No. 269PA09 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

TRAVIS T. BUMPERS, on behalf of himself and all other persons similarly situated,	)	
Plaintiff-Appellant and -Appellee,	)	From Wake County
	)	No. 01-CVS-11342
v.	)	COA08-1135
COMMUNITY BANK OF NORTHERN VIRGINIA,	)	
Defendant-Appellant and -Appellee.	)	

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AMICI CURIAE BRIEF OF THE
NORTH CAROLINA JUSTICE CENTER AND
CENTER FOR RESPONSIBLE LENDING

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AMICI CURIAE BRIEF OF THE
NORTH CAROLINA JUSTICE CENTER AND
CENTER FOR RESPONSIBLE LENDING

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The North Carolina Justice Center and Center for Responsible Lending respectfully submit this brief as *amici curiae* in support of Plaintiff-Appellee Travis T. Bumpers.

INTERESTS OF *AMICI CURIAE*

A. INTEREST OF THE NORTH CAROLINA JUSTICE CENTER

The North Carolina Justice Center (Justice Center) is a non-profit legal advocacy organization. The mission of the Justice Center is to secure economic justice for disadvantaged persons and communities.

The Justice Center provides legal assistance in civil matters to poor people, including civil matters involving consumer issues. The Justice Center's goal is to ensure justice and fair treatment for all, particularly those whose poverty renders them powerless to demand accountability from the economic marketplace. The Justice Center has advocated on consumer issues before North Carolina state and county agencies, as well as the North Carolina General Assembly; participates in numerous consumer law trainings; and coordinates a state-wide "Fair Lending and Home Defense Project," the purpose of which is to provide legal assistance to low income consumers in cases involving predatory mortgage lending and foreclosure defense. The Justice Center also conducts litigation on behalf of low-income North Carolina consumers in such areas as predatory lending.

B. INTEREST OF THE CENTER FOR RESPONSIBLE LENDING

Amicus curiae Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and

eliminating abusive lending practices pertaining to home mortgages and other consumer loans. Since its founding in 2002, CRL, which is headquartered in Durham, has sought to focus public and policymakers' attention on abusive practices in subprime mortgage lending, including the charging of excessive fees that strip significant wealth from homeowners of modest means. CRL has conducted landmark studies on the impact of predatory lending laws and worked to ensure that consumers, both nationally and in North Carolina, are protected from predatory lending. The organization's policy work has had a strong focus on lending practices in North Carolina, and these efforts have helped North Carolina to have some of the nation's strongest laws restricting abusive lending that have lessened the blow of the current national foreclosure crisis.

CRL is an affiliate of Self-Help, the Durham-based non-profit lender with branches across North Carolina that has provided since its founding in 1980 more than $5 billion in financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources. Self-Help's nearly 30 years of experience in lending to low and moderate-wealth individuals on fair terms with reasonable origination fees provides a practical basis for CRL's policy work.

QUESTIONS PRESENTED

I. Did the trial court err in granting summary judgment to Plaintiff?

STATEMENT OF THE CASE

Amici adopt by reference Plaintiff-Appellee's Statement of the Case. N.C. R. App. P. 28(f).

STATEMENT OF FACTS

Amici adopt by reference Plaintiff-Appellee's Statement of Facts. N.C. R. App. P. 28(f).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO PLAINTIFF.

In its *amicus* brief, the North Carolina Chamber of Commerce ("Chamber") criticizes the trial court's "creation of an 'overcharging' claim under the Unfair and Deceptive Trade Practices Act," claiming that "judicial price regulation" represents bad economic policy and imperils North Carolina's longstanding respect for core constitutional values. Chamber Br. at 2. This argument should be rejected for three reasons. First of all, the Chamber has mischaracterized the trial court's holding. Secondly, the prices for closing services are not the product of a free, competitive market.

Lastly, the holding of the trial court is squarely within the public policy of North Carolina.

