No. 120763

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MATTHEW R. WILDERMUTH, individually; GEORGE KLEANTHIS, individually and as managing member of LEGAL MODIFICATION NETWORK, LLC, a Limited Liability Company; and LEGAL MODIFICATION NETWORK, LLC, a Limited Liability Company, Defendants-Appellants.	)	On 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 LARSEN, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Plaintiff People of the State of Illinois filed a four-count Fourth Amended Complaint in which they alleged that defendants Matthew Wildermuth, George Kleanthis, and Legal Modification Network, LLC (LMN) engaged in a course of conduct that violated several statutory and regulatory provisions. Count IV, which is at issue here, alleged that the defendants violated section 3-102(B) of the Illinois Human Rights Act (775 ILCS 5/3-102(B) (2014)), which prohibits a person who engages in a real estate transaction or a real estate broker or salesman from altering the terms, conditions, or privileges of a real estate transaction or in furnishing facilities or services in connection therewith based upon unlawful discrimination.

The circuit court denied the defendants' motion to dismiss Count IV, but certified a question for interlocutory appeal under Supreme Court Rule 308. That question is, "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." Reverse redlining generally involves discrimination by creating barriers to favorable credit treatment for minority group members or extending credit to them on unfair terms. *See Saint-Jean v. Emigrant Mortg. Co.*, 50 F. Supp. 3d 300, 305 (E.D.N.Y. 2014). This is a question that relates to the pleadings. The appellate court affirmed the circuit court.

ISSUE PRESENTED FOR REVIEW

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.

STATUTORY PROVISIONS INVOLVED

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

> 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
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> * * *
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> (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) (2014).

Section 3-101 of the Human Rights Act contains the following definitions:

> * * *
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> (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 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) (2014).

STATEMENT OF FACTS

The People's Complaint

The People filed their original complaint against defendants Wildermuth, Kleanthis, and LMN, on September 27, 2011 (C. 2). The People subsequently filed a four-count Fourth Amended Complaint (C. 1128-1269), which alleged that they had engaged in a course of conduct that violated several statutory and regulatory provisions.

Count I alleged that the defendants violated the Mortgage Fraud Rescue Act (765 ILCS 940/5 (2014)) (C. 1177-81). Count II alleged that they violated section 2 of the Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2 (2014)) (C. 1182-85). Count III alleged that the defendants violated a Federal Trade Commission rule governing mortgage assistance relief providers (12 C.F.R. § 1015.2) (C. 1185-91). Count IV, which is at issue here, alleged that the defendants violated section 3-102(B) of the Human Rights Act (775 ILCS 5/3-102(B) (2014)), which prohibits a person who engages in a real estate transaction or a real estate broker or salesman from altering the terms, conditions, or privileges of a real estate transaction or in furnishing facilities or services in connection therewith based upon unlawful discrimination (C. 1191-93).

The alleged course of conduct underlying these counts was as follows. In 2009, Wildermuth and Kleanthis agreed to form a business enterprise to

offer loan modification services to distressed homeowners (C. 1138). Kleanthis became the sole managing member of LMN, which was incorporated in Nevada in February of that year and registered to do business in Illinois as a foreign corporation (C. 1139). LMN operated out of a Woodridge location, and none of its employees was an attorney, including Kleanthis (*id.*). LMN began to do business with customers in early 2009 (C. 1140).

Although the defendants advertised their loan modification services under the name of Wildermuth's law office, and customers contracted with Wildermuth, consumer intake, processing and follow up were performed originally by LMN staff (C. 1139). In most instances, customers communicated solely with LMN staff about the processing of their loan modification applications (*id.*). In early-to- mid 2010, defendants changed the structure of their business such that all LMN employees became employees of the Wildermuth law office, and contracts with consumers no longer contained any reference to LMN (C. 1140). Despite this change, the defendants continued to operate their loan modification business from LMN's office in Woodridge, and Kleanthis remained involved (C. 1131, 1140).

Initial meetings with consumers generally involved sales pitches in which staff of LMN or Wildermuth's law office would make promises to reduce the consumer's monthly mortgage loan payment by a specific amount within a specific period of time (C. 1141). Consumers who agreed to retain the services

of LMN or Wildermuth were required to fill out several forms, including a service agreement and factual worksheets, and they were led to believe that they would receive refunds if they did not receive loan modifications (C. 1142). Beginning in early to mid-2010, the service agreement was titled "Attorney-Client Retainer Agreement," and it stated that the consumer was engaging the Wildermuth law office to analyze his or her debt situation and provide "[l]egal services to Client in connection with options that may be available in respect to Client's current mortgage obligations." (C. 1142, 1263-69). Those services consisted of "exploring and pursuing" various loss mitigation options including:

> a forbearance agreement, payment moratorium, loan restructure, short sale payoff, deed in lieu of foreclosure transaction, submitting pleadings in opposition to the lender's foreclosure complaint, extending the deadlines in the foreclosure process, opposing or vacating entry of a judgment of foreclosure, obtaining a postponement of any sale of the property, deferral of the lender's post-sale possession of the property or negotiation of a payment to client in exchange for an agreement to surrender possession of the property early[.]

