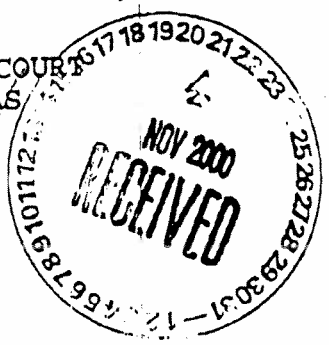
CLEARINGHOUSE # 53,502 TILA Loc. 7.5.5.



IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

TERESA BALLARD, KENISHA BRYANT,
ROBERT ROBEY, CHERYL KING,
RICHARD LYNN, CRYSTAL LUEBBERS,
And all others similarly situated — PLAINTIFFS

v. Civil No. 00-5100

AA CHECK CASHERS, INC.,
d/b/a Pay Day Check Cashers, et al. — DEFENDANTS

ORDER OF DISMISSAL

NOW on this 20 day of November, 2000, comes on for consideration a number of motions for dismissal (documents #26, #34, #60, #81, #90, #97, #112, #114, #143, #153, #155, #157, #180, #228, #253, #272, #282, and #290) and the Court, being well and sufficiently advised and having conducted a hearing on all pending motions on Friday, November 3, 2000 in which all interested parties appeared by and through counsel of record, finds as follows:

1. On May 16, 2000, the plaintiffs, on behalf of themselves and others purporting to be similarly situated, filed this action against more than fifty (50) entities and individuals generally comprised of corporations engaging in the check cashing business and their shareholders, former shareholders, officers, and sureties or insurance companies.

2. Plaintiffs seek declaratory and injunctive relief as

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well as damages from the defendants.

They have asserted claims under the Truth In Lending Act, 15 U.S.C. § 160 *et seq.*, the Arkansas Check Cashers Act, Ark. Code. Ann. § 23-52-101, *et seq.*, the Arkansas Constitution, Art. 19 § 13, and the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 *et seq.*

Plaintiffs also allege a claim for civil conspiracy under Arkansas' common law.

Plaintiffs contend that one or more of the defendants named herein owned or operated check cashing businesses under the auspices of the Arkansas Check Cashers Act whereby they repeatedly loaned small amounts of money to one or more of the plaintiffs at interest rates in violation of the Arkansas constitution. They allege that these defendants engaged in a civil conspiracy to "commit the illegal and immoral act of loaning money to the plaintiffs at usurious rates." Plaintiffs also contend these transactions, arguably "loans," violated the Truth in Lending Act because specific credit disclosures were not made to the plaintiffs in connection with each of their transactions.

(a) The transactions of which plaintiffs complain may be generally described as follows:

* a plaintiff presents to a check casher a personal check made payable to that check casher for a certain amount of money plus certain transaction "fees."

* Cash is then returned to plaintiff in an amount equal to

the face value of the personal check less the total of the transaction "fees" owed the check casher.

* The terms of a typical transaction require the check casher to hold the personal check for a short period of time, agreeing not to present or deposit the check for payment until an agreed upon presentment date ("deferred presentment date").

* The typical agreement normally permits plaintiff to redeem the personal check on or before the end of the deferred presentment date by returning to the check casher an amount of cash equivalent to the face amount of the check.

(b) In their complaint, plaintiffs say defendants intentionally mischaracterized their "fees" as ones for the service of deferring presentment of the check for payment. They say these "fees" are more properly characterized as interest because these "fees" represented defendants' charge for the use of money given to plaintiffs. Plaintiffs argue that the cash advances were actually "loans" with the deferment -- or "hold period" -- constituting the term of the loan. Thus, they conclude, since defendants failed to comply with the credit disclosures required by the Truth in Lending Act, they are in violation of the said Act and plaintiffs are entitled to the relief they seek.

(c) In addition to the foregoing allegations, plaintiffs further contend:

* that defendants intentionally took advantage of their known precarious financial situations by charging usurious rates

on these "loans"; and

* that part of defendants' scheme included encouraging plaintiffs to "rollover" their cash advances, or, in other words, to renew the cash advances ("loan") by paying an additional "fee" (more usurious interest) and in return, defendants would forbear collection of the actual cash advance for another short period of time. Thereafter, if customers did not redeem or rollover the cash advance, defendants would deposit plaintiffs' checks and thereafter threaten plaintiffs with prosecution if their checks were not honored by their banks.

