

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WENDY BETTS AND DONNA REUTER,)
)
 Petitioners)
)
 vs.) Case No. 01-1445RX
)
 DEPARTMENT OF BANKING AND)
 FINANCE,)
)
 Respondent,)
)
 And)
)
 ADVANCE AMERICA, CASH ADVANCE)
 CENTERS OF FLORIDA, INC.,)
)
 Intervenor.)
 _____)

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on May 29 and 30, 2001, in Tallahassee, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Rule 3C-560.803, Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On April 13, 2001, Petitioners, Wendy Betts and Donna Reuter, filed a Petition against the Department of Banking and Finance (Department). The Petition stated that Petitioners wanted an administrative determination that Rule 3C-560.803, Florida Administrative Code, is "illegal" as an invalid exercise of delegated legislative authority. The Petition also stated that if the Rule were found to be valid, Petitioners sought to have the Department's interpretation and implementation of Rule 3C-560.803, Florida Administrative Code, and Chapter 560, Florida Statutes, "permitting payday loans" declared invalid.

The Department forwarded the Petition to the Division of Administrative Hearings on or about April 16, 2001, for assignment of an Administrative Law Judge to conduct the final hearing.

On May 15, 2001, the Department filed a Request for Official Recognition of the following: Chapter 560, Florida Statutes; Section 655.86, Florida Statutes; Final Order issued in Department of Banking and Finance v. Title Loan, Inc., d/b/a Cash Cow, et. al., DBF Administrative Proceeding No. 3616a-B-1/97 (February 24, 1999); and Florida Attorney General Opinion 2000-26. On May 25, 2001, the Department filed a Second Request for Official Recognition in which it sought to have official recognition taken of Rule 1S-1.004, Florida Administrative Code. On May 22, 2001, Intervenor filed a Request for Official Recognition of proposed amendments to Rules 3C-560.704, 3C-560.704, 3C-560.803, and 3C-560.804, Florida Administrative Code, that were published in the February 16, 2001, issue of the Florida Administrative Weekly. At the final hearing, Petitioners filed a Request for Official Recognition in which they sought to have recognized officially certain documents attached to the deposition of Robert Fox. The Department's and Intervenor's requests for official recognition were granted as a matter preliminary to the hearing. Prior to a ruling on Petitioners' Request for Official Recognition, it was withdrawn.

The parties entered into a Prehearing Stipulation in which they agreed to facts that required no proof at hearing.

At the hearing, Petitioners submitted the deposition testimony of Wendy Betts, Donna Reuter, and Robert Alan Fox. These depositions were admitted as Petitioners' Exhibits 1, 2, and 3, respectively. The Department presented the testimony of Ray B. Kinsey, Jr., an expert in the area of banking and check clearing, and Robert Alan Fox, an assistant general counsel for the Department. The Department had seven exhibits admitted into evidence. The Intervenor presented the testimony of William Douglas Johnson, formerly an assistant director with the Department, and had two exhibits admitted into evidence. At the request of the Department, the record was left open for 30 days from the date of the hearing to allow the Department to depose Jeffrey David Jones, who was unavailable on the day of the formal hearing.

At the conclusion of the evidentiary portion of the hearing, Intervenor objected to documents included as exhibits in the deposition of Robert Fox. Specifically, Intervenor objected to the following: Exhibit A, partial minutes and transcripts of meetings of the Money Transmitters Task Force, which were held prior to the enactment of Chapter 560, Florida Statutes; Exhibit E, a series of handwritten charts and computer compilations; and Exhibit F, the affidavit of Harry Hooper. The

Department adopted the foregoing objections. Upon consideration, the foregoing objections are sustained and the documents referred to therein are rejected and accordingly, have not been considered in preparation of this Final Order.

At the conclusion of the hearing, the parties agreed to file proposed final orders within 30 days of either the filing of the transcript or the filing of the deposition of Jeffrey David Jones, whichever was later. The two-volume Transcript was filed on June 13, 2001, and the deposition of Mr. Jones was filed on June 28, 2001. The Department and Intervenor filed Proposed Final Orders, and the Petitioners filed Amended Proposed Findings of Fact on July 30, 2001. The Proposed Final Orders and the Amended Findings of Fact have been duly considered in rendering this Final Order.

