25. The appellate court cites no legislative history or other support for this conclusion because there is none.

Under accepted statutory construction principles, the terms "other financial assistance" and "maintain a dwelling" cannot plausibly be isolated from the complete phrase. For all practical purposes, the appellate court equates the term "other financial assistance" to mean ***any*** financial assistance whatsoever so long as the assistance is provided in the context of performing some act that preserves or prevents damage to some component of the residence. *Id.* at ¶ 25. Such a construction, however, ultimately yields absurd results. Taken to its logical extreme, under this reasoning, the issuer of a credit card for a "big box" home improvement store would face potential liability under § 3-102(b) because the issuer is providing "financial assistance" to the consumer by allowing him/her over time to pay for products the consumer uses to "maintain" his residence (e.g, painting his/her front porch). There is no evidence on the face of § 3-102(b) or elsewhere that the Illinois legislature ever intended it to reach so far down the "financial assistance" continuum.

The appellate court thus accorded far too much weight to the words "financial assistance" and "maintain a dwelling" in isolation rather than assessing the significance of those terms in context. Instead, the appellate court should have employed the construction technique *noscitur a sociis* ("known by its associates"), under which the court focuses on giving due consideration to the surrounding words and phrases within the same subsection in which the disputed terms appear. *See Hayes v. Mercy Hosp. & Medical Ctr.*, 136 Ill. 2d 450, 477-78 (1990). As this Court described the doctrine: "[t]he

meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it. The maxim, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to a legislative act." *Id.* at 477.

Here, applying such an analysis to the terms "financial assistance" and "maintain a dwelling" yields a more sensible and natural outcome. An outcome where "financial assistance" does not include any financial assistance plausibly related to "maintaining" (e.g. painting a front porch) a dwelling.

IV. The Trial and Appellate Court's Expansive Interpretation of the IHRA Also Absurdly Results In Encroachment on This Court's Exclusive Power to Regulate the Conduct of Attorneys

The Illinois Constitution provides for the separation of powers among the three branches of government:

> **SECTION 1. SEPARATION OF POWERS**
>
> The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

ILLINOIS CONSTITUTION, Article II, Section 1. The common law has long recognized that the admission and regulation of the practice of law in this State is an exclusive function of the Illinois Supreme Court, and is within the scope of the Court's inherent "judicial power." *See, e.g.*, *People ex rel. Brazen v. Finley*, 119 Ill. 2d 485, 492-93 (1988); *In re Day,* 181 Ill. at 89-91.

Consistent with these fundamental constitutional principles, only the Illinois Supreme Court has the inherent power to define and regulate the practice of law in this State. *Wilbourn v. Advantage Fin. Partners, LLC*, No. 09-CV-2068, 2010 U.S. Dist. LEXIS 26898, at *40 (N.D. Ill. Mar. 22, 2010) (citing *Cripe v. Leiter*, 184 Ill.2d 185,

190-99 (1998)). Accordingly, neither the Illinois Legislature nor the Governor has the authority to prescribe rules for or discipline attorneys practicing law in this State. *Chicago Bar Ass'n v. Croson,* 183 Ill.App.3d 710, 721-23 (1st Dist. 1989).

Pursuant to this exclusive authority, the Supreme Court promulgated and from time to time has amended the rules governing the conduct of attorneys licensed to practice in Illinois. With respect to the periods at issue in the Current Complaint, for conduct occurring between January 1, 1990 and January 1, 2010, the applicable Rules of Professional Conduct are found at 188 Ill.2d R. 1 *et seq.* (the "1990 Version"); for all subsequent conduct at issue, the Rules of Professional Conduct effective on and after January 1, 2010 (the "2010 Version") control. *See* Illinois Supreme Court Order, M.R. 3140 (July 1, 2009). Both the 1990 Version and the 2010 Version of the RPC expressly prohibit attorneys from engaging in conduct found to be discriminatory. The key language in the 1990 Version appears in RPC 8.4(a)(5) and 8.4(a)(9), which respectively state in pertinent part as follows:

> 8.4(a) [a] lawyer shall not:
>
> (5) engage in conduct that is prejudicial to the administration of justice [and] [i]n relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, sex, religion, or national origin.
>
> ...
>
> (9)(A) violate a Federal, State or local statute or ordinances that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities. (B) No complaint of professional misconduct based on an unlawfully discriminatory act, pursuant to paragraph (9)(A) of this rule,

> may be brought until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawfully discriminatory act, and that the determination of the court or administrative agency has become final and enforceable and the right of judicial review of the determination has been exhausted.

