STATE OF OHIO, LORAIN COUNTY, ss., - THE ELYRIA MUNICIPAL COURT FILED

MAGISTRATE'S DECISION

2011 MAR 25 P 4: 34

CLERK OF
ELYRIA MUNICIPAL COURT

BY: ________________

OHIO NEIGHBORHOOD FINANCE, INC.
DBA CASHLAND
Plaintiff

VS

CASE NO. 09CVF01488

RODNEY SCOTT
Defendant

This matter was referred back to the Magistrate for hearing and decision after objection had been filed to a prior magistrate's decision recommending only part of the relief in the complaint. A full evidentiary hearing was to be had on the merits and an instruction was made to determine the applicable law. Though Defendant is in default of an appearance, evidence was taken on all issues pursuant to Buckeye Supply Co. v. Northeast Drilling Co. (Wayne 1985), 24 Ohio App.3d 134, *citing* Dallas v. Ferneau (1874), 25 Ohio St. 635.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Ohio Neighborhood Finance, Inc., dba Cashland ("Cashland"), filed this action to collect on a loan that "Defendant has failed to discharge… by payment or other satisfaction although the same has been demanded by the Plaintiff." Under the parties' loan contract, Cashland gave Defendant $500 on December 5, 2008, in return for his promise to pay the full amount back by a $545.16 debit against his checking account fourteen days later on December 19, 2008. This reflects an annual percentage rate of 235.48% under the federal Truth in Lending Act ("TILA"), based on a $30.00 "loan origination charge," 25% per annum interest over 14 days, and a $10.00 "credit investigation fee." The TILA disclosure box states that contract also involved a late charge of the greater of $15 or 5% of the "total of payments," that is, $27.20, and a $20.00 "check collection charge." Cashland seeks only the lesser late charge, but asks for the check fee, though no check was written by Defendant. The fee is for trying to electronically debit his checking account on his payday. Cashland's witness admits that it still basically operates as when licensed as a "payday" lender, though the Payday Loan Act was repealed and replaced with a Short Term Lender law in 2008. Cashland is not licensed under that Act, but instead as a "Second Mortgage" lender. Cashland contends this Second Mortgage law permits its payday loan business to continue as before[1] though Cashland now calls its payday loans "Short Term Finance Loans" instead. Its witness says the loans are now scheduled even more closely than before to

[1] Cashland's witness testified that all of its loans are short term, one payment "payday" style loans like this one, though Cashland still is licensed as a check-cashing business and operates as a pawnbroker of gold and silver as well.

be "due back on paydays" of borrowers. For this fourteen-day loan of $500, Cashland claims $107.41 in charges and fees, **plus** interest at 25% per annum -- less credit for Defendant's $35 payment.

The Ohio Supreme Court authorizes courts to *sua sponte* scrutinize any "instrument for the payment of money, by which the maker has agreed to pay usurious interest at a stipulated rate" and as appropriate to reduce any improper interest charges "to the legal rate." Goode v. Sutton (1876), 29 Ohio St. 587, 596-597 ("on its own motion"). "Interest" in Ohio is generally defined in broad terms as "the compensation allowed by law, or fixed by the parties, for the use, detention, or forbearance of money or its equivalent." 61 OH. JUR.3d, *Interest and Usury* § 1 (1985). In most loans, **any** amount imposed as a condition of a loan, like the origination fees and investigation charges here, is properly regarded as "interest" as well. Charges by any other name added by contract, even after maturity of a loan, are also "interest." Lafayette Ben. Soc., v Lewis (1835), 7 Ohio pt 1 p 80; Hackett v. Kripke (Lucas 1939), 62 Ohio App. 89, 15 Ohio Ops. 445 (syllabus ¶1). The federal TILA tracks the conventional definition of pre-maturity interest, including virtually every charge imposed as a condition of credit, under the label of "finance charge," that is "the dollar amount the credit will cost you," 12 C.F.R. §§226.4(a) and 226.18(d), and as part of calculation of the "annual percentage rate," *i.e.*, the "cost of your credit on a yearly basis." §226.4(e). The TILA "annual percentage rate" disclosure of the pre-maturity cost of Defendant's loan here is 235.48%, raising a red flag for the potential of usury.

Cashland justifies its interest rate and charges based on its registration under Ohio's Second Mortgage Loan Act, R.C. §§1321.51, *et seq.*, often described these days as the "Mortgage Loan Act" ("MLA"). This Act is indeed one of the statutory exceptions to the general R.C. Chapter 1343 limits on interest in Ohio and is referenced in the loan contract with Defendant. Yet the alert judiciary has never permitted the labels used or even the form of a transaction to control over its substance when interest and the possibility of usury is at hand, as stated by our court of appeals:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered. **No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence,** and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings. Every species of contrivance in the modification of any loan or contract, for the purpose of evading the statute, being cases within the mischief, are also within the remedy. Usury is a moral taint wherever it exists, and no

subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.

Central United Nat. Bank v. Allshouse (Summit App. 7/19/33), 15 Ohio Law Abs. 711, 1933 WL 2424, at *2 (emphasis added) (citations omitted). This Court properly evaluates the legitimacy of Defendant's insistence that a law principally enacted to cover mortgages covers the short term, one payment transaction between the parties here to allow the interest and charges assessed.

