

NO. 14-15-00469-CV

---

IN THE FOURTH COURT OF APPEALS  
AT SAN ANTONIO, TEXAS

---

**CASH BIZ, LP, CASH ZONE, LLC  
D/B/A CASH BIZ and REDWOOD FINANCIALS, LLC**

*Appellants.*

v.

**HIAWATHA HENRY, ADDIE HARRIS, MONTRAY NORRIS,  
and ROOSEVELT COLEMAN, JR., on behalf of  
themselves and for all other similarly situated**

*Appellees.*

---

From the 224th Judicial District Court for  
Bexar County, Texas, No. 2015-CI-01545

---

**AMICUS CURIAE'S BRIEF OF TEXAS APPLESEED  
IN SUPPORT OF APPELLEES**

---

Ricardo G. Cedillo  
State Bar No. 04043600  
rcedillo@lawdcm.com  
DAVIS, CEDILLO & MENDOZA, INC.  
755 E. Mulberry, Suite 500  
San Antonio, Texas 78212  
Phone: 210.822.6666

**COUNSEL FOR AMICUS CURIAE  
AMICUS CURIAE REQUESTS ORAL ARGUMENT**

## TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	2
I. Statement of Interest of Amicus Curiae .....	2
II. Operation of Payday Loan Businesses and Their Use of Criminal "Bad Check" or "Theft by Check" Charges to Collect on Private Civil Debt.....	4
III. Allowing Payday Loan Businesses to Invoke the Criminal Justice System to Pursue Consumers for Private Civil Debt Is Illegal and Harmful to All Texans .....	10
IV. Conclusion .....	14

## INDEX OF AUTHORITIES

### Cases

<i>Arrwine v. State</i> , 320 S.W.2d 353, 355 (Tex. Crim. App. 1959).....	9
<i>Bearden v. Georgia</i> , 461 U.S. 660, 664-73 (1983).....	12
<i>Colin v. State</i> , 168 S.W.2d 500 (Tex. Crim. App. 1943).....	9
<i>Cortez v. State</i> , 582 S.W.2d 119 (Tex. Crim. App. 1979).....	9
<i>Daugherty v. State</i> , 387 S.W.3d 654, 659-62 (Tex. Crim. App. 2013).....	8
<i>Esquivel v. Watson</i> , 823 S.W.2d 589, 590-91 (Tex. 1992).....	9
<i>Hutson v. State</i> , 227 S.W.2d 813, 813-14 (Tex. Crim. App. 1950).....	9

### Statutes

Texas Finance Code §§ 393.001 & 393.601.....	1
Texas Finance Code § 393.....	4
Texas Finance Code § 392.301.....	10
Texas Finance Code §393.201(c)(3).....	10
Texas Penal Code §§ 31.06(f), 31.04(g)(1), and 32.41.....	6
Texas Penal Code § 32.41.....	9
Texas Penal Code Chapters 31 and 32.....	10
12 USC § 5531.....	10
12 USC § 5536.....	10

## SUMMARY OF THE ARGUMENT

The use of "bad check" or "theft by check" charges by payday loan businesses, which operate as credit services organizations (CSOs) and credit access businesses (CABs) in Texas,<sup>1</sup> constitutes a violation of the letter and spirit of: (1) state laws governing the filing of such criminal charges and the operations of CSOs and CABs; and (2) state and federal fair debt collection laws. It is an unlawful means by which payday, auto title, and other small dollar loan arrangers and lenders use the public criminal justice system to collect on private debts; a wrongful use of taxpayer-funded law enforcement resources; and now, a deceptive and unjust way that lenders, and the CSOs and CABs that arrange the loans, are attempting to use their contracts, as both sword and shield. In other words, these businesses are attempting to use Texas' court systems to their advantage, as their own private debt collector -- a practice which is wrongful in and of itself -- while simultaneously preventing their customers from direct access to these same courts.

