UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1327

September Term, 2014

MARYLAND COMMISSIONER OF FINANCIAL REGULATION

v.

BROWN, BROWN, & BROWN, P.C., ET AL.

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*Zarnoch,
Wright,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: October 23, 2015

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

This case concerns whether the definition of a "credit services business" in the Maryland Credit Services Businesses Act extends to lawyers who represent consumers in negotiating home-loan modifications with mortgage lenders. The Commissioner of Financial Regulation concluded that it does. On a petition for judicial review of the Commissioner's decision, the Circuit Court for Baltimore City disagreed. The Commissioner appealed. We affirm the circuit court.

QUESTIONS PRESENTED

The Commissioner presents two questions, which we have rephrased as follows:

I. Did the Commissioner correctly hold that an attorney attempting, or agreeing to attempt, to obtain modifications of clients' home loans, is a "credit services business" under the Maryland Credit Services Businesses Act?

II. Did the Commissioner correctly determine, based on substantial evidence in the record, that appellees violated the Maryland Credit Services Business Act when they entered into agreements to provide loan modification services for Maryland residents, subsequently breached those agreements, and accepted payments of up-front fees to perform services that they never performed?[1]

[1] The Commissioner phrased his questions as follows:

1. Did the Commissioner correctly hold that persons offering, providing, or entering into agreements to provide third party loan services to Maryland residents were subject to the Maryland Credit Services Businesses Act during the time period at issue in this case?

2. Did the Commissioner correctly determine, based on substantial evidence in the record, that appellees violated the Maryland Credit Services Business Act when they entered into agreements to provide loan modification services for Maryland residents, subsequently breached those agreements, and accepted payments of up-front fees to perform services that they never performed?

Because we disagree with the Commissioner's interpretation of the Act, we answer the first question in the negative. In view of our answer to the first question, it is unnecessary to address the second.

FACTUAL AND PROCEDURAL HISTORY

The Maryland Credit Services Businesses Act (the "MCSBA") regulates "credit services businesses." Md. Code (1975, 2013 Repl. Vol.), §§ 14-1901 to -1916 of the Commercial Law Article ("CL"). The term "credit services business" includes "any person who, with respect to the extension of credit by others," represents that he or she "can or will sell, provide, or perform, any of the following services[:] . . . (ii) [o]btaining an extension of credit for a consumer[,] or (iii) [p]roviding advice or assistance to a consumer with regard to . . . [obtaining an extension of credit for a consumer]." CL § 14-1901(e)(1). An "extension of credit" means "the right to defer payment of debt or to incur debt and defer its payment, offered or granted primarily for personal, family, or household purposes." CL § 14-1901(f).

If a business meets the definition of a "credit services business," the MCSBA requires, among many other things, that the business be licensed (CL § 14-1902(1)), that it collect fees only after the full and complete performance of the services that it agreed to perform (*id.*, § 14-1902(6)), that it obtain a surety bond (*id.*, § 14-1908) from a company that is authorized to do business in Maryland (*id.*, § 14-1909), and that it provide its customers with a written "information statement" (*id.*, § 14-1904 to -1905) and a written contract. *Id.* § 14-1906.

The "information statement" must disclose the services to be performed and the total cost (*id.*, § 14-1905(a)(5)), as well as an abundance of information concerning the consumer's rights with respect to the "consumer reporting agenc[ies]" that prepare and sell credit reports. *Id.*, § 14-1905(a)(1)-(4), (6). Similarly, the written contract must contain, among other things, "a list of the adverse information appearing on the consumer's credit report that the credit services business expects to have modified and the estimated date by which each modification will occur[.]" *Id.*, § 14-1906(a)(3).

The statute exempts "[a]n individual admitted to the Bar of the Court of Appeals of Maryland when the individual renders services within the course and scope of practice by the individual as a lawyer and does not engage in the credit services business on a regular and continuing basis[.]" *Id.*, § 14-1901(e)(3)(vi). By implication, a Maryland attorney is not exempt from the MCSBA if he or she "engag[es] in the credit services business on a regular and continuing basis."

For the events at issue here, we adopt the factual findings of the Office of the Commissioner of Financial Regulations (the "Commissioner").[2] The following facts are relevant to our analysis:

Appellee Brown, Brown, & Brown, P.C. ("BB&B") was a Virginia law firm. The firm's chief counsel and managing partner, appellee Christopher E. Brown, was licensed to practice law only in Virginia and the District of Columbia. At no point did Brown,

[2] The Commissioner adopted the factual findings of the ALJ who conducted the hearing.

BB&B, or anyone employed by or associated with BB&B, acquire or hold a credit services business license.

