

**DO NOT REMOVE
FILE COPY**

**NO. 35716
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

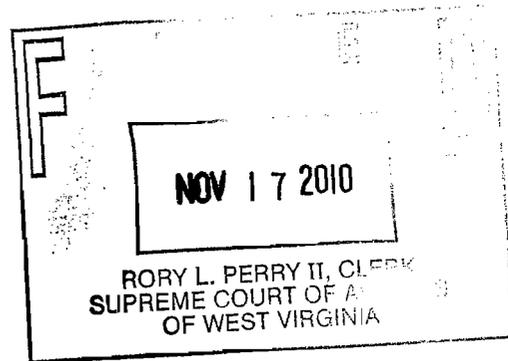
**STATE OF WEST VIRGINIA, ex rel.,
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,
Petitioner,**

v.

Civil Action No.: 10-MISC-372
(before the Circuit Court of
Kanawha County)

**THE HONORABLE LOUIS H. BLOOM,
JUDGE, CIRCUIT COURT OF KANAWHA
COUNTY,**

Respondent.



RESPONSE TO STATE'S PETITION FOR WRIT OF PROHIBITION

Louis H. Bloom, Respondent
Judge, Circuit Court of Kanawha County
111 Court Street, 5th Floor
Charleston, WV 25301
(304)-357-0365

NO. 35716
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel.,
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,
Petitioner,**

v.

Civil Action No.: 10-MISC-372
(before the Circuit Court of
Kanawha County)

**THE HONORABLE LOUIS H. BLOOM,
JUDGE, CIRCUIT COURT OF KANAWHA
COUNTY,
Respondent.**

RESPONSE TO STATE'S PETITION FOR WRIT OF PROHIBITION

Now comes the Respondent, the Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, and hereby files this response to the State's Petition for Writ of Prohibition.

I. Introduction and Overview

On August 18, 2010, the State filed a Petition to Enforce Investigative Subpoenas and for Related Relief ("Petition to Enforce") against eight different internet payday lenders in the Circuit Court of Kanawha County, in Civil Action No. 10-MISC-372. In the Petition to Enforce, the State requested the Respondent to order the eight payday lenders to appear and show cause why they should not be ordered to comply in full with the investigative subpoenas. However, in the Petition to Enforce, the State did not allege that any of the eight payday lenders acted together or that any of the alleged violations of the West Virginia Consumer Credit and Protection Act arose out of the same transaction

or occurrence by any of the eight respondents. The only commonality alleged by the State was that all eight lenders failed to respond to separate investigative subpoenas. *See* State's Appendix, 1.

Based on the allegations in the Petition to Enforce and pursuant to Rule 20(a) of the West Virginia Rules of Civil Procedure, the Respondent entered an order on August 19, 2010, finding and concluding that the respondent payday lenders were not properly joined as parties because the State failed to assert any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences. Accordingly, by the same order, the Respondent ordered that the claims against each of the eight payday lenders be severed, with the Respondent to maintain the action against the first named payday lender. State's Appendix, 2.

On August 30, 2010, the State filed a motion to alter or amend the Respondent's order severing the Petition to Enforce into eight separate civil actions. State's Appendix, 3. On September 21, 2010, the Respondent entered an order denying the State's motion to alter or amend. State's Appendix, 4. On September 23, 2010, the State filed a motion to stay the execution of the Order Denying Motion to Alter or Amend, pending its filing of a writ of prohibition. The Respondent denied the motion for stay. State's Appendix, 5-6.

The State proceeded to file a Petition for Writ of Prohibition with this Court and by Order received by the Respondent on October 29, 2010, this Court issued a rule to show cause directing the Respondent to show cause why a writ of prohibition should not be awarded, as prayed for by the State.

II. Argument

A. Even Under a Liberal Construction, the Respondent Payday Lenders Were Not Properly Joined as Parties in the State's Petition to Enforce Pursuant to Rule 20(a)

Under Rule 20(a) of the West Virginia Rules of Civil Procedure, “all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences **and** if any question of law or fact common to all defendants will arise in the action.” (emphasis added). Although Rule 20 is to be liberally construed, the use of the conjunctive “and” in the rule denotes that a right to relief arising out of the same transaction or occurrence and any common question of law or fact as to all defendants is required for permissive joinder. *See Anderson v. McDonald*, 170 W.Va. 56, 60, 289 S.E.2d 729, 734 (1982)(stating that “Rule 20 concerning permissive joinder of parties is to be liberally construed.”); *Ooten v. Faerber*, 181 W.Va. 592, 597, 383 S.E.2d 774, 779 (1989)(stating that “and” is a conjunction connecting words or phrases, expressing the idea that the latter phrase is to be added to or taken along with the first). Thus, notwithstanding the fact that the transaction and common question requirements proscribed by Rule 20(a) are to be liberally construed in the interest of convenience and judicial economy, joinder under the rule is only appropriate when both specific requisites are met. *Grennell v. Western Southern Life Insurance Company*, 298 F.Supp.2d 390, 397 (S.D. W.Va., 2004).

