



2005 - 6

**DEBORAH C. BENEFIELD**  
**JUDGE, SUPERIOR COURT**

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May 5, 2005

Sidney R. Barrett, Jr.  
Senior Assistant Attorney General  
40 Capitol Square S.W.  
Atlanta, GA 30334

**Re: JAG, LLC et al. v. John W. Oxendine, 2004-CV-3197-6**

Dear Mr. Barrett:

Judge Benefield has reviewed the Petition for Judicial Review filed by the petitioners in the above-referenced case and entered an Order affirming the decision of Commissioner Oxendine. A "General Civil Case Final Disposition Form" must be presented to the Clerk, pursuant to O.C.G.A. § 9-11-58(b). Please file this form within ten (10) days of the date of this letter.

Thank you for your attention to this matter.

Sincerely,

Lindsey C. Wade, Law Clerk to  
Judge Deborah C. Benefield

cc: Clerk's file  
Thomas C. James, III, Esq.  
Stephen L. Dillard, Esq.

Enc: (Order of 5/5/05)

IN THE SUPERIOR COURT OF CLAYTON COUNTY

STATE OF GEORGIA

JAG GA, LLC (f/d/b/a "Georgia Internet Cafe); Advance Long Distance, LLC; Operational Management, LLC; Corporate Services, Inc., N.W. (Washington) (a/k/a Corporate Services, Inc. N.W.); John Gill (a/k/a "J. Gill", "John A. Gill", and "John Allen Gill"),

CASE NO. 2004-CV-3197-6

Petitioners,

VS.

JOHN W. OXENDINE, individually and in his official Capacity as Industrial Loan Commissioner of Georgia,

Respondents.

UPY

JUDGMENT

On August 30, 2004, the petitioners in the above-styled case filed a petition for judicial review of the Final Cease and Desist Order (hereinafter referred to as the "Order") entered by John Oxendine, Industrial Loan Commissioner of Georgia (hereinafter referred to as the "Commissioner") on July 28, 2004. The Order required the petitioners to immediately cease their business operations in Georgia based on the Commissioner's finding that the businesses in question engaged in making loans in violation of O.C.G.A. § 7-3-1 *et seq.*, the Georgia Industrial Loan Act (hereinafter referred to as "GILA").

## **FINDINGS OF FACT**

Petitioners JAG GA, LLC d/b/a "Georgia Internet Cafe" (hereinafter referred to as "JAG GA") and Advance Long Distance, LLC (hereinafter referred to as "ALD") were two businesses, among others, operating in the state of Georgia that came under investigation by the Commissioner under suspicion that they were violating GILA by claiming to sell internet service and phone cards when they were actually engaged in making "payday loans". *See Notice and Order to Show Cause, attached as Exhibit 1 to Petition*, pp. 1, 5-13. On January 7, 2004, as a result of the investigation, Justin K. Durrance, Deputy Industrial Loan Commissioner of Georgia, entered a Notice and Order to Show Cause Order (hereinafter referred to as "Show Cause Order") calling for the above petitioners (as well as other entities associated with the petitioners who are not parties to these proceedings) to appear before the Commissioner on February 11, 2004, and show cause why he should not enter a Final Cease and Desist Order (hereinafter referred to as "Order"), requiring the petitioners to immediately cease their business operations in Georgia that violated GILA. *See Id.* at pp. 24-25.

On February 9, 2004, the petitioners filed a motion to dismiss, contending that the action lacked a justiciable controversy because the subject stores were no longer operating in the state of Georgia. *See Motion to Dismiss, attached as Exhibit 2 to Petition*. According to the motion, Georgia Catalog Sales (hereinafter referred to as "GCS"), which allegedly engaged in a "catalog sales scheme" was no longer in business, having filed bankruptcy. *Id.* at p. 2. (GCS is not a party to the present proceedings.) The other two businesses, JAG GA and ALD, which the investigation indicated were managed or assisted by OM, CSI, and Gill, were purportedly sold to ADAP, a Nevada company, mere days before the motion was filed and therefore no longer conducting business in the state of Georgia. *Id.* The petitioners further contended that the

inclusion of Talk N Shop in the proceedings (a business model the petitioners were planning to implement using a personal computer services retail installment contract and rebate application, *See Show Cause Order*, p. 16) was inappropriate as the plan had not been implemented. *See Motion to Dismiss*, p. 2. Further, the petitioners argued whether the new owner of the stores planned to implement such a plan was an issue not yet ripe for consideration. *Id.* The Enforcement Division of the Office of the Commissioner (hereinafter referred to as "Department") filed responses to the motion on February 9, 2004 and February 16, 2004. *See Letter Dated February 9, 2004, attached as Exhibit 3 to Petition; See Department's Response to Motion to Dismiss, attached as Exhibit 4 to Petition.*

