

STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO. 05:008:CF

IN RE:)
)
ADVANCE AMERICA, CASH ADVANCE)
CENTERS OF NORTH CAROLINA, INC.)
_____)

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR
PROTECTIVE ORDER AND ORDER LIMITING DISCOVERY**

The Office of the Commissioner of Banks and the Intervenor Attorney General (“the Petitioners”) submit the following memorandum of law in support of their Joint Motion for a Protective Order and Order Limiting Discovery.

INTRODUCTION

The Respondent Advance America, Cash Advance Centers of North Carolina, Inc. served discovery requests, including 52 requests for production of documents on March 31, 2005. The Petitioners filed their motion for protective order on April 7, 2005. The Petitioners served their responses and objections to the Respondent’s discovery request on April 15 and produced documents to the Respondent on April 18, 2005. The Respondent filed a memorandum of opposition to the Petitioners’ motion for protective order on April 18, 2005.

As noted in the Petitioners’ Motion, the Respondent’s production requests are extraordinary in their overbreadth, their irrelevance to the issues in this proceeding, the degree in

which they intrude upon attorney-client and attorney work product privileges, and in the burdens they would impose on counsel for the Petitioners. The requests literally seek the production of all documents generated, sent or received by the Petitioners, their counsel, or employees, that “relate to” or “concern” payday lending issues over an eight year period. The requests would include published news articles, studies and reports, communications with other government regulators and consumer groups, cases and legislation in other states, communications regarding legislation not enacted in North Carolina, internal memoranda, all without limitation as long as these documents “relate to” or “concern” payday lending. The Petitioners do not understand how such materials are remotely related to the issues before the Commissioner in this proceeding.

The only rational justification put forward by the Respondent for its massive request is its suggestion (in its opposition memorandum of April 18) that it can assert an estoppel defense and it therefore requires government documents to demonstrate it relied on some unspecified statements or assertions by government officials. For reasons more fully shown below, the Respondent cannot maintain a defense of estoppel. First, the Respondent cannot meet the elements of an estoppel defense. Second, estoppel rarely applies as a defense to a government enforcement agency. Finally, if the Respondent contends it has some sort of “safe harbor” promise from a state agency, it should not have to dig through all of the Petitioners’ records to find the statement it was relying on to conduct its operations in North Carolina. The estoppel theory is simply a red herring that should not be used to justify this discovery request.

The Petitioners have made substantial, time-consuming efforts within the 14-day time constraint to locate relevant, non-privileged documents to produce to the Respondent. The Petitioners have produced approximately 750 pages of documents, including correspondence of

both the Attorney General and Commissioner of Banks, and members of their respective staffs; legislative reports and summaries; documents received from other payday lending entities; declaratory rulings from the Office of the Commissioner of Banks; a formal opinion from the Attorney General's Office; press statements from the Attorney General and Commissioner of Banks, and civil complaints from prior payday lending related litigation.¹ The Petitioners have specifically provided public statements or official pronouncements relating to compliance or enforcement in the area of payday lending. The Petitioners are also in the process of producing documents from consumer complaint files in the possession of the Attorney General's Office which should be available on or before April 25.

In its April 18 opposition memorandum, the Respondent complains that the Petitioners' counsel have made insufficient efforts to narrow the discovery requests. However, the Respondent's discovery request is not something that lends itself to trimming around the edges. The whole premise behind the Respondent's discovery is fatally flawed. If Respondent is seriously interested in narrowing the scope of its discovery, it should have done so instead of persisting in arguing the relevance of its overbroad production requests. The fact of the matter is that there is an enormous disparity between the parties' views as to what information "is relevant to the subject matter involved in the pending action," pursuant to Rule 26(b)(1) of the Rules of Civil Procedure.