Between June 2008 and March 2009, BB&B entered into retainer agreements with at least 57 Maryland residents who were in default on their residential mortgage loans. Most of the Maryland residents were native Spanish speakers who spoke little or no English.

During the period from June 2008 through March 2009, BB&B operated exclusively out of a Virginia office, but always employed at least one Maryland-licensed attorney. Only four of the 57 agreements, however, were signed by an attorney who was licensed to practice law in Maryland. Moreover, in discussing conflicts of interest and the attorneys' right to withdraw from the representation, the agreements referred only to the Virginia Rules of Professional Conduct.

The precise language of the retainer agreements varied, but all pertained to "legal services" relating to the delinquent loans on real property. All but one of the 57 agreements stated that BB&B "agree[d] to engage the appropriate party in discussions to renegotiate the terms of [the client's] loan." All but three of the 57 agreements stated that "[i]f negotiations [to modify the loan] are not successful, then BB&B will assess the chances of success in state or federal court and the costs involved and make a decision [about] whether or not pursuing the case in in the best interest of the client." The other three agreements stated that "[i]f negotiations are not successful, BB&B will prepare a foreclosure defense on Client's behalf." The majority of the agreements appeared in English with a parallel Spanish translation, which was described as "poor." None of the

agreements contained the specific language that MCSBA requires credit services businesses to include in their agreements with consumers.

The Maryland clients paid at least $242,000.00 in fees to BB&B. They paid these fees up-front, in amounts ranging from $2500.00 to $7500.00. The fees were deemed to be "earned upon receipt," meaning that the firm immediately deposited them into its operating account and did not hold them in escrow and bill against them.

BB&B did not submit any loan modification packages, attempt to renegotiate the terms of any loans, or obtain any loan modifications for any of the 57 Maryland clients. Instead, BB&B engaged in pre-litigation foreclosure defense maneuvers, requesting documentation from the lenders in the hope that they would miss deadlines and thereby generate some form of leverage for the clients. BB&B and Brown conceded that the retainer agreements did not describe the activities that the firm actually performed. Brown explained that the agreements were "poorly" or "inartfully" worded.

On July 23, 2008, Theresa and Miguel Batres paid $3000.00 and entered into one such agreement with BB&B. In early January 2009, after Ms. Batres had received a notice of intent to foreclose from her lender, she complained to an investigator for the Commissioner.

On February 20, 2009, the Commissioner issued an "Advisory Notice," stating that providers of "loss mitigation consulting, foreclosure prevention, mortgage loan modification, and/or similar services likely will be subject to the MCSBA." On March 6, 2009, the Commissioner sent a summary cease and desist order to BB&B and its affiliated attorneys regarding actions that the Commissioner characterized as "loan

modification, loss mitigation, foreclosure consulting, or similar services." When the remaining Maryland-licensed attorney left BB&B, BB&B discharged its Maryland clients, recommending they retain the services of the departing attorney to complete the work on their cases. BB&B did not offer any refunds, as it "fe[lt its] efforts to date justif[ied] the fees paid . . . thus far."[3]

The Commissioner delegated this case to the Office of Administrative Hearings, which held a hearing on September 28, 2010, and November 4, 2010, and issued a proposed order. In that proposed order, the ALJ recommended that the Commissioner find that BB&B and Brown had violated the MCSBA, impose a statutory penalty in the amount of $114,000.00, order them to cease and desist from further violations, and require them to pay a monetary award totaling three times the amount of fees that they collected from the Maryland clients. *See* CL § 14-1912(a)(2) (authorizing "[a] monetary award equal to 3 times the total amount collected from the consumer" in case of willful non-compliance with the MCSBA).

After an exceptions hearing, the Commissioner issued an opinion and a final order on March 26, 2013. The Commissioner ordered BB&B and Brown to pay $114,000.00 in statutory penalties and ordered a monetary award of $720,600.00, representing three times the amount that they collected from the Maryland clients. The Commissioner explicitly voided "all retainer agreements in this case."

[3] In explaining why it was entitled to fees despite its lack of success in obtaining loan modifications, BB&B blamed its "lack of success in certain jurisdictions" on "the judge assigned there to handle the foreclosure cases."

On April 26, 2013, BB&B and Brown filed a petition for judicial review in the Circuit Court for Baltimore City. The circuit court reversed the Commissioner's decision, based, in large part, on the Court of Appeals' decision in *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128 (2012), another case concerning the definition of the term "credit services business" in the MCSBA. The Commissioner filed this timely appeal.

