

## Suit challenges payday lender procedures

By TAMMY FRAZIER Staff Writer

The bench trial involving the civil suit brought against Advance America Servicing, Inc. in Camden ended Tuesday with presiding Circuit Judge David Guthrie of El Dorado taking the case under advisement.

Defense attorneys for the payday lender claimed that the case was out of the jurisdiction of circuit court and wanted the case remanded to arbitration.

Three local plaintiffs have accused Advance America of applying unlawful interest in violation of the Arkansas Deceptive Trade Practices Act. Arkansas' constitution states that businesses cannot apply an interest rate in excess of 17 percent, and the plaintiff's lawyers contend that Advance America's interests rates range in the triple digits, but says that the company characterizes these interest rates as "fees."

According to plaintiffs' documents filed in Ouachita circuit court, Advance America applied fees that amounted to 295.12 percent on one plaintiff's contract and fees of over 150 percent in the cases of the remaining two plaintiffs. The plaintiffs are claiming that these fees are actually annual interest rates, are in excess of 17 percent and are in violation of the Arkansas' constitution.

Attorneys Phillip Stano and Lewis Weiner of the Sutherland, Asbill & Brennan law firm in Washington, D.C. and Claire Hancock of the Wright, Lindsey & Jennings law firm in Little Rock were in court Tuesday as the defense team for Advance America.

Chris Averitt of Scholtens & Averitt in Jonesboro and Todd Turner of Arnold, Turner & Turner in Arkadelphia were present as attorneys for the plaintiffs. The plaintiffs did not attend the trial.

Stano explained an earlier defendants' motion to dismiss the proceedings, saying that the case should be settled in arbitration. According to Stano, all of the plaintiffs signed customer agreements that contain a waiver of jury trial and a provision for arbitration.

This would require that any disputes between the customer and the payday lender be resolved in arbitration only.

According to Norman Pickell's Legal Web Reference, arbitration is a method of resolving a dispute in which an impartial third party, selected by the parties, listens to the facts and arguments presented and makes a decision as to how the issues in dispute will be resolved. In arbitration, the parties can usually choose who their arbitrator will be, whereas in court the parties cannot choose their judge. Court proceedings are held in public, whereas arbitration is held in private.

A case in Florida involving the payday lender Buckeye Check Cashing was used by Stano as having set a precedent in trials involving the payday lending industry. In January of 2005, the Supreme Court of Florida refused to enforce the arbitration clause in a payday loan contract saying that borrowers could not be forced to arbitrate a challenge to the loan contract.

However, in February of 2006, the U.S. Supreme Court overturned Florida's decision and ruled in favor of Buckeye, saying that a challenge to the validity of a payday contract containing an arbitration clause must go to an arbitrator, not to a judge and jury.

Stano also alleged that plaintiffs' attorneys changed the wording of their civil suit to avoid going to arbitration and that the plaintiffs are really challenging the validity of the contract.

"But to avoid being sent to arbitration, they are now saying that they are challenging the arbitration clause, not the contract," he said. "If they are challenging the contract, let them come right out and say they're challenging the contract. Then it can go to arbitration and save you and this court some time," Santos said to Guthrie.

Defense attorney Weiner said that the plaintiffs were "shopping" their case around, looking for a judge who would give them the verdict they want. He claimed that the plaintiffs pulled out of a class action suit that was filed with the 8th District Court in Clark County, but decided to try to get a better deal by filing their own suit.

Weiner also wanted Guthrie to throw the case out because he claimed that the plaintiff's attorneys did not produce evidence, testimony or affidavits to support their case.

Plaintiff's attorney Averitt stated that the plaintiffs' contracts did bear interest rates that were higher than Arkansas allows, but explained that the main contention was that the terms of the contract were not mutual.

Payday loans are usually secured by a personal check along with bank account or credit card information and a person can write a post-dated check or agree to have the amount withdrawn from their account at specified time. Averitt stated that the payday contract for Advance America states that the company can take customers to court if the check they used to secure the loan was insufficient, but states that customers cannot take Advance America to court if they challenge the contract. Averitt stated that contract must be the same for both the business and the customer.

"If a provision in the contract is optional for one party, it must be optional for the other party," Averitt explained. "This is all about mutuality. An agreement to arbitrate cannot be one-sided." He also said that, in other cases involving payday lenders, contracts had been voided "because of the lack of mutuality."

Plaintiffs' attorney Turner referred to the Check Cashers Act of 1999 that was passed to

allow the industry to charge fees. The act stipulated, however, that the fees could not be considered interest. Turner said that Advance America claims that the fees it charges its customers are used for operational costs.

“If it’s a fee you’re accepting to cover your expenses,” Turner explained, “it’s interest. They can’t put their expenses on a customer’s contract and not call it interest. If it goes to the cost of doing business, it’s interest.”

Turner said that the issue of the fees is what brings the plaintiffs to court, but the arbitration clause is unfair and does not give customers their day in court, but provides Advance America the option to sue them. He also said that Advance America has still been sending the plaintiffs collection letters, even though there is a court case in motion.

Plaintiff and defense attorneys mentioned that there were at least two other cases being brought to Judge Thomas in the 8th District. Guthrie told both sides that he wanted to look into those cases to see if they had any bearing on this case.

Guthrie said that he did not have all of the pleadings in this case, but would make sure to get them, take the matter under advisement and render a decision at a later time.

H.C. Klein, advocacy volunteer for the Association for the Advancement of Retired Persons, was present for the trial and stated that payday lenders are particularly hard on people on a fixed income.

“These people are barely making ends meet, will go to one of these places for what they think is a quick fix and find out that it’s a nightmare. They never get out from under it,” Klein said.

Turner and Averitt said after the trial that payday lenders are becoming a problem more so in small towns in southern regions because of depressed economic situations. “The payday lending industry preys on people who are desperate and unaware of the industry’s practices,” Averitt said.

Defense lawyers would not comment after Tuesday’s proceedings.