
IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1825

Lower Tribunal No. 4D03-3268

McKENZIE CHECK ADVANCE OF FLORIDA, LLC,
d/b/a NATIONAL CASH ADVANCE,
STEVE A. McKENZIE AND BRENDA G. McKENZIE,

Petitioners,

vs.

WENDY BETTS, on behalf of herself
and all others
similarly situated,

Respondent.

**AMENDEED BRIEF OF AMICUS CURIAE,
THE COMMUNITY FINANCIAL SERVICES
ASSOCIATION OF AMERICA,
IN SUPPORT OF PETITIONERS**

FILED BY THE CONSENT OF ALL PARTIES

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SUMMARY OF ARGUMENT

The primary interest of the Community Financial Services Association of America (“CFSA”) is fairness -- it is fundamentally unfair to penalize companies that have sought and complied for *years* with regulatory guidance on the proper way to conduct their business in Florida. The decision below also would adversely impact the stability of Florida’s regulatory framework. It calls into question settled expectations about doing business in Florida, thereby chilling business interest in the State. Furthermore, the Fourth District Court of Appeal erred when it determined that the statutory interpretation made by Florida’s Department of Banking and Finance (the “Department”) was unreasonable. The Department’s rulings not only were consistent with the statute, but also accommodated a critical financial need of Florida’s citizens.

ARGUMENT

I. The Community Financial Services Association Of America is the National Trade Association for the Deferred Presentment Industry.

CFSA is the national trade association for the deferred presentment transaction industry. CFSA member companies own and operate more than half of the estimated 15,000 retail outlets for deferred presentment transactions in the

United States. CFSA has no ownership interest in any parties to this litigation¹ and has no interest in the outcome of this case, other than in seeking, on behalf of its members, the correct, consistent, and *reliable* application of Florida law to the claims asserted in this action.

CFSA has established — and enforces among its members — responsible industry practices that address consumer rights and protections. The “Best Practices” of CFSA (attached as the “Appendix” hereto) require its members to comply with all applicable laws and regulations, to disclose fully the terms and cost of each transaction, to limit renewals of deferred presentment transactions, to encourage consumers to use this service responsibly by informing consumers of the intended use of the product and to notify them of counseling alternatives, to provide consumers with a next-day right of rescission, and to refrain from the threat or pursuit of criminal action for collection purposes.

Petitioner McKenzie Check Advance of Florida, LLC, d/b/a National Cash Advance, and other CFSA members doing business in Florida during the time in question, will suffer significant and long-lasting economic harm if the decision of the Fourth District Court of Appeal is allowed to stand.

¹ Petitioner McKenzie Check Advance of Florida, LLC (d/b/a National Cash Advance), which is now owned by Advance America, Cash Advance Centers, Inc. (“Advance America”), is a member of CFSA. Petitioners have not borne any portion of the cost of preparation of this brief, other than through Advance America’s payment of ordinary membership dues to the CFSA.

Accordingly, CFSA desires to share its perspective on these issues to assist the Court in its disposition of this case.

II. Corporate Citizens Should Be Able To Rely On Agency Actions.

Corporate citizens should be able to rely on the opinions and rulings of their regulators. Shortly after passage of the “Deferred Presentment Act,” Chapter 560, Florida Statutes (Supp. 1994) (“Chapter 560”), the deferred presentment industry sought an opinion from the Florida Department of Banking and Finance (the “Department”) regarding the impact of Chapter 560 on deferred presentment transactions. In response to this request, the Department issued an opinion in which it concluded that deferred presentment transactions were permissible under Chapter 560. That opinion was issued in February 1995, and was subsequently affirmed in regulations issued by the Department in 1997. The Department’s opinion also was affirmed by an opinion of the Florida Attorney General in 2000. Thus, between 1995 and 2001, when the Deferred Presentment Act became effective, National Cash Advance and others engaged in deferred presentment transactions with the full knowledge and affirmative approval of the Department.

Moreover, these actions by the Department and the Attorney General were not hidden. They were public actions, which could be known and understood by both regulated companies and their customers, such as Ms. Betts.

