

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-877

FILED
APR 13 2009
SUPREME COURT CLERK

MEMBERS CHOICE CREDIT UNION,
BEACON COMMUNITY CREDIT UNION,
SERVICE ON CREDIT UNION,
C & O CREDIT UNION, GREATER
KENTUCKY CREDIT UNION, INC. and
KENTUCKY EMPLOYEES CREDIT UNION

APPELLANTS

VS: **APPEAL FROM THE KENTUCKY COURT OF APPEALS
NO. 2007-CA-002384**

HOME FEDERAL SAVINGS AND LOAN
ASSOCIATION

APPELLEE

BRIEF OF APPELLANTS,

MEMBERS CHOICE CREDIT UNION,
BEACON COMMUNITY CREDIT UNION,
SERVICE ON CREDIT UNION,
C & O CREDIT UNION, GREATER
KENTUCKY CREDIT UNION, INC. and
KENTUCKY EMPLOYEES CREDIT UNION

Submitted by:
David T. Wilson II
550 W. Lincoln Trail Blvd.
P.O. Box 610
Radcliff, Ky 40160

The Undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail on April 19, 2009: Hon. Phillip J. Shepherd, Franklin Circuit court, P.O. Box 678, Frankfort, Ky 40602-0678; Jill F. Endicott, Woodward, Hobson & Fulton LLP, 101 South Fifth St., Suite 40202, Louisville, Ky 40202, counsel for Appellee; and to Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

The undersigned does hereby certify that the record on appeal has not been removed by counsel for the Appellants.



David T. Wilson II

Introduction

The Members Choice Credit Union, Beacon Community Credit Union, Service One Credit Union, C & O Credit Union, Greater Kentucky Credit Union Inc., and Kentucky Employees Credit Union appeal from a judgment construing KRS286.6-107(2) to preclude credit union membership based upon where an individual resides.

Statement Concerning Oral Argument

The Appellant requests oral argument. The issue presented in this case is a matter of statutory interpretation, which is best resolved through oral argument.

Statement of Points and Authorities

I. ARGUMENT

KRS 286.6-107.....	2,3,4,5
Credit Union Model Act of 1979.....	2,4,5
KRS 290.080 (repealed).....	3,4,5

1. Kentucky Rules of Statutory Interpretation

Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co., 250

S.W.3d 321, 325 (Ky. 2008).....	6
---------------------------------	---

<u>Commonwealth, Cent. State Hosp. v. Gray</u> , 880 S.W.2d 557 (Ky. 1994) ...	6
--	---

Richardson v. Louisville/Jefferson County Metro Government, 260

S.W.3d 777, 779 (Ky. 2008)	6
----------------------------------	---

<u>George v. Scent</u> , 346 S.W.2d 784, 789 (Ky. 1961)	6
---	---

<u>Brooks v. Meyers</u> , 279 S.W.2d 764 (Ky. 1955)	7
---	---

KRS 446.080	7
-------------------	---

2. Possible Interpretations of KRS 286.6-107(2)

KRS 286.6-107	7,8,9,11,12,13,14
---------------------	-------------------

Black's Law Dictionary (8 th ed. 2004)	8,12
---	------

a. Narrow Reading of Membership

KRS 290.080 (repealed)	8,10,12
------------------------------	---------

Credit Union Model Act of 1979.....	8,10
-------------------------------------	------

<u>Commonwealth, Cent. State Hosp. v. Gray</u> , 880 S.W.2d 557 (Ky. 1994)...	12
---	----

b. Expansive Reading of Membership

George v. Scent, 346 S.W.2d 748, 789 (Ky. 1961) 13

Brooks v. Meyers, 279 S.W.2d 764 (Ky. 1995) 13

KRS 446.080 13

National Credit Union Administration (17 March 2009)
www.ncua.gov/CreditUnionDevelopment/aboutCUs.html 13

Kentucky Mountain Coal Company v. Whitt, 358 S.W.2d 517 (Ky.
1962) 14

c. The Expansive Interpretation is not Limitless.