STANDARD OF REVIEW

"Generally, in an appeal from judicial review of an agency action, we review the agency's decision directly, not the decision of the circuit court[.]" *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297 (2015) (citing *Cosby v. Dep't of Human Res.*, 425 Md. 629, 637 (2012)). If the agency's decision was based on an erroneous conclusion of law, we may independently "decide the correctness of the agency's conclusions and [] substitute [our] judgment for that of the agency[]." *Charles Cnty. Dep't of Soc. Servs. v. Vann*, 382 Md. 286, 295 (2004). It is "always within our prerogative to determine whether an agency's conclusions of law are correct." *Crofton Convalescent Ctr. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 215 (2010) (internal quotation marks and citations omitted).

DISCUSSION

A. Relevant Principles of Statutory Interpretation

At bottom, this case presents an issue of statutory interpretation, which is a question of law that we generally undertake on a *de novo* basis. *Gomez*, 427 Md. at 142. "The cardinal rule of statutory interpretation is to ascertain and effectuate the real and

actual intent of the Legislature." *See*, *e.g.*, *Lockshin v. Semsker*, 412 Md. 257, 274 (2010) (citations omitted).

While statutory interpretation begins with the plain language of the statute, the statutory "'language should not be interpreted in isolation when the statute is part of a larger statutory scheme.'" *Gomez*, 427 Md. at 159 (quoting *Brooks v. Hous. Auth. of Baltimore City*, 411 Md. 603, 622 (2009)). Instead, a court should "analyze the statute as a whole[,] considering the purpose, aim, or policy of the enacting body." *Gomez*, 427 Md. at 159 (internal citations and quotation marks omitted).

"'[I]f the language [of a statute] can be subject to more than one interpretation, or if the terms are ambiguous when part of a larger statutory scheme, we endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, [and] statutory purpose, as well as the structure of the statute.'" *Id.* (quoting *Brooks*, 411 Md. at 621) (internal citation and quotation marks omitted). But "even when we believe that the language of the statute renders legislative intent clear, it is appropriate to examine the legislative history as a confirmatory process." *Id.* at 160.

Finally, "when 'seeking to ascertain legislative intent, [a court] may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable one, or one which is inconsistent with common sense.'" *Id.* at 158-59 (quoting *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75 (1986)).

B. Gomez v. Jackson-Hewitt, Inc.

This is not the first case to have interpreted the meaning of the term "credit services business" in the MCSBA. In *Gomez* both this Court and the Court of Appeals invested a great deal of effort in analyzing what is and is not a "credit services business." For that reason, the analysis in this case begins with *Gomez*.

Gomez concerned whether the MCSBA applied to a tax preparer who received payment from a bank for facilitating a consumer's receipt of a "refund anticipation loan" or "RAL," where the tax preparer received no direct payment from the consumer for that service. *Gomez*, 427 Md. at 133. Relying first on the language of the statute and, then, on an extensive review of the legislative history, the Court of Appeals affirmed this Court's conclusion that the MCSBA did not apply. *See id*. at 155; *id.* at 169.

In *Gomez* the tax preparer referred Maryland consumers to a bank, which made short-term loans to the consumers in anticipation of the tax refunds that they expected to receive. From their refunds, the consumers paid exorbitant amounts of interest and fees to the bank. *Id.* at 134 n.4 ("[f]or this marginally quicker access to the consumer's own money, RAL customers pay interest rates that range from 40 to 900 percent"). Although the bank paid the tax preparer for referring the consumers, the preparer did not receive any payment directly from consumers. *See id*. at 133-38.

The Court of Appeals assumed that, in referring the consumers to the bank, the tax preparer "provid[es] advice or assistance to a consumer with regard to . . . [o]btaining an extension of credit for a consumer," within the meaning of § 14-1901(e)(1) of the MCSBA. Nonetheless, the Court said (*id.* at 154) that the tax preparer did not provide

that "advice or assistance" "'*in return* for the payment of money or other valuable consideration.'" (Emphasis in original; quoting CL § 14-1901(e)(1)). The Court explained that, "[i]n the context of the [M]CSBA and § 14-1901(e), 'in return' can reasonably be understood to envision an exchange of assistance for payment between the consumer and the provider of that assistance and to mean that any payment to the credit services business for such assistance in obtaining the extension of credit must come *directly* from *the consumer*." *Id.* (emphasis in original). Because the tax preparer did not receive payment directly from the consumer, the Court reasoned that the tax preparer did not fall within the statutory definition of a "credit services business." *See id.* at 155.

