No. 04-12420

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BANKWEST INC., ADVANCE AMERICA,
CASH ADVANCE CENTERS OF GEORGIA INC.
Plaintiffs-Appellants,

COMMUNITY STATE BANK, FIRST AMERICAN CASH ADVANCE OF GEORGIA LLC, CASH AMERICA FINANCIAL SERVICES INC., GEORGIA CASH AMERICA INC., FIRST BANK OF DELAWARE, CREDITCORP OF GEORGIA LLC, COUNTY BANK OF REHOBOTH BEACH DELAWARE, EXPRESS CHECK ADVANCE OF GEORGIA LLC.
Consolidated Plaintiffs-Appellants,

v.

THURBERT E. BAKER, Attorney General of the State of Georgia
CATHY COX, Secretary of State, for the State of Georgia
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF AMICUS CURIAE FOR THE CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF DEFENDANTS-APPELLEES' EN BANC BRIEF

No. 04-12420 *Bankwest, Inc. v. Baker*

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

The Center for Responsible Lending ("CRL") is a nonprofit corporation which is tax-exempt under section 501(c)3 of the Internal Revenue Code and an affiliate of the Center for Community Self-Help, which is also a nonprofit corporation tax-exempt under section 501(c)3 of the Internal Revenue Service Code. The Center for Community Self-Help's mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

The following is a list of all persons and entities that have an interest in the outcome of this appeal in addition to those listed by plaintiffs-appellants in their En Banc Brief and in the *amicus curiae* brief of the American Financial Services Association and Community Bankers' Association:

Calhoun, Michael
Center for Responsible Lending
McGill, Yolanda
Monast, Jonas
Rosebrock, Seth

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Amicus curiae Center for Responsible Lending (CRL) is dedicated to protecting home ownership and family wealth by working to eliminate abusive financial practices. CRL is a nonprofit, nonpartisan research and policy organization that promotes responsible lending practices and access to fair terms of credit for low-wealth families. CRL is affiliated with Self-Help, one of the nation's largest community development lenders. Self-Help has provided more than $3.9 billion in financing to help over 43,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources. Self-Help's 25 years of experience in lending to low and moderate-wealth individuals provides a practical basis for CRL's policy work.

CRL has conducted landmark studies on the impact of predatory lending laws and worked to ensure that consumers, both nationally and in Georgia, are protected from predatory lending. Accordingly, *Amicus* also has significant interest in ensuring that Georgia citizens are protected from predatory lending through the continued implementation of the legislation at issue in this case.

Amicus submits this brief in support of Defendants-Appellees' En Banc Brief. In this brief, *Amicus* will address two of the five questions posed in the

Court's briefing order (Questions 4 and 5), and in so doing will argue that federal law, interstate banking and the preservation of the dual banking system are not at odds with Georgia's efforts to regulate the actions of non-banks through O.C.G.A. § 16-17-1 *et seq*.

ARGUMENT

Q4: Does Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a) preempt O.C.G.A. §§ 16-17-1 to 16-17-10, or any part of those provisions, as they would otherwise apply to the lending activities of the plaintiffs in this case? If so, what provisions of O.C.G.A. § 16-17-1 *et seq*. ("the Georgia Act") are preempted by Section 27(a)?

Answer: O.C.G.A. § 16-17-1 *et seq*. exempt all out-of-state banks from application of their provisions, therefore the lending activities of plaintiff banks, if they were still in the business of making these loans, would not be subject to these provisions. These same provisions are, however, applicable to the lending activities of the non-bank plaintiffs and are not preempted by Section 27(a), as non-banks may not avail themselves of federal preemption available thereunder.

A. THE GEORGIA ACT APPLIES ONLY TO NON-BANKS AND DOES NOT APPLY TO OUT-OF-STATE BANKS

The Georgia Act is narrowly tailored to prevent non-banks from engaging in lending activities that violate Georgia law. Sections 16-17-1(b) – (e) state the Georgia legislature's intent to restrict payday lending activities by non-banks. The Georgia Act exempts banks chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation ("FDIC") from its coverage.

Specifically, O.C.G.A. § 16-17-2(a)(3) provides that the statute's prohibitions on payday lending do not apply to:

> . . . a bank or thrift chartered under the laws of the United States, a bank chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation, or a credit card bank and is not operating in violation of the federal and state laws applicable to its charter.

GA. CODE ANN. § 16-17-2 (a)(3).[1] Because the Georgia Act does not prohibit loans made by out-of-state banks, the only issue before the Court is whether 12 U.S.C. § 1831(d) ("Section 27") of the Federal Deposit Insurance Act ("FDIA") preempts Georgia law regulating non-bank entities involved in making or arranging loans in Georgia.

B. THE GEORGIA ACT, AS APPLIED TO "AGENTS" OF STATE-CHARTERED BANKS, DOES NOT CONFLICT WITH SECTION 27 OF THE FDIA AND IS NOT PREEMPTED.