In National Credit Union Administrative v. First National Bank &
Trust Co., 522 U.S. 479, 502 (1998)..... 14

II. Conclusion

KRS 286.6-107 16

STATEMENT OF THE CASE

The Department of Financial Institutions (formerly known as the Office of Financial Institutions (“OFI”)) charters, regulates and supervises financial institutions in Kentucky, including banks, trust companies, savings and loan associations and credit unions. In 1984, the General Assembly enacted KRS 290.107 (now KRS 286.6-107), which defines membership for credit unions chartered and regulated by the OFI. Since the enactment of the statute in 1984, OFI has allowed community and geographic fields of membership for credit unions.¹ (R., Vol. 1, p. 543)

In May 2006 the Respondent, Home Federal Savings and Loan (“Home Federal”), filed a petition for declaratory judgment against OFI in Franklin Circuit Court. (R., Vol 1, p. 1) Home Federal is a federally chartered thrift located in Ashland, Kentucky. Home Federal alleged that OFI acted outside the scope of its authority by allowing community based charters because community (or geographic) fields of membership are not authorized under KRS 286.6-107. Home Federal alleged that because geographic fields of membership are not authorized under the enabling legislation, OFI’s action was in excess of its authority and therefore violated the separation of powers doctrine by allowing OFI to exercise legislative powers. (R., Vol. 1, p. 1)

In March 19, 2007 the Appellants, being six (6) credit unions regulated by OFI, were granted leave to intervene as defendants. (R., Vol. 1, p 185)

All parties to the Franklin Circuit Court litigation submitted motions for summary judgment. The trial court concluded that OFI was not authorized to allow state chartered credit unions to have geographic fields of membership. The trial court prospectively

¹ The term “geographic” or “community” field of membership refers to permitting an individual to be a member of a state chartered credit union based upon where the individual resides.

enjoined OFI from approving Credit Union by-laws allowing geographic fields of membership. The trial court also enjoined the intervening credit unions from “accepting new members whose only basis for membership is a ‘common bond of interest that is based on geography.’ Order, Franklin Circuit Court, (Appendix 2, p. 13).

On appeal, the Court of Appeals affirmed the trial court’s ruling regarding the issue of standing and the exhaustion of administrative remedies. (Appendix 1). As to the central issue of the appeal, namely the trial court’s interpretation of KRS 286.6-107, the Court of Appeals adopted verbatim the trial court’s opinion interpreting and applying the membership statute (KRS 286.6-107).

I. Argument

Not all citizens of the Commonwealth of Kentucky are permitted to utilize a credit union for the purposes of conducting their financial affairs. Unlike a traditional state chartered bank, one cannot utilize a state chartered credit union until one becomes a “member”. The pre-requisites to membership in a state chartered credit union are set forth in KRS 286.6-107(2). At issue is whether or not Kentucky’s membership statute, KRS 286.6-107(2), permits membership predicated on where an individual resides. Membership in a state chartered credit union predicated upon where an individual resides is often referred to as a “geographic field of membership.”

In reaching its conclusion that KRS 286.6-107(2) precluded credit union membership predicated upon where one resides, the Court of Appeals compared the membership statute that was enacted to other versions of the membership statute that were considered but not passed by the 1984 General Assembly. Specifically, the Court of Appeals compared KRS 286.6-107(2) to the Credit Union Model Act of 1979 (Appendix

3) and to Senate Bill 255 which was introduced February 14, 1984 and amended in the Senate Committee Substitute on February 28, 1984. (Senate Bill 255 is found on page 13 of the Court of Appeals Opinion (Appendix 1). What the Court of Appeals did not consider was KRS 290.080 (Appendix 4), the statute regulating credit union membership that was replaced by KRS 286.6-107(2).