(C. 1263).[1]

Despite the structural changes involving the transfer of employees from LMN to the Wildermuth law office and the signing of a retainer agreement with the law office, the actual services typically provided to consumers

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1 A short sale is a sale of real property for less than the amount of encumbrances on the property with the consent of the lienholders who are willing to accept less than what they are owed. *In re Fabbro*, 411 B.R. 407, 413 n.7 (Bankr. D. Utah 2009).

remained essentially the same as they were before the LMN employees became law firm employees, and Kleanthis remained involved in those services (C. 1131, 1144, 1146). The types of loan modification services that the defendants provided are routinely provided to consumers by non-attorneys, including non-attorneys who are part of a loan modification unit at the Illinois Attorney General's Office (C. 1134, 1146). Those services consisted largely of filling out and submitting applications for loan modifications through the Federal Home Affordable Modification Program (HAMP) (C. 1132-34, 1143).

Eligible borrowers who applied to HAMP could have their monthly mortgage payments reduced to 31% of their gross monthly income through a reduction of the interest rate and an extension of the loan amortization period (C. 1132-33). Basic eligibility requirements included being in default, having a monthly mortgage payment greater than 31% of gross monthly income, having a first lien mortgage secured by a one-to-four-unit property at which the borrower resided, and having a loan that was not owned, issued, insured or guaranteed by the federal government (C. 1132). The worksheets that LMN/Wildermuth consumers filled out sought factual information from them that was necessary for HAMP applications (C. 1131, 1142).

The defendants charged a non-refundable, up-front fee of between $1,495 and $1,995 before they would perform any work for a consumer, and total fees ranged between $3,000 and $5,000 (C. 1143). LMN/Wildermuth

routinely charged the up-front fee on occasions where they were aware that the consumer did not meet the basic eligibility requirements for a HAMP loan modification (C. 1144). When the defendants obtained loan modifications for customers, the terms were often not as good as those promised and the modification often was not obtained within the time frame promised (C. 1145). When loan modifications could not be obtained, the defendants generally suggested the listing of the consumer's property for a short sale (*id.*).

The Fourth Amended Complaint alleged specific examples of consumers who were aggrieved by the defendants' practices (C. 1152-63). One was Soledad Ramirez, who already had received a modification plan from American Service Company (ASC), the company that held her mortgage, on a three-month trial basis when she consulted with the defendants in March 2010 (C. 1153-54). That modification plan reduced Ramirez's monthly mortgage payments from $1,970.55 to $1,310.84 (C. 1153). As long as Ramirez made the required monthly payments on time during the three-month trial period, and her financial circumstances did not change, ASC would have granted Ramirez a permanent modification under the terms of the plan (C. 1153-54).

Ramirez gave the defendants a copy of the plan she had negotiated with ASC (C. 1154). The defendants had Ramirez fill out HAMP worksheets, even though she already had completed and submitted a HAMP application on her own (*id.*). They also had her sign a form that authorized Wildermuth's law

office "to act on [her] behalf to resolve [her] mortgage problems including but not limited [to] modification, forbearance, short sale and assumption," and a limited power of attorney (C. 1257-58).

Although the defendants were aware that they could not provide any services that would enhance Ramirez's chance to receive a permanent loan modification, they had her sign a service agreement that provided for a fee of $1,995 and required her to pay $1,000 immediately, which she did (C. 1154, 1252-53). Defendants did not refund any portion of that amount after she terminated their services because they were unable to assist her (C. 1155).

The Fourth Amended Complaint also alleged specific instances in which the defendants took fees from individual consumers despite being aware that they were ineligible for HAMP modifications for various reasons, and did not refund the fees (C. 1156-63). For example, Diane Hankle was ineligible for a HAMP modification because: 1) she had not defaulted on any mortgage payments, 2) her loan was assured by the Federal Housing Administration, and 3) her monthly mortgage amount did not exceed 31 percent of her gross monthly income, yet LMN advised her to stop paying her mortgage so she would be in default, which Hankle did (C. 1156-58). Hankle's application for a HAMP modification was rejected, and the only loan modification offered by her lender was one that increased her monthly mortgage payment from $1,394 to $1,522.50 in order to make up for the arrearage that accumulated after she

followed LMN's advice and stopped making payments (C. 1157-58). Defendants did not refund any portion of Hankle's $2,995 fee (C. 1158).

Omar Garrido paid an up-front fee of $1,495, which was not refunded, even though Wildermuth was aware that Garrido could not get a HAMP modification because his lending institution did not participate in HAMP (C. 1159-60). LMN and Wildermuth did not refund any portion of this amount (C. 1160). Another consumer, Cassandra Northern, paid Wildermuth $2,995 although Wildermuth was aware that Northern was ineligible for a HAMP modification because her mortgage was insured by the Federal Housing Administration (C. 1160-61). In the end, Northern's lender agreed to a new mortgage that reduced her monthly payment by only $11.52 (C. 1160-63). Wildermuth did not refund any portion of the fee that Northern paid (C. 1163).

As of the time the Fourth Amended Complaint was filed, the Attorney General's Office had received 90 consumer complaints about defendants' practices (C. 1151). Of the 90 complainants, 58 were African-American, 22 were Latino, one was white and the race and national origin of the others was unknown (*id.*).

