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Once again, payday loans escape ruling

BY DAVID SMITH
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The Arkansas Supreme Court declined on Thursday to make a decision on whether the law permitting "payday lending" violates the state constitution, instead sending the case back to Pulaski County Circuit Court.

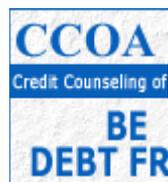
Pulaski County Circuit Judge Barry Sims declared in November 2005 that the Arkansas Check-Cashers Act is constitutional. The case, Sharon McGhee et al v. Arkansas State Board of Collection Agencies, was appealed to the Supreme Court.

But Sims' ruling from the bench that the law is constitutional was not included in the written order, which addressed several issues. So the Supreme Court determined that it could not make a decision on the constitutionality of the law.

When the Check-cashers Act passed in 1999, it said money earned by payday lenders was to be considered fees, and not interest. The law was written to avoid Arkansas' 17 percent constitutional limit on interest.

A payday loan works like this in Arkansas: A customer writes a check for \$ 400, for example, and receives \$ 350. The lender normally keeps the check for two weeks, but does not cash it.

The \$ 50 charge on a \$ 350 loan for 14 days equals 371 percent in annual interest. If the borrower cannot pay the loan in two weeks,



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another check is written, another fee paid and the loan is extended for two more weeks. The process often continues for months.

Some payday lending borrowers spend more than \$ 1, 000 before paying off one loan, consumer advocates say.

The decision to remand the case to the lower court means that payday lending will continue in Arkansas. It could take another year for the case to work its way back to the Supreme Court.

The Supreme Court upheld one of Sims' decisions in the case, reversed another and referred the question of the law's constitutionality back to Sims.

Justice Donald Corbin, who wrote the opinion, agreed with Sims, who ruled that McGhee's argument was flawed that the state Board of Collection Agencies was using public money to regulate the industry in the state. The board showed that it is funded solely from fees and fines paid by payday lenders.

The court reversed Sims' ruling that McGhee should take her case before the Board of Collection Agencies before taking it to circuit court.

And even though Sims had ruled from the bench that the law is constitutional, the Supreme Court said it couldn't address the issue because that finding isn't in the final order.

"If a trial court's ruling from the bench is not reduced to writing and filed of record, it is free to alter its decision upon further consideration of the matter," Corbin wrote. "Simply put, the written order controls."

Todd Turner, an Arkadelphia lawyer who represents McGhee, argued before the Supreme Court earlier this month that the court has the latitude to decide a case on matters not included in a written order. Turner said that because the Supreme Court is the judicial body that interprets the state's constitution, it could choose to do that in the McGhee case.

Jean Ann Fox, director of consumer protection with the Consumer Federation of America in Washington, D. C., asked: "What's the matter with your Supreme Court ? Why don't they just come out and make the decision ? The Federal Reserve says that payday loans are credit. Every court decision I've seen says that payday loans are credit, they are extensions of credit. Obviously these are loans and it's regrettable that the Supreme Court has not gotten to the end point of making a definitive decision."

This is at least the third time the high court has chosen not to

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make a direct ruling on the law.

McGhee's lawsuit, filed last year, has been before the Supreme Court twice.

This is the second time it has been ordered back to circuit court. In the first trip to the Supreme Court, the justices also did not rule on whether the Check-cashers Act is constitutional.

And in 2001, in *Luebbers v. Money Store Inc.*, the Supreme Court declared the Legislature did not have the authority to decide what is or is not interest, effectively disallowing calling payday lenders' income fees.

The law no longer contains that language. Last year, the Legislature struck the wording from the Check-cashers Act that referred to income as fees.

That 2001 decision "gutted" the Check-cashers Act, Attorney General Mike Beebe said in an August interview with the Arkansas Democrat-Gazette.

Matt DeCample, spokesman for Beebe's office, said Thursday, "We're reviewing the ruling and keeping a close eye on the case even though we're not a party to it."

H. C. "Hank" Klein, president of Arkansans Against Abusive Payday Lending, said Thursday that the state's 275 payday lenders "suck about \$ 68 million out of the [state] economy each year."

Klein said he was saddened by the Supreme Court's decision.

"I'm sad that it's going to take another year for this to be decided," Klein said.

Peggy Matson, executive director of the state Board of Collection Agencies, said she was pleased with the decision.

She said if the Check-cashers Act is declared unconstitutional, payday lenders would still find a way to operate without regulation, even though there probably would be fewer lenders.

"Payday lending existed before there was the law," Matson said. "I think there will always be people with the need for money on a short-term basis."

Turner said his next step is to go back to Sims' court and ask him to rule the statute unconstitutional.

"I hate that we didn't get a ruling on the constitutionality [Thursday]," Turner said. "To the extent that we could have done

something differently as lawyers to get a ruling, I regret that.”

No matter how Sims eventually rules, the case will be appealed again to the Supreme Court, Turner said. If Sims says the law is constitutional, Turner said he will appeal. If Sims rules that it is unconstitutional, payday lenders will appeal, said Bradley Rogers, president of the Arkansas Financial Services Association Inc.

“We’d love to see the system work a little faster,” said Chris Averitt, a Jonesboro lawyer who also represents McGhee. “But, of course, there is nothing stopping the General Assembly from repealing the act.”

Payday lending opponents already are working on bills to submit to the Legislature seeking a solution to the issue.

“We almost have our first bill [written], which will set up a penalty for usury in Arkansas,” said Mark Johnson, an advocacy consultant for AARP.

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