THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
Appellate Case No. 2016-001214

Quicken Loans, Inc., ... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank ..... Respondents.

QUICKEN LOANS INC.'S RETURN IN OPPOSITION TO THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS' MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Quicken Loans Inc. ("Quicken Loans") opposes the Motion for Leave to Appear as Amicus Curiae filed by the South Carolina Department of Consumer Affairs ("the Department"). The motion should be denied because (1) the Department attempts to enter this matter as an advocate with expert opinions rather than as a neutral friend of the Court; (2) the Department's administrative functions and purposes are not implicated in this action, which may be disposed of on procedural grounds; and (3) the Special Referee's rulings regarding the unauthorized practice

of law ("UPL") are outside of the Department's purview and have been foreclosed by the Supreme Court.

I. The Department should not be allowed to file an amicus brief because it is not a neutral nonparty offering insight on a doubtful or difficult question of law.

The Department's motion should be denied because the Department failed to establish that it is a proper amicus whose input is desirable for two reasons. *See* Rule 213, SCACR ("A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable."). First, the Department seeks to usurp the role of this Court by offering expert opinion on the ultimate legal issues in this case concerning the Consumer Protection Code. Second, the Department seeks to act as an advocate rather than as a friend of the Court.

The term amicus curiae describes a disinterested nonparty that seeks to inform the court on some difficult matter of law by offering insights not available from the parties. 4 Am. Jur. 2d Amicus Curiae § 1. It is a "Latin phrase for 'friend of the court' as distinguished from an advocate before the court." *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (internal citations omitted). "One permitted to proceed as amicus traditionally did so in the form of suggestions to the court on doubtful questions of law and in regard to which the court appeared to be in danger of going wrong." *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (internal citations omitted). Because its role is to ensure a complete and plenary presentation of difficult issues, an amicus participates only to the extent its supplementary information will benefit the court in ensuring justice may be done. *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974).

A. The Department's input is not desirable because it seeks to act as a legal expert rather than as a friend of the Court.

The Department presents itself not as an impartial friend of the court, but as an expert on the law entitled to deference. The Department contends that it is interested under Rule 213,

SCACR, because it is the sole agency entitled to construe and officially interpret the Consumer Protection Code. (Mot. p. 2.) The Department, however, failed to identify why its input is desirable under Rule 213, SCACR. The Department did not identify the issues on appeal on which it intends to comment, nor explain how those issues pose a difficult question of law requiring the Department's views. Nor does the Department identify any administrative rulemaking that the parties have overlooked which only the Department may explain. Instead, the Department intends to offer its expertise only to "assist the Court in the *resolution* of issues before it." (*Id.* at p. 3 (emphasis added).) The application of the law to the evidence in the record, however, is the role of the Court, not an amicus. *See Banerjee v. Bd. of Trustees of Smith Coll.*, 648 F.2d 61, 65 (1st Cir. 1981) ("While, presumably, an amicus' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims."); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("[A]n amicus who argues facts should rarely be welcomed."). The Court should not invite the Department to comment on the ultimate issues on appeal under the guise of its consumer protection purpose.

All of the issues on appeal, including the precedential value of a single administrative interpretation relied on by Respondent, have been fully briefed by the parties. (*See* Br. of Appellant at pp. 15-16; Br. of Resp't at pp. 4-5.) There is no guidance or special insight that the Department may provide. Instead, the Department's commentary will presumably improperly buttress Respondent's positions by adding the Department's name to them, effectively turning this appeal into two-versus-one. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus

curiae' means friend of the court, not friend of a party."); *see also United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (denying request by New York Civil Liberties Union to appear as amicus because it appeared that the NYCLU accepted and advocated for the facts as presented by one side rather than providing an objective and dispassionate discussion of the issues). The Department's motion should be denied.

B. The Department's input is not desirable because it seeks to act as an advocate rather than as a neutral friend of the Court.

The Department asserts that it is interested in this action because "[s]everal matters are currently pending before the Department pertaining to compliance with S.C. Code Ann. Section 37-10-102." (Mot. p. 3.) In the matters currently pending before the Department, whether they are in the investigation or contested case stage, the Department and its Administrator sit in an adverse position to creditors accused of violating the Attorney Preference Statute. *See* S.C. Code Ann. §§ 37-6-105, -107, and -113. Presumably, the Department will advocate a position in this case on the side of promoting consumer protection, which is consistent with its adversarial position in the cases currently pending before it. The Department is attempting to enter this case not as a neutral friend of the Court but as an advocate. *See Alexander*, 64 F.R.D. at 155 (amicus must not serve as advocates). The Court should deny its motion. *See Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as amicus curiae is perceived to be an interested party or an advocate of one of the parties to the litigation, leave to appear as amicus curiae should be denied.").

Further, if the Department is permitted to influence a decision in this case that benefits it in other matters pending before the Department, it would be to the unfair prejudice of the creditors in those matters. These unidentified creditors will not have the opportunity to submit amicus briefs in opposition to the Department's in this action. Even if they were aware of this action and decided

to file an opposing amicus brief, they would not be able to present the specific facts of their case. Rule 213, SCACR. Because the Department's involvement in this case would prejudice the rights of non-parties, the Court should deny its motion. Its involvement is not necessary to the resolution of this case and would not serve the interests of justice and due process.