Now comes the decision of the Fourth District Court of Appeal, which, by not deferring to the Department's interpretation of Chapter 560, would subject National Cash Advance and other companies to penalties under the State's criminal usury statute,² including conviction as a third degree felon, subject to a term of imprisonment not exceeding five years,³ and repayment of double the amount of interest.⁴

This after-the-fact rejection of an agency's determination not only is unfair, but also undermines the integrity of Florida's regulatory process.

In this case, National Cash Advance and other deferred presentment providers have done everything that can be asked of a regulated industry. They took note of Chapter 560 and sought confirmation of the law's requirements from their regulator. They then conducted their business in accordance with the guidance they received from the state regulator. Good corporate citizens should not be punished for seeking regulatory guidance and then abiding by it.

Punishing companies that act in accordance with regulatory guidance will have a chilling effect on Florida's ability to retain and attract business. The State's regulatory system is based upon the authority of regulators, such as the Department of Banking and Finance. Furthermore, the Attorney General is the chief legal

² §§ 687.071(3), 687.146, Fla. Stat. (2004).

³ § 775.082(3)(d), Fla. Stat. (2004).

⁴ § 687.04, Fla. Stat. (2004).

officer for the State. If a company cannot rely upon regulations, opinions, and interpretations of the Department – especially when ratified by the Attorney General – upon whom can they rely without over-burdening the courts with petitions for declaratory relief?

III. The Department’s Statutory Interpretations Are Reasonable.

Florida “courts generally will not depart from [an agency interpretation] unless it is clearly erroneous or unauthorized.”⁵ A court should thus defer to a reasonable interpretation of a statute made by the agency responsible for implementing the regulation. In this case, the agency responsible for interpreting the relevant statute was the Department. On two occasions, first in an opinion letter issued in 1995, and second in regulations issued in 1997, the Department concluded that Chapter 560 authorized deferred presentment transactions, as long as those transactions met certain conditions.

Were these interpretations reasonable? Without a doubt. Indeed, in its decision below, the Fourth District Court of Appeal acknowledges the legality of deferred presentment transaction practices prior to 2001: “Clearly, by amending the code [Chapter 560], the Legislature sought to *add greater* consumer

⁵ *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952).

protections, which were not previously in place.”⁶ The addition of “greater consumer protection” assumes that the practices extant prior to 2001 were not only legal, but also were subject to certain consumer protections.

The Legislature implicitly ratified this interpretation by the Department when it added a Part IV to Chapter 560 in 2001. Section 560.403 of this Part IV sets forth registration requirements for those engaged in deferred presentment transactions. It is titled, “Requirement of registration; declaration of intent.”

Moreover, Section 560.402(5) defines “deferred presentment provider” as “a person who engages in a deferred presentment transaction *and is registered under part II or part III* of the code [Chapter 560] and has filed a declaration of intent with the office.” It is counterintuitive to find that the 2001 amendment authorized wholly new and novel activities for deferred presentment providers if it refers to registration as a check-casher or funds transmitter under Parts of Chapter 560 that predated the amendments. Indeed, Section 560.403, which was added by the 2001 amendments, established additional registration requirements for deferred presentment providers.

⁶ *Betts v. McKenzie Check Advance of Fla., Inc.*, 879 So.2d 667, 674 (Fla. 4th DCA 2004). All emphasis in quoted materials in this brief was added by the undersigned unless otherwise noted.

For these reasons, we urge this court to acknowledge that the Department's interpretation was a reasonable interpretation of the check-cashing provisions as applied to deferred presentment transactions.

IV. **The Department's Stated Interpretation Serves a Broad Public Policy Purpose.**

The Department's interpretation accommodated the financial needs of citizens of Florida (as evidenced by the strong demand for the product) and, therefore, was in the public interest. The Credit Research Center at Georgetown University's McDonough School of Business authored a comprehensive analysis of the consumer demand for and use of deferred presentment transactions.⁷ The study shows that such transactions satisfy a demand that is not met by other financial institutions. The important findings of the study include:

- 92% of customers view deferred presentment transactions as beneficial
- About 66% of most recent new transactions were used to cover an unexpected expense or a temporary reduction in income.
- Nearly two-thirds of customers who considered other types of transactions chose a deferred presentment transaction because of the quick and easy process, the fast approval and the limited paperwork; a mere 6% said that they had no other option.
- Most customers use deferred presentment transactions infrequently or moderately and at different times over the year.