A. The North Carolina Chamber Has Mischaracterized the Trial Court's Decision

The Chamber claims that the trial court created an "overcharging" claim under the Unfair and Deceptive Trade Practices Act. Chamber Br. at 2-17. Judge Lewis was absolutely correct to hold that charging Mr. Bumpers $1,180 for closing services was a violation of N.C. Gen. Stat. § 75-1.1. The trial court clearly did not base its ruling solely on the fact that the plaintiff was overcharged for his closing services. There are several additional factors supported by the findings of the trial court and the uncontroverted facts of record that support a conclusion that the provision of "closing services" in this case constitutes an unfair trade practice. Plaintiff's expert witness stated that the "maximum reasonable fee" for the services purportedly provided was $400. The trial court also found, however, that certain of the charges are redundant, and others are duplicative, of other fees either charged by Title America or charged by Community Bank. Some of the fees were for services not performed at all, such as the $225 charge for "settlement or closing" when no actual closing took place. The borrowers, in essence, were charged for services they did not receive. The court also found that Community Bank, which had a

financial relationship with Title America, required plaintiff to use Title America for certain of the closing agent services. Thus, contrary to the Chamber's assertions in its brief, this case does not rest on the fact that the defendant "simply charged an above-market price for the provision of a good or service." Chamber Br. at 17.

B. Closing Services are an Unfairly Expensive Product of a Dysfunctional Market

The Chamber also argues that the trial court's ruling represents "bad economic policy." (Chamber Br. 3). Not only does the above-discussed uncontroverted expert testimony and record evidence fully support Judge Lewis' finding of an unfair trade practice, but it is also bolstered by numerous academic and governmental studies that find closing services providers charge unjustifiably high prices to home loan borrowers. Moreover, these studies find that the market for closing services has substantial structural flaws that render it immune from competitive market pressures.

The Chamber claims, based on its simplistic gloss on macroeconomic theory, that N.C. Gen. Stat. § 75-1.1 should not impose any constraints on prices charged to consumers because consumers are better off when prices are completely left to free market forces. *See* Chamber Br. at 2-5. But this argument is refuted by the North Carolina General Assembly's decision in

enacting N.C. Gen. Stat. § 75-1.1 that free market forces do not provide enough protection to consumers. *See Marshall v. Miller*, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981) (explaining that N.C. Gen. Stat. § 75-1.1 was enacted to overcome the ineffectiveness of common law remedies at stopping consumer abuses). Even more important for purposes of this case, the fact that numerous studies specifically find excesses and market failures in the pricing of closing services refutes the very premise of the claim that Judge Lewis' ruling upsets "free market principles." Chamber Br. at 4. The prices for closing services are not the product of a free, competitive market, and protecting against unfair prices is necessary to correct for this dysfunctional market. *See Legg v. Castruccio*, 642 A.2d 906 (Md. Ct. Spec. App. 1994) (noting Maryland's unfair competition law is intended to apply "to circumstances where the free market had failed").

There is abundant evidence of substantial unfair consumer overcharges for closing services.[1] The United States Department of Housing

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[1] Consistent with Judge Lewis' decision, this brief uses the term "closing services," which includes fees charged for conducting the closing and for services necessary to conduct the closing (such as title searches, title examinations, document review, and document processing). Most of the academic and government studies on the topic, however, use the term "title services" or "title charges" to describe these items. *See, e.g.*, Urban Inst., *A Study of Closing Costs for FHA Mortgages* 88 (2008), *available at* http://www.urban.org/UploadedPDF/411682_fha_mortgages.pdf ("Here 'title charges' include all the fees that are intended to appear in the '1100'

and Urban Development ("HUD"), in a recent rulemaking proceeding, has clearly stated its determination that consumers face substantial abuses in the fees charged for closing services: "[T]here is substantial evidence that the title industry is non-competitive and that title, closing, and other settlement fees can be reduced." U.S. Dep't of Housing & Urban Dev., *RESPA: Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis: Final Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs* 5-78 (2008), *available at* http://www.hud.gov/offices/hsg/ramh/res/impactanalysis.pdf. (hereinafter *RESPA: Regulatory Impact*).[2] Given the non-competitive nature of the closing services industry, "not only do borrowers find it difficult to comparison shop in today's mortgage

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series (lines) of the HUD-1 settlement statement. This is the sum of title insurance premiums, other charges related to obtaining a title insurance policy such as searches and abstracts, and courier fees and other services performed or arranged by the party who conducts the closing (the meeting at which final loan and sale papers are signed), often referred to as the closing agent, settlement agent, escrow agent, or title agent or company."). Although many studies discuss title *insurance* costs along with the fees for settlement services, this brief is careful to exclude such discussion in light of the theory of the case on appeal.