Plaintiffs contend that Section 27 of the FDIA, which empowers out-of-state banks to export the interest rate of their home state, also prevents state regulation of non-bank entities involved in payday lending. The Plaintiffs' arguments are without merit. Neither the statutory language of the FDIA, nor the relevant case law, supports Plaintiffs' expansive reading of the FDIA. In fact, Plaintiffs have

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[1] Such carve-outs are a common means for avoiding preemption issues. *See*, *e.g.*, GA. CODE ANN., § 7-1-1001 (exempting from the mortgage broker law "[a]ny lender authorized to engage in business as a bank, credit card bank, savings institution, building and loan association, or credit union under the laws of the United States, any state or territory of the United States, or the District of Columbia, the deposits of which are federally insured ….."); *see also* ALA. CODE § 5-25-3; FL. STAT. ANN. §§ 494.003 & 494.006.

been unable to cite a single case where a court held that the FDIA preempts states from applying their usury and consumer protection laws to regulate the actions of non-bank entities.[2]

The preemptive effect of the FDIA is much more limited than the NBA and does not preempt efforts by states to regulate non-bank agents of state-chartered banks.[3] In Section 1, below, we explain that while Section 27 confers authority onto insured state banks similar to that conferred on national banks by Section 85, it is not sufficient to grant complete parity. The FDIA, 12 U.S.C. § 1811 *et seq*., unlike the NBA, 12 U.S.C. § 38 *et seq*., does not contain a statutory grant of authority for banks to originate loans through agents and therefore does not preempt the Georgia Act. In Section 2, we explain that unlike the NBA, the primary purpose of the FDIA is to protect the FDIC insurance fund, and certain provisions of it were enacted in order to constrain the powers of state banks in

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[2] Plaintiffs cite FDIA cases, but none support this proposition. Plaintiffs rely heavily on *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818 (1st Cir. 1992), for the proposition that Section 27 of the FDIA preempts the Georgia Act. In *Greenwood Trust*, the court held that the express authority of federally-insured state-banks under Section 27 to use alternative interest rate ceilings must govern what fees are to be included in the term 'interest.' *Greenwood Trust*, at 827-829. *Greenwood Trust*, however, is inapposite, as the agent in the case was a wholly-owned subsidiary of the bank, rather than an unaffiliated third-party.

[3] Whether or not agents of national banks involved in payday lending are exempt from state regulation is a disputed legal issue. As we discuss in Section Q4 - C below, the national banks do not have the authority to enter into rent-a-charter relationships. That issue, however, is not presented in the instant case and it is unnecessary for the court to reach that question.

some circumstances. The Georgia Act is consistent with the limited grant of federal powers under the FDIA to state-chartered, federally-insured banks.

1. The Plaintiffs seek to bootstrap preemptive authority similar to national banks under two separate and distinct provisions of the National Bank Act when Congress has authorized similar authority under only one provision.

Plaintiffs conflate the separate issues of the permissibility of exportation of interest rates with the permissibility of using agents to originate loans. Both national banks and state-chartered insured institutions have the right to export interest rates from their home states. Section 85 of the National Bank Act ("NBA"), 12 U.S.C. § 85, gives this power to national banks.

In 1980, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat.164, Title V (March 31, 1980) ("DIDA"), an act that amended certain federal laws governing state banks. DIDA inserted Section 27(a), a provision that mirrors Section 85 of the NBA, into the FDIA.[4] Because the language of Section 27(a) of the FDIA tracks that of Section 85 of the NBA, the two provisions regarding exportation of interest rates have been construed *in pari materia*.[5] Section 27 does not, however, turn state banks into national banks. There remain fundamental differences in the

[4] *See* DIDA Section 521, codified at 12 U.S.C. § 1831d(a).
[5] *See Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992).

statutory language of the FDIA and the NBA regarding the authority of states to regulate non-bank agents, as well as differences in the powers of national versus state banks.

a. National banks derive their powers to make loans through non-bank agents through a combination of two express statutory provisions: NBA Sections 85 and 24(Seventh).

Plaintiffs are attempting to by-pass the clear language of the statute that exempts out-of-state banks by trying to make the banks themselves and their agents inextricably intertwined. In doing so, they confuse and conflate independent and separate sources of preemptive authority under the NBA, and then attempt to borrow the whole package. However, the FDIA does not give state chartered banks full preemptive parity with national banks.

National banks are given the authority "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking…" 12 U.S.C. § 24(Seventh). The OCC has invoked this "incidental powers'" authority to assert that state laws governing agents are preempted.

The OCC opined in 2001 that a Michigan law attempting to regulate loans offered by a national bank through a non-bank third party should be preempted because a national bank has express powers to engage in activities incidental to its business pursuant to Section 24(Seventh), and has the express authority to use the services of non-banks pursuant to 12 C.F.R. § 7.1004. *Preemption Determination*, 66 Fed. Reg. 28,593 (May 23, 2001). The OCC began its analysis with a discussion of the power of national banks to originate loans, and then discussed national banks' authority to use the services of third-party agents in their lending business. The OCC concluded that the source of the authority was Section 24(Seventh) and regulations promulgated under that statute:

> First, section 24(Seventh) specifically authorizes national banks to make loans. Thus, a national bank need look no further than the express language of the statute for authorization to make loans. Section 24(Seventh) also authorizes national banks to engage in the more general "business of banking" and activities incidental thereto. . . . An activity will be deemed "incidental" to the business of banking if it is "convenient or useful in connection with the performance of" a power authorized under Federal law. Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972).
>
> Second, the authority of national banks under section 24(Seventh) permits a national bank to use the services of agents and other third parties in connection with a bank's lending business. Federal banking regulations specifically provide that a national bank may "use the services of, and compensate persons not employed by, the bank for originating loans." 12 C.F.R. § 7.1004(a).