¹The Respondent asserts in its opposition memorandum that the Petitioners produced these documents belatedly by delivering them on Monday, April 18. In fact, Petitioners' counsel were prepared to deposit copies of the documents in the mail on the evening of April 15 (which is all that is required for service and the Respondent had not requested otherwise) but, out of courtesy, contacted Respondent's counsel on the afternoon of April 15, and offered to hand deliver the documents that evening or during the weekend. Petitioners' counsel left messages for Respondent's counsel in the early evening of April 15 but did not receive any further response.

I. MOST OF THE DOCUMENTS SOUGHT BY THE RESPONDENT ARE IRRELEVANT TO THE ISSUES IN THIS PROCEEDING.

A. Permissible Scope of Discovery.

The North Carolina Administrative Code provisions governing proceedings before the Commissioner of Banks provide that “the Rules of Civil Procedure shall apply in hearings and prehearing proceedings ... to the same extent as though the hearing or prehearing proceeding was pending in a Court.” 04 NCAC 03B .0221. Under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure,

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party....

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; ... or (iii) the discovery is unduly burdensome or expensive....

N.C. R. Civ. P. 26(b)(1) (emphasis added).

Rule 26(c) further provides that a court may, upon motion by a party, and for good cause, enter a protective order to protect a party from abusive discovery:

Upon motion by a party or by the person from whom discovery is sought and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters....

N.C. R. Civ. P. 26(c).

Thus, the touchstone of discovery is the *relevance* of the requested documents or materials to a party's claim or defense, or whether the information sought is "reasonably calculated to lead to the discovery of admissible evidence." N.C. R. Civ. P. 26(b)(1). Where parties have roved beyond the rule's scope, North Carolina courts have routinely upheld the entry of protective orders "to prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes." Williams v. State Farm Mut. Auto Ins. Co., 67 N.C. App. 271, 274, 312 S.E.2d 905, 907 (1984). In Williams, in upholding the trial court's entry of a protective order, the Court of Appeals noted that the discovery requests were "very broad" and that the plaintiff "ha[d] not shown that the materials sought were relevant or necessary, and, further, that [t]o comply with the request would have been burdensome to defendants." Id.

In another case, Powers v. Parish, 104 N.C. App. 400, 409 S.E.2d 725 (1991), the plaintiff filed an action against her ex-husband for child support, and propounded extensive document requests concerning the defendant's financial status over a five-year period. The requests included, among other things, a demand for "an itemization of all money received from any and all sources, other than income," all checking account records, cancelled checks, deposit slips, savings account records, "all written documents" relating to any tangible assets such as stocks or bonds, and, finally, evidence of debt. Id., 104 N.C. App. at 410, 409 S.E.2d at 731.

The defendant husband moved for a protective order, which the trial court denied. On appeal, the Court of Appeals observed that, under the statute, the relevant inquiries in the plaintiff's action were the "reasonable needs of the child" and the parties' present, relative financial abilities to contribute to those needs. Id. The Court further noted that "[o]rdinarily the

ability of the supporting spouse to pay child support is determined by the amount that parent is earning at the time of the court's award." Id. The Court of Appeals held that the trial court abused its discretion in refusing to enter a protective order because the plaintiff's discovery requests "far exceed[ed] the scope of ... documents relevant to plaintiff's action and [were], therefore, unduly burdensome." Id., 104 N.C. App. At 409, 409 S.E.2d at 730-31. The Court further held that, "absent [a showing of] relevance, plaintiff [could] not possibly establish the necessity for many of the documents sought...." Id. See generally, Nichols v. Wyndham International, Inc., 373 F.3d 537 (4th Cir. 2004) (In upholding the trial court's entry of a protective order, observing that "[e]ven assuming that [the requested] information is relevant (in the broadest sense), the simple fact that requested information is discoverable under Rule 26(a) does not mean that discovery must be had.").

