CASE NO. SC04-1825

LOWER TRIBUNAL NO: 4D03-3268

In The

Supreme Court of Florida

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

Petitioner,

vs.

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

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Mitchell Berger, Esq.
Florida Bar No.: 311340
BERGER SINGERMAN
Suite 1100
350 East Las Olas Boulevard
Ft. Lauderdale, FL 33301
Phone: (954) 525-9900
Fax: (954) 523-2872

Virginia B. Townes, Esquire
Florida Bar No.: 361879
AKERMAN, SENTERFITT
255 South Orange Ave.
Post Office Box 231
Orlando, FL 32802
Telephone: (407) 843-7860
Telefacsimile: (407) 843-6610

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE CASE AND OF THE FACTS

The Regulatory Scheme

The Money Transmitters Code ("Code") was adopted in Florida in 1994[1]. The legislature delegated authority to interpret and enforce the Code to the Department of Banking and Finance (the "Department"). § 560.102, Fla. Stat. (Supp. 1994).

In February of 1995, in response to an inquiry from the Florida Check Cashers Association ("FCCA"), the Department interpreted the scope of Chapter 560 to include deferred presentment transactions.[2] Subsequently, the Department formalized this interpretation by promulgating Florida Administrative Rule 3C-560.803, which permitted licensed check cashers to accept post-dated checks, so long as no fee (in addition to those established by the Code) was charged. Mrs. Betts challenged that rule in an administrative proceeding pursuant to section 120.56, Florida Statutes. The Administrative Law Judge ("ALJ") issued a Final Order ruling that the rule was a valid exercise of the Department's delegated legislative authority and did not enlarge, modify or contravene the statutes implemented. [Appendix,

[1]The Money Transmitters Code was amended effective October 1, 2001.
[2]*See Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294, 297 (Fla. 5th DCA 2002)

Tab 4] The ALJ dismissed the challenge, and Mrs. Betts did not appeal that Final Order.

On May 5, 1998, the Department issued an advisory letter to all licensed check cashers in Florida, clarifying its interpretation (and limitation) of its own rule recognizing that deferred presentment transactions were regulated under the Code. [Appendix, Tab 5]

National Cash Advance's Compliance with the Regulatory Scheme

In compliance with the Code, McKenzie Check Advance of Florida, LLC, d/b/a National Check Advance ("National"), was licensed by the Department as a Florida Check Casher on December 31, 1995. [R. 360—Defendants' Exhibit 2] Initially, National had permitted customers to redeem the checks written for deferred presentment transactions by replacing the original check with another check and paying a new fee. At the direction of the Department, National ceased this activity as of the end of December, 1997. [R. 1055-84]

Mrs. Betts's Transaction History with National

Wendy Betts began transacting business with National on August 21, 1997. [R. 1050; Exhibit 1)] By that time, she had done business with four other check cashers, over a period of more than a year. [*Id*.] The records of her transactions, authenticated by Ms. Betts, show that her first transaction

with National consisted of two checks, each for $115.00. For these checks, she received a total of $200.00 in the form of a check drawn on National's account. On August 29, 1997, she redeemed those checks for cash. [R. 1036:10—1037:24; 1054-061, Exhibit 4)] On September 4, 1997, Ms. Betts gave National three checks for $115.00 each and received three $100.00 checks in exchange. [*Id.* Exhibit 4] On September 16, Ms. Betts replaced those three checks with three new checks.[3] [*Id*. Exhibit 4] On September 30, 1997, she gave National a single check for $338.00. [R. 1041:23—1045:19, Exhibit 5)] After September 16, 1997, Ms. Betts did not write multiple checks on a single transaction day. [*Id*.] However, National continued to allow her to replace a check with a check through the transaction consummated on December 31, 1997. Thereafter, Mrs. Betts was required to redeem all checks in cash to close each transaction by redeeming her check for cash before she was permitted to commence a new transaction. [*Id*.]

Litigation between Mrs. Betts and National

In September of 1999, Wendy Betts sued National Cash Advance in the United States District Court in the Middle District of Florida, asserting a

[3]At this time, the Department had promulgated Florida Administrative Rule 3C-560.801, also effective September 24, 1997, which proscribed assessing more that a single verification fee on the same customer on the same day.

claim arising under the federal Truth in Lending Act, 15 U.S.C. §1601, *et seq.* *Betts v. McKenzie Check Advance of Florida, LLC, et al.*, Case No. 99-cv-2828-T-30F (M.D. Fla.). The court dismissed Mrs. Betts's TILA claim with prejudice and found that all other pending claims, including the federal RICO claim, were predominately governed by Florida law. The court dismissed the state-law claims without prejudice.

In April of 2001, Mrs. Betts and co-plaintiff Donna Reuter brought the action giving rise to this appeal in the Circuit Court for the Fifteenth Judicial Circuit of Florida against McKenzie Check Advance of Florida, LLC, Steve A. McKenzie, Brenda G. McKenzie and unknown entities and individuals. [R. 1-53] In that action, plaintiffs asserted claims arising out of alleged violations of Chapter 687, Florida's Usury Statute; Chapter 516, Florida's Consumer Finance Act; Chapter 501, Part II, Florida's Deceptive and Unfair Trade Practices Act; and sections 772.101--.104, Florida Statutes, Florida's Civil Remedies for Criminal Practices Act. [*Id*.] The trial court granted defendants' motion to compel Mrs. Reuter to arbitrate her claims.[4] [R. 363-65] Thereafter, the court granted summary judgment on behalf of

[4] Mrs. Reuter appealed that judgment; the Fourth District affirmed the ruling in *Reuter v. McKenzie Check Advance of Florida, LLC*, 825 So. 2d 1070 (Fla. 4th DCA 2002), review pending, SCO 02-2192.

Steve A. McKenzie and Brenda G. McKenzie on the claims asserted by Mrs. Reuter. [R. 728-29] That judgment was not appealed.

Defendants then moved for summary judgment against Mrs. Betts, based on the decision of the Fifth District Court of Appeal[5] in *Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294, 297 (Fla. 5th DCA 2002) [Appendix, Tab 2]. The parties briefed the issues and the court entertained oral argument on July 25, 2003. [R. 1003—1193] The trial court granted summary judgment by order dated July 28, 2003. [R. 1356-57] Mrs. Betts appealed the trial court decision to the Fourth District Court of Appeal. [R. 1358-61]

The Fourth District Court of Appeal Reverses the Trial Court

The Fourth District heard oral argument and reversed the summary judgment in National's favor, finding the transactions between Mrs. Betts and National were not within the ambit of the Money Transmitter's Code in effect at the time of the transactions and were therefore usurious loans. *Betts v. McKenzie Check Advance of Florida, LLC,* 879 So. 2d 667 (Fla. 4th DCA

[5]Mrs. Betts's claims against Ace Cash Express, identical to those she asserted against National in the trial court below, had been dismissed with prejudice. In *Ace*, the Fifth District affirmed that dismissal based on statutory construction, deference to agency action, and public policy grounds.

2004) [Appendix, Tab 1]. The Fourth District certified conflict with the Fifth District's ruling in *Ace.*

National sought certiorari review before this court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The Court withheld determination of jurisdiction pending briefing on the merits.

SUMMARY OF THE ARGUMENT

The issue before the Court is whether a deferred presentment check cashing transaction conducted pursuant to the directives of the Department issued prior to 2001 was the cashing of a check, a transaction regulated by Chapter 560 and excepted from the prohibitions of Florida's usury statute, or a usurious loan. The plain language of Chapter 560 prior to its amendment in 2001 encompassed deferred presentment transactions as a sub-category of check cashing transactions. "Cashing" was defined as "providing currency for payment instruments." A "check casher" was defined as a person who sells currency in exchange for payment instruments. Deferred presentment transactions were accomplished by a check casher providing currency for a payment instrument. Because the Code did not carve out any exceptions to the definition or dictate any manner in which the check casher was required to process the check after the check casher provided the currency for the check, the Code encompassed deferred presentment transactions.

