

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
12th DIVISION

STATE OF ARKANSAS *ex rel.*
DUSTIN MCDANIEL, ATTORNEY GENERAL

PLAINTIFF

vs.

CASE NO. CV 08-4717

Filed 01/06/2010 14:19:02
Pat O'Brien Pulaski Circuit Clerk
CR1 By

BIG R TOBACCO, INC.
& DAVID R. THOMPSON, et al

DEFENDANTS

**CONSENT JUDGMENT BETWEEN THE PLAINTIFF
AND BIG R TOBACCO AND DAVID R. THOMPSON**

The State of Arkansas *ex rel.* Dustin McDaniel, Attorney General, filed this action pursuant to the Arkansas Deceptive Trade Practices Act, ARK. CODE ANN. §§ 4-88-101, *et seq.* The Attorney General and Big R Tobacco, Inc. ("Big R") and David Thompson wish to resolve this action. The Attorney General and Big R and David Thompson assert that this Consent Judgment has been negotiated by the parties in good faith, and that this Consent Judgment is fair, reasonable, and in the public interest. Based upon the facts and matters before this Court, and with the consent of the parties to this Judgment, it is hereby ORDERED, ADJUDGED, and DECREED:

I. Definitions

1. Unless otherwise indicated, the terms used herein shall carry those definitions provided by the Arkansas Deceptive Trade Practices Act, ARK. CODE ANN. §§ 4-88-101, *et seq.*

2. Unless otherwise indicated, any reference to "Defendants" includes Big R and David Thompson.

II. Jurisdiction

3. The Attorney General brought this enforcement action pursuant to the Arkansas Deceptive Trade Practices Act. This Court has jurisdiction over this matter, and the parties hereto pursuant to Ark. Code Ann. § 4-88-104, and the common law of the State of Arkansas. Venue is proper pursuant to Ark. Code Ann. § 4-88-104, § 4-88-112, and the common law of the State of Arkansas. The Defendants have transacted business in the State of Arkansas.

4. For purposes of this Consent Judgment, the Attorney General and the Defendants waive all objections and defenses that they may have to the jurisdiction or venue of the Circuit Court of Pulaski County, Arkansas, and shall not challenge the Court's jurisdiction in any subsequent action to enforce the terms of this Consent Judgment.

III. Parties Bound

5. This Consent Judgment applies to and is binding upon the Attorney General, Big R and David Thompson.

6. Any change in ownership or status of a party, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such parties' responsibilities under this Consent Judgment.

IV. The Attorney General's Position

7. At all times herein material Big R operated what are commonly known as "payday loan" businesses in Arkansas under the name First Union Cash Advance ("First Union"). David Thompson is the sole shareholder of Big R.

8. Defendants offered and made short term, high interest loans. Funds were advanced to Arkansas consumers secured by the consumers' personal checks. The amount of each advance was less than the face value of the check presented. The loans were structured as short term (usually 14 to 30 day) single payment transactions with principal and interest due in

one payment, although the Defendants commonly allowed the borrowers to “roll over” the loan by paying only the interest due, or by executing a new loan immediately after the payoff on the previous loan. Such activities or transactions may hereafter be identified as a “Payday Lending Transaction(s),” or “Payday Loan(s).”

9. Defendants have charged interest at annual percentage rates ranging from approximately 173% to 868%, depending on the terms of each Payday Lending Transaction.

10. At all times Defendants held licenses issued by the Arkansas State Board of Collections Agencies (the “Board”). The Arkansas State Board of Collections Agencies formerly issued licenses to payday lenders pursuant to the Arkansas Check Cashers Act, ARK. CODE ANN. § 23-52-100, *et seq.* The Arkansas Supreme Court found the Check Cashers act to be unconstitutional. *Mcghee v Arkansas Board of Collection Agencies and American Manufactures Mutual Insurance Company*, No. 08-164 (AR S. Ct. Nov. 6, 2008). In accordance with that and previous rulings, at no time did the Check Cashers Act authorize or condone violations of the Arkansas Constitution or the Deceptive Trade Practices Act.

11. The Payday Lending Transactions engaged in by the Defendants constitute deceptive and unconscionable trade practices prohibited by the Arkansas Deceptive Trade Practices Act. The prohibited Payday Lending Transactions engaged in by the Defendants include, but likely are not limited to, violations of Arkansas Code Ann. §§ 4-88-107(a)(1), 4-88-107(a)(8), and 4-88-107(a)(10). More specifically, the Defendants have violated the Deceptive Trade Practices Act by charging and collecting unconscionable rates of interest on short term Payday Lending Transactions. The practice of charging ultra-high usurious rates of interest is unconscionable as a matter of law.

