2012 WL 12109913 (N.M.) (Appellate Brief)
Supreme Court of New Mexico.

THE BANK OF NEW YORK as Trustees for Popular Financial Services Mortgage/Pass Through Certificate Series #2006-D, Plaintiffs-Appellees,

v.

Joseph A. ROMERO and Mary Romero a/k/a Mary O. Romero a/k/a Maria Romero, Defendants-Appellants.

No. 33,224.
February 3, 2012.

On Writ of Certiorari from the New Mexico Court of Appeals

Brief of Amicus Curiae Attorney General of New Mexico

Gary K. King, New Mexico Attorney General, Joel Cruz-Esparza, Assistant Attorney General, Karen Meyers, Assistant Attorney General, Consumer Protection Division, Office of New Mexico Attorney General, Gary K. King, 408 Galisteo Street, Santa Fe, NM 87501, (505) 827-6000, (505) 827-5826 (Fax).

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***1** INTEREST OF AMICUS

The Attorney General of New Mexico is charged with protecting New Mexico citizens from unfair and deceptive trade practices, in part, by enforcing the New Mexico Unfair Practices Act ("UPA'), NMSA 1978, Sections 57-12-1 to 57-12-26 (1967, as amended through 2009). *See Fiser v. Dell Computer Corp.*, 2008-NMSC-46, ¶ 11, 144 N.M. 464, 188 P.3d 1215 (recognizing that the Consumer Protection Division of the Attorney General's Office "is charged with protecting New Mexico citizens from unfair and deceptive trade practices"). Further, it is the responsibility of the Attorney General to "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action...." NMSA 1978, § 8-5-2(J) (1975).

The Attorney General thus has a significant interest in cases that affect New Mexico consumers. Indeed, this Court has recognized the key role the Attorney General plays in matters pertaining to consumer protection:

Yet another example of New Mexico's fundamental public policy in ensuring that consumers have an opportunity to redress their harm is the Consumer Protection Division of the Attorney General's Office, which is charged with protecting New Mexico citizens from unfair and deceptive trade practices. In this effort, the Consumer Protection Division is authorized and funded to investigate suspicious business activities, informally resolve the complaints of dissatisfied ***2** consumers, educate citizens about their consumer rights, and file lawsuits on behalf of the public.

Fiser, 2008-NMSC-046, ¶ 11.

The Attorney General's strong interest in cases affecting consumers in the state includes those pertaining to the rights of New Mexico home-loan borrowers, particularly when those borrowers are faced with foreclosure.

In 2003, the New Mexico legislature passed the Home Loan Protection Act ("HLPA"), NMSA 1978, Sections 58-21A-1 to -14 , which provided more specific protections to borrowers refinancing home loans. HLPA was enacted because predatory lending schemes were causing harm to New Mexico residents resulting in the loss of their home equity and an increase in foreclosures. Like those in many states in the nation, the New Mexico legislature determined that such **abusive** practices are often intended to drive unsophisticated consumers into making ill-advised financial decisions.

Furthermore, the legislature provided that "[a] violation of the Home Loan Protection Act constitutes an unfair or deceptive trade practice pursuant to the Unfair Practices Act," NMSA 1978, Section 58-21A-12, which effectively charged the Attorney General with enforcement authority to protect homeowners facing foreclosure. In addition, HLPA requires the Financial Institutions Division ("FID") of the Regulation and Licensing Department to consult with the New ***3** Mexico Attorney General when FID adopts rules and regulations to implement HLPA. NMSA 1978, § 58-21A-13.

In this case, Joseph and Mary Romero, hereinafter, "the Romeros," faced a foreclosure action after defaulting on their mortgage loan. The Romeros answered and raised counter-claims under the HLPA and the UPA. This Court will address whether the correct standard and analysis were used to determine if the refinancing of the Romeros' home loan resulted in a "reasonable and net tangible benefit" to the borrower within the meaning of Section 58-21A-4(B) of HLPA; whether the named Plaintiff, the

Bank of New York, "BONY", had standing to bring the foreclosure action, and whether the HLPA is preempted by federal law. The protections provided to homeowners under the HLPA are of vital importance, particularly in the midst of the foreclosure and housing crisis impacting New Mexico.

Because of the significance of these issues to New Mexico consumers, and based on the expertise of the Office of the New Mexico Attorney General in enforcing New Mexico law in the public interest, the Attorney General respectfully requests that this Court duly consider his participation in this matter as Amicus Curiae.

***4** Pursuant to Rule 12-215 NMRAP all parties in this matter received notice of the intent to file an amicus brief on January 20, 2012, fourteen (14) days before the due date of filing an amicus brief.

