



Court of Appeals of North Carolina.
Juanita **RICHARDSON** and Robert and Gloria
Gower, on behalf of themselves and all others simi-
larly situated, Plaintiffs,
v.
BANK OF AMERICA, N.A. and NationsCredit
Financial Services Corporation, Defendants.
No. COA06-211.

April 17, 2007.

Background: Borrowers brought class action against bank and its wholly owned subsidiary lender that sold single-premium credit insurance in association with mortgage loans, alleging unfair and deceptive trade practices, unjust enrichment, breach of duty of good faith and fair dealing, and punitive damages. The Superior Court, Durham County, Catherine C. Eagles, J., granted borrowers summary judgment on certain deceptive trade practices claim and breach of duty of good faith and fair dealing, but granted defendants summary judgment on remaining claims.

Holdings: On cross-appeals, the Court of Appeals, McGee, J., held that:

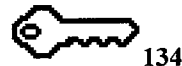
- (1) lender's sale of single-premium credit insurance in association with mortgage loans of 15 years or less was authorized by the Department of Insurance;
- (2) bank was not directly liable for subsidiary lender's actions in regards to the selling of single-premium credit insurance;
- (3) claims for unfair and deceptive trade practices accrued at the closing of loans and did not constitute continuing violations;
- (4) bank and lender waived affirmative defense of federal preemption;
- (5) sale of single-premium credit insurance in asso-

ciation with mortgage loans greater than 15 years constituted an unlawful and deceptive trade practice; (6) breached its duty of good faith and fair dealing; (7) lender was not entitled to reduce the amount of damages determined by the trial court by any amount attributable to unlawful insurance product; and (8) trial court was entitled to deduct any refunds paid to borrowers after trebling the entire amount of damages.

Affirmed.

West Headnotes

[1] Antitrust and Trade Regulation 29T



134

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk134 k. In General. Most Cited

Cases

Antitrust and Trade Regulation 29T



135(1)

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

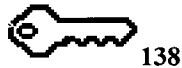
29TIII(A) In General

29Tk133 Nature and Elements

29Tk135 Practices Prohibited or Required

29Tk135(1) k. In General; Unfairness. Most Cited Cases

Antitrust and Trade Regulation 29T



29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk138 k. Reliance; Causation; Injury, Loss, or Damage. Most Cited Cases
To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) the defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that the plaintiff was injured thereby. West's N.C.G.S.A. § 75-1.1(a).

[2] Antitrust and Trade Regulation 29T



29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

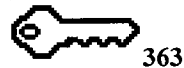
29Tk133 Nature and Elements

29Tk135 Practices Prohibited or Required

29Tk135(1) k. In General; Unfairness. Most Cited Cases

A practice is an unfair trade practice when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. West's N.C.G.S.A. § 75-1.1(a).

[3] Antitrust and Trade Regulation 29T



29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)5 Actions

29Tk361 Proceedings; Trial

29Tk363 k. Questions of Law or Fact. Most Cited Cases

Under statute regarding unfair trade practices, it is a question for the jury as to whether a party committed the alleged acts, and then it is a question of law for

the court as to whether these proven facts constitute an unfair or deceptive trade practice. West's N.C.G.S.A. § 75-1.1(a).

[4] Antitrust and Trade Regulation 29T



29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

Banks and Banking 52 86

52 Banks and Banking

52III Functions and Dealings

52III(A) Banking Franchises and Powers, and

Their Exercise in General

52k86 k. What Are Banking Powers in

General. Most Cited Cases

Lender's sale of single-premium credit insurance in association with mortgage loans of 15 years or less was authorized by the Department of Insurance and statute that provided that any gain to a lender from the sale of such insurance was not a violation of law, and thus, lender did not commit unfair and deceptive trade acts in regards to such sales. West's N.C.G.S.A. §§ 58-57-35(b), 75-1.1.

[5] Corporations 101 423

101 Corporations

101XI Corporate Powers and Liabilities

101XI(B) Representation of Corporation by

Officers and Agents

101k423 k. Wrongful Acts or Omissions.

Most Cited Cases

A parent corporation is itself responsible for the wrongs committed by its agents in the course of its business.

