

FILED
NOV 16 2007
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

MIDWEST TITLE LOANS, INC.,

Plaintiff,

v.

**Judith J. Ripley, In Her Official Capacity as
Director of the Indiana Department of
Financial Institutions,**

Defendant.

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CASE NO.

1: 07-cv-1479-SWB-WTL

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT
AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

Plaintiff Midwest Title Loans, Inc. brings this Verified Complaint against Defendant Judith J. Ripley (“Defendant” or the “Director”), in her official capacity as Director of the Indiana Department of Financial Institutions (the “Department), in order to enjoin Defendant from enforcing against Plaintiff the Indiana Consumer Credit Code, Ind. Code §§ 24-4.5, *et seq.* (the “Indiana UCCC” or the “Indiana Act”).

Plaintiff is located in Illinois and conducts no business in Indiana. Nevertheless, by letter to Plaintiff dated August 6, 2007 (the “Warning Letter”), a true and correct copy of which is attached hereto as Exhibit A, the Supervisor of the Department’s Consumer Credit Division (the “Supervisor”) asserted that, pursuant to Ind. Code § 24-4.5-1-201, as amended effective July 1, 2007, so long as Plaintiff has engaged in any solicitation of Indiana residents, through any means, the Indiana UCCC now applies to loans made by Plaintiff, in Illinois, to Indiana residents.

As a result of the Department's threat to enforce the Indiana UCCC against Plaintiff, Plaintiff was forced to immediately suspend offering loans to Indiana residents and to waive all finance charges for all Indiana borrowers who obtained loans on or after July 1, 2007. Accordingly, the Department's threatened enforcement of the Indiana UCCC against Plaintiff is severely and irreparably damaging Plaintiff's business.

Ind. Code § 24-4.5-1-201(1)(d) and the Department's threat to enforce it against Plaintiff, which conducts its business entirely outside Indiana, conflict with the Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8, cl. 3 ("Commerce Clause"), and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const. amend. XIV, § 1 ("Due Process Clause"). Additionally, because Ind. Code § 24-4.5-1-201(1)(d) exempts subsidiaries and affiliates of Indiana industrial loan and investment companies through June 30, 2009, it also discriminates against interstate commerce and for this reason as well violates the Commerce Clause.

PARTIES

1. Plaintiff Midwest Title Loans, Inc. is an Illinois business corporation, licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. It makes loans ("Loans") under Illinois law from 23 stores located in Illinois. Plaintiff maintains no stores in Indiana and only makes loans in-person to borrowers who visit its Illinois stores. Plaintiff is neither qualified to do business in Indiana nor required to qualify to do business in Indiana. *See* Ind. Code §§ 23-1-49-1(b)(6), (7), (8), (11).

2. Defendant serves as the chief executive and administrative officer of the Department and is responsible for the administration of the policies established for the

Department by or pursuant to applicable Indiana legislation. The Director exercises managerial control over the work of the Department, including the Supervisor and the Department's remaining deputies, supervisors, examiners and administrative personnel.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 in that the Complaint asserts claims arising under the Constitution and laws of the United States, and seeks a declaration of rights and other legal relations under the Constitution and laws of the United States.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the Director is located within this district and because a substantial part of the events giving rise to the claims asserted in the Complaint occurred in this district.

PLAINTIFF'S BUSINESS

5. Plaintiff provides the Loans for personal, family and household purposes. The Loans are secured by the borrower's motor vehicle. Typically, the amount advanced is approximately \$500, and the Loans are payable in equal monthly installments over a period of 12, 18 or 24 months. The interest rate on the Loans exceeds the 36% per annum rate limitation under the Indiana UCCC. However, the loan documentation expressly calls for the application of Illinois law. The Loans comply with Illinois law.

6. Plaintiff made Loans to Indiana residents from 1999 through mid-August 2007, when it received the Warning Letter. During 2006, the Company made 2,054 Loans to Indiana residents, representing approximately 9.1% of Plaintiff's total Loans. For the period in 2007

prior to receipt of the Warning Letter, the Company made 907 Loans to Indiana residents, representing approximately 8.4% of Plaintiff's total Loans.