FINDINGS OF FACT

1. Respondent, the Department of Banking and Finance (Department), is the state agency charged with the implementation of the Money Transmitters' Code (Code), Chapter 560, Florida Statutes, and with regulation of the entities registered thereunder.

2. Intervenor, Advance America, Cash Advance Centers of the State of Florida, Inc. (Advance America), is a check casher doing business in Florida, registered under Part III of the Money Transmitters' Code and regulated by the Department.

3. Petitioner, Wendy Betts, is a resident of the State of Florida who, from July 1996 through March 1999, engaged in check-cashing transactions with a number of registered check cashers, including Advance America.

4. Petitioner, Donna T. Reuter, is a resident of the State of Florida who, from 1996 or 1997 until September 2000, engaged in check-cashing transactions with a number of registered check cashers, including Advance America.

5. Petitioners engaged in check-cashing transactions because they needed cash. At the time Petitioners engaged in the check-cashing transactions, they had no other source available to meet their need for cash.

6. During the three years that Petitioner Reuter engaged in the check-cashing transactions described in paragraph 4, the procedures used by each of the check-cashing businesses was the same or very similar. Petitioner Reuter would write a check to the check-cashing business for the amount of cash that she wanted, plus the fee the business charged for cashing the check. The check-cashing business would, in turn, agree to hold the check until the end of Petitioner Reuter's payday, or for 10 to 14 days. At the agreed-upon time, the check-cashing business would deposit the check written by Petitioner Reuter unless she came back to the business to redeem the check. Petitioner Reuter could redeem the check by giving the check casher

currency in the amount of the check. Upon receiving the currency, the check-cashing company would give Petitioner Reuter the check that she had previously written to the company.

7. In many instances, when Petitioner Reuter went to the check-cashing business and redeemed her check, after redeeming the previously written check, she would write another check to the check-cashing company. That check would be written for the amount of cash Petitioner Reuter wanted, plus the amount of fees the company charged for cashing the check. Again, the understanding between Petitioner Reuter and the check-cashing company was that the company would deposit the check in approximately two weeks, or at the end of her next payday, unless she came in to redeem it. Petitioner Reuter refers to this consecutive transaction as a "rollover."

8. During the period between 1996 or 1997 and 1999, Petitioner Reuter engaged in numerous check-cashing and rollover transactions with approximately seven check-cashing companies. These transactions became problematic for Petitioner Reuter because of the number, frequency, and on-going nature of the transactions. Petitioner Reuter often had checks being held for her at several check-cashing companies at the same time. Eventually, it became evident to Petitioner Reuter that the total amount of the checks that were being held for her by the

various check-cashing companies exceeded the amount of funds she had in her checking account or otherwise available to her.

9. Petitioner Reuter was afraid that she could be criminally prosecuted if, on the agreed-upon date, she could not redeem the checks she had written to the check-cashing companies or did not have the funds in her checking account to cover the checks when the check-cashing companies deposited them.

10. Petitioner Betts engaged in check-cashing transactions with about nine check-cashing companies. At one point, Petitioner Betts was doing business with three check-cashing businesses during the same period of time. As part of these transactions, Petitioner Betts wrote a check to each check-cashing company for the amount of cash she wanted to receive, plus the amount of the company's fee. In turn, the company gave Petitioner Betts currency for the amount of the check, exclusive of the fees it charged for cashing the check. The check-cashing company agreed to hold the check for about two weeks or until Petitioner Betts' next payday, or allow her to come in and redeem the check.

11. If Petitioner Betts could not redeem the check or did not have the funds in her checking account to cover the check, at least one company agreed to extend the time for which it would hold the check. Such an extension was subject to Petitioner Betts' paying the check-cashing company a fee over

and above what she had paid for the initial check-cashing transaction.

12. In the typical transaction, Petitioner Betts would redeem the check at the time specified in the initial agreement but would then, in a consecutive transaction, write another check for the amount of cash she wanted to receive, plus the fee charged by the check-cashing company for cashing the check. The check-cashing company would cash the check for Petitioner Betts and give her the amount of money written on the check, minus the amount of the check-cashing fee.

13. Petitioner Betts believed that she would be criminally prosecuted and/or lose her driver's license if she did not redeem her checks on the agreed-upon date or did not have funds in her checking account to cover the checks when they were deposited by the check-cashing companies.

