STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL December 16, 2022	No. I22-005 (R22-011) Re: Earned Wage Access Products

To: Jeff Weninger, Senator
Arizona Senate

Questions Presented

Whether an Earned Wage Access ("EWA") product meets the definition of "consumer loan" in A.R.S. § 6-601, such that a person who makes, procures, or advertises an EWA product is required to be licensed as a "consumer lender" by the department of insurance and financial institutions under A.R.S. § 6-603.

Summary Answer

No. An EWA product that is offered as a no-interest and non-recourse product does not fall within § 6-601(7)'s definition of "consumer loan" for two reasons.

First, an EWA product that is fully non-recourse represents a payment of wages already earned by the employee and is, therefore, not a "consumer loan" under § 6-601(7) because the EWA product does not allow recourse against the employee in the event the provider is unable to recoup all or some portion of the advance. An EWA product is fully non-recourse where the

provider obtains no legal or contractual right to repayment against the employee, does not engage in any debt collection activities with regard to any unpaid balance, does not sell or assign any unpaid balance to a third party, and does not report non-payment to any consumer credit reporting agency.

Second, and independently, an EWA product is not a "consumer loan" under § 6-601(7) so long as the provider does not impose a "finance charge," as that term is defined in A.R.S. § 6-601(11). An EWA product provider is permitted, however, to impose certain fees listed in A.R.S. § 6-635 without the EWA product being considered a "consumer loan" because the definition of "finance charge" in § 6-601(11) excludes "other fees allowed pursuant to section 6-635."

Background

A. The Consumer Lenders Act

"Since before statehood, Arizona has had general usury laws that regulate the amount of interest a lender could charge." *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 64 (1999). "Historically, [usury laws] have set a maximum interest rate, which the legislature periodically altered in response to market conditions." *Id.* In 1980, the Legislature amended the general usury statute to remove the absolute ceiling on interest rates, instead allowing contracting parties to use a higher rate in a written contract. More specifically, the general usury statute now provides that "[i]nterest on any loan, indebtedness or other obligation shall be . . . at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to." A.R.S. § 44-1201(A)(2).

Pre-statehood, Arizona also "had a Small Loan Act that placed certain restrictions on licensed consumer lenders." *Aros*, 194 Ariz. at 64. In 1980, the Legislature "passed an amended version of the Small Loan Act, renaming it the Consumer Loan Act. Many of the [act's] provisions

remained unchanged, including [former] A.R.S. § 6-602, the 'scope of article.'" *Id.* In 1984, the Legislature amended former § 6-602 "to require all consumer lenders to be licensed and thus regulated by the [act]." *Id.* at 64 n.1 (citing Ariz. Sess. Laws 1984, ch. 238, § 5 (2d Reg. Sess.)). Then, in 1997, the Legislature repealed the Consumer Loan Act and re-codified the statutes addressing consumer loans, which remained in Title 6, Chapter 5 titled "Consumer Lenders." *See* 1997 Ariz. Sess. Laws ch. 248 (1st Reg. Sess.). This Opinion will refer to those re-codified statutory provisions as the Consumer Lenders Act ("CLA"). The CLA contains two articles, one titled "General Provisions" and containing A.R.S. §§ 6-601 to -615, and one titled "Requirements for Consumer Lender Loans" and containing A.R.S. §§ 6-631 to -639. Under the CLA, "[u]nless exempt under § 6-602, a person, whether located in this state or in another state, shall not engage in the business of a consumer lender without first being licensed as a consumer lender by the deputy director." A.R.S. § 6-603(A). The provisions primarily at issue in this Opinion are contained in the CLA and have remained materially unchanged since its passage in 1997.

B. Earned Wage Access Products

Most businesses in the United States pay their employees using biweekly, semimonthly, or monthly pay periods. The delay between work performed and pay received often stems from employers' cash management needs, payroll processing inefficiencies, or regulatory uncertainty about wage and hour laws. But that delay can contribute to employees' financial distress, and has resulted in the increased use of short-term, small-dollar credit.