In Count IV, the People alleged that the defendants targeted African-American and Latino homeowners disproportionately as part of their scheme, and that they violated section 3-102(B) of the Human Rights Act (775 ILCS 5/3-102(B) (2014)), which prohibits a person who engages in a real estate

transaction or a real estate broker or salesman from altering the terms, conditions, or privileges of a real estate transaction or in furnishing facilities or services in connection therewith based upon unlawful discrimination. (C. 1191-92). The defendants targeted Latinos by placing advertisements on three Spanish-language radio stations, La Tremenda (1200 AM), Recuerdo (103.1 FM), and La Calle (106.7 FM) (C. 1146-47). According to Arbitron, a media ratings company, the audience for Recuendo and La Calle is 97% Latino/Hispanic, while La Tremenda's audience is 84% Latino/Hispanic and 15% African-American (C. 1148). The defendants targeted African-Americans in the Chicago area by placing advertisements on a radio station known as Soul 106.3 FM, whose audience was 97% African-American (C. 1148-49).

Soledad Ramirez and Omar Garrido are Latino; Diane Hankle and Cassandra Northern are African-American (C. 1153, 1156, 1159, 1160). Hankle and Northern both heard advertisements for defendants' loan modification services on Soul 106.3 FM, and Garrido heard such an advertisement on La Tremenda (C. 1156, 1159-60). Defendants asked consumers who contracted for their services to fill out marketing surveys identifying how they learned of those services (C. 1147). The only marketing tools identified by the consumers in these surveys were ones that targeted African-Americans and Latinos (*id.*).

Typically, radio hosts on the above stations narrated the defendants'

advertisements, which contained consumer testimonials, and the host mentioned a telephone number where the defendants could be contacted (C. 1149-50). One of those radio hosts, A.C. Green, who is prominent in the African-American community, maintained an office in the same building as defendants and sometimes attended meetings with clients, including Cassandra Northern (C. 1149, 1161).

The Defendants' Motion to Dismiss Count IV

The defendants moved to dismiss Count IV of the Fourth Amended Complaint under section 2-615 of the Code of Civil Procedure and filed a memorandum in support of their motion (C. 1388-91, 1431-50). Among other things, they asserted that Count IV did not state a violation of section 3-102(B) of the Human Rights Act because Wildermuth rendered legal services and was not engaging in real estate transactions as defined in the Act (C. 1389, 1433). They further asserted that Count IV failed to allege facts showing that the defendants treated African-Americans or Hispanics differently than other groups (C. 1390, 1433-34).

The People filed a response to the motion in which they asserted that Count IV stated a cause of action that defendants had violated section 3-102(B) (C. 1557-73). The People asserted that the defendants had engaged in real estate transactions within the meaning of the Human Rights Act when they sought loan modifications and short sales on behalf of consumers (C. 1562-67).

The People also asserted that they had alleged unlawful discrimination under the Human Rights Act through their allegations that the defendants' predatory practices were targeted against African-Americans and Latinos (C. 1567-72). In support of this assertion, the People cited "reverse redlining" cases brought under the federal Fair Housing Act in which federal district courts held that it was not necessary to show disparate treatment or impact when there was evidence that defendants intentionally targeted predatory practices against minorities (C. 1567). The defendants filed a reply in support of their motion to dismiss (C. 1616-29).

The Circuit Court's Ruling

On July 1, 2014, the circuit court denied the motion to dismiss, concluding that defendants functioned as mortgage brokers when they conducted short sale negotiations and sought loan modifications (C. 1644; Transcript, July 1, 2014, at 8). Defendants then filed a motion to reconsider the denial, or in the alternative, to have the circuit court certify a question to the appellate court for interlocutory review under Supreme Court Rule 308 and a supporting memorandum (C. 1656-77). The People filed a response in which they objected to the motion (C. 1727-39), and the defendants submitted a reply (C. 1746-61).

The circuit court denied the motion to reconsider but certified for interlocutory review the following issue: "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." (C. 1775). The court also denied defendants' oral motion for a stay of circuit court proceedings pending the potential appeal (*id.*; Transcript November 19, 2014, at 18-19).

The Appellate Court Decision

The appellate court granted the defendants' application for leave to appeal, and it affirmed the circuit court. *People ex rel. Madigan v. Wildermuth*, 2016 IL App (1st) 143592 (AT App. A3-A20). In distinguishing this case from a federal case relied upon by the defendants, the appellate court stated,

> 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.

Id., ¶ 37 (AT App. A19). The appellate court concluded that reverse redlining "is not strictly limited to situations involving mortgage lending and section 3-102(B) of the Human Rights Act broadly encompasses conduct other than mortgage lending, including the loan modification services that defendants offered." *Id.*, ¶ 38 (AT App. A19-A20). This Court thereafter granted the defendants' petition for leave to appeal.

ARGUMENT

I. The People May Claim Violations Of Section 3-102(B) Of The Human Rights Act By Defendants Even If They Were Not Mortgage Lenders.

A. Introduction and Standard of Review.

The circuit court certified for interlocutory appeal under Supreme Court Rule 308 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." (C. 1775). Reverse redlining generally involves discrimination by creating barriers to favorable credit treatment for minority group members or extending credit to them on unfair terms. *See Saint-Jean v. Emigrant Mortg. Co.*, 50 F. Supp. 3d 300, 305 (E.D.N.Y. 2014).[2] To prevail on a reverse redlining theory, the plaintiff must show: (1) that the defendants' practices were predatory and unfair; and (2) either that the defendants intentionally targeted the plaintiff because of his race, ethnicity or gender or that their practices had a disparate impact on members of the plaintiff's race, ethnicity or gender. *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757, 767-68 (Pa. Commw. Ct. 2005).