The Commissioner protested that if the General Assembly had intended to exclude "RAL facilitators," like the tax preparer, from coverage under the statute, it could easily have listed them in one of the statute's nine enumerated exceptions. *Id.* at 155. In part of its lengthy refutation of that contention, the Court observed that "many provisions of the [M]SCBA do not logically apply to RAL facilitators." *Id.* at 156. For example, the Court reviewed the required contents of the "information statement" that every credit services business must provide to consumers:

> (1) An accurate statement of the consumer's right to review any file on the consumer maintained by any consumer reporting agency, and the right of the consumer to receive a copy of a consumer report containing all information in that file as provided under the federal Fair Credit Reporting Act (15 U.S.C. § 1681g) and under § 14-1206 of this title;
>
> (2) A statement that a copy of the consumer report containing all information in the consumer's file will be furnished free of charge by the consumer reporting agency if requested by the consumer within 30 days of receiving a notice of a denial of credit as provided under the federal Fair Credit Reporting Act (15 U.S.C. § 1681j) and under § 14-1209 of this title;

> (3) A statement that a nominal charge not to exceed $5 may be imposed on the consumer by the consumer reporting agency for a copy of the consumer report containing all the information in the consumer's file, if the consumer has not been denied credit within 30 days from receipt of the consumer's request;
>
> (4) A complete and accurate statement of the consumer's right to dispute the completeness or accuracy of any item on the consumer contained in any file that is maintained by any consumer reporting agency, as provided under the federal Fair Credit Reporting Act (15 U.S.C. § 1681i) and under § 14-1208 of this title;
>
> (5) A complete and detailed description of the services to be performed by the credit services business for or on behalf of the consumer, and the total amount the consumer will have to pay for the services; and
>
> (6) A statement that accurately reported information may not be permanently removed from the file of a consumer reporting agency.

CL § 14-1905(a)(1)-(6).

"With the exception of [sub]section (5)," the Court wrote, such provisions are more clearly applicable to consumers seeking to improve their credit score." *Gomez*, 427 Md. at 158. Nothing in those provisions contemplated an RAL transaction (*id.*), and it was illogical to suppose that the General Assembly intended the tax preparer to comply with them. *See id.* at 157, 159.

Similarly, the Court reviewed the statutorily required contents of the contract between a consumer and a credit services business, which includes "'a list of the adverse information appearing on the consumer's credit report that the credit services business expects to have modified and the estimated date by which each modification will occur[.]'" *Id.* at 158 (quoting CL § 14-1906(a)(3)). "Certainly," the Court observed, the tax preparer "has no control over the consumer's credit report and has not been engaged

to modify that report." *Id*. The provision did not logically apply to an RAL transaction. *See id.* at 157, 159.

Invoking its ability to consider the consequences of adopting a particular interpretation, the Court pointed out that under the Commissioner's interpretation many mainstream businesses would fall within the purview of the MSCBA. *Id*. at 158-59. The Court specifically cited department stores, electronic retailers, big box retailers, bookstores, gas stations, and clothing retailers as examples of businesses that might become "credit services businesses" under the Commissioner's interpretation, because they may facilitate consumers' access to credit from third-party lenders in exchange for compensation from the lenders. *Id.* at 159. For that reason, the Court concluded that "the most logical reading of the [M]CSBA as a whole is that it was not intended to regulate RAL facilitators who do not receive compensation directly from the consumer." *Id.*

Nonetheless, on the supposition that the Commissioner's contrary interpretation was "not unreasonable" (*id.*), the Court embarked on a lengthy and exhaustive survey of the MCSBA's legislative history from its enactment in 1987 through 2012. The legislative history clearly disclosed that the General Assembly had originally intended the legislation only to address the conduct of "credit repair agencies" that mislead "'consumers to believe that they can offer a "quick fix" to credit problems and rehabilitate poor credit records.'" *Id.* at 160-61 (quoting *Gomez v. Jackson-Hewitt, Inc.*, 198 Md. App. 87, 112 n.4 (2011), *aff'd*, 427 Md. 128 (2012)).

According to the Court, "the 'documents in the bill file make clear that the General Assembly enacted the [M]CSBA in response to concerns about predatory

practices and misleading advertising of "*credit repair organizations*."'" *Id.* at 161 (quoting *Gomez*, 198 Md. App. at 112) (emphasis added by the Court of Appeals). Moreover, "'the General Assembly understood its original 1987 enactment of the [M]CSBA to be for the purpose of regulating *credit repair agencies* who take fees from consumers to improve or extend credit, or to give advice or assistance in such matters.'" *Id.* at 161-62 (quoting *Gomez*, 198 Md. App. at 113) (italicization in original). "'In other words, the legislature sought to regulate those in the business of claiming to offer services to improve a consumer's credit or otherwise extending credit in exchange for a fee paid by consumers . . . particularly those that over[-]promise and mislead consumers[.]'" *Id.* at 162 (quoting *Gomez*, 198 Md. App. at 112).

