



Office of the Attorney General  
State of Connecticut

May 16, 2011

The Honorable Howard F. Pitkin  
Department of Banking  
260 Constitution Plaza  
Hartford, CT 06103

Dear Commissioner Pitkin:

You have requested a legal opinion regarding whether Conn. Gen. Stat. § 36a-555, as amended by Public Act 09-209, § 40, alters a 1952 opinion issued by the Office of the Attorney General concluding that a company located outside of Connecticut that solicits and makes small loans by mail to Connecticut residents is not engaged in the business of making loans in Connecticut. You have also requested a legal opinion regarding whether application of recent amendments expanding the scope of Conn. Gen. Stat. § 36a-555 to out-of-state small loan lenders conducting business in Connecticut by mail, telephone, or electronic means, violates the Commerce Clause of the United States Constitution.

I conclude that because § 36a-555 was amended in 2009 to expressly cover small loans offered to Connecticut consumers "through any method, including, but not limited to, mail, telephone, Internet or any electronic means," § 36a-555 now applies to out-of-state small loan lenders using these methods to make small loans to Connecticut consumers. I also conclude that applying § 36a-555 to out-of-state small loan lenders conducting business by mail, telephone, Internet or other electronic means does not violate the Commerce Clause. Courts generally only invalidate state regulation of interstate commerce where such regulation (1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the state's boundaries. Although a court's review may be fact specific, because § 36a-555 applies equally to in-state and out-of-state lenders, imposes relatively simple registration requirements on lenders, and expressly requires that some elements of

the transaction take place inside Connecticut,<sup>1</sup> I conclude that § 36a-555 passes constitutional muster.

### Background

Your opinion request related that the Department of Banking received a complaint from a Connecticut borrower about the interest charged by an out-of-state small loan lender. When the Department of Banking sent a letter to the out-of-state lender informing it that it must be licensed by the Department of Banking under section 36a-555, the out-of-state-lender's counsel responded that the out-of-state lender was not engaging in the business of making loans in Connecticut, and had taken no action that would subject it to Connecticut's jurisdiction. Counsel for the out-of-state lender further claimed that application of § 36a-355 would violate the United States Constitution's Commerce Clause under the holding of *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7<sup>th</sup> Cir.), *cert. denied* 131 S. Ct. 83 (2010). The *Midwest Title Loans* court held that an Indiana banking law violated the Commerce Clause because it attempted to regulate an Illinois lender making loans to Indiana consumers, but without any portion of the loan transactions actually occurring in Indiana.

### Law and Analysis

Prior to the 2009 amendment to Conn. Gen. Stat. § 36a-555, the Department of Banking relied on a 1952 opinion of this Office concluding that

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<sup>1</sup> I also conclude that § 36a-555 comports with basic due process requirements because § 36a-555 only applies if there are sufficient minimum contacts with Connecticut. "Once minimum contacts have been established, the second stage of the due process inquiry asks whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice' – that is, whether it is reasonable to exercise personal jurisdiction under the circumstances of the particular case." *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 525 (2007). (Internal quotation marks and citations omitted.) Courts are cognizant of the effects of the internet on commerce and how that affects the assertion of personal jurisdiction. The Second Circuit recently noted in a case in which the defendant marketed merchandise on the internet that the "case involves an update to our jurisprudence on personal jurisdiction in the age of internet commerce" and held that "the single act of an out-of-state defendant employee shipping an item into New York, combined with his employer's extensive business activity involving New York, gives rise to personal jurisdiction over the employee." *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165 (2d Cir. 2010).

out-of-state small loan lenders that did not have an office or agents in Connecticut and solicited loan applications only by mail were not engaged in the business of making small loans in Connecticut and therefore were not subject to Department of Banking regulation. *See* Atty. Gen. Op. (December 23, 1952). On October 1, 2009, Public Act 09-208 amended Conn. Gen. Stat. § 36a-555 to require a person who makes, offers, brokers, or assists a borrower in Connecticut to obtain a loan of less than \$15,000 at a rate of interest greater than 12 percent per annum “through any method, including, but not limited to, mail, telephone, Internet or any electronic means” to be licensed by the Department of Banking.<sup>2</sup> Thus, it is clear that by virtue of the amendment of § 36a-555 by Public Act 09-208, small loan lenders who make loans to Connecticut residents by mail, telephone, or any electronic means are now covered by § 36a-555 and must seek a license from the Department of Banking (assuming other applicable requirements of banking law are met).

