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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-02859

South Carolina Department of Consumer Affairs ..... Respondent,

v.

Cash Central of South Carolina LLC ..... Petitioner

BRIEF OF AMICI CURIAE SOUTH CAROLINA AUTOMOBILE DEALERS ASSOCIATION AND CAROLINAS INDEPENDENT AUTO DEALERS ASSOCIATION

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INTRODUCTION

The South Carolina Automobile and Truck Dealers Association ("SCADA") is the only statewide entity in South Carolina dedicated to the economic and political interests of manufacturer-franchised new car and truck dealers. Since 1937, SCADA has represented franchised dealers across the state and advocated on behalf of its members in public policy, regulatory issues, and economic developments impacting the automotive industry. SCADA's membership includes 272 dealers, representing $15.23 billion in total sales with 58.2% of all motor vehicle retail sales in this state. These dealerships are major employers (33,294 jobs attributable to SCADA members), taxpayers ($315.85 million paid in state and local taxes), and charitable contributions ($8.7 million donated).

Similarly, the Carolinas Independent Auto Dealers Association ("CIADA") is the only non-profit organization in South Carolina that represents the independent used car dealer. There are nearly 3,000 used car dealers in South Carolina, many of whom are CIADA members. Independent dealers employ approximately 24,000 individuals, and are responsible for approximately one-third of all automobile sales transactions in South Carolina.

Motor vehicle dealers are subject to regulation by the South Carolina Department of Consumer Affairs ("Department") in at least two areas relevant to the issues raised by Petitioner: (1) consumer credit sales, and (2) the charging of closing fees in motor vehicle sale or lease transactions for dealerships that elect to charge such fees. Seemingly emboldened by the decision of the Court of Appeals in this case, the Department has taken a zero-tolerance approach with respect to inadvertent and harmless filing errors, and the absence of any harm to consumers who, after full disclosure of their loan terms and any applicable fees, have knowingly and voluntarily entered into contracts and received the full benefit of their bargain. The Department is not

authorized by the General Assembly to act as a Robin Hood, taking from businesses and giving to consumers.

Requiring perfect compliance with every statutory requirement, even when the primary statutory purpose of disclosure to the consumer has undeniably been achieved, is inconsistent with the common law as set forth in *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 87, 484 S.E.2d 471, 473 (1997) and the legislative intent underlying the South Carolina Consumer Protection Code ("SCCPC or Code"). The Code clearly provides various affirmative defenses to harmless errors and unintentional compliance failures as well as the directive that the statutory requirements of the Code must be interpreted "*having due regard for the interests of legitimate and scrupulous creditors.*" S.C. Code Ann. § 37-1-102(2)(d) (emphasis added).[1] Thus, the Department cannot order the recasting of the contracts of car dealerships and other creditors in these situations. SCADA and CIADA urge the Court to grant the Petition for a Writ of Certiorari and to reverse the opinion of the Court of Appeals in this matter.

ARGUMENTS

I. The 2016 Amendment to the Closing Fee Statute further illustrates the legislative intent to provide defenses under the Code.

In addition to the arguments outlined in the Petition, SCADA and CIADA further direct the Court's attention to the amendment of one section of the Code, S.C. Code Ann. § 37-2-307 (the "Closing Fee Statute"), enacted following this Court's decision in *Freeman v. J.L.H. Invs., LP*, 414 S.C. 362, 778 S.E.2d 902 (2015), which upheld a verdict under the South Carolina Dealers Act stemming from the charging of closing fees. The dealership in *Freeman* attempted to assert defenses under the Code, but this Court found "neither the Good Faith Error Defense nor the Safe

[1] SCADA does not restate the arguments presented in the Petition and incorporates them by reference here. Instead, it seeks to present additional concerns specific to SCADA's membership.

Harbor Defense, codified at sections 37–5–202(7) and 37–6–506(3) respectively, provides [the defendant auto dealership] immunity from liability as these code sections only apply to consumer credit transactions brought under Title 37 of the SCCPC. [Plaintiff] brought this action pursuant to section 56–15–40 of the Dealers Act and not under the SCCPC." *Id.* at 379, 778 S.E.2d at 911.