B. The Relevant Issues to Be Decided.

In the instant proceeding, the relevant issues for decision are delineated in paragraphs 10 through 12 of the Commissioner's Pre-Hearing Order issued on April 21, 2005. Specifically, paragraph 10 of that Order exhorts the parties that: "In summary, the Notice of Hearing correctly limits the issue in contest to whether AANC's current operations violate the Consumer Finance Act and the action to be taken by the Commissioner should a violation be found to issuance of an order to cease and desist." Pre-Hearing Order, ¶10.

In Paragraph 11 of the Pre-Hearing Order, the Commissioner set forth the factual issues to be determined in the proceeding:

The Notice of Hearing correctly summarizes the factual issues to be determined in that regard; they are:

- A. Whether AANC is a person engaged in the business of lending as that term is used in G.S. § 53-166.
- B. Whether AANC regularly offers, arranges, originates, and collects on consumer loans with interest rates in excess of those allowed by Chapter 24 of the General Statutes.
- C. Whether AANC contracts for, exacts or receives in connection with such loans, directly or indirectly, charges which in the aggregate are greater than those allowed by Chapter 24.
- D. Whether AANC is required to be licensed under the Consumer Finance Act and, if so, whether it is in fact so licensed.

Pre-Hearing Order, ¶11.

Finally, the Commissioner stated that “[t]here is an additional determination that must be made in this matter raised; that is, whether AANC is exempt from the application of the Consumer Finance Act, either under the terms of that statute or otherwise.” Pre-Hearing Order, ¶12.

C. The Respondent Has Failed to Meet Its Burden of Demonstrating That the Documents It Seeks Are Relevant to the Issues to Be Decided or to the Respondent’s Defense.

Under the above standard, the Respondent must, as a preliminary matter, demonstrate that the documents it seeks are relevant to the issues to be decided in this case, or are relevant or necessary to the Respondent’s defense. With respect to many categories of documents it seeks, Respondent has failed to meet its burden.

As previously set out in Petitioners’ Motion for a Protective Order, taken in their entirety, Respondent’s requests seek literally all documents in the possession of either the Commissioner of Banks’ Office or the Attorney General’s Office that relate in any way to payday lending. For example, Request for Production No. 10 requests “[a]ny and all documents created by any

government representatives, including but not limited to the following individuals, that in any way concerning [sic] payday lending issues in North Carolina prior to or after the August 31, 2001 sunset of N.C.G.S. § 53-281.” (Eight individuals are then named, six of whom are attorneys in the Offices of the Attorney General or Commissioner of Banks.) As another example, Request for Production No. 18 requests “[a]ny and all formal or informal opinions, rulings, announcements, and/or factual or legal memoranda or materials concerning payday lending issues in North Carolina prior or subsequent to the August 31, 2001 sunset of N.C.G.S. § 53-281 (emphasis added). Thus, on its face, this request seeks all materials “concerning payday lending issues in North Carolina” in the possession of Petitioners. Such a request is grossly overbroad and would sweep within its scope anything and everything in Petitioners’ files that “concern” payday lending, which could involve thousands upon thousands of documents, virtually all of which are irrelevant to this proceeding.

The Commissioner has identified the key issue in this proceeding as whether or not the Respondent is engaged in the business of lending in North Carolina, in violation of the Consumer Finance Act. With respect to the conduct of Respondent’s business, Respondent, needless to say, should have full and complete information regarding its own business. Any documents that Petitioners have regarding this issue are publicly-filed documents, or are documents previously produced to Petitioners by Respondent. Accordingly, Respondent has no need for discovery on this issue, and, moreover, Petitioners have no responsive documents to provide, other than those already in the possession of Respondent.

1. Respondent Cannot Assert An Estoppel Defense Against the State When the State is Enforcing its Police Powers.

In its Opposition to the Motion to Intervene, and in its Opposition to Joint Motion for a Protective Order, Respondent advances only two defenses. Both of these defenses are entirely baseless and should not be allowed as grounds for seeking unfettered discovery in the guise of a “fishing expedition” of the files of the Attorney General’s Office and the Office of the Commissioner of Banks.