The Court did not confine its analysis to the initial enactment of the MCSBA in 1987, but looked to the 2001, 2002, and 2010 amendments, "which focus on payday lenders[.]" *Id.* For example, in discussing the 2001 amendments, the Court quoted a letter from the Counsel to the General Assembly, who wrote that the legislation was "'primarily aimed at payday loans,'" and specifically "'at local agents and the role they play in facilitating payday loans and interest rates in excess of those permitted by Maryland law.'" *Id.* at 164. In addition, the Court cited materials associated with the 2002 and 2010 amendments that confirmed that those enactments concerned the abuses associated with payday loans. *Id.* at 165-68.

In view of the amendments to the original 1987 legislation, the Court agreed that "the reach of the [M]CSBA extends beyond ordinary credit repair services." *Id.* at 169. "On the other hand," in view of the post-1987 amendments concerning payday lenders,

the Court stated that "the legislation was clearly industry[-]specific and did not address expressly the issue of direct or indirect payment from the consumer to the RAL facilitator as presented in this case." *Id.* The Court was "not persuaded that such industry-specific legislation indicates the General Assembly's intent to regulate income tax preparers that assist their clients in receiving, through a third-party lender, a RAL, if they do not receive any payment directly from the consumer for that assistance." *Id.*

C. The Implications of Gomez

Although *Gomez* does not dictate the result in this case, it points the way to the correct outcome.

As in *Gomez*, "many provisions of the [M]SCBA do not logically apply to" attorneys who represent consumers in negotiating modifications of their loans. *Id.* at 156. For example, there is no coherent rationale for requiring such an attorney to provide a consumer with:

> [a]n accurate statement of the consumer's right to review any file on the consumer maintained by any consumer reporting agency, and the right of the consumer to receive a copy of a consumer report containing all information in that file as provided under the federal Fair Credit Reporting Act . . . and under [CL § 14-1206];
>
> [a] statement that a copy of the consumer report containing all information in the consumer's file will be furnished free of charge by the consumer reporting agency if requested by the consumer within 30 days of receiving a notice of a denial of credit as provided under the federal Fair Credit Reporting Act . . . and under [CL § 14-1209];
>
> [a] statement that a nominal charge not to exceed $5 may be imposed on the consumer by the consumer reporting agency for a copy of the consumer report containing all the information in the consumer's file, if the consumer has not been denied credit within 30 days from receipt of the consumer's request;

> [a] complete and accurate statement of the consumer's right to dispute the completeness or accuracy of any item on the consumer contained in any file that is maintained by any consumer reporting agency, as provided under the federal Fair Credit Reporting Act . . . and under [CL § 14-1208]; or
>
> [a] statement that accurately reported information may not be permanently removed from the file of a consumer reporting agency.

CL § 14-1905(a)(1)-(4), (6).

Nor is there any coherent rationale for requiring attorneys who represent consumers in negotiating modifications of their loans to include, in their contracts with their clients, "a list of the adverse information appearing on the consumer's credit report that the credit services business expects to have modified and the estimated date by which each modification will occur." CL § 14-1906(a)(3).

These items concern a consumer's rights with respect to a credit report. It makes perfect sense to require a credit repair agency to provide them to a consumer when the consumer hires the agency to improve a credit score or to correct errors in a credit report. By contrast, it makes little sense to require them from the attorneys who represent clients in negotiating modifications of their loans.[4]

[4] The only arguably applicable requirement under § 14-1905 is largely duplicative of Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct. Section 14-1905(a)(5) requires that contracts contain a "complete and detailed description of the services to be performed by the credit services business for or on behalf of the consumer, and the total amount the consumer will have to pay for the services[.]" Rule 1.5(b) generally requires that attorneys communicate, "preferably in writing," about "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible[.]" In the case of a contingency fee, the communication must be in writing. Md. Lawyers' Rule of Prof. Conduct 1.5(c).