14. As a result of Petitioner Betts' continuing, repeated, and simultaneous check-cashing transactions with numerous check-cashing businesses and her financial situation, she was unable to redeem the checks she had written to the check-cashing companies. Moreover, on the dates that the check-cashing companies were to deposit Petitioner Betts' checks, she typically did not have sufficient funds in her checking account to cover the checks she had written to the companies.

15. A "check cashing" occurs when the check casher receives the customer's personal check and gives currency to the customer. The customer's check covers the amount of currency provided as well as a fee for the service.

16. "Deferred deposit," also sometimes referred to as "payday lending" occurs subsequent to the check-cashing transaction when a check casher agrees to hold the customer's check for a certain agreed period of time.

17. Petitioners are not currently engaged in check-cashing transactions and do not reasonably anticipate engaging in check-cashing transactions in the future.

18. At the time that Petitioners engaged in check-cashing transactions, for some transactions they wrote checks dated with the date of the check-cashing transaction and for some transactions, Petitioners wrote checks dated with later dates.

19. At the time that Petitioners engaged in check-cashing transactions, Petitioners' writing of the checks for a date later than the date of the transaction neither encouraged nor discouraged Petitioners' entering into the check-cashing transactions.

20. Petitioners did not know of the existence of the postdated check rule, Rule 3C-560.803, Florida Administrative Code, at the time they engaged in the aforementioned check cashing transactions.

21. In the Joint Prehearing Statement, Petitioners provided the following statement of their position in this proceeding. "The Petitioners contend that Rule 3C-560.803, Florida Administrative Code, is invalid under the standards set forth in Southwest Florida Water Management District v. Save the Manatee, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000), but if held to be valid the Rule merely allows a registered check casher to accept a postdated check and does not permit a deferred presentment transaction, also called a "payday loan."

22. The Department has no rule, order, or declaratory statement authorizing deferred deposit transactions or repeated, consecutive deferred deposit transactions by a registered check casher.

23. In 1994, the Legislature enacted Chapter 560, Florida Statutes, the Money Transmitters' Code. After the enactment, the Department received a written inquiry from Larry Lang, president of the Florida Check Cashers Association, Inc., concerning whether check cashers were permitted to defer, for an agreed-upon period, the deposit of checks they had cashed. This type of transaction was referred to as a "deferred deposit" transaction.

24. Mr. Lang's letter, which was received by the Department on or about February 23, 1995, stated in relevant part:

It is the position of the FCCA [Florida Check Cashers Association] 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 allowable for the specific type of check cashed. This service shall be referred to as "Deferred Deposit."

25. In response to Mr. Lang's letter and other inquiries regarding the Department's position on what was allowable under Chapter 560, Florida Statutes, the Department examined the relevant statutes. An assistant general counsel with the Department, Jeffrey D. Jones, determined that nothing in the governing statutory provisions prohibited deferred deposit transactions, so long as the check casher did not charge a fee in excess of the amount prescribed by statute.

26. Assistant General Counsel Jeffrey D. Jones summarized his analysis and conclusion in a February 24, 1995, letter to Mr. Lang which stated in part:

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.

27. Although the term "postdated check" was not used in either Mr. Lang's letter to the Department or in Mr. Jones' response thereto, the "deferred deposit" transaction described in both letters contemplated and encompassed the use of a postdated check. Moreover, the Department understood that deferred presentment or deferred deposit transactions could involve postdated checks as well as other negotiable instruments.

28. William Douglas Johnson was the assistant director of the Department from 1994 through 1999. As assistant director, Mr. Johnson had supervisory responsibility over the Department's regulation of money transmitters. Moreover, with regard to the Money Transmitters' Code, Mr. Johnson participated in policy-making decisions, interpreted state statutes and administrative rules, and was involved in the promulgation of administrative rules.

29. After reviewing Assistant General Counsel Jones' February 24, 1995, letter, Mr. Johnson believed that the legal opinion expressed in that letter needed to be adopted as a rule. Mr. Johnson believed a rule would provide clarification both to the check cashing industry and consumers as to whether "deferred deposit" or "deferred presentment" transactions were allowed under the provisions of Chapter 560, Florida Statutes.

30. Another factor considered by the Department when it was contemplating adopting a postdated check rule was that the check casher would be prevented from filing criminal charges or even threatening criminal charges against a customer whose postdated check was returned for insufficient funds. The Department's position was based on its knowledge that controlling judicial interpretations of Florida's criminal statutes imposing penalties for passing bad checks prevented criminal prosecution of a person who tendered a postdated check that was later returned for insufficient funds.