I. Cashland's short-term, one payment loans are not governed by the Second Mortgage Loan Act but by Ohio's Short Term Lender Act.

That Cashland may be registered as an MLA lender does not mean that **this** loan is authorized by the MLA.[2] Cashland's witness described Cashland's practices and procedures associated with this loan as basically the same as when licensed as a check cashing business making "payday" loans under former §§1315.39, *et seq.* That statute, enabling check-cashing businesses to make very short term, one payment loans tied to impending paychecks or bank deposits commonly known as "payday" loans, was repealed by Sub H.B. 545 (eff. 9/1/08). In its place, the General Assembly enacted R.C. §§1321.35 through 1321.48 to officially authorize a special "short term loan" law. OHIO CONSUMER LAW, §23:02 (West 2010). This legislative repeal of payday lending in Ohio was placed on the ballot by the payday loan industry and then ratified by referendum as Issue 5 by Ohio voters on November 4, 2008, to ensure that "borrowers would have at least 30 days to repay the loan" and "the maximum interest rate would be a 28% annual percentage rate" expressly defined as the broad, federal "annual percentage rate" under the Truth in Lending Act. **Cashland contends that the mantle of its registration as a mortgage loan lender authorizes the same payday loans expressly disallowed by the General Assembly and the voters of Ohio.**

This contention is not persuasive -- contradicted not only by the language of the MLA contemplating payments over time on all loans but by the legislative history of the MLA, Small Loan Act, and Payday Loan laws in Ohio, particularly the 2008 legislative and electoral substitution of a new "Short Term Loan Law" for the payday loan laws. Using an MLA registration as a pretext to make these loans is an evasion of the Short Term Loan law. Without proof of Cashland's registration under the Short Term Lender Law, Cashland could not make **any** short-term loans in Ohio, without high interest or charges being usurious and unenforceable as matter of law.

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[2] *See e.g.,* Glouster Community Bank v. Winchell (Athens 1995), 103 Ohio App.3d 256, 261-262 (bank selling mobile home titled in its name not exempt as financial institution from consumer usury laws at R.C. Chapter 1317).

A. The language of the MLA does not authorize single payment, short-term loans

The language of the MLA is replete with references to "monthly installments," "scheduled payments" and "balances outstanding from time to time." Nonetheless, Cashland argues that this law, primarily enacted for mortgage loans, authorized the two-week, lump sum loan here, just because Cashland calls it "interest-bearing." Cashland asks this Court to ignore the forest for the trees.

Analysis of a statute begins with its language. State ex rel. Gelesh v. State Med. Bd. of Ohio (2007), 172 Ohio App.3d 365, 370. Cashland focuses on the wording of the MLA pertaining to the two different methods permitted for calculating interest. Interest in an MLA loan may be structured as "precomputed" or "interest-bearing." R.C. §1321.57(A). Cashland compares the presence of language in the statute that says that loans with interest which is "precomputed" must be "repayable in monthly installments" to the absence of that same language to describe "interest-bearing loans." Cashland extrapolates from this difference that any loan, including the payday style one here, just by structuring it as "interest-bearing," need not be even a month, week or daylong or have installments. However, "words and phrases in a statute must be read in context of the whole statute." Commerce & Industry Ins. Co. v. City of Toledo (1989), 45 Ohio St.3d 96, 102. The language of the statute when read carefully and in context does not support Cashland's contention, but rather describes **all** loans to involve installments or balances carried with monthly payments.

A "precomputed loan" is defined at R.C. §1321.51(G) as one "in which the debt is a sum comprising the principal amount and the amount of interest computed in advance on the assumption that all **scheduled payments** will be made when due." (emphasis added). Section § 1321.57(D)(1) adds unequivocally that all of these loans "shall be repayable in monthly installments," restricted in timing with amounts to be essentially uniform. Under §1321.51(I), interest is computed on "periodic balances" through "payments" made in relation to "each monthly installment period of the loan contract." Cashland concedes that this method of calculating interest would preclude loans like the one to Defendant here. Yet it is difficult to conceive a loan more clearly within the definition of "precomputed" than the one here. A fourteen-day loan made on the premise that the borrower will have no money until a "payday," resulting in a bank deposit, at which time the bank account will be tapped, and with all of the interest and charges "computed in advance" and included on the very face of the contract "on the assumption that [the only] **scheduled payment**[ ] will be made when due" cannot be construed as anything else but precomputed, as a matter of law. Calling a precomputed loan like this one by any other name does not render the loan less "precomputed."

The other method of computing MLA interest is called "interest-bearing." This means, by the definition given at R.C. §1321.51(F), that the "debt is expressed as the principal amount" only, with interest "computed, charged, and collected on unpaid principal **balances** outstanding **from time to time.**" (emphasis added). This language is repeated at §1321.57(C)(1)(a), which Cashland cites as its express authority that "a single installment loan is permitted." Cashland ignores that "balances" are expected to be "outstanding" not "over time," but "from time to time." "[W]ords in statutes should not be construed to be redundant, nor should any words be ignored." East Ohio Gas Co. v. Public Utilities Com'n of Ohio (1988), 39 Ohio St.3d 295, 295. Each "time" in the phrase, "from time to time," is thus to be accorded meaning. *See* Southwestern Sur. Ins. Co. v. Douglas (Okla 1921) 198 P. 334, 340. After all, registrants by §1321.57(C)(1)(c) must ensure that unpaid interest in interest-bearing loans "be paid from the proceeds of **subsequent payments.**" (emphasis added).

