

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



PHYSICAL ADDRESS:
812 Quarrier St.
Charleston, WV 25301

MAILING ADDRESS:
P. O. Box 1789
Charleston, WV 25326-1789

E-Mail: consumer@wvago.gov
<http://www.wvago.us>

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL

Consumer Protection
and Antitrust Division
(304) 558-8986

Preneed Funeral Services
(304) 558-8986

Consumer Hotline
1-800-368-8808

FAX: (304) 558-0184

June 29, 2012

*via First Class Mail and
Facsimile (304) 558-8986*

Re: Investigation of

Dear Sirs and Madam:

I am writing to notify you that our office has decided to open a formal investigation of your business, (). This decision was prompted in part by the complaints of () copies of which are enclosed, which confirm that you are engaging in the business of payday lending in West Virginia. Please be advised that all activity pertaining to Internet payday loans in West Virginia is unlawful, regardless of whether you are the direct lender or performing other supportive roles, such as marketing, leads generation, or servicing and processing of accounts.

Based upon the complaint, the pertinent documents, and your response, we have determined that you are violating the West Virginia Consumer Credit and Protection Act ("WVCCPA") W. Va. Code 46A-1-101 et seq., the law enforced by the Attorney General of West Virginia ("Attorney General"). We have also determined that the conduct of your company in West Virginia has conferred us with specific personal jurisdiction such that we can and will enforce the WVCCPA with respect to your company and its principals.

Jurisdiction and Applicable Law

The seminal case of Zippo Manufacturing Company v. Zippo Dot Com, Inc., 952 F. Supp 1119, 1124 (W.D. Pa. 1997) established the important principle that a state may constitutionally exercise personal jurisdiction over a company based upon its commercial activities on the Internet. The court in Zippo articulated a “sliding scale” for analyzing whether a state has jurisdiction in a particular case that has been almost universally followed:

This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. (Citation omitted.) At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction; (Citation omitted.) Id.

The United States Court of Appeals for the Fourth Circuit expressly adopted the “Zippo model” in determining when judicial power may be exercised over a person outside of the states based upon commercial activities on the Internet. See ALS Scan, Inc., v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002); and Carefirst of Maryland, Inc., v. Carefirst Pregnancy Centers, Inc., 334 F.3d. 390, 399 (4th Cir. 2003).

Based upon the principles established by Zippo and adopted for analysis of conduct in West Virginia by ALS Scan, we have concluded that the Attorney General has specific personal jurisdiction over the conduct of your company and its principals in West Virginia.

We have also determined that the loan contract in question is governed by the laws of the State of West Virginia. The United States Court of Appeals for the Fourth Circuit has long held “[T]he rule applies that a contract is deemed to be executed in the state where the final act is done which is necessary to make it binding.” See Hogue-Kellogg Co., Inc., v. G.L. Webster Canning Co., Inc., 22 F.3d 384, 385 (4th Cir. 1927), citing various cases and authorities, including Williston on Contracts, Vol. I, Sec. 97; and Minor on Conflict of Laws, Sec. 157. The West Virginia Supreme Court of Appeals cited the Hogue-Kellogg principle in Holt Motors, Inc., v. Casto, 67 S.E. 2d 432, 435 (W. Va. 1951) (the formal validity of a contract is to be determined by the *lex loci celebrationis* - the law of the place where a contract is made.) Finally, the Hogue-Kellogg principle has been followed as recently as this year by a Virginia federal district court in Bellagio Insurance, Ltd., v. Digital Broadcast Corporation, 2005 WL 677223 (W.D. Va.): “... [T]he state in which the parties ‘made’ the contract governs questions of interpretation and validity...and the contract is ‘made’ in the state where the final act is done which is necessary to make it binding.” Williston on Contracts has confirmed that “the place of the contract is the place where the last act necessary to the completion of the contract is done, that is, where the contract first creates a legal obligation (emphasis added).” See Williston on Contracts § 6:61 (4th ed.).