In *Grennell, supra*, the plaintiffs alleged that the defendants committed fraud over the course of over 1,800 separate sales transactions of insurance policies. All of the plaintiffs had purchased the same basic product, a “vanishing premium” life insurance

policy from defendant Western-Southern and Western-Southern designed computer software for use by the individual defendants in their sales presentations of the policy. Thus, according to the court, each purchase was induced by a different misrepresentation by each of the individual defendants. Therefore, the court found that just because the plaintiffs were fraudulently induced to purchase the same thing, they did not satisfy the requirements of Rule 20(a). *Grennell*, 298 F.Supp. at 397-398. The court noted that it did not need to decide whether to apply federal or state law regarding permissive joinder, as the two are identical in West Virginia.

In the present action, the State is seeking to enforce separate investigative subpoenas against separate and distinct entities relating to separate and distinct alleged violations of the West Virginia Consumer Credit and Protection Act. There is no allegation by the State that the respondent payday lenders in any manner acted together by failing to respond to the subpoenas or in their alleged violations of the West Virginia Consumer Credit and Protection Act, the subject of the subpoenas. Instead, each payday lender, separately and individually, failed to respond to a separate investigative subpoena. Like the plaintiffs in *Grennell, supra*, just because all the payday lenders failed to respond to the investigative subpoenas does not satisfy the requirements of Rule 20(a), because each subpoena is a separate inquiry related to separate alleged violations of the West Virginia Consumer Credit and Protection Act. Thus, just because all the payday lenders did the same act does not create a logical relationship between them. *See Carbon Fuel Co. v. USX Corp.*, 867 F.Supp. 414, 418-419 (S.D. W.Va., 1994) (stating that the word transaction has a flexible meaning and may encompass a series of occurrences,

depending not so much upon the immediateness of their connection, but upon their logical relationship).

B. The Respondent Applied the Proper Standard for Permissive Joinder Under Rule 20(a) of the West Virginia Rules of Civil Procedure

As stated above, the proper standard under Rule 20(a) is that there must be both a right to relief arising out of the same transaction or occurrence **and** a common question of law or fact as to all defendants for permissive joinder to be proper. *Grennell, supra*. (emphasis added). Although Rule 20 is to be liberally construed, permissive joinder is only proper when both of the specific requisites are met. The State argues that because all eight payday lenders failed to respond to separate investigative subpoenas issued by the Attorney General, based on the payday lenders' alleged separate violations of the West Virginia Consumer Credit and Protection Act, that joinder of all eight payday lenders as respondents in the single Petition to Enforce is proper under Rule 20(a).¹ Thus, implicit in the State's argument is that the same transaction or occurrence in the present action is that the payday lenders, individually, failed to respond to separate investigative subpoenas, giving rise to common questions of law and fact as to all of the payday lenders.

Although in the abstract State's argument seems sound, when viewed closer it is clear that the State's interpretation of Rule 20 to the present set of facts would obviate the rule and open the door to allow any plaintiff to join multiple defendants to assert claims not arising out of the same transaction or occurrence under the guise of permissive joinder. For example, under the State's interpretation of Rule 20, an administrative

¹ The Respondent notes that the State also argues that because such action was permitted in the past that it is proper in the present action. However, just because such action was previously allowed does make it procedurally proper under Rule 20(a) of the West Virginia Rules of Civil Procedure.

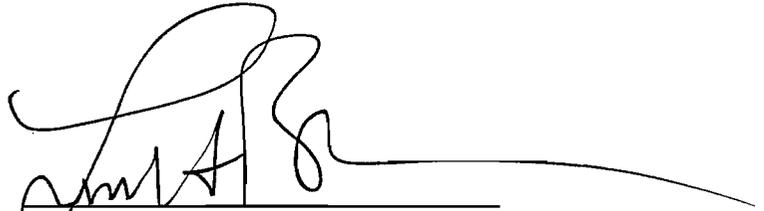
agency, such as the Division of Motor Vehicles, could file a single action seeking to enforce different subpoenas against different investigating officers who failed to appear at different administrative hearings, scheduled for different dates and times, presumably for different reasons, asserting that each officer's separate failure to appear at separate administrative hearings constituted a same transaction or occurrence under Rule 20.

Obviously, there is not a logical relationship between multiple investigating officers who failed to appear at different administrative hearings held at various places throughout the state.

By further example, under the State's interpretation, a creditor, such as a hospital, could file a single action against multiple patients for their separate failures to pay for medical services rendered to them. Again, the allegation on its face would be the same; all the patients failed to pay for medical services rendered. However, the hospital would not have a right to relief in respect of or arising out of the same transaction or occurrence against each patient, as each patient's failure to pay his or her bill is a separate and distinct transaction or occurrence not involving the same medical care received or the same circumstances. (emphasis added). Ultimately, under the State's interpretation of Rule 20, if two or more persons on different days committed the same alleged tort against a single person, that person as a plaintiff could join all of the persons as defendants in a single action, although no logical relationship would exist between the defendants or their actions. Clearly, even under a liberal construction of Rule 20, the permissive joinder of such parties is not contemplated under the rule.

