Bumpers v. Community Bank of Northern Virginia

By Scottie Beth Forbes

In August, the North Carolina Supreme Court issued a major decision, **Bumpers v. Community Bank of Northern Virginia**, that further defined the scope of N.C.G.S. section 75-1.1. **Bumpers v. Cmty. Bank of N. Va.**, 747 S.E.2d 220 (N.C. 2013). The court clarified that in a section 75-1.1 claim based on an alleged misrepresentation, the plaintiff must prove that she actually and reasonably relied on the statements at issue. The decision raises the burdens of proof for parties who allege unfair or deceptive business practices. This article summarizes the key points of the **Bumpers** decision, along with its practical and doctrinal significance going forward.

Background | In 1999, plaintiffs Travis Bumpers and Troy Elliott obtained second-mortgage loans from defendant Community Bank of Northern Virginia. In connection with the loans, the plaintiffs paid various fees, including a one-time loan discount fee and various closing costs. Bumpers, for example, paid a loan discount fee of $1,280 to Community Bank. He also paid a total of $1,180 in closing fees to a nonlawyer closing agent, Title America, LLC. All of these charges were disclosed to the plaintiffs on the closing statement for their loans. In deposition testimony, the plaintiffs stated that they found the transaction terms acceptable, and that they paid no attention to the titles of the individual fees.

In 2001, the plaintiffs filed a putative class action in Wake County Superior Court. They alleged, among other things, that the above fees violated section 75-1.1. Specifically, the plaintiffs asserted that they paid loan discount fees but did not receive discounted interest rates. They also alleged that the fees charged in connection with the origination of the loans were unreasonably high. According to the plaintiffs, the charging of these fees was unfair and deceptive, violating section 75-1.1.

Community Bank removed the case to federal court. The federal court remanded the case to state court in 2008. The plaintiffs then moved for offensive summary judgment on two theories of liability under section 75-1.1: (1) the plaintiffs paid "loan discount" fees but did not receive discounted interest rates, and (2) the closing fees were "excessive." The trial court certified this partial summary judgment for immediate appeal under Rule 54(b), so Community Bank pursued an appeal.

The N.C. Court of Appeals Decision | The North Carolina Court of Appeals initially pierced the Rule 54(b) certification and dismissed the appeal, but the North Carolina Supreme Court reversed that decision. **Bumpers v. Cmty. Bank of N. Va.**, 675 S.E.2d 697, 700 (N.C. Ct. App. 2009), rev'd, 695 S.E.2d 442 (N.C. 2010). The court of appeals then decided the appeal on its merits. **Bumpers v. Cmty. Bank of N. Va.**, 718 S.E.2d 408 (N.C. Ct. App. 2011), rev'd, 747 S.E.2d 220 (N.C. 2013).

The court of appeals affirmed the offensive summary judgment on the loan discount fee claim. The plaintiffs based this claim on the label "loan discount" on their closing statements. The court of appeals nonetheless held that the plaintiffs did not need to show that they relied on that label, because the claim was really one for "charging [the plaintiffs] for something that they did not receive (i.e.[,] charging a 'loan discount fee' where there was no evidence that plaintiffs received a discounted interest rate on the loan)," rather than a claim that explicitly claimed a misrepresentation. *Id.* at 412–13. This reasoning allowed the court of appeals to avoid a dozen of its own decisions, plus two North Carolina Supreme Court decisions, that had required a showing of reliance in deception claims under section 75-1.1.

On the excessive-pricing claim, the court of appeals reversed the trial court's order, holding that there were factual issues on whether the fees were really "excessive." *Id.* at 414. By doing so, the court of appeals silently assumed that "excessive" pricing states a claim for unfair conduct under section 75-1.1.

The State Supreme Court's Decision | The North Carolina Supreme Court granted Community Bank's petition for discretionary review. In August 2013, with Justice Paul Newby writing for a five-justice majority, the supreme court reversed the decision of the court of appeals. **Bumpers**, 747 S.E.2d at 229.

First, on the loan discount claim, the supreme court held as follows:

- The court of appeals erred by not treating the loan discount claim as one based on a misrepresentation: "[A] claim for overcharging is not distinct from one based on misrepresentation." *Id.* at 227.

- When a plaintiff bases a section 75-1.1 claim on an alleged misrepresentation, he must demonstrate reliance on the misrepresentation to prevail. *Id.* at 226.

- The plaintiff must show not only actual reliance, but reasonable reliance. *Id.* at 227.

In reaching these conclusions, the supreme court agreed that when the only basis for a 75-1.1 claim is a statement—here, the title of the loan discount fee—plaintiffs cannot show proximate causation of their injuries unless they actually relied on the statement in question. *Id.* The bank had not urged the supreme court to require reasonable reliance as well, but the court nonetheless adopted this requirement by analogizing to other torts that involve misrepresentations. *Id.*

On the excessive-pricing claim, the supreme court held as follows:

- "In most cases, there is nothing unfair or deceptive about freely entering a transaction on the open market." *Id.* at 228.