Information about the right to review a consumer reporting agency's file, the right to receive a copy of the consumer report containing all information in the file, the right to receive a copy of the report free of charge, the nominal charges that the consumer reporting agency may sometimes impose for a copy of its file, the right to dispute the accuracy or completeness of information in the consumer reporting agency's file, the consumer's rights under the Fair Credit Reporting Act and its Maryland analog, and the adverse information that is to be removed from the consumer report and when it is to be removed, have no obvious bearing on an attorney's engagement to represent clients in negotiations concerning the modification of consumer loans. Because it is illogical and unreasonable to conclude that the General Assembly intended to impose these irrelevant requirements on attorneys, we reject the Commissioner's contention that MSCBA applies to Brown and BB&B. *See Gomez*, 427 Md. at 158-59.[5]

We also disagree with the Commissioner's contention because it would extend his regulatory authority over a broad swath of the legal profession, which is already regulated by the Court of Appeals. Under the Commissioner's interpretation, the MCSBA would not only apply to attorneys like Brown, who represent clients in negotiations concerning

[5] At oral argument, the panel asked counsel for the Commissioner why the General Assembly would require attorneys who represent consumers in negotiating modifications of their loans to make a raft of irrelevant disclosures regarding a client's credit report. Counsel responded that the requirements also apply to persons who facilitate payday loans even though they are similarly irrelevant to that business. We find that response unpersuasive. The General Assembly has targeted payday lenders and made it clear that the MCSBA applies to persons who facilitate payday loans, however irrelevant some of the statute's requirements might be to them. *See* CL § 14-1902(9). We see no point in imposing irrelevant requirements on other businesses by implication or of multiplying the number of irrelevant requirements that the law imposes.

the modification of residential mortgage loans; it would also apply to any attorney who regularly received compensation from a consumer in obtaining an "extension of credit" – *i.e.*, to any attorney who regularly advised consumers about "the right to defer payment of debt or to incur debt and defer its payment[.]" CL § 14-1901(f).

Under this definition, the concept of a "credit services business" would extend to attorneys who regularly represent consumer clients in connection with credit card debt, automobile loans and other consumer debt, unpaid medical bills, past-due alimony or child support, refinancings, excess judgments, etc. Virtually any attorney who regularly consulted with consumer clients about the possibility of bankruptcy would become a "credit services business" under the Commissioner's interpretation.

Under the Commissioner's interpretation, not only would these attorneys be required to make numerous irrelevant disclosures about consumer reporting agencies, but they would also have to post a surety bond (CL § 14-1908) and obtain a license from the Commissioner before they could begin to represent their clients. CL § 14-1902(1). They could receive payment for their services only upon the completion of the engagement (CL § 14-1902(6)), which might not occur until months or even years after they began work. They would have to inform their clients that the clients could "cancel th[e] contract at any time prior to midnight of the third business day after the date of the transaction" (CL § 14-1906(a)(1)), even though under Maryland law a client ordinarily may fire his or her attorney at any time. *See Somuah v. Flachs*, 352 Md. 241, 250-51 (1998). Finally, the Commissioner could exercise the power, as he did in this case, to issue a summary cease and desist order that prohibited the attorneys from representing

their clients and a final order that voids the attorney-client relationship. Just as the Court of Appeals in *Gomez* expressed doubt that the General Assembly intended the MCSBA to apply to many mainstream businesses across Maryland (*Gomez*, 427 Md. at 159), we doubt that the General Assembly intended to authorize the Commissioner to impose the MCSBA's requirements on much of the mainstream of the legal profession.

Finally, the legislative history, as recounted by *Gomez*, refutes the contention that the General Assembly intended the MSCBA to apply to attorneys who represent consumers in negotiations to modify their mortgage loans. "'The General Assembly understood its original 1987 enactment of the [M]CSBA to be for the purpose of regulating *credit repair agencies* who take fees from consumers to improve or extend credit, or to give advice or assistance in such matters." *Gomez*, 427 Md. at 161-62 (quoting *Gomez*, 198 Md. App. at 113). Although "the legislative history of the amendments indicates that the reach of the [M]SCBA extends beyond ordinary credit repair services," to businesses that facilitate payday loans, "the legislation was clearly industry[-]specific[.]" *Gomez*, 427 Md. at 169.

Just as the Court of Appeals was unpersuaded "that such industry-specific legislation indicates the General Assembly's intent to regulate income tax preparers" that are paid by third-party lenders to refer clients who receive RALs (*id.*), we are unpersuaded that the General Assembly, through this same "industry-specific legislation," somehow intended, *sub silentio*, to regulate lawyers who represent clients in negotiating the modification of consumer debt.

We recognize that *Gomez* differs from this case in that Brown and BB&B received compensation from their clients "in return" for their services (CL § 14-1901(e)(1)), while the tax preparer in *Gomez* received no compensation directly from the consumers for referring them to the RAL lender. In our view, however, that difference is not dispositive. The Commissioner's interpretation in this case is illogical because it would impose pointless and irrelevant licensing and disclosure obligations on many attorneys, and it is at odds with the legislative history of the statute, as exhaustively recounted in *Gomez*. We decline to ignore the lengthy portions of the *Gomez* opinion in which the Court of Appeals examined the legislative history of the MCSBA and considered the unreasonableness of imposing its statutory obligations on persons outside the specific industries that the legislature intended to regulate. *Gomez*, 427 Md. at 157-78.