STATEMENT OF THE CASE

This matter is on appeal from the Court of Appeals' decision affirming the district court's holding that the home loan in this case resulted in a "reasonable and net tangible benefit" to the borrowers under HLPA. The district court also entered a finding that HLPA is preempted by federal law.[1] In its complaint, BONY alleged that the Romeros breached their loan agreement by failing to timely make their monthly payments and were in default. The Romeros presented the defense that BONY had violated provisions of the HLPA and the UPA, in that BONY "flipped" the home loan; i.e. the new loan BONY made to refinance the Romeros' existing loan did not provide a "reasonable and net tangible benefit" to the Romeros.

After a bench trial, the district court found that federal law preempted HLPA and that "flipping" had not occurred. *Bank of New York as Trustee for Popular Financial Services Mortgage/Pass through Certificate Series #2006-* ***5** *D vs. Joseph A. Romero and Mary Romero,* No. CV-2008-139 (1st Jud. Dist. Ct. September 1, 2009). The district court emphasized as significant that "flipping" had not occurred. Specifically, the district court determined that the Romeros were able to pay off credit card debts of $9,000, received a cash payment in excess of $30,000 as a result of the loan transaction and, therefore, received a reasonable and net tangible benefit.

BONY argued on appeal that the preemption issue was irrelevant since no violation of the HLPA had been shown. The Court of Appeals opted to not address the preemption issue, but affirmed the district court's finding that substantial evidence existed that the HLPA had not been violated. *Bank of New York as Trustee for Popular Financial Services Mortgage/Pass through Certificate Series #2006-D vs. Joseph A. Romero and Mary Romero,* 2011-NMCA-110, ¶6, 2011 N.M. App. LEXIS 96. The Court of Appeals entered its decision on August 23, 2011, leading to this appeal.

SUMMARY OF THE ARGUMENT

The New Mexico Legislature took steps in 2003 to specifically prohibit certain practices regarding home loans, including the unfair act or practice of "flipping" a home loan, when it adopted the HLPA. The language of Section 58-21A-4(B) of HLPA defines "flipping a home loan" and prohibits lenders of home loans from knowingly and intentionally engaging in the unfair act or practice of ***6** flipping a home loan.[2] A plain reading of the language in HLPA leads to a proper interpretation that "all circumstances", including the borrowers' circumstances, must be considered in determining whether the Romeros received a reasonable tangible net benefit. We disagree with the Court of Appeals in finding that "[t]he HLPA does not specify under what circumstances a 'reasonable, tangible net benefit' will be considered to exist." 2011-NMCA-110, ¶15, 2011 N.M. App. LEXIS 96. HLPA specifically defines what those circumstances are at Section 58-21A-4(B) of HLPA. Furthermore, the HLPA, as a remedial statute, must be construed and applied broadly and liberally to accomplish the legislature's intent and purposes, which is to protect consumers from overreaching lenders.

In support of the purposes of HLPA, FID promulgated a rule to provide an appropriate standard to be used in determining whether the "flipping" of a loan has occurred. This rule is found in the New Mexico Administrative Code at 12.5.5.1 through 12.5.5.9 NMAC, which can be termed as the "Rule on Prohibition Against Flipping", hereinafter referred to as the "Rule". Under HLPA and the Rule, the correct standard for determining whether "flipping" a home loan has occurred is whether a reasonable and net tangible benefit has been received by the borrower when the borrower refinances the home loan. Unfortunately, it appears from the ***7** proceedings of this case that the Rule, which requires a case-by-case determination of whether a net tangible benefit has been achieved, was not brought to the attention of either the district court or the Court of Appeals. Accordingly, the analysis made by the courts below was insufficient as it stopped short of considering all of the circumstances as required by the HLPA and the Rule.

Historically, states have overseen the enforcement of consumer protection laws through their legislative arm. As the U.S. Supreme Court has consistently held, national banks are subject to such laws. *See e.g. Cuomo v. Clearing House Ass'n,* 557 U.S. 519, _, 129 S. Ct. 2710, 2720 (2009) ("States... have always enforced their general laws against national banks[.]"). BONY is therefore subject to the HLPA. The National Bank Act does not preempt the HLPA, because the HLPA does not "stand as an obstacle to," "impair the efficiency of," nor "significantly interfere" with the purposes of the National Bank Act. *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 33 (1996).

While national banks are subject to the HLPA, it is important to underscore that in this case BONY is not acting in the capacity of a "national bank" but rather as the trustee for the benefit of investors in a real estate trust. Under these circumstances it is abundantly clear that federal preemption cannot bar the application of the HLPA to BONY, when BONY is not acting in the capacity of a national bank.

***8 STANDARD OF REVIEW**

The application of the statutory and regulatory interpretation is a question of statutory construction and, therefore, is a question of law that is reviewed de novo. *Pub. Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶48, 131 N.M. 100, 33 P.3d 651. It is a question of law that appellate courts review de novo when the language in a statute or rule is being reviewed. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-20, ¶16, 132 N.M. 382, 49 P.3d 61. The HLPA and the UPA are remedial legislation, as they are consumer protection measures, and therefore, are interpreted liberally to facilitate and accomplish its purposes and intent and are applied broadly. *Salmeron v. Highlands Ford Sales, Inc.* 271 F.Supp.2d 1314, 1318 (D.N.M. 2003); *Lohman v. Daimler Chrysler Corp.*, 2007- NMCA- 100, ¶ 25, 142 N.M. 437, *Cuomo v. Clearing House Ass 'n,* 557 U.S. 519, 129 S. Ct. 2710, 2720 (2009) 166 P.3d 1091; cert denied, 142 N.M. 434.