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2 Redlining is a practice of excluding minority neighborhoods from areas in which banks would invest or offer certain financial products and services. *Saint-Jean*, 50 F. Supp. 3d at 304-05. The term was derived from the fact that red lines were sometimes literally drawn around areas on maps to indicate the excluded areas. *Id.*

The *de novo* standard of review applies to questions of law certified under Rule 308. *Simmons v. Homatas*, 236 Ill. 2d 459, 466 (2010). Although the court generally reviews only the certified question, it also may review the propriety of the circuit court order that gave rise to the certified question if this serves the interests of judicial economy or is necessary to reach an equitable result. *Id.*; *see also Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 153 (2007). Here, the defendants additionally ask this Court to review and reverse the circuit court's order denying their motion to dismiss Count IV pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (2014)) (AT Br. 37). If this Court reaches that issue, the *de novo* standard still applies because it is the appropriate standard of review for rulings on motions to dismiss. *See Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 78.

B. Under The Facts Alleged In Count IV, The Defendants Violated Section 3-102(B) Of The Human Rights Act By Directing Predatory Practices Relating To Real Estate Transactions Against African-Americans And Latinos.

The appellate court correctly concluded that 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." (AT App. A19-A20). Accordingly, Count IV states a cause of action for violations of section 3-102(B) of the Human Rights Act (775 ILCS 5/3-102(B) (2014)), through allegations of defendants' predatory practices that were targeted at

African-Americans and Latinos (C. 1191-93). Because section 3-102(B) encompasses conduct other than mortgage lending, including the services that defendants offered, the answer to the circuit court's certified question is yes.

If this Court chooses to review the order denying defendants' to dismiss count IV under section 2-615 and not merely the certified question *(see Simmons*, 236 Ill. 2d at 466; *Townsend*, 227 Ill. 2d at 153), the result is the same. A section 2-615 motion contests the legal sufficiency of a complaint based upon alleged facial defects. *McLeary v. Wells Fargo Sec., L.L.C.*, 2015 IL App (1st) 141287, ¶ 14. In resolving a section 2-615 motion, the circuit court should "take all well-pled facts as true, draw all reasonable inferences from those facts in favor of the plaintiff and determine whether the allegations, construed in a light most favorable to plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* The court should deny a section 2-615 motion unless it is clear that the plaintiff cannot prove any set of facts that will warrant recovery. *Id.*

As the appellate court stated, the People 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." *People ex rel. Madigan v. Wildermuth*, 2016 IL App (1st) 143592, ¶ 37 (AT App. 19). The appellate court correctly concluded that these and other allegations of count IV stated a cause of action under section 3-102(B).

Section 3-102(B) states as follows:

> 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
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> * * *
>
> (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) (2014). In construing section 3-102(B), this Court's most important objective is to determine and effectuate the legislature's intent. *See Brucker v. Mercola*, 227 Ill. 2d 502, 513 (2007). A court should give effect to clear and unambiguous statutory language, but if the relevant statutory language is ambiguous, meaning that there is more than one reasonable interpretation, the court may look to other methods of statutory construction. *Id.* at 513-14. These include the purpose of the statute, the problems that the legislature sought to remedy, and the goals that the legislature sought to achieve in enacting the law. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003). Words and phrases in the statute should be construed in light of other relevant provisions and not in isolation. *Brucker*, 227 Ill. 2d at 514. Further, like other portions of the Human Rights Act, section 3-102 should be

construed liberally to effectuate the Act's purpose of combating discriminatory practices, including such practices in real estate transactions and other areas that affect home ownership. *See* 775 ILCS 5/1-102(A) (2014); *Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Human Rights Comm'n*, 88 Ill. 2d 22, 26 (1981); *Arlington Park Race Track Corp. v. Human Rights Comm'n,* 199 Ill. App. 3d 517, 520 (1st Dist. 1990).

The language of section 3-102(B) suggests that a two-step analysis is necessary in determining whether the People alleged violations of that provision in Count IV. The first step is to determine whether the defendant held a status set forth at the beginning of section 3-102, which includes owners or other persons engaged in real estate transactions and real estate brokers and salesmen. The second step is to determine whether the defendant engaged in conduct that section 3-102(B) prohibits. If this Court limits itself to resolving the question certified by the circuit court and does not go on to resolve whether Count IV states a cause of action, it does not need to undertake the second step because the language of section 3-102(B) and other Human Rights Act provisions demonstrates that section 3-102(B) encompasses more than mortgage lenders.

Here, the defendants held two of the statuses set forth at the beginning of section 3-102. First, they were engaged in real estate transactions within the meaning of section 3-102 because they provided financial assistance to

distressed homeowners. Second, they were real estate brokers within the meaning of that provision.

1. The Defendants Were Persons Engaged In Real Estate Transactions Within The Meaning Of Section 3-102 Because They Provided Financial Assistance To Distressed Homeowners.