On February 10, 2004, the petitioners filed a motion requesting recusal of the Commissioner, which the Department responded to on February 17, 2004. *See Motion Requesting Recusal of John W Oxendine as Hearing Officer, attached as Exhibit 5 to Petition; See Department's Response to Motion Requesting Recusal of John W. Oxendine as Hearing Officer, attached as Exhibit 6 to Petition.* The motion argued **that** the Commissioner, when acting as a hearing officer for the Office of the Industrial Loan Commissioner ("OILC"), is governed by the Georgia Code of Judicial Conduct and that "his personal bias against companies with business models like those utilized by JAG GA and ALD" mandated his recusal. *Id.* at ¶ 7, 16. In support of the motion, the petitioners referenced several newspaper articles where the Commissioner likened the business practices utilized by the petitioners to "loan sharking" and characterized the sale of pre-paid phone cards and use of purported rebates as "'sham transactions' to hide loans". *Id.* at ¶ 16-21.

On February 11, the hearing was held before the Commissioner. *See Transcript of Show-Cause Hearing, attached as Exhibit 7 to Petition.* The Commissioner reserved ruling on the

motion to dismiss based on the petitioners' contention that the case was moot, *Id.* at 70-76, and denied an additional motion to dismiss presented by the petitioner's attorney that the Commissioner lacked jurisdiction over the controversy as the business practices of the petitioners did not meet the definition of a loan as defined by O.C.G.A. § 7-3-3. *Id.* at 78-80. The Commissioner denied the petitioners' motion requesting recusal. *Id.* at 86.

The hearing was not concluded on February 11, 2004, *Id.* at 286, and following multiple continuances, the parties entered into a Consent order agreeing to have the remainder of the proceedings presented by way of briefs and affidavits to the Commissioner. *See Consent Order, attached as Exhibit 9 to Petition.* After consideration of the record as a whole, the Commissioner entered the Order on July 28, 2004 denying the motion to dismiss for mootness and ordering all parties to cease and desist from making loans of \$3,000.00 or less by any means except as permitted under GILA. *See Order, attached as Exhibit 16 to Petition.*

GCS conducted business in Georgia under the names "Advance Til Payday" and "GCS". *Enforcement Exhibits ("Exhs. ") E-1, E-6, E-10, E-24, and E-26; Transcript, pp. 142-144.* At the time of the Order, GCS was undergoing bankruptcy proceedings. *Transcript, pp. 138-139; Affidavit of John A. Gill, ¶ 3.* JAG GA and ALD conducted business in the state of Georgia under the names "Georgia Internet Cafe" and "Advance Long Distance" respectively. *Exhs. E-2, E-3, E-10, and E-19.* OM and CSI serviced the payroll and accounts payable for JAG GA, ALD, and GCS. *Transcript, pp. 189, 222; Affidavit of Kevin Hartshorn, ¶ 7-8.* OM also published training materials for the businesses' employees, which described business procedures which are substantially identical to the way GCS operated, and similar to the business practices of JAG GA and ALD. *Exhs. E-58 through E-60.*

John Allen Gill ("Gill") is an individual who is associated with the businesses in question as he is listed as the CEO, CFO, and Secretary of GCS. *Exh. E-9; Transcript, pp. 128-261.* At the time of the Order, his name appeared as the CEO, CFO, Secretary, and Registered Agent of CSI. *Id.* Furthermore, he has been listed as a member-trustee of OM. *Id.* Gill owns trademarks or service marks used in the advertising of JAG GA, ALD, and GCS and developed the Talk N Shop business model. *Exhs. E-57, E-75; Transcript, pp. 143-145, 208-214; Affidavit of Clarence Cutsforth, ¶ 5.* He testified that he has resigned from his positions associated with the petitioners with the exception of serving as the president of GCS, currently undergoing bankruptcy proceedings, and CSI. *Transcript, p. 127-140; Gill Affidavit ¶ 2.*