ARGUMENT

I. THERE IS GUIDANCE IN NEW MEXICO ON THE PROPER REASONABLE AND NET TANGIBLE STANDARD IN HOME LOAN TRANSACTIONS

A. THE HOME LOAN PROTECTION ACT WAS ADOPTED TO ELIMINATE ABUSIVE MORTGAGE LENDING PRACTICES

In 2002 and 2003, before the enactment of the HLPA, the Consumer Protection Division of the NM Attorney General's Office participated in taking ***9** legal actions against several national lenders who were involved in "subprime" or non-conventional home loans. The NM Attorney General was an integral part of multi-state litigation against national sub-prime lending institutions, such as Household Financial, Ameriquest, and others, ultimately filing complaints in New Mexico district courts resulting in Consent Decrees and Judgments. *See State of New Mexico ex rel. Patricia A. Madrid, Attorney General of New Mexico v. Household International, Inc., No. CV-2002-02739 (1st Jud. Dist. Ct. December 16, 2002) and State of New Mexico ex rel. Patricia A. Madrid, Attorney General of New Mexico v. Ameriquest Mortgage Company; Town & Country Credit Corporation; AMC Mortgage Services, Inc. f/k/a Bedford Homes Loans, and ACC Capital Holding Corporations,* No.

CV-2006-00628 (1st Jud. Dist. Ct. March 21, 2006).[3] These legal actions addressed the issue of flipping and the judgments entered in these cases assured that a reasonable and net tangible benefit would result in favor of mortgage borrowers.

There are three factors that may be cited as the causes for the rise of a subprime market. These are: the rising values of homes, the deregulation of the ***10** lending industry,[4] and tax reform.[5] Elizabeth Renaurt, *Stop Predatory Lending: A Guide for Legal Advocates*, published by the National Consumer Law Center (2002), at pages 20-25. These three factors gave rise to the secondary market in home loans and mortgage backed securitized investments. The secondary market is where the originating lenders sell their loans, usually in bulk, to investor/buyers. The ability to sell their loans to the secondary market enables these mortgage companies to operate with a small capital base. In other words, these companies do not have, and do not need, the capital to make the actual loans. They acquire a line of credit in order to offer the loans to homeowners and home loan borrowers. Thus, these companies only perform the origination of the loans, making their money from the up-front fees, points and commissions they charge, and then immediately sell these loans to the secondary market. To contribute to this process of lending, securitization takes place when the loans are pooled, or "bundled" and assigned to a trustee that supervises the servicer of the loans and distributes the ***11** proceeds from the loan payments to the security holders or investors. *Stop Predatory Lending*, at 28-29.

Since loan originators do not keep an interest in the loan, their main incentive is to profit from the origination of the loan which gives them fees, points and commissions of each loan they originate. Whether the loan gets paid ultimately or not is really none of their concern. Whether the loan gets paid or not is a concern that will be transferred to the investors in the secondary market. Points, fees and commissions are all based on the amount of the loan. Companies specializing in home equity lending were enabled to operate much more profitably by having a "back-end" income stream they could operate with little capitalization base. *Stop Predatory Lending*, at 21.

Borrowers with blemished credit histories, borrowers who are denied a "prime" or "conventional" loan for whatever reason, unsophisticated borrowers, the **elderly**, and borrowers belonging to racial minority groups, become the ideal targets of this market. Higher interest rates, higher points and fees, misrepresentation as to the benefit of the new loan are all part of the mix of non-conventional lending. Cathy Lesser Mansfield, *The Road to Subprime "Hel" Was Paved With Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C.L. Rev. 473 (2000). The distancing of the originator ***12** of the loan from the borrower allows for the stripping of responsibility and paves the way to predatory lending.

The earnings of these subprime lenders began to match or surpass the earnings of conventional mortgage lenders. Glenn B. Canner, Thomas A. Durkin, and Charles A. Luckett, *Recent Developments in Home Equity Lending*, 84 Fed. Res. Bull. 241, 250 (April 1998). Low-income and minority homeowners borrow from subprime lenders in disproportionate numbers, even when they have good credit. *Unequal Burden: Income and Racial Disparities in Subprime Lending in America*, HUD (April 2000). This is done by the subprime industry's marketing techniques, i.e. aggressive solicitations, steering to high interest lenders, high loan-to-value ratios and shifting unsecured debt to mortgages, all of these motivated by the incentives and commissions charged by loan originators and mortgage brokers. Additionally, the borrowers' lack of sophistication in these complex matters fuels their perceptions that they have few choices coupled with the confusion in deciphering whether the refinance is the best alternative. According to the mortgage industry's own analysis, 30% to 40% of all mortgage borrowers were confused by the loan process. Mortgage Bankers Association of America, *Homebuyers and the Loan Settlement Process: A Yankelovich CNN Study* (March 5, 1997), at 48.