The appellate court correctly concluded that the defendants were persons engaged in real estate transactions within the meaning of section 3-102 because they provided financial assistance to distressed homeowners. *Wildermuth*, 2016 IL App (1st) 143592, ¶¶ 25-31 (AT App., A13-A16). The Act's definition of "real estate transaction" includes "the making or purchasing of loans or providing other financial assistance." 775 ILCS 5/3-101(B) (2014). Accordingly, defendants held a status set forth at the outset of section 3-102 because they were engaged in real estate transactions within the meaning of section 3-102(B) when they provided such financial assistance.

In concluding that defendants provided financial assistance to distressed homeowners within the meaning of section 3-102(B), the appellate court relied in part on cases interpreting the federal Fair Housing Act (FHA), 42 U.S.C. §§ 3604, 3605, which contains language similar to that found in sections 3-101 and 3-102 of the Human Rights Act. *Wildermuth*, 2016 IL App (1st) 143592, ¶¶ 28-31 (AT App. A14-A16). Section 804(b) of the FHA bars discrimination in the terms or conditions of the sale or rental of a dwelling "or in the provision of services or facilities in connection therewith" (42 U.S.C. § 3604(b)). And

section 805(a) of the FHA makes it "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[.]" 42 U.S.C. § 3605(a). Section 805(b)(1) defines "residential real estate transactions" as including "the making and purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling; or . . . secured by residential real estate." 42 U.S.C. § 3605(b)(1).

In one case relied upon by the appellate court, a federal district court held that the plaintiffs had pleaded a cause of action under section 805 of the FHA against defendant United States Mortgage Reduction Company (USMR) even though USMR was not a mortgage lender, banker, mortgage arranger or creditor. *See Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862, 887-89 (N.D. Ohio 2001). The plaintiffs in *Eva* alleged that the defendants, including USMR, violated the FHA and other federal statutes in connection with a mortgage refinancing scheme. *Id.* at 870-71. Another entity provided the loans to refinance the plaintiffs' mortgages, and USMR managed an Equity Acceleration Program (EAP) for collection of payments under which one extra mortgage payment per year was drawn from the mortgagor's checking account. *Id.* at 879, 889. The plaintiffs alleged that they were charged dramatically

higher interest rates and fees than were originally promised, and that their unnecessary enrollment in the EAP managed by USMR enabled defendants to generate additional fees and to misrepresent the terms of the loans through the EAP's disclosures. *Id.* at 879.

The district court held that the plaintiffs stated claims against USMR under section 805 of the FHA because they provided "other financial assistance for maintaining a dwelling" within the meaning of that provision by managing the EAP. *Eva*, 143 F. Supp. 2d at 889. The court rejected USMR's argument that section 805 was inapplicable because USMR was not a mortgage lender, banker, mortgage arranger or creditor, and stated that the plain language of the statute did not require a defendant to be any of those things. *Id.*

Similarly, this Court should reject defendants' argument that section 3-102(B) applies only to mortgage lenders, brokers or appraisers who had the ability to affect the terms upon which credit was extended to the borrower (AT Br. 27). Section 3-102(B) is more expansive and inclusive than the defendants suggest. Under its plain terms, section 3-102(B) applies to "an owner or any other person engaging in a real estate transaction" and to "a real estate broker or salesman." 775 ILCS 5/3-102(B) (2014). And section 3-101(B) defines "real estate transaction" broadly, to include "the sale, exchange, rental or lease of real property" as well as "the brokering or appraising of residential real

property and the making or purchasing of loans or providing other financial assistance." 775 ILCS 5/3-101(B) (2014).

The "other financial assistance" language should be construed liberally like other parts of the Human Rights Act. *See Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 88 Ill. 2d at 26. The *Eva* court construed the same language in section 805 of the FHA as applying to USMR's management of the EAP even though USMR was not acting as a mortgage lender, mortgage broker or appraiser. 143 F. Supp. 2d at 889. Another federal court held that sections 804 and 805 of the FHA applied to a quasi-public agency whose approval was necessary to secure conduit tax-exempt bond financing for real estate projects, even though the agency did not provide the actual financing. *See United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 27-29 (D. Mass 1996). In so holding, the court found that the agency was "integrally involved" in real estate transactions and that "the conduit bond financing agency makes housing unavailable no less than other actors with the power to block the sale or rental of housing." *Id.* at 27-28; *see also Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1358-60 (6th Cir. 1997) (holding that section 804 of FHA applies to providers of property or hazard insurance for homes because unavailability of such insurance tends to make housing unavailable).

Similarly, here, the appellate court observed that the defendants' alleged conduct "interfered with consumers' ability to obtain a particular type

of financial assistance--residential loan modification--for maintaining their homes against the risk of foreclosure." *Wildermuth*, 2016 IL App (1st) 143592, ¶ 27 (AT App. A13). This alleged conduct included making unreasonable assurances to consumers about the likelihood of success in obtaining a mortgage loan modification and charging them substantial amounts for services of little or no value. *Id.*; (AT App. A13). Like the conduct in *Mass. Indus. Fin. Agency,* defendants' alleged actions tended to make housing unavailable to distressed homeowners as they were charged substantial amounts that they could ill afford for services worth little or nothing, thus placing them at greater risk of losing their homes.