Additionally, the Department claims an interest in this case as "the state's consumer protection agency." (Mot. p.3.) The Department's interests as the State's agency charged with promoting consumer protection aligns with the Respondent, who is the consumer in the transaction before the Court. A request to appear as amicus should be rejected if it appears that the movant is a "friend of a party" rather than a "friend of the court." *See, e.g., Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 556 (E.D. Pa. 1999) (denying petition of association of school district insurers to participate in case related to school district liability and insurance on the grounds that it had a specific interest in a particular outcome and made no attempt to present itself as a neutral party); *Goldberg v. City of Philadelphia*, C.A. No. 91-7575, 1994 WL 369875, at *1 (E.D. Pa. July 14, 1994) ("When an organization seeking to appear as amicus curiae is perceived to be an advocate for one of the parties to the litigation, leave to appear amicus curiae should be denied."). Because the Department's stated interests prevent it from being a neutral friend of the Court, its input is not desirable and its motion should be denied.

II. The Department's interest in administering the Consumer Protection Code is not implicated in this appeal, which may be disposed of on procedural issues.

Under the Consumer Protection Code, codified at Title 37 of the South Carolina Code, the Administrator of the Department has the statutory duty to:

> See that the provisions of this title are faithfully administered and enforced and to that end it may adopt, amend and repeal rules and regulations, not inconsistent with law, to interpret and explain provisions of this title, carry out the purposes and policies of this

> title, to prevent circumvention or evasion thereof or to facilitate compliance therewith.

S.C. Code Ann. § 37-6-506(2). To effectuate this duty, the Administrator may "take action designed to obtain voluntary compliance with this title, or commence proceedings on his own initiative." S.C. Code Ann. § 37-6-104(1)(a).

This Court's review of the Special Referee's misapplication of the attorney preference statute to the facts in this case does not implicate the Department's regulations or rulemakings. This case is not an appeal from, or related to, an administrative action by the Department. The Court should not allow the Department to graft an administrative dimension onto this appeal or expand it to involve issues beyond those on appeal by the parties. *See In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (denying motion by Public Service Commission to file amicus brief in action regarding telecommunications disputes on the grounds that the brief did not contain any new information or arguments, despite the regulator's different perspective from the parties).

Moreover, this appeal is predominated by procedural issues. Specifically, whether the Special Referee erred by granting summary judgment for Respondent prior to the close of discovery and despite the existence of genuine issues of material fact regarding Quicken Loans' ascertainment of the Respondent's attorney preference. (*See* Br. of Appellant at pp. 12-21.) Similarly, the Court's review of the Special Referee's denial of Quicken Loans' jury trial demand, denial of Quicken Loans' motion to amend the pleadings, and reliance on impermissible evidence does not require the application of the Consumer Protection Code. (*See id.* at pp. 32-37.) The Department's positions regarding the Consumer Protection Code are not necessary to resolving these dispositive issues on appeal.

III. The Department's commentary on issues of UPL are of no consequence.

Finally, the Department's motion should be denied to the extent it seeks to comment on the Special Referee's finding that Appellant engaged in UPL and violated S.C. Code Ann. § 40-5-320, which prohibits the practice of law by corporations, and the South Carolina Supreme Court's holding in *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). (*See* Order pp. 7-8 & 15-17 (supporting unconscionability holding by inferring Quicken Loans engaged in UPL and violated Section 40-5-320 and *Buyers Services*).) Only the Supreme Court may determine what conduct constitutes UPL. *In re Unauthorized Practice of Law Rules Proposed by S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992). The Supreme Court recently reviewed Quicken Loans' processes and determined that it did not engage in UPL. *Boone v. Quicken Loans, Inc. et al.*, Op. No. 27727 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 60). Accordingly, the Special Referee's finding that the loan was unconscionable because Quicken Loans' conduct violated S.C. Code Ann. § 40-5-320 and the Supreme Court's UPL jurisprudence should be reversed without the need for an amicus brief from the Department.

[*signature page attached*]

Respectfully submitted,

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August 28, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM BARNWELL COUNTY
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J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
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Quicken Loans, Inc., ... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank..... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant Quicken Loans, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: QUICKEN LOANS INC'S RETURN IN OPPOSITION TO THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS' MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

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August 28, 2017

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
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P.O. Box 11629
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RE: Quicken Loans, Inc. v. Wayne D. Wilson, et al.
Civil Action No. 2015-CP-06-00070
Appellate Case No. 2016-001214
Our File No. 42677/01510

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Quicken Loans Inc.'s Return in Opposition to the South Carolina Department of Consumer Affairs' Motion for Leave to Appear as Amicus Curiae in regard to the above-referenced matter. We ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them a copy of this document.

Very truly yours,

Matt Bogan

A. Mattison Bogan

AMB:rd
Enclosures
cc: C. Bradley Hutto, Esquire
Steven W. Hamm, Esquire
Daniel W. Williams, Esquire
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