***13** Mortgage loans issued with disproportionate loan-to-value ratios and disproportionate debt-to-income ratios, underwriting mechanisms ignored, higher interest rates, higher payments, large fees to loan originators and kickbacks to mortgage brokers that are included in the cost of the loan, and shifting unsecured debt into the home loan, are all factors which contributed to the financial credit crisis of this country. *The Financial Crisis Inquiry Report: Final Report of the National Commission of the Causes of the Financial and Economic Crisis in the United States*, published by the Financial Crisis Inquiry Commission in 2010.

B. GENERAL STATUTORY AND REGULATORY INTERPRETATION PRINCIPLES MUST BE USED TO DETERMINE WHETHER A HOME-LOAN TRANSACTION PROVIDES A REASONABLE AND NET TANGIBLE STANDARD

In adopting the HLPA, the New Mexico Legislature found that:
A. **abusive** mortgage lending has become and increasing problem in New Mexico, exacerbating the loss of equity in homes causing the number of foreclosures to increase in recent ears;

B. one of the most common forms of **abusive** lending is the making of loans that are equity-based, rather than income-based;

C. the financing of points and fees in these loans provides immediate income to the originator and encourages creditors to repeatedly refinance home loans; and

D. while the marketplace appears to operate effectively for conventional mortgages, too many borrowers find themselves victims of overreaching creditors who provide loans with high costs and terms the are unnecessary to secure repayment of the loan.

NMSA 1978, § 58-21A-2.

***14** When it enacted the HLPA in 2003, the New Mexico Legislature took steps to specifically prohibit certain practices regarding home loans, including the unfair act or practice of "flipping" a home loan. Section 58-21A-4(B) of HLPA defines "flipping a home loan" as the *"making of a home loan to a borrower that refinances an existing home loan when the new loan does not have reasonable, tangible net benefit to the borrower considering all of the circumstances,* including the terms of both the new and refinanced loan, the cost of the new loan and the borrower's circumstances." (Emphasis added). The prohibition is clear: "No creditor shall knowingly and intentionally engage in the unfair act or practice of flipping a home loan." NMSA 1978, § 58-21A-4(B).

The most basic principle in statutory interpretation is to look at the language or wording used in a statute. See Uniform Statute and Rule Construction Act, NMSA 1978, § 12-2A-19. The text of a statute or rule is "the primary, essential source of its meaning." *Truong v. All State Insurance Company*, 2010-NMSC-9, ¶ 37, 147 NM 583; 227 P.3d 73.

Section 58-21A-4(B) of the HLPA defines "flipping a home loan" in a clear and unambiguous manner. The section states that "all of the circumstances" must be considered to determine the reasonable, tangible net benefit to the borrower. When statutory language is clear and unambiguous it must be given effect as written without the need for further statutory construction. *Id.* Under this plain ***15** meaning rule, the clear intent of the legislature was that in determining whether a new loan has conferred a reasonable, tangible net benefit to a borrower, "*all* of the circumstances, including the terms of both the new and refinanced loan, the cost of the new loan and *the borrower's circumstances* " must be considered. The courts below failed to comply with this mandate when they gave significant and inappropriate weight to only one major circumstance -- the monetary benefit to the Romero's in the cash-back and debt payment they received -- and disregarded the detrimental consequences that placed the Romeros' home in jeopardy.

The HLPA is a remedial statute providing damages and other remedial relief in civil actions to borrowers who may be need protection when refinancing their home loans. [6] As such, the HLPA contains in its statutory provisions a liberal construction to carry out the HLPA purposes. *See* NMSA 1978, § 58-21A-14 (2003). Furthermore, since a violation of any of HLPA's provisions is also a violation of UPA, and UPA is considered remedial legislation to protect consumers from unfair and deceptive trade practices, which includes the extension of credit, HLPA must be construed liberally with the broadest possible application. *State ex rel. Stratton v. Gurley Motor Co.*, 105 N.M. 803, ¶16, 737 P.2d 1180 (Ct. App. 1987). Furthermore, "[w]here two statutes are related to the same general subject, ***16** the court will generally construe them in *pari materia* to give effect to each." *Cuomo*

v. Clearing House Ass'n, 557 U.S. 519, 129 S. Ct. 2710, 2720 (2009) . *Trujillo v City of Albuquerque,* 1998-NMSC-31, ¶44, 125 N.M. 721, 965 P.2d 305 (citing *State vs. Alvarado,* 1997-NMCA-26,¶16, 123 N.M. 187, 936 P.2d 869).