The membership statute prior to 1984, the statute as passed, and the other two versions referenced by the Court of Appeals are set forth on the following page. The Act prior to 1984 is found at Appendix 4 and the Act adopted by the 1984 Legislature is set forth at Appendix 5.

286.6-107(2) (enacted 1984)

Credit Union membership shall be limited to persons having a common bond of similar occupation, association or interest.

290.080 (repealed)

Membership in each corporation shall be limited to those persons, societies, associations, partnerships, and corporations, which independent of their membership in the credit union, have a mutual affiliation by either:

- a) Duly enrolled membership in a religious, social or educational group or association;
- b) Identity of profession, occupation, trade or business so long as members of such profession, occupation, trade or business are bona fide members of a common bona fide profession, occupation, trade or business group;
- c) Identity of their employer; or
- d) Location for common residential or occupational purposes, within an area to be defined in the bylaws, containing, at the time the credit union is organized, not more than two thousand persons, societies, associations, partnerships, or corporations eligible to become members of such credit union.

Model Act

Credit Union membership may include, but is not necessarily limited to groups having a common bond of similar occupation, association or interest, or to groups who reside within an identifiable neighborhood, community, or rural district, or to employees of a common employer, or to persons employed within a defined business district, industrial park or shopping center, and members of the immediate family of such persons.

Senate Bill 255

Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest, or to persons who reside within an identifiable neighborhood, community, rural district, or to employees of a common employer (sic), or to persons employed within a defined business district, industrial park or shopping center, and members of the immediate family of such persons.¹

¹ The Senate Committee Substitute deleted all of the definition set forth above following the word "interest."

The Court of Appeals held as follows:

- a. The legislature considered and rejected the option of allowing community based, or geographic, fields of membership for credit unions. OFI cannot expand its legislative mandate by administrative fiat. (Court of Appeals opinion p. 10);
- b. The second section of Kentucky's statute, however, deleted the portion of the model language that specifically authorized geographic fields of membership (Court of Appeals opinion p. 11);
- c. Thus, it is clear that the legislature considered and rejected the proposal to allow for geographic fields of membership in credit unions (Court of Appeals opinion p. 13);
- d. The statute makes no mention of geographic fields of membership. OFI has interpreted this silence as authorizing geographic fields of membership, notwithstanding the clear legislative history that demonstrates that geographic fields of membership were proposed and rejected by the General Assembly (Court of Appeals opinion p. 18).

According to the Court of Appeals, the General Assembly contemplated geographic based membership and rejected same. Therefore, OFI is precluded from allowing membership in a state chartered credit union predicated upon where one resides.

The General Assembly contemplated different versions of the membership statute and ultimately selected the one now codified at 286.6-107(2). Both versions contemplated by the 1984 General Assembly (the Model Act and Senate Bill 255) extended credit union membership to the following:

Persons/groups having a common bond of similar occupation, associate or interest, or

Persons/groups who reside within an identifiable neighborhood, community, or rural district, or

Employees of a common employer, or

Persons employed within a defined business district, industrial park or shopping center, and

Members of the immediate family of such person

1. Kentucky Rules on Statutory Interpretation

In Kentucky, “statutory interpretation is a question of law” that is reviewed by the Supreme Court *de novo*. Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co., 250 S.W.3d 321, 325 (Ky. 2008). When a court reviews statutory interpretation, it must presume “that the legislature did not intend an absurd result.” Commonwealth, Cent. State Hosp. v. Gray, 880 S.W.2d 557 (Ky. 1994). The goal of the Court “in construing a statute is to give effect to the intent of the General Assembly.” Richardson v. Louisville/Jefferson County Metro Government, 260 S.W.3d 777, 779 (Ky. 2008).