Preemption Determination, 66 FR at 28,595. Only *after* concluding that the national bank has the authority to use the services of a third-party in connection with making a loan, did the OCC address the question of which interest rate the bank may charge.

> Finally, under 12 U.S.C. 85, national banks may charge interest in accordance with the laws of the state where the bank's main office is located without regard to where the borrower resides and despite contacts between the loan and another state.

Id. Thus, according to the OCC, the ability of national banks to originate loans through agents derives from the express grant of authority in Section 24(Seventh) of the NBA and 12 C.F.R. § 7.1004, rather than Section 85 of the NBA which relates to interest rate exportation. There is no comparable grant of authority for state banks. In fact, the purpose behind this language stems from the original creation of the national banks in order to establish a uniform currency and to engender public trust in the banking system.[6] FDIC-insured state banks have no express federal authority to make loans through or in partnership with agents.[7] Section 27 alone does not give federally-insured state-chartered banks express federal powers to conduct interstate banking business through or in concert with

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[6] Patricia McCoy, BANKING LAW MANUAL § 3.02[1] (2d. ed. 2004).

[7] See *Does Section 27 of the Federal Deposit Act Preempt the Michigan Motor Vehicle Sales Finance Act*, FDIC-02-06 (Dec. 19, 2002) 2002 WL 32361502 at *7. The FDIC warned that the opinion letter was non-binding, *id*., so it is unclear why plaintiffs' *amici* AFSA and CBA cited to this opinion letter as authority. The Supreme Court has held that the authority of such a letter is not entitled to *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The FDIC letter notes that the OCC preemption determination was based in part on 12 U.S.C. § 24(Seventh), but fails to cite to any FDIA provision analogous to Section 24(Seventh). Significantly, in the opinion letter, FDIC Counsel then suggests that "*the better approach*" for the state enforcement agency, with respect to an insured state bank, "would be to interpret and apply federal *and* state provisions in a way that *gives meaning to the state law* but also avoids frustrating the Congressional objective and purpose [for enacting Section 27]." (Emphasis added). The purpose of enacting Section 27 of the FDIA was to permit the exportation of interest rates by the bank, however, not to permit the use of agents.

non-banks, just as NBA Section 85 alone does not confer that authority on national banks.

b. State banks may avail themselves of the authority of only one of the provisions available to national banks; FDIA Section 27, on its own, does not grant state banks express authority to make loans through non-bank agents.

Plaintiffs argue that because state banks have exportation authority similar to that of national banks, Section 27 has sufficient preemptive scope to also confer express authority to engage in other activities incidental to banking business that would facilitate exportation, and that these incidental activities should therefore also be governed by federal and not state law. This interpretation would be an unwarranted expansion of Section 27 for at least two reasons.

First, to read Section 27 so expansively would make it a *broader* grant of authority than that contained in Section 85.[8] National banks derive their exportation authority from Section 85, but they derive the authority to use non-bank means to export the rates with minimum interference of host state law from

[8] Like Plaintiffs, the FDIC itself has conflated the issues of interest rates and agency. After receiving a request from AFSA, the FDIC issued a letter captioned *Does Section 27 of the Federal Deposit Act Preempt the Michigan Motor Vehicle Sales Finance Act,* FDIC-02-06 (Dec. 19, 2002) 2002 WL 32361502 at *7. See Section Q4 -- B(1)(a). *infra* for detailed discussion of the OCC's preemption determination with respect to national banks' authority to make loans through non-bank agents.

the combination of NBA Section 85 and the "incidental powers" language set forth in NBA Section 24(Seventh).[9]

Furthermore, Section 27's preemptive effect on state laws governing loans is not plenary given the context of its enactment. The DIDA provision that effectuates Section 27 gives a state authority to opt out of Section 27 as applicable to 'other loans' made within its borders. Section 521 of DIDA adds Section 27 to the FDIA. In Section 525, Congress inserted language that permits a State to withdraw from the purview of Section 27, in which case domestic state usury laws would govern loans such as those at issue in this case. [10]

There is no sunset on the states' ability to use Section 525 to opt-out of the availability of Section 27 for loans made within the state. Clearly, Congress did not deem a state's right to opt out of the application of Section 27 to non-mortgage consumer loans made by a bank within a state's borders as a threat to interstate banking. This right therefore cannot be squared with a ruling that mandates the

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[9] 12 U.S.C. § 24(Seventh).

[10] "The amendments made by section 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date…on or which such State adopts a law or certifies that the voters of such state have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State…." DIDA Section 525, 12 U.S.C. § 1730g.

same degree of national uniformity with regard to state banks as is possessed by national banks.

2. The restrictions on the activities of federally-insured state banks in Section 24 of the FDIA contrast starkly with the grant of powers to the national banks in Section 24 of the NBA.

The FDIA's more limited grant of powers to federally-insured, state-chartered banks is consistent with Congress' intent in enacting the FDIA and the NBA. Congress enacted Section 24(Seventh) of the NBA to set forth the powers given to national banks. In contrast, Congress enacted Section 24 of the FDIA during a period of weak state regulation to *restrict* the powers of state-chartered depository institutions that were engaging in risky activities that jeopardized the safety of the federal deposit insurance system.