In summary, we hold that the General Assembly did not intend the MCSBA to regulate attorneys representing clients in loan-modification negotiations with mortgage lenders. The application of the MCSBA to attorneys engaged in such practices would run counter to the overall statutory scheme set forth in the MCSBA.

D. The 2013 Amendment to the MSCBA

In 2013, the General Assembly passed the Maryland Mortgage Assistance Relief Services Act (the "MARS Act"). 2013 Maryland Laws Ch. 465 (H.B. 291). The MARS Act created a new category of business, "Mortgage Assistance Relief Services Providers" ("MARS providers"), which were to be regulated in Md. Code (1974, 2010 Repl. Vol.) § 7-509 of the Real Property Article ("RP").

The MARS Act defines the term "[m]ortgage relief service provider" as "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service." RP § 7-501(e)(1) (incorporating 12 C.F.R. § 1015.2). The act also defines the term "mortgage relief services" to include "any service . . . offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with . . . [n]egotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees[.]" RP § 7-501(d) (incorporating 12 C.F.R. § 1015.2). The Commissioner contends that Brown and BB&B qualify as "mortgage relief service providers" under the MARS Act.[6]

Notably, the MARS Act amended CL § 14-1901 to state that a "'Credit services business' does not include . . . *[b]eginning July 1, 2013, a mortgage assistance relief service provider regulated under Title 7, Subtitle 5 of the Real Property Article*." CL § 14-1901 (emphasis added to indicate new language). On the theory that BB&B and Brown would be exempt from the MCSBA "[b]eginning July 1, 2013," the Commissioner contends that they must have been covered under it before July 1, 2013. We disagree.

As previously discussed, the *Gomez* Court gave a thorough account of the legislative history of the MCSBA from its enactment in 1987 through 2012. According

[6] It is not at all clear that the Commissioner is correct: the MARS Act incorporates the provisions of the Code of Federal Regulations concerning "mortgage relief service providers," and those provisions contain expansive exemptions for attorneys. *See* 12 C.F.R. § 1015.7.

to the Court, that history confirmed that the "the legislation was clearly industry[-]specific," *Gomez*, 427 Md. at 160, and that it centered on credit repair agencies and businesses that facilitated payday loans. *See id*. The Commissioner cannot consign that extensive legislative history to an Orwellian memory hole by pointing to the insertion of a single sentence in a subsequent legislative amendment.

After` reviewing the legislative history and hearings on the MARS Act, we conclude the act was designed to align Maryland law with the federal provisions concerning mortgage assistance relief services in "12 CFR § 1015.2 and any subsequent revision of that regulation." *Real Property—Maryland Mortgage Assistance Relief Services Act: Hearing on H.B. 291 before the H. Comm. Environmental Matters*, 2013 Leg., 433rd Sess. ("Committee Hearing").[7] In the General Assembly's own words, the law was

> not intended, and may not be construed, to have any effect on the authority of the Commissioner of Financial Regulation to regulate mortgage assistance relief service providers under Title 14, Subtitle 19 [the MCSBA] of the Commercial Law Article, or on any enforcement actions, including litigation, taken under that authority as it existed and based on actions that occurred before the effective date of this Act.

2013 Maryland Laws Ch. 465 (H.B. 291), § 2.

Both by its own terms and by our independent analysis, the 2013 amendment is irrelevant to our interpretation of the MCSBA's applicability to BB&B and Brown's 2008-2009 activities.

[7] Available online at http://mgahouse.maryland.gov/house/play/d3bb46ff2e99429eb77f0aa028b419f9/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=8255798 (last visited Sept. 15, 2015).

E. Deference to the Commissioner's Interpretation

Despite the courts' interpretations of the MCSBA, the Commissioner contends that his interpretation represents a "consistent policy of the Agency," which should be afforded a certain level of deference. We are not persuaded.