As an initial matter, the Respondent argues that its requests are “calculated to lead to the discovery of relevant evidence concerning an estoppel defense.” (Opposition to Joint Motion for a Protective Order, pp. 10-13) The Respondent cannot meet the required elements of an estoppel defense. More fundamentally, and contrary to Respondent’s arguments, North Carolina courts have squarely held that an estoppel defense cannot be raised where the State is acting pursuant to its police powers to enforce a duly-enacted law of the legislature.

“The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.” State of North Carolina ex rel. Easley v. Rich Food Services, Inc., 139 N.C. App. 691, 703, 535 S.E.2d 84, 92 (2000); Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 796-97 (1998).

In Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948), the plaintiffs, who owned a flower shop, were incorrectly advised by a collector of the Department of Revenue that sales of flowers grown on their own land were not subject to sales tax. Subsequently, after further

review, the Department of Revenue determined that the sales were subject to tax, and forced the plaintiffs to pay taxes on the sales. The plaintiffs filed suit to recover the tax paid under protest. The plaintiffs argued that they had detrimentally relied on the advice given them by the collector, and, in relying on that advice, they were unable to retroactively collect the 3% sales tax from their customers on the past transactions.

The North Carolina Supreme Court ruled that, even assuming the Commissioner of Revenue had “presumptively” reviewed the plaintiffs’ tax report, no estoppel could lie against the government where it was acting in “the exercise of a governmental or sovereign right.”

These facts, however potent in creating an estoppel in ordinary transactions between individuals do not estop the State in the exercise of a governmental or sovereign right....

The imposition and collection of taxes are, of course, governmental functions; and the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid; and under the law as we understand it neither can their conduct or advice create an estoppel against the State....”

Id., 229 N.C. at 316, 49 S.E.2d at 756 (emphasis added) (citations omitted).

Similarly, in another case, the City of Raleigh brought an action against landowners who were in violation of a zoning ordinance by operating a bakery business in an area zoned for residential use. Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950). The North Carolina Supreme Court ruled that the municipality could not be estopped from enforcing the zoning ordinance against the landowners, despite the fact that the landowners’ illegal use of the property had been ongoing and with the municipality’s knowledge for a period of years.

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society.

In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.

Undoubtedly, this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id., 232 N.C. at 634, 61 S.E.2d at 901 (emphasis added) (citations omitted).

See also Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953) (holding, in a tax case, that the county could be estopped only in instances in which the estoppel would not impair the exercise of the governmental powers of the county, and thus the county was not estopped from asserting its ownership of the property through a tax deed); Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947) (Holding that the Commissioner of Insurance “has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by the statute. When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, the approval of the doing of it by a ministerial officer cannot create a right to do that which is unauthorized or forbidden.”); Kings Mt. Bd. of Education v. North Carolina State Bd. of Education, 159 N.C. App. 568, 583 S.E.2d 629 (2003) (observing that a governmental agency is not subject to an estoppel claim to the same extent as an individual or private corporation, and that a governmental entity may be estopped only if it is necessary to prevent a loss to another, *and* the estoppel will not impair the exercise of governmental powers).

In the instant proceeding, the Office of the Commissioner of Banks and the Attorney General are clearly exercising the police powers of the State to enforce duly-enacted laws of the General Assembly. As such, the Respondent is barred from asserting an estoppel defense, even assuming the Respondent could demonstrate – which it cannot – that it relied on unidentified statements of the Attorney General or his staff, or of the Commissioner of Banks or his staff. Because it is manifest that the Respondent cannot raise an estoppel defense in this proceeding, Respondent should not be allowed to engage in open-ended discovery of the Petitioners in a vain attempt to raise a meritless defense.

2. The Respondent’s Intent is Immaterial in This Proceeding, and, Moreover, the Respondent Should Not Need to Engage in Discovery from the State on the Respondent’s Intent.