3. It is noted by the Court that one of the plaintiffs, Crystal Luebbers, filed an earlier state court action making many of these same state law claims against check cashers. *See Crystal Luebbers, an Individual and all others similarly situated v. Money Store, Inc., et al.*, CASE NO. CIV. 2000-11-1, in the Circuit Court of Benton County, Bentonville, Arkansas.

On April 6, 2000, Benton County Circuit Judge Tom Keith dismissed plaintiffs' action by upholding the constitutionality of a challenged section of the Arkansas Check Cashers Act which denominates check cashing charges as "fees" and not "interest" and provides that the transaction is not a "loan." *See* Ark. Code Ann. § 23-52-104(b) (1999). Judge Keith's ruling as to the constitutionality of this subsection is currently on appeal before the Arkansas Supreme Court.

4. Plaintiffs' complaint has been served on most of the

have the power to entertain only cases they have been authorized to hear by the Constitution or Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Godfrey v. Pulitzer Publ'g Co.*, 161 F.3d 1137 1141 (8th Cir. 1998). As stated above, the sole basis for this Court's exercise of subject matter jurisdiction over plaintiffs' complaint under 28 U.S.C. § 1331 is the Truth In Lending Act, 15 U.S.C. § 160. However, in addition to their claim under the Truth in Lending Act, plaintiffs request this Court to hear their state law claims by exercising pendent jurisdiction over them. 28 U.S.C. § 1367(a).

Defendants' F.R.Civ.P.12(b)(1) motions challenge this "court's jurisdiction -- its very right to hear the case." *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). Accordingly, when dealing with such a challenge, the Court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* "[N]o presumptive truthfulness attaches to the plaintiffs' allegations, and the existence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims." *Id.* Plaintiffs bear the burden of establishing jurisdiction[1] and the Court has the authority to consider matters outside of the pleadings when determining the existence of subject matter jurisdiction. *Drevlow v. Lutheran Church*, 991 F.2d 468, 470 (8th Cir. 1993). With the

[1] *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

foregoing authorities in mind, the Court will examine the TILA claims more closely.

(a) The purpose of TILA is to promote the informed use of consumer credit by requiring consumer lenders to disclose interest rates and certain other information deemed critical by Congress. *See* 15 U.S.C. § 1601(a). The Act requires, *inter alia*, creditors to disclose the cost of credit as a dollar amount (the "finance charge") and as an annual percentage rate ("APR") in the hope that uniformity in credit disclosures will assist consumers in comparison shopping. *See* 12 C.F.R. § 226.

(b) Congress has specifically authorized the Federal Reserve Board to promulgate regulations that "provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *See* 15 U.S.C. § 1604(a).

(c) Congress did issue certain regulations -- among which was Regulation Z.

A clarification to the official commentary concerning Regulation Z -- issued by the Federal Reserve Board and published on Friday, March 31, 2000 -- attempted to rectify confusion among the courts as to TILA's application to check cashing transactions.

The clarification states in unambiguous language that TILA applies to such transactions:

> For the reasons discussed below, comment 2(a)(14)-2 [to Regulation Z] is adopted to clarify that payday loans,

> and similar transactions where there is an agreement to defer payments of a debt, constitute credit for the purposes of TILA.

See 65 Fed. Reg. 17130.

The Supreme Court has held that "absent some obvious repugnance to the statute," the Federal Reserve Board's regulations implementing TILA should be accepted by the courts, *see Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). *See also* 15 U.S.C. § 1604(a) (Congress has authorized the Federal Reserve Board to make regulations with the force of law).

The Court sees no obvious repugnance in the language quoted nor is it aware of any authority calling the authority of the regulation into question. Accordingly, the Court believes it appropriate to defer to the Federal Reserve Board's official interpretation of TILA as it applies to "payday loans" or -- as such are described in plaintiffs' complaint -- check cashing transactions. The Court notes in passing that its conclusion on this point is shared by another Arkansas Western United States District Judge (Hon. Robert T. Dawson) contained in the case of *Gary Cox, et al. v. AA Check Cashers, Inc. et al.*, Civil No. 00-2030, Western District of Arkansas, Fort Smith Division.