In 1995, the Department interpreted the Code as encompassing deferred presentment transactions. Thus, the Code authorized check cashers engaged in deferred presentment transactions to charge the fees established by statute and by Department rule. This interpretation was duly promulgated as part of the Rule 3C-560.803, and withstood Mrs. Betts's administrative challenge. The unappealed ruling of the ALJ establishes conclusively that the rule was a lawful exercise of delegated legislative authority.

The Attorney General agreed with the Department's interpretation of the Code, AGO 00-26 (2000), that deferred presentment transactions accomplished in compliance with the Department's interpretation did not constitute usurious loans. In *Ace*, the Fifth District reached the same result.

Only the Fourth District has rejected the Department's interpretation of the Code. It concluded that the Code's failure to expressly identify deferred presentment transactions as regulated activity signals legislative intent to prohibit deferred presentment transactions.

The Fourth District erred in its analysis because it failed to start with the plain language of the Code. It focused on what the Code did not say rather than giving full weight to what the Code did say. This is not an appropriate method of statutory construction. As this Court has noted, the

legislature's failure to expressly prohibit application of a regulatory statute to an activity supports the conclusion such application is appropriate. As the First District Court of Appeal has noted, "Silence is an unreliable source of legislative intent."

The Fourth District misunderstood the effect of the 2001 amendment to the Code. From the amended Code's adoption of a separate regulatory subchapter governing deferred presentment transactions, the Fourth District inferred prior legislative intent to prohibit such transactions. This analysis mistakes the effect of the amendment. Before 2001, deferred presentment transactions were permitted under the Code as a sub-category of check-cashing transactions. After 2001, deferred presentment transactions were **still** permitted, but certain aspects of those transactions were regulated or limited in a new way. For example, although deferred presentment transactions are still permitted under Florida law, a consumer is prohibited from commencing a new deferred presentment transaction within 24 hours of terminating the prior one.

The Fourth District erred in failing to give proper deference to the Department's interpretation of the statute it was charged with enforcing and interpreting. The Fourth District rejected an authorized agency interpretation it found unpalatable and substituted its own preferred

interpretation. However, whether the reviewing court agrees with the agency's interpretation is not the standard of review; it is whether the agency's interpretation is clearly erroneous and departs from the essential requirements of law. Its interpretations were neither clearly erroneous nor departures from the essential requirements of law. The Fourth District overreached its function as a reviewing tribunal in substituting its judgment for that of the agency.

The Fourth District also overstepped its bounds by invalidating the Department's properly promulgated administrative rules. Rule 3C-560.803 withstood Mrs. Betts's challenge to its validity. The Fourth District failed to give the DOAH Final Order dismissing the challenge preclusive effect and, in a proceeding to which the Department was not a party, substituted its judgment for that of the Department. In so doing, the Fourth District ignored the constitutional separation of powers and the doctrines of exhaustion of administrative remedies and of primary jurisdiction.

Finally, the Fourth District ignored the statutory safe-harbor the legislature adopted in the Code, section 560.105, Fla. Stat. (Supp. 1994). National and all other licensed check cashers were entitled to rely in good faith on Rule 3C-560.803 and the Department's interpretation of that rule. The Fourth District's rejection of the Department's rules and its regulatory

authority exposes licensed check cashers that scrupulously followed Department directives to annihilating liability. This outcome destroys faith in Florida's regulatory agencies and chills Florida's ability to attract and retain business.

The Fourth District's decision is wrong as a matter of law and dangerous as a matter of public policy. It must be overturned.

ARGUMENT

I. CHAPTER 560, FLORIDA STATUTES, AS ENACTED IN 1994, ENCOMPASSED DEFERRED PRESENTMENT TRANSACTIONS.

In 1993, a check casher who demanded $20 as a charge for cashing a $200 check would have violated Florida's usury statute.[6] The fee charged for advancing cash until the check could clear through the payment system was within the statutory definition of interest and—assuming the check cleared in a week or less—yielded an interest rate of approximately 575% per annum.

After 1994, that same transaction would have been entirely lawful, so long as the check casher had registered under Part III of the newly enacted Money Transmitters Code.

There is and can be no dispute that Chapter 560, Florida Statutes (1994), created a carve-out from Florida's usury law. By legislative

[6] § 687.01-.13, Fla. Stat. (1993).

mandate, the "charge" exacted for the advance of money was classified as a fee rather than interest and registered check cashers were entitled to charge up to an additional five dollars as a verification fee. Notwithstanding the fact that the same or an even greater cost was imposed on the consumer by the new statute, the legislature had determined that the social utility of the ability to cash checks warranted an exemption from the usury statute.

This analysis is compelled by both principles of statutory construction and by the plain language of the statute. In statutory construction, if two statutes are in conflict, the more recent prevails over the earlier[7] and the specific controls over the general[8].

The controversy before the Court in this case is not whether Chapter 560 as enacted in 1994 created an exemption from the usury statute. The sole issue on which the Fourth District and the Fifth District disagreed is whether deferred presentment transactions conducted prior to the 2001 amendment to Chapter 560 were check-cashing transactions within the scope

---

[7] *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287 (Fla. 2000) ("When two statutes are in conflict, the more recently enacted statute controls the older statute"); *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent"); *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987)(Legislature is presumed to be aware of prior enactments; court is to harmonize conflicts by affording each statute its appropriate sphere of application.).

[8] *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205 (Fla. 1969); *Harley v. Board of Public Instruction of Duval County*, 103 So. 2d 111 (Fla. 1958).

of the Code. The definitions the legislature employed in the 1994 Code permit no doubt that deferred presentment transactions were a category of check-cashing transaction encompassed by the Code.

A. The Plain Language of the Money Transmitters Code Includes Deferred Presentment Transactions.

In 1994, the Florida Legislature adopted the Money Transmitters Code. § 560.101, Fla. Stat. (Supp. 1994). The Code defined a "money transmitter" as "any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, check casher, or funds transmitter." § 560.103(10), Fla. Stat. (Supp. 1994). A "check casher" was defined as "a person who, for compensation, sells currency in exchange for payment instruments received, except travelers checks and foreign-drawn payment instruments." § 560.103(3), Fla. Stat. (Supp. 1994). A "payment instrument" under the Code was "a check, draft, warrant, money order, whether or not negotiable," § 560.103(14), Fla. Stat. (Supp. 1994). "Sell" was defined to mean "to sell, provide or deliver." § 560.103(19), Fla. Stat. (Supp. 1994).

Part III of the Code addressed Check Cashing and Foreign Currency Exchange. § 560.301, *et seq.*, Fla. Stat. (Supp. 1994). That Part required registration of all persons who "engage in, or in any manner advertise engagement in, the business of cashing payment instruments." § 560.303(1),

Fla. Stat. (Supp. 1994). There were only two exemptions from the regulation of check cashers—authorized vendors of persons registered under the Code and acting within the scope of the registrant's authority and persons whose cashing of payment instruments was incidental to the retail sale of goods and services. § 560.304, Fla. Stat. (Supp. 1994).

Part III of the Code also added a definition of "cashing"—"providing currency for payment instruments, except for travelers checks and foreign-drawn payment instruments." § 560.302(1), Fla. Stat. (Supp. 1994). The Code thus required every business that provided currency in exchange for a payment instrument to register as a check casher pursuant to Part III. Any exchange of currency for a payment instrument was the cashing of a check, regulated by the Code.

