ORIGINAL

IN THE SUPREME COURT OF OHIO

Ohio Neighborhood Finance dba Cashland, Plaintiff-Appellant, v. Rodney Scott, Defendant-Appellee,	:	ON APPEAL FROM COURT OF APPEALS, NINTH APPELLATE DISTRICT Court of Appeals Case No. 11CA010030 13-0103

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE RICHARD F. KECK, FORMER DEPUTY SUPERINTENDENT AND CHIEF EXAMINER OF THE DIVISION OF FINANCIAL INSTITUTIONS OF THE OHIO DEPARTMENT OF COMMERCE

Darrell L. Dreher (0005935)
Elizabeth L. Anstaett (00056024)
Dreher Tomkies Scheiderer LLP
2750 Huntington Center
41 South High Street
Columbus, Ohio 43215-6196
(614) 628-8000
(614) 628-1600 – Facsimile
ddreher@dltlaw.com
eanstaett@dltlaw.com

Attorneys for Amicus Curiae Richard F. Keck, former Deputy Superintendent and Chief Examiner, Division of Financial Institutions of The Ohio Department of Commerce

Rodney Scott
250 13th Street
Elyria, Ohio 44035

Pro se
Defendant-Appellee

John W. Zeiger (00107070)
Stuart Parsell (0063510)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 365-9900
Facsimile: (614) 365-7900
zeiger@litohio.com
Parsell@litohio.com

Attorneys for Plaintiff-Appellant, Ohio Neighborhood Finance dba Cashland

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STATEMENT OF INTEREST OF AMICUS

Amicus Richard F. Keck had responsibility, as Chief Examiner of the Division of Financial Institutions of The Ohio Department of Commerce, for the enforcement of the Ohio Mortgage Loan Act ("MLA"), R.C. 1321.51-.60 for more than twenty years. Although now retired from State service, Amicus submits this brief out of concern that the court of appeals' decision below threatens to overthrow Ohio's consistent interpretation and enforcement of the MLA based on nothing more than an erroneous reading of the statute. Having been intimately involved in the enforcement of the MLA during most of his professional career, Mr. Keck urges the Court to accept jurisdiction and correct the decision below.

Mr. Keck served as Chief Examiner of the Division of Consumer Finance (subsequently reorganized into the Division of Financial Institutions) from 1989 until 2009. He served as a Field Examiner for four years before becoming Chief Examiner. Recognizing his expertise in consumer finance issues, Governor Strickland appointed Mr. Keck as acting Deputy Superintendent for Consumer Finance in 2006-2007.

Mr. Keck's responsibilities during his twenty years as a Chief Examiner included supervision of all licensees and examinations under Ohio's consumer finance laws. That responsibility expressly included the enforcement of the MLA. As such, he participated in the policy and enforcement decisions of the Division regarding the MLA; participated in legislative and administrative rule decisions of the Division under the MLA; and reviewed and resolved consumer complaints arising under the MLA. During his tenure as acting Deputy Superintendent for Consumer Finance, he was the individual ultimately responsible for these decisions on behalf of the State of Ohio.

Mr. Keck was Chief Examiner when the Short-Term Loan Act ("STLA"), R.C. 1321.35-.45, was enacted on June 2, 2008. He was intimately involved in the Division's decision-making as to the proper interpretation and enforcement of the STLA. Given Mr. Keck's more than twenty years of day-to-day responsibility for enforcement of the statutes at issue in this case, he is intimately familiar with the positions taken by the Ohio Department of Commerce in construing and enforcing these Acts.

Mr. Keck is now fully retired and wishes to emphasize that he is not, and has never been, employed by or compensated by the consumer finance industry, or by anyone else, with regard to the matters set forth in this brief. Rather, as a long time public servant, he is concerned that Ohio's consumer finance laws be interpreted and enforced correctly and consistently. Inasmuch as the court of appeals' decision is inconsistent with and contrary to over thirty years of interpretation and enforcement of the MLA by the Division of Consumer Finance, he submits this amicus brief in the hope that this Court will accept jurisdiction and correct the error below.