[6] Corporations 101 1.4(2)

101 Corporations

101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(2) k. Justice and Equity. Most Cited Cases

Corporations 101  **1.4(3)**


101 Corporations
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(3) k. Fraud or Illegal Acts. Most Cited Cases

Courts will disregard the corporate form or pierce the corporate veil, and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity.

[7] Corporations 101  **1.4(4)**

101 Corporations
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(4) k. Instrumentality, Agency, or Alter Ego. Most Cited Cases

In order to prevail under the instrumentality rule to pierce the corporate veil, a party must prove three elements: (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of the plaintiff's legal rights; and (3) the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

[8] Corporations 101  **1.6(4)**

101 Corporations
101I Incorporation and Organization
101k1.6 Particular Occasions for Determining

Corporate Entity
101k1.6(4) k. Evasion or Violation of Law or Orders Generally. Most Cited Cases
Parent company of lender was not directly liable for lender's actions in regards to the selling of single-premium credit insurance in association with mortgage loans; the mere fact that there were overlapping officers between parent company and lender was insufficient to impose direct liability on parent and there was no evidence that the lender was operated as a mere instrumentality or alter ego of the parent company.

[9] Limitation of Actions 241  **58(1)**


241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense

241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

Borrowers' claims for unfair and deceptive trade practices against lender that sold single-premium credit insurance in association with mortgage loans accrued at the closing of their loans and did not constitute continuing violations that extended the statute of limitations period, and thus, any claims that accrued more than four years before the filing of the complaint were precluded by the statute of limitations. West's N.C.G.S.A. §§ 75-8, 75-16.2.

[10] Appeal and Error 30  **1079**

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient Discussion of Objections. Most Cited Cases
Borrowers abandoned on appeal their argument regarding postjudgment interest by failing to cite to any authority. Rules App.Proc., Rule 28(b)(6).

[11] Pleading 302  **78**

302 Pleading

302III Responses or Responsive Pleadings in General

302III(A) Defenses in General

302k78 k. Necessity for Defense. Most Cited Cases

Choice-of-law federal preemption is an affirmative defense that can be waived.

[12] Antitrust and Trade Regulation 29T



359

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)5 Actions

29Tk356 Pleading

29Tk359 k. Defenses; Answer and Counterclaim. Most Cited Cases

Banks and Banking 52



226

52 Banks and Banking

52III Functions and Dealings

52III(H) Actions

52k226 k. Pleading. Most Cited Cases

Bank and its wholly owned subsidiary lender that sold single-premium credit insurance in association with mortgage loans waived their affirmative defense of federal preemption in borrowers' class action suit by failing to raise the defense in their answer or their motions for summary judgment.

[13] Antitrust and Trade Regulation 29T



221

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

Banks and Banking 52



86

52 Banks and Banking

52III Functions and Dealings

52III(A) Banking Franchises and Powers, and Their Exercise in General

52k86 k. What Are Banking Powers in General. Most Cited Cases

Lender's sale of single-premium credit insurance in association with mortgage loans greater than 15 years was not authorized by statute and such sales could not have been approved by the Department of Insurance, and thus, the sales were void as against public policy and constituted an unlawful and deceptive trade practice. West's N.C.G.S.A. §§ 58-3-150(a), 58-57-1, 75-1.1.

[14] Insurance 217



3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad Faith in General. Most Cited Cases

Lender sold an unlawful insurance product by selling single-premium credit insurance in association with mortgage loans over 15 years in length, and thus, it breached its duty of good faith and fair dealing as a matter of law.

[15] Breach of Marriage Promise 61



30

61 Breach of Marriage Promise

61k24 Damages

61k30 k. Exemplary Damages. Most Cited Cases

Damages 115



89(2)

115 Damages

115V Exemplary Damages

115k88 Injuries for Which Exemplary Damages May Be Awarded

115k89 In General

115k89(2) k. Breach of Contract. Most Cited Cases

Generally, a party may not recover punitive damages for breach of contract, except for breach of contract

to marry.