A deferred presentment is a sub-category of check-cashing as the legislature defines the cashing of checks. The customer presents a payment instrument—his check—and receives currency in exchange. In a deferred presentment check-cashing transaction, the check casher retains the check for an agreed-to period. At the end of that period, the customer may redeem the check so that it is never deposited. If the customer does not redeem the check, the check casher submits it for payment by the customer's bank.

Nothing in Part III of the 1994 enactment of Chapter 560 limited the definition of "check casher" or "cashing" so as to exclude deferred presentment transactions or any other variant of check-cashing. In fact, the plain language of section 560.303 signaled legislative intent for the Code to have broad regulatory effect over all forms of check-cashing.

B. The Department's Construction of the Code to Include Deferred Presentment Transactions Applied the Plain Meaning of the Code.

The legislature delegated to the Department authority to interpret and enforce the statute and to promulgate rules implementing the statute.[9] Shortly after the Code's enactment, the FCCA asked the Department to inform the check-cashing industry whether deferred presentment transactions were within the Code's regulatory ambit. The Department issued a letter dated February 24, 1995 (the "FCCA Letter") stating that the plain language of the Code encompassed deferred presentment transactions.

> It is the position of the FCCA that member stores may cash checks for customers and defer the deposit of those checks for a reasonable period of time, mutually agreed upon between the store and the customer, *provided* that the fee charged for cashing these checks *shall not* exceed the statutory fee

[9] The legislature granted specific authority to "issue and publish rules, orders, and declaratory statements, disseminate information, and otherwise exercise its discretion to effectuate the purposes, policies and provisions of the code and to interpret and implement the provisions of the code." § 560.105, Fla. Stat. (Supp. 1994).

> allowable for the specific type of check cashed. The service will be referred to as deferred deposit.
>
> Since Chapter 560, Florida Statutes, does not explicitly prohibit the concept of deferred deposits and since all other provisions of Chapter 560, Florida Statutes, would be adhered to, I see no reason to object to your offering of the above described services. Again, this analysis is based upon the fact that the deferred deposit service will be offered and managed pursuant to the provisions of Chapter 560, Florida Statutes, and specifically within the fee caps contained within Section 560.309(4), Florida Statutes.

See Ace, 827 So. at 297 (italics in opinion).

This interpretation is consistent with the plain language of the Code. Part III of the Code imposed only one statutory limitation on the cashing of a check; it limited the fees the check casher could charge. § 560.309, Fla. Stat. (Supp. 1994). The legislature did not require the check casher to deposit the check. The legislature did not prohibit a check casher from holding the check and allowing the customer to redeem it for cash or with another check.

The Department formalized its interpretation and further exercised its delegated legislative authority by promulgating Rule 3C-560.803, Florida Administrative Code, (the "Rule") in 1997. The Rule provided that a check casher could, but was not required to, accept a postdated check and charge the fees permitted in Section 560.309, Florida Statutes (Supp. 1994). By enacting a rule permitting the acceptance of post-dated checks, the

Department recognized that a check casher could accept a check and agree with the consumer to hold the check for a period of time to allow the customer to redeem the check.

In May of 1998, the Department issued its Letter of Advice regarding deferred presentment transactions to all registered check cashers in Florida:

> Some companies accept personal checks and agree in writing or otherwise to wait a predetermined amount of time before collecting the checks. These transactions are referred to as "deferred deposits," "payday loans," "cash advances," "payroll advances" "check discounts" or a variety of other names.
>
> . . .
>
> (b) Pursuant to Section 687.02, Florida Statutes, it is illegal to charge a higher rate of interest than 18 percent per annum simple interest. Any "rollover," extension" or "renewal" of a deferred deposit check for an additional fee may constitute interest. Any extension of this type may be an extension of credit requiring licensure of your business under the Florida Consumer Finance Act, and subject to the interest rate limits established in that act.

[R. 437, 448, Defendants' Exhibit 3] For the first time in an interpretation of general circulation, the Department explained its interpretation of Part III of Chapter 560 as requiring check cashers to require their customers to terminate each deferred presentment transaction by deposit of the check or redemption for cash.[10]

[10] National had ceased allowing check-for-check redemptions by the end of 1997, at the direction of the Department.

C. The Attorney General of Florida's Interpretation of the Code is Consistent with the Department's.

In 2000, Robert F. Milligan, Comptroller of Florida and head of the Department, requested an advisory opinion from the Florida Attorney General on the subject of deferred presentment transactions. The question posed was, "Are so-called 'payday loans' or like transactions subject to the state laws prohibiting usurious rates of interest?" AGO 00-26 at 1. The Attorney General determined they were not, so long as each deferred presentment transaction was properly terminated.

The Attorney General's analysis began with consideration of the state's usury laws and the policies supporting them. In that context, the Attorney General then examined the plain language of Chapter 560. He first noted that the Code specifically authorized a capped fee for the act of cashing a check and that the Department, as authorized by statute, had promulgated a rule capping verification fees. *Id.* at 3. The statute expressly permits these fees to be charged; the fees are not usurious interest. He then recognized the effect of the Rule:

> Accordingly, Chapter 560, Florida Statutes, as implemented by rule of the Department of Banking and Finance, authorizes the acceptance of a postdated check to be cashed at the end of a specified period of time. Nothing in Chapter 560, Florida Statutes, however, recognizes that such arrangements may be deferred from presentment in order to be extended, renewed, or continued in any manner with the imposition of additional fees.

> Thus, to the extent that a transaction comports with the provisions of this act, it would not violate the usury provisions in Chapter 687, Florida Statutes.

Id. at 3-4.

The Attorney General's construction of Chapter 560 as permitting deferred presentment check-cashing transactions was entirely consistent with the Department's interpretation.

D. Rule 3C-560.803 Was Determined to Be a Valid Exercise of Delegated Legislative Authority.

In 2001, Mrs. Betts challenged the Rule as an invalid exercise of delegated legislative authority alleging that the promulgation of the rule was outside the scope of the Department's delegated legislative authority and that it enlarged, modified or contravened the specific provisions of the law implemented.[11]

The Administrative Law Judge tested these contentions against the plain language of the Code. She examined the statutory definitions of "check casher," "payment instrument" and "cashing" in the Code. Rule Challenge Order at 25-26. She then followed Florida Supreme Court instruction on proper exercise of delegated legislative authority to clarify the application of a statute.

---

[11]*Betts v. Department of Banking and Finance and Advance America, Cash Advance Centers of Florida, Inc.*, Case No. 01-1445RX (Fla. Div. Admin. Hearings September 7, 2001)("Rule Challenge Order") at 21-22.

> The Florida Supreme Court has recognized the principle that rules may clarify the details of an enabling statute and that agencies may use their expertise to flesh out the Legislature's stated intent by adopting rules necessary to effectuate the Legislature's overall policy. Avatar Development Corporation v. State, 723 So. 2d 199 (Fla. 1998). In Southwest Florida [Water] Management District v. Save the Manatee, 773 So. 2d 594, 599 (Fla. 1st DCA 2000), the court noted that "the use of the word 'interpret' suggests that a rule will be more detailed than the applicable enabling statute."

Id. at 27-28. Following this guidance, the ALJ ruled that Rule 3C-560.803 did not enlarge, modify, or contravene the statute and that its promulgation was within the powers and duties expressly delegated to the Department.

> [The Rule] is consistent with the language of the Money Transmitters' Code defining "check cashers," "Payment instruments" and "cashing." Moreover, the rule interprets and provides clarification for those regulated by the Department under Chapter 560, Florida Statutes.