[2] This analysis was written to support revisions to HUD's regulations implementing the Real Estate Settlement Procedures Act. *See* 73 Fed. Reg. 68204 (Nov. 17, 2008).

market, but that they are all too often charged excessive prices." *Id.* at 6-23.[3]

HUD has found these unfair overcharges occur because "[i]n today's market, originators too often simply pass high prices through to consumers, with little effort at controlling them." *Id.* at 3-143. When asked by HUD, loan originations explain they pass along closing services providers' high prices because "there is not enough incentive in today's market to negotiate lower prices for third-party services" *Id.* at 3-109. HUD explains this incentive is absent because "consumers may not be the best shoppers for third-party service providers due to their lack of expertise and to the infrequency with which they shop for these services. Consumers often rely on recommendations . . . from the loan originator . . . ." *Id.* at iv. Not only do consumers have a limited ability to shop for closing services, but they may have little inclination to do so—even though the costs are substantial—when they are focused on shopping for the loan itself—with a price tag often in the hundreds of thousands of dollars. As the Federal Trade Commission noted to HUD, "settlement services are likely not the primary products for

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[3] Closing service providers vigorously challenged HUD's findings. HUD, however, found their evidence unpersuasive. *See RESPA: Regulatory Impact*, *supra*, at 5-67 ("The American Land Title Association (ALTA) claims there are no significant potential savings in title-related fees. This Regulatory Impact Analysis disagrees with ALTA.").

which borrowers search. Rather, borrowers may devote more search time to a loan . . . ." *Id.* at 2-62.

HUD's findings are confirmed by a groundbreaking recent study on closing services fees from the Urban Institute. That study was based on a review of fees charged to more than 7,500 borrowers in May and June 2001 who took out home loans guaranteed by the Federal Housing Administration. *See* Urban Inst., *supra*, at 2. This data set constitutes the best source of information used to date to study home lending fees. *See RESPA: Regulatory Impact*, *supra*, at 2-61 ("Most information on the title industry was through anecdotes, court cases, industrial organization studies, and a few small surveys. Now more comprehensive data are available from the Urban Institute and HUD.").

The Urban Institute's study determined that "title fees vary widely in ways that suggest that markets are not fully transparent or competitive, and that many consumers may be paying more than necessary for these services." Urban Inst., *supra* at xii. Like HUD, it finds that these overcharges occur because "[t]his market has substantial impediments to competition and little price transparency." *Id.* at 105. The study explains that such a result is consistent with economic theory:

> Homebuyers have good reasons to not shop for title services. First, they might presume that the market is competitive and

> that all the prices are the same, and that there is no payoff to shopping. Or they might assume that the market is regulated or be told by lenders, real estate agents, or even title agents that the market is regulated, that prices are fixed, and there is no point in shopping (the author has heard many personal accounts of being told this and also heard it for herself). Or homebuyers might presume that it is in the real estate agent or lender's interest to guide them to the lowest cost provider to leave more money in the transaction for their own fees. All these reasons for not searching for the lowest price make economic sense. Add to this most buyers' ignorance of the institutions of the real estate market (that the entire market is a negotiated market, that there are no truly fixed prices), plus their anxiety to get their deals closed, and they become highly inelastic demanders, constrained mainly by how much cash they have available given the house they have chosen, and vulnerable to price discrimination.

Id. at 105-06. Judge Lewis' determination that the closing services fees paid by Mr. Bumpers violated N.C. Gen. Stat. § 75-1.1 is particularly appropriate in light of such dysfunction that prevents the price competition that might ordinarily occur in a free market.