[16] Damages 115  **89(2)**

115 Damages

115V Exemplary Damages

115k88 Injuries for Which Exemplary Damages May Be Awarded

115k89 In General

115k89(2) k. Breach of Contract. Most Cited Cases

Where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages; even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed.

[17] Judgment 228  **181(25)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(25) k. Mortgage Cases. Most Cited Cases

Genuine issues of material fact existed as to whether lender's conduct in selling single-premium credit insurance in association with mortgage loans greater than 15 years in violation of insurance statutes constituted willful and wanton activity, precluding summary judgment on borrowers' claim for punitive damages. West's N.C.G.S.A. §§ 1D-5(7), 58-57-1.

[18] Appeal and Error 30  **949**

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases
The Court of Appeals reviews a trial court's decision to certify a class for an abuse of discretion.

[19] Parties 287  **35.71**

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.71 k. Consumers, Purchasers, Borrowers, or Debtors. Most Cited Cases

The fact that borrowers in class action suit against lender that sold unlawful single-premium credit insurance in association with mortgage loans greater than 15 years might be entitled to varying amounts of damages did not preclude class certification.

[20] Antitrust and Trade Regulation 29T

 **351**

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)5 Actions

29Tk351 k. Nature and Form. Most Cited Cases

Antitrust and Trade Regulation 29T

 **390**

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection


29TIII(E) Enforcement and Remedies

29TIII(E)7 Relief

29Tk387 Monetary Relief; Damages
29Tk390 k. Measure and Amount.

Most Cited Cases

Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions; the measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money. West's N.C.G.S.A. § 75-16.

[21] Contracts 95  136

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k135 Effect of Illegality

95k136 k. In General. Most Cited Cases

The law will not allow one party to benefit directly or indirectly from a contract void as against public policy.

[22] Antitrust and Trade Regulation 29T



390

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)7 Relief

29Tk387 Monetary Relief; Damages

29Tk390 k. Measure and Amount.

Most Cited Cases

The single-premium credit insurance sold by lender to borrowers with loans greater than 15 years in length did not have any value because the contract was void as against public policy, and thus, lender was not entitled to reduce the amount of damages determined by the trial court by any amount attributable to the unlawful insurance product; therefore, the measure of damages in borrowers' action alleging unfair and deceptive trade practices included the premium, interest, fees, and points associated with the purchase and financing of the insurance. West's N.C.G.S.A. § 75-16.

[23] Antitrust and Trade Regulation 29T



393

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)7 Relief

29Tk387 Monetary Relief; Damages

29Tk393 k. Enhanced Damages;

Double or Treble Damages. Most Cited Cases

Trial court's decision to deduct any refunds paid to borrowers who purchased from lender single-premium credit insurance in association with mortgage loans greater than 15 years after trebling the entire amount of damages in borrowers' unfair and deceptive trade practices action against lender facilitated the remedial and punitive purposes of statute providing for treble damages to entity injured by violation of provisions of chapter governing monopolies, trusts, and consumer protection, and facilitated settlement. West's N.C.G.S.A. § 75-16.

****413** Appeal by Plaintiffs and Defendants from orders entered 10 March 2005, 19 April 2005, 23 June 2005, 27 July 2005, and 12 October 2005; appeal by Plaintiffs from orders entered 15 April 2003, 8 October 2004, 16 November 2004, 10 March 2005, 19 April 2005, and 16 June 2005; and appeal by Defendants from orders entered 14 June 2004, 19 April 2005, and 16 June 2005 by Judge Catherine C. Eagles in Superior Court, Durham County. Heard in the Court of Appeals 15 November 2006.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson, Raleigh, for Plaintiffs.

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Culver III and Amy Pritchard Williams, Charlotte, for Defendants.

McGEE, Judge.

***534** Juanita Richardson, Robert Gower, Gloria Gower, and Joyce M. Smith, on behalf of themselves and all others similarly situated (collectively Plaintiffs), filed this action on 10 May 2002 against, *inter alia*, Bank of America, N.A. (Bank of America) and its wholly-owned ***535** subsidiary, NationsCredit Financial Services Corporation (NationsCredit) (collectively Defendants).^{FN1} Plaintiffs alleged claims for unfair and deceptive trade practices (UDTP) under N.C. Gen.Stat. § 75-1.1, unjust enrichment, breach of the duty of good faith and fair dealing, and punitive damages. Plaintiffs' claims arose out of the alleged sale by Defendants to Plaintiffs of single-premium credit insurance (SPCI) in association with mortgage loans.