Both houses of Congress agreed that the FDIA needed to be amended to *limit* the authority given to state-chartered depository institutions under less restrictive state laws in order to protect the fiscal soundness of the federal deposit insurance system. Rather than stating the activities in which state-chartered depository institutions may engage, Section 24 of the FDIA states negatively the activities in which such institutions may *not* engage.[11]

[11] See 12 U.S.C. § 1831a. (" [A]n insured state bank may not engage as principal in any type of activity that is not permissible for a national bank ….").

As the Senate Report stated:

> The Committee is concerned that the existence of Federal deposit insurance may, in some cases, give States an incentive to gamble at Federal expense. At the request of Chairman Riegle, the FDIC, together with the Conference of State Bank Examiners, reviewed the powers each state has granted to its State-chartered banks.… In at least 40 states, therefore, federally-insured deposits are directly funding risky activities.
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> * * *
>
> Because States have allowed their banks to risk federally-insured deposits in speculative ventures, some Federal restrictions on the activities of such banks are needed. . . . Title II [of the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991][12] will impose *strict limits* on the ability of State-chartered banks to engage in activities *impermissible* for national banks.[13]

The House Report evidences a similar concern with the lack of restrictions on state-chartered depository institutions:

> Section 303. Restrictions on insured State bank activities. A new Section 24 is added to the FDI Act regarding permissible activities for federally insured State banks and their subsidiaries. This new section 24 retains the authority given to the States under the dual banking system for State bank agency activities but, as was done for savings associations in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), State bank activities as principal may be limited based on risk.[14]

Far from preempting the application of state laws to state-chartered depository institutions, Congress provided for state and federal regulation to work together.

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[12] The Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991 (CDIRTPA) eventually was subdivided and enacted as several different acts including the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDIAIA). Both the CDIRTPA and the FDIAIA provided for the enactment of a Section 24 of the FDIA regarding activities of state-chartered depository institutions.

[13] S. Rep. No. 102-167, at 49, 54 (1991) (emphasis added).

[14] H.R. Report No. 102-330, at 135 (1991).

Thus, Plaintiffs' reliance on the NBA, and its case law,[15] is misplaced. Section 24(Seventh) of the NBA grants national banks specific powers. This explicit grant of powers is deemed to preempt contrary state laws.[16] Section 24 of the FDIA, enacted to *restrict* the powers of state-chartered depository institutions, simply cannot be viewed *in pari materia* with Section 24 of the NBA.[17] Section 24 of the FDIA clearly does not prevent the application of state laws to state-chartered depository institutions except as specifically set forth in the FDIA.

C. NATIONAL BANKS ARE PROHIBITED FROM ENGAGING IN PAYDAY RENT-A-CHARTER, SO PLAINTIFFS' RELIANCE ON NBA PRECEDENT IS AS UNAVAILING AS IT IS INAPPOSITE.

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[15] Plaintiffs cite a string of cases decided under the NBA in support of their contention that the FDIA preempts state law that regulates the actions of agents of federally-insured state-chartered banks. *See e.g. Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978); *Krispin v. May Dep't Stores Co., 218 F.3d 919* (8th Cir. 2000); *Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994); *Christiansen v. Beneficial Nat'l Bank*, 972 F. Supp. 681 (S.D. Ga. 1997). None of these cases, however, involved state-chartered banks or their agents. These cases rely on the unique powers of national banks and the purposes of the NBA. For example, in *Marquette*, the Supreme Court states that "Omaha Bank is a national bank; it is an instrumentality of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Marquette Nat'l Bank,* 438 U.S. at 308 (1978).

[16] *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), at 34 ("[W]here Congress has not explicitly conditioned the grant of 'power' upon a grant of State permission, the Court ordinarily found that no such condition applies.")

[17] In fact, the section of the FDIA that tracks Section 24 of the NBA is Section 9 of the FDIA, which sets forth the powers of the Federal Deposit Insurance Corporation itself, not those of insured state banks. *Compare* 12 U.S.C. § 24 ("Corporate powers of associations --- Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power --- . . .") *with* 12 U.S.C. § 1819 ("Corporate powers—In general. Upon the date of enactment of the Banking Act of 1933, the [Federal Deposit Insurance] Corporation shall become a body corporate and as such shall have the power ---. . .").

Despite the powers possessed by national banks, the OCC has made it clear that national banks have no authority to 'rent' these powers to non-bank payday lenders. In a joint statement issued with the Director of the Office of Thrift Supervision, the Comptroller of the Currency warned non-bank payday lenders that they should not expect the benefits of a bank charter by virtue of a relationship with a national bank, nor should they count on support from the OCC should the relationship be subject to legal challenges similar to the case at bar.[18]

Furthermore, the OCC and the federal courts have repeatedly denied attempts by both national banks and payday lending companies to obtain a regulatory or judicial decision legitimating these arrangements.[19] In fact, despite the claims by plaintiffs and their *amici* that no principled distinctions can be drawn between the rent-a-bank arrangements at issue in this case and other areas where

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[18] Joint Statement by John D. Hawke, Comptroller of the Currency and Ellen Seidman, Director, Office of Thrift Supervision, Nov. 27, 2000, available at http://www.ots.treas.gov/docs/48594.pdf . Significantly, the OCC made good on this warning when it submitted a brief *amicus curiae* in the case of *State of Colorado ex rel. Ken Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colo. 2002), in support of the state attorney general's motion to remand.