31. Prior to the Department's making a final decision on whether to promulgate a postdated check rule, in February 1997, Mr. Johnson asked Robert Alan Fox, an assistant general counsel employed by the Department, for a legal opinion on the status of postdated checks under Florida law. Mr. Fox's opinion concluded that postdated checks were extensions of credit. With regard to postdated checks, it was Mr. Fox's opinion that a rule allowing check cashers to accept a postdated check was not necessary because Chapter 560, Florida Statutes, already authorized check cashers to do so.

32. Notwithstanding Mr. Fox's opinion that no postdated check rule was required, both assistant general counsels, Mr. Fox and Mr. Jones, agreed that nothing in Chapter 560, Florida Statutes, required the check casher to deposit the

customer's check or prohibited the check casher from holding the customer's check.

33. The Department has consistently followed the legal opinion expressed in the February 24, 1995, letter, discussed above in paragraph 26, 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.

34. Subsection 560.105(3), Florida Statutes, authorizes the Department to adopt rules pursuant to Subsection 120.536(1), Florida Statutes, and Section 120.54, Florida Statutes, to implement the provisions of Chapter 560, Florida Statutes.

35. Consistent with the provisions of Section 120.54, Florida Statutes, the Department filed Rule 3C-560.803, Florida Administrative Code, for adoption with the Department of State.

36. 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.

37. At the time the rule was promulgated, the specific authority cited for the rule was Section 560.105(3), Florida

Statutes, and the law implemented cited for the rule was Section 655.86, Florida Statutes.

38. Section 655.86, Florida Statutes, addresses the issuance of postdated checks and imposes on the person drawing a postdated check, the duty to notify, in writing, the separate office or branch of the financial institution upon which the postdated check is drawn. According to that provision, if the drawer of the check fails to provide the statutorily prescribed notice, the financial institution is absolved from liability if it cashes the postdated check before the date the drawer of the check specified. By implication, Section 655.86, Florida Statutes, recognizes that a postdated check is a type of negotiable instrument under Florida law.

39. At some point after the Petition was filed and prior to the hearing, the Department decided to correct and/or modify the law implemented section of Rule 3C-560.803, Florida Administrative Code, by adding the appropriate statutory cites.

40. By letter dated May 24, 2001, the Department, through its General Counsel, requested that the Department of State, Bureau of Administrative Code, add citations to Subsections 560.103(3) and (14) and 560.302(1), Florida Statutes, to the law implemented section of Rule 3C-560.803. Section 120.74, Florida Statutes, both requires and permits agencies to correct technical defects in adopted rules.

41. Petitioners have not claimed any injury or harm by the aforementioned technical modification to the rule.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. Section 120.56, Florida Statutes.

43. Subsection 120.56 (3)(a), Florida Statutes, provides in part:

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.

44. In order to be deemed a "substantially affected person" who has standing, the Petitioner challenging a rule under Section 120.56, Florida Statutes, must show: (1) that he or she would suffer a real and sufficiently immediate injury from the challenged rule; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated. Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999).

45. As to the first prong of the "substantially affected" test, Petitioners have suffered a real and sufficiently immediate injury in fact. They have paid fees for the repeated and consecutive check-cashing transactions they have engaged in with check cashers. The manner and frequency with which the

check cashers assessed fees to Petitioners resulted in Petitioners' becoming indebted to the check cashers for excessive amounts that they could not pay.

46. As to the second prong of the "substantially affected" test, the injuries suffered by Petitioners must be within the "zone of interest" to be protected. The court in Lanoue explained the zone of interest element as follows:

[T]he general rule regarding the zone of interest element of the substantially affected test is that such element is met where a party asserts that a statute, or a rule implementing such statute, encroaches upon an interest protected by a statute or the constitution . . . In the context of a rule challenge, the protected zone of interest need not be found in the enabling statute of the challenged rule itself.

Id. at 98, citing Ward v. Board of Trustees of the Internal Improvement Trust Fund, and Department of Environmental Protection, 651 So. 2d 1236, 1238 (Fla. 4th DCA 1995).