In light of the expansive language of section 3-102(B), the answer to the question certified by the trial court is clearly yes, because that provision encompasses more than mortgage lenders. And if this Court goes beyond the certified question, it should conclude that count IV states a cause of action under section 3-102(B) because the defendants were offering "financial assistance" in relation to real estate within the meaning of section 3-101(B).

2. In The Alternative, Defendants Held A Status Set Forth In Section 3-102(B) Because They Were Real Estate Brokers Or Salesmen Within The Meaning Of Section 3-101(D) Of The Human Rights Act.

In the alternative, the defendants held a second status set forth in section 3-102(B) because, under the allegations of the People's Fourth Amended Complaint, which must be taken as true for purposes of a motion to

dismiss, they were "real estate brokers" within the meaning of the Human Rights Act. Section 3-101(D) of that Act defines a "[r]eal estate broker or salesman" as "a person, whether licensed or not, who, for or with the expectation of 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(D) (2014).

According to the People's Fourth Amended Complaint and attached exhibits, the defendants held themselves out as negotiating modifications of mortgage loans and short sales (C. 1138, 1141-42, 1257, 1263). The agreement customers signed with the Wildermuth Law Firm stated that it would pursue various loss mitigation options including "loan restructure" and "short sale payoff" (C. 1263). Soledad Ramirez signed a form that authorized Wildermuth's law office "to act on [her] behalf to resolve [her] mortgage problems including but not limited [to] modification, forbearance, short sale and assumption" (C. 1257-58). Furthermore, the Fourth Amended Complaint alleged that, when the defendants could not obtain loan modifications, they generally suggested the listing of the consumer's property for a short sale (C. 1145).

A short sale is a sale of real property for less than the amount of encumbrances on the property with the consent of the lienholders who are

willing to accept less than what they are owed. *In re Fabbro*, 411 B.R. 407, 413 n.7 (Bankr. D. Utah 2009). According to the People's allegations, defendants held themselves out as negotiating short sales on their clients' behalf (C. 1191). This places them squarely within the Human Rights Act's definition of "real estate broker," which encompasses those who negotiate sales of real property or hold themselves out as doing so. 775 ILCS 5/3-101(D) (2014).

Defendants' actions in helping to procure loan modification agreements also place them within the Human Rights Act's definition of "real estate broker." As Illinois courts have noted, mortgages convey interests in real property to the mortgage lender in order to secure debts created by mortgage loans. *See Wolkenstein v. Slonim*, 355 Ill. 306, 309 (1934); *In re Application of Busse*, 124 Ill. App. 3d 433, 440 (1st Dist. 1984). Thus, defendants negotiated sales of interests in real property when they negotiated loan modification deals, which also places them squarely within the definition of "real estate broker" in section 3-101(D).

With respect to the certified question, the above analysis also demonstrates that the defendants can be held liable under section 3-102(B) even if they were not mortgage lenders because there is no language in section 3-102(B) limiting its application to mortgage lenders. *See McGlawn*, 891 A. 2d 757, 766-68 (upholding Pennsylvania Human Relations Commission decision that corporation engaging in business of brokering mortgage loans violated the

state Human Relations Act by targeting African-Americans for predatory practices even though corporation was not a mortgage lender). The defendants fit within the Human Rights Act's definition of "real estate brokers" so they may be held liable under section 3-102(B) even if they were not mortgage lenders. This Court can affirm the appellate court's conclusion that defendants held a status set forth in section 3-102(B) on this basis even though the appellate court did not rely on it. *See Material Service Corp v. Dep't of Revenue*, 98 Ill. 2d 382, 387 (1983).

3. Count IV States A Cause Of Action That The Defendants Violated Section 3-102(B) Through Their Predatory Practices With Regard To The Services They Offered To Distressed Homeowners And By Targeting African-Americans And Latinos.

The conduct alleged in Count IV states a cause of action for violations of section 3-102(B) . According to the allegations of the Fourth Amended Complaint, the defendants engaged in predatory practices by charging distressed homeowners substantial amounts for "services" that had little or no value (C. 1152-63). And they targeted African-American and Latino homeowners in advertising and soliciting those services (C. 1146-49). These allegations stated a cause of action for violating section 3-102(B).

As explained above, defendants were engaged in real estate transactions within the meaning of section 3-102(B) because of the financial assistance they offered to distressed homeowners and because they were real estate brokers

within the meaning of section 3-101(B). Further, according to the allegations of the Count IV, the defendants offered those services in a manner that constituted unlawful discrimination under section 3-102(B). This is so because they engaged in predatory practices that were targeted against African-Americans and Latinos.

As noted above, section 3-102(B) prohibits a real estate broker or a person engaged in a real estate transaction from altering "the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith" because of discrimination. 775 ILCS 5/3-102(B) (2014). Similar language in section 804 of the FHA bars discrimination in the terms or conditions of the sale or rental of a dwelling "or in the provision of services or facilities in connection therewith" (42 U.S.C. § 3604(b)), and that language has been broadly construed. *See Beard v. Worldwide Mortg. Corp.*, 354 F. Supp. 2d 789, 808 (W.D. Tenn. 2005) (holding settlement agent and notary potentially liable under FHA for targeting African-American homeowners for fraudulent services in connection with real estate transactions).