Cashland likewise disregards other statutory language manifesting the legislative expectation of recurring "monthly" payments with interest-bearing loans, coordinating the repayment terms for interest-bearing loans with those for precomputed ones. Under §1321.57(C)(1)(b), MLA registrants in interest-bearing loans may contract for interest without regard to when borrowers actually make their payments, but rather "from the date of the loan to the **first scheduled payment due date**" and thereafter "for each **succeeding installment period** from the scheduled payment due date to the next scheduled payment due date." (emphasis added). Just as with precomputed loans, the duration of "**the** first monthly installment period" in an interest-bearing loan is defined by a month, that is, like precomputed loans where "the first installment period may exceed one month by not more than fifteen days," for interest-bearing loans "[i]nterest may be charged to extend **the first monthly installment period** by not more than fifteen days." R.C. §1321.57(C)(2)(a)(emphasis added).

No explanation is offered by Cashland for the absence from this loan of a "first monthly installment period," a schedule for "subsequent payments" or "succeeding installment periods." Nor is there a framework for "unpaid principal balances [to be] outstanding from time to time." Rather than telegraphing a legislative message to approve one payment, short-term loans, the language of the statute describes all loans, both precomputed and interest-bearing, as with multiple payments.

B. Short-term, one payment "payday" loans like this have always been and still are covered by specially targeted legislation as part of an overall scheme of usury regulation

The Mortgage Loan Act is only one part a larger scheme of laws in Ohio governing interest and usury for different types of transactions. Laws governing short term, one-payment loans tied to

borrowers' "paydays" are, and have always been, another important part of this scheme. These and other usury laws were enacted and continue to serve very different purposes. To hold the MLA covers this type of loan would ignore the clear history of legislative regulation of the "payday loan" industry, conflict with the legislative intent behind both the Small Loan Act and the MLA, and outright undermine the Short-Term Lending Loan recently enacted to specifically cover loans like this. Cashland's use of the MLA for a loan like this one is an evasion of the Short Term Loan Act.

Any review of the usury laws of Ohio must begin with R.C. §1343.01(A), "Ohio's general usury statute." Capital Fund Leasing, L.L.C. v. Garfield (Cuyahoga 1999), 135 Ohio App.3d 579, 581. That section has always set a maximum rate of interest to which parties may "stipulate" in "a bond, bill, promissory note, or other instrument of writing for the forbearance of money." That maximum rate today is eight percent per annum. Interest under a general usury ceiling like this considers **all** charges required by a contract to be paid, before, for, or after, for the period of time that the money is used, regardless of the name given the charge. Allshouse v Bank & Trust Co. (Summit C.P. 1932), 30 N.P.(NS) 17, *affirmed by* (Summit 1933) 15 Ohio Law. Abs 711. This maximum rate applies to every loan unless the creditor proves "that the statute does not apply." Hudson & Keyse, L.L.C. v. Yarnevic-Rudolph (Jefferson App. 11/29/10), No. 09 JE 4, 2010 WL 4927616, at *5. Of course, when "specific language" of other statutes apply and authorize higher rates, rates that comply with those sections "are not subject to the limitations imposed by R.C. 1343.01 or the general usury statutes." AVCO Financial Services v. Smith (Franklin 11/24/87), No. 87AP-748, 1987 WL 26345.

One of the earliest enacted exceptions[3] to Ohio's general usury laws covered loans exactly like the present one, then labeled a "salary loan." This type of loan has been around since ancient times.[4] "The practice of salary selling involved a worker taking a loan a week before his paycheck and then repaying the loan by handing over the paycheck when it arrived." Faller, "Payday Loan Solutions: Slaying the Hydra," 59 Case W. Res. L. Rev. 125, 150 (2008). To avoid charges of violating the interest caps of the general usury laws like R.C. §1343.01, lenders fabricated "a variety of thinly veiled disguises and sham transactions" such as "phrasing the contract as a purchase or assignment of future wages, rather than as a loan." Graves & Peterson, "Predatory Lending and the Military: The Law and

[3] Revised Code §1343.01(B) itself has several exceptions to the 8% usury ceiling, including unsecured loans payable in a single installment. In contrast, the usury laws discussed here regulate those **in the business** of making these loans.

[4] According to one law review article, "pledging to pay one's earnings in the immediate future in exchange for money today" is a practice dating back to "our earliest recorded civilizations," which was banned by early Roman Law but when left unchecked has played a part in significant historical events of social upheaval. Graves, "Predatory Lending and the Military: The Law and Geography of 'Payday' Loans in Military Towns," 66 Ohio St. L.J. 653, 665 (2005).

Geography of 'Payday' Loans in Military Towns," 66 Ohio St. L.J. 653, 671 (2005). These "high-cost wage-based" loans, "very similar to today's payday loans," were regarded as worsening financial situations of borrowers, leading "working class people in the eastern United States" to create the term "loan shark" to describe their lenders. *Id.* at 670. Little doubt exists that "salary lenders, the nation's first loans sharks, engaged in essentially the same business model as today's payday lenders." Peterson, "Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing." 92 Minn. L. Rev. 1110, 1119 and at fn. 28 (2008).