7. Plaintiff maintains no stores, employees or agents in Indiana and only makes loans in-person to applicants (including those from other states) who visit its Illinois stores and bring both their motor vehicle and their motor vehicle title to Plaintiff's Illinois stores.

8. While Plaintiff made Loans to Indiana residents prior to Plaintiff's receipt of the Warning Letter, Plaintiff's contacts with the State of Indiana historically have been extremely limited. Prior to its receipt of the Warning Letter:

(a) Plaintiff made Loans, at its Illinois stores, to Indiana residents who applied for Loans at its Illinois stores. To obtain a Loan, an Indiana resident needed to drive his or her motor vehicle to one of Plaintiff's Illinois stores and apply in-person for the Loan. If approved for a Loan, the applicant needed to execute the necessary Loan documentation at the Illinois store. The Loan funds were disbursed at the Illinois store in the form a check that could be cashed without charge at the store (or elsewhere). Plaintiff has never made a Loan to any borrower who was not physically present at one of its Illinois stores.

(b) Plaintiff made yearly mailings to past customers, thanking them for their business and reminding them of the availability of Loans from Plaintiff.

(c) Plaintiff advertised on radio and television stations in Indianapolis and Terre Haute, Indiana. (It also advertised on radio and television stations in Chicago which reach Indiana residents.)

(d) Plaintiff's name has been included in a few Indiana Yellow Pages listings.

(e) Plaintiff made available an 800 number, staffed by personnel physically located outside Indiana. By calling the 800 number, prospective borrowers, including Indiana residents, could obtain information about the Loans and how to apply for a Loan. However, prospective borrowers could not apply for or obtain Loans over the telephone, through the mail, by fax or over the Internet.

(f) After making a Loan to an Indiana resident, Plaintiff would submit to the Indiana Bureau of Motor Vehicles (the "Indiana Bureau") the documentation necessary to have its lien noted on the borrower's motor vehicle title and would then hold the revised title upon receipt from the Indiana Bureau.

9. Plaintiff continues to accept payments of principal and interest on Loans to Indiana borrowers made prior to July 1, 2007 and continues to accept principal payments on Loans to Indiana borrowers made between July 1, 2007 and Plaintiff's receipt of the Warning Letter. Borrowers can make payments in person at Plaintiff's Illinois stores or pay by money order or certified check (including money order or certified check transmitted through the U.S. mail), by credit card or through Western Union.

10. From its Illinois offices, Plaintiff makes reminder and collection calls to Indiana borrowers. If the borrower defaults, Plaintiff pays an independent repossession company to effect repossession of the vehicle securing the loan and obtains a new title showing Plaintiff as the owner of the vehicle. Repossessed Indiana motor vehicles may be kept in Indiana prior to sale and may be sold through an Indiana auction house. Plaintiff does not bring lawsuits to collect deficiency judgments and has never filed any lawsuit in an Indiana court.

11. Plaintiff has never: (a) owned or leased property in Indiana; (b) held a certificate of authority or license to do business in Indiana; (c) used agents or employees to solicit Indiana business in person; or (d) negotiated or determined contractual relationships in Indiana.

12. Plaintiff has no contacts with the State of Indiana, except as set forth above. Plaintiff does not conduct business – and has never conducted business – in the State of Indiana.

THE DISPUTE

13. Because the Loans are for small amounts and because much of Plaintiff's customer base has impaired credit, Plaintiff cannot profitably make Loans on the interest and other terms permitted by the Indiana UCCC.

14. On or about August 6, 2007, the Supervisor sent Plaintiff the Warning Letter. The Warning Letter claimed that, effective July 1, 2007, Ind. Code § 24-4.5-1-201 “requires lenders who are soliciting (by any means) and then making consumer loans to Indiana residents to be licensed” under the Indiana UCCC. The Warning Letter quoted Ind. Code § 24-4.5-1-201(8) as follows: “If a creditor has violated the provisions of this article that apply to the authority to make consumer loans (IC 24-4.5-3-502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24-4.5-5.202.” It added: “Failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers.”