The fact that unfair closing services fees were found in a case that also involves unjustifiably high origination fees (the "discount fee" that provided no discount in interest rate), is also consistent with and supported by the Urban Institute's study. The study determined that "title fees are higher when lender/broker fees . . . are higher." *Id.* at 103. According to the study, this finding "undermines the hypothesis that competition among other suppliers of settlement services competes away the monopoly element of

pricing for title services" and yet again demonstrates the uncompetitive nature of the market for closing services. *Id.* at 104.[4]

The findings of HUD and the Urban Institute are also supported by a recent report by the United States Government Accountability Office ("GAO"). Like the other two studies, it found a broken market for closing services that is filled with incentives likely to promote unfair results for consumers:

> [C]onsumers generally do not select their title agent[[5]] . . ., and title agents do not market to consumers but rather compete among themselves for referrals from those who do—that is, real estate and mortgage professionals. This arrangement can create conflicts of interest if professionals making the referrals have a financial interest in the agent recommended. HUD and state insurance regulators have recently identified instances of alleged illegal activities within the title industry that appeared to compensate real estate agents, builders, and others for referring consumers to particular title . . . agents. These alleged activities, which include referral fees, captive reinsurance arrangements, and inappropriate [affiliated business arrangements], potentially reduce price competition . . . .

U.S. Government Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* 4 (2007), *available at* http://www.gao.gov/new.items/d07401.pdf. Moreover,

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[4] Also, quite disturbingly, the Urban Institute found that "[t]itle fees are higher in minority neighborhoods, *other things equal*." Urban Inst., *supra*, at 103 (emphasis added).

[5] "Title agents," as defined by the GAO report, serve a dual role of both selling title insurance and performing various services necessary as part of the loan closing. *See id.* at 9, 16.

GAO notes that unfairly high fees can be charged free of pressure from competitive market forces because "[m]ost consumers place a higher priority on completing their real estate transaction than on disrupting or delaying that transaction to shop around for potentially small savings" *Id.* at 22-23.

GAO's report also highlights a feature of Mr. Bumpers' transaction—the connected nature of Title America, the closing service provider, and Community Bank, the lender—that made it quite susceptible to unfairly high closing service costs that violated N.C. Gen. Stat. § 75-1.1. The report notes the potential harm to consumers from the growing prevalence of "affiliated business arrangements" ("ABAs") in which the lender and closing services provider have ownership ties:

> A number of regulators and industry participants we spoke with expressed concerns about the growing use of ABAs in the title industry. For example, HUD officials have said that while properly structured ABAs may provide some consumer benefits, they also create an inherent conflict of interest as the owner of an ABA is in a position to refer a consumer to that same ABA.
>
> . . .
>
> Some title industry participants expressed concern that ABAs might also restrict competition. They said that when a real estate or mortgage brokerage firm, for example, owns an ABA, other title agents are generally barred from marketing their services to individuals working for that firm. In addition, they said that most or all of the consumer referrals from a brokerage that is an owner of an ABA generally go to that ABA. As a result of this guaranteed order flow, they said, the title agents at

> that ABA might not be as interested in competing on price or service.
>
> . . .
>
> Overall, the concerns expressed by regulators and some industry participants over ABAs raise questions about the potential effects of some ABAs on consumers. Specifically, concerns about some ABAs being used as a means of paying illegal referral fees raise questions about whether referrals are always being made in consumers' best interests. In addition, concerns about some ABAs potentially restricting competition among title agents raise questions about the extent of competition that is beneficial to consumers.

Id. at 32-33.

The evidence the plaintiff presented to Judge Lewis overwhelmingly demonstrated that he was charged unfair closing service fees in his home lending transaction. By itself, that evidence more than adequately supports the finding of a violation of N.C. Gen. Stat. § 75-1.1. But the evidence becomes all the more overwhelming when considered in light of the recent studies, highlighted above, showing the dysfunction and abuses in the closing services market. Moreover, the studies refute the Chamber's arguments that applying N.C. Gen. Stat. § 75-1.1 to these closing services costs disrupts the free market. Instead, it is the current practices of closing service providers that inhibit a free and competitive market.