In 1911, by enacting G.C. §§6346-1, *et seq.*, the Ohio General Assembly first passed statewide legislation that required licensing and regulated the interest rates and charges as well as the business practices of lenders "purchasing or making loans upon salaries or wage earnings." 102 O.L. 469 (prefatory language to 1911 SB 52). Though the rates allowed these lenders were still as high as three percent per month, §6346-5(a), these laws sought "to prevent and punish" "[t]he extortion practices by a class of money lenders" which was "a matter of common knowledge." Cain v. People's Salary Loan Co. 24 Ohio C.D. 115, 1912 WL 709, at *1, affirmed, 88 Ohio St. 550 (1913). None other than the Ohio Supreme Court recognized the need for this type of legislation because the "class" of borrowers who receive these payday loans "comprises the most needy and improvident, and consequently the most susceptible to fraud and extortion." Sanning v. City of Cincinnati (1909), 81 Ohio St. 142, 156 (municipal regulation of salary loans constitutional). Still, problems persisted with wage-based loans after this regulation. *See* Dunn v. State (1930), 122 Ohio St. 431, 437 ("protecting needy borrowers from the extortion of purchasers of salaries.") Enactment of new "small loan laws" was demanded, with higher interest rates and administrative charges supposed to attract "respectable private lenders into the market for costly consumer loans, creating healthy competition and driving the salary lenders out of business." "Predatory Lending," 66 Ohio St. L.J. at 672.[5]

In 1943, Ohio's General Assembly in one fell swoop repealed all of the laws allowing this type of lending, G.C. §8624-70, eff. 7/16/43, and substituted Ohio's current "Small Loan Act."[6] G.C. §§8624-50, *et seq.*, now codified at R.C. §§1321.01, *et seq.* Any "money, credit, goods or things in action," valued at $300 or less given "as a consideration for any sale or assignment of, or order for, the

[5] *See also* Peterson, "Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing." 92 Minn. L. Rev. 1110, 1120-1121 (2008), Faller, "Payday Loan Solutions: Slaying the Hydra," 59 Case W. Res. L. Rev. 125, 150 (2008). Woolston, "Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona," 52 Ariz. L. Rev. 853, 887, fn. 283 (Fall 2010).

[6] The term "Small Loans Act" [sic] was first used to describe the earlier laws, §§6346-1 to 6346-7, covering both wage and salary lending and loans secured by chattels. *See* Merchants Finance Co. v. Goldweber (1941), 138 Ohio St. 474.

payment of wages, salary, commissions, or other compensation for services" became governed as a small loan. G.C. §8624-65(a). *See preface to* 1943 HB 49, 120 v. 75. Licensing was required of anyone "in the business of lending money" of $1000 or less who contracted for or received interest or charges above the ceiling of the general usury laws. G.C. §8624-51(a). These lenders could charge the same 3% per month as former salary lenders on loans up to $150, 2% per month for loans up to $300, but no more than 8% **per annum** above that. The key was that "repayment of the amount lent" had to be "in substantially equal installments... at approximately equal periodic intervals of time." G.C. §8624-62(a). That is, Ohio's Small Loan Act was enacted with the manifest purpose of abolishing the type of short term, lump sum loans as made to Defendant here, in favor of installments spread out over time. Amendments have been made to this law since its creation, including the structuring of loans as "precomputed" and "interest-bearing" by 1981 H.B. 134, eff. 7-14-81, but nothing in any amendment remotely suggests that this original purpose for enactment of the Small Loan Act changed.

A half-century after payday loans were abolished by the Small Loan Act, the payday loan was legislatively resurrected in 1995 in Ohio. Lenders no longer had to pretend to purchase wages or salaries of borrowers, which continued to be prohibited in that form. R.C. §1321.32 ("assignment of, or order for wages or salary" invalid). In the modern age, the ubiquitous checking account became the target. The General Assembly enacted a "Check-Cashing Lender Law," R.C. §§1315.35 to 1315.44, by 1995 HB 313, eff. 12/5/95, popularly known as "the Payday Loan Act." *See* Checksmart v. Morgan (Cuyahoga App. 1/16/03), No. 80856, 2003 WL 125130, at *1; *see* Faller, "Payday Loan Solutions: Slaying the Hydra," 59 Case W. Res. L. Rev. 125, 127, fn. 7 (2008) (Ohio Dept of Commerce using this term); *see also, generally,* Fiscal Notes for 2008 HB 545. Businesses already licensed under R.C. §1315.21 to cash checks for the public now could receive separate licenses to make cash advances to their customers for up to $500 (which later became $800), at 5% interest per month, repayable by lump sum, without regard to installments. R.C. §1315.39. The industry boomed[7] as it has throughout the ages when condoned. Controversy also ensued, with complaints[8] very similar to those raised in 1943, the turn of the last century, and before that.

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[7] In two years, payday loans increased from 41 to between 95 and 100 million loans and revenues from $2.4 billion to between $4.0 and $4.3 billion. 64 Consumer Fin. L.Q. Rep. 145, 276 (2010), *citing* "Unsafe and Unsound: Payday Lenders Hide Behind FDIC Charters to Peddle Usury." Consumer Federation of America, Mar. 2004.