[19] *See, e.g., Long v. ACE Cash Express, Inc*., 2001 U.S. Dist. LEXIS 24617 (M.D. Fla. 2001); *Brown v. ACE Cash Express, Inc*., Civil Action No. S-01-2674 (D.Md. Nov. 14, 2001); *State of Colorado ex rel. Salazar v. ACE Cash Express, Inc*., 188 F.Supp.2d 1282 (D.Colo. 2002); *Goleta Nat'l Bank and ACE Cash Express, Inc. v. Lingerfelt,* 211 F.Supp.2d 711 (E.D.N.C. 2002); *Goleta Nat'l Bank v. O'Donnell*, 239 F.Supp.2d 745 (S.D. Ohio 2002); *Flowers v. EZPawn Oklahoma, Inc*., 2004 U.S. Dist. LEXIS 24876 (N.D. Okla. 2003). *See also OCC Preemption Determination*, 66 Fed. Reg. at 28595 n. 6 (distinguishing legitimate relationship between a national bank and its agent from those where the third-party has developed the loan product and has the preponderant economic interest in the loan). *Cf. Hudson v ACE Cash Express*, 2002 WL 1205060 (S.D. Ind. 2002).

financial services are offered to the public through bank-third party relationships, the OCC does just that.

According to the OCC, arrangements with non-bank third party providers in which the non-bank "offers products or services through the bank with fees, interest rates, or other terms that cannot be offered by the third party directly" may constitute "abuse of the national bank charter." *Third Party Relationships: Risk Management Principles*, OCC Bulletin 2001-47 (Nov. 1, 2001) at 4, *available at* http://www.occ.treas.gov/ftp/bulletin/2001-47.doc (describing and distinguishing three categories of bank-third party relationships).

Q5: Is the determination of whether a "State-chartered insured depository institution" is the actual lender for purposes of applying Section 27(a) an issue of federal or state law? May a state affect the preemptive scope of Section 27(a) by enacting a statute that defines the actual or *de facto* lender?

Answer: Federal law applicable to insured state banks, as well as state law governing other bank-agent relationships, support state authority to investigate whether a non-bank is acting in violation of state law, which is the purpose, intent and effect of the "actual lender" inquiry in the Georgia Act. Such inquiry does not affect the preemptive scope of Section 27, as Section 27(a) can only be triggered when the loan is made by the bank itself; Section 27(a) does not cover loans made by non-banks, nor does it reach the bank's use of agents.

A. BOTH FEDERAL AND STATE AGENCIES REGULATE FEDERALLY-INSURED STATE BANKS.

Significantly, Congress explicitly included in Section 24 of the FDIA a subsection that states "[t]his section shall *not* be construed as limiting the authority of any appropriate Federal banking agency or any *State supervisory authority* to impose *more stringent restrictions*."[20] That is, Congress explicitly provided for multiple regulators of the activities of insured state-chartered institutions. This fact is also highlighted in the FDIC's own regulations implementing the provisions of Section 24 of the FDIA:

> The FDIC intends to allow insured state banks and their subsidiaries to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and *other applicable law*. This subpart does not authorize any insured state bank to make investments or to conduct activities that are not authorized *or that are prohibited by either state or federal law*.

12 C.F.R. § 362.1(d) (emphasis added). Both Section 24 of the FDIA itself and the regulations implementing that section clearly state that Section 24 does not preempt state laws or regulations.

Congress' intent for insured state banks to remain subject to state laws, except as specifically provided to the contrary, is apparent from other provisions of

[20] 12 U.S.C. § 1831a(i) (emphasis added).

the FDIA. For example, the FDIA gives states *concurrent* visitorial powers over insured state banks, expressly reserving certain aspects of the banking business to state regulation.[21] The FDIA defines the "State Bank Supervisor" as any party having "primary regulatory authority" over state banks.[22] The Act further provides for a state bank supervisor or a state law enforcement officer to exercise enforcement powers regarding "fair lending, consumer protection, and permissible activities."[23] In contrast, federal banking law provides a basis for the OCC's assertion of exclusive enforcement and supervisory powers over national banks.[24]

Section 24 of the FDIA is not equivalent to Section 24(Seventh) of the NBA and does not purport to give state-chartered depository institutions the benefit of preemption of state laws with respect to permitted activities. Congress has made clear when it intends for the FDIA to preempt conflicting state law, for example with respect to exportation of interest rates. The issue of state-chartered depository institutions using agents in connection with their lending activities is simply not an area where Congress has authorized the preemption of state law.

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[21] *See* 12 U.S.C. § 1820(h)(1)(A).
[22] 12 U.S.C. § 1813(r).
[23] 12 U.S.C. § 1820(h)(2).
[24] *See* 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by federal law…"); Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub.L.103-328, 108 Stat. 2338 (1994).

Furthermore, the FDIC has not issued any regulations or published any opinions in the Federal Register that adopt the Plaintiffs' expansive view that agents of insured state banks are entitled to the benefit of preemption of state laws that conflict with the FDIA. In the Guidelines for Payday Lending issued by the FDIC (the "Guidelines"), attached as an exhibit to Plaintiffs' Verified Complaint, the FDIC describes payday loans as "a form of specialized lending not typically found in state nonmember institutions, and … most frequently originated by specialized *nonbank firms subject to state regulation.*"[25]

Contrary to Plaintiff BankWest's assertion, the Guidelines do not support the contention that the FDIC has ruled that non-bank entities involved in payday lending are exempt from state interest rate limitations. Furthermore, while the FDIC General Counsel has issued two agency opinions confirming that Section 27 confers most favored lender status upon insured state banks, neither opiniondiscusses whether Section 27 also extends to non-banks that enter arrangements with insured state banks. [26]

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[25] Guidelines for Payday Lending (July 2003) at 2, *available at* http://www.fdic.gov/regulations/safety/payday/index.html (emphasis added).