This Court consistently has imposed discipline on individual attorneys under Rule 8.4(a)(5) and 8.4(a)(9) upon competent proof that the attorney engaged in prohibited discriminatory conduct. *See, e.g., In re Fishman*, Commission No. 01 CH 109 (Report and Recommendations of the Review Board (March 31, 2004)) (repeated sexual harassment of female associate). Similarly, in *In re Timothy Ray Tyler*, Commission No. 98 CH 74 (Review Board Report and Recommendation (May 2000)), the Review Board rejected the respondent's attempt to narrow the application of Rule 8.4(a)(5), finding instead that Rule 8.4(a)(5) "appears to be designed to make it clear that [discriminatory] conduct is ... prohibited by the rule ...". Rule 8.4(j) of the 2010 Version of the RPC likewise expressly prohibits discriminatory conduct by attorneys through language that is virtually identical in form and substance to Rule 8.4(a)(9) of the 1990 Version of the RPC.

The provisions of the RPC cited above reflect this Court's recognition of the need to prohibit discriminatory conduct by Illinois attorneys but also provide procedural safeguards that protect an attorney's due process rights prior to a final disposition. The manner in which these provisions delicately balance the rights of alleged victims of discrimination to be heard within the attorney discipline process but also mitigate the impact a charge of discrimination may have on an individual attorney, his or her partners, law firm and clients, regardless of the ultimate outcome on the merits of the claim. Circumstances like these reinforce the proposition that this Court is uniquely positioned to strike the proper balance between respecting the discrimination victim's right to have

the offending party held accountable and ensuring that the RPC are enforced in such a way as to provide attorneys subject to its oversight clear guidance as to the extent to which specific types of conduct that may constitute unlawful discrimination potentially subjecting them to discipline before this Court.

Along these lines, after several years of detailed study and analysis, the American Bar Association's Board of Delegates recently approved at its August 2016 Annual Meeting revisions to Model Rule 8.4 that expressly identify specific examples of discriminatory conduct for which an attorney may be subjected to discipline. Specifically, the ABA Standing Committee on Ethics and Professional Responsibility presented and proposed for adoption Resolution 109 incorporating new Rule 8.4(g) – *Misconduct.* On August 8, the ABA House of Delegates adopted new Rule 8.4(g) by a voice vote. New Rule 8.4(g) states in pertinent part as follows:

> It is professional misconduct for a lawyer to:
>
> > (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

Because the Illinois RPC are modeled after the ABA Model Code of Professional Responsibility, this Court has relied on ABA commentary and interpretation of the Model Rules when interpreting the Illinois Rules of Professional Conduct. *See Schwartz v. Cortelloni*, 177 Ill.2d 166, 179-80 (1997). Accordingly, we will respectfully suggest that the probability exists that this Court will incorporate the changes adopted through Resolution 109 and Rule 8.4(g). Illinois attorneys thus will be required to conform their

conduct to the terms of Rule 8.4(g) or face potential disciplinary action for discriminatory conduct.

Again, no matter how one reads the IHRA, there is no basis on which to find that the legislature intended through this legislation to disrupt the constitutionally-mandated separation of powers among the Executive, Legislative and Judicial Branches. *See* Illinois Constitution, Article II, Section 1. Indeed, to do so would render the construction of the statute absurd. Hence, the decisions of the courts below are not based on existing precedent, do not adhere to fundamental rules of statutory construction and otherwise are not logically sound.

CONCLUSION

For all these reasons, this Court should reverse the judgment of the appellate court and circuit court and remand this matter to the circuit court with directions to dismiss with prejudice Count IV of the Current Complaint against all Defendants.

Respectfully submitted,

MATTHEW R. WILDERMUTH,
GEORGE KLEANTHIS AND
LEGAL MODIFICATION NETWORK, LLC

By: _____
One of their Attorneys

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 37 pages.

Robert E. Browne, Jr.

APPENDIX

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Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ENTERED
JUDGE DIANE J. LARSEN-1771
NOV 19 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

The People of the State of Illinois

v.

No. 11 CH 33666

Matthew Wildermuth, et al

ORDER

This matter coming befor this Court for hearing on Defendants' consolidated motion to reconsider and for certification of ~~an~~ a question for Interlocutory Appeal under Rule 308, both parties present and the Court having been fully advised in the premises, it is hereby Ordered:

① Defendants' Motion to Reconsider is denied
② Defendants' Request For Certification under Rule 308 is granted as to the following question: Whether the State may claim a violation under the Illinois Human Rights Act pursuant to a reverse redlining theory where it did not allege that the defendant acted as a mortgage lender. *
③ Defendants' pre motion to stay the proceedings is denied.
④ Case is continued for ~~status~~ a status hearing to January 21, 2015 at 9:30 am Room 2405.

* Defendants' have leave of Court pursuant to Rule 308 to file a notice of Appeal.

