

# ARKANSAS BUSINESS

www.arkansasbusiness.com

Vol. 22, No. 50 • December 19-25, 2005 • 1 Dollar



MICHAEL PRINCE

Safe Foods CEO Curtis Coleman said Russian bureaucracy set his business plan back by more than a year.

## Safe Foods Prepares for Growth

### Russian Roadblock Removed, Company Plans to Make Up Lost Time

BY JOHN HENRY

before getting U.S. Food & Drug... brought about a problem no one...

## Future for Payday Loans Unpredictable

BY GEORGE WALDON  
george@abpg.com

**W**ILL 2006 BE THE YEAR THE Arkansas Supreme Court finally rules that payday lending in its various guises is an illegal enterprise?

Consumer advocates and other payday lending opponents hope so, and it's a possibility that has payday lenders concerned.

The president of the Arkansas Financial Services Association, successor to the Arkansas Check Cashers Association, believes the future for payday lending in the state is hazy at best.

"It's very uncertain right now," said Bradley Rogers of Stuttgart. "There are a lot of people trying to shut us down. When you put your future in the hands of politicians and judges, nothing is guaranteed, but we feel like we're in the right."

OVER...

PAYDAY (Continued on Page 14)

## Payday Loan Question Heads to High Court

(Continued From Page 1)

The state's high court has avoided providing a definitive answer on the legality of payday lending for nigh on eight years.

In the meantime, companies have continued collecting high fees on services that several lower courts across the state have determined to be nothing more than high-interest loans. And some of those same lower court judges have said the interest rates on those payday loans are usurious, patently unconstitutional and therefore illegal.

Clouding the judicial vista are a few lower court rulings that have upheld payday lending as legal, protected by the industry-written Check Cashers Act of 1999.

But one recent case is now viewed as the key to unlocking a definitive ruling that could do away with payday lending in Arkansas.

Pulaski County Circuit Judge Barry Sims ruled late last month that the Check Cashers Act is constitutional while handing down a judgment in favor of the Arkansas State Board of Collection Agencies, charged with regulating payday lenders.

That ruling will allow Todd Turner, an Arkadelphia lawyer representing payday loan customers, to appeal the decision to the Supreme Court.

Some have suggested that Sims doesn't actually believe the Check Cashers Act and payday lending pass constitutional muster.

"I'm really limited on what I can say because this case is still pending, but you might infer something like that," Sims said.

The underlying motivation for his ruling, so the thinking goes, is to force the Arkansas Supreme Court to finally address the core issue: Are the fees collected by payday lenders actually interest in excess of the usury limit set by the state constitution?

### Hutchinson Opposes Act

Gov. Mike Huckabee, who signed the Check Cashers Act into law, declined to share his thoughts on the ongoing payday lending controversy. Instead, he referred questions to the state attorney general's office. Mike Beebe, attorney general and Democratic gubernatorial candidate, couldn't be reached for comment.

Asa Hutchinson, Republican gubernatorial candidate, said he opposes payday lending or any other form of lending that doesn't adhere to the state's usury law.

"I believe it's bad public policy to permit predatory payday lending practices," he said. "It binds workers into a paycheck-to-paycheck lifestyle that we should discourage."

"The Check Cashers Act permits and almost encourages that type of lending practice. That again is not only bad public policy but fails to exercise

the government's duty to protect citizens from this sort of economic abuse."

Hutchinson said that if a lender has to charge an interest rate higher than 17 percent — the current cap under the state's usury law — then the risk is too great and the loan shouldn't be made.

The fees charged by payday lenders universally exceed that figure, often equating to a triple-digit annual interest rate, as the lenders themselves acknowledge in the "truth in lending" disclosures they provide to customers in compliance with federal laws.

A final order from Sims is expected this month. That would set in motion a timetable that could lead to an appeal early next year, submission of briefs by summer, and possible oral arguments and a ruling before next Christmas.

"I certainly hope that the Supreme Court not only provides clarity but also will strike down portions of the law," Hutchinson said. "If not, it's something the Legislature should come back and address. I would certainly be willing to work with the Legislature to come up with a remedy."

The closest thing to a remedy the Arkansas Legislature has undertaken so far is a minor revision of the Check Cashers Act earlier this year. That change came four years after the Supreme Court said the offending phrases were unconstitutional.

The stricken phrases included a statement that money advanced to payday lender customers "shall not be deemed to be a loan" and fees charged "shall not be deemed to be interest."

Hank Klein, founder of Arkansans Against Abusive Payday Lending and retired CEO of Arkansas Federal Credit Union, said payday lenders have conducted business as usual for too long.

"The General Assembly did fix those objectionable words, but they didn't change the objectionable interest rate," he said. "It still exceeds our state constitution's usury limit of 17 percent."

