

argument they deem helpful." Nothing in the Commissioner's order indicates that the civil plaintiffs have been or will be deemed a party to the administrative proceeding before the Commissioner, or that they should be served with any papers filed in this matter. Rather, by the Commissioner's express terminology, civil plaintiffs' involvement in the administrative proceeding has been limited to the submission of a brief as an *amicus curiae*. Advance America-NC, and its counsel, have acted fully in accordance with that ruling.

Moreover, counsel for the civil plaintiffs notes a conversation with counsel for Advance America-NC during a break in their court appearance in the *Kucan* case on March 10, 2005, regarding obtaining pleadings in the administrative matter. The conversation did take place, but civil plaintiffs' counsel (Mr. Hartzell) neglects to mention several important aspects of it and characterizes it incorrectly; namely, counsel for Advance America-NC stated that civil plaintiffs were not parties to the administrative matter, civil plaintiffs' counsel never asserted that his clients *were* parties, and civil plaintiffs' counsel made it clear to counsel for Advance America-NC that the issue was of no real moment in any case because he had been obtaining pleadings from the Office of the Commissioner of Banks and its website. There was no discussion at the time regarding any obligation on Advance America-NC's part to serve civil plaintiffs with anything in the administrative matter, or otherwise treat them like parties.

In any event, and in accord with civil plaintiffs' counsel's statement to Advance America-NC's counsel that he was receiving the pleadings, it seems clear from the recent filings that civil plaintiffs have had no difficulty obtaining pleadings filed in this matter even though

they are not parties and are not entitled to formal service. In short, civil plaintiffs, for all their concerns, do not appear to have been prejudiced in any fashion.¹

The Response of the Attorney General to the Notice of Appeal of the Commissioner's Order Allowing Intervention points out that N.C. GEN. STAT. § 114-2(8) provides that the Attorney General may intervene when it is in the public interest and specifically "on behalf of the using and consuming public of this State." Response at 3. While Advance America-NC objects to the intervention of the Attorney General's Office on other grounds, civil plaintiffs would appear to be part of the consuming public. There is no basis, in other words, for the civil plaintiffs to be offered the opportunity to file an *amicus* brief in this matter, let alone to file one as part of litigation in derogation of their arbitration agreements. Advance America-NC's appeal is well-taken.²

Regarding prejudice to Advance America-NC, the civil plaintiffs fail to note the fact that they signed multiple binding arbitration agreements that preclude litigation in this forum. These arbitration agreements provide Advance America-NC with a statutorily recognized substantial right. *See* former N.C. GEN. STAT. § 1-567.18 (allowing interlocutory appeal of denial of motion to compel arbitration); N.C. GEN. STAT. § 1-569.28 (same). Civil plaintiffs'

¹ Civil plaintiffs state that they complained about lack of service in their reply brief filed on March 18, 2005, in support of their motion to intervene. Neither North Carolina nor Washington, D.C. counsel for Advance America-NC ever received this brief, which should have been served on it as a party to the administrative proceeding before the Commissioner. Because the brief apparently was not served, we were unaware of Mr. Hartzell's view that we were being "discourteous."

² Advance America-NC cited several statutes in support of its Notice of Appeal of the Commissioner's ruling on the motion to intervene, including N.C. GEN. STAT. § 1-277(a) (an appeal may be taken of a determination "which affects a substantial right claimed in any action or proceeding") and N.C. GEN. STAT. § 150B-43 ("Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.").

violations of these contractual agreements and of Advance America-NC's right to arbitrate – let alone the need to respond to an undefined "*amicus*" brief containing whatever civil plaintiffs choose to put in it – constitutes the prejudice that will occur if civil plaintiffs are allowed to intervene in any fashion.³ See Opposition to Motion to Intervene at 5-6; Notice of Appeal at 3-4; Motion to Dismiss at 4.

WHEREFORE, civil plaintiffs' motion to dismiss or ignore the appeal should be rejected, Advance America-NC's appeal of the Commissioner's ruling allowing limited intervention to the civil plaintiffs should be granted, and proceedings before the Commissioner should be stayed pending resolution of this matter.

³ As *amicus curiae*, civil plaintiffs should not even be permitted to file a response or "Motion to Dismiss or Ignore Appeal." The procedural impropriety of such a motion, as well as civil plaintiffs' mischaracterization of certain facts, however, necessitated this response to clarify the record.

Dated: April 7, 2005

Respectfully submitted,



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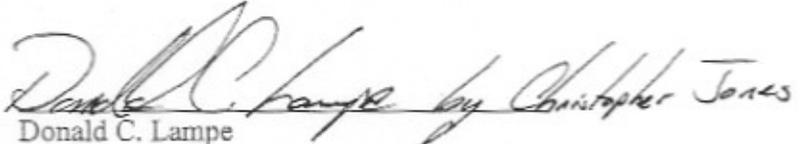
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **RESPONSE TO CIVIL PLAINTIFFS' MOTION TO DISMISS OR IGNORE APPEAL** on all parties to this action by sending a copy by electronic mail and by United States mail, postage prepaid, addressed as follows:

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This the 7th day of April, 2005.


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