JAG GA and ALD entered into asset purchase and sale agreements with ADAP, LLC, a Nevada-based company (hereinafter referred to as ADAP). *Affidavit of Owen Charles, ¶ 5; Exhs. R-1, R-11.* According to Clarence Cutsforth, a JAG GA and ALD representative, ADAP "is simply a shield corporation for businesses owned and operated by, or on behalf of, Mr. John Allen Gill". *Affidavit of Clarence "Lance" Cutsforth, ¶ 5.* Gill denies this assertion. *Rebuttal Affidavit of John A. Gill.*

According to the affidavit of Terry Battle, audit supervisor with the OILC, none of the businesses held a Georgia Industrial Loan license that would permit them to make loans of \$3,000.00 or less, pursuant to GILA. *Affidavit of Terry Battle, ¶ 49.* Yet, the businesses in question made "payday loans" to customers at exorbitant interest rates under the guise of selling phone cards, internet access, and gift certificates for catalog merchandise. *Id.* at ¶¶ 44-48.

GCS required the customers to submit a personal check for the amount of the cash advance requested plus 30 percent. *Transcript, pp. 29-40; Battle Affidavit, ¶ 35.* GCS would hold the check typically until the customers' next pay period at which time, the customer was

required to either pay the amount of the check or renew the transaction by paying an additional amount of 30 percent. *Id.* If neither of these actions were taken, GCS would deposit the customer's check. *Id.* The 30 percent charged initially and at the time of each extension or renewal, considered as interest, amounts to an interest rate of approximately 780 percent per year. *Id.*

JAG GA d/b/a Georgia Internet Cafe operated in a similar fashion. The customers signed contracts to subscribe to a program that offered internet access for a period of one year. *Transcript*, pp. 45-47, 101-105; *Battle Affidavit*, ¶ 36. The contract stipulated that the customer had to buy a certain number of hours of internet access every 14 days to receive the cash advance that was administered in the form of a "rebate" unless the contract was cancelled or terminated. *Id.* The customers had to use the purchased internet time at one of the computers located in the Georgia Internet Cafe stores. *Exhs. E-32 through E-33.* Each branch had one to two computers for up to one hundred customers. *Transcript*, pp. 255-256. The computer time expired at the end of the 14 days if unused. *Id.* at p. 258. If the customers defaulted on the terms of the agreement, Georgia Internet Cafe electronically debited the customer's account. *Battle Affidavit*, ¶ 36. For each \$100 worth of "internet time", the customer had to repay \$130. *Id.* The termination fee required the customer to pay \$35 for each \$100 initially received. *Id.* The fee for computer access, considered as interest, amounts to an annual interest rate of approximately 780 percent to 910 percent. *Id.*

ALD customers similarly purchased and subscribed to a one-year program that offered phone cards as opposed to internet access. *Exh. E-29; Transcript*, pp. 13-14, 44-45, 49-50 and 95-98; *Battle Affidavit*, ¶ 44. The program worked in the same manner as the internet access program except that the 100-minute phone card was purchased at a price of \$25 per card for

every \$100 advanced and the termination fee equaled five payments. *Id.* These "fees" resulted in interest charges of approximately 650 percent per year. *Id.*

No customer testified that his or her intent to enter into the transactions with the businesses was to purchase catalog merchandise, phone cards, or internet service. *Transcript*, pp. 12-15, 95, 101. The customers' testimony clearly shows that they went into the businesses for the sole purpose of obtaining an immediate cash advance. *Id.* Moreover, instead of advertising the "retail products", the businesses advertised the availability of "payday loans". *Id.*

Finally, Talk N Shop represents a business model that combines the phone card and internet access "products" whereby customers would be charged increments of \$59.99 for a Talk N Shop card and 16 hours of internet access. *Exhs. E-38, E-42; Transcript*, pp. 207-217; *Battle Affidavit*, ¶¶ 41-43. Again, the customer would receive a "rebate" - a \$100 cash advance - and similar renewal methods and termination fees would apply to those previously discussed. *Id.*

Parties who are aggrieved by a decision made by the Commissioner may petition for judicial review under Chapter 13 of Title 50, the "**Georgia** Administrative Procedure Act". O.C.G.A. § 7-3-27. Pursuant to O.C.G.A. § 50-13-19(h), this Court may not substitute its judgment for that of the Commissioner's as to the weight of the evidence on questions of fact.