You next ask whether application of § 36a-555 to out-of-state small loan lenders making loans to Connecticut consumers would violate the Commerce

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<sup>2</sup> Section 36a-555 of the Connecticut General Statutes now provides, in relevant part, that

No person shall (1) engage in the business of making loans of money or credit; (2) make, offer, broker or assist a borrower in Connecticut to obtain such a loan; or (3) in whole or in part, arrange such loans through a third party or act as an agent for a third party, regardless of whether approval, acceptance or ratification by the third party is necessary to create a legal obligation for the third party, through any method, including, but not limited to, mail, telephone, Internet or any electronic means, in the amount or to the value of fifteen thousand dollars or less for loans made under section 36a-563 or section 36a-565, and charge, contract for or receive a greater rate of interest, charge or consideration than twelve per cent per annum therefor, unless licensed to do so by the commissioner pursuant to sections 36a-555 to 36a-573, inclusive.

Public Act 09-208 also amended Conn. Gen. Stat. § 36a-573.

Clause. Application of § 36a-555 depends on meeting the requirements of § 36a-573(b). Section 36a-573(b) now requires that

The provisions of subsection (a) of this section shall apply to any loan made or renewed in this state if the loan is made to a borrower who resides in or maintains a domicile in the state and such borrower (1) negotiates or agrees to the terms of the loan in person, by mail, by telephone or via the Internet while physically present in this state; (2) enters into or executes a loan agreement with the lender in person, by mail, by telephone or via the Internet while physically present in this state; or (3) makes a payment of the loan in this state.

As a general matter, state statutes are presumed constitutional. *See Bush v. Vera*, 517 U.S. 952, 992 (1996). More specifically, under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress has primary responsibility for regulating interstate commerce. Nevertheless, the Supreme Court has recognized

a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. Accordingly, [t]he Commerce Clause does not . . . invalidate all State restrictions on commerce. A state statute or regulation may violate the dormant Commerce Clause only if it (1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

*Selevan v. N.Y. Thruway Authority*, 584 F.3d 82, 90 (2d Cir. 2009) (internal quotation marks and citations omitted); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding that an unconstitutional state regulatory burden on interstate commerce must be “clearly excessive in relation to the putative local benefits”). Applying these factors, I conclude that Connecticut’s statute would not likely be held to violate the Commerce Clause as long as it cannot be said that the transaction the State seeks to regulate takes place “entirely outside” of Connecticut.

First, § 36a-555 clearly manifests no preference or protection for in-state small loan lenders over out-of-state small loan lenders. The same licensing requirements apply to in-state and out-of-state small loan lenders. “Where the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142.

Second, Connecticut’s interest in restricting the maximum interest rates charged by small loan lenders is also clearly legitimate. Congress has recognized the states’ interest in regulating this aspect of consumer credit transactions in Section 1610(b) of the Truth in Lending Act, 15 U.S.C. § 1610(b).<sup>3</sup> As the Kansas District Court held in *Quik Payday, Inc. v. Stork*, 509 F. Supp.2d 974 (D. Kan. 2007), *aff’d* 549 F.3d 1302 (10<sup>th</sup> Cir. 2008), *cert. denied* 129 S. Ct. 2062 (2009),:

[N]o case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation. This despite the facts that such laws do burden interstate commerce, and that the burden is increased by the lack of uniformity. Considering, however, the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws, any judgment that the present proliferation of regulations of consumer credit transactions has burdened commerce unduly must be made by Congress. Here the legislative judgment made in § 1610(b) of the Truth in Lending Act once more becomes significant. Congress has deferred to the states on the matter of maximum interest rates in consumer credit transactions. Since it has done so we decline to hold that the burden imposed by Pennsylvania on . . . interstate commerce . . . is so great that it outweighs the Commonwealth’s interest

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<sup>3</sup> 15 U.S.C. § 1601(b) states in relevant part “this title [15 USCS §§ 1601 et seq.] does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or charges, permissible under such laws in connection with the extension or use of credit.”

in regulating the rates which its resident consumers may pay for the temporary use of money. . . .