Atty. No.: 99000

Name: Manuela Hernández

Atty. for: Illinois Attorney General (Plaintiff)

Address: 100 W. Randolph Street, 11th Floor

City/State/Zip: Chicago IL

Telephone: 312-814-1188

ENTERED:

Dated: _____, _____

Diane Joan Larsen
Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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C01775
A000338

A-1

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT------SIXTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-14-3592
MATTHEW R. WILDERMUTH, et al.,	)	
Defendants-Appellants.	)	

ORDER

This cause having come on for hearing on the application of the defendants, MATTHEW R. WILDERMUTH, et al., for leave to appeal pursuant to Supreme Court Rule 308; the Court having considered the application and the supporting record; and being advised in the premises:

IT IS HEREBY ORDERED that the application of the defendants for leave to appeal pursuant to Supreme Court Rule 308 is GRANTED; and the defendants shall file their record by January 23, 2015.

ENTER:

Presiding Justice

Justice

Justice

ORDER ENTERED

DEC 17 2014

APPELLATE COURT, FIRST DISTRICT

C01785

A-2

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

Corrected copy

2016 IL App (1st) 143592

No. 1-14-3592

Lawyers

FIFTH DIVISION
March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE *ex rel.* LISA MADIGAN, Attorney General of Illinois,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 11 CH 33666
MATTHEW WILDERMUTH, GEORGE KLEANTHIS, Individually and as Managing Member of Legal Modification Network, LLC, and LEGAL MODIFICATION NETWORK, LLC,	)	Honorable Diane J. Larsen, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Presiding Justice Reyes and Justice Gordon concurred in the judgment and opinion.

OPINION

¶ 1 This appeal presents a certified question that deals with the pleading requirements for the Attorney General of Illinois for a claim under section 3-102(B) of the Illinois Human Rights Act (Act) (775 ILCS 5/3-102(B) (West 2010)). Specifically the Attorney General filed a complaint alleging, *inter alia*, that defendants Matthew Wildermuth, George Kleanthis, and Legal Modification Network, LLC (LMN) violated section 3-102(B) of the Act by engaging in a real estate transaction and, because of unlawful discrimination, altering the terms, conditions, or

privileges of the real estate transaction or the furnishing of facilities or services in connection therewith. The Attorney General also alleged the defendants intentionally targeted their predatory practices against minorities by aiming their advertising at African-Americans and Latinos. The circuit court denied defendants' motion to dismiss this claim. After also denying defendants' motion to reconsider, the court certified the following question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010):

> "Whether the State may claim a violation under the [Act] pursuant to a reverse redlining theory where it did not allege that the defendant acted as a mortgage lender."

¶ 2 For the reasons that follow, we answer the certified question in the affirmative.

¶ 3 I. BACKGROUND

¶ 4 The Attorney General filed its original complaint against defendants in September 2011 and subsequently filed a four-count fourth-amended complaint, which alleged the defendants had engaged in a course of conduct that violated several statutory and regulatory provisions. Count IV, (which is the only count that concerns us here) alleged that defendants Wildermuth, an attorney, and Kleanthis, a veteran of the real estate business and the sole managing member of LMN, engaged in acts and practices that violated section 3-102(B) of the Act and constituted a pattern and practice of discrimination when they partnered to offer loan modification services to Illinois consumers. Eventually, LMN ceased functioning and Wildermuth and Kleanthis provided the loan modification services through Wildermuth's law offices. The Attorney General alleged defendants engaged in "real estate transactions" as defined by section 3-101(B) of the Act by claiming to negotiate loan modifications and short sales on behalf of their clients.

¶ 5 The Attorney General alleged that after the collapse of the housing market, the federal government largely created the loan modification market through a number of programs designed to assist delinquent and underwater homeowners avoid foreclosure. However, unscrupulous private, for-profit enterprises proliferated and seized on consumer confusion and desperation, often targeted minority homeowners, and falsely offered guarantees on loan modifications and charged exorbitant and nonrefundable fees for services the enterprises could not perform.

¶ 6 The Attorney General alleged defendants advertised on radio that they would succeed where other loan modification providers had failed, help consumers save their homes and obtain significant reductions on their monthly mortgage payments, and obtain modifications for consumers within a short time frame. Consumers who contacted defendants were scheduled for meetings with nonattorneys at defendants' Woodridge, Illinois office and given aggressive sales pitches. Defendants' intake and sales staff made unreasonable assurances about defendants' likelihood of successfully modifying the consumers' mortgage loans, including promises to reduce the consumers' monthly mortgage payments by a specific amount and in a specific period of time. However, despite their broad assurances, defendants' services consisted primarily of merely filling out and submitting the paperwork to apply for a traditional affordable home loan modification program.