C. The Trial Court's Ruling is Consistent with the Public Policy of North Carolina With Respect to the Pricing of Settlement Fees.

The General Assembly has recognized that free market principles have simply not worked with respect to the pricing of settlement fees in mortgage loans, and enacted specific legislation to address rampant pricing abuses in the industry. To combat the charging of high fees by predatory lenders and third party service providers, as well as other predatory practices, North Carolina became the first state in the nation to pass a predatory lending law, with the enactment of Senate Bill 1149 on July 22, 1999. As part of this landmark legislation, N.C. Gen. Stat. § 24-8(d) was rewritten to state:

> [n]o third party shall charge or receive (i) any unreasonable compensation for loan-related goods, products and services, or (ii) any compensation for which. . . only minimal loan-related services are provided.

Thus, contrary to the assertions of the Chamber in its brief, "permitting judges to set a 'maximum reasonable price' as the court did here" does *not* represent a "radical departure from the free market principles that animate the laws governing our state's economy." Chamber Br. 4. Instead, judges would be enforcing the laws and public policy of this state. The Chamber's arguments that borrowers should be obligated to pay the price indicated in the contract, Chamber Br. at 3, or that businesses should have the unfettered right to price their settlement services based on supply and demand, Chamber Br. at 4, would be contrary to the explicit language of

N.C. Gen. Stat. § 24-8(d) and the public policy embodied in our predatory lending statute.

II. THE CHAMBER'S CONSTITUTIONAL ARGUMENTS SHOULD BE REJECTED.

Lastly, the Chamber argues that the trial court's ruling is an "abrupt departure from the longstanding principle that parties to a contract are bound to their bargains, regardless of what they think of those bargains in hindsight." Chamber Br. at 9. The very purpose of the enactment of the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat.§ 75-1.1 *et seq.*, however, was to set standards of dealings between consumers and those engaged in business in this state. The purpose of the statute is "to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State." *Bhatti v. Buckland,* 328 N.C. 240, 400 S.E.2d 440 (1991). Parties do not have the unfettered freedom to include terms in contracts that are unfair or deceptive.

The cases cited in support of the Chamber's argument are not persuasive. The majority of cases cited, including *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), *Weyerhaeuser Co. v. Carolina Power & Light*

Co., 257 N.C. 717, 127 S.E.2d 539 (1962), *Miller's Mut. Fire Ins. Ass'n of Alton, Ill v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951), *Johnson v. Aetna Ins. Co. of Hartford, Conn.*, 201 N.C. 362, 160 S.E. 454 (1931), and *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911), for example, all predate the existence of N.C.G.S. § 75-1.1, which was enacted on June 14, 1969. In two of the cases, *Fidelity Bankers Life Ins. Co. v. Dortch,* 318 N.C. 378, 348 S.E.2d 794 (1986) and *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 175, 221 S.E.2d 499 (1976), no claim of an unfair trade practice was raised by the parties or addressed by the court. The court in *Pappas v. NCNB Nat'l Bank of North Carolina*, 653 F. Supp. 699 (M.D.N.C. 1987), held that the plaintiff's claim failed to satisfy the requirements of N.C. Gen. Stat. § 75-1.1, and did not consider whether the parties' freedom of contract was impaired by that statute.

In the only other case cited by the Chamber in support of this argument, *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 539 S.E.2d 274 (2000) the parenthetical summary included in the brief, Chamber Br. at 7, misstates the recognition made by this Court regarding freedom of contract. The opinion stated "[i]ndeed, our state's legal landscape recognizes that, *unless contrary to public policy or prohibited by statute*, freedom of contract is a fundamental constitutional right." *Id.* at 243, 539 S.E.2d at 276

(emphasis added). The charges assessed against Mr. Bumpers in the instant case were contrary to public policy as prescribed by both N.C. Gen. Stat. § 24-8(d) and N.C. Gen. Stat. § 75-1.1.

CONCLUSION

Amici urge this Court to affirm the ruling of the trial court.

Respectfully submitted, this, the 16th day of November, 2009.

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CERTIFICATE OF SERVICE

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This, the 16th day of November, 2009.

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