EWA products are intended to satisfy the short-term liquidity needs of employees without reliance on payday loans. EWA products facilitate advance access to earned but not yet paid wages. Typically, an EWA product allows an employee to request payment of a certain amount of accrued wages for some period (e.g., daily or weekly), which the EWA provider immediately

pays to the employee after confirming the amount of wages earned. The EWA provider then recoups the accessed funds through direct payroll deductions or bank account debits on the employee's actual payday. EWA products are a non-recourse, no interest financial product, meaning the EWA provider bears the entire risk if the money provided to the employee is not recovered for some reason. The EWA provider does not utilize debt collection resources like debt collectors or credit agencies and does not report unpaid balances on consumer credit reports. If an EWA provider is unable to recoup funds that were provided to an employee, the EWA provider's primary recourse is to refrain from allowing the employee to access further advances until previously advanced funds are recovered.

While EWA products are universally non-recourse and interest-free, they can vary in other ways. An employee can enroll with an EWA provider through their employer, if the employer offers access to an EWA product as a benefit, or directly with an EWA provider by providing certain bank account and paycheck information. Some EWA providers receive payment directly from the employee's paycheck through an employer's payroll system or provider, while others receive payment from the employee's bank account. Some EWA products disburse funds through direct deposit into a bank account, while others allow disbursement using a proprietary payment card. Some EWA products allow a user to pay a fee to expedite access to earned wages and some allow voluntary tipping of the EWA provider.

Analysis

Whether an EWA provider is required to obtain a license from the department of insurance and financial institutions to offer EWA products to Arizonans is a matter of statutory interpretation. When interpreting a statute, courts follow the rules of statutory construction and first look to the statutory language. *State v. Williams*, 175 Ariz. 98, 100 (1993); *Patterson v. Mahoney*, 219 Ariz.

453, 456 ¶9 (App. 2008). "When construing a statute, [the courts'] goal 'is to fulfill the intent of the legislature that wrote it.'" *City of Sierra Vista v. Dir., Ariz. Dep't of Env't. Quality*, 195 Ariz. 377, 380 ¶10 (App. 1999). "In discerning the text's meaning, the most objective criterion available is the accepted meaning of the words, in context, when the provision was adopted." *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 483 ¶10 (2022). If the statutory language is clear and unequivocal, it is determinative. *Patterson*, 219 Ariz. at 456 ¶9; *see also* A.R.S. § 1-213. If, on the other hand, a statute is ambiguous, courts look to rules of statutory construction and "'consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose.'" *Callan v. Bernini*, 213 Ariz. 257, 260 ¶13 (App. 2006).

Turning to the statutory language at issue, A.R.S. § 6-603 provides that "[u]nless exempt under § 6-602, a person, whether located in this state or in another state, shall not engage in the business of a consumer lender without first being licensed as a consumer lender by the deputy director." A.R.S. § 6-603(A). The "deputy director" is "the deputy director of the financial institutions division of the department." A.R.S. § 6-101(6). And the "department" is "the department of insurance and financial institutions." A.R.S. § 6-101(5). There is no plausible argument that offering an EWA product falls within the exceptions contained in A.R.S. § 6-602, and thus the question of department authority over the issuance of an EWA product turns on whether an EWA provider is a "consumer lender."

The CLA defines a "consumer lender" as "a person that advertises to make or procure, solicits or holds itself out to make or procure, or makes or procures consumer lender loans to consumers in this state." A.R.S. § 6-601(5). There is no question that an employee to whom an EWA product is offered is a "consumer." *See* A.R.S. § 6-601(4). Thus, the question presented turns on whether an EWA product fits the definition of "consumer lender loans."