### **CONCLUSIONS OF LAW**

The issues before the court are whether: 1) there was a justiciable controversy at the time the Commissioner entered the Order; 2) the Commissioner lacks the authority to regulate the petitioners' business affairs; and 3) there is substantial evidence to support the Commissioner's finding that the transactions at issue constitute loans within the meaning of Georgia law. The petitioners decided to drop the recusal enumeration of error from their petition, rendering that



argument unnecessary for this Court to address. *See Petitioners' Reply Brief to Respondents' Brief Opposing Petition for Judicial Review*, p. 2.

### **Justiciable Controversy**

The petitioners submit that the Order should be vacated on justiciability grounds. The petitioners contend no justiciable controversy existed at the time the Commissioner entered the order because the businesses were no longer operating in the state of Georgia. *See Petition*, ¶¶ 16-18. To support this position, the petitioners point to the bankruptcy of GCS and the sale of JAG GA and ALD to ADAP. *Id.* Moreover, because the Talk N Shop model had not yet been implemented, the petitioners argue its legality or illegality is not ripe for review. *Id.* at ¶ 19.

"[A] case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights..." *Collins v. Lombard Corp. et al.*, 270 Ga. 120, 121 (1998). It is the petitioners' position that because the companies at issue went bankrupt or were sold to an out-of-state entity, there was no existing issue for the Commissioner to consider at the time of the hearing. Such an argument has been rejected by the U.S. Supreme Court on the grounds that "voluntary cessation of allegedly illegal conduct...does not make the case moot". *U.S. v. W. T. Grant*, 345 U.S. 629, 632 (1953); *Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). To hold otherwise would permit defendants to start and stop their alleged illegal conduct at will, permitting them to escape judicial review of their conduct indefinitely.

*Friends of the Earth, Inc.* addresses the standard for determining mootness in a case where the defendant has voluntarily ceased the conduct: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The burden of persuasion on this point lies with the party

asserting mootness. *Id.* The petitioners maintain that the stiff civil and criminal penalties imposed by newly enacted Senate Bill 157, codified in O.C.G.A. § 16-17-2(d), are so harsh that no one would reasonably risk punishment. *See Petitioners' Reply Brief to Respondents' Brief Opposing Petition for Judicial Review*, pp. 5-8. O.C.G.A. § 16-17-2(d) authorizes imprisonment for not more than one year or a fine not to exceed five thousand dollars (\$5,000.00) or both for those who violate GILA. "Each loan transaction shall be deemed a separate violation of this Code section...If a person has been convicted of violations of subsection (a) or (b) of this Code section on three prior occasions, then all subsequent convictions shall be considered felonies punishable by a fine of \$10,000.00 or five years imprisonment or both." O.C.G.A. § 16-17-2(d).

Merely pointing to a statute that imposes harsh penalties for making loans in violation of GILA is insufficient to prove that the petitioners could not reasonably be expected to resume their business practices using the same companies or under a different name in the future. With transactions imposing up to 910 percent annual interest rates on customers, it is entirely possible that the petitioners would risk the penalties outlined in O.C.G.A. § 16-17-2(d) for the profitable "business" of payday lending. Moreover, it is ironic that the petitioners staunchly maintain that their stores do not make loans yet claim O.C.G.A. § 16-17-2(d), which punishes those who engage in making loans in violation of GILA, is a sufficient deterrent that they would never resume business.

Even if this Court were persuaded that the bankruptcy of GCS and the sale of JAG GA and ALD rendered this action moot, it falls under the exception to the mootness doctrine where an otherwise moot case may be considered because it "contains an issue that is capable of repetition yet evades review". *Collins*, 270 Ga. 120 at 122. Such a controversy "is not moot because a decision in such a case would be based on existing facts or rights which affect, if not

the immediate parties, 'an existing class of sufferers'. *Id.* As previously noted, the petitioners have ceased doing business in Georgia voluntarily and there is evidence that Gill remains involved with the companies despite the sale of JAG GA and ALD. If this case were found to be moot, Gill and other individuals could repeat the process of making payday loans under the guise of selling various products and avoid the issuance of a cease and desist order by selling the businesses or simply closing their doors.