¶ 7 The Attorney General alleged defendants failed to provide any of the disclosures and notices mandated by the Illinois Mortgage Rescue Fraud Act (765 ILCS 940/1-1 *et seq.* (West 2010)) or the federal Mortgage Assistance Relief Services Rule (12 C.F.R. § 1015.1 *et seq.* (2012)) and charged consumers nonrefundable fees that ranged from $3,000 to $5,000, which often exceeded the consumers' monthly mortgage payments. The consumers paid the fees in advance of receiving services and were led to believe that a portion of their payments would be refunded if

defendants failed to obtain a loan modification. Defendants routinely required and accepted advance payments from consumers whom defendants knew were not eligible for loan modifications because defendants knew the consumers did not meet the basic eligibility requirements under the affordable home loan modification program. When defendants obtained loan modifications for consumers, the modifications often were either inconsistent with the promised terms or not obtained within the promised time frame. When defendants were not able to obtain a loan modification, they would suggest listing the consumer's property as a short sale. When a consumer requested a refund, in most cases defendants refused to tender a refund.

¶ 8 The Attorney General alleged defendants intentionally discriminated in the furnishing of facilities or services in connection with real estate transactions on the basis of race and national origin by targeting the African-American and Latino communities. Defendants' actions in targeting disproportionately subjected African-American and Latino homeowners to defendants' fraudulent scheme and resulted in the loss of thousands of dollars and, in many cases, the loss of homes. Defendants' discriminatory acts involving targeting included: (1) the exclusive advertisement of their services through radio stations known to have a predominantly Latino or African-American audience; and (2) the use of a well-known radio personality in the African-American community to promote defendants' services, which were carelessly or never performed. Defendants' scheme affected African-American and Latino homeowners who, in an effort to save their homes, gave defendants thousands of dollars without receiving any of the benefits defendants claimed to be able to provide.

¶ 9 Defendants moved to dismiss count IV of the fourth-amended complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), asserting the complaint failed to state a violation of section 3-102(B) of the Act because Wildermuth rendered legal

services and was not engaging in real estate transactions as defined in the Act. Defendants also asserted the Attorney General failed to allege facts showing that defendants treated African-Americans or Latinos differently than other groups.

¶ 10 In response, the Attorney General asserted defendants engaged in real estate transactions within the meaning of the Act when they negotiated loan modifications and short sales on behalf of consumers. Furthermore, the Attorney General, citing reverse redlining cases involving the federal fair housing statute, asserted it was not necessary to show disparate treatment or impact because the Attorney General alleged facts showing direct evidence that defendants intentionally targeted predatory practices against minorities, specifically, radio advertising aimed at African-Americans and Latinos.

¶ 11 The trial court denied defendants' motion to dismiss, concluding they functioned as mortgage brokers when they conducted short sale negotiations and sought loan modifications. Thereafter, defendants moved the court to reconsider the denial or certify a question to this court for interlocutory review. The trial court denied the motion to reconsider but certified for review the following question:

> "Whether the State may claim a violation under the [Act] pursuant to a reverse redlining theory where it did not allege that the defendant acted as a mortgage lender."

Over the Attorney General's objection, this court granted defendants' application for leave to appeal.

¶ 12 II. ANALYSIS

¶ 13 Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) allows for a permissive appeal of an interlocutory order certified by the trial court involving a question of law as to which there is

substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate termination of the litigation. *Brookbank v. Olson,* 389 Ill. App. 3d 683, 685 (2009). However, the rule was not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of a particular case. *Walker v. Carnival Cruise Lines, Inc.,* 383 Ill. App. 3d 129, 133 (2008); *Morrissey v. City of Chicago,* 334 Ill. App. 3d 251, 258 (2002). Nor does it permit us to review the propriety of the order entered by the lower court. *Walker,* 383 Ill. App. 3d at 133. Rather, we limit our review to answering the specific question certified by the trial court to which we apply a *de novo* standard of review. See *Moore v. Chicago Park District,* 2012 IL 112788, ¶ 9.

¶ 14 The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. *DeLuna v. Burciaga,* 223 Ill. 2d 49, 59 (2006). The language of the statute is the best indication of legislative intent, and we give that language its plain and ordinary meaning. *Ready v. United/Goedecke Services, Inc.,* 232 Ill. 2d 369, 375 (2008). In determining the plain meaning of a statute's terms, we consider the statute in its entirety, keeping in mind the subject it addresses, and the apparent intent of the legislature in enacting the statute. *Ready,* 232 Ill. 2d at 375. We may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board,* 225 Ill. 2d 103, 117 (2007). "[A] court should not attempt to read a statute other than in the manner in which it was written." *Ultsch v. Illinois Municipal Retirement Fund,* 226 Ill. 2d 169, 190 (2007).