In another attempt to justify its sweeping discovery requests, the Respondent makes a perplexing argument that it needs discovery from the State to demonstrate that Respondent did not engage in “subterfuge,” if the State was aware of Respondent’s activities. This argument is vacuous.

As the Commissioner is well aware, N.C.G.S. § 53-166(b) provides that “[t]he provisions of subsection (a) of this section shall apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.” The express language of this provision makes clear that the terms “device,” “subterfuge,” and “pretense” are independent of each other, and, thus, where a party engages in any device, or subterfuge, or pretense to evade the statute, those activities will be brought within the statute’s scope. “Device” is defined as, among other things, “something devised or constructed for a particular purpose.” The American Heritage Dictionary, 2d ed. 1985.

Petitioners have not contended that Respondent engaged in “subterfuge” with an intent to deceive the State, or that Respondent did deceive the State. Instead, Petitioners maintain that Respondent’s “bank agency model” is a “device” employed by Respondent to evade the application of the Consumer Finance Act. Therefore, it is immaterial whether Respondent intentionally engaged in deceit, so long as Respondent employed any device to evade the statute. Accordingly, Respondent should not be allowed to justify its extraordinary discovery requests on the grounds that it needs discovery on Respondent’s “intent” or “subterfuge.”

D. It Would Be Enormously Burdensome For the Petitioners to Respond to All of the Respondent’s Requests In Their Entirety.

Not only are most of the Respondent’s requests irrelevant to the issues in this proceeding, but, moreover, it would be enormously burdensome for the Petitioners to respond to all of the Respondent’s requests in their entirety. See Petitioners’ Joint Motion for a Protective Order, pp. 6-8, which is incorporated herein. The Respondent seeks production of files that are in the possession of any employee of the Attorney General’s Office or the Office of the Commissioner of Banks. The documents would include copies of all news articles, studies, legislation and legislative proposals from other states, cases and litigation materials from other states, miscellaneous e-mail messages on payday lending issues and developments, bills and amendments relating to proposed North Carolina legislation, internal e-mail messages, and various other documents relating to payday lending issues. The process to locate, identify, categorize, review, and copy such irrelevant materials would occupy counsel for weeks and would delay the progress of this proceeding.

II. THE PETITIONERS ARE ENTITLED TO PROTECT FROM PRODUCTION DOCUMENTS THAT ARE PRIVILEGED.

A. The Petitioners Are Entitled to Protect Documents That Are Covered by the Attorney Work Product and Attorney-Client Privileges.

The Respondent seeks production of the Petitioners' internal documents that relate to the planning or conduct of official investigations or litigation. For example, Request for Production No. 27 requests: "Any and all documents reflecting your office's, agency's or organization's plan of action relative to businesses that you believe(d) were/are engaged in payday lending activities in North Carolina, which documents were created prior or subsequent to execution of the consent order in the ACE payday lending litigation."

Such unqualified requests to gain access to confidential work files and attorney-client communications is unprecedented in the litigation experience of the Petitioners' counsel. Any such documents, prepared in confidence to advise the Attorney General or the Commissioner of Banks or their senior staff regarding prospective litigation, or to discuss, review or plan litigation on behalf of the Attorney General or the Commissioner, are shielded from production pursuant to the attorney-client privilege. Documents prepared by counsel in anticipation of litigation are protected by the attorney work product privilege or work product exception to the discovery rules.

The attorney-client privilege exists if: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney was professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 291 (1981). When the attorney-client relationship exists, all confidential communications made pursuant to that relationship are privileged and may not be disclosed. Id. The protection of the attorney-client privilege is “absolute” with respect to discovery under Rule 26. Willis v. Duke Power Co., 291 N.C. 19, 34, 229 S.E.2d 191, 201 (1976). Of course, the protection of the attorney-client privilege extends to communications between government attorneys and their clients. Carolina Holdings, Inc. v. Housing Appeals Board, 149 N.C. App. 579, 561 S.E.2d 541 (2002).