---

<sup>1</sup> See Tex. Fin. Code §§ 393.001 & 393.601. The Credit Services Organizations Act was passed in 1987, in order to rein in abuses by credit repair businesses. It is under Title 5 of the Texas Finance Code, "Protection of Consumers of Financial Services." Starting in 2005, payday and auto title lending businesses moved, en mass, from licensing as consumer lenders, under Chapter 342 of the Texas Finance Code, to registration as credit services organizations (CSOs). As CSOs, these businesses can arrange loans "by others" in partnership with third-party lenders that lend under the 10% constitutional usury cap. This system enables these businesses to get around rate and fee caps for consumer loans because the fees charged by CSOs are uncapped. In 2011, in the 82nd Texas Legislative Session, HB 2594 created the credit access business designation (CAB) and required licensing by the Texas Consumer Credit Commissioner as a first step to better understand use of the CSO model by payday and auto title businesses. The new law went into effect on January 1, 2012. All CABs must also be registered as a CSO. Cash Biz was a registered CSO prior to the adoption of HB 2594 and obtained a CAB license after the law went into effect on January 1, 2012.

Here, Appellants Cash Biz, LP, Cash Zone, LLC d/b/a Cash Biz and Redwood Financial, LLC ("Cash Biz"), are alleged to have violated the Texas Finance Code, Texas Penal Code, and the Texas Constitution, by pursuing theft by check charges against the Appellees of record. As a nonprofit, nonpartisan, investigating authority on the precise issue of payday loan businesses' use of criminal charges to pursue private civil debt, Texas Appleseed submits this brief to highlight: (1) how payday loan businesses, including Cash Biz, operate in the State of Texas; (2) how and why use of "bad check" or "theft by check" charges by payday loan businesses constitutes violations of the Texas Constitution and state laws governing the filing of such criminal charges, the operations of CSOs and CABs, and state and federal fair debt collection laws; (3) how payday loan businesses, including Cash Biz, have sought to simultaneously utilize and avoid the court system; and (4) why allowing payday loan businesses, including Cash Biz, to invoke the criminal justice system to pursue consumers for private civil debt, without forcing them to face the consequences of their unlawful actions, severely harms all Texans.

## **ARGUMENT**

### **I. Statement of Interest of Amicus Curiae**

Texas Appleseed is a nonprofit public interest justice center that pursues economic and social justice for all Texans through education, community

empowerment, and innovative advocacy. Texas Appleseed's work focuses on a variety of project areas, including, but not limited to fair financial services, the school-to-prison pipeline,<sup>2</sup> criminal discovery reform, disaster recovery and fair housing,<sup>3</sup> juvenile justice reform, and mental health reform. Texas Appleseed works with pro bono partners and collaborators who assist Texas Appleseed in its mission of:

promot[ing] social and economic justice for all Texans by leveraging the skills and resources of volunteer lawyers and other professionals to identify practical solutions to difficult, systemic problems.<sup>4</sup>

Texas Appleseed's Board of Directors is comprised of distinguished legal practitioners from various sectors of the Texas Bar who are committed to achieving equity and justice for all Texans.

---

<sup>2</sup> Texas Appleseed works to dismantle the school-to-prison pipeline and keep children in school and on track to graduate by researching, analyzing data and reporting on issues such as school disciplinary policies; ticketing, arrest and use of force in public schools; court involvement in student discipline; and the effectiveness of alternative education programs to help close pathways to dropout and incarceration. Working on a number of fronts, Texas Appleseed advocates for policy changes on the state level, as well as the local and school district level that close pathways to dropout and incarceration.

<sup>3</sup> Texas Appleseed works with a network of organizations in Texas, including housing advocates, policy experts, and grassroots community groups, to ensure that all Texas families get their fair share of disaster recovery funds in the wake of a natural disaster, and that all families have the opportunity to live in safe, decent neighborhoods with equal access to educational and economic opportunity. Texas Appleseed works to ensure federal housing and civil rights laws are followed so that individual families have the right to choose where they live free of discrimination, and that all neighborhoods have equal access to opportunity.

<sup>4</sup> Texas Appleseed, Mission, *available at* [www.texasappleseed.org/mission](http://www.texasappleseed.org/mission) (last visited Oct. 1, 2015).

