

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) PRE-HEARING ORDER
CAROLINA, INC. ("AANC" OR)
"RESPONDENT"))
_____)

1. Pursuant to a Notice of Hearing and Order for Pretrial Conference, dated February 1, 2005 (the "Notice of Hearing"), the Office of the North Carolina Commissioner of Banks gave notice to Advance America, Cash Advance Centers of North Carolina, Inc. ("AANC") of allegations regarding AANC's compliance with the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the North Carolina General Statutes, G.S. §§ 53-164 *et.seq.* (the "Consumer Finance Act") and the North Carolina statute entitled "Check Cashing Businesses," Article 22 of Chapter 53 of the North Carolina General Statutes, G.S. §§ 53-275 *et.seq.* (the "Check Casher Act").
2. Since the service of the Notice of Hearing, the Commissioner of Banks, hearing officer in this case, has received a number of procedural motions and significant discovery requests from counsel for AANC. These discovery requests have been largely opposed by counsel for OCOB and by the North Carolina Attorney General, acting in his capacity as intervenor in this case. A determination with regard to the relevance of evidence, and thus the scope of allowable discovery, depends on the nature and scope of this proceeding and the nature of the remedies that could be sought against AANC in this forum.

Claims under the Consumer Finance Act

3. The Notice of Hearing contains thirty-one allegations of fact (all Factual Allegations except for Numbers 29 and 31) that relate to the applicability of the Consumer Finance Act to AANC's business and operations in North Carolina.

After a summary of certain provisions of the Consumer Finance Act, the Notice of Hearing states:

Based on the foregoing, there is reasonable cause to believe that AANC may be engaged in the business of lending within the meaning of G.S. § 53-166; that it regularly offers, arranges, originates and collects on consumer loans with interest rates in excess of the rates authorized by Chapter 24 of the General Statutes; that it contracts for, exacts or receives in connection with such loans, directly or indirectly, charges which in the aggregate are greater than permitted by Chapter 24; and that it is not licensed as a consumer finance licensee pursuant to G.S. § 53-166 (Notice of Hearing, “Claim For Relief,” paragraph 5).

4. The Notice of Hearing also states that:

...good cause exists for the Commissioner of Banks to conduct a hearing ...relating to AANC’s compliance with North Carolina law and (a) if AANC is found to be in violation of the Consumer Finance Act, to issue an order to cease and desist such violation...” (*Ibid*, paragraph 7).

5. Accordingly, the only Consumer Finance Act issue before me is whether AANC is currently violating the Consumer Finance Act and the only remedy under the Consumer Finance Act called for in the Notice of Hearing is injunctive relief.

6. The Consumer Finance Act gives the Commissioner of Banks direct and personal enforcement powers in two of its provisions:

- A. The Consumer Finance Act confers upon the Commissioner the power and duty, among other things, “to issue subpoenas, ... conduct hearings and transcribe testimony in making the investigations and conducting the hearings provided for herein or in the other exercise of his duties, and to give such publicity to the investigation as he may deem best for the public interest.” G.S. § 53-186.

- B. The Consumer Finance Act further states that, “Whenever the Commissioner has reasonable cause to believe that any person *is violating or is threatening to violate* any provisions of this Article, he may in addition to all actions provided for in this Article, and without prejudice thereto, enter an order requiring such person to cease or desist or to refrain from such violation; and an action may be brought in the name of the Commissioner on the relation of the State of North Carolina to enjoin such person from engaging in or continuing such violation or from doing any act or acts in furtherance thereof...” G.S. § 53-187 (emphasis added). The same statute goes on to describe further remedies that may be sought by the Commissioner, including appointment of a receiver. *Ibid*.