The legislature subsequently amended the Closing Fee Statute in 2016 in several respects, including "to provide that a dealer who complies with certain statutory requirements may lawfully charge a closing fee, **to allow a motor vehicle dealer to assert any defenses provided to a creditor pursuant to title 37**, . . . **and to express the intent of the General Assembly**." Act No. 231 at Title, 2016 S.C. Acts 1558 (emphasis added). The Closing Fee Statute now provides:

> (D) Whether the vehicle transaction is a credit sale, consumer lease, or cash transaction:
>
> . . .
>
> (2) **a motor vehicle dealer may assert any defenses provided to a creditor pursuant to the provisions of this title**; . . .

S.C. Code Ann. § 37-2-307(D) (emphasis added).

In enacting this provision, the General Assembly sought to strike a balance between the need for full and fair disclosure to consumers and the contractual rights and obligations of the parties. There is no question but that both goals can be met even in the absence of strict, technical compliance with statutory filing requirements, and there is no doubt that the legislative intent is to provide affirmative defenses for dealerships that may not have strictly complied with all requirements of the Closing Fee Statute, rather than to impose a regime of strict liability. Those defenses include the "Good Faith Error Defense" and the "Safe Harbor Defense," codified at S.C. Code Ann. §§ 37–5–202(7) and 37–6–506(3). This 2016 amendment of the Closing Fee Statute underscores the legislative commitment to providing defenses under the Code generally.

II. The Department is taking a strict liability approach following the decision of the Court of Appeals in this case.

Since the ruling by the Court of Appeals, the Department has taken unreasonable and excessively rigid positions regarding both closing fees and consumer loans, resulting in large potential liability for SCADA and CIADA members, as reflected by several ongoing matters. The Department's positions, as reflected in the letters attached to this brief as Exhibits A and B, are summarized below. There are four (4) statutory requirements for dealerships charging a closing fee: (1) registering the fee and paying a registration fee to the Department during each state fiscal year, (2) including the closing fee in the advertised price of the motor vehicle, (3) disclosing the closing fee on the consumer's sale or lease contract, and (4) displaying a notice that the dealership charges a closing fee in a conspicuous location in the dealership's business premises. S.C. Code Ann. § 37-2-307(A). Unless the proposed closing fee exceeds $225, the Department is not permitted to review the closing fee for reasonableness and approval is automatic. S.C. Code Ann. § 37-2-307(C)(1).

The first example of the Department's unreasonable and excessive positions involves Patriot Chevrolet of Darlington, Inc. ("Patriot"). In March 2019, Patriot purchased the assets of a troubled dealership in Darlington, South Carolina. Patriot continued operations of the prior dealer in the same facilities. In addition, Patriot increased staffing and made investments in the facilities and operations technology. With respect to closing fees, Patriot continued charging the same $489 closing fee charged by the predecessor dealership. The closing fee was clearly and conspicuously disclosed on its customers' sales contracts and posted in its dealership premises.[2] Patriot did not,

[2] There is no allegation or evidence that Patriot failed to include the closing fee in the price of any advertised vehicle. Similar to the disclosure provided by Petitioner to its customers, clear and conspicuous disclosures assure that consumers are able to make informed decisions, whether that be in the context of an automobile purchase or a loan agreement. The Department appears less

however, make a new filing of a closing fee registration with the Department. Patriot became aware of its inadvertent failure to register the closing fee in August 2019, and voluntarily reported its error to the Department.

On August 20, 2019, Patriot filed a closing fee registration with the Department requesting to continue the $489 fee. Three months later, the Department approved a $225 fee as of November 26, 2019.[3] The Department refused to approve any fee in excess of the safe harbor amount of $225 because Patriot had been operating in that location for less than a year, even though Patriot was operating in the same facilities with essentially the same or increased staffing as the predecessor dealership. The Department's requirement of operating in a particular location for a year or more in order to approve a closing fee of more than $225 is completely arbitrary and is not found anywhere in the Closing Fee Statute.