9. In this Court's view however, the pivotal question is not whether TILA currently applies to check cashing transactions -- but, rather, whether TILA applied to the transactions at issue in this case which all occurred prior to the issuance of Federal Reserve Board's March, 2000, clarification. A close scrutiny of

this question is required because, on its face, the clarification seems to clearly provide that compliance with TILA is "optional" for a period of time:

> DATES: This rule is effective March 24, 2000. **Compliance is optional until October 1, 2000.**

See 65 Fed. Reg. 17129 (emphasis added).

(a) On the one hand, defendants point out that plaintiffs' transactions pre-date the Federal Reserve Board's clarification establishing TILA's application to check cashing transactions, Accordingly, they argue the language "optional until October 1, 2000" means that compliance with TILA's disclosure requirements was not mandated until October 1, 2000 -- a date long after plaintiffs' challenged transactions had been concluded.

(b) Plaintiffs, on the other hand, say the clarification represented no change in the law and point to language therein stating that the amended comment to Regulation Z "does not present a change in the law." Accordingly, say plaintiffs, a clarification only -- not a substantive change -- was intended by the Federal Reserve Board's amendment.

Arguing that a number of courts have applied TILA's requirements to these types of credit extension, plaintiffs contend that TILA's disclosure requirements reach back to the dates of plaintiffs' check cashing transactions. Plaintiffs argue that the "optional" language contained in the Federal Reserve Board's March, 2000, clarification applies only to changes contained therein and that application of TILA was not a "change

in the law."

(c) While the Court expresses its opinion that the clarification could have been made more "clear", the Court is obliged to apply a plain meaning to it. That application leads the Court to conclude that, while there may have not been a "change" in the law (by the clarification), the Federal Reserve Board included the "optional" language therein to provide check cashers a compliance period until October 1, 2000 -- after which date compliance would be mandatory and before which time it was not.

(d) Plaintiffs have provided citation to decisions outside of this Circuit wherein courts have applied TILA's disclosure requirements to check cashing transactions. Notably, plaintiffs have not cited a case wherein a court decided the precise issue now being considered and the Court of Appeals for the Eighth Circuit has not answered this question.

(e) The Court is more persuaded by the actual language employed by the Federal Reserve Board than by the cases cited by the parties.

In the Court's view, some of the language in the Board's Supplementary Information substantially undermines plaintiffs' argument that the Federal Reserve Board intended to mandate TILA application to check cashing transactions prior to October 1, 2000:

> TILA is implemented by the Board's Regulation Z (12 C.F.R. § 226). The Board's official staff commentary (12 C.F.R. § 226 (Supp. I) interprets the regulation, and provides guidance to creditors in applying the

regulation to specific transactions. The commentary is a substitute for individual staff interpretations; it is updated periodically to address significant questions that arise.

In November, 1999, the Board published proposed amendments to the commentary (64 FR 60368, November 5, 1999). The Board received more than 50 comment letters. Most of the comments were from financial institutions, other creditors, and their representatives. Comments were also received from state attorneys general, state regulatory agencies, and consumer advocates. **The comment letters were focused on the proposed comment concerning payday loans.** Most commenters supported the proposal. A few commenters, mostly payday lenders and their representatives, were opposed.

As discussed below, the commentary is being adopted substantially as proposed. Some revisions have been made for clarity in response to commenters' suggestions. The commentary revision concerning payday loans clarifies that when such transactions involve an agreement to defer payment of a debt, they are within the definition of credit in TILA and Regulation Z.

* * * *

The Board proposed to add comment 2(a)(14)-2 to clarify that transactions commonly known as "payday loans" constitute credit for purposes of TILA. These transactions may also be known as "cash advance loans," "check advance loans," "post-dated check loans," "delayed deposit checks," or "deferred deposit checks."

* * * *

Most commenters supported the proposal because they believed that payday loans are credit transactions. A few commenters opposed the proposal. These commenters questioned whether payday loans should be covered under TILA when applicable state law does not treat such as credit. They were concerned that Regulation Z would preempt state law where, for example, the transactions are regulated under check-cashing laws, and they also asserted that providing TILA disclosures would result in unnecessary compliance costs. These commenters also questioned whether disclosure of APR in such transactions provides consumers with useful information. One commenter asserted that the proposed comment's scope was unclear, and believed the comment might be interpreted too broadly, resulting in the application of Regulation Z to noncredit transactions. This commenter also suggested that payday lenders will be unable to

determine whether transactions are consumer credit or for an exempt purpose, such as business credit.

For the reasons discussed below, comment 2(a)(14)-2 is adopted to clarify that payday loans, and similar transactions where there is an agreement to defer payment of a debt constitute credit for purposes of TILA.