[8] "In 2006, the Center for Responsible Lending (CRL) published its report on payday lending practices in which it contended, contrary to industry claims, that the majority of payday loans were renewals of previous loans which borrowers were unable to repay, rather than one-time, emergency loans repaid on the due date." 64 Consumer Fin. L.Q. Rep. 145, 276 (2010). *See* 5/7/08, Press Release of Atty Gen. Dann, http://www.rtoonline.com/images/OhioAgRecs paydayLending050708.pdf ("well-documented abuses" in "short-term loans that cause long-term financial ruin.") Cashland's witness testified that as soon as the Defendant here had "paid one [loan] off he got another."

Then in 2008, exactly as occurred in 1943 by the Small Loan Act supplanting the salary lending laws, the Payday Loan Act was repealed simultaneously with the introduction of a **substitute** usury law, specifically intended to regulate the same lenders and lending practices. Effective September 1, 2008, Sub H 545 "[r]epeal[ed] the current Check-Cashing Lender Law in its entirety and enact[ed] the bulk of the repealed law's provisions with changes in a new Short-Term Lender Law." *See* Bill Summary of 2008 H 545, OLSC, http://www.legislature.state.oh.us/analysis.cfm?ID=127_HB_545&ACT=As%20Introduced&hf=analyses127/h0545-rh-127.htm. The law was "bipartisan legislation" intended as "a major step toward protecting Ohio consumers who are already struggling with debt by strictly regulating payday lenders and lowering the maximum interest rate for short-term loans." OH Gov. Mess. 6/2/08, Annotation to 2008 H 545.

This new "Short-Term Lender Law," R.C. §§1321.35 to 1321.48, prohibits any lender from engaging "in the business of making short-term loans to a borrower in Ohio... without first having obtained a license" under the Act. R.C. §1321.36(A). The Act covers not only licensed businesses but those "required to be licensed" to make short-term loans.[9] *See* R.C. §1321.47. The Act appears tailored to address the specific problems perceived by some with payday loans under the prior Act, prohibiting short term loans from being less than thirty-one days in duration, having interest rates above a 28% "annual percentage rate" -- defined expansively and with express reference to the Truth in Lending Act -- and limiting the number and refinancing of loans and the remedies of lenders on returned checks. R.C. §§1321.35(C), 1321.39, 1321.40, R.C. §1321.41. Moreover, lenders may not "indebt the borrower... for an amount that is more than twenty-five per cent of the borrowers gross monthly salary." R.C. §1321.41(E). No clearer expression can be imagined of legislative intent to regulate short term, one-payment loans to be paid from checking accounts and connected with paydays.

Any doubt about the intent to turn "payday lenders" into "short term lenders" was removed on November 5, 2008, when the voters of Ohio by referendum approved the language on the ballot of Issue #5 to end payday lending in Ohio as then existed and substitute requirements that **"all short term lenders,** including check cashing lenders," described on the ballot as "payday lenders," be required to obey the "limitations" of a new Short-Term Loan law. (emphasis added). Under Ohio

[9] The words, "short-term loan," at R.C. §1321.36(A) must be accorded their plain meaning, that is, any loan for a "short term." If restricted to the definition at §1321.35(A), which states that "'[s]hort-term loan' means a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code," then the first line of §1321.36A) -- "No person shall engage in the business of making short-term loans to a borrower in Ohio.... without first obtaining a license" -- would be circular and have no meaning, that is, only those already licensed to make these loans or already making loans compliant with the Act would be subject to a prohibition against making loans without a license. "In the construction of statutes, the courts start with the assumption that the legislature intended to enact an effective law." 85 OH. JUR.3D, *Statutes* §228. Cashland's employees calling their own loan product a "short-term finance loan" exemplifies the commonness of this phrasing.

Const. Art. II §a, the referendum submitted this issue "directly to the people that they ordain a law set forth therein, or that they repeal a law already enacted." 56 Ohio Jur.3d *Initiative & Referendum* §2. It gave "the people the final decision." State ex rel. LetOhioVote.org v. Brunner (2009), 123 Ohio St.3d 322, 328 (citation omitted). Thus, by vote of the legislature **and** the people of Ohio, payday lending in Ohio as then existed was to end, with lenders inclined to continue making loans of that type "subject to [new] limitations" under **only one**, specific new governing law.

Yet, Cashland argues that buying a license to make loans as a "second mortgage branch" registered under §§1321.51 *et. seq.* is -- and by implication always has been -- alternate authority to make payday loans. After all, Cashland's loans and practices have changed little from being licensed as "check-cashing lender" to "second mortgage loan lender" and its witness says its current loans are now more closely connected to borrowers' paydays than before. Cashland seems to believe that the 1995 Payday Loan Act from its inception was little more than a redundancy to the MLA and its 2008 repeal was just an inconvenience, because it could have made payday loans all along as a MLA lender, just perhaps not at the same level of profit.