Id. at 28. The ALJ upheld the validity Rule, ruling:

> Rule 3C-560.803, Florida Administrative Code, "implements" or "interprets" the above-cited statutory definitions by clarifying that a postdated check is within the definition of payment instrument and that a check casher may accept a postdated check . . .There is no requirement in Chapter 560, Florida Statutes, that requires a check casher to deposit the customer's check or that prohibits the check casher from holding the customer's check for an agreed-upon period of time. The only limitation are [sic] the fees set forth in Section 560.309(4), Florida Statutes.
>
> . . .

> Rule 3C-560.803, Florida Administrative Code, does not enlarge, modify, or contravene the statute and is a proper exercise of the Department's delegated legislative authority.

Rule Challenge Order at 27, 28.

Mrs. Betts did not seek judicial review of the DOAH Final Order. Therefore the rule remained final and binding for all check cashers and their customers, as it had been since its effective date of September 24, 1997

E. The Fifth District's Interpretation of pre-2001 Chapter 560 is Consistent With the Department's.

Mrs. Betts advanced the same argument before the Fifth District in *Ace* that she advanced in the case below--her deferred presentment transactions constituted loans and the fees she paid were usurious interest. *Ace*, 827 So. 2d at 296.

1. <u>The Fifth District correctly analyzed the language of the Code.</u>

The Fifth District began, as it was required to do, with the plain language of the Code. The fees Mrs. Betts paid for deferred-presentment check cashing transactions were the fees statutorily authorized by section 560.309, Florida Statutes (1994). The lawful fee was the same whether the check was deposited immediately or held for two weeks. Again examining the plain language of the Code, the Fifth District rejected Mrs. Betts's argument that the deferred nature of the cashing of the check took the transaction outside the Code.

> Chapter 560 . . . contains **no requirement for the disposition of checks after receipt by the Defendants**. As in any other business transaction, the Defendants were free to do whatever they desired with the check after receiving it subject only to the deferral agreement with the Plaintiffs.

Id. at 297 (emphasis added). The Fifth District reviewed the Department's interpretation of the Code as evidenced by the FCCA Letter and by the Rule and agreed that the Code as it existed prior to the 2001 amendment did not prohibit deferred presentment transactions. *Id*.

The Fifth District then addressed Mrs. Betts's contention that all transactions after the initial deferred check-cashing transaction constituted a usurious loan. "We must also consider the effect of each of the new transactions that took place after the initial transaction." The Fifth District rejected Mrs. Betts's contention that the new transactions were usurious loans on practical grounds:

> It appears to us that the parties' options at the end of each redemption period were that the Defendants could deposit a check for payment, or the Plaintiffs could redeem the check. If the Defendants deposited the check for payment, and the Plaintiffs had insufficient funds in their respective account at the drawee bank, the consequences of a dishonored check would be imposed upon the Plaintiffs, the Defendants and the drawee bank. If the Plaintiffs had the funds on deposit with the drawee bank it is doubtful that they would have authorized the costly "rollover" of the initial transaction unless they had another use for those funds.

Id. at 298. The Fifth District recognized that the customer had certain options and should have the autonomy to elect the least unpalatable.

> If the Plaintiffs wished to redeem the initial check rather than to allow the Defendants to deposit it, they would either have to pay the Defendants in cash or deliver still another check that would be honored in a timely fashion. If they had no cash, they would be required to obtain it in some manner and apparently found that their easiest practical source was the Defendants. The allegation that the Defendants encouraged them to use their services rather than another source seems irrelevant to us. Solicitations are a way of life in the business world. Their choice to again use the Defendants to satisfy their initial obligation that was voluntarily entered was theirs to make.

Id.

In accordance with Department guidance, National had, since the end of 1997, required that all checks be redeemed for cash before a new transaction could be commenced. The Fifth District did not find this requirement to be dispositive of the check casher's compliance with the statute. "Although the Plaintiffs have not alleged that [redemption of checks for cash] was not followed, in our view there is no practical difference between the ritualistic extended transaction and an abbreviated one in which only the fee accompanied the delivery of a new check." *Id.*

Finally, the Fifth District noted the tension between protecting consumers from their own necessity and providing a source of readily available cash.

> The explosive growth of the [deferred presentment] industry is indicative of the scarcity of resources available for financial assistance to those in dire need and least able to afford the high cost of the assistance. It may also be indicative of a lucrative business venture by those who are willing to invest their capital in transactions involving a high risk of non-payment.

Id. at 298-99. The Fifth District recognized that the sole authority to resolve that societal and economic tension resides in the legislature.

> The Legislature has made it possible for both sides of the deferred presentments [sic] transaction to engage in the economic exercise of supply and demand and has begun the job of fine tuning the statutory scheme in the Deferred Presentment Act. It is apparent that the policy of this state is to find workable restrictions for an originally broad statute without drying up the well for those who are in need of financial assistance even though it may be an expensive source.

Id. at 299.

In short, the Fifth District recognized the separation of powers required by the Constitution of the State of Florida Article II, Section 3, Fla. Const. The legislature makes policy decisions and establishes the broad outlines of the law. The agency to which the legislature delegates the authority interprets and clarifies the operation of that statute in the regulated field. If the statutory scheme is determined to be too broad or to contain some defect, it is the legislature, not the courts, that must revise the statute.

Prior to the decision of the Fourth District Court of Appeal, every governmental entity that has reviewed pre-2001 Chapter 560 has reached the

conclusion that deferred presentment transactions were subsumed in the regulatory structure of the Code.

2. The Fifth District correctly evaluated the Code's priority over the usury statute.

Notwithstanding the Fifth District's decision in *Ace*, Mrs. Betts continued to contend before that court that deferred presentment transactions constituted loans subject to the usury statute. In *FastFunding The Company v. Betts*, 852 So. 2d 353 (Fla. 5th DCA 2003) [Appendix, Tab 3], Mrs. Betts asked the Fifth District to reconsider its analysis of the relationship between Chapter 687 and Chapter 560 in the context of a set of transactions she had negotiated with yet another licensed check casher. The Fifth District again agreed with the Department's interpretation of Chapter 560 as including deferred presentment transactions as a sub-category of check-cashing transactions.

Moreover, the Fifth District acknowledged that FastFunding had taken every available step to insure that it was in full compliance with the Department's regulations of deferred presentment transactions: FastFunding had specifically sought approval of the Department for its operations; the Department had investigated FastFunding once it commenced doing business in Florida and found no violation of the Code.

The Fifth District recognized that by encompassing deferred presentment transactions within the scope of Chapter 560, and by authorizing fees for providing the service, the legislature had removed check-cashing transactions performed in accordance with Chapter 560 from the application of Florida's usury statute:

> The transactions may be found to be usurious if only the usury statutes are considered during the examination of the transactions. But the scope of the examination cannot be limited to the usury statutes. Chapter 560 must also be applied to determine whether the legislature carved the transactions described in Chapter 560 out of the usury statutes. The usury statutes were in existence at the time chapter 560 was created and the legislature must be presumed to have been aware of them when it enacted legislation allowing the transactions to take place.[12] Because FastFunding's transactions comply with Chapter 560, Florida Statutes, it must follow that they should not be deemed to be in violation of Florida's usury laws.

852 So. 2d at 355.

The Fifth District correctly ruled that deferred presentment transactions were encompassed by the Code and were therefore carved out of the application of the usury statute.

---

[12]The Fifth District apparently considered this principle of statutory construction so axiomatic as to require no citation to authority. The Fifth District is correct that the principle is well established in Florida law. *See supra,* note 4.