Over much of the last decade, Texas Appleseed has become a leading voice regarding fair financial services issues in the great State of Texas by, among other things, advocating for responsible and reasonable regulations governing the payday lending industry and supporting fair, equitable interest and fee charges for payday, auto title, and other small dollar loans.

Texas Appleseed has successfully collaborated with local and municipal leaders to encourage 27 cities to pass Texas' unified ordinance, which adds basic, common-sense standards to control predatory practices in the payday and auto title lending marketplace. Texas Appleseed is part of the Texas Fair Lending Alliance, a coalition of organizations and individuals working to transform the Texas payday and auto title loan market from one based on a cycle of debt, to one that thrives on borrower and lender success.

## **II. Operation of Payday Loan Businesses and Their Use of Criminal "Bad Check" or "Theft by Check" Charges to Collect on Private Civil Debt**

Payday loan businesses, which operate as CSOs and, since January 1, 2012, as CABs in Texas,<sup>5</sup> generally provide short-term loans to borrowers who present a post-dated personal check or authorize electronic debits from a bank account for

---

<sup>5</sup> HB 2594 passed into law in the 82nd Texas Legislative Session. The new law requires payday and auto title loan businesses operating as CSOs to also become licensed as a CABs under the Credit Services Organization Act. Tex. Fin. Code § 393.

the amount borrowed, plus the finance charge.<sup>6</sup> CSOs and CABs work with one or more third-party lenders and charge high fees to arrange consumer loans. The CSO or CAB arranges the loan, guarantees the loan, services the loan, and acquires the loan and engages in collections if the loan goes into default, per the terms of the guarantee or letter of credit.<sup>7</sup> Once the term of the loan expires, typically the borrower's next payday, the loan may be paid by the borrower by: (1) allowing the check to be deposited by the payday loan business; (2) allowing the business to debit a designated account; or (3) paying a new finance charge to roll the loan over for another pay period ("roll-over").<sup>8</sup> Often these loans, in conjunction with their roll-over payments, result in total charges that amount to anywhere from 400% to 600% APR.<sup>9</sup>

---

<sup>6</sup> Leah A. Plunkett & Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 *Suffolk U. L. Rev.* 31, 33-34 (2011).

<sup>7</sup> See Sealy Hutchings & Matthew J. Nance, *Credit Access Businesses: The Regulation of Payday and Title Loans in Texas*, 66 *Consumer Fin. L.Q. Rep.* 76 (2012)

<sup>8</sup> *Id.*

<sup>9</sup> Based on the latest data posted on the website of the Texas Consumer Credit Commissioner, who licenses credit access businesses, average charges for single payment and installment payday loans, including the fee and interest charge, have an annual percentage rate charge ranging from 494 to 585 percent. See Texas Office of Consumer Credit Commissioner, CAB Second Quarter Data Reporting (Sept. 6, 2015), available at <http://occc.texas.gov/sites/default/files/uploads/reports/cab-q2-state-2015.pdf> (last visited Oct. 2, 2015).



In cases where the borrower does not make a new payment to pay off or refinance the loan and the check or debit authorization is rejected by the financial institution, some CSOs and CABs threaten borrowers with criminal prosecution, and jail time, for writing "bad checks" (i.e., the check the non-liquid borrower must write to obtain the payday loan in the first place, which the business knows to be insufficient at the time of the execution of the CSO/CAB and loan contract) and file complaints with district attorneys, county attorneys, or justice courts.<sup>10</sup> This scenario takes place even after the borrower has paid refinance fees in excess of the original loan amount borrowed. Unsurprisingly, the threat of imprisonment is a powerful borrower intimidation and debt collection tactic.<sup>11</sup>

Some prosecutors and judges have exacerbated the issue by allowing criminal complaints to be filed,<sup>12</sup> by mailing demand letters,<sup>13</sup> and by punishing

---

<sup>10</sup> See Tex. Penal Code §§ 31.06(f), 31.04(g)(1), & 32.41.

<sup>11</sup> Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 86-87 (2002).