C. THE RULE ON THE PROHIBITION AGAINST FLIPPING PROVIDES APPROPRIATE GUIDELINES TO DETERMINE REASONABLE, TANGIBLE NET BENEFIT

Pursuant to Section 58-21A-13 of HLPA, and to support the statutory requirements of the HLPA, FID promulgated the Rule on the Prohibition against Flipping, to provide an appropriate standard for determining whether the "flipping" of a loan has occurred. FID did this after consulting the Attorney General pursuant to Section 58-21A-13 NMSA of the HLPA. The legislature deposited its trust in FID and the Attorney General, who with their expertise and authority are most able to implement and carry out protections for borrowers in home loan transactions. The judiciary has held that some deference is given to the actions and interpretations of these regulatory bodies. "When an agency that is governed by a particular statute, the court will begin by according some deference to the agency's interpretation." *Truong,* 2010-NMSC-9, ¶ 32 citing *Morning Star Water Users Ass'n vs. N.M. Pub. Util. Comm'n,* 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). We therefore request that this Court take judicial notice of the existence of the ***17** Rule, give proper deference, and determine that it provides the proper standard for the flipping of home loans.

"Flipping" is definitely more than an economic analysis of the loan transaction. Flipping, as defined by HLPA and supported by the Rule, takes into consideration all circumstances, economic and non-economic. We submit to this Court that the plain language of HLPA and the standard outlined by the Rule is consistent with the intent of the legislature and is the proper analysis. Among other things, under the Rule, the reasonable tangible net benefit standard is as follows:
(1) A close scrutiny must be made considering the totality of facts and circumstances.

(2) An economic test alone may not be sufficient as the lender must develop and maintain policies and procedures for evaluating whether the loan transaction provided the requisite benefit in both economic as well as non-economic terms.

(3) Several important factors should be considered such as the terms and cost of the new loan, the loan-to-value of the new loan compared to the existing loan, debt-to-income ratio of the borrower before and after the loan transaction, amount of time elapsed between the new loan and the existing loan, and an explanation for the need and proposed use for the loan proceeds.

(4) Truthful disclosures of all relevant financial information must be made by the borrowers, but lenders cannot disregard known facts ***18** and circumstances that may place in question the accuracy of information contained in the loan application.

(5) A borrower's certification, standing alone, is not determinative that a benefit has been met.

12.15.5.9(A, B, D, G, and H) NMAC.

This standard considers both economic and non-economic benefits. When economic benefits are found, it gives proper weight to that benefit; but does not stop there. The gist of protection against "flipping" is that refinancing should not place the borrower in a worse situation with respect to the borrower's ability to re-pay his or her mortgage. Even before the adoption of HLPA, as we saw in the multi-state litigation, "flipping" was recognized as a violation of the UPA. Thus, several levels of protection were targeted in the prohibition against "flipping" and these were included to prevent "equity stripping," limit "asset-based loans," and prevent foreclosure by assuring that the borrower is able to re-pay the mortgage.

The standard as outlined in the Rule on the Prohibition against Flipping takes consideration of the "totality of the facts and circumstances" of the specific loan transaction. [12.15.5.9(A) NMAC] Therefore, a "closer scrutiny" is required, not just a balancing test. [12.15.5.9(A) NMAC] It is recognized that the "majority of the loans may be evaluated using an appropriate economic analysis of the old and the new loan." [12.15.5.9(B) NMAC] The correct standard requires analysis as to whether

the lender had "developed and maintained policies and procedures ***19** for evaluating loans" where an economic analysis alone is insufficient to determine whether the loan transaction provided the net tangible benefit to the borrower. [12.15.5.9(C) NMAC] The Rule on the Prohibition against Flipping provides advice and guidance for lenders to create "additional upper-level management review" and to devise worksheets "for collecting relevant information from the borrower such as the borrower's financial status, objectives for use of the funds, and knowledge of other alternatives." [12.15.5.9(C) NMAC]

The next level of analysis is to consider important and relevant factors such as the terms of the loan in comparison with the then existing loan, the cost of the new loan, including the loan-to-value ratio and the debt-to-income ratio of the borrower before and after the loan transaction. [12.15.5.9(D) NMAC] At this level, relevant questions have to be made as to what determined the ultimate amount of the loan and what analysis was made as to the proposed use of the loan proceeds.