Finally, the petitioners contend that the legality of the proposed business model "Talk N Shop" was a matter not yet ripe for adjudication and therefore, the "Commissioner does not possess the power to enter a cease and desist order against a nonexistent company and/or a proposed business model that was never implemented". *See Petition, p.* 18-19. While the Order mentions a "Talk N Shop" card in its examples of guises the petitioners are forbidden from using to make payday loans, the cease and desist language clearly only refers to the then-existing businesses of GCS, JAG GA, ALD, OM, CSI, and the individual, Gill. *See Order, pp.* 20-21. Therefore, the petitioners' ripeness argument is without merit.

### **Commissioner's Authority**

Next, the petitioners argue that the Commissioner exceeded the authority given him by GILA. O.C.G.A. § 7-3-23 grants the Commissioner the authority to investigate, hold hearings, and ultimately issue cease and desist orders against those he determines to be in violation of GILA. The petitioners' argument is simple: the businesses in question do not make loans; they merely sell retail products and offer cash rebates for a customer's commitment to various "programs". O.C.G.A. § 7-3-3 defines a loan as "an advance of money in an amount of \$3,000.00 or less under a contract requiring repayment and any and all renewals or refinancing thereof or any part thereof." Following the petitioners' reasoning, because the contracts used in

their businesses involve the sale of retail products, the Commissioner has no authority to regulate their businesses.

This argument attempts to place form over substance, a practice that has long been disapproved of by Georgia courts. "Whether a given transaction is a purchase...or a loan of money...depends, not upon the form of words used in contracting, but upon the real intent and understanding of the parties." *Pope v. Marshall*, 78 Ga. 635, 640 (1887). The legislators' adherence to substance over form is manifested in the language used in O.C.G.A. § 16-17-2. Subject to certain exceptions inapplicable in this case, O.C.G.A. § 16-17-2 prohibits "all transactions [of \$3,000.00 or less] in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements". O.C.G.A. § 16-17-2. This statute was enacted precisely to reach businesses like GCS, JAG GA, and ALD. The petitioners contend that the "fundamental flaw in the Commissioner's reasoning is that it is premised on common law principles of usury, rather than the plain meaning of a loan under GILA". *Petition*, p. 23. However, "[t]he purpose of GILA is 'to define and prevent usury'". *BankWest, Inc. v. Oxendine*, 266 Ga. App. 771, 772 (2004). Accordingly, the Commissioner's reliance on principles of usury is neither misplaced nor erroneous.

While the petitioners maintain that the products sold are the phone cards, internet access time, and gift certificates for catalog merchandise, the record indicates otherwise. The testimony by the customers that they entered into the contracts in order to get payday loans\_ and that they rarely or never used the products they were required to purchase combined with the businesses' advertising which primarily or solely advertised payday loans places the petitioners' activities within the ambit of the Commissioner. Therefore, the Commissioner did not exceed his authority by issuing the Order.

**Substantial Evidence**

Finally, the petitioners argue for reversal of the Order on the grounds that it is not supported by substantial evidence as required by O.C.G.A. § 50-13-19(h). "[I]n Georgia, the substantial-evidence standard is effectively the same as the any-evidence standard." *Emory University v. Levitas*, 260 Ga. 894, 897 (1991). Even in light of the inclusion of the phrase "clearly erroneous" in O.C.G.A. § 50-13-19(h)(5), *Levitas* held, "O.C.G.A. § 50-13-19(h)(5) only permits a superior court to apply an any-evidence standard of review to a state administrative agency's decision". *Id.* at 898. Using the limited scope of judicial review set forth in O.C.G.A. § 50-13-19(h), the record contains sufficient evidence to support the Commissioner's decision for the reasons set forth herein.

**CONCLUSION**

In sum, the Commissioner was within his authority to investigate and issue the Order against the petitioners in the justiciable controversy brought before him. Furthermore, in accordance with O.C.G.A. § 50-13-19(h), this Court FINDS that there is evidence to support the Commissioner's decision below. For the foregoing reasons, the cease and desist order entered by Commissioner Oxendine is AFFIRMED.

SO ORDERED AND ADJUDGED, this 5 day of May, 2011,

  
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Deborah C. Benfield, Judge  
Superior Court