15. Under Ind. Code § 24-4.5-1-201(9), the Department may act on behalf of a debtor to enforce the debtor's rights under Ind. Code § 24-4.5-1-201. Thus, the Indiana UCCC authorizes the Department to take action in an effort to render post-July 1, 2007 Loans (“Covered

Loans”) null and void and to recover interest and principal on all such Covered Loans. Additionally, the Indiana UCCC authorizes the Department to issue cease and desist orders, Ind. Code § 24-4.5-6-108; bring civil actions for injunctive relief, Ind. Code § 24-4.5-6-110; bring actions for civil penalties, Ind. Code § 24-4.5-6-113(2); and impose civil penalties on its own, Ind. Code § 24-4.5-6-113(3).

16. As a result of its receipt of the Warning Letter and the unacceptable risks that continued lending to Indiana residents would have entailed, Plaintiff was forced to immediately suspend offering Loans to Indiana residents (unless and until this Court enjoins Defendant from enforcing the Indiana UCCC against Plaintiff).

17. Additionally, Plaintiff discontinued charging or collecting any interest on Covered Loans and refunded all payments of interest on Covered Loans. *See* the exchange of correspondence with the Supervisor attached hereto as Exhibit B.

18. Accordingly, the Department’s threat to enforce the Indiana UCCC against Plaintiff has damaged, and is severely and irreparably damaging, Plaintiff’s business.

19. Plaintiff believes that Defendant cannot constitutionally apply the Indiana UCCC to govern Plaintiff’s business. Nevertheless, in light of the recent amendment to Ind. Code § 24-4.5-1-201, the Warning Letter and the draconian remedies available for violations of the Indiana UCCC, Plaintiff does not believe that it can make Loans to Indiana residents without obtaining a court ruling that the Indiana UCCC is inapplicable to the Loans.

20. As a direct result of the amendment to Ind. Code § 24-4.5-1-201 and the Department’s threat to enforce the Indiana UCCC against Plaintiff, Plaintiff was forced to

immediately suspend offering loans to Indiana residents and to waive all finance charges for all Indiana borrowers who obtained loans on or after July 1, 2007.

COUNT I

**(Claim for Declaratory and Injunctive Relief
Under the Commerce Clause and the Due Process
Clause Based on Invalid Extraterritorial
Application of the Indiana UCCC)**

21. The prior allegations are hereby incorporated by reference.

22. The Commerce Clause prohibits the State of Indiana from applying its laws extraterritorially to regulate commerce conducted outside the State of Indiana. *See, e.g., Healy v. Beer Institute*, 491 U.S. 324 (1989); *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir.1999). The Due Process Clause prohibits the State of Indiana from applying its laws extraterritorially to regulate and punish lawful conduct in other States. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573 (1996).

23. The Indiana UCCC, particularly Ind. Code § 24-4.5-1-201(1)(d), as amended, violates the Commerce Clause by purporting to govern loans where an Indiana resident “enters into a . . . loan transaction with a creditor in another state and the creditor has advertised or solicited . . . loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet or electronic means.” *See Dean Foods*, 187 F.3d at 618 (stating that “the fact that [a party] mails business solicitations to Wisconsin businesses . . . [does] not appear relevant to our inquiry” whether the Commerce Clause allows Wisconsin law to apply to the transactions in question). The Indiana UCCC, including Ind. Code § 24-4.5-1-201(1)(d), violate the Due Process Clause by purporting to subject Plaintiff to cease and desist orders, injunctive relief and penalties for conduct in Illinois that is lawful in that State. *See, e.g., Gore*, 517 U.S. at

573 (a State may not “impose sanctions on [a company] in order to deter conduct that is lawful in other jurisdictions”).

24. Plaintiff brings this claim pursuant to 42 U.S.C. § 1983.

25. Plaintiff is suffering irreparable injury, loss and damage for which it has no adequate remedy at law.

26. Plaintiff has a substantial likelihood of succeeding on the merits of its Commerce Clause and Due Process claim set forth herein; and Plaintiff is suffering irreparable injury, loss and damage for which it has no adequate remedy at law so long as enforcement of the Indiana UCCC is not enjoined and until such time as the Court can determine the merits of the action, decide Plaintiff’s request for declaratory relief and enter a permanent injunction should Plaintiff prevail. Granting preliminary injunctive relief will preserve the preexisting *status quo* as to Plaintiff until such time as the Court may determine the merits of this action; and the public interest favors entry of preliminary injunctive relief.