¶ 15 The Act states that it is the public policy of Illinois to "secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or

mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." 775 ILCS 5/1-102 (West 2014). Because the Act is remedial legislation, it must be construed liberally to give effect to its purposes. *Arlington Park Race Track Corp. v. Human Rights Comm'n*, 199 Ill. App. 3d 698, 703 (1990). Illinois courts interpreting the terms of section 3-102(B) of the Act have looked to federal case law interpreting comparable provisions the federal Fair Housing Act (FHA) (42 U.S.C. §§ 3601-3631 (2006)), and other civil rights statutes. See *Szkoda v. Human Rights Comm'n*, 302 Ill. App. 3d 532, 539-40 (1998) (examining relevant federal law to determine what constitutes sexual harassment under section 3-102(B) of the Act, which has close parallels to section 3604 of the FHA).

¶ 16 Section 3-102(B) of the Act states, in relevant part, as follows:

> "Civil Rights Violations; Real Estate Transactions. It is a civil rights violation for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman, because of unlawful discrimination or familial status, to
>
> ***
>
> (B) Terms. Alter the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith[.]" 775 ILCS 5/3-102(B) (West 2010).

¶ 17 Section 3-101 of the Act contains the following definitions:

> "(B) Real Estate Transaction. 'Real estate transaction' includes the sale, exchange, rental or lease of real property. 'Real estate transaction' also includes the brokering or appraising of residential real property and the making or purchasing of loans or providing other financial assistance:

(1) for purchasing, constructing, improving, repairing or maintaining a dwelling; or

(2) secured by residential real estate.

***

(D) Real Estate Broker or Salesman. "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property, or who negotiates or attempts to negotiate any of these activities, or who holds himself or herself out as engaged in these." 775 ILCS 5/3-101(B), (D) (West 2010).

¶ 18 Because we are limiting our review to the certified question, we discuss only the parties' arguments on appeal that are relevant to the certified question. Defendants contend the conduct alleged by the Attorney General does not technically constitute reverse redlining because defendants did not extend credit or influence the terms and conditions of credit to the consumers in the first instance. According to defendants, reverse redlining is a viable theory where the alleged discriminator controlled or influenced the terms and conditions under which borrowers were extended credit and those terms and conditions were predatory and unfair. Defendants, however, represented homeowners who had already procured credit to obtain their homes and to whom no new credit was extended.

¶ 19 To support their argument, defendants cite federal cases involving actions under the FHA against mortgage companies that have described redlining as " 'the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents.' " *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7,

20 (D.D.C. 2000) (quoting *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998)). The term "redlining" is derived from the actual practice of drawing a red line around designated areas in which credit is to be denied. *Sargeant*, 20 F. Supp. 2d at 203 n.5. Reverse redlining has been described as " 'the practice of extending credit on unfair terms to those same communities.' " *Hargraves*, 140 F. Supp. 2d at 20 (quoting *Sargeant*, 20 F. Supp. 2d at 203 n.5).

¶ 20 Defendants argue that in order to allege discrimination under the Act pursuant to a reverse redlining theory, the Attorney General must establish that defendants (1) engaged in lending practices and loan terms that were predatory and unfair, and (2) either intentionally targeted the consumers because of their race, or that the defendants' lending practices had a disparate impact on the basis of race. Defendants contend the Attorney General cannot meet this pleading requirement because the alleged misconduct fails to establish that defendants extended credit to any consumer and, thus, the Attorney General cannot show that defendants targeted a certain class of consumers to whom defendants extended credit on materially less favorable terms.

¶ 21 Furthermore, defendants argue the Attorney General failed to allege they extended credit to any consumer or had the opportunity to affect the terms of credit through which the consumers obtained or refinanced their residential property in any way. Defendants contend that they are not mortgage brokers and their representation of delinquent borrowers does not constitute "engaging in real estate transactions" pursuant to section 3-102(B) of the Act. Although the Attorney General alleged defendants claimed to negotiate loan modifications and short sales on behalf of clients, defendants argue the Attorney General failed to allege any facts to suggest defendants acted in the capacity of a mortgage broker. Defendants also argue that the conduct alleged by the Attorney

General does not bring defendants within the section 3-101(B) definition of a real estate transaction.

¶ 22 The Attorney General argues this court should answer the certified question in the affirmative because it alleged defendants targeted distressed African-American and Latino homeowners for predatory practices with regard to mortgage loan modification services and section 3-102(B) of the Act encompasses conduct other than mortgage lending, including the negotiation and procurement of loan modifications and short sales.