⁷ Elliehausen and Lawrence, "Payday Credit: An Analysis of Consumer Demand," Monograph #35, Georgetown University, April 2001, <http://www.msb.edu/prog/crc/order/Mono35.pdf>.

- More than half of deferred presentment customers have annual incomes between \$25,000 and \$50,000, and three out of four have a high school diploma or some college education.
- Deferred presentment customers are overwhelmingly young, one- and two-parent families in the early life cycle stages, not having reached their peak earning years or accumulated large amounts of liquid assets.
- Two-thirds of customers are under 45 years of age.
- Hardly any elderly or retirees use the product: only one in ten deferred presentment customers is over age 55 (compared to three in ten of all Americans).

Kweisi Mfume, President and Chief Executive Officer of the National Association for the Advancement of Colored People, has applauded the deferred presentment industry's "creative ideas to do what the Community Reinvestment Act tried to make banks do and giving back to the community." Specifically, he has noted:

There is an ongoing need for what you do. If there wasn't a need for your services, you could not go on doing what you do [People who criticize the products] say "no, no, that's wrong," *but they never offer an alternative*. People in the communities you serve need the leverage and opportunity for access to credit that you provide . . . Since we know that banks are not going to do it and these are services Americans are crying out for, what you do is important.⁸

⁸ Remarks of Kweisi Mfume at 2001 Financial Services Centers of America National Conference, October 8, 2001.

Deferred presentment transactions are for the short term, and most generally are used to navigate unanticipated cash-flow problems: for example, to repair an automobile needed to get to and from work, for medical expenses, or to cover a large, unexpected home-repair bill. The following are examples of actual experiences of deferred presentment customers⁹:

Max C.'s employer wanted to add him as a company driver. Becoming a driver also meant a promotion. But his driver's license was about to expire, as were both the tags on his vehicle, and his car insurance. All three of these had to be taken care of before he could become a company driver. He used a deferred presentment transaction to help him through his cash shortage.

Jessie B.'s husband had been working in Idaho, where he lost his life in an accident. She received a call from the authorities telling her not only of her husband's death, but that she had to come to Idaho to identify and make arrangements for his body. She had no money in the bank, and the only family vehicle was the one her husband had been driving. She arrived at the deferred presentment store in shock and in tears. A deferred presentment transaction allowed her to accomplish what she needed to do that same day.

Angela L. got a promotion about a month ago. Unfortunately, her new position had a different pay schedule. Angela went from being paid every other week to only once a month. A deferred presentment transaction enabled her to get through that change. In taking her new job, she took the risk of having her utilities cut off and was even going to have to take her children out of their karate classes. With a deferred presentment transaction, she was able to keep all of her bills current and keep her credit in good standing.

⁹ These examples were provided by a member of *amicus* based on interviews with representative deferred presentment customers. Personal identifying information has been redacted to preserve the privacy of the customers and is available to the Court if it so requests.

More real-life examples of responsible use of deferred presentment transactions are available at the Internet web site maintained by *amicus*, <http://www.cfsa.net/mediare/cmediare.html>.

Just as commuters understand that taxi services are valuable and convenient when used for short-term travel needs, but too expensive for extended trips, consumers understand that deferred presentment transactions are useful for short-term needs but inappropriate for long-term financial needs. To America's working middle class, the deferred presentment product serves as a dignified, discreet, cost-efficient "financial taxi" to hold the customer over to his or her next payday.