27. Plaintiff is entitled to declaratory relief and a permanent injunction.

COUNT II

(Claim for Declaratory and Injunctive Relief Under the Commerce Clause Based on Discrimination Against Interstate Commerce)

28. The prior allegations are hereby incorporated by reference.

29. Ind. Code § 24-4.5-1-201(1)(d) provides that, from July 1, 2007 through June 30, 2009 and in specified circumstances, it “does not apply to an affiliate or a subsidiary of a financial corporation issued a certificate of authority to operate as an industrial loan and investment company under Ind. Code § 28-5.”

30. There is no legitimate basis for the discrimination of Ind. Code § 24-4.5-1-201(1)(d) against companies such as Plaintiff that are not affiliated with Indiana industrial loan and investment companies.

31. Ind. Code § 24-4.5-1-201(1)(d) discriminates against interstate commerce and violates the Commerce Clause.

32. Plaintiff brings this claim pursuant to 42 U.S.C. § 1983.

33. Plaintiff is suffering irreparable injury, loss and damage for which it has no adequate remedy at law.

34. Plaintiff is entitled to declaratory relief and a permanent injunction.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

- (a) declaring that Ind. Code § 24-4.5-1-201(1)(d) is invalid;
- (b) enjoining Defendant on a preliminary and permanent basis, from enforcing or threatening to enforce the Indiana UCCC against Plaintiff;
- (c) awarding Plaintiff a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988(b); and
- (d) granting such other and further relief as the Court may deem equitable and just.

VERIFICATION

I, Kenneth R. Wayco, declare that I am the President of Plaintiff Midwest Title Loans, Inc. and have been authorized to make this verification on its behalf.

I have read the foregoing Verified Complaint and know the contents thereof. The facts contained in same are true of my own knowledge.

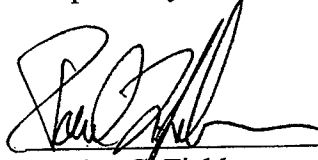
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Alpharetta, Georgia on November 7, 2007.



Kenneth R. Wayco

Respectfully submitted



Stanley C. Fickle

John R. Maley

Paul L. Jefferson

BARNES & THORNBURG LLP

11 South Meridian Street

Indianapolis, Indiana 46204

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Attorneys for Plaintiff

Dated: November 16, 2007

OF COUNSEL:

Alan S. Kaplinsky

Jeremy T. Rosenblum

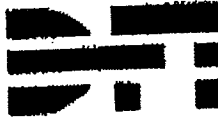
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1735 Market Street, 51st Floor

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(215) 665-8500

**STATE OF INDIANA****DEPARTMENT OF FINANCIAL INSTITUTIONS**

90 South Meridian Street, Suite 300
Indianapolis, IN 46204
Telephone: (317) 232-3955
FAX: (317) 232-7655
WEB SITE: <http://www.dfi.state.in.us>

Monday, August 06, 2007

SENT VIA UPS

Mr. Rod Aycox, President
Midwest Title Loan, Inc.
330 N Gilbert St
Danville, IL 61832-5630

Dear Mr. Aycox:

Single-pay, short-term loans secured by the customer's lien-free auto title are not authorized in Indiana except by licensed pawnbrokers who are also securing the customer's auto in pawn.

This letter is being sent to inform you that during the recently concluded session of the Indiana General Assembly, there was a change in the statute governing the territorial application of the Indiana Uniform Consumer Credit Code (IC 24-4.5, et al).

Effective July 1, 2007, IC 24-4.5-1-201 requires lenders who are soliciting (by any means) and then making consumer loans to Indiana residents to be licensed. Additionally, IC 24-4.5-1-201(8) reads "If a creditor has violated the provisions of this article that apply to the authority to make consumer loans (IC 24-4.5-3-502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24-4.5-5-202."

Failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers.

Any questions or comments should be directed to this office at the address listed above.

Sincerely,

Mark B. Tarpey

Mark B. Tarpey
Supervisor - Consumer Credit Division

cc: file



EXHIBIT
A

Midwest Title Loans, Inc.
3440 Preston Ridge Rd., Suite 500
Alpharetta, Georgia 30005
Phone: (678) 823-4700
Facsimile (678) 823-4041

September 5, 2007

Confidential

By Federal Express

Honorable Mark B. Tarpey
Supervisor -- Consumer Credit Division
State of Indiana Department of Financial
Institutions
30 South Meridian Street, Suite 300
Indianapolis, IN 46204

Re: IC 24-4.5-1-201

Dear Mr. Tarpey:

This letter responds to your letter to me dated August 6, 2007. Thank you for bringing to our attention the amendment expanding the territorial application of the Indiana UCCC. We were not previously aware of the amendment.

In response to your letter and the UCCC amendment, and without admitting that the UCCC applies to the Company's activities or that the Company is in violation of the law, the Company immediately suspended offering loans to Indiana residents. Additionally, and again without admitting any liability, the Company is prepared to waive all finance charges for all Indiana borrowers who obtained loans on or after July 1, 2007 -- at least if that would constitute a satisfactory resolution of this matter from the Department's perspective.

Please give us your reaction to this proposal as soon as possible. If acceptable to you, we will proceed to implement the waiver immediately.

Very truly yours,

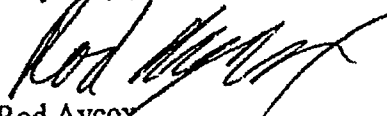

Rod Aycox

EXHIBIT
B



STATE OF INDIANA

DEPARTMENT OF FINANCIAL INSTITUTIONS



30 South Meridian Street, Suite 300
Indianapolis, Indiana 46204-2759
Telephone: (317) 232-3955
FAX: (317) 232-7655
WEB SITE <http://www.in.gov/dfi>

October 9, 2007

Mr. Michael Reed, General Counsel
Midwest Title Loans, Inc.
3440 Preston Ridge Rd., Suite 500
Alpharetta, Georgia 30005

Re: Territorial Application of IC 24-4.5

Dear Mr. Reed:

The Department has reviewed the September 5 letter from Rod Aycox and your notes on the fax received on October 9.

Thank you for your cooperation and your intent to comply with the Indiana Uniform Consumer Credit Code, including the new expanded territorial application provisions.

Your proposal to waive all finance charges on the 235 accounts listed in your notes is satisfactory to the Department. Please return a list of Indiana consumers with loans, and indicate the finance charges were refunded by credit to accounts or list the check numbers for paid out accounts.

Upon receipt of the requested information, the matter will be resolved.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Mark B. Tarpey". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Mark B. Tarpey
Division Supervisor
Consumer Credit Division

MBT:jh

MIDWEST TITLE LOANS, INC.
3440 PRESTON RIDGE ROAD, SUITE 500
ALPHARETTA, GA 30005

General Counsel

Tel. (678) 823-4679

Fax (678) 823-4726

mreed@selectmgmt.com

October 23, 2007

Mark B. Tarpey
Department of Financial Institutions
30 South Meridian Street, Suite 300
Indianapolis, Indiana 46204-2759

Dear Mark:

At your request, I have enclosed lists showing the 235 Indiana customers who have taken out loans with our company since July 1, 2007. One list contains the 27 accounts that are getting refunds. The other list contains the rest of the 235 accounts.

As explained previously, we are waiving all finance charges on these accounts. Since loans are for a period of twelve months or longer, only 27 people have made enough payments to cover the principal amount of the loan and be entitled to a refund. Refund checks are being mailed today. Copies of the checks are enclosed.

Our system has now been set up so that we will not accept any payment in excess of the principal amount of the loan. If someone were to mail in a payment that exceeds the principal, we would refund the excess.

Based on your letter, I will assume this concludes the matter from the Department's perspective.

Sincerely,

Michael V. Reed
General Counsel

Enc.