¶ 23 The Attorney General argues defendants fall within the term "real estate broker or salesman" pursuant to section 3-101(D) of the Act because they held themselves out as negotiating and procuring short sales and loan modifications. According to defendants' customer agreements with the consumers, defendants stated that they would pursue various loss mitigation options, including loan restructuring and short sale payoffs. When defendants could not obtain loan modifications for their consumer clients, defendants generally suggested that the clients list the property for a short sale, which is a sale of real property for less than the amount of encumbrances on the property with the consent of the lien holders who are willing to accept less than what they are owed. See *In re Fabbro*, 411 B.R. 407, 413 n.7 (Bankr. D. Utah 2009). The Attorney General also argues defendants' conduct of negotiating loan modifications puts them within the section 3-101(D) definition of a real estate broker because a mortgage conveys an interest in real property to the mortgage lender to secure the debt created by the mortgage loan, so defendants, therefore, were negotiating sales of interests in real property.

¶ 24 The sole distinct issue raised in this interlocutory appeal is whether the Attorney General may claim a violation under the Act pursuant to a reverse redlining theory where the Attorney General did not allege that the defendants acted as mortgage lenders. Neither the Attorney General

nor defendants direct this court to, and this court is unaware of, any existing controlling law on this issue.

¶ 25 Section 3-102 of the Act requires that the entity alleged to have violated this section be either "a real estate broker or salesman" or "an owner or any other person engaging in a real estate transaction." 775 ILCS 5/3-102 (West 2010). Furthermore, the term *real estate transaction*, in addition to meaning "the sale, exchange, rental or lease of real property, *** also includes the brokering or appraising of residential real property and the making or purchasing of loans or providing other financial assistance *** for purchasing, constructing, improving, repairing or maintaining a dwelling ***." 775 ILCS 5/3-101(B)(1) (West 2010). The plain language of the statute does not require a defendant alleged to have violated section 3-102 to be a mortgage lender. To the contrary, the plain language of this section merely requires that the entity engage in a real estate transaction, which includes "providing other financial assistance *** for maintaining a dwelling." 775 ILCS 5/3-101(B)(1) (West 2010).

¶ 26 The Attorney General's amended complaint alleged that defendants offered loan modification services to consumers and utilized government programs that were designed to help delinquent and underwater homeowners avoid foreclosure. Defendants, however, allegedly made unreasonable assurances to clients about the likelihood of success in modifying the clients' home mortgage loans, carelessly or never performed the touted services, and charged the clients exorbitant and nonrefundable fees for services of little or no value. Furthermore, the Attorney General alleged defendants, because of unlawful discrimination, altered the terms, conditions or privileges in the furnishing of facilities or services in connection with real estate transactions.

¶ 27 Clearly, defendants' alleged conduct interfered with consumers' ability to obtain a particular type of financial assistance—residential loan modifications—for maintaining their

homes against the risk of foreclosure. This conduct may be construed as providing other financial assistance for maintaining a dwelling, especially in light of the allegation that defendants charged consumers fees in connection with these services. The term *other financial assistance* is not specifically defined in the Act, and section 3-102 does not require "other financial assistance" to be in the form of a mortgage loan or otherwise. The Attorney General's allegations concerning defendants' residential loan modification services are neither too far removed from transactions in the residential real estate market nor lacking any connection to the financing of residential real estate. Construing the Act—which is remedial legislation—liberally, we conclude that defendants' alleged conduct brings them within the section 3-101 definition of a *real estate transaction* as providing other financial assistance for maintaining a dwelling, and the section 3-102(B) requirement concerning the furnishing of facilities or services in connection with a real estate transaction that alters the terms, conditions or privileges of such a transaction based on unlawful discrimination.

¶ 28 We find support for this position by looking to persuasive federal case law interpreting a comparable provision of the FHA—section 3605 of the FHA—which closely parallels the language of sections 3-101 and 3-102(B) of the Act. See *Szkoda*, 302 Ill. App. 3d at 539-40. Federal courts have discussed the meaning of *financial assistance* in the context of section 3605 of the FHA. The Seventh Circuit held that property or casualty insurance did not constitute financial assistance because "[i]nsurers do not subsidize their customers or act as channels through which public agencies extend subsidies." *National Ass'n for the Advancement of Colored People v. American Family Mutual Insurance Co.*, 978 F.2d 287, 297 (7th Cir. 1992). In *United States v. Massachusetts Industrial Finance Agency*, 910 F. Supp. 21, 28-29 (Mass. Dist. Ct. 1996), the court held that a quasi-public agency's action of channeling the proceeds from tax-exempt bonds to

qualifying applicant organizations was extending financial assistance to those applicants. Consistent with both *American Family* and *Massachusetts Industrial*, defendants here, although admittedly not quasi-government agencies, hold themselves out as a channel through which relief flows in the form of residential loan modifications via government programs designed to help delinquent and underwater homeowners avoid foreclosures. The terms *financial assistance* in section 3605 of the FHA and *other financial assistance* in section 3-101(B) of the Act are very similar, and we find that the discussions of financial assistance in *American Family* and *Massachusetts Industrial* support our conclusion that defendants' alleged loan modification conduct brings them within the section 3-101 definition of a *real estate transaction* as providing other financial assistance for maintaining a dwelling.