At its outset in 1965, the MLA was named the "Second Mortgage Security Loan Act" for good reason. It was enacted **solely** to regulate any lender in Ohio that "advertises, solicits, or holds himself out as willing to take as security for a loan on a borrower's real estate which is other than a first lien." 131 v. 439, eff. 11/1/65, codified at R.C. §1321.52. Like the Small Loan Act, each loan had to be "repayable in substantially equal installments." 131 v 444, eff. 11/1/65, codified at R.C. §1321.57. Despite amendments over the years that eventually allowed its registrants to make other loans, including unsecured ones, the Act still governs second mortgage lending in Ohio as originally intended and is often referenced by its original name.[10] Since 1989, even first mortgage loans have been allowed. 1989 HB 497. As recent as January 1, 2010, major new conditions only covering loans secured by home mortgages were added to the MLA. *See* 2009 HB 1, eff. 10/16/09, *amended by* 2009 SB 125, §5, eff. 12/28/09, to be applicable 1/1/10. In other words, this usury law was first intended to regulate and remains primarily focused on large, long-term installment loans like mortgages. Nothing in the legislative history or the plain words of the statute remotely intimates any change of intention by the legislature. Cashland surely cannot be arguing that the MLA was intended or can be conceivably interpreted to allow its lenders to write loans secured by home mortgages to be repayable in full in a matter of days by lump sum. That would be a necessary effect of agreeing with Cashland's analysis.

[10] Cashland's registration of the Elyria office with the State of Ohio is described as a "Second Mortgage Branch Office." Westlaw still lists the relevant sections of the Revised Code as "Second Mortgage Security Loans."

Nor is Cashland persuasive that the availability of an option to calculate interest on these loans according to the "interest-bearing" method makes any difference. The 1979 amendments authorizing loans to be structured as "interest-bearing" as well as "precomputed" under R.C. §1321.57(A) merely incorporated "the traditional way to compute interest" most commonly found in **mortgages**, where loan payments are applied first to unpaid charges, then interest, and finally the principal balance. Elizabeth Renuart & Kathleen E. Keest, The Cost of Credit: Regulation, Preemption, and Industry Abuses §4.5.2, *et seq.*, at 149-150 (3d ed. 2005). Unsecured loans were not even allowed by the MLA at that time. *See* §1321.52 under 1979 HB 511, eff. 9/28/79. That the General Assembly was actually contemplating long-term loans with this amendment, particularly "interest-bearing loans," is evidenced by that same amendment's removal of the sixty-month limit on the duration of loans at §1321.57(A) and the addition of a requirement that "interest-bearing" calculations **always** be used to determine rebates for loans in excess of sixty one-months. 1979 H 511, eff. 9/28/79, *codified* at §1321.51(J). Because the Small Loan Act shortly afterwards also adopted the traditional "interest-bearing" method to calculate interest, 1981 H 134, eff. 7/14/81, to validate Cashland's argument would seem to turn that law also into authorizing payday loans, despite the historical record of its enactment to abolish them.

The mandate of legislative interpretation is to read "related and co-existing statutes" on the same subject matter "*in pari materia*, construing them together" and "give such a reasonable construction as to **give proper force and effect** to **each** and **all** such statutes." United Tel. Co. of Ohio v. Limbach (1994), 71 Ohio St.3d 369, 37 *quoting* Maxfield v. Brooks (1924), 110 Ohio St. 566 (emphasis added). Their "interpretation and application ... must be viewed in a manner to carry out the legislative intent" of each statute and a court "must harmonize and give **full application to all such statutes** unless they are irreconcilable and in hopeless conflict." Limbach, 71 Ohio St.3d at 37 (emphasis added). Thus, before its repeal in 2008, the Payday Loan Act had to be recognized for its separate purpose from but harmonized with the Small Loan Act and the MLA, just as today the Short Term Lender Law must be given "proper force and effect" in the context of these other usury laws. This Court cannot ignore these principles to allow Cashland to turn these separate, very focused usury laws into redundancies while corrupting the MLA into a payday or Short-Term lending law.

C. Without a Short Term Lender license, Cashland's interest is limited by R.C. §1343.01.

The substance of this transaction, not its form, must control, according to our court of appeals. Central United Nat. Bank, 1933 WL 2424, at *2. This fourteen day, one payment loan, tied to payment by an automatic withdrawal from Defendant's bank account on a payday, cannot as a matter of law be

an MLA loan. The only legislative authority for a loan like this in Ohio is now under the Short-Term Lender law. Cashland is not registered under that Act, though §1321.36(A) prohibits short-term loans without that licensing. By the preponderance standard of proof in civil cases, Cashland's MLA license was and is more likely than not a subterfuge to evade this usury law.

The General Assembly did not provide a self-effecting remedy for failing to register as a short-term lender, such as found at §1321.02. Thus, Cashland may still recover actual damages for the money lent, but is limited to the maximum interest rate of eight percent per annum under the general usury law of Ohio, §1343.01. All other charges, being conditions of Defendant's credit, are subsumed within that rate of interest. No independent authority exists for these other charges. After credit for the $35 in payments, judgment should be granted for $465 plus 8% interest from 12/05/08 plus costs.

II. The interest and charges in this loan are usurious even under the MLA.

Even if the Second Mortgage law covered this loan, the interest and charges here violate that Act. This analysis explains in part the Magistrate's original denial to Cashland of requested charges.