[26] Interest Charges under Section 27 of the Federal Deposit Insurance Act, Gen. Counsel's Opinion No. 10, 63 Fed. Reg. 19,258 (Apr. 17, 1998) (defining charges included in "interest" under Section 27); Interest Charges by Interstate State Banks, Gen. Counsel's Opinion No. 11, 63 Fed. Reg. 27,282 (May 18, 1998) (discussing impact of Riegle-Neal Act and Riegle Neal Amendments Act on Section 27 interest rate exportation).

B. THERE IS NO DISPUTE THAT A STATE MAY DEFINE AND ENFORCE ACCEPTABLE LENDING AND BROKERING PRACTICES FOR IN-STATE, NON-BANK ENTITIES.

1. The Georgia Act prohibits in-state payday lenders from evading Georgia's usury laws by employing fraudulent schemes or contrivances.

The Georgia Act does not purport to regulate out-of-state banks, nor does it grant the state of Georgia the authority to meddle in their activities. It does, however, give the state the authority to investigate and regulate in-state, non-bank lenders who may attempt to evade the laws of Georgia by hiding under the auspices of out-of-state banks. The power of a state to investigate illegal schemes and subterfuges employed by local entities that wish to avoid application of state law has long been recognized. In 1872, Judge Montgomery noted that there were a "thousand and one devices that the ingenuity of man has resorted to for the purpose of evading the usury laws," and in so recognizing, the Supreme Court of Georgia went on to look beneath the mantle of the transaction to find "the real truth."[27]

In order to fully comprehend the legislative purpose behind the adoption of the Georgia Act, it is necessary to review the vast panoply of schemes and devices which payday lenders have historically employed in an effort to evade Georgia's

[27] *Lay v. Seago*, 47 Ga. 82, 1872 WL 2798 at *5 (1872).

usury laws. In light of this history, it is apparent that payday lenders' recent attempts to affiliate with federally-insured, state chartered banks are merely the most recent device, subterfuge, or pretense in this long history of attempted evasions.

a. Payday lenders have a long history of engaging in deception in an effort to circumvent the application of Georgia's usury laws.

The practice of making small loans at triple-digit annual interest rates, required to be repaid at a borrower's next payday, is not a new phenomenon. "Payday lending" began in the late 1800's and, by the turn of the century it was wreaking "social havoc."[28] By 1904, the Atlanta Chamber of Commerce and the *Atlanta Constitution* were demanding investigation and legislative reform to control the small loan business.[29]

In 1904, 1908, and 1920, the Georgia legislature took steps to curb the predatory activities of these small lenders by subjecting them to licensure and regulation of interest rates.[30] Unwilling to abide by these new usury laws, payday lenders cast themselves as "wage buyers" or "salary buyers," alleging they were

[28] Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historic Context of the Truth in Lending Act*, 55 Fla. L. Rev. 807, 850-55 (2003).
[29] William Hays Simpson, America's Small Loan Problem: with Special Reference to the South, 21 (1963).
[30] *Id*. at 21, *citing* GA. CODE ANN. § 57-9901 (1933), *Ga. Laws*, 1908, p. 83; GA. CODE ANN. § 25-301 (1933), *Ga. Laws*, 1920, p. 215.

not engaged in the business of making loans, but rather that their business was "buying and selling real and personal property, including… wages."[31] Thus, they alleged their loans were not loans, but were really purchase agreements whereby a customer would "sell" his rights to his future wages at a discount.

When the Georgia Supreme Court declared these salary buying transactions to be little more than clever devices designed to evade Georgia's laws and authorized the award of civil and criminal penalties against such lenders, these lenders once again employed subterfuge in an effort to sidestep the law. The former salary buyers altered their business model, engaging in an "insurance scheme," whereby borrowers were required to purchase excessive, overpriced, and sometimes worthless life, accident, and health insurance with their payday loan.[32]

By means of this fictitious contrivance, payday lenders alleged that they were merely acting as the *agents* of insurance companies.[33] However, upon investigation, the State of Georgia discovered that these so-called "agents" had merely disguised the majority of the borrower's interest payments within inflated

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[31] *Parsons v. Fox*, 179 Ga. 605, 176 S.E. 642 (Ga. 1934). *See also* Simpson, *Supra* note 29 at 21. This metamorphosis occurred in North Carolina at the same time to evade similar regulations. *See* Peterson, *Supra* note 28 at 852; *From Checks to Cash: the Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339 (2001) at n. 3.
[32] *See* Simpson, *Supra* note 29 at 23-24 .
[33] *See, e.g.*, *Peebles v. State*, 87 Ga. App. 649, 75 S.E.2d 35 (1953); *Tribble v. State*, 89 Ga. App. 593, 80 S.E.2d 711 (1954).