The CLA defines "consumer lender loans" as "consumer loans, consumer revolving loans and home equity revolving loans." A.R.S. § 6-601(6). An EWA product does not satisfy the definitions of a "consumer revolving loan" or a "home equity revolving loan," *see* A.R.S. § 6-601(9), (12), so an EWA provider is only required to obtain a license from the department if an EWA product is a "consumer loan." The CLA defines "consumer loan," in relevant part, as "the direct closed end loan of money . . . in an amount of $10,000 or less that is subject to a finance charge in which only the principal amount of the loan is considered, and not any finance charges or other fees allowed pursuant to § 6-635[.]" A.R.S. § 6-601(7); *see also SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, 438 ¶14 (App. 2000) (discussing requirements for falling under the definition of "consumer loan"). Thus, an EWA provider must be licensed only if the EWA product satisfies each of the following requirements: (1) the EWA product is a direct closed end loan of money, (2) the principal amount of the EWA product is equal to or less than $10,000, and (3) the EWA product is subject to a finance charge. As explained below, an EWA product does not satisfy either the first or third requirement to be a "consumer loan" because an EWA product is not a "loan of money" and is not "subject to a finance charge."

I. An EWA Product As Described Herein Is Not A "Loan Of Money."

An EWA product is a non-recourse advancement of wages earned by an employee. As used herein, an EWA is "non-recourse" only if the EWA provider retains no legal or contractual right to repayment against the consumer, does not engage in debt collection activities with regard to any unpaid balance, does not sell such balance to a third party, and does not report nonpayment to a consumer reporting agency. An EWA product that is "non-recourse" against a consumer in the event an EWA provider is unable to recoup the full amount of fund previously provided does

not qualify as a "loan of money" under A.R.S. § 6-601(7) and does not require an EWA provider to obtain a license from the department.

The CLA does not define the term "loan," and thus we are required to interpret the meaning of the term. "Because it does not appear from the context that the drafters intended a special meaning, we are guided by the word's ordinary meaning." *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 239 ¶14 (2019); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). In ascertaining the ordinary meaning of a term, we may look to dictionary definitions of the term. *See Vangilder v. Ariz. Dept. of Rev.*, 252 Ariz. 481, 489 ¶29 (2022) (looking to dictionary definitions to determine the ordinary meaning of statutory terms).

Black's Law Dictionary defines a "loan" as "a grant of something for temporary use." Black's Law Dictionary (11th ed. 2019); *see also* Black's Law Dictionary (6th ed.1990) (defining a "loan" as "[a]nything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use."). Consistent with this dictionary definition, Arizona has statutorily defined "loan" in another context as "an advance or commitment of certain funds pursuant to a repayment agreement." A.R.S. § 20-1603(9) (definition for consumer credit insurance).

A recent advisory opinion from the Consumer Financial Protection Bureau ("CFPB") also provides persuasive guidance on whether an EWA product constitutes a "loan." *See* Truth in Lending Act (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79404, 79404-08 (Dec. 10, 2020) (submitted for publication on November 30, 2020) (the "CFPB Opinion").[1] The CFPB Opinion analyzes the related question of whether an EWA product provided through an employer

[1] Available at https://www.govinfo.gov/content/pkg/FR-2020-12-10/pdf/2020-26664.pdf.

without charging the consumer a fee constitutes "credit" under the Truth in Lending Act ("TILA"). The CFPB Opinion concludes that such an EWA product does not constitute "credit." For purposes of TILA, "credit" is defined as "the right to defer payment of debt or to incur debt and defer its payment." CFPB Opinion at 79406 & n.20 (quoting Regulation Z at § 1026.2(a)(14)). The CFPB Opinion concludes in relevant part that the EWA product discussed does not involve "debt" because "a Covered EWA Program facilitates employees' access to wages they have already earned, and to which they are already entitled, and thus functionally operates like an employer that pays its employees earlier than the scheduled payday." *Id.* at 79406 & n.24.