III. Conclusion

Based on the foregoing, the Respondent represents that the State's Petition for Writ of Prohibition should be denied, as the Respondent did not abuse its discretion by issuing the subject order severing the respondents below into eight separate actions, pursuant to Rule 20 of the West Virginia of Civil Procedures. As illustrated above, if this Court were to adopt the State's interpretation and application of Rule 20 it would completely obviate Rule 20 and essentially allow for the permissive joinder of unrelated defendants by any plaintiff in a single action, despite the lack of a right to relief arising out of the same transaction or occurrence. Accordingly, the Respondent respectfully requests this Court to deny the State's Petition for Writ of Prohibition.

A handwritten signature in black ink, appearing to read 'Louis H. Bloom', written over a horizontal line. The signature is stylized and cursive.

Louis H. Bloom, Respondent
Judge, Circuit Court of Kanawha County
111 Court Street, 5th Floor
Charleston, WV 25301
(304)-357-0365

NO. 35716
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,
Petitioner,

v.

Civil Action No.: 10-MISC-372
(before the Circuit Court of
Kanawha County)

THE HONORABLE LOUIS H. BLOOM,
JUDGE, CIRCUIT COURT OF KANAWHA
COUNTY,
Respondent.

CERTIFICATE OF SERVICE

I, Louis H. Bloom, Judge of the Circuit Court of Kanawha County, hereby certify that a copy of the foregoing "Response to State's Petition for Writ of Prohibition" was served this 17th day of November, 2010, by first-class United States mail, postage prepaid, upon:

Norman Googel, Esq.
Assistant Attorney General
Consumer Protection/Antitrust Division
P.O. Box 1789
Charleston, WV 25326-1789

Payday Loan Resource Center, LLC
Moe Tassoudji
7600 E. Doubletree Ranch Road, Suite 130
Scottsdale, AZ 85258

Payday Loan Resource Center, LLC
Gary L. Crandell, Esquire
P.O. Box 24266
Denver, CO 80224

DirectROI d/b/a Cash West Payday Loans
Mike Brewster
3100 W. Ray Road, Suite 300
Chandler, AZ 85226

First American Credit
PTY 11730
10000 NW 25th Street
Miami, FL 33172

LoanPointe, LLC
Joe S. Strom
James C. Endicott
Mark S. Lofgren
11529 North Bull River Circle
Highland, UT 84003

LoanPointe, LLC
John J.E. Markham, II, Esquire
Bridget A. Zerner, Esquire
Markham & Read
Attorneys at Law
One Commercial Wharf West
Boston, MA 02110

Eastbrook, LLC d/b/a Ecash and d/b/a GeteCash
Benjamin J. Lonsdale
696 North 1890 West
Provo, Utah 84601

Eastbrook, LLC d/b/a Ecash and d/b/a GeteCash
John J.E. Markham, II, Esquire
Bridget A. Zerner, Esquire
Markham & Read
Attorney at Law
One Commercial Wharf West
Boston, MA 02110

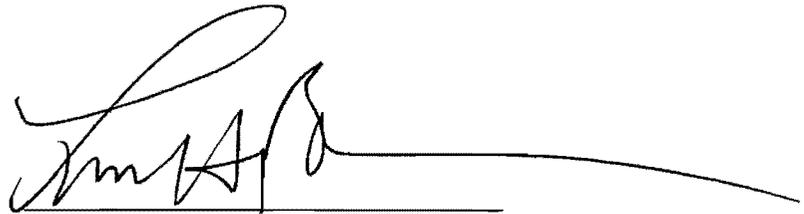
National Title Loans d/b/a National Credit 12
2419 Kirkwood Highway
Elsmere, DE 19805

National Title Loans d/b/a National Credit 12
Wheeler K. Neff, Esquire
Attorney at Law
118 School Road
Wilmington, DE 19803

Payday Financial, LLC d/b/a www.LakotaCash.com
Martin E. Webb
P.O. Box 128
Timber Lake, SD 57656

Payday Financial, LLC d/b/a www.LakotaCash.com
Cheryl Laurenz-Bogue, Esquire
200 Main Street
P.O. Box 400
Dupree, SD 57623

Payday Loans-ACH d/b/a www.ACHLoans.com
P.O. Box 99800
Emeryville, CA 94662

A handwritten signature in black ink, appearing to read "Louis H. Bloom", is written over a horizontal line. The signature is stylized and extends to the right with a long, thin tail.

Louis H. Bloom, Respondent
Judge, Circuit Court of Kanawha County
111 Court Street, 5th Floor
Charleston, WV 25301
(304)-357-0365