The defendants targeted African-American and Latino consumers by placing advertisements on radio stations whose audiences were overwhelmingly Latino and/or African-American (C. 1146-48). A prominent African-American radio host on one of those stations sometimes sat in on

meetings with defendants' customers (C. 1146, 1161). The defendants asked consumers who contracted for their services to fill out marketing surveys identifying how they learned of defendants' services (C. 1147). The only marketing tools identified by consumers in these surveys were ones that targeted African-Americans and Latinos (*id.*).

Furthermore, the defendants charged substantial fees for services that often had little or no value. Their services consisted largely of gathering information from consumers and filling out applications on their behalf for HAMP, a program that allowed eligible borrowers to have their monthly mortgage payments reduced to 31% of their gross monthly income through a reduction of the interest rate and an extension of the loan amortization period (C. 1132-34, 1143, 1263). The defendants charged a non-refundable, upfront fee of between $1,495 and $1,995 before they performed any work for a consumer, and total fees ranged between $3,000 and $5,000 (C. 1143).

LMN/Wildermuth routinely charged the up-front fee on occasions where they were aware that the consumer did not meet the basic eligibility requirements for a HAMP loan modification, as was the case with Diane Hankle, Omar Garrido, and Cassandra Northern, and it did not refund the fee even under these circumstances (C. 1144, 1156-61). The defendants collected the up-front fee from Soledad Ramirez even though they were aware that she had already received a modification plan from the company that held her

mortgage on a three-month trial basis when she consulted with the defendants in March 2010, and they could do nothing to enhance her chances of receiving a permanent modification plan from that company (C. 1153-54).

Additionally, when the defendants obtained loan modifications for customers, the terms were often not as good as had been promised and the modification often was not obtained within the time frame promised (C. 1145). This Court should conclude that defendants' alleged conduct violates section 3-102(B) because they engaged in predatory practices by charging distressed homeowners substantial amounts for "services" that had little or no value (C. 1152-63), and they engaged in discrimination by targeting African-American and Latino homeowners in advertising and soliciting those services (C. 1146-49). *See McGlawn*, 891 A.2d at 766-68. In fact, of the 81 individuals who complained to the Attorney General's Office about the defendants' practices and whose race or ethnicity was known, 80 were either African-American or Latino (C. 1151).

These allegations of targeting African-Americans and Latinos for predatory practices state a cause of action under section 3-102(B) even though the People did not explicitly allege that the defendants offered more favorable terms to others. Courts in other jurisdictions have repeatedly held that evidence that a defendant targeted predatory practices regarding housing against members of a particular race or ethnic group was sufficient to establish

unlawful discrimination under the FHA and similar state housing discrimination statutes, thereby rendering it unnecessary to establish that members of other groups were treated differently. *See Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887 (S.D. Ohio 2002) (allegations that defendant targeted single elderly females for predatory loans sufficient to withstand motion to dismiss); *Hargraves v. Capital City Mortg. Corp*, 140 F. Supp. 2d 7, 20-22 (D.D.C. 2000) (relying in part on evidence that defendants had targeted African-Americans in denying summary judgment on FHA claim); *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 888, 892 (N.D. Ill. 2000) (holding real estate agency potentially liable under FHA for reverse redlining for allegedly targeting African-American home buyers with predatory sales practices); *McGlawn*, 891 A.2d at 772-73.

The respondent mortgage broker in *McGlawn* targeted African-Americans for its predatory practices through advertising. *Id.* at 772-73. The broker asserted that the complainants had failed to show discrimination because they did not present evidence that the broker had made loans to non-African-Americans on more favorable terms. *Id.* at 773. In rejecting this argument and holding that the evidence of targeting constituted sufficient evidence of discrimination, the *McGlawn* court stated that such an "injustice cannot be permitted because it is visited exclusively upon African-Americans." *Id.*

Similarly, the defendants in this case targeted African-Americans and Latinos for their predatory practices primarily through advertising on radio stations whose audiences were mostly African-American or Latino. The People's allegations of such targeting are sufficient, and it was not necessary to allege that the defendants offered more favorable terms for their services to non-African Americans and non-Latinos to state a claim under section 3-102(B), especially in light of the liberal construction afforded provisions of the Human Rights Act to facilitate fulfillment of its purpose of combating discriminatory practices in real estate transactions and in other areas. *See* 775 ILCS 5/1-102(A) (2014); *Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 88 Ill. 2d at 26; *Arlington Park Race Track Corp.*, 199 Ill. App. 3d at 520.

This is so even if defendants' conduct does not fall within some courts' definition of reverse redlining. Some courts define reverse redlining as applying to the extension of credit to consumers in residential real estate transactions. *See, e.g., Hargraves*, 140 F. Supp. 2d at 18. But other courts have held that defendants can be held liable under the FHA for reverse redlining or "targeting" even when they did not extend credit to consumers. *See Martinez v. Freedom Mortg. Team, Inc.*, 527 F. Supp. 2d 827, 833-34 (N.D. Ill. 2007) (holding mortgage broker potentially liable under FHA for targeting Hispanic home buyers to receive higher interest rates from lenders); *Beard*, 354 F. Supp. 2d at 795-96, 808-09.