The CFPB further concluded that "the totality of circumstances of a Covered EWA Program supports that these programs differ in kind from products the Bureau would generally consider to be credit." *Id.* at 79407. EWA providers "have no rights against the employee in the event of nonpayment," "do not charge employees to participate in a Covered EWA Program," "[n]o interest or other fees are charged against a Covered EWA Transaction, ensuring that the amount the Provider is entitled to recover does not 'increase[] with the passage of time, another characteristic of a loan,'" "there are no late fees or prepayment penalties," "providers do not take any payment authorization from employees, such as a check, ACH, or debit card authorization," "providers do not pull credit reports or credit scores on individual employees or otherwise assess their credit risk," "providers do not report information concerning Covered EWA Transactions to consumer reporting agencies," and "providers do not engage in debt collection activities related to Covered EWA Transactions or place such amounts as debt with, or sell such amounts to, any third party." *Id.*

The CFPB came to a similar conclusion regarding the definition of "credit" in connection with the CFPB's 2017 Payday Lending Rule, explaining at that time that

> some efforts to give consumers access to accrued wages may not be credit at all. For instance, when an employer allows an employee to draw accrued wages ahead of a scheduled payday and then later reduces the employee's paycheck by the amount drawn, there is a quite plausible argument that the transaction does not involve 'credit' because the employee may not be incurring a debt at all.

Id.

Similarly, the Federal Reserve Board of Governors has concluded that "credit" is not extended when a consumer is permitted to borrow against the accrued cash value of an insurance policy or pension account and there is no independent obligation to repay. *See id.* at 79406 & n.27. In that scenario, "credit has not been extended because the consumer is, in effect, only using the consumer's own money." *Id.* at 79406 & n.28. The accrued cash value of an employee's wages is no different—the accrued cash value of wages is effectively the employee's own money and providing access to those wages does not constitute a "loan." *See id.* at 79407.

Finally, the California Commissioner of Financial Protection and Innovations issued an opinion on February 11, 2022 ("California Opinion"), concluding that when an EWA provider works directly with an employer to allow employee access to an EWA product, that the EWA product is not a "loan" under California Financial Code § 22009.[2] The California Opinion did so even in the face of a California law instructing that the California Financial Code should "be 'liberally construed and applied' to 'protect borrowers against unfair practices.'" California Opinion at 3. While the California Opinion relied heavily on the fact that the EWA product at issue allowed an employer to provide funds that do not exceed what the employer already owes an employee, the California Opinion's ultimate conclusion was that the EWA product at issue was not a "loan" because an employer was not providing an employee funds "for temporary use."

[2] Available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf.

Rather, "the recipient has simply agreed to accept a portion of their earned wages from their employer earlier than their regularly scheduled payday." *Id.* at 4–5. That same logic applies where an EWA provider is working directly with an employee, rather than with an employer.

Applying the common meaning of "loan," an EWA product that is "non-recourse" is not a "loan" because it is neither for the employee's "temporary use," nor is there a "condition that it shall be returned, or its equivalent in kind." Rather, an EWA product permanently provides an employee with funds that the employee has already earned from an employer, funds which therefore the employee need not return to the EWA provider. The primary function of an EWA product is to accelerate the payment of funds that have already been earned as if the employer had shortened the pay period. And while the EWA provider has the right to directly receive a portion of the consumer's paycheck, if the EWA provider is working directly with the employer, or to debit the consumer's bank account on or after the date on which the next paycheck is to be deposited, the EWA provider has no legal or contractual right to repayment against the consumer. Moreover, to be "non-recourse," the EWA provider must not engage in debt collection activities with regard to any unpaid balance, sell such balance to a third party, or report nonpayment to a consumer reporting agency. The conclusion that a "non-recourse" EWA product is not a "loan" under Arizona law is consistent with the reasoning of the CFPB Opinion, the CFPB's commentary in connection with the 2017 Payday Lending Rule, and the Federal Reserve Board of Governor's conclusion regarding consumer borrowing against the accrued cash value of an insurance policy or pension.