In a recent case, the West Virginia Supreme Court of Appeals signaled that it will hold Internet merchants accountable to our laws regardless of whether they have a physical presence here. In Tax Commissioner of the State of West Virginia v. MBNA America Bank, N.A., 640 S.E. 2d 226 (W. Va. 2006), the Court held that the tax commissioner's imposition of West Virginia's business franchise and net income taxes on MBNA, a Delaware based credit card bank with no physical presence here, does not violate the federal Commerce Clause.

The Court's discussion in MBNA provides a strong indication that it will enforce state consumer protection laws against Internet payday lenders:

[W]e believe that the Bella Hess [286 U.S. 753] test, first articulated in 1967, makes little sense in today's world. In the previous almost forty years, business practices have changed dramatically. ***

The development and proliferation of communication technology exhibited, for example, by the growth of electronic commerce now makes it possible for an entity to have a significant economic presence in a state absent any physical presence there. For this reason, we believe that the mechanical application of a physical presence standard to franchise and income taxes is a poor measuring stick of an entity's nexis with a state. (Emphasis added.)

(Emphasis added.) MBNA, 640 S.E. 2nd at 234. The Court further explained:

...[I]t would have been impossible for the Framers to imagine our world. When they fashioned the Commerce Clause, they could not possibly have foreseen the complex and varied ways that commerce is conducted today, especially via the Internet and electronic commerce. This recognition of the staggering evolution in commerce from the Framers' time up through today suggests to this Court that in applying the Commerce Clause we must eschew rigid and mechanical formulas in favor of a fresh application of Commerce Clause principles tempered with healthy doses of fairness and common sense. This is what we have attempted to do herein.

(Emphasis added.) Id. at 237, our court's holding in MBNA has been cited with approval by at least two sister states, *i.e.*, MBNA America Bank, N.A. & Affiliates v. Indiana Department of State Revenue, 895 N.E. 2nd 140, 143 (Ind. Tax 2008); and Capital One Bank v. Commissioner of Revenue, 899 N.E. 2nd 76, 84 (Ma. 2009).

In a recent opinion that has sweeping national implications, the tenth circuit court of appeals upheld the district court in resoundingly rejecting the contention of QuikPayday, Inc., a Utah-based Internet payday lender, that the State of Kansas was barred from regulating its usurious lending activities by the dormant Commerce Clause and the Due Process Clause. See QuikPayday, Inc. v. Stork, 549 F. 3d 1302 (10th Cir. 2008). The court in Quick Payday held:

We reject the argument that the dormant Commerce Clause prohibits such regulation [regulation of Internet lenders by states] just because the parties use the Internet to communicate. [citing Zippo, Supra.] *** ‘Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction [by the foreign jurisdiction over the entity] is proper. Different results should not be reached simply because business is conducted over the Internet.

(Emphasis added.) Quick Payday, 549 F. 3d at 1312. As was the case in Kansas, the Internet loans at issue here were solicited, consummated, and collected in West Virginia. Accordingly, there is no question that the loans are governed by West Virginia law and the lenders activities may be regulated by the Attorney General.

Based upon all of the foregoing principles we have determined that the loan contract in question, and all of the loan contracts entered into by your company with consumers residing in West Virginia, are governed by the laws of the State of West Virginia. Accordingly, your company’s conduct is subject to the usury laws of West Virginia as well as the WVCCPA, all of which may be enforced by the Attorney General.

Violations of West Virginia Consumer Protection Law

We have determined that _____ are engaging in violations of the WVCCPA that include, but are not limited to, the following:

1. _____ is engaging in the business of making consumer loans in the State of West Virginia without having filed a notification with the state tax department within 30 days after commencing business in this state or at any time thereafter, as required by W. Va. Code § 46A-7-115. Such failure constitutes an unfair or deceptive act or practice, in violation of W. Va. Code § 46A-6-104.