Finally, the Rule recommends that lenders document and maintain records in the loan file to demonstrate the lender performed an analysis of the reasonable net tangible standard. [12.15.5.9(F) NMAC] While borrowers are responsible to provide truthful and accurate financial information, the lender is not allowed to disregard known facts and circumstances that may question the accuracy of the financial information provided by the borrower. [12.15.5.9(G) NMAC] This ***20** documentation can be very helpful in determining whether the appropriate standard was applied to meet the statutory requirement. [12.15.5.9(F) NMAC] The Rule is very clear that a borrower's certification that the borrower received the required benefit, standing alone, is not enough to prove the required benefit. [12.15.5.9(H) NMAC]

D. THE CORRECT STANDARD WAS NOT USED BY THE COURTS BELOW TO DETERMINE WHETHER THE HOME LOAN WAS FLIPPED.

In reading the district court's findings in its Final Judgment and the Court of Appeal's Opinion, it is evident that a full analysis as worded in HLPA and outlined in the Rule on the Prohibition against Flipping was not performed. The courts below focused on the fact that the Romeros received a monetary benefit in cash and payment of their credit card debts. In some cases, the receipt of a monetary benefit may be an apparent benefit to the borrower. However, a monetary benefit alone can be equally detrimental, particularly if borrowers are unable to re-pay the new loan. Cash benefits, which are an economic benefit alone, cannot be considered in a vacuum without analyzing other circumstances and factors.

The loan transaction for the Romeros involved both a purchase money mortgage and non-purchase money loan. The purchase money mortgage was the amount of the new loan used to pay the Romeros then existing loan. The remaining part of the loan was to pay unsecured credit card debts and to replenish the ***21** Romeros' small business. The loan transaction created for the Romeros a risk that, in taking out a significant additional non-home-related consumer loan, (in this case, $30,000 cash plus $9,000 to pay credit cards), the Romeros might lose their home. It was not enough under the reasonable, tangible net benefit standard for the lender to look solely at the monetary benefit received in the transaction. Monetary benefit does not provide the whole picture of the effect of the loan transaction. Here, the benefit received by the Romeros in getting their unsecured credit card debts paid was not reasonable given the exposure of losing their home.

The record below does not show that there was any analysis as to whether the originator of this loan, Equity One, had in place policies and procedures for evaluating loans. There is no discussion as to whether a managerial review of this loan transaction was done by Equity One. Finally, there is no evidence that Equity One collected relevant financial information as to the alternatives available to the Romeros in order to get them out of the cycle of debt they were in; and most importantly, how the Romeros would be able to re-pay the new loan. These factors are all relevant to the proper determination of the required protection or benefit that our legislature intended to give borrowers in light of the ever growing predatory and subprime lending that was occurring in New Mexico and around the nation.

***22 II. FEDERAL PREEMPTION DOES NOT PROTECT NATIONAL BANKS FORECLOSING IN NEW MEXICO FROM COMPLIANCE WITH THE HOME LOAN PROTECTION ACT**

The trial court ruled, as a matter of law, that a national bank need not comply with the New Mexico Home Loan Protection Act (HLPA) because of federal preemption. The District Court did not set forth the basis for its decision. RP at 349. In the Court of Appeals, BONY argued that it had not violated the Home Loan Protection Act. Evidently concerned that consideration of the issue of preemption might result in an adverse ruling, BONY also argued that the Court of Appeals need not reach the question of preemption, and that it would be "unwise to do so" because it is a "difficult doctrine", in a "state of flux", having been recently "curtailed by Congress". Appellee's COA Answer Brief (filed Sept. 2, 2010), at 33. In affirming the district court's decision, the Court of Appeals based its decision on the existence of substantial evidence supporting the district court's findings and conclusions and therefore did not address preemption. *Bank of New York as Trustee for Popular Financial Services Mortgage/Pass through Certificate Series #2006-D vs. Joseph A. Romero and Mary Romero*, 2011-NMCA-110, ¶6, 2011 N.M. App. LEXIS 96.

Whether federal law, governing the operation of national banks, preempts state consumer protection laws has far reaching implications for the rights, and ***23** equally the fate, of homeowners in New Mexico. In a mortgage market that routinely sells loans to national banks after origination and where the mortgage industry has created elaborate "holding" entities to facilitate the assignment of notes and mortgages, the homeowners' rights under HLPA must be protected from overreaching efforts to use preemption as an obstacle to effective enforcement of state law protections for homeowners. Moreover, in this case, BONY makes an even more expansive claim of preemption. In bringing this foreclosure action, BONY did not originate the loan and was acting solely in its capacity as a trustee, not a bank. These questions are important public policy issues worthy of this Court's consideration and guidance. Should this Court reach the question of federal preemption, Amicus urges the Court to overrule the district court's finding and hold that the HLPA is not preempted as it applies to national banks.

A. NATIONAL BANKS AND TRUSTEES ARE SUBJECT TO STATE ENFORCEMENT LAWS OF GENERAL APPLICATION SUCH AS THE HLPA AND THE UPA

The Supreme Court has consistently held that national banks "are subject to the laws of the State.... All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law." *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1870); see also *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 529, 129 S. Ct. 2710, 2720 (2009) ("States... have always ***24** enforced their general laws against national banks[.]"); *Watters v. Wachovia Bank*, 550 U.S. 1 (2007) ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA.").