“To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning. Id. “The statute must be read as a whole and in context with other parts of the law.” Id. “The presumption is that the Legislature intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act.” George v. Scent, 346 S.W.2d 784, 789 (Ky. 1961). “It is elementary that a Statute should be

construed, if possible, so that no part of it is meaningless or ineffectual.” Brooks v. Meyers, 279 S.W.2d 764, 765 (Ky. 1955).

KRS 446.080 states that “all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.” KRS 446.080(1). In addition, “all words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.” KRS 446.080(4).

2. Possible Interpretations of KRS 286.6-107(2)

In its entirety, KRS 286.6-107 states:

- (1) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed to one (1) or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.
- (2) Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest.

The language of KRS 286.6-107(2) is ambiguous. KRS 286.6-107(2) provides no insight into what qualifies as a “common bond”, or what can be properly categorized as a “similar occupation, association or interest.” If the Court relies on the “plain and ordinary meaning” of the language in the statute, it seems that what occurs is something completely unworkable. “Occupation” is understood to be “an activity or pursuit in

which a person is engaged.” Black’s Law Dictionary (8th ed. 2004). “Association” is “the process of mentally collecting ideas, memories, or sensations; a gathering of people for a common purpose,” or “an unincorporated organization that it not a legal entity separate from the persons who compose it.” *Id.* “Interest” is “the object of any human desire” or “a legal share in something.” *Id.* These definitions do nothing to clarify who falls within the membership groups of “persons having a common bond of similar occupation, association or interest.” KRS 286.6-107(2).

This case presents a situation in which the Court must choose: (1) whether the membership statute rejected every form of membership considered during debate and not explicitly stated in the statute (Court of Appeals decision) or (2) whether the membership provision was intended to implicitly include, through its broad and inclusive language, the areas discussed during the debates.

a. Narrow Reading of Membership Statute

The Court of Appeals and the Circuit Court held that any form of membership which the legislature considered, but did not explicitly include in the enacted statute, was rejected as a criteria for credit union membership. Membership based on residency was permitted under the previous membership statute (KRS 290.080) and obviously contemplated by the Model Act and Senate Bill 255. However, it was omitted from the enacted statute and, therefore, the Court of Appeals held that such a membership criteria was obviously contemplated and rejected.

The interpretation adopted by the Court of Appeals leads to a bizarre outcome when applied to other traditional basis of credit union membership. For instance, if the

Court of Appeals has correctly interpreted KRS 286.6-107(2), then membership previously extended to employee groups was intentionally withdrawn by the 1984 General Assembly. If so, the single largest source of credit union membership, employee groups, would be stricken as a basis for credit union membership. State chartered credit unions would no longer be able to serve their core constituency. In fact, it is unclear whom, if anyone, a state chartered credit union could serve.

A review of the core constituency of the six appellants is illustrative. Members Choice Credit Union in Ashland, Kentucky was originally formed by the employees of Armco Steel. Beacon Community Credit Union was originally formed by the employees of the now closed Naval Ordnance Station in Louisville. (Appendix 6) Service One Credit Union in Bowling Green, Kentucky was originally formed by the employees of Western Kentucky University. (Appendix 7). C&O Credit Union was formed by employees of the Chesapeake and Ohio Railroad in 1929. (Appendix 8). The Greater Kentucky Credit Union, Inc. was originally comprised of employees of General Telephone. (Appendix 9). Lastly, the Kentucky Employees Credit Union was originally comprised of employees of the State of Kentucky. Each of these credit unions was originally chartered by the Department of Financial Institutions or its predecessors. Each of the six Appellants was in existence and conducting business prior to the 1984 modernization of the Credit Union Act by Kentucky's Legislature. The core membership of each Appellant was and is employee groups.

An additional category of membership under the Model Act and Senate Bill 255, which was omitted from KRS 286.6-107(2), is membership for "persons employed within a defined business district, industrial park or shopping center". Application of the Court

of Appeals' logic dictates that membership would now be denied these citizens of the Commonwealth.