Section 3-102(B) of the Human Rights Act has broader application than section 805 of the FHA because section 3-102(B) applies to those who furnish "facilities or services in connection" with real estate transactions, and the defendants did so through activities such as helping distressed homeowners obtain loan modifications. 775 ILCS 5/3-102(B) (2014). Thus, section 3-102(B) extends liability for reverse redlining to the alleged conduct of defendants even if it would not constitute reverse redlining under the narrower definition of the term in some of the cases cited by defendants (AT Br. 23).

For the above reasons, Count IV stated a cause of action against the defendants under section 3-102(B).

II. The Appellate Court's Interpretation Of The Relevant Human Rights Act Provisions Does Not Create Separation-Of-Powers Concerns.

For several reasons, this Court should reject Wildermuth's assertion that attorneys are not subject to the Human Rights Act for the type of discriminatory conduct alleged here because this Court can discipline them for such conduct (AT Br. 32-36). First, Wildermuth forfeited this contention by failing to raise it in the circuit or appellate courts. *See State ex rel. Pusateri v. People's Gas Light & Coke Co.*, 2014 IL 116844, ¶ 22 (issues not raised below are forfeited); *City of Champaign v. Torres*, 214 Ill. 2d 234, 240 n.1 (2005) (same). Second, this issue was not certified by the circuit court for review. *See Simmons*, 236 Ill. 2d at 466 (court will ordinarily address only issues certified

for review in interlocutory appeal under Supreme Court Rule 308). Finally, if this Court nonetheless chooses to address the argument, it lacks merit because civil liability against Wildermuth would not raise any separation-of-powers concerns. In other words, Wildermuth's status as an attorney does not shield him from potential liability under the Human Rights Act.

The separation-of-powers clause states: "The legislative, executive and judicial branches are separate. No branch shall exercise powers belonging to another." Ill. Const., art. II, § 1 (1970). The purpose of the clause "is to ensure that the whole power of two or more branches of government shall not reside in the same hands." *People v. Walker*, 119 Ill. 2d 465, 473 (1988). The clause does not require a complete divorce among the three branches of government, but instead contemplates a government of separate branches having certain shared or overlapping powers. *Id.*

This Court has exclusive authority to regulate the practice of law in Illinois (*see In re Mitan*, 119 Ill. 2d 229, 246 (1987)), but subjecting Wildermuth to potential liability under the Act does not interfere with that authority. Courts in Illinois and other jurisdictions have repeatedly held that laws of general applicability do not improperly intrude upon the judiciary's authority to regulate the practice of law merely because they might have an impact upon attorneys. *See Kavanagh v. Cty. of Will*, 293 Ill. App. 3d 880, 885 (3d Dist. 1997) (upholding county ordinance governing lobbyists); *see also*

Ortiz v. Taxation and Revenue Dep't, 124 N.M. 677, 680 (1998) (upholding revolving door ethics statute applicable to certain public employees, including attorneys); *Midboe v. Comm'n on Ethics for Pub. Emps.*, 446 So. 2d 351, 358-59 (La. 1994) (same); *Howard v. State Comm'n on Ethics*, 421 So. 2d 37, 39 (Fla. Dist. Ct. App. 1982) (same); *but see Shalius v. Pa. State Ethics Comm'n*, 574 Pa. 680, 695 (2003) (holding revolving door provision unconstitutional over dissent because it targeted attorneys).

In upholding a county ordinance regulating lobbyists, the *Kavanagh* court stated that the ordinance "is not aimed at the activities of lawyer-lobbyists and does not attempt to punish them for misconduct in their role as lawyers; rather, it seeks to further the public interest by regulating the activities of all lobbyists in Will County." 293 Ill. App. 3d at 303. And, in *Clark v. Ill. Human Rights Comm'n*, 312 Ill. App. 3d 582 (1st Dist. 2000), where a former employee brought an employment discrimination claim against a law firm under the Human Rights Act, the appellate court did not mention any potential interference with this Court's authority to regulate the practice of law.

Similarly, the Act's housing provisions are not aimed at lawyers; instead they apply broadly to real estate owners and other persons who engage in real estate transactions, and real estate brokers and salesmen. 775 ILCS 5/3-102(B) (2014). Accordingly, those provisions do not interfere with this Court's

authority to regulate the practice of law.

Additionally, the principal allegations of misconduct in the People's Fourth Amended Complaint do not involve the practice of law. Instead, they involve alleged predatory conduct by a loan modification business that generally engaged in the routine tasks of gathering information from customers and filling out and submitting HAMP loan modification applications for them (C. 1132-34, 1143). As alleged by the People, the types of loan modification services that the defendants provided are routinely provided to consumers by non-attorneys, including non-attorneys who are part of a loan modification unit at the Illinois Attorney General's Office (C. 1134, 1146). These services do "not require the skill peculiar to one trained and experienced in the law." *See Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 121 (1966) (holding that real estate brokers were not engaged in unauthorized practice of law when they filled in blanks on sale forms or offers to purchase).

For the above reasons, this Court should reject the defendants' separation-of-powers argument if it reaches that argument.

CONCLUSION

If this Court chooses to address only the question certified by the circuit court, it should answer the question in the affirmative and hold that the People may claim a violation under the Illinois Human Rights Act pursuant to a reverse redlining theory even if they did not allege that the defendant acted as a mortgage lender. In the alternative, the People ask this Court to affirm the circuit court's order denying the defendants' motion to dismiss count IV.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rule 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 thirty-seven pages.

John Schmidt