The National Bank Act ("NBA"), 12 U.S.C. Section 38, was enacted in 1874 to create a system of national banks. Claims that a national bank is immune from state law protections are usually premised on the application of the NBA. [7] The NBA preempts state laws only if they "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996); see also Watters, 550 U.S. at 12; *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("[N]ational banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."). The test is not whether the state law has any effect on banking powers - or even whether the state law has ***25** more than an "incidental" effect on those powers. Instead, the level of interference must be "significant". [8]

In *Barnett Bank* and *Cuomo*, the United States Supreme Court rejected the Office of the Comptroller's of the Currency ("OCC") overreaching interpretation of the scope of NBA preemption. In *Barnett Bank*, the Supreme Court considered whether a federal statute expressly permitting national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so. While holding in *Barnett Bank* that federal preemption applied, the Court specifically limited the scope of its ruling:

To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. *See, e.g. Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 247-252, 88 L. Ed. 692, 64 S. Ct. 599 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac [h] on the rights and privileges of national banks"); *McClellan v. Chipman*, 164 U.S. 347, 358, 41 L. Ed. 461, 17 S. Ct. 85 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions); *National Bank v. Commonwealth*, 76 U.S. 353, 9 Wall. 353, 362, 19 L. Ed. 701 (1870) (national banks subject to state law that does not ***26** "interfere with, or impair [national banks;] efficiency in performing the functions by which they are designed to serve [the Federal] Government").

Barnett Bank, 517 U.S. at 33-34.

In Cuomo, the Court considered NBA preemption as grounds to prohibit the state Attorney General from enforcing state lending laws by demanding records or through judicial proceedings against a national bank. The state Attorney General had requested several national banks to produce certain information about their lending practices to determine whether the banks had violated New York's state lending laws. While *Cuomo* addressed the specific enforcement power of the state's Attorney General, the Court's analysis of the scope of the NBA is equally pertinent here. The Court rejected the OCC's construction of the NBA, underscoring the "well established distinction between supervision and law enforcement." *Cuomo*, 129 S. Ct. at 2717. The Court thus limited NBA preemption to supervision of banks and affirmed the right of states to enforce state laws of general applicability since "the power of enforcement must rest with the [State] and not with the National Government." *Id.* (internal quotation marks and citation omitted) (alteration in original).

The law in New Mexico is in accord with the reasoning of *Cuomo*. The New Mexico Supreme Court has rejected claims of federal preemption of New Mexico protective laws of general application. *See Ashlock v. Sw. Bank of* ***27** *Roswell*, 107 N.M. 100, 103, 753 P. 2d 346, 349 (1988) (no federal pre-emption of New Mexico Unfair Practices Act), *overruled on other grounds by Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995); [9] *see also Humphries v. Pay and Save, Inc.*, 2011-NMCA-035, ¶7, 261 P.3d 592 (New Mexico courts have "strong preference against" federal pre-emption).

HLPA , like the Unfair Practices Act, is a law of general applicability affording consumer protections in mortgage origination of home loans and allowing for violations of HLPA to be raised as affirmative defenses or counterclaims in a foreclosure proceeding. Contract law, debt collection and foreclosure proceedings are the types of state laws specifically not preempted by the NBA. [10] *See Cuomo*, 129. S. Ct. at 2719. The HLPA does not "stand as an ***28** obstacle to," "impair the efficiency of," "significantly interfere," "interfere," "infringe," or otherwise "hamper" the purposes of the National Bank Act. *See Barnett Bank*, 517 U.S. at 30-33.

Private enforcement of consumer protection laws does not run afoul of the preemption policies of the NBA as articulated in Barnett Bank and Cuomo. The New Mexico Home Loan Protection Act's prohibition against "flipping" is precisely the type of consumer-oriented regulation that is not preempted. The current economic and housing crisis make abundantly clear that, in the absence of consumer protection law enforcement, the mortgage industry will fail to abide by even the most common sense rules of its own business. Furthermore, enforcing consumer protection measures with respect to locally originated mortgages does not implicate the policy concerns of federal preemption under the NBA.

B. BONY'S STATUS AS "TRUSTEE" OF THE MORTGAGE ON ITS FACE PRECLUDES A FINDING OF PREEMPTION

The party advocating preemption bears the burden of proof. *Fifth Third Bank v. CSX Corp.*, 415 F. 3d 741, 745 (7th Cir. 2005). Not only has BONY failed to set forth the legal basis for its claim of preemption, on the face of the Complaint ***29** the preemption claim is clearly without any merit. Federal preemption cannot bar the application of the HLPA when, as here,

BONY was not acting in its capacity as a bank, but solely as trustee for Popular Financial Services Mortgage/Pass Through Certificate Series #2006-D. In no sense should a bank acting as trustee for the benefit of investors in a real estate "trust" be allowed to assert preemption as grounds to protect them from compliance with state home loan protection laws.

