HUDSON COOK 25th ANNIVERSARY

Consumer Bank Partnerships In Jeopardy in Maryland

June 29, 2016 | Catherine M. Brennan

In late June, the Maryland Court of Appeals, Maryland's highest court, affirmed in *Maryland Commissioner of Financial Regulation v. CashCall, Inc.* that a non-bank partner cannot promote loans originated by a bank unless the nonbank partner is licensed as a credit services business and the loans comply with substantive Maryland law. Court of Appeals, No. 80, September Term 2015 (June 23, 2015), affirming Court of Special Appeals, No. 1477, September Term 2013 (October 27, 2015). The decision hampers the ability of nonbank partners to market loans on behalf of a bank in Maryland unless they acquire a credit services business license.

CashCall solicited Maryland consumers for high-interest rate, closed-end loans. The loans were originated by one of two FDIC-insured banks. Within three days of loan closing, the loans were sold by the banks to CashCall, and CashCall serviced the loans. Each loan amount included a loan origination fee. This fee was paid by the bank to CashCall, but CashCall collected all payments from consumers after it purchased the loans. The Maryland Commission of Financial Regulation asserted that CashCall was subject to licensing under the Maryland Credit Services Business Act ("MCSBA"), Md. Com. Law Art. §§ 14-1901 *et seq.* This statute, the Maryland version of a credit services organization act, applies to any person who, among other things, assists a *consumer* with obtaining an extension of credit "in return for the payment of money or other valuable consideration." The MCSBA prohibits credit services businesses from "assist[ing] a consumer to obtain an extension of credit at a rate of interest which, except for federal preemption of State law, would be prohibited under Title 12 of this article [the Maryland usury laws]." This prohibition was added to the MCSBA to prohibit local check cashing stores from offering payday loans made by out-of-state banks. In 2012, the Maryland Court of Appeals ruled in *Gomez v. Jackson Hewitt, Inc.* , which involved a tax preparation company that offered refund anticipation loans through a bank partnership model, that the MCSBA only applied if the alleged credit services business received payment *directly* from the consumer. *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128 (2012). Under the Jackson Hewitt program, the company received a portion of the loan amount for its services in preparing the customer's tax returns, as well as a fee from the bank for services on the bank's behalf.

CashCall argued that it was not a credit services business under the reasoning of *Gomez* because it was paid by the bank, not the consumer. CashCall lost the administrative hearings in the matter, and appealed to the Circuit Court for Baltimore City, where it prevailed. The Commissioner appealed. The Maryland Court of Special Appeals reversed the judgment for CashCall and sided with the state. In doing so, the court distinguished *Gomez* in two ways. First, it held that the requirement that the credit services organization's fee be paid directly by the consumer only applied in a case where the putative credit services business primarily was offering a service other than obtaining an extension of credit for the consumer. It noted that in *Gomez*, the principal service that Jackson Hewitt provided was tax

preparation. In such a situation, the Court of Special Appeals read *Gomez* to require the payment for services to come directly from the consumer. However, the Court of Special Appeals held that the requirement that the payment come directly from the consumer, a requirement not found in the MCSBA, would not apply if the primary service provided by the non-bank partner was procuring an extension of credit. As additional support for its holding, the Court of Special Appeals held that CashCall received its payment directly from the consumer since the loans were sold by the banks within three days of funding, and CashCall accepted all payments made by the borrowers pursuant to the loans.

CashCall appealed this decision to the Court of Appeals, which affirmed the intermediate appellate court decision. The high court concluded that the definition of "credit services business" under Maryland law does not require a direct payment from a consumer to an entity that markets, facilitates and then promptly acquires the loan it arranges. Any individual or company that engages in this business in return for remuneration for obtaining "an extension of credit by others" for a consumer must comply with the Maryland Credit Services Business Act. The high court limited the "direct payment" requirement in *Gomez* to so-called "mainstream" businesses like a tax preparer that offers to arrange a loan as an ancillary service to its main business. Such businesses can be distinguished from a business like CashCall, which operates for the sole purpose of assisting banks in originating loans. In return for marketing the bank loans in Maryland, CashCall received, through contracts with the banks it partnered, the exclusive right to collect all payments of principal, interest and fees, including the upfront origination fee. Because CashCall provided consumers with "advice or assistance" to obtain a loan from another, and received compensation for this activity, CashCall is a credit services business, the court concluded.

Give the decision in *CashCall*, any company engaged in a consumer bank lending partnership that offers high-rate consumer loans in Maryland (other than to finance a separate service or product from the non-bank partner) must review its licensing position. The nonbank partner must obtain a credit services business license and, once licensed, cannot solicit Maryland consumers for loans in excess of rates permitted under Maryland law. In other words, a credit services business cannot assist a consumer to obtain a loan, from any in-state or out-of-state bank, at an interest rate prohibited by Maryland law. We do not, however, believe that the *CashCall* holding would be transferable to other states that have credit services organization acts. The Maryland Credit Services Business Act has been heavily amended from the more typical credit services organization acts in an attempt to prohibit high-rate bank partnership programs in Maryland. However, other states, emboldened by the *CashCall* decision, may become more active in requiring nonbank partners to become licensed under their credit services organization laws. In addition, this holding might suggest that other states should try "regulating" the nonbank partner to the extent that bank partnerships would not wish to operate in the state.

HUDSON
COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com