In general, when an agency charged with enforcing a statute already has a "consistent and long-standing" interpretation of the statute, that interpretation is often entitled to deference. *Gomez*, 427 Md. at 170 n.35. As the Court of Appeals held,

> "The consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute's subject matter. The weight given an agency's construction of a statute depends on several factors—[**1.**] the duration and consistency of the administrative practice, [**2.**] the degree to which the agency's construction was made known to the public, and [**3.**] the degree to which the Legislature was aware of the administrative construction when it reenacted the relevant statutory language. Other important considerations include [**4.**] the extent to which the agency engaged in a process of reasoned elaboration in formulating its interpretation and [**5.**] the nature of the process through which the agency arrived at its interpretation, with greater weight placed on those agency interpretations that are the product of adversarial proceedings or formal rules promulgation. An administrative agency's construction of the statute is not entitled to deference, however, when it conflicts with the unambiguous statutory language."

Id. (internal citations and quotation marks omitted) (quoting *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.,* 346 Md. 437, 445-46 (1997)).

Despite the Commissioner's request for deference to a consistent and long-standing policy, he cites no example, from the MCSBA's first 22 years of existence, in which his agency interpreted the term "credit services business" to include persons who assisted consumers in negotiating home-loan modifications, let alone attorneys who

represented clients in those negotiations. As far as we can tell, this interpretation first arose two weeks before the enforcement action began against Brown, when the Commissioner issued an agency advisory that deals with the applicability of the MCSBA to businesses engaged in loan modification. A two-week-old policy does not reflect a consistent or long-standing interpretation.[8]

In addition, the Commissioner cites "enforcement actions against over 160 different persons offering or providing loan modification services for violations of the MCSBA." As an example, the Commissioner cites a January 2011 decision in an uncontested case where a cease and desist order was filed on December 10, 2009, more than ten months *after* the summary order filed in the case at hand. A thorough review of the Commisioner's website shows that the Commission has no record of any enforcement action or consent agreement against *any* credit services business before April 5, 2010, more than a full year after Brown received a summary cease and desist order. A review of the cases involving lawyers, law firms, etc. has uncovered no cease and desist order dating before Brown's.[9]

[8] The Commissioner also cites the testimony of A. Thomas Koehler, a representative of the agency, who stated that it is "the position of the agency that persons offering loan modification services . . . fall[] under the ambit of the [Act]." Nothing in the record suggests the agency held this view before the case at hand.

[9] The Commissioner's website for 2010 contains five enforcement actions (final orders and settlement agreements) against "Credit Services Business[es]" involving organizations with "law," "lawyer," "legal," or "Esq." in the title. (The years 2009, 2008, and 2007 contain no such orders, and the website contains nothing dated 2006 or earlier.) None of those orders shows any enforcement action before the date of Brown's summary order. In the earliest, *In the Matter of 21st Century Legal Services, Inc.*, the (cont.)

The Commissioner has pointed to evidence that the agency interpreted the statute in this manner only after he began investigating Brown's activities. Nothing implicates any of the *Marriott* factors, and we are not persuaded that the Commissioner's is a "long-standing construction . . . entitled to great deference." *Gomez*, 427 Md. at 173 (quoting *Marriott*, 346 Md. at 445). Therefore, we decline to afford the Commissioner's interpretation of the statute any deference.

CONCLUSION

Nothing we have said is an endorsement of methods employed by BB&B and Brown. The findings in this case raise serious questions about the conduct of BB&B and Brown. According to the findings:

Under Brown's management, BB&B collected up-front fees, which it deposited directly into the firm's operating account before performing any work. The retainer agreements with Spanish-speaking clients were "poor translations." BB&B failed to provide the agreed services: eight months after signing the first "foreclosure defense" client, BB&B had not obtained a single settlement or modification offer. Finally, Brown and BB&B may have run afoul of the rules concerning multi-jurisdictional practice.

Commissioner issued a summary order on May 15, 2009, more than two months after the order in Brown's case. In another, *In the Matter of The Selig Law Group, P.C.*, the Commissioner did not issue the order until July 14, 2009, more than four months after the order in Brown's case. In the other three, *In the Matter of Katie Lee Douglas, LLC*, *In the Matter of The Jameson & Sosa Law Group*, and *In the Matter of: Federal Loan Savers, Inc.*, the Commissioner did not issue any orders until more than a year after the order in Brown's case.

Because of these concerns, this Court shall order that the Clerk forward a copy of this opinion to the relevant regulatory bodies in Virginia and Maryland. *See* Rule 2.15 of the Maryland Code of Judicial Conduct.

However, our analysis of the statute reveals only one logically palatable outcome to the case at hand. We hold that neither BB&B nor Brown met the definition of a "credit services business" under the MSCBA.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT. THE CLERK OF THE COURT OF SPECIAL APPEALS SHALL TRANSMIT A COPY OF THIS OPINION TO THE MARYLAND ATTORNEY GRIEVANCE COMMISSION AND THE VIRGINIA STATE BAR ASSOCIATION.