II. THE FOURTH DISTRICT ERRED IN IGNORING THE PLAIN LANGUAGE OF THE CODE

In ruling that deferred presentment transactions completed in accordance with the formal and informal guidance of the Department of Banking were usurious loans, the Fourth District did not engage in the rigorous analysis of the language of the Code undertaken by the authorities that had earlier recognized that the definitional provisions of the Code did not exclude deferred presentment transactions. It did not give proper deference to the reasonable interpretation of the Code by the agency charged with implementing and enforcing it.

A. The Fourth District Did Not Analyze the Language of the Code.

The Fourth District rejected the Department's and the Fifth District's interpretation of the Code, on the grounds that "the Code did not specifically address or authorize deferred presentment or rollover transactions." *McKenzie*, 879 So. 2d at 672. The court's opinion was based solely on what the Code does **not** say, not on what it does say. This is not the proper basis for determining legislative intent.

1. The Fourth District erred in construing the pre-2001 Code's failure to separately regulate deferred presentment check-cashing transactions as excluding them from the Code.

The Department was given the delegated legislative authority to interpret and to implement the statute. As the ALJ ruled, that delegated

authority to interpret a statute includes the authority to clarify what is encompassed within the plain language of the statute.

Just last year, this Court reaffirmed the precept that the agencies are given discretion to interpret and implement legislative enactments for the very purpose of addressing those situations that arise within the statute, but either are not expressly addressed or that arise after the legislation is enacted. In *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003), this Court reiterated that the legislature was not able to foresee every exigency that could arise in the implementation and enforcement of a statute. In such cases,

> [s]ome discretion must be given to regulatory bodies to promulgate the detailed rules that expand upon and implement legislative directives. . . . Unless there is something directly contrary in the statute itself, we must assume the legislature intended to grant the commission the discretion to determine what factors should be used in calculating gross profits.

841 So. 2d at 454, quoting *General Telephone Co. of Florida v. Marks*, 500 So. 2d 142, 145 (Fla. 1986). The *Level 3 Communications* Court went on to hold, "Since **nothing in the statute expressly prohibited** the inclusion of white page expenses in the calculating of gross profits, the [*General Telephone*] Court affirmed the PSC's order. **We agree with this reasoning**." *Id.* (Emphasis added.)

The Fourth District's determination that legislative silence is the equivalent of legislative prohibition[13] is diametrically opposed to the regulatory burden imposed on the Department. If a statute identifies a category of regulated activity, an agency exceeds the scope of its delegated legislative authority by excluding any form of that activity from the regulation. If such an exclusion is to be made, it must appear in the plain language the legislature adopts and not from the legislature's failure to enumerate every activity within the general category. As the First District Court of Appeal recently admonished a state agency, "Silence is an unreliable source of legislative intent." *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association*, 794 So. 2d 696, 704 and n. 8 (Fla. 1st DCA 2001), *rev. denied* 798 So. 2d 847 (Fla. 2000)(quoting *United States v. Mitchell*, 39 F.3d 465, 469 n.6 (4th Cir. 1994), *cert. denied* 515 U.S. 1142 (1995).

Nothing in Chapter 560 excluded providers of deferred presentment transactions from the regulatory sweep of the legislation. Nothing in Chapter 560 expressly prohibited deferred presentment transactions or excluded them from the regulated category of check-cashing transactions.

[13] Of course, the legislature had not been silent. By statutory definition, the legislature clearly carved **all** check-cashing transactions out of the application of the usury statute.

The Fourth District overreached its own authority by inferring a statutory prohibition the legislature had not created.

2. The Fourth District misunderstood the regulatory effect of the 2001 amendment to the Code.

The Fourth District's analytical error arose, at least in part, from its misunderstanding of the effect of the 2001 amendment. The Fourth District reasoned that because the amended Code expressly addressed deferred presentment transactions and the pre-2001 Code had not done so, deferred presentment transactions had been, *sub silentio* excluded from the pre-2001 Code. In fact, the opposite is true.

As noted above (and as recognized by the Department, the Attorney General, the ALJ and the Fifth District), all check-cashing transactions, including that sub-category denominated "deferred presentment transactions," were regulated by Chapter 560. Concomitantly, all check-cashing transactions, including deferred presentment transactions were excluded from the reach of the usury statute so long as the only fees charged were those authorized by statute and Department rule.

Between the initial enactment of the Code and approximately 1999,[14] deferred presentment transactions generated little controversy. At that time,

[14] This date is derived from the case numbers assigned to the cases themselves, a matter of public record. E.g., *Betts v. Advance America Cash*

Mrs. Betts and others filed their first civil complaints attacking deferred presentment transactions as usurious loans. Without regard to the legal validity of the claims asserted, the complaints did raise social and legislative consciousness of an unintended consequence of failing to separately regulate the deferred presentment sub-category of check-cashing transactions. In 2001, the legislature turned its attention to the consumer protection issues the complaints made manifest. It carved the sub-category of deferred presentment transactions out of the larger category of check-cashing transactions and imposed more stringent limitations on them.

In short, the 2001 amendment did not **authorize** deferred presentment transactions for the first time. Rather, for the first time it **prohibited** certain acts and practices connected with deferred presentment transactions, acts and practices that were not associated with the larger class of check-cashing transactions. The legislature's goal was not to authorize deferred presentment transactions. Rather, it was to build in consumer protections that prevented the unwary consumer from finding herself on the treadmill of consumer debt that gave rise to Mrs. Betts complaints. As the Fifth District

---

Advance Centers of Florida, Inc., 99-3458 (Fla. 9th Cir. filed April 4, 1999)(later removed to federal court as Case No. 6:99-cv-593); *Betts v. FastFunding The Company*, Case No. 99-3457 (Fla. 9th Cir., filed April 19, 1999); *Clement v. Ace Cash Advance*, Case No. 99-09730 (Fla. 13th Cir.); *Kane v. Ace Cash Express, Inc.*, Case No. 99-918-CIV-T-26E (M.D. Fla.).

expressed it, the legislature has "begun the job of fine tuning" the regulatory scheme, to "find workable restrictions for an originally broad statute without drying up the well for those who are in need of financial assistance." 827 So. 2d at 299.

B. The Fourth District Failed to Give Proper Deference to The Department's Interpretation of the Code.

This Court by long precedent has established that an agency's interpretation of statutes it is charged with implementing and enforcing will be given great deference. The standard for rejecting such agency statements of policy or construction of the statutes is very high. The agency's interpretation must be clearly erroneous or unauthorized, *Level 3 Communications,* 841 So. 2d at 450 (Fla. 2003); and depart from the essential requirements of law. *BellSouth Telecommunications v. Johnson*, 708 So. 2d 594, 596-97 (Fla. 1998).[15]

As this Court noted more than fifty years ago,

> Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of the statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart

[15] See also *Ameristeel Corporation v. Clark*, 691 So. 2d 473, 477 (Fla. 1997); *Florida Interexchange Carriers Association v. Clark*, 678 So. 2d 1267, 1279 (Fla. 1996); *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988).

> from such construction unless it is clearly erroneous or unauthorized.

Gay v. Canada Dry Bottling Company of Florida, Inc., 59 So. 2d 788, 790 (Fla. 1952), quoting *Coca-Cola Co. v. State Board of Equalization*, 156 P.2d 1, 2 (Cal. 1945).

