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State appeals court sends payday lending case to a jury trial

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A recent ruling by the Georgia Court of Appeals sets the stage for a trial in a long-running battle between a payday lending company and borrowers at its Georgia stores.

The company, Georgia Cash America, had argued the facts were clear that it was not responsible for small, short-term loans the plaintiffs claim carried finance charges equivalent to annual percentage rates above 200 percent. Instead, the company said it merely assisted the real lenders, out-of-state banks not governed directly by Georgia usury laws.

The appellate panel said conflicting evidence made that issue one for a jury.

Consumer advocates are quick to point out that payday loans, characterized by high interest rates, have been illegal in Georgia for decades. The prohibitions were hard to enforce until 2004, when the General Assembly added stiffer penalties, law enforcement tools and civil actions against the banks.

Restricted also by changes in federal banking regulations, leading payday lenders largely closed their doors here. Cash America shut down in Georgia in 2006.

$9.85 million in settlements

The case against Cash America will be the last of those brought by former Governor Roy Barnes against payday lenders to be resolved but would be the first to go to a jury. According to John Bevis, a partner in Barnes' office, settlements have provided for as much as $9.85 million in the matters, although not all of it may have been claimed by class members.

Filed in 2004 under the state racketeering law, the litigation involving Cash America has made four trips to the state Court of Appeals, with related proceedings in federal court including a rare en banc argument before the U.S. Court of Appeals for the Eleventh Circuit.

Noting that Cash America is a publicly-traded company, Bevis said, "I think they have just fought it harder."

He added that, by failing in their efforts to move the case to arbitration, the company has been more exposed to liability.

Bevis said the plaintiffs are seeking return of all illegal interest to the borrowers who have paid it. He said Cash America loaned more than $40 million from 2001 to 2006, and there are more than 25,000 members of the class.

The latest appellate argument was handled by Barnes and Cash America's previous lawyer on the case, John Parker of the

Atlanta office of Paul Hastings Janofsky & Walker.

William "K" Whitner, a Paul Hastings partner who has taken over the case since Parker's retirement from the firm, said his client didn't allow him to comment on the case.

Trial by jury is something Cash America has sought to avoid from the beginning. Payday lenders sued by the Barnes firm have pointed to arbitration clauses the consumer plaintiffs signed when they took out their loans. But in the case against Cash America, Cobb County State Court Judge Toby Prodgers allowed the plaintiffs to take discovery on their theory that the arbitration agreements were fraudulent on their face and unconscionable.

Unsatisfied by the company's response to discovery requests, Prodgers held Cash America in contempt and struck its arbitration defense, a ruling upheld by the state Court of Appeals in 2007. Cash America for years has asked the federal courts to order arbitration in the dispute, but last year a panel of the Eleventh Circuit said Prodgers' contempt ruling put an end to that issue.

Prodgers also certified a class of all Cash America borrowers in Georgia, covering a period of Oct. 1, 2001 to April 1, 2006. That ruling was upheld by the state Court of Appeals in 2010.

Summary judgment disputed

At issue in the appeal decided Nov. 6 were Prodgers' rulings on the parties' summary judgment motions, as well as Cash America's ongoing attempt to send the case to arbitration.

Cash America had moved for summary judgment on all of the plaintiffs' claims. The plaintiffs had sought summary judgment on loans made through May 14, 2004, the day before the state law went into effect. Prodgers denied the defense motion and granted the plaintiffs' motion.

At the heart of the dispute on the merits are Cash America's arrangements with two South Dakota banks, First National Bank, which contracted with Cash America from 2000 to 2003, and Community State Bank, which entered into similar agreements with Cash America beginning in 2003.

Cash America has argued that prior to the 2004 law Georgia didn't regulate in-state loan servicing agents for out-of-state banks and that the proportion of loan revenue retained by the servicing agent didn't matter.

After the 2004 law went into effect, Cash America's written agreements with Community State Bank were amended so that Cash America would not receive more than 49 percent of the revenue on the loans. The company has argued that this amendment proved that the banks were the lenders after May 14, 2004.

For loans made prior to May 14, 2004, Prodgers found as a matter of law that Cash America was the true lender. He based his ruling on, among other evidence, Cash America retaining 88 percent of the gross revenue on the loans, being required to provide initial funding for the loans and bearing the expenses of marketing, originating and processing the loans.

The true lender

In the Nov. 6 opinion written by Judge Michael Boggs and joined by Judges Gary Andrews and Sara Doyle, the appeals court panel reversed that part of Prodgers' ruling.

The panel said that, if Cash America were the true lender, it was bound by the state's rules and that Prodgers was allowed to look outside the written agreements between Cash America and the banks to figure out what was really going on.

The panel disagreed with Prodgers' assessment of the evidence. While citing evidence arguably supporting the conclusion that Cash America was the true lender, the panel pointed to loan documents and written agreements between the banks and Cash America showing the bank as the lender.

Boggs concluded that the question of whether someone tries to exact usurious interest rates under the cover of some artificial arrangement is one for a jury to answer.

For loans issued after the 2004 law went into effect, Prodgers had said the revised agreements created a dispute over who was the true lender, rather than settling that question as a matter of law. The appellate panel agreed that part of the case should go to a jury.

"While Cash America amended the [agreements with Community State] to provide that its intention was for its total

compensation to be less than a predominant economic interest such that it could not be presumed to be the lender," wrote Boggs, "there was other evidence presented ... sufficient to create a genuine issue of material fact regarding whether Cash America actually received a 49 percent economic interest for its services and even if it did so, whether it nevertheless, by contrivance, device, or scheme, attempted to avoid the provisions of [the 2004 law]."

The panel also said Prodgers hadn't erred in denying Cash America's motion for summary judgment as to the personal liability of its CEO. The appellate judges rejected Cash America's argument that Prodgers should have sent the case to arbitration, saying the appeals court's prior ruling on the subject was binding, notwithstanding a 2011 decision by the U.S. Supreme Court that said states must enforce arbitration agreements, even if they forbid claims being resolved on a classwide basis.

Bevis, the plaintiffs' lawyer, said that in reversing Prodgers to the extent that he had granted summary judgment for the plaintiffs, the appeals court had focused on the written agreements without seeing what was really happening.

"The part that reversed the trial court I think didn't really pay homage to the admissions by the defendants in the case," said Bevis. "At least for the three years from 2001 to 2004, the defendants admitted that they had the bulk of all the interest in the loans," said Bevis.

"But that's all right," he added. "We'll try it."

The case is *Georgia Cash America v. Greene*, No. A12A1015.