47. In the instant case, the injuries suffered by Petitioners are within the protected zone of interest. One purpose of Chapter 560, Florida Statutes, is to provide a regulatory scheme for the operation of money transmitters, including check cashers. See Subsection 560.102 (1), Florida Statutes. However, among the other purposes of the Money Transmitters' Code are to provide for and promote (1) the

protection of the maintenance of public confidence in the money transmitter industry and (2) the protection of the interests of the public in the money transmitter system. See Subsections 560.102 (2) (b) and (c), Florida Statutes.

48. By the express language of Section 560.102 (2) (b) and (c), Florida Statutes, Chapter 560, Florida Statutes, is to protect the maintenance of public confidence in the money transmitter industry and protect the interests of the public in the money transmitter system. The challenged rule, at least as applied, encroaches upon the protected zone of interests of Petitioners.

49. Petitioners have standing pursuant to Subsection 120.56(3) (a), Florida Statutes, to challenge the validity of Rule 3C-560.803, Florida Administrative Code.

50. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Because Chapter 120, Florida Statutes, does not provide otherwise, Petitioners, who are challenging the existing rule, have the ultimate burden to establish that the rule is invalid.

51. An existing rule may be challenged pursuant to Section 120.52, Florida Statutes, only on the ground that it is an "invalid exercise of delegated legislative authority," as defined in Section 120.52(8), Florida Statutes, which provides as follows:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by

the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

52. In the Petition filed in this case, Petitioners challenged the validity of Rule 3C-560.803, Florida Administrative Code, as an invalid exercise of delegated legislative authority. Petitioners contend that there is no specific authority for the Department to promulgate the Rule and that the Department has no explicit power or duty identified in the enabling statute to promulgate the Rule.

53. Petitioners did not specify upon which provisions of Section 120.56(8), Florida Statutes, they were seeking to have the challenged rule declared invalid. Based on the language in the Petition, it is determined that the Petitioners contend that the Rule is an invalid exercise of delegated legislative authority under Subsections 120.56(8) (b) and (c), Florida Statutes.

54. When promulgated, Rule 3C-560.803, Florida Administrative Code, Subsection 560.105(3), Florida Statutes,

was cited as specific authority for the Rule and Section 655.86, Florida Statutes, was cited as the law implemented.

55. Section 655.86, Florida Statutes, provides:

It is the duty of the person drawing a postdated check to notify, in writing, the separate office or branch of the institution upon which such check is drawn, giving a complete description thereof, including the name of the payee, the date, the number, and the amount thereof; otherwise, the institution is not liable for paying such check.

56. Chapter 560, Florida Statutes, provides a statutory scheme for the regulation of the money transmitter industry in the State of Florida. The purposes of Chapter 560, Florida Statutes, also known as the Money Transmitters' Code are described in Section 560.102. That section provides the following:

The purposes of the code are to:

(1) Provide general regulatory powers to be exercised by the Department of Banking and Finance in relation to the regulation of the money transmitter industry. The code applies to all money transmitters transacting business in this state and to the enforcement of all laws relating to the money transmitter industry.

(2) Provide for and promote, subject to the provisions of the code:

(a) The safe and sound conduct of the business of money transmitters who are subject to the code.

(b) The maintenance of public confidence in the money transmitter industry.

(c) The protection of the interests of the public in the money transmitter system.

(d) The deterrence of the use of money transmitters as a vehicle for money laundering.

(e) The opportunity for money transmitters to be and remain competitive with each other and with other business organizations existing under the statutes of this state, and with other money transmitters and organizations organized under the laws of other states, the United States, or foreign countries.

(f) The opportunity for money transmitters to effectively serve the convenience and needs of their customers and the public and to participate in and promote the economic progress and welfare of this state and the United States.

(g) The opportunity for the management of money transmitter businesses to exercise its business judgment within the framework of the code.

(h) Only such rulemaking power and administrative discretion to the department as is necessary, in order that the supervision and regulation of money transmitters may be flexible and readily responsive to changes in economic conditions, in technology, and in money transmitter practices.

57. Section 560.105, Florida Statutes, empowers the Department with supervisory powers and rulemaking authority with regard to the Chapter 560, Florida Statutes, the Money Transmitters' Code. That section provides the following:

Consistent with the purposes of the code the department shall have:

(1) Supervision over all money transmitters and their authorized vendors.

(2) Access to books and records of persons over whom the department exercises supervision as is necessary for the

performance of the duties and functions of the department prescribed by the code.

