

STATE OF NORTH CAROLINA

WAKE COUNTY

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

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

**FINDINGS**

1. Pursuant to a Notice of Hearing and Order for Pretrial Conference, dated February 1, 2005 (the "Notice of Hearing"), the Office of the North Carolina Commissioner of Banks ("OCOB") gave notice to Advance America, Cash Advance Centers of North Carolina, Inc. ("AANC") of allegations regarding AANC's compliance with the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the North Carolina General Statutes, G.S. §§ 53-164 *et.seq.* (the "Consumer Finance Act") and the North Carolina statute entitled "Check Cashing Businesses," Article 22 of Chapter 53 of the North Carolina General Statutes, G.S. §§ 53-275 *et.seq.* (the "Check Casher Act").
2. By Pre-Hearing Order dated April 21, 2005, (the "Pre-Hearing Order") the North Carolina Commissioner of Banks (the "Commissioner") limited the scope of this proceeding and the nature of the remedies potentially available against AANC in this forum.
3. The Pre-hearing Order dismissed without prejudice the part of the case relating to the Check Casher Act; it eliminated any claim for civil money penalties based upon past transactions or any request for criminal sanctions arising from past transactions; it instructed the parties to prepare for a prompt hearing with regard to the Consumer Finance Act elements that remained.
4. The Pre-Hearing Order summarized for the parties the central issues to be determined in the hearing:
  - A. Whether AANC is a person engaged in the business of lending as that term is used in G.S. § 53-166.

- B. Whether AANC regularly offers, arranges, originates, and collects on consumer loans with interest rates in excess of those allowed by Chapter 24 of the General Statutes.
  - C. Whether AANC contracts for, exacts or receives in connection with such loans, directly or indirectly, charges which in the aggregate are greater than those allowed by Chapter 24.
  - D. Whether AANC is required to be licensed under the Consumer Finance Act and, if so, whether it is in fact so licensed.
  - E. Whether AANC is exempt from the application of the Consumer Finance Act, under the terms of that statute, federal law or the United States Constitution.
5. Counsel for AANC served Requests for Production of Documents and Interrogatories on Office of the OCOB and the Office of the Attorney General (“OAG”) on March 31, 2005 (the “Requests For Production”). The Requests for Production were directed to the North Carolina Banking Commission, the North Carolina Commissioner of Banks and the North Carolina Office of the Attorney General and contained fifty-two requests for production of documents and nine interrogatories.
  6. Counsel for OCOB and the OAG filed a Joint Motion For Protective Order and Order Limiting Discovery (the “Production Motion”), accompanied by a Memorandum of Law in support of such motion on April 8, 2005, arguing, among other things, that the Requests For Production were irrelevant, overbroad, burdensome, and violative of various evidentiary privileges. The Production Motion requested that the Commissioner deny any discovery request to the Banking Commission; narrow the scope of the discovery to matters that are non-privileged and relevant to the subject matter of the proceeding and not unduly burdensome; and enter a protective order accordingly.
  7. Counsel for AANC submitted an Opposition to Joint Motion for a Protective Order and Order Limiting Discovery on or about April 18, 2005, which included a detailed rebuttal of matters of fact and law stated in the Production Motion and arguing for enforcement of the Requests for Production.
  8. On April 18, 2005, AANC served Notices of Depositions (the “Notices”) on Roy A. Cooper, III, Attorney General of North Carolina; Joshua N. Stein, Senior Deputy Attorney General; L. McNeil Chestnut, Special Deputy Attorney General; Phillip A. Lehman, Assistant Attorney General; and M. Lynne Weaver, Assistant Attorney General; and Reitzel Deaton, an employee of OCOB.
  9. On April 25, 2005, OCOB and AG made a joint motion to quash the Notices served by AANC to all of the persons mentioned in the next preceding paragraph except for Reitzel Deaton (the “Deposition Motion”). The Deposition Motion was supported by a Memorandum of Law.

10. Pursuant to a Continuance Order dated April 13, 2005, counsel for parties appeared before the Commissioner on April 26, 2005 at the Office of the Commissioner of Banks to commence the contested case hearing of this matter. At the hearing, oral arguments were heard on the Production Motion. Arguments were not heard with regard to the Deposition Motion because counsel for AANC had not had sufficient time to respond.
11. The Commissioner received the Response of AANC to the Deposition Motion on May 2, 2005.
12. At the hearing on April 26, 2005, the Commissioner granted the Production Motion, subject to two exceptions and with an undertaking to issue a written order to that effect. No ruling was made on the Deposition Motion. This Order is the written order formalizing the ruling on the Production Motion and ruling on the Deposition Motion.