Klein also is disappointed that the attorney general's office has done nothing to remedy the situation since Winston Bryant left office.

Near the end of Bryant's tenure, he successfully sued payday lenders as violators of the state's usury law. That proactive stance changed when Mark Pryor took office.

Under Pryor, two AG staffers were discouraged from warning lawmakers that the proposed Check Cashers Act was unconstitutional. When Mike Beebe succeeded Pryor, his stance in the matter was the same: If the Legislature said it's legal, it must be legal.

"I thought officers of the state took an oath to uphold the state constitution, not the Check Cashers Act of

## Past Payday Lending Judgment

**T**HE COURT FINDS THAT THE so-called fees are interest, and based upon plaintiff's own pleadings and attached exhibits, these charges amount to usurious interest.

"No matter what label is attached to the cost of hiring money, interest is what is being exacted. This is the case even though the Legislature is the entity attaching such labels by enactment of Act 1216 of 1999 (the Check Cashers Act).

"As Juliet says in 'Romeo and Juliet': 'What's in a name? That we call a rose by any other word would smell as sweet.'

"Arkansas Constitution Section

13(b) provides, in part, 'All contracts for consumer loans having a greater rate of interest than 17 percent per annum shall be void as to principal and interest.'

"The Constitution refers to 'interest'; Act 1216 refers to 'fees'; just the same, both are charges for the use of money.

"This court may, and hereby does find that Act 1216 of 1999 is itself void as being contrary to the Constitution of the State of Arkansas, which prohibits usurious interest." ■

— Springdale Municipal Judge Stanley W. Ludwig, Oct. 4, 2000.

### Payday Lending Highlights

**1996:** Under the leadership of Winston Bryant, the state attorney general's office sued a number of payday lenders, claiming the transactions were usurious according to Article 19, Section 43 of the Arkansas Constitution. The AG's office never lost a case, meaning that payday lending customers could walk away from the illegal loans with financial impunity.

**1999:** The Arkansas General Assembly passes the Check Cashers Act, legislation largely penned by the payday lending lobby. Key components seek to create a protective bubble from the state constitution's anti-usury provision.

These include money advanced to payday lender customers "shall not be deemed to be a loan" and fees charged "shall not be deemed to be interest."

Despite the legislative nicety, payday lenders keep losing cases brought by consumers around the state. Most judges continue to rule payday lending activity is usurious and unconstitutional and that loans and interest by any other names are still loans and interest.

**2000:** The Federal Reserve Board of Governors rules that "regardless of how the fee is characterized for state law purposes, 'payday lending fees would be considered interest."

**2001:** During the state legislative session, a variety of bills are introduced to alter the Check Cashers Act of 1999. Senate Bill 6, advocated by Sen. Cliff Hootman of North Little Rock, went so far as to attempt to repeal the entire Check Cashers Act. None of the measures passed.

The Arkansas Supreme Court rules that aspects of the Check Cashers Act violate the constitutional separation of powers. The courts are to determine what constitutes a loan and interest, not the Arkansas Legislature. However, the state's high court fails to address the direct question of whether the fees are in fact usurious interest.

**2002:** Todd Turner, an Arkadelphia lawyer representing payday loan customers, gets an \$834,000 judgment against Kentucky Cash Connection LLC of Cumberland Gap, Tenn., for charging usurious interest rates. Turner has yet to collect any money.

**2005:** The Arkansas Legislature finally passes legislation removing language from the Check Cashers Act of 1999 that the Supreme Court found to be unconstitutional in 2001. The key passages excised were money advanced "shall not be deemed to be a loan" and the fees charged "shall not be deemed interest."

Pulaski Circuit Judge Barry Sims rules the Arkansas Check Cashers Act is constitutional in another case involving Todd Turner. His decision paves the way for an appeal to the Arkansas Supreme Court and a hoped-for definitive ruling regarding the legality of payday lending. ■

1999," Klein said. "It appears to be a simple matter. The law is unconstitutional."

Even as the constitutional dance around the issue continues, lenders are employing ways to circumvent the state's usury limit.

One scheme is known as Internet rebating. Critics describe the setup as nothing more than a ruse to disguise payday lending.

A scenario involves a customer signing up for Internet service. In return, the customer receives a loan masquerading as a rebate and agrees to pay regular fees for grossly overpriced Internet services.

It's common for the customers to not

even use the Internet during the "service contract." Other lenders use phone cards in a similar ruse.

Another gambit involves using "rent-a-bank" charters to evade state usury laws. This involves a payday lender aligning itself with a bank domiciled in a usury-friendly state.

The lender then claims that under national banking law it is exempt from any local state usury restrictions and governed by the favorable terms of its "headquarters."

Some states are attempting to crack down on these payday lenders who function as banks in name only. The situation also is drawing more attention from national bank regulators. ■