<sup>12</sup> Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 610 (2000) ("Payday lenders filed over 13,000 criminal charges with law enforcement officials against their customers in just one Dallas, Texas precinct in one year.").

<sup>13</sup> Forrest Wilder, *Fast Cash: How Taking Out a Payday Loan Can Land You in Jail*, The Texas Observer (Jul. 16, 2013, 11:49 AM), <http://www.texasobserver.org/cash-fast-how-taking-out-a-payday-loan-could-land-you-in-jail/>.

debtors.<sup>14</sup> A Texas Observer article published in July of 2013 uncovered the severity of the debt collection scheme, by documenting at least 1,700 instances in which criminal complaints were filed against customers by payday loan businesses in Amarillo, Houston, and San Antonio.<sup>15</sup>

In order to further understand the pervasiveness of this practice, Texas Appleseed submitted open records requests to state regulators and 21 district attorneys or county attorneys, and collected data from four justice courts based on individual complaints to state regulators and to Texas Appleseed.<sup>16</sup> This data was collected from January 1, 2012, to various dates in the Spring of 2014, and Texas Appleseed completed its investigation and analysis on December 17, 2014, resulting in a complaint to various state and federal agencies regarding this practice.

The open records requests revealed approximately 1,500 cases by 13 CSOs operating under a CAB license, including Cash Biz, where a consumer was criminally charged or a district attorney's office sent the consumer a notice to pay

---

14 *Id.*

15 *Id.*

16 Texas Appleseed produced 21 open records requests to the county and district attorneys in the most populous areas of the state. Five counties refused to provide the data; 10 indicated that they do not pursue theft by check or bad check charges for payday loans, citing a post-dated check exemption; six provided documentation of one or more complaints. Texas Appleseed uncovered evidence in two additional counties where criminal complaints were filed by payday loan businesses in at least one justice court and pursued by county attorneys.

on behalf of a payday loan business, regarding collection of a private civil debt, disguised as a "bad check" or "theft by check" claim.<sup>17</sup> By way of example only, in one Harris County justice court alone, where more detailed data was available and Cash Biz was the only complaining witness, arrest warrants were issued in 42% of the cases brought based on payday loan business "bad check" complaints, and jail time or jail credit applied in 5.6% of the cases.<sup>18</sup>

This use of "bad check" or "theft by check" charges by payday loan businesses constitutes violations of (1) state laws governing the filing of such criminal charges and the operations of CSOs and CABs and (2) state and federal fair debt collection laws. Moreover, it is a harmful practice and a wrongful use of taxpayer-funded law enforcement resources.

Recognizing this fact, Texas courts have emphatically rejected efforts to circumvent these public policies through creative schemes designed to use the courts to recover private civil debt. *See Daugherty v. State*, 387 S.W.3d 654, 659-62 (Tex. Crim. App. 2013) (holding debtor's issuance of hot check to contractor *after* contractor finished renovation project was not theft of services by deception

---

<sup>17</sup> Letter from Deborah Fowler & Ann Baddour of Texas Appleseed to Richard Cordray, Director of Consumer Financial Protection Bureau, *et al.*, Complaint Regarding Criminal Charges Filed by Payday Lenders (Dec. 17, 2014), *available at* <https://www.texasappleseed.org/sites/default/files/Complaint-CriminalCharges-PaydayBusinesses-Final2014.pdf>.