¶ 29 Furthermore, in *Eva v. Midwest National Mortgage Banc, Inc.*, 143 F. Supp. 2d 862 (N.D. Ohio 2001), the plaintiffs, female borrowers, alleged, *inter alia*, that defendants, which included a mortgage lender, its employees or agents, and a corporation—U.S. Mortgage Reduction, Inc. (USMR), violated section 3605 of the FHA by engaging in a pattern or practice of predatory and sexually discriminatory lending related to the refinancing of homes already owned by the plaintiffs. Defendant USMR moved to dismiss the claim against it, arguing, *inter alia*, that section 3605 of the FHA applied to mortgage lenders, bankers, mortgage arrangers and creditors, but did not apply to entities like USMR, which was a separate entity that merely managed and marketed a program utilized by the other defendants in their alleged predatory, discriminatory, and fraudulent mortgage refinancing scheme that extracted excessive funds from the plaintiffs. *Id.* at 872, 875, 878, 888-89. Specifically, USMR, according to the plaintiffs' allegations, had signed the plaintiffs up for the program and imposed transaction fees every time the plaintiffs made a mortgage payment. *Id.*

¶ 30 The *Eva* court rejected USMR's argument, finding that the plain language of section 3605 of the FHA did not "require a defendant to be a mortgage lender, banker, mortgage arranger or creditor," but "[to] the contrary, *** merely require[d] that the entity conduct business which '*includes* engaging in residential real estate-related transactions.' " (Emphasis in original.) *Id.* at 889 (quoting 42 U.S.C. § 3605 (2000)). In addition, the court concluded that the term *residential real estate-related transaction* included the conduct of "providing other financial assistance for maintaining a dwelling," and applied to USMR's management of the program utilized by the lender and the other defendants. *Id.* (citing 42 U.S.C. §§ 3605(b)(1)(A)-(B) (2000)).

¶ 31 We find that the relevant provisions of the FHA discussed in *Eva* are very similar to sections 3-101 and 3-102(B) of the Act, and the alleged misconduct of defendant USMR in *Eva* has close parallels to the alleged misconduct of defendants' in the instant case. Accordingly, we reject the premise that a section 3-102(B) claim against a defendant must allege the defendant was a mortgage lender.

¶ 32 The interlocutory appeal question also asks whether the Attorney General must allege that defendants acted as mortgage lenders because the Attorney General utilized a reverse redlining theory to allege defendants engaged in unlawful discrimination by intentionally targeting on the basis of race. This issue arises because the Attorney General utilized the reverse redlining theory, *i.e.*, the intentional targeting of African-Americans and Latinos, instead of pleading facts to show unlawful discrimination by defendants based on their practices having a disparate impact on the basis of race. See *Hargraves*, 140 F. Supp. 2d at 20 (a claim against the defendant mortgage lenders for violating the FHA must show that (1) the defendants' lending practices and loan terms were unfair and predatory, and (2) the defendants either intentionally targeted on the basis of race or there was a disparate impact on the basis of race).

¶ 33 Defendants assert that although reverse redlining is a viable theory when the alleged discriminator controlled or influenced the terms and conditions under which borrowers were extended credit, reverse redlining is not applicable to situations where no new credit was extended to homeowners who had already procured credit to purchase their homes. To support this assertion, defendants cite federal cases analyzing reverse redlining theories of discrimination that involved claims of FHA violations against mortgage lenders extending credit to borrowers. In those cases, reverse redlining was described as the practice of *extending credit* on unfair terms to specific geographical areas due to the income, race or ethnicity of the communities' residents. See *id.*

¶ 34 We reject defendants' assertion that the reverse redlining theory for proving discrimination narrowly applies only to instances involving the extension of credit. Federal courts have addressed cases that utilized the redlining or reverse redlining theories to allege discrimination in the context of claims pursuant to the FHA involving the issuance and cancellation of property insurance policies. See *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995); *American Family Mutual Insurance Co.*, 978 F.2d at 298. Furthermore, permitting evidence of intentional targeting in the context of residential loan modification services as an alternative to evidence of disparate treatment or impact is in keeping with the Act's multiple aims of forbidding practices that make housing unavailable to persons on a discriminatory basis as well as discriminatory terms and conditions with respect to housing that is provided. The Act would provide little vindication to the policy of nondiscrimination in housing if it prohibited discrimination against individuals seeking a home or credit to purchase a home, but then subsequently gave free reign to entities to discriminate against these same individuals seeking loan modification services in order to avoid foreclosure. In the context of section 3-102 of the Act,

reverse redlining is not strictly limited to the practice of mortgage lending; rather it more broadly encompasses the conduct of engaging in predatory practices with respect to services related to *real estate transactions*, as that term is broadly defined in section 3-101(D) of the Act, and directing those predatory practices against members of minority groups.