### **Findings with Regard to AANC's Requests for Production of Documents and Interrogatories**

1. This hearing is a contested case under the North Carolina Administrative Procedure Act, N.C. Gen. Stat. Chapter 153B (the "NCAPA"). In cases of this kind, the NCAPA incorporates the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1-1A. Discovery under the Rules Civil Procedure is also incorporated by the NCAPA. N.C. Gen. Stat. § 150B-39. The parties differ with regard to the application of Rule 26(b) to the Requests for Production and Notices with regard to the following issues:
  - A. **Relevance.** Subparagraph (b)(1) of Rule 26 states that parties "may obtain discovery regarding any matter, *not privileged*, which is *relevant to the subject matter involved in the pending action.*" (*emphasis added*) Counsel for OCOB and OAG argue that substantially all of the documentary evidence sought to be produced is irrelevant to the matters at issue in this case.
  - B. **Privilege.** Counsel for the OCOB and OAG argue that a number of internal communications covered by the Requests for Production are covered by attorney work product or other similar privileges and are exempt from production. *Ibid.*
  - C. **Undue Burden.** Counsel for OCOB and OAG argue that the Requests for Production are unduly burdensome because they are overbroad and not materially related to the case. Rule 26(b)(1)(a)(iii). They also argue that such information, to the extent it is material, is obtainable from other sources (including AANC itself). Rule 26(b)(1)(a)(i). Counsel for OCOB and OAG additionally argue that the Notices are burdensome and disruptive of governmental processes without a showing of necessity by AANC.

2. Counsel for AANC argues that the Request for Production and Notices are seeking relevant information to the company's presentation of its case, to wit:
  - A. Evidence that AANC was not engaged in the "business of lending," as that phrase is used in N.C. Gen. Stat. § 53-166(a). AANC argues that the statements of public officials interpreting a statute are persuasive authority of the meaning of such statute. AANC then points to statements or correspondence of representatives of OAG and OCOB in its possession suggesting that those agencies viewed the company's conduct as either compliant with or exempt from the Consumer Finance Act. Based on this line of reasoning, AANC argues that virtually all information regarding payday lending in the possession of OCOB or the OAG should be produced because it is either (i) evidence of such interpretation itself or (ii) appears reasonably calculated to lead to the discovery of such evidence. Rule 26(b)(1).
  - B. Evidence that AANC's operation in North Carolina under the "agency model" does not constitute a "device, subterfuge or pretense," as that phrase is used in N.C. Gen. Stat. § 53-166(b). AANC argues that the knowledge of its activities by representatives of the OCOB and OAG is material evidence of the absence of any deceptive intent on the part of AANC, which it argues is a necessary element of a violation under § 53-166(b). Here again, AANC argues that the requested information is itself evidence or appears reasonably calculated to lead to such evidence.
  - C. Evidence supporting the argument that OCOB and the OAG are estopped to assert claims of violations against AANC after meeting with the company to review its operations, knowing of the continuance of such operations after the sunset date of former N.C. Gen. Stat. § 53-281, and not taking any action against the company while in possession of such knowledge.
3. Counsel for OCOB and the AG respond to the AANC arguments just summarized by pointing out that:
  - A. OCOB and the AG have provided AANC with roughly 750 pages of documents that comprise the public statements of OAG and OCOB regarding payday lending, which documents are responsive to the Requests for Production and are not privileged.
  - B. Intention to deceive is not required to be proved with regard to the allegation under N.C. Gen. Stat. § 53-166(b) that a business method is a "device" for avoidance of compliance with the Consumer Finance Act. In that regard, counsel for OCOB and the OAG concede that AANC's operations after the sunset date of former N.C. Gen. Stat. § 53-281 were in the open and were known to OCOB and OAG. Counsel for OAG argues

nonetheless that a separate claim under N.C. Gen. Stat. § 53-166(b) is at issue and that AANC's conduct violated that provision of the statute.

- C. Extensive discovery is not required with regard to AANC's proposed estoppel defense because (i) estoppel cannot be asserted against a governmental entity in the exercise of governmental power; and (ii) even if such a defense could be raised, statements or conduct of governmental officials would have to be in the possession of AANC to establish the company's reliance on such statements or conduct.
4. Relevance of the Information Sought by the Requests for Production to Claims under N.C. Gen. Stat. § 53-166(a):
- A. A determination with regard to the relevance of information sought by the Requests for Production to the claim that AANC has not violated N.C. Gen. Stat. § 53-166(a) depends upon a determination of which governmental agency has authority to interpret the statute.
  - B. OAG is not the agency charged with administering the Consumer Finance Act. As more fully discussed in the Pre-Hearing Order, the express language of that statute makes it clear that the Commissioner of Banks is the officer of the state having that duty. Accordingly, with the possible exception of a published legal opinion of the Attorney General, other statements by or information in possession of OAG or its representatives is irrelevant to the determinations to be made in this case.
  - C. Published interpretations of the statute by OCOB may be relevant to AANC's case. The most definitive statement by the Commissioner would be a rule or declaratory ruling under the NCAPA; however, for purposes of this case, "published interpretations" may include documentation of consumer complaints involving payday lending so long as such information is produced in a manner consistent with OCOB's statutory obligations of confidentiality under N.C. Gen. Stat. § 53-99.
5. Relevance of Information Sought by the Request for Production to Claims Under N.C. Gen. Stat. § 53-166(b)
- A. The relevance of information sought by the Requests for Production with regard to claims under N.C. Gen. Stat. § 53-166(b) depends, in the first instance, on whether such claims are at issue in the case.
  - B. N. C. Gen. Stat. § 53-166(a) is broadly drawn to include persons engaged in the "business of lending" rather than "lenders" alone. This broad construction of the paragraph is supported by a careful reading of its language, including particularly the language regarding compensation in respect of loans.