The Department has demanded that Patriot fully refund all closing fees collected from March to November 2019 and has refused to consider any lesser amount. This demand includes the three months between the time Patriot realized its error, self-reported, and made the requisite filing and the time the Department ultimately approved a $225 fee.[4] Citing the opinion in this case, the Department has taken the position that the doctrine of substantial compliance is inapplicable to *any* regulatory filing requirement including the registration requirement in the Closing Fee Statute and that there is no defense for any failure to register with the Department. Exhibit A at p. 19. The Department has taken this position notwithstanding the fact that no car

interested in informing consumers than it does in requiring strict and rigid adherence to statutory requirements that do not affect consumers.

[3] On May 11, 2020, over five months later, the Department finally approved a closing fee of $413.60.

[4] Approval at the $225 level should have been automatic per the terms of the Closing Fee Statute. Instead, the Department sat on the application for three months and is now attempting to penalize the dealership for that delay.

buyer was deceived as to the amount of the closing fee. The Department appears to have the view that it can play "gotcha" and undo bargained for agreements because of inadvertent mistakes in direct contravention of the plain language of the Code and the Closing Fee Statute.

The other examples of unreasonably strict compliance requirements involve Bennettsville Honda and Bennettsville Ford, which are both owned by the same parent corporation. These dealerships filed closing fee registrations and maximum rate schedules with the Department in 2018, 2019, 2021, and 2022. The closing fee registrations in each year were for the statutory safe harbor amount of $225. Both dealerships inadvertently failed to file closing fee registrations and maximum rate schedules in 2020.

In 2020, both dealerships continued to charge the $225 safe harbor closing fee, and with only a few minor exceptions, charged maximum interest rates consistent with those rates previously filed with the Department.[5] Both dealerships continued to post and disclose the previously filed closing fees and maximum rates in accordance with statutory requirements. Nevertheless, the Department is demanding that both dealerships refund all closing fees collected in 2020 and demanding that both dealerships refund interest charges over 18% in the same period. *See generally*, Exhibit B.

The Department's strict compliance approach and refusal to consider applicable common law and statutory defenses adds risk and uncertainty where the General Assembly clearly intended

[5] During the relevant time period, Bennettsville Honda had only four loans with an annual percentage rate that exceeded 18% per annum, and the highest APR among those loans was 21.21%. None of the loans in the relevant time period exceed the maximum rate of 30% filed in 2019. Bennettsville Ford had only five loans with an annual percentage rate that exceeded 18% per annum, and the highest APR among those loans was 28%. In addition, and similar to the facts regarding Cash Central's loans, the interest rate for each of these loans above 18% was clearly and prominently disclosed to the consumers on the financing contracts, which the consumers knowingly and voluntarily signed.

to protect "legitimate and scrupulous creditors" and to allow defenses for inadvertent compliance errors that do not compromise consumer disclosures. As shown in the Department's enforcement activity with respect to SCADA members, the reach of the decision of the Court of Appeals in this case extends far beyond Cash Central.

CONCLUSION

The Department believes the opinion of the Court of Appeals in this matter applies broadly to all requirements under the Code and justifies a "no available defense" approach to statutory compliance, notwithstanding the long history of the doctrine of substantial compliance and the stated defenses in the Code. The Department's view extends to Code provisions not applicable in this case, such as the Closing Fee Statute, without any regard to the purpose of the 2016 amendment to that statute and the express statement that the defenses provided in the Code apply to dealerships charging closing fees. The Department is now emboldened to ignore the clear intent of the legislature, to read applicable and meritorious defenses out of the Code entirely, and to require full refunds for any failure, regardless of the degree or circumstances and lack of any harm to the consumer. For all of these reasons, the Court should grant the Petition and reverse the opinion of the Court of Appeals because it is inconsistent with the Code and established common law. Any other decision works a forfeiture on any business subject to the Code by depriving them of legitimate defenses.

Respectfully submitted,

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