The holding of the Court of Appeals would also necessitate a finding that the 1984 General Assembly intentionally acted to exclude members of the last category under the Model Act – “members of the immediate family of such persons.” Can it be seriously contemplated that the wife and children of a credit union member would lose their membership rights upon the death of their husband/father? Is it logical to infer such was the intent of the Kentucky's lawmakers in 1984? Alternatively, has the interpretation by the Court of Appeals triggered the law of unintended consequences i.e. a credit union act regulating credit unions without members?

If the Court of Appeals is correct, not only geographic fields of membership, but nearly every basis of credit union membership authorized prior to 1984 by KRS 290.080 (repealed) (Appendix 4) set forth above was “considered and rejected” by the General Assembly. Court of Appeals Opinion p. 13. According to the Court of Appeals interpretation, citizens previously entitled to membership, but inexplicably excluded by the 1984 General Assembly, include the following:

- A.) Persons with a mutual affiliation as a result of enrollment in a religious, social or educational group (persons in such an “association” apparently retain membership privileges)
- B.) Persons with a mutual affiliation by identity of profession, trade or business; (membership predicated on “occupation” survives the modernization of the Act)
- C.) Persons with a mutual affiliation by identity of their employer;
- D.) Persons with a mutual affiliation by location for common residential or occupational purposes;

Since the above criteria were the only basis of credit union membership prior to 1984, the logic of the Court of Appeals would mean that nearly every basis for membership was “considered and rejected”, in favor of membership describe in a single sentence – “Credit union membership shall be limited to persons having a common bond of similar occupation, association or an interest.” KRS 286.6-107(2). Can it be seriously considered that virtually every criterion for membership was rejected in favor of the nebulous and undefined phraseology of KRS 286.6-107(2)?

There also exists the issue of Fancy Farm Credit Union <http://www.fancyfarmcreditunion.com/>. Fancy Farm Credit Union was founded in 1957 as a state chartered credit union with a geographic field of membership. (Appendix 10). The trial court Opinion and Order (Appendix 2, p 2 and p 11) discusses the plight of Fancy Farm Credit Union. The trial court found that Fancy Farm is “a perfect example of a community that arguably has a common bond of similar interest.” Trial Court Opinion and Order. (Appendix 2, p 11)

Appellants offer two observations as to Fancy Farm. One, it is exceedingly improbable that the 1984 General Assembly intended to decommission Fancy Farm Credit Union by revoking geographic fields of membership, the opinion of the Court of Appeals (Appendix 1, p 13 “considered and rejected”) notwithstanding. Second, the trial court’s opinion that Fancy Farm Credit Union, and its geographic field of membership, would still qualify as a state chartered credit union because of its “common bonds” validates Appellant’s contention that the language found in KRS 286.6-107(2) is broad and inclusive.

Of course, there exists no evidence that the General Assembly in 1984 intended to expel members from state chartered credit unions. There are no minutes reflecting discussion and debate within any house or senate sub-committees, nor is there any record reflecting debate on the floor of either house. What is known is that in 1984 the entire Credit Union Act was modernized. The Court of Appeals concluded that the 1984 General Assembly modernized the entire act relative to credit unions, but at the same time rejected virtually all forms of membership found in the proposed Model Act or the existing membership statute. (KRS 290.080) (repealed). This interpretation leads to an absurd result, which is not favored under Kentucky law Commonwealth of Kentucky, Central State Hospital v. Gray, 880 S.W. 2d 557, 559 (Ky. 1994).

b. Expansive Reading of Membership Statute

The alternative interpretation of KRS 286.6-107(2) is that the General Assembly, in lieu of a laundry list type membership statute, opted for broad verbiage which would encompass not only existing members but also membership predicated on other not yet specifically identified factors. Hence, the selection of the inclusive language “common bond of similar occupation, association for interest.” The Court is reference to the definition of “association” found in Black’s Law Dictionary (8th ed. 2004). “A gathering of people for a common purpose.”