(3) Power to issue orders and declaratory statements, disseminate information, and otherwise exercise its discretion to effectuate the purposes, policies, and provisions of the code and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of the code. (emphasis supplied.)

58. Subsection 560.105(3), Florida Statutes, expressly delegates to the Department the authority to promulgate rules to implement the provisions of the Money Transmitters' Code. Pursuant to that rulemaking authority, the Department adopted Rule 3C-560-803, Florida Administrative Code.

59. Notwithstanding the Department's rulemaking authority, its reliance on Section 655.86, Florida Statutes, as law implemented for Rule 3C-560.803, Florida Administrative Code, is not well-founded. Section 655.86, Florida Statutes, lends credence to the Department's position that postdated checks may be written and accepted by check cashers. However, that provision deals with financial institutions, not money transmitters. The clear import of Section 655.86, Florida Statutes, is to absolve financial institutions from liability for cashing postdated checks if the maker or drawer of the check had not provided the prescribed statutory notice.

60. Pursuant to Rule 1S-1.004(3), Florida Administrative Code, by letter dated May 24, 2001, the Department requested that the Florida Department of State, Bureau of Administrative Code, add Subsections 560.103(3) and (14) and 560.302(1), Florida Statutes, as the law implemented for Rule 3C-560.803, Florida Administrative Code.

61. Rule 1S-1.004(3), Florida Administrative Code, provides the following:

(3) The specific authority, law implemented and history notes shall be corrected or modified by writing a letter to the Bureau of Administrative Code specifying the change. Such a change does not require notification in the Florida Administrative Weekly.

62. Subsections 560.103(3) and (14) and 560.302(1), Florida Statutes, were enacted and in effect at the time Rule 3C-560.803, Florida Administrative Code, was promulgated. In accordance with Rule 1S-1.004, Florida Administrative Code, those legal citations did not require publication and were not published in the Florida Administrative Weekly.

63. The Department's requested additions to the legal citations of Rule 3C-560.803, Florida Administrative Code, were added to the rule and published in the Florida Administrative Code, June 2001 Supplement.

64. The statutory provisions added to the law implemented section of Rule 3C-560.803 are definitions included in the Money

Transmitters' Code. Subsections 560.103(3) and (14), Florida Statutes, provide:

(3) "Check casher" means a person who, for compensation, sells currency in exchange for payment instruments received, except travelers checks and foreign-drawn payment instruments.

* * *

(14) "Payment instrument" means a check, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable. Payment instrument does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher, or a letter of credit.

65. Subsection 560.302(1), Florida Statutes, provides:

In addition to the definitions provided in s. 560.103, unless otherwise clearly indicated by the context, for purposes of this part:

(1) "Cashing" means providing currency for payment instruments, except for travelers checks and foreign-drawn payment instruments. (emphasis supplied.)

66. 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 subject to the fees established in Section 560.309(4), Florida Statutes. 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 limitations are the fees set forth in Section 560.309(4), Florida Statutes.

67. Pursuant to Sections 560.102, 560.105, and 560.106, Florida Statutes, the Department has been charged by the Legislature to interpret and implement the provisions of the Money Transmitters' Code. By adopting Rule 3C-560.803, Florida Administrative Code, the Department carried out its statutory duties.

68. The inclusion of these additional statutory cites to the law implemented section of the Rule is deemed to be a technical change and, as such, no notification in the Florida Administrative Code is required. See Rule 1S-1.004, Florida Administrative Code.

69. 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 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."

70. A check, regardless of whether it is postdated, falls within the definition of "payment instrument" as defined in Section 560.103(14), Florida Statutes, and thus, the enabling statute authorizes the challenged Rule.

71. 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.

72. The promulgation of Rule 3C-560.803, Florida Administrative Code, falls within the power and duties expressly delegated to the Department. Moreover, the Rule serves to implement the provisions of the Money Transmitters' Code as expressly authorized in Section 560.102, Florida Statutes, by interpreting the language of the Code so as to clarify activities that fall within the regulatory scope of the Code.

73. Rule 3C-560.803, Florida Administrative Code, 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. According to the Rule, check cashers may, but are not

required to cash postdated checks, but have the discretion to do so.