Important governmental policies are advanced by this rule of deference, among them are maintaining separation of powers, discouraging judicial activism and fostering the repose of confidence in the regulator by the regulated. For this reason, the mere fact that the court might disagree with the interpretation, as the Fourth District did in the instant case, is not a sufficient basis for rejecting the agency's interpretation. In *Edwards v. State of Florida*, 858 So. 2d. 394, 396 (Fla. 1st DCA 2003), the court recognized that neither the agency nor the reviewing court is empowered to change the legislature's statutory meaning and that where ambiguity exists, the agency's interpretation must be affirmed if it is within the range of "possible and reasonable interpretations." The agency's interpretation "need not be the sole possible interpretation or even the most desirable one." *D.A.B. Constructors, Inc. v. State, Department of Transportation*, 656 So. 2d 940, 944 (Fla. 1st DCA 1995). A court may not reject the agency's interpretation merely because "the courts might prefer another view of the statute." *Smith*

v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994), citing *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979).

The Department's interpretation of Chapter 560 was not contrary to the law; it was not unreasonable. The Fourth District simply preferred an interpretation of the Code that equated silence with prohibition, notwithstanding that to do so violates the rules of statutory construction.

1. The Department's interpretation of the Code was not clearly erroneous.

An agency's interpretation is "clearly erroneous" when the interpretation is not supported by competent standards of statutory construction and no reasonable person could agree with the agency's interpretation. *See Florida Department of Education v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003)(Agency interpretation within the range of possible and reasonable interpretations is not clearly erroneous and should be affirmed.) Because the Department's interpretation is consistent with the plain language of the Code and not unreasonable, it is not clearly erroneous.

The Fourth District simply ignored the Code's broad definitional language. National was a check casher as defined by the pre 2001 Code. Its business consisted of "cashing" checks—providing currency for payment

instruments.[16] § 560.302(1), Fla. Stat. (Supp. 1994). Once National came within the regulatory framework of the Code, the Code provided no exemption from its authority. It is uncontroverted that NCA provided currency to Mrs. Betts in exchange for her check and that her claims against National arise from transactions statutorily defined as check-cashing.

Once the legislature had defined the activity to be regulated, the Department was without authority to deviate from that definition in exercising its delegated legislative authority. *See Campus Communications, Inc. v. Department of Revenue, State of Florida*, 473 So. 2d 1290, 1294-95 (Fla. 1985)(Department of Revenue could not by regulation alter definition of "newspaper" embodied in statute.) *See also Florida Dairy Farmers Federation v. The Borden Company,* 155 So. 2d 699, 701-02 (Fla. 1st DCA 1963)(Neither the agency nor the courts were permitted to ignore legislative definitions so as to permit producers to sell reconstituted milk products.)

Contrary to the Fourth District's opinion, the Department did not create "exceptions" to the Code or "expand the impact of the Code." 879 So. 2d at 673. Quite the reverse; had the Department refused to regulate

[16] Neither the Fourth District nor petitioner herein contends that the Department exceeded its legislative authority in requiring check-cashers who engaged solely in the business of providing deferred presentments to be licensed by the Department or regulated by it. The disagreement arises from the manner of that regulation, rather than the fact thereof.

such activities, holding them to be outside the Code, the Department would have "modified and contravened the statute."[17] It would have abdicated its legislatively delegated authority.

2. The Department's interpretation of the Code was authorized.

The Fourth District justified rejecting the Department's interpretation of Chapter 560, Part III, on grounds that the agency had exceeded the scope of its lawfully delegated legislative authority. Because it erroneously ruled that the Department's interpretation of the Code expanded the impact of the Code, it held the Department's interpretation was unauthorized. 879 So. 2d at 674.

The Fourth District acknowledged the comprehensive scope of the regulatory authority the legislature delegated to the Department in the Code:

> [T]he legislature granted the Department of Banking and Finance (the Department) "general regulatory powers" limited, by express statutory authority, to "[o]nly such rulemaking power and administrative discretion . . . as is necessary, in order that the supervision and regulation of money transmitters may be flexible and readily responsive to changes in economic conditions. § 560.102(1), 2(h), Fla. Stat. (Supp. 1994) and Fla. Stat. (2001). To that end, the Department has supervisory, investigatory, enforcement and disciplinary powers. See §§ 560. 105, 560.108, 560.109, 560.112, 560.113, 560.114, Fla. Stat. (Supp. 1994). Among the Department's supervisory powers is the "[p]ower to issue and publish rules, orders, and declaratory statements, disseminate information, and otherwise exercise its discretion to effectuate the purposes, policies and

[17] See § 120.52(8), Fla. Stat.

> provisions of the code and to interpret and implement the provisions of the code " § 560.103(3), Fla. Stat. (Supp. 1994).

Betts v. National Cash Advance, 879 So. 2d at 671.

But the Fourth District disagreed with the Department's interpretation of the plain language of the statute. Lacking any statutory language that supported excising deferred presentment transactions from the category of check-cashing transactions, it cited legislative silence as the basis on which the Department should have limited the legislature's broad definitions. In making this leap of illogic, the Fourth District misconstrued the nature of the authority lawfully delegated to the Department. An administrative agency may determine whether specific acts are governed by the statute. The agency may not expand or limit the statute because the legislature did not name that specific act in the statute.

III. THE FOURTH DISTRICT ERRED IN FAILING TO GIVE PRECLUSIVE EFFECT TO THE FINAL ORDER VALIDATING THE RULE.

In its opinion the Fourth District invalidated rules[18] promulgated by the Department that "expressly approved deferred presentment transactions subject to certain restrictions, which were also imposed by the rules." *Id.*

[18] As a threshold matter, it is not even clear which rules the Fourth District considered invalid. It cites generally to Part VII, Ch. 3C-560, but itemized only Rules 560.801 and .803. It does not specifically reference the other rules in that chapter, but apparently includes the entire chapter in the blanket invalidation.

Because the Fourth District did not approve of the Department's interpretation, the Fourth District issued a blanket invalidation of the rules. "Consequently, in issuing rules approving deferred presentment transactions, the Department exceeded its authority." *Id*. at 674. Thus, the Fourth District rejected the Department's promulgated rules out of hand, declaring them invalid by judicial fiat. In so doing, the Fourth District violated the provisions for judicial review of administrative rules, ignored long-established principles of issue preclusion and violated the constitutional separation of powers. In short, the Fourth District engaged in judicial activism.

A. The Fourth District Ignored the Preclusive Effect of the ALJ's Final Order Establishing the Validity of the Rule.

The Fourth District ignored the fact that Mrs. Betts had challenged the Rule in an administrative proceeding—and lost. That unappealed and final administrative ruling precluded the Fourth District's substitution of its judgment for that of the executive branch.

The manner in which an administrative rule can be invalidated is established by the Administrative Procedures Act ("APA"), Chapter 120, Florida Statutes. A person who is substantially affected by a proposed or existing rule must file a rule challenge with the Division of Administrative Hearings ("DOAH") under section 120.56, Florida Statutes, and prove one

of the grounds for invalidating the rule as an invalid exercise of delegated legislative authority enumerated in section 120.52(8), Florida Statutes. With limited exceptions not applicable here, the proper avenue for bringing a challenge to an administrative rule before the appellate court is to appeal a DOAH final order from an APA rule challenge[19]

The proper avenue for bringing a challenge to an administrative rule before the appellate court is to appeal of the DOAH's final order in an APA rule challenge. As noted, Mrs. Betts challenged the validity of the Rule before the DOAH in 2001. The ALJ dismissed that challenge, finding the rule to be a valid exercise of delegated legislative authority. Mrs. Betts's time to appeal expired "thirty days after the rendition of the order to be reviewed." Fla. R. App. P. 9.110(c). **Mrs. Betts did not appeal that final order.**

Instead, on appeal of the Final Summary Judgment in the trial court below, Mrs. Betts mounted a second, unauthorized and procedurally

[19] Under section 120.68(9), the district courts have jurisdiction to review a final order entered on a challenge to a proposed or a promulgated rule. However, the only rule challenge that may by-pass the administrative process and proceed to a district court is a challenge to the determination of an emergency purporting to support an emergency rule or a challenge to the facial constitutionality of a rule in which there are no issues of disputed fact. See *Baille v. Department of Natural Resources*, 632 So. 2d 1114, 1116 (Fla. 1st DCA), rev. denied 642 So. 2d 1362 (Fla. 1994). Mrs. Betts did not challenge the Rule on that basis, either before DOAH or before the Fourth District.

improper rule challenge. She argued to the Fourth District in her Initial Brief that "if one concludes that the Department authorized deferred presentment, then one must also necessarily conclude that the Department far exceeded its authority." [Initial Brief at 34] In other words, Mrs. Betts tried to circumvent the APA review procedure by bringing this back-door challenge to a rule already upheld in the statutorily mandated APA proceeding.