* * * *

TILA, as implemented by Regulation Z, reflects the intent of Congress to provide consumers with uniform cost disclosures to promote the informed use of credit and assist customers in comparison shopping. This purpose is furthered by applying the regulation to transactions, such as payday loans, that fall within the statutory definition of credit regardless of how such transactions are treated or regulated under state law.

* * * *

Comment 2(a)(14)-2 has been added as an example of a specific type of transaction that involves an agreement to defer payment of a debt. Because such a transaction falls within the existing statutory and regulatory definition of "credit," the comment does not represent a change in the law. **Generally, updates to the Board's staff commentary are effective upon publication. Consistent with the requirements of section 105(d) of TILA, however, the Board typically provides an implementation period of six months or longer. During that period, compliance with the published update is optional so that creditors may adjust their documents to accommodate TILA's disclosure requirements.**

See 65 Fed. Reg. 17129, 17130 (emphasis added).

The foregoing language, when read in its entirety and in context with the amended clarification issued by the Federal Reserve Board, persuades the Court to conclude that the TILA mandatory disclosures were not required of check cashers prior to October 1, 2000. Since plaintiffs' transactions occurred prior to that October 1,2000, TILA cannot form a basis for relief as

against the defendants and these claims must be dismissed.

10. It also follows that, as these claims are plaintiffs' only basis for the invocation of this Court's federal jurisdiction, plaintiffs' entire complaint is subject to dismissal unless the Court believes it appropriate to exercise pendent jurisdiction over plaintiffs' state law claims. 28 U.S.C. § 1367(c)(1).

The Court notes that the state law claims alleged herein appear premised entirely upon the constitutionality of relevant provisions of the Arkansas Check Cashers Act and, as previously noted, the Arkansas Supreme Court is currently in the process of addressing and resolving that precise issue. Accordingly, the Court believes it would be imprudent for it to consider those particular state law claims at this time and before this Court. The Court will, therefore, decline to exercise pendent jurisdiction over plaintiffs' state law claims.

11. The Court is mindful that not all defendants have challenged this Court's jurisdiction under TILA. However, as all parties have been afforded the opportunity to address the issue of whether TILA applied to the plaintiffs' challenged transactions, it is not inappropriate for this Court to dismiss plaintiffs' complaint in its entirety for lack of subject matter jurisdiction. *See Madewell v. Jones*, 68 F.3d 1030, 1049-50 (8th Cir. 1995) (grant of summary judgment in favor of all defendants was proper even though not all defendants had moved for summary judgment as nonmoving defendants' liability was founded on same facts and law

and all parties had opportunity to address the issue). Accordingly, the Court will dismiss plaintiffs' claims against all defendants.

12. In light of the foregoing rulings, the Clerk of the Court will be directed to dismiss all other pending motions as moot.

IT IS THEREFORE ORDERED AND ADJUDGED that this matter be, and it hereby is, dismissed as this Court lacks subject matter jurisdiction over plaintiffs' TILA claims and declines to exercise pendent jurisdiction over plaintiffs' state law claims which raise novel and complex claims of first impression now pending before the Arkansas Supreme Court. *See* 28 U.S.C. § 1367(c)(1).

IT IS FURTHER ORDERED that the Clerk of Court shall dismiss all other pending motions herein as moot.

IT IS SO ORDERED.

JIMM LARRY HENDREN
UNITED STATES DISTRICT COURT

U. S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

NOV 21 2000

CHRIS R. JOHNSON, Clerk
By _____ Deputy

This document entered on docket in compliance with Rule 58 and 79 (a) FRCP.

on 11-20-00 by _____

#53502

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

June 30, 2000

Amy Files-Boston
Amy, could you please send these to Clearinghouse & Lexis, & let me know to Clearinghouse numbers? They look like letters but I need decisions from judge. Thanks. — Carson

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Re: *Gholson v. SMC Corp.*, At Law No. 183561

Dear Counsel:

This matter came before the Court on March 10, 2000, upon the Defendant's demurrer and the plaintiffs' motion to amend their motion for judgment. At the conclusion of the hearing, the Court took the case under advisement. The Court has now considered fully the pleadings and arguments of counsel. For the reasons stated below, the demurrer will be overruled and the motion to amend will be granted.

