

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

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

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

**REPLY BRIEF IN SUPPORT OF  
KUCAN PLAINTIFFS' MOTION TO INTERVENE**

Advance America's strong words seems more focused on generating a certain level of animosity than on addressing the issues relevant to the pending motion to intervene.<sup>1</sup>

Advance America's Opposition directed against the *Kucan* plaintiff's intervention (the "Opposition") employs "the lawyers are in it for the money" and "hijack" rhetoric.

"Private counsel in [the *Kucan*] litigation, on behalf of plaintiffs, seek to use the Commissioner's proceeding as an additional front against Advance America-NC and the payday cash advance industry for their own pecuniary ends, and in so doing threaten to hijack and certainly delay resolution of this case."

Opposition, p. 3 (emphasis added). What's the point of the lawyer bashing?<sup>2</sup> The public interest

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<sup>1</sup> In addition to its language in its brief, Advance America also has refused to serve the *Kucan* plaintiffs with copies of its filings relating to the instant motion, on the ground that the *Kucan* plaintiffs "are not yet parties to the case." The discourtesy seems pointless, since filings in this contested case proceeding are matters of public record.

<sup>2</sup> As it happens, in the *Tomlin* case that was settled in 2003 and in which the Commissioner of Banks came to be involved by reason of defendants' efforts to subpoena the Commissioner's records, and in which Advance America's counsel represented one of the defendants, Judge Tennille publicly complimented the work of plaintiffs' counsel and indicated he would have been willing to award a larger class counsel fee in that case than was requested. Three of the counsel herein-- McNulty, Maynard and Hartzell-- were among plaintiffs' counsel. *Tomlin v. Dylan Mortgage*, case no. 99-CVS-3551, 2000 NCBC 9 (New Hanover County, assigned to the North Carolina Business Court).

lawyers among plaintiffs' counsel are described as "special interest group lawyers for whom the payday cash advance industry has become a *cause celebre* nationwide." *Id.* What relevance do these *ad hominem* arguments have to the issue of intervention?

Advance America also says it is "plain" that movants seek to "abuse the instant administrative proceeding as an alternate forum to obtain discovery to which they are not entitled . . . ." *Opposition*, p. 5 (emphasis added). The *Kucan* plaintiffs do not intend, and never have intended, to conduct discovery in this proceeding. Advance America would have known this if Advance America had made any inquiry. Indeed, Advance America is aware that the *Kucan* plaintiffs regard the issue presented in this proceeding to be extraordinarily simple, and that the *Kucan* plaintiffs contend Advance America's violation of the Consumer Finance Act and check cashing laws is quite clear.

Matters seem sufficiently clear that no discovery by any party would seem necessary and all necessary facts should be the subject of agreement.<sup>3</sup> The Commission has done its investigation, and now it remains only to apply the law to known facts to be placed on the public record through stipulation.

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<sup>3</sup> *Cf.* Advance America's "Opposition To Motion To Intervene By The Office of the Attorney General" dated March 11, 2005 at p. 3, in which Advance America states on "information and belief":

"that at least three individuals, and possibly others from the Office of the Attorney General, made public statements and met with representatives of Advance America-NC and other companies . . . ."

"Advance America-NC had the right to rely on such statements in the structuring and conduct of its business in the State . . . ."

Advance America's intent to get into discovery about this seems to be a strategic ploy. How is it that Advance America does not know what was supposedly said, but nonetheless supposedly relied on "such statements." How is such alleged reliance possible given that the Banking Commissioner specifically advised all payday lenders in writing on August 30, 2001 that all payday lending by payday lenders "either directly or as agent for another" must cease immediately? (Emphasis added.) (See Exhibit 1.) How is such reliance possible given that the other acts of which Advance America complains concern the Attorney General's statements and suits *against* payday lenders? How is any such reliance relevant, given that estoppel is not available as against state agencies?

### WHAT THE KUCAN PLAINTIFFS CONTEND

Advance America chides the *Kucan* plaintiffs for failing to comply with 4 NCAC

03B.0215.

“Perhaps demonstrating that their role in any administrative proceeding only would serve to hinder an efficient resolution of this matter, plaintiffs have failed to follow regulatory requirements for filing a motion to intervene. Specifically, plaintiffs have failed to provide a summary of the arguments or evidence they seek to present to the Commissioner. *See* 4 N.C.A.C. § 3B.0215(c)(6) (Jan. 2005). Their motion can and should be denied on this basis alone.”

Opposition at 7, n.5. While Advance America refers to the “Jan. 2005” edition of the NCAC, somehow their research failed to reveal that the rule they cite was repealed effective August 1, 2004.