Rule 26(b)(3), which addresses limitations on discovery, sets out the work product exception as follows:

Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

N.C. R. Civ. P. 26(b)(3).

The North Carolina Supreme Court has stated that the work product immunity, although qualified, is far broader than the common law work product protection under Hickman v. Taylor, 329 U.S. 495 (1947). Willis v. Duke Power Co., supra, 291 N.C. at 35, 229 S.E.2d at 101.

Work product protection is extended to materials prepared in anticipation of litigation, including “circumstances under which a reasonable person might anticipate a possibility of litigation.” Id.

There is no exception in Rule 26(b)(3) that limits the applicability of the work product protection to non-government attorneys.

The Respondent has not made the required showing of “substantial need” or “undue hardship” to attempt to overcome the work product protection from discovery afforded by Rule 26(b)(3). Therefore, all work product materials and all documents reflecting confidential communications between the State’s attorneys in this action and their client agencies or officials should be protected from discovery.

B. The Petitioners are Entitled to the Protection of the Decisional Process Privilege.

The Respondent seeks to discover documents which reflect the internal decision making process of the Attorney General’s Office and the Office of the Commissioner of Banks. The Respondent’s requests that seek, in whole or in part, to discover internal memoranda that relate to payday lending enforcement and policy include Nos. 1, 2, 3, 10, 11, 13, 18, 19, 20, 26, 27 and 31. The Petitioners assert that such documents are protected by the work product privilege and more specifically, by a subcategory of the privilege known as the decisional process privilege.

The decisional process privilege has been recognized by the Supreme Court as one intended to protect “the decision making policies of government agencies.” National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). The Court noted that “frank discussion of policy matters in writing might be inhibited if the discussion were made public, and that the decisions and policies formulated would be the poorer as a result.” Id. (internal quotes omitted). The Court has recognized the privilege as a privilege against discovery of internal advisory documents that also creates an exception to disclosure under the federal

Freedom of Information Act. According to the Court, the privilege serves important public policy ends: “efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to ‘operate in a fishbowl.’” Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973).

The decisional process privilege protects documents that are both predecisional and deliberative. Predecisional communications are those communications generated in order to assist the agency decisionmaker in making a decision. Deliberative communications are those relating to the process by which policies are formulated. Hopkins v. U.S. Dept. of Housing and Urban Development, 929 F.2d 81, 84 (2d Cir. 1991). See also City of Virginia Beach v. U.S. Dept. of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993).

The Respondent is seeking discovery of documents which include internal advisory memoranda to assist in internal decision making, including the development of litigation and enforcement options relating to payday lending. Such documents are precisely the sort of information the deliberative process privilege was intended to protect. To the extent that any such documents are at all relevant (and they are not), the Petitioners are entitled to the application of the privilege to protect their internal communications.

C. The Petitioners are Entitled to the Protection of the Common Interest Privilege.

The Respondent seeks documents which relate to Petitioners’ written communications with other Attorneys General or private counsel who are involved in litigation related to payday lending. Petitioners’ counsel has had communications with both government and private counsel, including occasional confidential communications with plaintiffs’ counsel in the Kucan

case specifically referred to in production request No. 9.

Communications between counsel allied in interest, made with an expectation of confidentiality, are protected under a derivative of work product privilege referred to as the “common legal interest doctrine” or the “joint defense privilege.” The purpose of the privilege is that persons who share a common interest in similar litigation should be able to communicate freely with each other to more effectively prosecute or defend their claims. In Re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990). The protection has been extended by court decisions to potential co-parties to prospective litigation, to plaintiffs pursuing separate actions in different states, and to civil defendants who were sued in separate actions. Id. at 249, and cases cited therein.