^{FN1}. The trial court dismissed the individual claims of Joyce M. Smith with prejudice and removed her as a class representative on 16

June 2005.

Plaintiffs filed their first amended complaint on 13 August 2002. Plaintiffs' first amended complaint alleged claims against only Bank of America and NationsCredit. Plaintiffs again alleged claims for UDTP, unjust enrichment, breach of the duty of good faith and fair dealing, and punitive damages.

****414** Defendants filed their answer and conditional counterclaim on 19 August 2002. Defendants asserted numerous defenses, including the statute of limitations. Defendants also asserted a counterclaim against those Plaintiffs who were in default and/or who owed deficiency balances, to become effective if and when a class was certified. Plaintiffs filed an answer on 5 September 2002 asserting several defenses to Defendants' conditional counterclaim.

Pursuant to Rule 2.1(a) of the General Rules of Practice, the case was designated as an exceptional case on 14 November 2002. Superior Court Judge Catherine C. Eagles was assigned to the case on 22 November 2002. The parties then engaged in extensive discovery.

Defendants removed the action to the United States District Court for the Middle District of North Carolina on 20 June 2003, and that Court granted Plaintiffs' motion to remand the case back to the trial court on 10 March 2004. The trial court issued a class certification order on 14 June 2004, and defined the class as follows:

North Carolina borrowers who obtained a loan before July 1, 2000, from ... NationsCredit in the State of North Carolina, whose loans are secured or were secured by real property located in North Carolina, and who were sold single-premium credit life, disability, accident and health, or involuntary unemployment insurance with a term less than that of their loan, and who have not made a claim under any such credit insurance policy and who made payments on their loan at any point after May 10, 1998.

***536** The trial court entered a supplementary scheduling order on 23 July 2004, ordering, *inter alia*, that discovery should be completed by 25 October 2004 and that the trial date be set for 4 April 2005. Discovery continued, and the trial court entered a compre-

hensive order on 23 November 2004 resolving all pending non-dispositive motions and revising and restating scheduling requirements. Defendants appealed this order on 21 December 2004, but Defendants subsequently dismissed their appeal.

The parties filed motions for summary judgment and partial summary judgment, along with memoranda in support of those motions, dated 19 January 2005. In a memorandum in response to Plaintiffs' motion for partial summary judgment, filed 31 January 2005, Defendants first raised the defense of federal preemption. The parties had also filed a joint statement of undisputed facts and proposed issues on 20 January 2005. In that statement, the parties agreed that the following facts were undisputed. NationsCredit sold Juanita Richardson and Robert and Gloria Gower SPCI on twenty-five year loans. The coverage term for the SPCI was ten years. NationsCredit loan officers sold the SPCI pursuant to agreements between NationsCredit and several insurance companies.

It was also undisputed that “[w]ith [SPCI], the credit insurance premium was financed over the term of the loan. The premium for [SPCI] was calculated based upon the amount financed. The amount financed would include any charges for origination fees, points, loan discount fees, and other closing costs.” It was further undisputed that NationsCredit's sales of SPCI were “in or affecting commerce.”

The parties further agreed that, at the time of the closing of their loans, Plaintiffs received and signed numerous documents and disclosure statements. Plaintiffs signed and received a statement that informed them that NationsCredit expected to profit from the sale of any insurance.

It was also undisputed that North Carolina allowed the sale of truncated credit insurance in connection with closed-end real estate loans. The SPCI sold by NationsCredit to Plaintiffs with loans of fifteen years or less was approved by the Department of Insurance. However, the SPCI sold to Plaintiffs having loans greater than fifteen years was not approved by the Department of Insurance.

The trial court entered an order on 10 March 2005 addressing parts of the 19 January 2005 motions for summary judgment. The trial ***537** court ruled that Defendants had waived any right to assert federal