2. _____ is charging an interest rate in excess of 18% per annum, the maximum allowable rate for such consumer loans as determined by the West Virginia Lending and Credit Rate Board (“Board”). A copy of the latest order issued by the Board effective December 1, 1999, and still in effect today, is enclosed. Accordingly, _____ are engaging in the practice of making usurious loans as defined by W. Va. Code § 47-6-6. The latter provides that usurious loans are void as to all interest and, in addition, the consumer may recover an amount equal to four times all interest charged and in any event a minimum of \$100.00. Such conduct also constitutes an unfair or deceptive act or practice in violation of W. Va. Code § 46A-6-104.

_____'s practice of engaging in the business of making consumer loans in the State of West Virginia without a license, coupled with the fact that its loans are usurious, renders each such consumer loan void and unenforceable. Courts of other states have held consumer loan

contracts to be void and unenforceable when the lender was not licensed or when the contract otherwise violated state consumer protection law. For example, the court in Edwards v. Alabama Farm Bureau Mutual Casualty Insurance Company, 509 So. 2d 232, 236 (Ala. App. 1986) held that when a loan instrument fails to comply with Alabama consumer law, both the instrument and the underlying obligation are void.

The United States Supreme Court in McMullen v. Hoffman, 174 U.S. 639, 654 (1932) recognized the common law principle that a court will not enforce illegal contracts:

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

The Supreme Court of Connecticut in Solomon v. Gilmore, 731 A. 2d 280, 289 (Conn. App. 1999), relied upon McMullen in holding that a secondary mortgage issued by an unlicensed lender was unenforceable in a foreclosure action: “In reaching this conclusion, we join several of our sister states that similarly have held that loan contracts issued by moneylenders or creditors in violation of statutory or licensing requirements are not enforceable, even though the applicable statutes did not expressly so provide” (emphasis added). Id.

The Attorney General’s Enforcement Powers

West Virginia Code § 46A-7-101 et seq. authorizes the Attorney General to enforce the WVCCPA. In order to meet this obligation, the legislature authorized the Attorney General to conduct formal investigations, W. Va. Code § 46A-7-104, and to take court action if necessary to enforce the law. Specifically, W. Va. Code § 46A-7-108 provides: “The attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief.” The West Virginia Supreme Court of Appeals has held in State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799 (W. Va. 1998), that “other appropriate relief” means the legislature intended that the “full array of equitable relief” be available in suits brought by the Attorney General. On this basis, the Court in Imperial Marketing held that the Attorney General could seek restitution for all aggrieved consumers. The concept of equitable relief is broad and also authorizes the Attorney General to recover attorney fees in court cases brought to enforce the WVCCPA. See State ex rel. McGraw v. National Fuels Corporation 600 S.E. 2d 244 (W. Va. 2004).

West Virginia Code § 46A-5-101(1) provides that consumers may be awarded their actual damages and a civil penalty of up to \$1,000 if a creditor has engaged in any illegal, fraudulent, or unconscionable conduct or any prohibited debt collection practice with respect to them. West Virginia Code § 46A-5-106 further provides that the court may adjust the damages awarded to consumers to account for inflation from the time the WVCCPA became effective, September 1, 1974, to the time of the award in an amount equal to the consumer price index. Recent calculations indicate that adjustment for inflation has raised the maximum civil penalty under this statute to approximately \$3,700.

In addition, W. Va. Code § 46A-7-111(2) provides that the Attorney General may recover a civil penalty of up to \$5,000 for each violation of the WVCCPA “if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter.”

conduct as alleged herein was “willful” even if it believed at the time that its practices were lawful. Moreover, W. Va. Code § 47-6-6 provides “Every usurious contract and Assurance shall be presumed to be willfully made by the lender or creditor...(emphasis added).”