The conclusion that advancing earned wages through a "non-recourse" EWA product is not a "loan" under the CLA is not impacted even if the consumer is required to pay bank overdraft or other fees in the event that the debit of money agreed to as part of the EWA product exceeds

the amount in the consumer's bank account at the time of the debit. This is clear from considering a different situation. Suppose that Person A gives Person B a gift of money with no obligation whatsoever to repay the amount of the gift, but Person A charges Person B a small fee (relative to the amount of the gift) for delivering the gift. If Person B pays the fee with a check and that check then bounces, Person B's bank would likely impose an overdraft fee. But that would not change the nature of the agreement between Person A and Person B. Person B is entitled to keep the gift, even if he or she still owes the fee to Person A and now also owes the bank an overdraft fee. The gift was not for Person A's "temporary use" and is not transformed into a loan by either the obligation to pay a fee to Person A or to pay an overdraft fee to the bank.

In sum, because an EWA product is "non-recourse" and involves wages an employee has already earned, such that the employee's use of the funds is not temporary, an EWA product is not a "loan" under the CLA.[3] An EWA provider, therefore, is not required to obtain a license from the department of insurance and financial institutions to offer EWA products to Arizonans.

II. An EWA Product As Described Herein Is Not "Subject To A Finance Charge."

A non-recourse EWA product that requires repayment only of the principal balance is not a "loan" for another reason—an EWA product does not charge a "finance charge" as defined in A.R.S. § 6-601(11). The CLA defines a "finance charge" as "the amount payable by a consumer incident to or as a condition of the extension of a consumer lender loan but does not include other fees allowed pursuant to § 6-635." A.R.S. § 6-601(11). Although the CLA does not expressly state that the obligation to repay principal is not a "finance charge," requiring repayment of

[3] The same would be true where a consumer provides debit-card information and authorization to debit a bank account, or where a consumer pays a third-party bank fee, a voluntary gratuity, or a fee for expedited access to earned wages.

principal is self-evidently not an amount payable incident to or as a condition of a consumer lender loan.

Even if it were not clear on the face of § 6-601(11) that principal does not meet the definition of a "finance charge," the overall text and structure of the CLA dictates that conclusion. The CLA consistently uses the term "finance charge" in a manner precluding principal, and thus § 6-601(11) is presumed to make the same use of the term. *See Trisha A. v. Dept. of Child Safety*, 247 Ariz. 84, 88 ¶17 (2019) (explaining that under the presumption of consistent usage canon, "[a] word or phrase is presumed to bear the same meaning throughout a text." (quoting Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012)). The CLA's definition of "consumer loan," for example, distinguishes between principal and finance charges. The CLA explains that, in determining whether a consumer loan is for an amount less than $10,000, "only the principal amount of the loan is considered, and not any finance charges or other fees allowed pursuant to § 6-635." A.R.S. § 6-601(7). The CLA similarly distinguishes between principal and finance charges in several other definitions. *See, e.g.*, A.R.S. § 6-601(1) ("'Actuarial method' means the method of allocating each payment between finance charges and principal . . . ."); A.R.S. § 6-601(8) ("'Consumer loan rate' means the periodic rate of finance charges that applies to the outstanding principal balance of a consumer loan and that remains unpaid."); A.R.S. § 6-601(15) ("'Precomputed consumer loan' means a consumer loan that is payable in . . . installments that are applied to the unpaid balance of the principal and precomputed finance charges combined . . . .").