There is little legislative history to help the Court decide what the legislative intent was when the Legislature passed KRS. 286.6-107 in 1984. However, when addressing an issue of statutory interpretation the Court must assume that:

(1) “the Legislature intends an Act to be effective as an entirety.” George v. Scent, 346 S.W.2d 784, 789 (Ky. 1961);

(2) “the cardinal rule (is) that significance and effect shall, if possible, be accorded to every part of the Act.” *Id.*;

(3) “a statute should be construed, if possible, so that no part of it is meaningless or ineffectual.” Brooks v. Meyers, 279 S.W.2d 764 (Ky. 1995); and

(4) “all statutes of this state shall be liberally construed with a view to promote their objects.” KRS 446.080.

Credit unions have a long history of service in the Commonwealth of Kentucky. “Most credit unions are organized to serve people in a particular community, group or groups of employees, or members of an organization or association.” National Credit Union Administration (March 17, 2009).

www.ncua.gov/CreditUnionDevelopment/aboutCUs.html. The Model Act of 1979 was an attempt to modernize credit unions, not eliminate the traditional functions of credit unions and overhaul their membership.

Subtitle 6 of KRS 286, (Appendix 5) Credit Unions, read in its entirety leads logically to the conclusion that the Legislature intended 286.6-107(2) to be read broadly. It is fundamental that for the “Act to be effective as an entirety” there must be a group of individuals who qualify for membership in the credit unions. George v. Scent, 346 S.W.2d 784, 789 (Ky. 1961). Under the narrow interpretation of KRS 286.6-107(2) that the Court of Appeals has put forth, it is uncertain who, if anyone, qualifies for membership in credit unions, and it appears that the core membership groups on which credit unions were built are now excluded. Thus, the entire Act becomes meaningless and ineffective. More likely, the broad verbiage of 286.6-107(2) was intended by the Legislature to include the traditional area of membership and membership groups.

In construing a statute, the courts are called upon to consider the purpose which the statute is intended to accomplish. Kentucky Mountain Coal Company v. Whitt, 358 S.W.2d 517 (Ky. 1962). The presumption is that the legislature intended an act to be effective as an entirety. See George v. Scent, 346 S.W.2d 784 (Ky. 1961). When the statute is reviewed in its entirety, the more appropriate interpretation of the enacted membership statute is that it includes all preexisting membership groups as well as those envisioned by the Model Act and SB 55. This interpretation is consistent with the objective of modernizing the credit union statute as a whole.

c. The Expansive Interpretation is not limitless.

In National Credit Union Administrative v. First National Bank & Trust Co., 522 U.S. 479, 502 (1998), the Court stated that credit union membership must be limited. The Circuit Court and Court of Appeals is concerned that an expansive view of KRS 286.6-107(2) would render credit union membership limitless. However, the Circuit Courts interpretation of KRS 286.6-107(2) makes the entire statute meaningless because it seems that virtually no one qualifies for membership.

The expansive interpretation is not limitless. The statute still requires that persons seeking membership to have a "common bond." KRS 286.6-107(2). The 1984 General Assembly intended by its comprehensive revision of the Credit Union Act to maintain the traditional membership groups it discussed and to reform the statute to conform to the modern trends in the industry articulated in the Model Act of 1979. This conclusion is implicit in the fact the Legislature did not do away with the concept of a credit union, but rather took the steps required to modernize the Act.

II. Conclusion

For the reasons set forth above, the Appellant contends that the Court of Appeals has misconstrued KRS 286.6-107 pertaining to credit union membership. Moreover, the question is of significant import as it directly affects the rights of citizens of the Commonwealth to access financial services afforded to them by state chartered credit unions.

Respectfully submitted,



David T. Wilson II
Attorney for Appellants
SKEETERS, BENNETT, WILSON & PIKE
550 W. Lincoln Trail Blvd.
Radcliff, Ky 40160
270-351-4404