<sup>18</sup> *Id.*

because contractor was not induced to perform by check; ". . . routine civil breach of contract case does not give rise to a criminal conviction for theft . . ."); *see also Esquivel v. Watson*, 823 S.W.2d 589, 590-91 (Tex. 1992) (per curiam) (reversing trial court's dismissal of malicious prosecution under Texas Penal Code § 32.41 on ground that probable cause to prosecute hot check requires more than writer's knowledge of insufficient fund at time check is written); *Cortez v. State*, 582 S.W.2d 119 (Tex. Crim. App. 1979) (" . . . appellant's conduct of issuing and passing the check could not have affected the judgment of the complaining witness in the delivery of the services allegedly stolen, because the check was not issued and passed until after performance of the services had been completed."); *Arnwine v. State*, 320 S.W.2d 353, 355 (Tex. Crim. App. 1959) (quoting *Kuykendall v. State*, 160 S.W.2d 525, 527 (Tex. Crim. App. 1942) ("The intent to defraud is the gist of the offense and this intent must have existed at the time the check in question was given. Consequently, the State was required to prove facts from which such an intent is deducible beyond a reasonable doubt, in the absence of which a conviction would not be justified."); *Hutson v. State*, 227 S.W.2d 813, 813-14 (Tex. Crim. App. 1950) (holding that evidence of closed account was not sufficient to establish hot check violation of prior version of law); and *Colin v. State*, 168 S.W.2d 500 (Tex. Crim. App. 1943) (holding that mere fact that bad

check is given for pre-existing indebtedness is insufficient to establish intent to defraud, required under prior version of the Penal Code).

### **III. Allowing Payday Loan Businesses to Invoke the Criminal Justice System to Pursue Consumers for Private Civil Debt Is Illegal and Harmful to All Texans**

Texas has a long history of not criminalizing debts. The Republic of Texas Constitution, drafted in 1836 clearly states, "No person shall be imprisoned for debt in consequence of inability to pay" and the current Texas Constitution's Bill of Rights states, "No person shall ever be imprisoned for debt." Texas Penal Code Chapters 31 and 32 both establish that a returned check or payment, in the case of a transaction where a post-dated check is accepted, does not meet the legal standard to establish theft or fraud. In addition, the *Texas Legislature clarified the matter, which was already well-established in Texas case law, in 2011 by adding § 393.201(c)(3) to the Texas Finance Code, prohibiting CABs from pursuing criminal charges related to a check or debit authorization* absent affirmative evidence of the intent of fraud, forgery, or theft. State and federal debt collection laws also include language prohibiting wrongful threats of criminal charges, including Texas Finance Code § 392.301 and the Fair Debt Collections Practices Act, 15 USC § 1692(e). This practice of invoking the criminal justice system to pursue private civil debt also meets the standards of unfair and abusive practices under 12 USC § 5531 and prohibited acts under 12 USC § 5536.

Moreover, in response to the findings of the July 2013 Texas Observer article, the Office of Consumer Credit Commissioner ("OCCC"), the state's regulator of CABs, issued an advisory bulletin stating that "if a consumer postdates a check to pay for a payday loan, and that check later bounces, this is not sufficient evidence to show that the consumer committed criminal conduct . . . [w]hen a CAB accepts a postdated check or ACH transfer authorization, the CAB should understand that there might not be available funds at the time of the transaction."<sup>19</sup> This bulletin is consistent with Texas courts' longtime interpretation of theft by check and other similar claims, as discussed in detail in the previous section of this brief.

The Consumer Financial Protection Bureau emphasized the seriousness of abusive debt collection tactics by taking enforcement action against ACE Cash Express, headquartered in Irving, Texas, for using "unfair, deceptive, and abusive practices" to collect consumer debts, including threats to criminally prosecute borrowers.<sup>20</sup>

---

<sup>19</sup> Texas Office of Consumer Credit Commissioner, Credit Access Business Advisory Bulletin: Filing Criminal Charges Against Consumers (Oct. 14, 2013). In fact, the Commissioner pursued regulatory action directly against Cash Biz for this exact practice. See Cash Zone LLC d/b/a Cash Biz, No. L15-048 (Tex. Office of Consumer Credit Comm'r Dec. 15, 2014) (agreed order).

<sup>20</sup> Consumer Financial Protection Bureau, *CFPB Takes Action Against ACE Cash Express for Pursuing Payday Borrowers Into Cycle of Debt* (July 10, 2014), available at <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/> (last visited Oct. 2, 2015).