Deferred presentment transactions are frequently criticized on the basis of cost. But any such criticism must take into account the cost to the customer of *not* engaging in a transaction. For example, a consumer with limited financial alternatives may write a check drawn on insufficient funds. Even if the depository bank pays the overdraft, the cost of such credit is substantial, because the consumer is charged a service charge of \$18 to \$25 (or more) for the overdraft. In many cases, middle-income consumers do not find that their banks are willing to pay overdrafts; rather, the checks are returned unpaid. When the check "bounces," not only does the consumer's bank impose a service charge, but the consumer is also subjected to a returned-check fee – generally another \$25 or more. Thus, the total

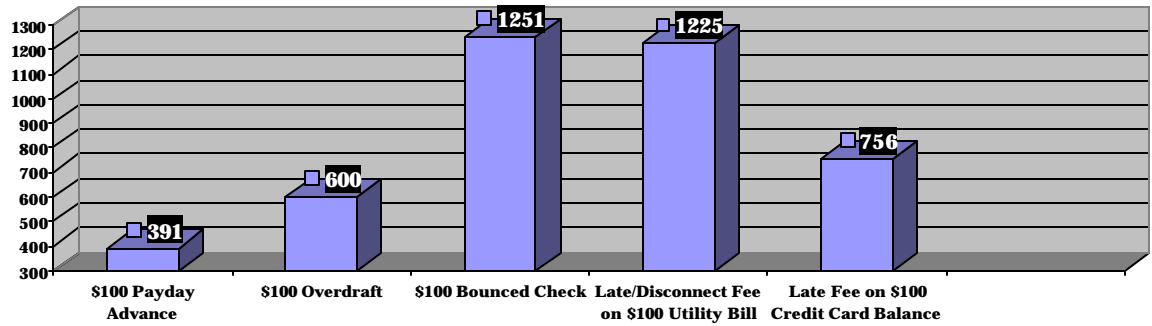
cost of “bouncing” a check, which may provide a consumer with a few days or weeks of “float” until the check is paid, is often \$45 or more.

Alternatively, a consumer with limited financial alternatives may engage in self-help in the form of a deferred payment of rent, a utility bill, or an installment due on a mortgage or a car loan. Such late payments will generally subject the consumer to late fees – penalties charged by the landlord or creditor that are very substantial relative to the true amount of temporary credit obtained. If payment is not made to a utility, often the consumer is subject to disconnect/reconnect fees. These charges have also risen to the point that consumers will almost always find it less expensive to employ a deferred presentment transaction instead.

The following chart compares the cost of deferred presentment transactions with other alternatives available to many consumers:¹⁰

¹⁰ The respective costs in terms of annual percentage rate are computed as follows:

- Deferred presentment transactions: \$15 typical finance charge on \$100 for 14 days = 391%.
- Overdraft: \$23 typical bank overdraft charge on \$100 overdraft carried for 14 days = 600%.
- Bounced check: \$23 typical bank overdraft charge plus \$25 typical merchant returned-check charge on \$100 check outstanding for 14 days = 1,251%.
- Utility bill: \$47 typical total disconnect/reconnect charge for 14 days on \$100 balance = 1,225%.
- Credit card: \$29 typical late fee on \$100 balance for 14 days = 756%.



A deferred presentment transaction thus compares favorably in cost with the limited alternatives available to many middle-income consumers.

CONCLUSION

Deferred presentment providers, like other businesses operating in Florida, should be able to rely on an interpretation of a state regulator, affirmed by the Attorney General, and related regulations. The Department made a reasonable interpretation of Florida law in 1995 when it determined that engaging in deferred presentment transactions was consistent with Florida law. The 2001 amendment to Chapter 560 did not authorize deferred presentment transactions; it added consumer protections to a practice that was legal before 2001. As recognized by the Department, deferred presentment transactions, when accompanied by certain consumer protections, serve a useful societal purpose – helping people with short-term financial needs. The decision of the Fourth District Court of Appeal should be reversed.

Respectfully submitted on this 5th day of January, 2005.

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I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief was furnished by United States Mail, first-class postage prepaid, on this 5th day of January, 2005, to the following:

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I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

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Appendix A - CFSA's *Best Practices*.

Appendix B - *Betts v. McKenzie Check Advance of Fla., LLC*, 879 So. 2d 667 (Fla. 4th DCA 2004).