12. The Attorney General specifically denies the assertions of the Defendants set forth in the Defendants' position in this Consent Judgment.

V. THE DEFENDANTS' POSITION

13. (a) The Defendants specifically deny the assertions of the Attorney General set forth in the Attorney General's position in this Consent Judgment. More specifically, the Attorney General confuses the difference between the undisputed facts in this case and the application of Arkansas law to those facts. The undisputed facts are that Big R d/b/a First Union operated a cash advance business. While the Attorney General alleges that as a matter of law the Arkansas Deceptive Trade Practices Act extends vicarious liability for the acts and omissions of Big R to David R. Thompson (presumably in his capacity as sole shareholder of Big R), the Attorney General cites no facts to support the allegation that anyone other than Big R actually operated First Union.

(b) The General Assembly of the State of Arkansas created, licensed and regulated a system of payday lending pursuant to the Arkansas Check Cashers Act, Ark. Code Ann. § 23-52-101, *et seq.* That legislation authorized the Arkansas State Board of Collections Agencies (the "Board") to regulate payday lending activities.

(c) At all times herein material First Union's payday lending activities were licensed and regulated by the Board and its staff.

(d) The rules and regulations adopted by the Board required First Union to use certain contracts and documents in connection with First Union's transactions with its customers. Depending on the terms of each Payday Lending Transaction, the Board required First Union to indicate in its contracts that interest rates of 173% to 868% were being charged by First Union to its customers.

(e) The Board audited each contract documenting First Union's Payday Lending Transactions with its customers. If a contract failed to disclose an interest rate calculated in accordance with the Board's rules and regulation, the Board fined First Union.

(f) First Union began Payday Lending operations in the summer of 2006, and ceased all operations in April, 2008. During the entire course of its Payday Lending operations First Union lost approximately \$68,016.19, not including legal fees and settlement expenses incurred with respect to this litigation.

(g) First Union ceased all operations prior to the decision of the Arkansas Supreme Court in *Mcghee v Arkansas Bd. of Collection Agencies*, 375 Ark. 52, 289 S.W.3d 18 (2008).

(h) It is the Defendants' position that one agency of the State (the Board) created, licensed, condoned, and regulated the activity that another branch of State government (the Attorney General) has used as a basis for this litigation against the Defendants, and that the activities that the Attorney General alleges to have been in violation of the Deceptive Trade Practices Act were treated as legitimate business activities by the General Assembly and the Board pursuant to the Arkansas Check Cashers Act.

VI. Relief

14. This Consent Judgment is intended to preclude the Defendants from engaging in any type or form of Payday Lending Transactions in violation of Arkansas law. Accordingly, the Defendants shall hereafter be permanently restrained and enjoined from engaging or entering into any type, shape or form of Payday Lending in the State of Arkansas. Specifically, Defendants are enjoined from charging or collecting any payments on any Payday Lending transactions, or variation of such transaction, in the State of Arkansas where the interest charged

is in excess of that allowed by the Arkansas Constitution, Article 19, § 13 and the Arkansas Deceptive Trade Practices Act, ARK. CODE ANN. §§ 4-88-101, *et seq.*

15. More specifically, Defendants are permanently restrained and enjoined from using any plan, device, model, mechanism, or other sham, to avoid the terms of this Consent Judgment. Prohibited practices include, but are not limited to, internet based lending with residents of the State of Arkansas, regardless of the location from which the Defendants or their agents may claim they are operating.

16. All outstanding contracts for Defendants' Payday Lending Transactions, which were entered into with residents of the State of Arkansas are hereafter cancelled. Defendants are currently holding Arkansas consumers' checks valued at \$197,214.00. These checks are hereinafter cancelled and Defendants will undertake no efforts to collect on these instruments. Furthermore, the Defendants shall take no action, formal or informal, to attempt to enforce any such obligation against any Arkansas consumer pursuant to any Payday Lending contracts or the check itself. Specifically, the Defendants shall take no action to enforce such contracts, nor to collect any sums which might arguably be due pursuant to such contracts. Defendants shall not contract with any third party debt collectors regarding these Payday Lending Transactions, nor sell, or transfer, any obligations arguably due based upon these transactions. Defendants shall make no negative reports to any credit bureau, check clearing house, or other related service with respect to any of these Payday Lending Transactions.

