

STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO. 2005:008:CF

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

**ATTORNEY GENERAL'S RESPONSE TO RESPONDENT'S OPPOSITION
TO MOTION TO INTERVENE**

On February 15, 2005, the Attorney General filed a motion to intervene in this proceeding pursuant to G.S. § 114-2(8) and other authority cited in the motion. Despite the clear statutory authority for the Attorney General's intervention, respondent Advance America, Cash Advance Centers of North Carolina, Inc. (hereinafter "Advance America" or "the respondent") filed an Opposition to the Motion to Intervene on March 11, 2005. In its memorandum, Advance America contends (1) that intervention should be denied because the Attorney General has taken an advocacy position on the matters at issue in the hearing; and (2) that undersigned counsel for the Attorney General should be disqualified because Advance America may seek to call Attorney General staff as witnesses. There is no merit to Advance America's contentions.

**I. THE ATTORNEY GENERAL HAS THE RIGHT TO INTERVENE
IN THIS PROCEEDING AND TO ASSERT AN ADVOCACY
POSITION.**

Intervention by the Attorney General should not be a serious or disputed issue in this

proceeding. North Carolina law provides that the Attorney General has an unqualified right to intervene in legal proceedings to assert the public interest. G.S. § 114-2(8)a states that the Attorney General has the duty

[t]o intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

The Court of Appeals has affirmed that, unlike private litigants, the Attorney General has the exclusive right to act in the public interest on behalf of the consuming public of the State.

Neuse River Foundation, Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 119, 574 S.E.2d 48, 55 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). The Notice of Hearing in this proceeding also recognized the Attorney General's right to intervene by affirmatively stating that "[t]he Attorney General may intervene to participate in the hearing pursuant to G.S. § 114-2."

It is axiomatic that when the Attorney General intervenes in a proceeding, he does so as an advocate, to argue for the public interest, and to present a particular position in the matter. There would be little point in intervention if the Attorney General had no point of view to articulate. In the instant proceeding, the Attorney General does not have any judicial or quasi-judicial role. The motion to intervene clearly states that the Attorney General seeks to assert the claims and remedies set forth in the Notice of Hearing. Since the Attorney General is appearing as an advocate and not a neutral arbiter, the "extrajudicial source doctrine" cases cited by the respondent are inapposite.

The fact that the Attorney General has asserted a similar position in other litigation and has made public comments on his position is of no particular consequence to the intervention motion. Advance America makes much of the fact that Attorney General Cooper has made statements on payday lending and attaches four exhibits to its memorandum to demonstrate alleged bias and prejudice on the part of the Attorney General. Three of the exhibits (B, C and D) are news stories from January, 2002, and relate to the filing or prospective filing of the State's challenge to ACE Cash Express' payday lending operations in North Carolina. (State ex rel. Cooper v. ACE Cash Express, Inc., 02 CVS 330, Wake County Superior Court) In the news stories, the Attorney General explained the State's position in the litigation and, not surprisingly, asserted that loan companies doing business in North Carolina should comply with North Carolina law. The fourth exhibit (A) is from Attorney General Cooper's campaign website and, although it summarizes the Attorney General's consumer protection record, it does not even mention payday lending.

Intervention by the Attorney General should not come as a surprise to the respondent, and the respondent should not be able to claim it is prejudiced by the intervention. The Attorney General's Office has been involved with the investigation of Advance America's North Carolina lending activities since the beginning of the investigation. The Attorney General's Office issued an Investigative Demand to the respondent on August 26, 2004, the same day as the Office of the Commissioner of Banks issued its subpoena. The Attorney General's Investigative Demand and the Commissioner's subpoena were substantially identical. The respondent cooperated with the dual investigation and produced the same documents to the Attorney General and the Commissioner. The Attorney General's intervention in this proceeding is the natural and logical

result of the investigative process.

The respondent now complains that the undersigned appeared and asked questions at the investigative hearing before the Commissioner. The Attorney General, under G.S. § 75-10, had the right to independently summon representatives of Advance America for examination under oath. One would assume that Advance America and its counsel would prefer to appear at one time to answer questions, and not be subjected to duplicative investigative proceedings. Advance America also suggests that it is improper for an Assistant Attorney General to participate with the Commissioner at the investigative hearing and then to appear as an advocate before the Commissioner in a contested case hearing. There is no conflict or *per se* due process violation arising out of dual investigative and advocacy roles on the part of the Attorney General's Office. Dorsey v. UNC-Wilmington, 122 N.C. App. 58, 66-67, 468 S.E.2d 557, 562 (1996).