7. These provisions of the Consumer Finance Act make clear that in addition to the office's investigative powers, the only expressly authorized enforcement power of the Commissioner is issuance of a cease and desist or other injunctive order. Further, this power is to be exercised with regard to the then current activities of a person based upon the determination that such person is violating the statute or is threatening to do so.
8. The Consumer Finance Act also imposes on the Commissioner an additional and indirect enforcement obligation. Its provisions regarding penalties make violation of the statute by any person other than an exempt person a Class 1 misdemeanor and further state that:

It shall be the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any such offense with all facts and evidence in his actual or constructive possession, and to testify as to such facts upon the trial of any person for such offense. G.S. § 53-166(c).
9. While G.S. § 53-166(c) allows for a criminal referral by the Commissioner of Banks, it does not require one unless and until the Commissioner determines that a violation has occurred. Further, discretion with regard to criminal prosecution rests with the district attorney rather than the Commissioner. In the current case, no prospect of such action is possible unless and until it has been determined that the current activity of AANC violates the Consumer Finance Act.
10. 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.
11. 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.

12. There 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. The statute exempts from its coverage a number of persons, including, “any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks.” G.S. § 53-191. In addition to this express statutory provision, there may be other arguments advanced by AANC under federal law and / or the United States Constitution regarding the applicability of North Carolina law to its operations. Now is the time to for this issue to be raised, briefed and decided.

Claims under the Check Casher Act

13. The Notice of Hearing contains two paragraphs (paragraphs 29 and 31) that are expressly related to AANC’s compliance with the Check Casher Act. The Notice of Hearing then states that, “there is good cause to believe that AANC may be cashing checks for consideration in violation of G.S. § 53-276.” (Notice of Hearing, “Claim for Relief,” paragraph 6.)
14. It goes on to state that there is good cause for a hearing to determine AANC’s compliance with North Carolina law and “(b) if AANC is found to be in violation of the Check Casher Act, to issue an order to cease and desist such violation and to assess such civil money penalties as may be appropriate.” (*Ibid*, paragraph 7.)
15. The Check Casher Act provides the Commissioner of Banks with the power to:
 - A. Issue a cease and desist order to a violator after notice and an opportunity for hearing under Chapter 150B. G.S. § 53-285.
 - B. Assess civil penalties not in excess of \$1,000 per violation. G.S. § 53-286.
 - C. Order restitution of unlawful or excessive fees. *Ibid*.
16. The Check Casher Act also authorizes the imposition of serious criminal penalties (Class I felony) for violations, but the Check Casher Act does not specify who is to determine liability or how. Given the seriousness of the potential liability, such liability should be determined by a court of criminal jurisdiction after trial.
17. Like the Consumer Finance Act, the Check Casher Act contains an exemption for certain firms, in this case, “a bank ... organized under the laws of the United States or any state.” G.S. § 53-53-277(a)(1).

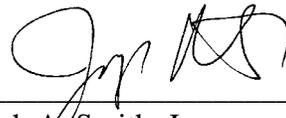
18. While the allegations of violations of the Check Casher Act set forth in the Notice of Hearing appear to have been made in good faith, consideration of such allegations in this proceeding does not serve the interest of procedural efficiency because:
- A. Issues regarding violations of the Check Casher Act have been minimally pled and could require significant additional discovery and factual development.
 - B. The Consumer Finance Law portion of this case has been much more extensively investigated and is ready to be able to be heard in the near future.
 - C. The Consumer Finance Law portion of this case requires resolution of a number of legal issues that would make resolution of the Check Casher Act portion of the case easier if and when those allegations are heard.
 - D. No prejudice will result to the State or AANC if hearing of the Check Casher Act allegations is deferred.

ORDER

Based on the foregoing, it is hereby ordered:

1. That the allegations in the Notice of Hearing of violations or potential violations by AANC of the North Carolina Check Casher Act are hereby dismissed without prejudice. Such claims may be heard at a later date and in a separate proceeding, in this or another forum.
2. That any claim for civil money penalties based upon past transactions or any request for criminal sanctions arising from past transactions is denied and the allegations supporting such in the Notice of Hearing are dismissed without prejudice to the right of any person or party to prosecute or defend such at a later date or in a separate proceeding.
3. The parties are instructed to prepare for a prompt hearing with regard to allegations that AANC's operations in North Carolina violate the North Carolina Consumer Finance Act in accordance with the guidance set forth above.

This the 21st day of April, 2005.



Joseph A. Smith, Jr.
Commissioner of Banks

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that he has this day served a copy of the foregoing Order by facsimile and by placing a copy of the same in the mail, at Raleigh, first class mail, postage prepaid and addressed to the persons listed below:

This the 21st day of April, 2005.



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