17. Simultaneous with the entry of this Judgment, the Defendants shall, collectively, pay the sum of \$25,000.00 to the Attorney General, and the Attorney General hereby acknowledges the receipt of said sum. All monies shall be delivered to the Chief Financial Officer of the Attorney General's office and shall be made payable to the Office of the Attorney

General. A copy of all checks shall be delivered to Charles Saunders, Assistant Attorney

General. All checks may be delivered to Office of the Attorney General, 323 Center Street, Suite 200, Little Rock, AR 72201. These sums shall be held by the Attorney General and deposited in the Consumer Education and Enforcement Fund and shall be held in trust there to be used by the Attorney General in his discretion to further efforts to investigate and prosecute consumer protection, environmental, public utilities and antitrust matters, and to educate consumers regarding such matters.

18. In addition to the \$25,000.00 payment, the Defendants agree to be contingently liable for the payment of an additional \$75,000.00. However, the imposition of the \$75,000.00 sum will be suspended for a period of five years. The payment of said additional sum shall be contingent upon, and shall be due and payable only upon a specific finding by this Court that any one of the Defendants have materially breached a substantive term of this agreement within said five year period commencing on the date this Consent Judgment is entered. After the expiration of five years from the entry of this Judgment, this contingent liability shall expire and the contingent payment of \$75,000.00 shall no longer be collectable by the Attorney General. However, neither the suspension of such payment nor the expiration of such contingency shall prevent the Attorney General from pursuing any and all actions and claims available to the Attorney General for any conduct occurring after the entry of this Consent Judgment.

19. This Consent Judgment constitutes the entire agreement of the parties. The undersigned acknowledge that there are no communications or oral understandings contrary, different, or which in any way restrict this Consent Judgment and that any and all prior agreements or understandings within the subject matter of this Consent Judgment are, upon the effective date of the Consent Judgment, superseded, null and void.

20. This Consent Judgment resolves and releases all civil claims, causes of action, or proceedings which were or could have been asserted by the Attorney General against Defendants for those practices alleged within its Original Complaint. Nothing within this Consent Judgment, however, precludes the Attorney General from instituting any cause of action against any party not a signatory to this Consent Judgment. Nor shall this release or in any way limit the authority of the Attorney General to conduct such investigations as he deems advisable or to bring any enforcement action regarding alleged violations of law unrelated to its Original Complaint or occurring after the date of this Consent Judgment. Also, the Attorney General is empowered to seek enforcement of any and all sections of this Consent Judgment by appropriate action with this Court.

21. Nothing in this Consent Judgment shall be construed to deprive any person or entity not a signatory hereto of any private right of action of any kind whatsoever, nor shall this Consent Judgment be construed to create any private right of action for any person or entity not a signatory hereto. Further, the parties understand and agree that: this Consent Judgment is the compromise and settlement of disputed claims; the payment made is not to be construed as an admission of liability on the part of the Defendants; the Defendants deny liability for all claims and causes of action asserted against them in this litigation and have entered into this compromise settlement for the purpose of avoiding litigation and buying their peace; and that this Consent Judgment shall never be treated as an admission of liability by the Defendants at any time or in any manner whatsoever.

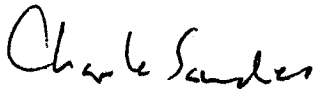
22. Nothing herein shall be construed as the endorsement of, or acquiescence in, any trade practices of the Defendants, past, current, or future; and, the Defendants shall make no representations to the contrary.

23. This Consent Judgment will be construed and enforced under the laws of the State of Arkansas.

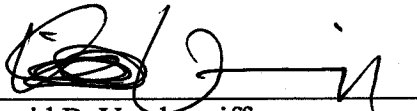
VII. Signatories

24. Each undersigned representative of a party certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Judgment and legally bind such parties to its terms.

25. This Consent Judgment is made and entered into by and between the parties hereto and on this 28th day of December, 2009.



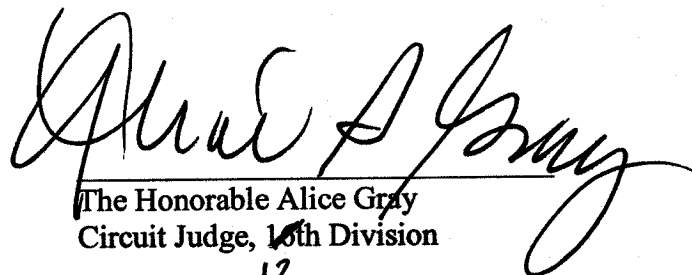
Charles Saunders
Assistant Attorney General



David B. Vandergriff
Attorney for the Defendants

SO ORDERED:

Dated: 1-5, 2010.



The Honorable Alice Gray
Circuit Judge, 12th Division
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PREPARED BY:

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Judge Gray
Date 1/5/10 Dw 12
Jury Trial
Bench Trial
Non-Trial