Apart from definitional provisions, the CLA treats principal as different than finance charges in several places. For example, the CLA distinguishes between principal and finance charges when imposing forfeitures on consumer lenders who overcharge or fail to obtain a required license. *See* A.R.S. § 6-613(A)(1) ("If the original principal amount of a consumer loan is five

thousand dollars or less, that consumer loan is voidable and the licensee has no right to collect or receive any principal, finance charges or other fees in connection with that consumer loan."); A.R.S. § 6-613(A)(2) ("If the original principal amount of a consumer loan is more than five thousand dollars, the licensee has no right to collect or receive any finance charges in connection with that consumer loan."); *see* A.R.S. § 6-613(A)(3)–(4) (making similar distinction for consumer revolving loans and home equity revolving loans by allowing recovery of principal only for loans over $5,000); A.R.S. § 6-613(B) (unlicensed consumer lender has no right to "collect, receive or retain any principal, finance charges or other fees in connection with that consumer lender loan").

The CLA's prohibition on compounding interest on finance charges in § 6-633 differentiates between principal and finance charges. *See* A.R.S. § 6-633(C) ("A licensee may compute finance charges only on the unpaid principal balance, allowed additional fees and prepaid finance charges. A licensee shall not compound finance charges."). And, finally, the CLA section discussing terms and payments distinguishes between principal and finance charges. *See* A.R.S. § 6-637(B) ("The note evidencing a consumer loan shall provide for the scheduled repayment of principal and finance charges in approximately equal periodic installments."); A.R.S. § 6-637(F) ("A licensee shall permit a consumer to prepay any scheduled installment or additional amount due on any consumer lender loan in advance at any time during the licensee's regular business hours, but the licensee may apply that prepayment first to all finance charges accrued through the date of that prepayment.").

If the principal amount of earned wages constitutes finance charges, then the distinction drawn in the foregoing statutes between principal and finance charges would make little sense and the term "principal" in each would be rendered largely superfluous. That result strongly militates against adopting an interpretation of "finance charges" that encompasses principal. *See Orbitz*

Worldwide Inc., 247 Ariz. at 239 ¶16 (explaining that courts look to a code "as a whole and attempt to give meaning 'to every word and provision so that no word or provision is rendered superfluous.'" (citations omitted)); *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 406 ¶28 (2020) (emphasizing that courts "give meaning to 'each word, phrase, and sentence . . . so that no part will be void [sic], inert, redundant, or trivial.'" (citation omitted)).

The Office is aware that certain EWA products may charge the consumer a fee. But so long as any fee charged falls within the fees described in A.R.S. § 6-635(A), an EWA product will not be considered to have imposed a finance charge because the CLA stipulates that the term "finance charge" does not "include other fees allowed pursuant to § 6-635." A.R.S. § 6-601(11). For example, the CLA permits "[a] loan origination fee of not more than five percent of a closed end consumer loan" and that is not more than $150. *See* A.R.S. § 6-635(A)(4).

An EWA provider may also receive revenue through services ancillary to providing an EWA product without converting the EWA product into a "loan" under the CLA. For example, an EWA provider may request a voluntary gratuity, charge a fee for an expedited transfer of an EWA payment, or earn interchange revenue from money spent using a payment card. So long as an EWA provider does not condition providing an EWA product on receipt of any such ancillary revenue or otherwise impose a fee or charge falling within the CLA's definition of "finance charge," the EWA product will not meet the CLA's definition of a "consumer loan."

In sum, the obligation to repay principal does not fall within the statutory definition of "finance charge." Instead, the term "finance charge" refers to charges other than repayment of principal, and a contractual arrangement that merely requires the repayment of principal with no interest or fees, other than those permitted under A.R.S. § 6-635, does not qualify as a "consumer

loan" under§ 6-601(7) and does not require licensure by the department of insurance and financial institutions.[4]

Conclusion

An EWA product that is "non-recourse" and does not charge any interest or other fees to access wages is not a "loan" as defined in A.R.S. § 6-601(7). Thus, a provider of such an EWA product is not required to obtain a license as a "consumer lender" under the CLA.

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[4] There is no indication that an EWA product as described in this Opinion is an indirect means of obtaining interest or "finance charges," and therefore licensure is not required under A.R.S. § 6-603(B), which applies "to any person who seeks to avoid [the CLA's] application by any device, subterfuge or pretense."