A. Contracting for an "interest rate" over 21% under the MLA is usurious

Revised Code §§1321.57 and 1321.571 appear to have inconsistent provisions as to the interest allowed in MLA loans. Section 1321.57(A) unambiguously sets 21% as the maximum rate of interest that a registrant may contract for and receive "notwithstanding any other provisions of the Revised Code." However, §1321.571 follows to allow as an "alternative" to the 21% under 1321.57(A), interest "at any rate or rates agreed upon... but not exceeding an **annual percentage rate** of twenty-five percent." (emphasis added). These provisions may not be reconciled in their present form.

Only one court in Ohio has thoughtfully examined this issue. The Franklin County Municipal Court -- also in a default proceeding -- observed the apparent conflict presented by "the preliminary language of the two statutes," finding it "impossible to choose between these two statutory interest limits." Ohio Neighborhood Finance Inc. v. Hill (Franklin Mun. 7/30/10), No. 2010 CVF 010114. This was not an instance where "ambiguity in the language" existed to allow a conclusion "that one enactment trumps the other." *Id.* The court therefore considered the legislative history of each statute. Revised Code §1321.57 has been amended six times, the last time being 2009 H 1, eff. 10-16-09, after §1321.571 was last amended in 1994 by 1994 H 695, eff. 9-29-94. Each time, the General Assembly left the exclusivity "notwithstanding" language of §1321.57(A) intact. That municipal court observed:

[T]he General Assembly had before it R.C. §1321.57(A), was presumptively aware of the apparent conflict presented by the existence of R.C. §1321.571, and chose nevertheless to re-enact the language "notwithstanding any other provisions of the Revised Code..."

Under the circumstances and given the timing of the relevant acts of the General Assembly, the court can only conclude that the General Assembly intended R.C. §1321.57 to prevail "notwithstanding any other provision of the Revised Code," even over the alternative rate set out in R.C. §1321.571.

The Magistrate agrees with the analysis of that municipal court. In Ohio such "notwithstanding any other provision" language in a statute has been held to be a "mandate... expressly intended to preempt conflicting... law." Perkins v. Ohio Dept. of Transp. (Franklin 1989), 65 Ohio App.3d 487, 500. No less than the U.S. Supreme Court has stressed that "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section," following lower courts that generally "interpreted similar 'notwithstanding' language ... to supersede all other laws," with "[a] clearer statement... difficult to imagine." Cisneros v. Alpine Ridge Group (1993), 508 U.S. 10, 18, 113 S.Ct. 1898, 1903 (citations omitted). Put another way, the use of "notwithstanding" language actually "eliminates conflict rather than creates it" with an otherwise inconsistent statute because "no other provisions of law can be held in conflict with it"; after all, "a conflict would exist only if both statutes included a prefatory 'notwithstanding' clause." Kidde America, Inc. v. Director of Revenue (Mo. 2008), 242 S.W.3d 709, 711 -712. Considering the effect of this strong language together with the legislative history, R.C. §1321.571 has been superseded by §1321.57(A).[11]

Because the rate in that loan contract exceeded 21% per annum, the Hill court reduced interest on the loan to the default rate under R.C. §1343.03(A). Section 1321.56 requires this reduction:

The maximum rate of interest applicable to any loan transaction that does not comply with section 1321.57 of the Revised Code shall be the rate that would be applicable in the absence of sections 1321.51 to 1321.60 of the Revised Code.

[11] When first enacted, these two sections could be reconciled, because MLA "annual percentage rate" and "interest rates" were then defined very differently. When R.C. §1321.571 was enacted by 1981 H 526, eff. 2/11/82, as a "temporary" measure, second mortgage loans were about the only loans made under the MLA, the term "annual percentage rate" was undefined by the MLA, and the term "interest" included most fees and charges imposed by a registrant. *See* 1981 H 134 eff. 7/14/81. The maximum "interest rate" under §1321.57(A) had just been raised from 18% to 21%. *Id.* The legislative history shows that MLA terms were meant to gibe with the TILA: the MLA was amended "to delete disclosure requirements on loan terms and interest rates inconsistent with the federal Truth-in-Lending Act." Preface to 1979 H 511, eff. 9/28/79. As the term "annual percentage rate" at that time under the TILA meant the all-inclusive "cost of your credit as a yearly rate," 12 C.F.R. §226.18(e), when §1321.571 was enacted it was a true "alternative" to §1321.57(A), giving way on rates of interest, **so long as the combined total of all** interest, fees and charges did not exceed the 25% TILA APR ceiling. Thus, lenders charging lower fees to borrowers could charge higher interest – subject to this overall APR limitation. "Annual percentage rate" when later defined by §1321.51(K) was pared to match the newer, narrower MLA definition of "interest" at the new §1321.51(E), excluding all charges but basic interest. The MLA APR under §1321.571 only then became identical with "interest rate." Thus, here the TILA APR is 235.48% but the MLA APR is 25%. As such, the language of §1321.57(A) cannot be reconciled with that of §1321.571.

That should be the result here as well. Cashland is limited to the eight percent per annum rate applicable by default under R.C. §1343.03(A) in 2008 and all other charges that either would be either interest or construed as interest because unauthorized under the law "in the absence of" the MLA should be stricken. After credit for $35 in payments, judgment should be granted for $465 plus 8% interest from 12/05/08 plus costs.