These actions are illegal, in part, because debtors' prisons have long been found contrary to our American principles.<sup>21</sup> Many of the people subject to these unlawful charges now have criminal convictions simply because they borrowed money from a payday loan business, are poor, cannot obtain a traditional loan from a bank or credit union, and cannot yet afford to pay back the loan. Moreover, these threats and charges only perpetuate a cycle of poverty. These convictions show up on background checks performed by employers, in custody disputes, and when individuals are seeking housing. Many of these individuals have to pay extra court fines and fees, when the entire reason they sought out a payday loan in the first instance was because he or she did not have enough money.

Now, Cash Biz and other payday loan businesses, having already invoked the public criminal court process themselves, to attempt to recover on a private civil debt, are pushing their customers further into poverty, seeking to force them to pay more money (which they do not have) to arbitrate, one by one.

Appellees will undoubtedly go into greater detail regarding Cash Biz's waiver of the arbitration clauses and class action waivers. However, it should be noted that based on the research and investigation conducted by Texas Appleseed, and substantiated with documents provided by district attorneys, justice courts, county attorneys, and other public data sources, it is clear that payday loan

---

<sup>21</sup> See *Bearden v. Georgia*, 461 U.S. 660, 664-73 (1983).

businesses, including Cash Biz, are attempting to use their contracts as both sword and shield, by using the courts to criminally pursue their consumers and attempting to recover on civil debt (an act which is wrongful in and of itself), while simultaneously attempting to prevent their customers from direct access to the courts.

Indeed, some payday loan businesses, knowing that they cannot use a post-dated check to criminally pursue their customers, as discussed above, require that consumers write a check dated on the date the loan is issued, promising to deposit the check when the loan becomes due, to attempt to ensure that they are allowed to later rely on criminal prosecution, directly through the courts, to then attempt to collect on the private civil debt or send their customers to jail. Compelling evidence exists that Cash Biz engaged in this very practice.<sup>22</sup>

Tax payers should not be forced to bankroll wrongful collection practices, courts should not be clogged with these illegal charges, and payday loan businesses cannot be allowed to have their cake and eat it too, by inviting public criminal charges in order to attempt to collect on private debt, when normally they would be required to arbitrate, while simultaneously preventing their customers from pursuing legal action directly through the courts, forcing them to arbitrate.

---

<sup>22</sup> Wilder, *supra* note 13.



#### **IV. Conclusion**

Every time Cash Biz and other payday loan businesses wrongfully complain of "bad check" or "theft by check" actions by a consumer, they knowingly violate state laws governing the filing of such criminal charges, the operation requirements of CSO, CABs, and various state and federal fair debt collection laws. To allow these businesses to pursue criminal charges, taking advantage of Texas' public court system to collect on private civil debt, while simultaneously preventing their consumers from meaningful access to these same courts is detrimental to all Texans and must not be allowed to stand.

For these reasons, Texas Appleseed asks this Court to affirm the trial court's order denying Cash Biz's application to compel arbitration and to enforce class action waiver.

Respectfully Submitted,

DAVIS, CEDILLO & MENDOZA, INC.

By: /s/ Ricardo G. Cedillo  
Ricardo G. Cedillo  
State Bar No. 04043600  
McCombs Plaza, Suite 500  
755 E. Mulberry Avenue  
San Antonio, Texas 78212  
T 210.822.6666  
F 210.822.1151

**Counsel for Texas Appleseed**

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is in compliance with the rules governing the length and font requirements for briefs prepared by electronic means. The brief was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 3,529. The “Times New Roman” font is used in this brief, with 14 pt. font for the body of the brief, and 12 pt. font for footnotes.

/s/ Ricardo G. Cedillo

Ricardo G. Cedillo

## **CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2015, a true and correct copy of the foregoing was sent by E-service in accordance with TEX. R. CIV. P. 21a(a)(1) in accordance with TEX. R. CIV. P. 21a to the following counsel of record:

Sumit K. Arora  
Edward S. Hubbard  
Coats Rose  
9 Greenway Plaza, Ste. 1100  
Houston, Texas 77046

Daniel R. Dutko  
Hanszen Laporte  
11767 Katy Freeway, Suite 850  
Houston, Texas 77079

/s/ Ricardo G. Cedillo

Ricardo G. Cedillo