Finally, W. Va. Code § 46A-5-102 further provides: “Rights granted by this chapter [WVCCPA] may be asserted as a defense, setoff or counterclaim to an action against a consumer without regard to any limitation of actions” (emphasis added). Importantly, W. Va. Code § 46A-5-105 provides that “the court may cancel the debt when the debt is not secured by a security interest” in those instances where the “creditor has willfully violated the provisions of the chapter [WVCCPA] applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice” (emphasis added).

Offer of Resolution

Notwithstanding all of the foregoing, it is the policy of our office to first seek voluntary compliance with the WVCCPA before initiating enforcement action in court. Toward this end, we respectfully convey the following offer of resolution to :

1. will enter into an Assurance of Discontinuance, as authorized by W. Va. Code § 46A-7-107, in which it promises future compliance with the WVCCPA without admitting to any wrongdoing in connection with this matter.

2. The Assurance will outline all of the alleged unlawful practices as set forth herein above and will require to agree to refrain from engaging in each of these practices in the future. Specifically, in the event that undertakes to engage in the business of making consumer loans to persons residing in West Virginia in the future, it must agree (i) to file notification with the state tax department within 30 days after commencing business in this state, and, thereafter, on or before the last day of January of each year as required by W. Va. Code § 46A-7-115; and (ii) to refrain from charging interest rates in excess of 18% per annum or such other rates as may be prescribed by the Board pursuant to W. Va. Code § 47-A-1-1 et seq.

3. shall take the following actions with respect to all loans that it has entered into with West Virginia consumers from the time it commenced making consumer loans to persons residing in West Virginia up to and including the present.

(a) All such loans on which a balance is currently owed, whether such loan is viewed as current, delinquent, in default, or

charged-off, shall be closed with a zero balance and shall notify all consumer reporting agencies, including check guarantee companies, to delete all references to this transaction from their records.

(b) shall fully refund all amounts whatsoever that it collected from any consumers in West Virginia from the time it commenced engaging in the business of making consumer loans in West Virginia up to and including the present.

(c) shall meet its obligation to make refunds by providing the Attorney General, within 30 days after the date of this Assurance, with a check payable to the State of West Virginia representing the total amount of all fees or charges collected from West Virginia consumers, accompanied by a report in hard copy and electronically containing the names, addresses, and telephone numbers of all affected consumers and the amounts owed to each. Thereafter, the Attorney General shall prepare and distribute checks to each consumer in the appropriate amount along with an explanatory cover letter.

4. further agrees that, in the event the Attorney General is not able to locate consumers to whom refunds are owed after all reasonable efforts to do so have been taken, such amounts shall be retained by the Attorney General, placed in trust, and used solely for consumer protection purposes, including but not limited to, restitution, consumer education, credit or bankruptcy counseling and education, conflict resolution programs, and costs associated with implementing restitution orders.

5. The Assurance will require that resolve all future complaints filed with our office, including complaints arising from loans entered into prior to the date of this Assurance, to the reasonable satisfaction of the Attorney General.

I am respectfully requesting that you advise me in writing, on or before **August 6, 2012** whether agrees in principle to accept our offer of resolution as set forth herein. Upon receiving written confirmation from you, I will prepare an appropriate Assurance of Discontinuance containing the terms of this agreement for your review and approval.

If we fail to receive written confirmation of your acceptance of this offer by the requested date, we will proceed with our investigation. The first step will be the issuance of a formal investigative subpoena as authorized by W. Va. Code § 46A-7-104 for the purpose of identifying any other conduct in violation of the WVCCPA as well as all consumers potentially aggrieved by this conduct. Thereafter, if this matter still is not resolved, the Attorney General may file a civil action as authorized by W. Va. Code § 46A-7-108 seeking a permanent injunction and other appropriate relief, including but not limited to, restitution for all aggrieved consumers, civil penalties of \$5,000

for each violation, and reimbursement of all costs including attorneys fees. Your prompt attention to this matter will be anticipated.

Sincerely yours,

Norman Googel
Assistant Attorney General
norman.googel@wvago.gov

NAG/rlg
Enclosure