¶ 35 Defendants cite *Davis v. Wells Fargo Bank*, 685 F. Supp. 2d 838 (N.D. Ill. 2010), to support the proposition that they cannot be liable under section 3-102(B) of the Act because the court in that case construed the similar language of section 3605 of the FHA as applying only to transactions involving the making or purchasing of loans. In *Davis*, the plaintiff was the victim of a predatory mortgage in 1999; in 2007, a jury found that her loan was based on fraud and awarded her a judgment against her original lender. *Id.* at 840-41. The plaintiff, however, was unable to collect the judgment after the original lender went out of business. See *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011). Meanwhile, the plaintiff's loan was eventually assigned to a new lender and was serviced by a new loan servicer, and a foreclosure proceeding was initiated against the plaintiff when she failed to make her monthly payments. *Davis*, 685 F. Supp. 2d at 840. Thereafter, the plaintiff sued the new lender and loan servicer, alleging, *inter alia*, that they violated section 3605 of the FHA by attempting to foreclose on her home and demanding repayment of the loan and related fees despite a court finding that the loan was fraudulent. *Id.*

¶ 36 The district court granted summary judgment in favor of the defendant loan lender and servicer, stating that the plaintiff failed to present any legal argument to support her section 3605 claim. *Id.* at 844. The district court then noted that the defendants did not directly enter into or refuse to enter into any loan with the plaintiff and summarily concluded that section "3605 applies only to transactions involving the 'making or purchasing of loans.' " *Id.* (quoting 42 U.S.C. § 3605(a) (2006) and citing two unpublished district court cases). In reaching this conclusion, the

district court failed to discuss or analyze the specific language of section 3605 that provides an entity may be liable for providing other financial assistance for improving, repairing, or maintaining a dwelling. See 42 U.S.C. § 3605(b)(1)(a) (2006). When the Seventh Circuit affirmed the judgment of the district court on appeal, the Seventh Circuit did not review the district court's decision concerning the plaintiff's section 3605 claim because she had abandoned any section 3605 claim. *Estate of Davis*, 633 F.3d at 539 n.3.

¶ 37 This court is not bound by the federal district court's holding in *Davis*, and it does not change our analysis. The *Davis* court did not address the statutory language concerning *providing other financial assistance for maintaining a dwelling*, which is central to our holding in the instant case. Furthermore, *Davis* is inapposite because the plaintiff forfeited her section 3605 claim and the defendants did not directly engage in any transaction with her, either for the original mortgage or the refinanced mortgage, and their involvement with her occurred merely in the context of a foreclosure proceeding years after other entities had procured the fraudulent loan. Here, in contrast, the Attorney General alleged that defendants directly engaged in real estate transactions with consumers by intentionally targeting minority homeowners for residential loan modification services, by giving the homeowners aggressive sales pitches and unreasonable assurances about defendants' ability to successfully modify the homeowners' loans, and by charging exorbitant and nonrefundable fees for services of little or no value.

¶ 38 We hold that the Attorney General may claim a violation under the Act pursuant to a reverse redlining theory even though the Attorney General did not allege that defendants acted as mortgage lenders because the concept of reverse redlining is not strictly limited to situations involving mortgage lending and section 3-102(B) of the Act broadly encompasses conduct other than mortgage lending, including the loan modification

services that defendants offered. Accordingly, we answer the trial court's certified question in the affirmative.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we answer the certified question in the affirmative.

¶ 41 Certified question answered; cause remanded.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

THE PEOPLE ex. rel. LISA MADIGAN, Attorney General of Illinois, *Plaintiff-Appellee,*	)	
v.	)	No. 120763
MATTHEW R. WILDERMUTH, et al., *Defendants-Appellants.*	)	

The undersigned, being first duly sworn, deposes and states that he filed the original and 19 copies of the Brief of Appellants Matthew R. Wildermuth, George Kleanthis and Legal Modification Network, LLC via Federal Express with the above court and that he also served 3 copies of the Brief in the above entitled cause by depositing the same in the United States Mail at Chicago, Illinois on the 2nd day of December, 2016 properly stamped and addressed to:

John Schmidt
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Subscribed and sworn to before me
this 2nd day of December, 2016.

Notary Public

OFFICIAL SEAL
ROSE E OLEJNICZAK
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:10/09/18