B. A "default charge" is usurious interest after maturity of this one payment loan

Revised Code §1321.57(L) allows parties to an MLA loan to contract to collect "a default charge on any **installment** not paid in full within ten days after its due date" with the "amount of the default charge... not [to] exceed the greater of five per cent of the **scheduled installment** or fifteen dollars." (emphasis added). The loan papers here have this language as well, but describe the amount owed as five percent of the "total of payments" instead of a "scheduled installment," deviating from wording of the statute. Under the plain language of the statute, Cashland cannot recover these fees.

The statute references its default charges as applying only when an "installment" is late. "Installment" means a "partial payment of a debt" and "different portions of the same debt payable at different successive periods as agreed." *Black's Law Dictionary* (5th Ed. 1979) 717. "Installment" is more generally defined as "one of the portions into which a sum of money or a debt is divided for payment at set and usu. regular intervals." *Webster's Third New Int'l Dictionary* 1171 (unabridged ed. 2002). No "installment" is involved in this short term, one payment loan.

This is not a loan like the second mortgages for which the MLA was enacted, with payments extending over months or years. Absent also are the periodic, affordable sums for which a statutory late charge of 5% could be justified as a token percentage to cover administrative costs and encourage future adherence to a schedule. Here, as a percent of the "total of payments," this is a five percent charge on the entire loan, that is, principal, interest, **and** fees, which as an interest rate is astronomical.

Construing the statute to allow this charge in this context would likely encourage more MLA registrants to require more borrowers to sign one payment, short term loans – especially much larger loans -- at the prospect of receiving an extra five percent upon a breach. **Only after** the breach, that is, after five percent more is added to the debt, would a lender be magnanimous as to installment plans. Cashland's witness explained that it too allows payment plans exactly like this, **after** maturity.

Without a reasonable basis to support late charges on a total balance owed, "creditors are usually denied late fees after acceleration or maturity." In re Market Center East Retail Property, Inc. (Bkrtcy.D.N.M.,2010), 433 B.R. 335, 366. *See also* In Hernandez (Bkrtcy. S.D. Ohio 2003), 303 B.R. 342, 348 (5% based on the entire amount due was overreaching and unreasonable).

C. The MLA and loan contract did not permit "check collection charges" to be assessed on ACH electronic transactions from Defendant's checking account.

Under R.C. §1321.57(K), a MLA registrant "may charge and receive check collection charges not greater than twenty dollars plus any amount passed on from other depository institutions for each check, negotiable order of withdrawal, share draft, or other negotiable instrument returned or dishonored for any reason."

Cashland requests the full fee here, though no actual check was received from Defendant and presented for payment. Cashland's witness states that Cashland does not take borrowers' checks any more. Instead Cashland copies a blank check, returning it to the borrower, and uses the account number from the check to make an "ACH" or "automatic debt entry" on borrowers' accounts for payment pursuant to contract language that states: "You agree that we may initiate the ACH (as defined below)... on or after the Payment Date as payment under this Customer Agreement."

Although the contract also has terms that would allow "[i]n certain circumstances, such as for technical or processing reasons... [to] process your [ACH] payment as a check transaction" or even to "convert [a] personal check to an electronic check and electronically debit Your Bank Account for the face value of the check," each of these authorizations have an express contractual condition precedent that "you provide us with a personal check."

A "check" is defined as either a "draft, other than a documentary draft, payable on demand and drawn on a bank" or a "cashier's check or teller's check." R.C. §1303.03(F). A photocopy of a blank "personal check," not yet made payable to anyone or signed is a nothing, neither negotiable nor with any legal significance. Cashland may as well have hand-copied the information from the check onto a gum wrapper. The photocopied blank check, equivalent to Cashland's own notations on scrap paper, cannot reasonably be construed as a "check, negotiable order of withdrawal, share draft, or other negotiable instrument." Nothing in the MLA at present or even in the parties' contract[12] permits a failed ACH alone to be a basis for the "check collection charges" authorized by R.C. §1321.57(K).

In any case, no evidence was ever offered into evidence that an ACH ever occurred under this contract, such as a copy of notice from a bank of insufficient funds.

D. Cashland withdrew its demand for attorney fees.

The Magistrate previously denied attorney fees to Plaintiff as inconsistent with the specific language of the statute and the legislative history of the MLA. *See* discussion at OHIO CONSUMER

[12] The ACH authorization permits another ACH "for any applicable Check Collection Charge." No such charge is "applicable" unless the requirements of §1321.57(K) are satisfied.

LAW, §14:46 (West 2010). Because Cashland at the hearing withdrew all claims for attorney fees in this and all pending, related Cashland cases in this Court, the validity of its contractual provision and its demands for such fees in its complaint and motion need not be decided under the MLA or otherwise.

RECOMMENDATION

THE SHORT-TERM LENDER LAW, R.C. §§1321.35 *ET SEQ.*, NOT THE SECOND MORTGAGE LOAN ACT, R.C. §§1321.51, *ET SEQ.*, SHOULD BE APPLIED TO THE LOAN BETWEEN THE PARTIES. BECAUSE PLAINTIFF IS NOT LICENSED TO MAKE SHORT TERM LOANS, PLAINTIFF SHOULD BE GRANTED JUDGMENT OF $465 PLUS 8% INTEREST PER ANNUM FROM 12/05/08 PLUS COURT COSTS.

Magistrate

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

Copy to Attorneys Lim and Otto
Defendant