However the *Kucan* plaintiffs make no secret about the contentions to be advanced in this proceeding. They are substantially as follows:

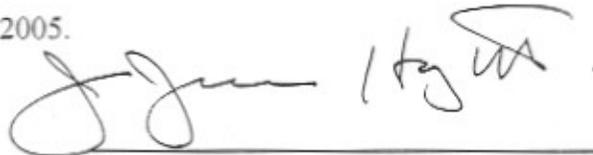
- Advance America employs signage and media listings (phone directories, Internet) that indicate it is a source of payday loans. The bank that is the purported lender does not have signage or media listings for loans made in North Carolina, maintains no offices in North Carolina and is not licensed to conduct business in North Carolina.
- Advance America performs the marketing, origination, processing, disbursing, servicing and collection functions associated with the payday loans made at its offices in North Carolina.
- Advance America receives and retains the great majority of the fees paid in connection with payday loans made at Advance America offices in North Carolina.
- Advance America protects the bank that is the purported lender against risk of loss on the payday loans made at Advance America offices in North Carolina.
- Advance America employs its “agent assisted lending” model only in those states in which Advance America seeks to avoid some state law, such as the North Carolina Consumer Finance Act.
- Advance America did not employ its “agent assisted lending” model in North Carolina until the expiration of the statute authorizing payday lending.

- Advance America is “engaged in the business of lending” in North Carolina within the meaning of G.S. 53-166(a). Alternatively, Advance America is seeking to avoid the application of the Consumer Finance Act through “device, subterfuge or pretense” within the meaning of G.S. 53-166(b).
- Advance America is further engaged in the business of “cashing checks” for “consideration” in North Carolina within the meaning of G.S. 53-275 et seq. without holding the required license or abiding by the requirements imposed by G.S. 53-275 et seq.

CONCLUSION

The *Kucan* plaintiffs ask that their motion to intervene be permitted, and that the Commission not be distracted by Advance America’s tactics or inflammatory language.

This the 19<sup>th</sup> day of March, 2005.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached "Reply Brief In Support Of *Kucan* Plaintiffs' Motion To Intervene" was served upon all parties by U.S. mail, addressed to:

L. McNeil Chestnut, Esq.  
Special Deputy Attorney General  
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Advance America, Cash Advance Centers  
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This the 18<sup>th</sup> day of March, 2005.



J. Jerome Hartzell

## URGENT MEMO

TO: All check-cashing business licensees now engaged in "payday lending"  
FROM: Hal D. Lingerfelt, Commissioner of Banks  
DATE: August 30, 2001  
RE: N.C.G.S. § 53-281 not extended; it will sunset on August 31, 2001

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**Sunset of statute.** In 1997, the NC Legislature enacted N.C.G.S. § 53-281 as the sole statutory basis for a check-cashing business to engage in post-dated or delayed deposit check-cashing transactions in this state. That law was set to expire on July 31, 2001, but the General Assembly extended the sunset for thirty (30) days, until August 31, 2001. The General Assembly has now adjourned this week without taking action to either extend the sunset again or to reform the current law and re-enact some form of "payday lending" authorization. Consequently, N.C.G.S. § 53-281 will expire on Friday, August 31, 2001, and there is no lawful basis for "payday lending" without such a law, including "payday lending" transactions effected by "agents" or "facilitators" of out-of-state lending institutions.

**Effect of sunset on delayed deposit transactions of licensees.** Check-cashing businesses which engage in transactions involving postdated or delayed deposit checks should be prepared to cease all such new agreements after August 31, 2001. Any delayed deposit checks that a licensee is holding as of August 31, 2001 may, of course, be held and then deposited in accordance with the licensee's lawful contract with its customer. However, licensees should make no further payday loans after August 31, 2001, either directly or as agent for another, since they are without legal authority to enter such transactions.

**"Regular check cashing" business is unaffected.** The only portion of the law on "Check-cashing Businesses" that is affected by the sunset is delayed deposit check-cashing. The sunset does not affect in any way the authority of a licensee to cash a check for a customer according to the fee structure set forth in the law. License renewals for these licenses have now been mailed out to all check cashing business licensees. We will continue to license, regulate, and examine check cashing businesses as before under the remaining provisions of Article 22 of Chapter 53.

**LICENSEES SHOULD VISIT THE OFFICE OF THE COMMISSIONER OF BANKS WEB SITE OR CALL (919) 733-2978 FOR FURTHER INFORMATION CONCERNING THE SUNSET OF THIS LAW! Our website is: [www.banking.state.nc.us](http://www.banking.state.nc.us).**