The Fourth District did not articulate the theory under which it ignored the preclusive effect of the ALJ's determination of the validity of the Rule. Rather, the Fourth District patently ignored a well established body of law regarding application of the doctrines of res judicata and collateral estoppel in Florida administrative law. In *Department of Revenue v. Accredited Surety and Casualty Company, Inc.*, 690 So. 2d 614 (Fla. 5th DCA 1997), a plaintiff who had previously received an adverse ruling on a tax issue from the regulatory authority, affirmed on appeal, was precluded from bringing a challenge to another assessment of the same type. The Fifth District held that the earlier agency pronouncement was acted as both res judicata and collateral estoppel on the issue. The fact that the decision in *Accredited Surety* had been appealed to the district court is not dispositive. In *South Florida Regional Planning Council v. State Land and Water*

Adjudicatory Commission, 372 So. 2d 159 (Fla. 3d DCA 1979), the appellate court held that failure to seek judicial review of an agency's final order forecloses all collateral attacks on the same issue.

Here, Mrs. Betts's failure to appeal the ALJ's determination that the Rule was a valid exercise of the Department's delegated legislative authority resolved that issue. The Fourth District overreached its judicial authority in setting that ruling aside.

B. The Doctrines of Exhaustion of Administrative Remedies and of Primary Jurisdiction Requires The Court To Avoid Usurping An Administrative Agency's Regulatory Role.

Perhaps the most striking departure from the essential requirements of law in the Fourth District's decision is that it invalidated the Department's exercise of its delegated legislative authority in a proceeding to which the Department was not a party. The doctrine of exhaustion of administrative remedies holds that "[i]t is improper, if administrative remedies are adequate, 'to seek relief in the circuit court before those remedies are exhausted.'" *Florida Marine Fisheries v. Pringle*, 736 So. 2d 17, 20 (Fla. 1st DCA 1999). The doctrine of primary jurisdiction "enables a court to have the benefit of an agency's experience and expertise in matters with which the

court is not familiar[[20]], protects the integrity of the regulatory scheme administered by the agency and uniformity in areas of public policy." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001), citing *Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Fund*, 427 So. 2d 153, 157 (Fla. 1982).

As this court noted in *Key Haven*, "Judicial intervention in the decision–making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." 427 So. 2d at 157.

The First District has given meaningful instruction as to the proper application of the doctrine of primary jurisdiction and the concomitant obligation to exhaust administrative remedies. In *Willette v. Air Products*, 700 So.2d 397, 399 (Fla. 1st DCA 1997), the court ruled:

> The Department is correct that appellate courts do not have a roving commission arbitrarily to decide the validity of administrative rules, or to invalidate them willy-nilly. . . . Unless necessary for decision, statutory construction that amounts to passing on the validity of a rule not challenged in a section 120.56 proceeding should be avoided. . . . But, when

[20] Petitioner does not contend that courts are without expertise in construing statutes. However, in this instance, the regulation of financial service providers and the weighing of the competing interests in availability of services and consumer protection were particularly within the expertise of the Department of Banking.

> an appellate court is called upon to decide a dispositive question within its jurisdiction, it cannot refrain from decision on grounds that deciding might imply a view as to the validity of an administrative rule not challenged below in a section 120.56 proceeding. Taking any applicable administrative rules into account, the court must make such decisions as "essentially a matter of law to be determined by the ordinary rules of statutory construction."

Nord v. Florida Parole and Probation Commission, 417 So.2d 1176, 1177-78 (Fla. 1st DCA 1982), a case the court cited in *Willette*, states:

> Although we have accepted jurisdiction to review appellant's challenge to the validity of the Commission's aggregation rule, and found it valid, our decision should not be interpreted as any indication that we will so treat every claim of rule invalidity. We undertook review in this case because the challenge to the rule involved essentially a matter of law to be determined by the ordinary rules of statutory construction. When the challenge to a rule implicates the Commission's exercise of its discretion in matters requiring its special knowledge, experience and services to determine technical and intricate matters of fact, or a uniformity of ruling is essential to comply with the purposes of the statute being administered, we will require prior resort to the Commission via Section 120.54, or 120.56.

In this case, the Department was charged with implementing the entire regulatory scheme of all money transmitters. In so doing, it was obligated to avoid arbitrary and capricious enforcement[21] and to fully occupy the regulatory arena the legislature defined. Here, the Fourth District simply dismissed the agency's exercise of its delegated legislative authority as unauthorized, without consideration of the Department's reasoning or

[21] §120.52(8)(e), Fla. Stat.

experience. In the ordinary progress of a case at law, the court would have deferred to the administrative process—and, in a case such as this to the existence of a dispositive rule whose validity had already been tested in a rule challenge—to obtain the information required to evaluate whether the agency's exercise of delegated legislative authority is proper.[22] However, no such procedure was available to Mrs. Betts. She had challenged the Rule already, and the executive branch had determined the Rule to be lawful. Mrs. Betts had waived her right to have an appellate court review that determination. The Fourth District encroached on the executive branch by ignoring that branch's final determination of the merits of an issue within the scope of its constitutional power.

[22] In fact, this is what the United States District Court for the Middle District of Florida did in *Betts v. Advance America, Cash Advance Centers, Inc.*, Case No. 6:99-civ-593-Orl-28JGG (M.D. Fla.). Faced with an attack on the Rule identical to that raised here, the court noted that Mrs. Betts was challenging the legality of payday loans and noted, "Section 120.56, Florida Statutes, sets forth an administrative process through which rules may be challenged." The court then ordered the parties to notify it within two weeks "whether the validity of Rule 3C-560.803 has been addressed in an administrative challenge as well as whether the doctrine of primary jurisdiction applies to this action." *Id*. at Docket Entry 110. It was the federal court's proper deference to administrative procedure that triggered Mrs. Betts's unsuccessful challenge to the Rule.

C. The Fourth District's Invalidation Of The Department's Rule Encourages Forum Shopping.

Reduced to its simplest analysis, Mrs. Betts was forum shopping when she argued to the Fourth District that the Rule represented an invalid exercise of the Department's delegated legislative authority. Mrs. Betts had challenged the Rule in the appropriate forum (after being directed to it by the United States District Court). She was displeased with the outcome of that challenge, but she did not seek judicial review of that decision. Instead, she mounted a collateral attack on the Rule in a forum she hoped (and ultimately found) to be more favorable and less inclined to give deference to the administrative process and the powers vested in the executive branch. Disappointed challengers to administrative rules have a clear and adequate opportunity for review. They must not be permitted to ignore that opportunity, but to raise the same issue at a later time, in different procedural circumstances, before a more sympathetic forum.

IV. NATIONAL IS ENTITLED TO THE PROTECTION OF THE CODE'S SAFE HARBOR PROVISION.

When it originally enacted the Code, the legislature adopted a safe-harbor provision. Section 560.107 provides:

> No person acting, or who has acted, in good faith reliance upon a rule, order, or declaratory statement issued by the department shall be subject to any criminal, civil, or administrative liability for such action, notwithstanding a subsequent decision by a

court of competent jurisdiction invalidating the rule, order or declaratory statement.