Finally, allowing intervention by the Attorney General will not complicate or delay the proceedings or impose any significant additional burden on the parties. As the motion to intervene specifies, the intervention will allow other representatives of the Attorney General's Office to assist counsel for the Office of the Commissioner of Banks in the preparation and presentation of evidence and legal argument in this proceeding.¹

¹To date, Special Deputy Attorney General L. McNeil Chestnut is the only counsel appearing for the petitioner in this case while the respondent lists seven attorneys as counsel on its opposition memorandum.

II. ADVANCE AMERICA HAS NOT DEMONSTRATED ANY NEED TO CALL MEMBERS OF THE ATTORNEY GENERAL'S OFFICE AS WITNESSES.

Advance America asserts that it has the "absolute right" to call members of the Attorney General's staff as witnesses, and that the motion to intervene should be denied because Advance America may wish to call the undersigned as witnesses.

Advance America, of course, has no such absolute right to call opposing counsel as witnesses. It has not demonstrated any legitimate or reasonable need for testimony by any member of the Attorney General's staff. The undersigned take strong issue with Advance America's representation that we could be witnesses in this proceeding. The practice of designating opposing counsel as a witness and using a disqualification motion as a litigation tactic has met with judicial disapproval. Colonial Gas Co. v. Aetna Casualty and Surety Co., 144 F.R.D. 610, 612 (D. Mass. 1991).

One justification advanced by the respondent is that members of the Attorney General's Office, including the undersigned, "may have made statements regarding the scope and interpretation of state law as it pertained to payday cash advance companies ..." and that such statements "may prove relevant to legislative history type evidence concerning the scope and interpretation of the statutes at issue in this proceeding." (Respondent's memorandum, p. 10) There is no merit to this attempt at justification of the respondent's extraordinary claim that it can call opposing counsel as witnesses. Testimony and affidavits of witnesses, even from members of the General Assembly, are not competent evidence of legislative history and are inadmissible to show legislative intent. State ex rel. North Carolina Milk Comm. v. National

Food Stores, Inc., 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967).

Even if in the extremely unlikely event that members of the Attorney General's staff could offer competent and relevant testimony in this proceeding, the respondent should first establish that it has a compelling need for such testimony, and that the evidence is not available from other sources. State v. Simpson, 314 N.C. 359, 373, 334 N.C. 53, 62 (1985). The respondent has not come close to making any such showing. The ethical rules cited by the respondent make it clear that a lawyer-witness is subject to disqualification only if he or she "is likely to be a necessary witness." N.C. Rules of Professional Conduct, Rule 3.7(a) (emphasis added). Further, the party calling opposing counsel as a witness has no right to require opposing counsel to withdraw. Colonial Gas Co., *supra*.

It is difficult to understand how counsel for the Attorney General could legitimately be called as witnesses in this proceeding under any test, much less a "compelling need" standard. The primary issue in this case is whether Advance America's lending activities are permitted by North Carolina law. The facts as to how Advance America conducts its operations in North Carolina are obviously well known to the respondent. There will undoubtedly be disputed issues as to the application of North Carolina and federal law but these are issues of law which, like legal issues in any contested matter, do not require testimony of counsel.

CONCLUSION

The Attorney General respectfully submits that he has the statutory right to intervene in this proceeding, that intervention would not impose any additional burdens on the process or the parties, and that participation by the Attorney General would contribute to the presentation of

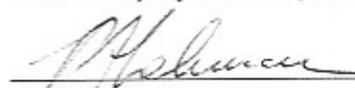
the case to the Commissioner. The respondent has not demonstrated any substantial reasons why the Attorney General's motion to intervene should not be granted.

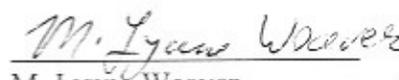
This the ___ day of March, 2005.

ROY COOPER
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Attorney General's Response to Respondent's Opposition to Motion to Intervene was served upon counsel for the respondent Advance America, Cash Advance Centers of North Carolina, Inc., by electronic mail, as well as placing a copy thereof in first-class mail, postage pre-paid, and addressed as follows:

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This the 18th day of March, 2005.



Philip A. Lehman
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