For the sake of future New Mexico litigants, we urge the Court to clarify the application of the HLPA to national banks who, either as assignees of mortgage loans or originators of mortgage loans seek to foreclose on property in New Mexico. Given the frequency of assignments to national banks of loans originated by other lenders, it is in the public interest for this Court to clarify the enforceability of HLPA protections where the foreclosure is brought by a national bank, as trustee or otherwise.

CONCLUSION

The reasonable net tangible benefit standard used by both lower courts is incomplete: it fails to meet the intent of the legislature to provide broad consumer protection under the HLPA and UPA. The standard is clearly articulated in HLPA's statutory language in its definition of "flipping a home loan" and in the provisions of the Rule on the Prohibition Against Flipping.

***30** Holding that federal law preempts the HLPA directly and the UPA indirectly is erroneous. Federal and New Mexico case law clearly holds that the UPA is not preempted by federal law. The HLPA is also a substantive law protecting consumers who are extended credit in the form of a home loan and is intertwined with UPA. Therefore, the HLPA should receive the same treatment of preemption as the UPA.

For the foregoing reasons, the Attorney General of New Mexico respectfully requests that this Court reverse the holding of the Court of Appeals and remand this case for further proceedings.

Footnotes

1 The HLPA provides that a violation of any provision of the HLPA is a violation of the UPA. NMSA 1978 § 58-21A-12. Therefore, indirectly, this ruling also affects the enforcement of UPA.

2 While the HLPA was amended six years later in 2009 to provide additional protections regarding home loans, the "flipping" prohibition in Section 58-21A-4(B) was not affected.

3 The investigation in the *Ameriquest* case began sometime in 2003 and ended with the filing of the complaint and stipulated consent decree in the year 2006.

4 Congress adopted the Depository Institutions Deregulation and Monetary Control Act of 1980, ("DIDMCA"), 94 Stat. 132, in an era of economic inflation with high market rates for conventional mortgage loans resulting in the deregulation of home-secured lending rates, the deregulation of interest caps on Federal Housing Administration and Veterans' Administration loans and the almost inadvertent deregulation of usury laws as they relate to non-purchase home-secured loans.

5 Congress adopted the Tax Reform Act of 1986, 100 Sta. 2085, 2247-49, which disallowed the deductibility of consumer interest but permitted taxpayers to deduct interest paid on loans secured by a taxpayer's principal and one other residence.

6 The 2009 Amendment to the HLPA added protections to all home loans and not just to "high cost" loans as the original HLPA of 2003 had provided.

7 Under the Supremacy Clause of the United States Constitution, federal law is limited in preempting state law in three circumstances: (1) when Congress explicitly defines the extent to which its statute preempts state law ("express preemption"); (2) when state law attempts to regulate conduct in a field Congress intended the federal government to occupy exclusively ("field preemption"); or (3) when state law actually conflicts with federal law ("conflict preemption"). *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)

8 This test was recently confirmed by Congress' passage of the Dodd - Frank Act, which explicitly states that under the NBA, state consumer financial laws are preempted "only if... in accordance with... *Barnett Bank*... the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044 (2010) (codified at 12 U.S.C. § 25b(b)(1)(B)). *Barnett Bank* shows that the NBA has always had this meaning; the Dodd - Frank Act underscores the point.

9 Upholding these principles, the Eighth Circuit held that the National Bank Act ("NBA") does not preempt state consumer protection laws in circumstances similar to those in the instant case. *Thomas v. U.S. Bank National Ass 'n*, 575 F.3d 794 (8th Cir. 2009); *see*

also *Sheinkin v. Simon Property Group, Inc.*, 931 NYS2d 823 (NY Sup. 2011) (NBA does not preempt NY consumer fraud statute); *Perdue v. Crocker Nat. Bank*, 702 P.2d 503, 523 (Cal. 1985) (State laws regulating service charges are not preempted by NBA); *Agustin v. PNC Financial Services Group*, 707 F. Supp. 2d 1080, 1092 (D. Hawaii 2010) (State unfair and deceptive practices claims were not preempted by NBA); *In Re Checking Account Overdraft Litigation*, 694 F. Supp. 2d 1302, 1310-1314 (SD Fla. 2010) (State contract and tort claims are not preempted by NBA); *Jefferson v. Chase Home Finance*, 2008 WL 1883484 *10-15 (ND Cal. 2008) (State claims brought under state consumer protection laws are not preempted by NBA); and *Preston State Bank v. Ainsworth*, 552 F. Supp. 578 (D Tex. 1982) (State claims concerning unfair competition and trademark infringement are not preempted by NBA).

10 Significantly, the U.S. Treasury Department's 2004 regulations for national banks expressly treated the "rights to collect debts" as not preempted, 12 C.F.R. § 34.4(b)(5), and specially noted that state laws governing foreclosure "historically have been within a state's purview." OCC Notice of Proposed Rulemaking, Description of the Proposed Amendments to Part 34, 68 Fed. Reg. 46119 n. 86 (proposed Aug. 5, 2003) (codified at 12 C.F.R. § 34).

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