STATEMENT OF THE CASE

Rodney Scott entered into a loan agreement with Cashland for a loan of $500 at an interest rate of 25% per annum calculated on the principal outstanding for the time outstanding. The agreement provided that it was governed by the Ohio Mortgage Loan Act. The loan provided for a loan origination charge and a credit investigation charge as permitted by the Mortgage Loan Act. The lower court entered judgment in favor of Cashland, but with interest accruing at 8% per annum as opposed to the 25% per annum provided for in the agreement and by the Mortgage Loan Act. The Ninth Appellate District affirmed the lower court on the basis of the "from time to time" language in the definition of interest-bearing loan in the Act.

interpretation of its own rules and regulations where such interpretation is consistent with the statutory law and the plain language of the rules. *Penix v. Ohio Real Estate Appraiser Board*, 5th Dist. No. 09-CA-14, 2009-Ohio-6439 ¶ 30 *citing State ex. rel. Celebrezze v. National Lime & Stone Company* (1994), 68 Ohio St.3d 377, 382. The court is not to second guess the agency as a court is prohibited from substituting its judgment for that of the agency. *Haynam v. Ohio State Board of Education,* 6th Dist. No.L-11-1100, 2011-Ohio-6499 ¶ 89.

II. INTERPRETATION OF THE MORTGAGE LOAN ACT

A. Single Installment Loans

Contrary to the holding below, the Division has permitted single installment lending by MLA registrants for more than thirty years. After the enactment of the STLA, additional single installment lenders concluded that obtaining a certificate of registration under the MLA provided alternative lending authority. At that time the Division re-examined the statutory language of the MLA for its applicability to single installment loans. Mr. Keck was an important part of this process. At the conclusion of its review, the Division reconfirmed its longstanding position that the MLA authorizes single installment loans based on the plain language of the statute. The Division's decision was based in part on the contrast between Section 1321.57(D) of the MLA requiring that "precomputed loans" be repayable in *"monthly installments"* (plural) and Section 1321.57(C) which does *not* require "interest-bearing loans" to be repayable in installments (emphasis added). The plain wording of these two statutes reflects that these two different methods of calculating interest are subject to different requirements under the MLA. As such, the Division has consistently required that *single* installment loans can only be made under the simple interest provisions of the MLA, *i.e.,* Section 1321.57(C) and cannot be made under the

precomputed interest provisions of Section 1321.57(D). The Division consistently enforced this interpretation both before and after the enactment of the STLA.

Given the Division's interpretation that Section 1321.57(C) allows single installment loans by MLA registrants, the Division approved numerous applications by lenders whose loan programs were based on a single installment repayment both during and after the time Mr. Keck was Chief Examiner. And Mr. Keck specifically remembers advising one MLA registrant long before the STLA was enacted that the registrant's single installment loan program would be permitted under the MLA.

B. Interpretation of "From Time to Time"

The MLA definition of "interest-bearing loan" provides that "interest-bearing loan" means a loan in which the debt is expressed as the principal amount and interest is computed, charged and collected on unpaid principal balances outstanding "from time to time." R.C. § 1321.51(F). During Mr. Keck's more than 20 years at the Division, the words "from time to time" were always understood to refer to the "principal balances outstanding" from the time the loan is made until the time the loan is repaid. The balances may vary or they may not, but each time the principal balance varies, the daily interest is recomputed. That is the way simple interest is calculated and is the most favorable calculation method to the borrower. Indeed, it is a universal method of calculating interest. This language has never been interpreted or understood by the Division or the industry to require multiple installment payments.