- C. N.C. Gen. Stat. § 53-166(b) supports a broad interpretation of N.C. Gen. Stat. § 53-166(a) in that it emphasizes that more than just the “lender,” the person that advances a loan, can be covered by the Consumer Finance Act.

As stated at the hearing on April 26, 2005, I do not find grounds in this case for a separate claim against AANC under N.C. Gen. Stat. § 53-166(b).

- D. Therefore, there is no need for any discovery in connection with claims under N.C. Gen. Stat. § 53-166(b).

6. Relevance of Information Sought by the Requests For Production to AANC’s Estoppel Defense.

- A. A determination with regard of the relevance of information sought by the Requests for Production to AANC’s proposed estoppel defense depends on whether such a defense is available in the case as it now stands.

- B. In the Pre-Hearing Order, the scope of the claims against AANC were reduced to comprise only a claim that AANC’s business activities, as currently conducted, violate the Consumer Finance Act. Further, the Pre-Hearing Order expressly limited remedies to prospective injunctive relief.

- C. Given this status of the case, the only argument for estoppel that can be advanced would be to prevent the exercise by the Commissioner of his duty to interpret and enforce the Consumer Finance Act or to hinder the OAG in representing the Commissioner in such enforcement. These activities are clearly the exercise of the governmental power expressly granted by statute to these agencies. The cases presented by the parties with regard to this issue make clear that such a use of estoppel is contrary to the public policy of North Carolina.

- D. Accordingly, I find no ground in relevant law or policy to justify additional discovery of information having to do with this proposed defense.

7. In summary, AANC has not established a need for discovery of documentary evidence beyond evidence of public statements of public officials in the possession of OCOB and the OAG, which have been provided to its counsel. Because it is not unduly burdensome, I also find that there are adequate grounds to require that OCOB provide AANC with expurgated copies of consumer complaints regarding payday lending from the period of the sunset of former G.S. § 53-281 to a date within 30 days of this date.

**Findings with Regard to AANC's Notices of Depositions for AG Personnel**

1. While the submissions of the parties with regard to the Notices have been made on somewhat different theories, I am of the view that the legal and policy considerations with regard to depositions of the Attorney General and OAG personnel are the same as those relating to the Requests for Production.
2. I find that admissible evidence is not reasonably likely to be found through such discovery, given the case as currently limited.
3. Accordingly, the right of AANC to such depositions is not supported by applicable law or public policy.

**ORDER**

In light of the foregoing, the Commissioner makes the following rulings and orders:

1. The Joint Motion For a Protective Order and Order Limiting Discovery of OAG and OCOB is granted subject to the following conditions:
  - A. Counsel for OAG and OCOB shall provide a statement to counsel for AANC that the material previously submitted by them in response to the Requests for Production represents the product and result of a good faith and diligent search of records available to them and that the material provided represents all of the known public statements of the Attorney General or the Commissioner of Banks or their staffs with regard to payday lending; and
  - B. Counsel for OCOB will supplement the prior submission by counsel for OAG of the consumer complaints under the control of the OAG with a submission of consumer complaints held by OCOB relating to payday lending from August 31, 2001 to April 26, 2005; provided, that for all complaints other than those directed against AANC, the name of the company complained of will be expunged; and provided further that, for all complaints, all names of complaining consumers and any of their personal identifiable information will likewise be expunged.
2. The motion to quash the notice of deposition of Roy A. Cooper, III, Attorney General of North Carolina; Joshua N. Stein, Senior Deputy Attorney General; L. McNeil Chestnut, Special Deputy Attorney General; Phillip A. Lehman, Assistant Attorney General; and M. Lynne Weaver, Assistant Attorney General is hereby granted.

This the 11th day of May, 2005.



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Joseph A. Smith, Jr.  
Commissioner of Banks

## CERTIFICATE OF SERVICE

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

This the 11<sup>th</sup> day of May, 2005.



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