74. Nothing in Chapter 560, Florida Statutes, requires a check casher to deposit a check. Rather, the Money Transmitters' Code addresses the cashing of checks by those regulated by Chapter 560, Florida Statutes. The act of "cashing" the check is complete at the time the check casher pays the maker or drawer of the check in currency. Therefore, Chapter 560, Florida Statutes, does not prohibit a check casher from holding a customer's postdated check for an agreed period of time.

75. The Money Transmitters' Code establishes fees for "cashing" checks and limits such fees to those prescribed in Subsection 560.309(4), Florida Statutes. Rule 3C-560.803, Florida Administrative Code, authorizes, "check cashers" to cash postdated checks but explicitly limits the fees that may be charged for cashing these "payment instruments" to those prescribed in Subsection 560.309(4), Florida Statutes.

76. The Department's adoption of Rule 3C-560.803, Florida Administrative Code, does not exceed the scope of its delegated legislative authority. As the First District explained in Southwest Florida Water Management District v. Save the Manatee Club, Inc., at 599, Section 120.536 was amended in 1999 to narrow the agencies' authority to promulgate rules:

The new law gives the agencies authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself.

77. Rule 3C-560.803, Florida Administrative Code, provides more detail than the statute, but it does not enlarge, modify or contravene the language it seeks to interpret.

78. The challenged rule is similar in purpose and function to that upheld by the First District Court of Appeal in Board of Podiatric Medicine v. Florida Medical Association, 779 So. 2d 658 (Fla. 1st DCA 2001). In that case, the Board of Podiatric Medicine promulgated a proposed rule interpreting the term "human leg" as used in Section 461.003(3), Florida Statutes. The Rule was held by an Administrative Law Judge to be invalid because it expanded the scope of the practice of podiatric medicine. The appellate court overruled that decision:

In light of the broad discretion and deference which is accorded an agency in the interpretation of a statute which it administers, Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987 (Fla. 1985), and because such an interpretation should be upheld when it is within the range of permissible interpretations, Board of Trustees of Internal Improvement Trust Fund

v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995), the judge should not have rejected the board's definition of the term "human leg" as used in Section 461.003(3), and as provided in Rule 64B18-23.001. This definition does not enlarge, modify, or contravene the statute, and is neither arbitrary nor capricious, and is fully supported by competent substantial evidence so as to be a proper exercise of the Board's delegated legislative authority.

Id. at 660.

79. Rule 3C-560.803, Florida Administrative Code, implements the definitional sections of Chapter 560, Florida Statutes. It does not enlarge, modify or contravene the statutory definitions interpreted. Petitioners have adduced no evidence that would support a finding that the Rule represents an unlawful exercise of delegated legislative authority by the Department.

80. In the Petition filed in this case, Petitioners challenged the validity of Rule 3C-560.803, Florida Administrative Code, as an invalid exercise of delegated legislative authority. Petitioners contend there is no specific authority for the Department to promulgate the Rule and that the Department has no explicit power or duty identified in the enabling statute to promulgate the Rule.

81. Contrary to argument of Petitioner, Rule 3C-560.803, Florida Administrative Code, is a valid and proper exercise of the Department's delegated authority. The Rule merely

authorizes check cashers to accept postdated checks subject to the fees established in Section 560.309(4), Florida Statutes. The rule does not establish the fees nor does it authorize "rollover transactions" or "payday loans."

82. Petitioners have made no showing that their substantial interests or the fairness of the proceedings were impaired by the Department's request to the Department of State for a correction to the law implemented citations for Rule 3C-560.803, Florida Administrative Code.

83. Petitioners have not alleged, nor proven that Rule 3C-560.803 is invalid under the provisions of Subsections 120.52(8) (a) and (d) through (g), Florida Statutes.

84. Finally, Petitioners contend that the Department's interpretation and implementation of Rule 3C-560.803, Florida Administrative Code, should be declared "invalid." Petitioners argue that the Department's interpretation and implementation of the Rule permits "payday lending." Petitioner's assertion and argument are without merit.

85. Rule 3C-560.803, Florida Administrative Code, is interpreted by the Department to authorize a check casher to cash postdated checks, subject to the fees established in Section 560.309(4), Florida Statutes. This interpretation is within the range of permissible interpretations and is entitled to deference.

86. Petitioners have failed to show that Rule 3C-560.803, Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed in this cause be DISMISSED.

DONE AND ORDERED this 7th day of September, 2001, in Tallahassee, Leon County, Florida.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.