C. Division Examinations Under the Mortgage Loan Act

The Division regularly examines companies holding certificates of registration under the MLA. The majority of the 1,517 companies holding certificates of registration under the MLA are in the business of making single installment loans. According to the Division's annual

report, in 2010 the industry made over six million loans to Ohio residents totaling over 3-3/4 billion dollars, the vast majority of which were single installment loans. During Mr. Keck's time at the Division, no examination letter written by the Division in connection with a MLA examination ever raised an examination issue regarding the single installment nature of MLA loans. Rather, single installment loans were always understood to be appropriate under the MLA.

III. INTERPRETATION OF THE SHORT TERM LOAN ACT

At the time of the enactment of the STLA, the Division had been following the committee hearings in the General Assembly and had been in contact with the sponsor of Ohio H.B. No. 545, the legislation enacting the STLA.

Once the STLA was enacted, the Division reviewed the statutory language to begin implementation and to develop an enforcement position. Mr. Keck was actively involved in this process. The unambiguous wording of the STLA provides that no person shall engage in the business of making "short-term loans" to a borrower in Ohio, or, in whole or in part, make, offer or broker a loan, or assist a borrower in Ohio to obtain such a loan, without first having obtained a license from the superintendent of financial institutions under Sections 1321.35 to 1321.48 of the Revised Code. R.C. § 1321.36(A) (effective September 1, 2008). "Short-term loan" means a loan made pursuant to Sections 1321.35 to 1321.48 of the Revised Code. *Id.* 1321.35(A). Thus, under the plain language of the STLA, a "short-term loan" is a loan made by a lender choosing to become licensed under the STLA. The Division concluded that nothing in the STLA requires a lender to obtain a STLA license or requires any particular type of loan to be made pursuant to the STLA. Rather, the Division concluded that the STLA provides higher optional interest rate authority. If a lender is not relying on the STLA for rate authority, no license is required under

the STLA and the STLA does not apply. Mr. Keck believes this has been the uniform interpretation and enforcement position of the Division since the enactment of the STLA in 2008.

The Division's interpretation of the STLA also is consistent with the opinion expressed by the Ohio Attorney General. In an opinion regarding the impact of the referendum on portions of Ohio H.B. No. 545, the Attorney General concluded that the STLA neither prohibits the making of loans without a license nor requires the licensure of persons choosing to make loans. 2008 Ohio Op. Atty. Gen. 2-365, 2008 WL 4891125 (Nov. 7, 2008). The Attorney General stated that the licensing requirement applies only to lenders choosing to make loans under the STLA and not to all lenders of loans of short duration. The Ohio Attorney General noted accurately that her interpretation of the STLA "is consistent with the position taken by the Department of Commerce's Division of Financial Institutions." *Id.*

CONCLUSION

The court of appeals decision will overturn over 30 years of administrative interpretation and enforcement by the State of Ohio and put billions of dollars of loans at risk. Mr. Keck urges this court to accept jurisdiction of this important case. After doing so, a simple reading of the plain language of the MLA, as well as consideration of the deference due the Division's longstanding interpretation of this language, will clearly show the error of the court below.

Respectfully Submitted,

Darrell L. Dreher
Elizabeth L. Anstaett
Dreher Tomkies Scheiderer LLP
2750 Huntington Center
41 South High Street
Columbus, Ohio 43215-6196
(614) 628-8000
(614) 628-1600 – Facsimile
ddreher@dltlaw.com
eanstaett@dltlaw.com

Attorneys for Amicus Curiae Richard F. Keck, former Deputy Superintendent and Chief Examiner, Division of Financial Institutions of The Ohio Department of Commerce

PROOF OF SERVICE

I certify that a copy of this Brief in Support of Jurisdiction was sent by ordinary U.S. mail on January 17, 2013 to:

Attorneys for Plaintiff-Appellant:

John W. Zeiger (00107070)
Stuart Parsell
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215

Defendant-Appellee:

Rodney Scott
250 13th Street
Elyria, Ohio 44035

One of the Attorneys for
Amicus Curiae Richard F. Keck, former
Deputy Superintendent and Chief Examiner,
Division of Financial Institutions of
The Ohio Department of Commerce