The facts of this case, as alleged in the Motion for Judgment, are as follows. In March 1998, plaintiffs Mr. and Mrs. Gholson (the "Gholsons"), residents of Virginia, purchased a new mobile home from a dealership in Pennsylvania. The mobile home had a purchase price of nearly $160,000 and was manufactured by defendant SMC ("SMC") in Oregon. The dealer in Pennsylvania made no warranties of any kind and is not a party to this action. SMC, the manufacturer, made certain express warranties about the mobile home and its chassis.

The express warranty contained no choice of law provision. The language of the warranty suggests that SMC anticipated it would be interpreted under the laws of more than one state. Section 7 of the warranty concerning the chassis states, in pertinent part:

> 7. HOW STATE LAW APPLIES TO THIS WARRANTY:
>
> Please note: Some states do not allow the exclusion or limitation of incidental or consequential damages, or limitations on how long an implied warranty may last, so the above limitations or exclusions may not apply to you.
>
> This Limited Warranty gives you specific legal rights. You may also have other rights, which may vary from state to state . . . .

The Gholsons contend that their mobile home, far from being their dream home, is in fact a lemon. As of the time of the filing of the Motion for Judgment, the vehicle had been in the shop on five separate occasions for a total of eighty-one days. In a single-count Motion for Judgment, the Gholsons alleged causes of action for breach of express and implied warranties, violations of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, and violations of the Virginia Motor Vehicle Warranty Enforcement Act, Va. Code Ann. §§ 59.1-207.9 *et seq.*, (the "lemon law").

SMC filed a demurrer to the entire Motion for Judgment, alleging that the Gholsons' claims are governed by Pennsylvania's version of the lemon law, which does not cover "motor homes."

The Court first notes that, if SMC is correct that Pennsylvania's lemon law governs this case, at most the demurrer should be sustained to the Gholsons' Virginia lemon law claims. The Gholsons' claims of breaches of implied warranties, express warranties and the federal Magnuson-Moss Warranty Act would be unaffected by application of the Pennsylvania lemon law.

The Court concludes that the Gholsons may pursue their claims against SMC under the Virginia lemon law. The nature of a lemon law claim is that the manufacturer has failed, after reasonable efforts, to conform the defective vehicle to its warranties, or to accept a return of the vehicle and a refund of the purchase price, or to give the consumer a comparable vehicle. In this case, the breach of warranties or violation of the lemon law occurred, if at all, in Virginia.

SMC's express warranties to the Gholsons contained no choice of law provisions. Section 1-105 of the Uniform Commercial Code, Va. Code § 8.1-105, provides that, where the parties have not specified the law that governs their commercial transaction, Virginia's UCC will govern if the transaction has an "appropriate relation" to the Commonwealth.

The Court concludes that the Gholsons' claims have a "appropriate relation" to Virginia. SMC advertises in Virginia for Virginia residents to purchase their mobile homes. The Gholsons' $160,000 mobile home is not of the type that can be found readily at any local dealer. Instead, it is one of those behemoths that are sold regionally. The Gholsons proffer that, upon inquiry, they were directed to a dealer in Southern Pennsylvania. They traveled to Pennsylvania for the purpose of purchasing the mobile home. The purchase order was issued to them listing Fairfax, Virginia as their address. They returned with the mobile home to Virginia. SMC's attempts to comply with the warranty were made in Virginia. Under such circumstances, the Court concludes that Virginia law applies to the Gholsons' present claims. See, e.g., *Besser Co. v. Hansen,* 243 Va. 267, 415 S.E.2d 138 (1992).

For the foregoing reasons, the demurrer will be overruled.

After additional investigation, the Gholsons seek to amend their Motion for Judgment to include additional claims against SMC. At the time of the hearing, the Gholsons had not submitted a proposed amended motion for judgment. Therefore, SMC and the Court were left to speculate as to what new claims they might want to raise. The Gholsons have since filed their proposed amended

motion for judgment. As leave to amend should be freely granted, the Gholsons' motion to amend is granted. Any infirmities in the amended motion for judgment can be addressed by further responsive pleadings of SMC.

The Gholsons should file their amended motion for judgment within ten days of the entry of the order reflecting this ruling. SMC shall file responsive pleadings within ten days thereafter.

Will Mr. Swann please prepare an order reflecting the rulings contained in this letter, circulate it to Mr. Tiller for his endorsement, and present it to the Court within ten days for entry?

Sincerely,

Jane Marum Roush

Jane Marum Roush