The Fourth Circuit has applied the common interest privilege to documents shared between a government agency and a private attorney representing a client who was allied in interest with the government agency. Hanson v. U.S. Agency for International Development, 372 F.3d 286 (4th Cir. 2004). The Court held that the government’s right to obtain confidential information from private sector counsel prevailed over the plaintiff’s claim for disclosure under the federal Freedom of Information Act.

Petitioners’ counsel are therefore entitled to protect confidential communications with other Attorneys General and plaintiffs’ counsel in the Kucan litigation relating to the legal issues in this proceeding.

D. The Public Records Act is Not Applicable to this Proceeding.

The Respondent argues that the North Carolina Public Records Act trumps the Petitioners’ claims of work product and attorney-client privilege. The problem with the

Respondent's argument is that this is not a public records case; it is contested case litigation to which the Rules of Civil Procedure and established principles of privilege apply. Under the rules of discovery, the Respondent cannot engage in an open-ended fishing expedition and must demonstrate some relevancy for its requests. As the Court of Appeals has held, "it would be illogical to allow a party to circumvent the rules of discovery in a civil context through the use of the Public Records Act." Shella v. Moon, 125 N.C. App. 607, 610, 481 S.E.2d 363, 365 (1997).

In Shella, the plaintiff's requests for the Department of Transportation to produce certain documents was denied by the trial judge. The plaintiff then filed a separate suit under the Public Records Act for the same information. The Court of Appeals said that to allow the plaintiff to seek the same discovery records under the Public Records Act "would make a mockery of our discovery rules." Id. at 611. See also Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 434 S.E.2d 176 (1993) (rules restricting discovery of criminal investigative files under Article 48 of Chapter 15A prevail over Public Records Act request).

The Respondent relies on McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004), to question whether the Petitioners have any work product privilege. McCormick was a declaratory judgment case brought under the Public Records Act. It was not a civil case with discovery issues under the Rules of Civil Procedure. In fact, the Court did not even discuss the discovery rules or the Rules of Civil Procedure. Further, the direct application of McCormick is to local government attorneys who do not have the Attorney General's unique constitutional and common law powers as affirmed by G.S. § 114-1.1. The Attorney General has the constitutional and statutory authority to enforce the law and provide legal counsel to state officials, and requires confidential internal communications and work

product privilege to fulfill his responsibilities.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request the Commissioner to grant their Motion for a Protective Order and Order Limiting Discovery.

This the 25 day of April, 2005.



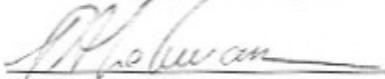
L. McNeil Chestnut
Special Deputy Attorney General
And Counsel to the Office of the
Commissioner of Banks
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Phone: 919.716.6800
Fax: 919.716.6755
Email: mchest@ncdoj.com

ROY COOPER
ATTORNEY GENERAL

By:



Joshua N. Stein
Senior Deputy Attorney General



Philip A. Lehman
Assistant Attorney General



M. Lynne Weaver
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Phone: 919.716.6000
Fax: 919.716.6050

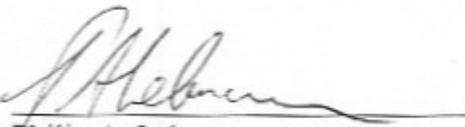
CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that he has this day served a copy of the foregoing MEMORANDUM IN SUPPORT OF PETITIONERS' JOINT MOTION FOR A PROTECTIVE ORDER AND ORDER LIMITING DISCOVERY by electronic mail to counsel for Respondent and by placing a copy of the same in the United States Post Office at Raleigh, North Carolina, certified mail, return receipt requested, postage prepaid and addressed to:

Donald C. Lampe
Christopher W. Jones
WOMBLE, CARLYLE, SANDRIDGE & RICE PLLC
One Wachovia Center
301 South College Street, Suite 3500
Charlotte, NC 28202

Saul M. Pilchen
Lesley B. Whitcomb
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue N.W.
Washington, D.C. 20005

This the 22nd day of April, 2005.


Philip A. Lehman
Assistant Attorney General