- The legislature did not intend to regulate prices through section 75-1.1. *Id.*

- The 2003 enactment of anti-price-gouging statutes that prohibit "unreasonably excessive" pricing in disasters suggests that 75-1.1 did not already broadly prohibit "excessive" pricing in general. *Id.* at 228–29.

The court concluded that because the **Bumpers** plaintiffs were informed and aware that other lending and closing options existed and declined to use those options, the plaintiffs "entered into their loan transactions freely and without any compulsion." *Id.* at 229. Therefore, the supreme court held, the court of appeals erred when it recognized these claims for excessive pricing. *Id.*

The supreme court's decision answers some questions and raises others. For instance, the court stated that "[w]hile there may be circumstances [in which price levels would violate section 75-1.1], such circumstances are not present in this case." *Id.* Likewise, the court stated that "the fees paid [here were] not so high as to run afoul of section 75-1.1." *Id.* The court's opinion, however, offered no elaboration on when, if ever, high prices would state a claim under section 75-1.1.

Justices Robin Hudson and Cheri Beasley each wrote dissenting opinions, in which they disagreed with the majority's analysis and with the result.

Justice Hudson stated that because there was no "genuine issue of material fact regarding whether plaintiffs were charged for a discount rate they did not receive," the trial court properly granted offensive summary judgment for the plaintiffs on their loan discount fee claims. *Id.* at 230. Justice Hudson further disagreed with the majority on the requirement of reliance, stating that the plain language of sections 75-1.1 and 75-16 (the main remedial statute in chapter 75) do not require reliance. *Id.*

Justice Hudson also would have allowed the plaintiffs' excessive-pricing claims to proceed under section 75-1.1. Justice Hudson pointed to the legislature's existing regulation of the mortgage lending industry and the broad language of section 75-1.1 for support of the excessive-pricing claims. *Id.* at 231.

In Justice Beasley's dissenting opinion, she argued that the majority had mischaracterized the plaintiffs' section 75-1.1 claim as one based on a misrepresentation rather than a claim for "overcharging." *Id.* at 232. Accordingly, Justice Beasley disagreed with the reliance requirement: "The majority's conclusion that reliance is required . . . opens the door to an array of new fees intended to pad a company's bottom line rather than to reflect the fair cost of a good or service provided to the consumer." *Id.* at 235. Under the majority's decision, Justice Beasley wrote, "[t]he customer has no recourse because the fee was not a part of his decision-making process, despite the existence of an unethical and unfair practice that charges the consumer a fee for a good or service he did not receive." *Id.*

Justice Beasley interpreted the majority's decision as "blur[ring] the line between fraud and an unfair and deceptive trade practice claim." *Id.* Since the claim in **Bumpers** was not one based on fraud, Justice Beasley stated, it was enough for plaintiffs to show that Community Bank's fees proximately caused the plaintiffs' injuries, and that the bank's "deceptive act of charging a discount fee on an undiscounted loan could foreseeably cause a monetary loss and in fact caused a monetary loss." *Id.*

Lastly, Justice Beasley disagreed with the majority's reasoning regarding the loan closing fees. She stated that transactions should not be exempted from the scope of consumer-protection statutes merely because a consumer "enter[ed] into their loan transactions freely and without any compulsion." *Id.* at 236. Justice Beasley concluded, "[i]f entering into a transaction freely is now a defense to an unfair and deceptive trade practice claim, then the entire purpose of Chapter 75 and its corollaries elsewhere in the General Statutes is void." *Id.*

The Significance of Bumpers | Since the **Bumpers** decision, consumer advocates have been vocal in their opposition to the supreme court's decision. For example, the statements listed below were quoted in a recent N.C. Policy Watch article:

- "How do you prove reliance? You paid a discount fee to buy down the interest rate, and the lender doesn't buy down the rate—what else is there to show? That is deception, and there shouldn't be any need to show reliance, because there's nothing but reliance."—Margot Saunders, National Consumer Law Center

- "Bottom line—consumers in North Carolina just lost the most effective vehicle they have had for checking unfair, unethical, and overreaching business practices."—Chris Olson, consumer lawyer

Sharon McCloskey, In a Battle Between Banks and Consumers, Banks Win, Supreme Court Says, N.C. Policy Watch (Sept. 10, 2013), ***http://www.ncpolicywatch.com/2013/09/10/in-a-battle-between-banks-and-consumers-banks-win-supreme-court-says/***.

In any event, **Bumpers** appears to be part of a trend of the North Carolina Supreme Court becoming more engaged in business litigation. In fact, on the same day the supreme court issued the **Bumpers** opinion, the court also granted discretionary review in four civil cases—an unusual occurrence, since historically, discretionary review has been granted only about five percent of the time in civil cases.

The supreme court's decision has doctrinal significance as well. In **Bumpers**, the supreme court disapproved one claim for unfairness, but it was unwilling to make a categorical ruling even on the type of claim at issue—that is, a categorical ruling that price levels alone cannot be "unfair" enough to support claims for treble damages.

The long litigation path in **Bumpers** highlights the need for clarity in the standards for unfairness under section 75-1.1. **Bumpers** adds clarity on the standards for private recovery for deceptive conduct, but it says less on the substantive standards for unfair conduct. The latter question is likely to bedevil the North Carolina courts for years to come.

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