In promulgating Rule 3C-560.803, permitting check-cashers to accept post-dated checks, the Department formalized the interpretation of the Code contained in the FCCA opinion by promulgating the Rule.[23] Even if the Fourth District were correct that the Rule was an invalid exercise of the Department's delegated legislative authority, National was entitled to rely on the Rule in conducting its business and thus is protected by the Code's safe harbor provision.

A. The Fourth District's Ruling Undermines The Regulatory Authority Of The Executive Branch And Fosters Litigation The Legislature Intended To Prevent.

The impropriety of the Fourth District's incursion into the authority of the executive branch is underscored by its failure to recognize the legislatively created safe harbor. Moreover, the Fourth District's judicial

---

[23] See Rule Challenge Order at 15, ¶¶ 33, 36:

The Department has consistently followed the legal opinion expressed in the February 24, 1995, letter [the FCAA Letter] . . . that a "deferred deposit" transaction is not prohibited by Chapter 560, Florida Statutes, provided that the fees charged do not exceed the caps set in Section 560.309(4), Florida Statutes. Inasmuch as this was its policy, the Department believed it was necessary and appropriate to promulgate the policy as a rule.

. . .

The Department followed all applicable rulemaking procedures and the rule took effect on September 24, 1997. Rule 3C-560.803, Florida Administrative Code states the following:

A check casher may accept a postdated check, subject to the fees established in Section 560.309(4), F.S.

activism raises the specter of competing and irreconcilable administrative and judicial decisions. If appellate courts ignore the precepts of administrative res judicata, are regulated entities who rely on a rule upheld in a final (and unappealed) administrative order acting in good faith under the statute if an appellate panel substitutes its judgment for that of the regulatory agency and DOAH?

This inquiry is not rendered moot by the 2001 amendment. Mrs. Betts's husband[24], a resident of Orange County, has filed another action in the Fifteenth Judicial Circuit in and for Palm Beach County, *Reuter and Betts v. Advance America, Cash Advance Centers of Florida, Inc. et al.*, Case No. 2004-CA-008164 (Filed August 19, 2004), asserting the same claims against Advance America that were asserted in the trial court below.

The decision of the Fourth District fosters litigation the legislature clearly intended to foreclose.

B. Subsequent Deferred Presentment Transactions Were Not Usurious Loans Pursuant To The Pre-2001 Code.

In the past, Mrs. Betts has argued that even if the initial deferred presentment transaction was lawful under Chapter 560, all subsequent transactions were outside the ambit of the Rule and therefore were usurious loans. Regardless of the form in which the original transaction was

[24]Together with Donna Reuter, a resident of Palm Beach County.

terminated—cash for check; check for check—Mrs. Betts has classified all transactions after the initial one as rollovers. Initial Brief to the Fourth District at 10, 26; *Ace*, 827 So. 2d at 297 and n.4. She then contends that any rollover is outside the regulatory scheme of the pre-2001 Code and thus a usurious loan. The rules of statutory construction and of logic that demonstrate that deferred presentment transactions were within the scope of the pre-2001 Code and not usurious loans.

Deferred presentment transactions are a sub-category of check-cashing transactions. As the Department, the Attorney General, the ALJ and the Fifth District Court of Appeal recognized, the statute did not dictate when or in what manner a deferred presentment transaction was to be terminated. However, the Department clarified its interpretation of the regulatory scheme in its May 5, 1998, Letter of Advice. The Department made clear that "[a]ny 'rollover,' 'extension' or 'renewal' of a deferred deposit check for an additional fee may constitute interest." Thus, no later than May 5, 1998, the Department had established the outer limit of the Code's inclusion of deferred presentment transactions. Each deferred presentment transaction had to be terminated by redemption for cash or by deposit of the payment instrument. *Accord*, AGO-2000-26 at 4.

It is uncontroverted that after 1997, National required each deferred presentment transaction to be terminated before a new transaction could be begun. Mrs. Betts has argued that the immediate commencement of a new deferred presentment transaction poses the same potential for injury that a rollover, extension or renewal represents.[25] That does not alter the authority of the Department to interpret the statute and to interpret its own rule. *Citizens of the State of Florida v. Wilson*, 586 So. 2d 1269, 1271 (Fla. 1990). National, even prior to the Department's issuance of its Letter of Advice, was in full compliance with the Rule as interpreted by the Department.[26]

The uncontroverted facts demonstrate that National made every effort to comply with the laws of this state as interpreted and enforced by the agency to which the legislature delegated authority to interpret and to

---

[25] In 2001, the legislature for the first time prohibited immediately sequential deferred presentment transactions by requiring a 24-hour cooling-off period between transactions. §560.404(19), Fla. Stat. (2001).

[26] National acknowledges that prior to the Department's clarification of its rule it engaged in check-for-check redemptions which were identified as prohibited roll-overs by the Letter of Advice. National cannot be held accountable for failing to anticipate the Department's interpretation of its own rule, nor can that interpretation be applied retroactively. The Fifth District itself did not find that interpretation to be the only reasonable interpretation of the regulatory scheme, "[I]n our view there is not practical difference between the ritualistic extended transaction and an abbreviated one in which only the fee accompanied the delivery of the new check." *Ace*, 827 So. 2d at 298. National cannot be held to have violated the statute because its analysis of what was required by the Code and the Rule comported more with the Fifth District's rather than the Department's.

enforce those laws. Having acted as a good corporate citizen, National, like its competitors, finds itself faced with potentially crippling liability. Such an outcome is contrary to the legislature's expressed intent to grant safe harbor. It also undermines the confidence regulated entities must repose in the agencies that regulate them. If businesses acting in reliance on guidance from their regulators can suddenly be held civilly and criminal liable in Florida courts for the very activities approved by the regulators, they can no longer risk doing business in Florida.

National and all check cashers who complied with the Department's interpretation of pre-2001 Code are entitled to the protection of section 560.107, Fla. Stat. (Supp. 1994).

CONCLUSION

For the foregoing reasons, Appellee, McKenzie Check Advance of Florida, L.L.C., d/b/a National Cash Advance, respectfully requests this Honorable Court to quash the decision of the Fourth District Court of Appeal in the instant case and to approve the decision of the Fifth District Court of Appeal in *Ace* and *FastFunding*.

Respectfully submitted,

Mitchell Berger, Esq.
Florida Bar No.: 311340
BERGER SINGERMAN
Suite 1100
350 East Las Olas Boulevard
Ft. Lauderdale, FL 33301
Phone: (954) 525-9900
Fax: (954) 523-2872

Virginia B. Townes, Esquire
Florida Bar No.: 361879
AKERMAN, SENTERFITT
255 South Orange Ave.
Post Office Box 231
Orlando, FL 32802
Telephone: (407) 843-7860
Telefacsimile: (407) 843-6610

Counsel for McKenzie Check
Advance of Florida, LLC,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits has been served by United States Mail, first-class postage prepaid, on Christopher Casper, Esquire, James, Hoyer, Newcomer & Smilianich, P.A., 4839 West Kennedy Blvd, Suite 550, Tampa, FL 33609; and on E. Clayton Yates, Esquire, Law Office of E. Clayton Yates, P.A., 205 South Second Street, Fort Pierce, FL 34950, this 16th day of November, 2004.

Virginia B. Townes, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Florida Rule of Appellate Procedure 9.210(a)(2) that the foregoing brief is printed in Times New Roman 14 point font.

Virginia B. Townes, Esquire