insurance premiums, of which the payday lender retained seventy-five to eighty-five percent (75-85%) as an agent's "commission," and kicked back the remaining fifteen to twenty-five percent (15-25%) to an affiliated insurance company.[34] Moreover, the State concluded that the insurance company itself, like the out-of-state banks in modern payday loan transactions, bore little-to-no risk of loss in these transactions.[35]Once again, the courts of the State of Georgia looked beneath the form of these transactions and concluded that the alleged agency relationship between the payday lenders and the affiliated insurers was nothing more than a "contrivance" or "device" to evade the laws of the State.[36]

In 2001, the national trade association for the payday lending industry, the Community Financial Services Association of America ("CFSA") encouraged payday lenders to engage in a new subterfuge to evade state prohibitions or restrictions on payday lending: partnering with national banks.[37] Under the theory that NBA Section 85 preempts state laws and regulations, and that national banks

[34] *Tribble*, 89 Ga. App. at 594 (involving lenders structuring loans so to appear to be charging $0.75 interest and $17.04 for the alleged insurance premium, or $1.00 interest and $21.23 for the alleged insurance premium). It is notable that, in the recent North Carolina Commissioner of Banks investigation of Advance America's alleged agency relationships with out-of-state banks, Advance America was found to receive roughly the same percentage for acting as an "agent" under this new model. *See* In re Advance America, available at http://www.nccob.org/NR/rdonlyres/AF33D27C-2D74-40D5-88BE-E701B031DDB4/0/43_AANCFINALORDER122205.pdf, pages 12, 15, and 20.
[35] *See Peebles*, 87 Ga.App. at 653-54.
[36] *See Peebles*, 87 Ga. App. at 655; *Tribble*, 89 Ga.App. at 597.
[37] Community Financial Services Association of America, *Agent-Assisted Bank Loan Progams: A Legal Analysis of Federal Banking Laws Affecting Relationships Between Financial Institutions and the Payday Advance Industry*, xi (2002).

may use the services of agents and other third parties in connection with a bank's lending business, payday lenders attempted to affiliate with these national banks in the hopes that their activities would also be protected by preemption. This avenue is no longer available. As of 2003, the OCC had made known its disfavor of these arrangements and national banks no longer partner with payday lenders.[38]

Now in 2006, Advance America and the other non-bank plaintiffs claim that their lending activities are exempt from the purview of state lending laws because they act as agents for FDIC insured, state-chartered banks. However, as was discussed above, no federal banking law confers any authority whatsoever on these third-party non-bank agents to engage in this type of rent-a-bank model with an out-of-state, federally insured bank. Even CFSA admits as such in its own legal analyses. CFSA notes that "CFSA is aware of no legal precedent providing a State Bank similar authority [to that possessed by national banks to export interest rates

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[38] With respect to federal preemption, Comptroller Hawke stated that:

> [t]he benefit that national banks enjoy by reason of this important constitutional doctrine cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a national bank. . . . We have recently seen several instances in which nonbank lenders who would otherwise have been fully subject to various state regulatory laws have sought to rent out the preemption privileges of a national bank to evade such laws. Indeed, the payday lending industry has expressly promoted such a "national bank strategy" as a way of evading state and local laws. Typically, these arrangements are originated by the payday lender, which attempts to clothe itself with the status of an "agent" of the national bank. Yet the predominant economic interest in the typical arrangement belongs to the payday lender, not the bank.

See, e.g., Press Release, Office of the Comptroller of the Currency, Remarks by John D. Hawke, Jr., Comptroller of the Currency, before the Women in Housing and Finance 10 (Feb. 12, 2002) (emphasis added).

through an agent].[39] Moreover, on the issue of incidental powers (such as the use of agents), CFSA notes that this incidental powers doctrine is "codified <u>*only*</u> in the NBA."[40] This new rent-a-bank business model represents nothing more than payday lenders' most recent effort to avoid Georgia's usury laws.

Consistent with Georgia law, the Georgia Act requires courts to look beyond the mere form of a transaction in order to analyze the underlying substance. Beneath the surface of this latest scheme, it becomes apparent that the payday lenders are the true lender, that the alleged agency relationships with out-of-state banks are a ruse, as was discussed above, any claims to federal preemption are frivolous at best.

b. The Georgia Act is consistent with state law precedent requiring courts to look beneath contrivances designed to disguise a potentially usurious loan made to a Georgia borrower.

Even before the adoption of the Georgia Act, Georgia courts held that the laws governing charges imposed on borrowers require an analysis of the *substance* of a transaction rather than its *form* to prevent evasions of Georgia's laws. The notion that the law will look to the substance of loan transactions rather than the manner in which the paperwork reads is in fact fundamental in Georgia law. As

[39] Community Financial Services Association of America, *supra* note 37 at xi.
[40] *Id.*

the Supreme Court of Georgia stated more than a century ago in the case of Pope v. Marshall:

> No disguise of language can avail for covering up usury, or glossing over a usurious contract. The theory that a contract will be usurious or not, according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance. [41]

Given this mandate to make a penetrating inquiry into the substance of potentially fraudulent schemes, the Court of the State of Georgia looked beneath the "thousand and one devices" alluded to by Judge Montgomery to examine sham sale/leaseback transactions, wage buying schemes, and the fraudulent insurance agency relationships described above.[42] Only by such a deep and penetrating inquiry has the State of Georgia been able to protect its most vulnerable citizens. the Georgia Act merely codifies long-held Georgia authority to continue to look beneath the mere form of a transaction.

c. Georgia has a right to inspect Georgia corporations who might be attempting to evade Georgia lending law through a device, contrivance, or subterfuge.

