

JUMP V. ACP ENTERPRISES, INC.
224 F. Supp. 2d 1216 (N.D. Ind. 2002)

ALLEN SHARP, District Judge.

The plaintiffs, Aimee Jump, Angela Wehrle and Irene Rothgeb (collectively referred to as “payday customers”), sued ACP Enterprises, Inc., d/b/a Cash Now (referred to as “ACP”) for certain violations under the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*... Presently before the court is a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure....

I. Brief Background

ACP, until recently, specialized in making high interest “payday loans” to its various customers throughout the Northern District of Indiana....

...[I]t is alleged here that ACP and the various payday customers entered into numerous loan agreements. The amounts of the loans were for very small amounts, usually between \$100 and \$200 dollars. However, in order to receive the loan amount the payday customers paid an unusually high finance charge, usually no less than \$25 dollars.... [T]he annual percentage rates on these particular loans greatly exceeded the allowable finance charge under Indiana law. *See* IND. CODE § 24-4.5-3-508; *see also Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001). ACP required, as additional security for payment of the loans, that the payday customers issue a post-dated check in exchange for receiving the loan amount. The terms of the loans were typically two weeks in duration. At the end of the loan term, the payday customer either paid the loan amount to ACP or extended the loan by paying an additional finance charge. If payment was not tendered by the payday customer, ACP then had the option of cashing the post-dated check. The purpose of requiring the post-dated check was to give ACP added security that the loan amount would be paid in full. The post-dated check gave ACP certain additional legal rights and remedies which increased the likelihood of collection (*i.e.*, Indiana bad check statute, IND. CODE §§ 26-2-7-(4-5)).

II. Discussion

1. Whether a post-dated check must be disclosed under TILA

ACP argues that under TILA a post-dated check does not constitute a security interest and therefore ACP need not have disclosed the post-dated check as such on its loan agreements with its customers. TILA and Regulation Z, TILA’s implementing regulation, require that a creditor disclose accurately a security interest that is taken by a lender and to describe accurately the property in which the interest is taken. 15 U.S.C. § 1638; 12 C.F.R. § 226.18(m)....

15 U.S.C. § 1638(a)(9) states:

For each consumer credit transaction other than under an open end credit plan the creditor shall disclose each of the following items, to the extent applicable:

....

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as a part of the credit transaction, or (B) property not purchased as a part of the credit transaction, or (B) property not purchased as a part of the credit transaction identified by item or type ...

....

Clearly, ACP sought the post-dated checks as additional security for the payment of the loans made to the payday customers. Under Indiana law, a security interest in an instrument, here the post-dated check, occurs when a creditor pursuant to an agreement takes possession of the collateral, here also the post-dated check. *See* IND. CODE § 26-1-9.1-203(b). Typically, in situations where a security interest is taken in the form of a pledge, the collateral has a value independent from the amount owed pursuant to the security agreement. *See In re Rolain*, 823 F.2d 198 (8th Cir. 1987) (promissory note held by bailee of a creditor used as collateral to ensure the payment of the loan by the debtor). In those situations the collateral is used to secure payment if a debtor fails to pay the amount agreed upon in the primary agreement by allowing for a secondary source that remains available for the creditor to collect against.

Here unlike the typical situation explained above, the post-dated check does not represent an alternative source of payment should the payday customer fail to pay the loan amount. However, ... the post-dated checks do provide some additional extrinsic value to the transaction.... It is without question that ACP sought the post-dated checks from its customers as an additional avenue of securing full payment from its customers, much like the security interests taken in a typical Article Nine transaction. In this situation the collateral taken is not in the amount printed on the face of the check, but rather in the form of the rights created by state law. These rights do constitute some further value beyond the face amount of the post-dated checks.

As such, the requirements for attachment and enforceability of a security interest under Indiana law have been satisfied. Here value has been given by ACP in the amount of the consumer's "payday loan." IND. CODE § 26-1-9.1-203(b)(1). Clearly, the payday customers have rights in the post-dated checks retained by ACP. IND. CODE § 26-1-9.1-203(b)(2). Finally, the post-dated checks are in the possession of ACP. IND. CODE § 26-1-9.1-203(b)(3)(B). Thus, the requirements for a security interest in the post-dated checks have been satisfied under Indiana law. That interest must be disclosed pursuant to 15 U.S.C. § 1638(a)(9). Therefore, the court now **DENIES** the motion to dismiss with respect to the claim that ACP failed to adequately disclose the existence of the post-dated check as a security interest in violation of TILA.

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