[41] *Pope v. Marshall*, 78 Ga. 635, 4 S.E. 116, 118 (Ga. 1887).

[42] *See Parsons v. Fox*, 179 Ga. 605, 176 S.E. 642 (Ga. 1934) ("the substance of a transaction will be critically analyzed and inspected for the name by which the transaction is denominated is altogether immaterial"); *Rogers v. Blestein*, 124 Ga. 501, 52 S.E. 617 (Ga. 1905) ("[a] transaction, being on its face apparently lawful, might, nevertheless, be shown to be a device for concealing usury"); *Bank of Lumpkin v. Farmers' State Bank*, 161 Ga. 801, 132 S.E. 221 (Ga. 1926)("this court, *in obedience to the law*… has strongly denounced any artifice by which a lender, taking advantage of the distress and necessities of a borrower, has sought to evade or violate the provisions of Georgia law")(emphasis added).

Section 16-17-2(a)(3) specifically exempts out-of-state banks from the law's purview. However, the State maintains that it may inspect third-party corporations existing within and operating under the laws of the State of Georgia. What the Plaintiffs demand is that this Court overturn longstanding law and deprive Georgia of its rights to make such an inquiry.

The rule of law Plaintiffs put forward would allow any Mafioso or loan shark to stand on a street corner in Atlanta and evade state inquiry by merely *alleging* that his loans are made by an out-of-state bank. Because of the long history of fraudulent evasions perpetrated by fringe lenders, including payday lenders, states must be allowed to retain their abilities to inquire and investigate the true nature of in-state lending activities. Georgia should not be forced to accept as gospel-truth the mere allegation by a lender that the loans which pass through his hands are originated by an exempt entity. Georgia should be permitted to look into the "paper bag." If an exempt entity is inside the bag, Georgia has acknowledged within the text of the statute in question that it may not regulate this entity. But if the paper bag is merely a disguise used by non-exempt agents to evade Georgia law, Georgia should not be shackled to accept this disguise at face value. To hold otherwise would render meaningless the lending laws of the State of Georgia.

2. It is long-standing practice for states to regulate specific lending practices, and to differentiate between federally regulated bank lenders and non-lending agents.

Far from being a radical departure from the law, the Georgia Act typifies 11th Circuit states' regulation of third parties working in concert with insured state banks. Georgia, Florida, and Alabama each distinguish between the mortgage broker – an agent who facilitates loans for banks, including out-of-state banks – and the mortgage lender – a person who makes, originates, or purchases mortgage loans.[43] Alabama grants its Superintendent of Banks "the power to examine … every [in-state agent of a] foreign bank for the purpose of ascertaining whether it has violated any law of the state and for such other purposes and to such other matters as the superintendent may prescribe."[44]

As with the Georgia Act, these states overcome preemption issues by expressly exempting banks subject to the FDIA, the NBA, and other financial institutions subject to substantial federal oversight.[45] It is noteworthy that these routinely accepted laws covering mortgage brokers do not exempt agents working

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[43] GA. CODE ANN. § 7-1-1000 *et seq.*; FL. STAT. ANN. § 494.001 *et seq.*, ALA. CODE § 5-25-1 *et seq.*

[44] ALA. CODE § 5-3A-5.

[45] *See, e.g.* GA. CODE ANN., § 7-1-1001 (*exempting* "[a]ny lender authorized to engage in business as a bank, credit card bank, savings institution, building and loan association, or credit union under the laws of the United States, any state or territory of the United States, or the District of Columbia, the deposits of which are federally insured ….."); *see also* ALA. CODE § 5-25-3; FL. STAT. ANN. §§ 494.003 & 494.006.

with out-of-state banks. To the contrary, just like the Georgia Act, the regulations are directly aimed at such agents. There is no question that a state such as Georgia that differentiates between mortgage brokers and mortgage lenders can: (1) investigate agents claiming to be brokers if the state believes that they are in fact exceeding their authority and acting as the lenders; and (2) sanction those agents who are operating in violation of state law. The Georgia Act simply grants the State of Georgia the same authority to investigate a bank's agents in the payday lending context.

Beyond the mortgage context, Georgia regulates who may own, organize, and control in-state credit card banks, and makes these requirements applicable to "any domestic lender, foreign lender, or holding company."[46] Similarly, the State regulates car loans, including placing limits on finance charges that non-bank lenders may collect, without distinguishing whether the person facilitating the loan is working in conjunction with an insured state bank.[47] In another banking context, Georgia has gone even further by reserving the right to issue cease and desist orders to wholly owned subsidiaries of out-of-state banks that fail to comply with

[46] GA. CODE ANN., § 7-5-3.
[47] GA. CODE ANN., § 10-1-33.

notification and registration requirements.[48] Despite the sky-is-falling assertions by Plaintiffs and some *amici*, the Georgia Act is consistent with these laws have gone unchallenged for decades and are an integral part of the modern dual banking system. It would be unreasonable to hold the Georgia Act to a different standard.

[48] GA. CODE ANN. § 7-1-1001(2).

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's denial of Plaintiffs' motions to enjoin the enforcement of the Georgia Act.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing brief, which was prepared using a proportional font, is less than 8,050 words (including headings, footnotes, and quotations) as reported by the word-processing software used to prepare the brief.

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