*Quik Payday*, 509 F.Supp. at 979, quoting *Aldens, Inc. v. Packel*, 524 F.2d 38, 48-49 (3d Cir. 1975); see also *Midwest Title Loans, Inc.*, 593 F.3d at 664 (holding that “Indiana has a colorable interest in protecting its residents from the type of loan that Midwest purveys”). Moreover, the burden imposed on interstate commerce by § 36a-555 is relatively slight (an \$800 licensing fee, meeting basic capital requirements, and potential examination costs) and is similar to legal requirements upheld in the past. See *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1305 (10<sup>th</sup> Cir. 2008), cert. denied 129 S. Ct. 2062 (2009) (upholding a Kansas statute requiring a \$425 license fee, a \$500 surety bond, and a criminal background check); *Silver v. Woolf*, 694 F.2d 8, 10 (2d Cir. 1982) (upholding Connecticut debt collection statute requiring \$250 application fee, sworn financial statement, and evidence of good moral character and financial responsibility).

Finally, the requirements of § 36a-555 only apply if at least some of the loan transaction in question occurs in Connecticut as described in Conn. Gen. Stat. § 36a-573(b). The Connecticut borrower complaining about his out-of-state lender did not provide details about his particular loan. Assuming that the loan transaction meets one of the § 36a-573(b) requirements -- that some of the loan terms were negotiated by the consumer while the consumer was in Connecticut, that the contract was agreed to by the consumer while the consumer was in Connecticut, or that the consumer makes payments on the loan while the consumer is in Connecticut -- it is unlikely that a court would find the transaction occurred wholly outside of Connecticut. Thus, application of § 36a-555 to an out-of-state, small loan lender does not amount to extraterritorial regulation of interstate commerce occurring “entirely outside” of Connecticut because at least some of the conduct occurs inside Connecticut.

Different courts have taken different approaches to the state’s ability to regulate out-of-state small loans. In *Quik Payday, Inc. v. Stork*, *supra*, the Court of Appeals for the Tenth Circuit upheld application of a Kansas banking law to a Utah lender. The lender, Quik Payday, made payday loans from its headquarters in Utah and sought a declaratory judgment that Kansas could not regulate Quik Payday under the Kansas Uniform Consumer Credit Code (“Kansas UCCC”). The Kansas UCCC required that payday lenders charging interest rates in excess of 12 percent must be licensed by the Office of the State Banking Commission (“OSBC”). Under Kan. Stat. Ann. § 16a-1-201(1)(b), a consumer credit transaction is deemed to have been made in Kansas if the “creditor induces the consumer who is a resident of [Kansas] to enter into the transaction by solicitation in [Kansas] by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means.”

Quik Payday argued that the Kansas statute regulated interstate commerce that happens entirely outside Kansas and gave the example of a Kansas resident who is solicited on a work computer in another state, Missouri, and accepts the loan on the same computer. Kansas argued that it is the borrower's physical location at the time of the solicitation that is controlling, and that Kansas regulates Internet payday lenders who choose to make payday loans with Kansas consumers while the consumer is in Kansas. The Tenth Circuit held that it would adopt Kansas's reasonable interpretation of the statute in finding that the Kansas UCCC does not have a prohibited effect on extraterritorial commerce. The Tenth Circuit also noted that even if the Kansas resident applied for a loan on a Missouri computer, other aspects of the transaction, such as the transfer of funds, are likely to be in Kansas, so that the transaction would not be entirely extraterritorial and not be problematic under the dormant commerce clause. *Quik Payday*, 549 F.3d at 1308.

In *Quik Payday*, the Tenth Circuit also applied a balancing test from *Pike v. Bruce Church, Inc.*, *supra*, to determine whether the burden on interstate commerce was "clearly excessive in relation to the putative local benefits." *Quik Payday* 549 F.3d at 1308 *quoting Pike*, 397 U.S. at 142. The burden created by the Kansas UCCC was that Quik Payday had to be licensed, bonded, pay a \$425 fee and submit to a criminal background check. The benefits included protecting Kansas consumers from giving their financial information and access to their bank accounts to felons, as well as through the surety bond requirement providing Kansas residents with a meaningful remedy if they are harmed by the lender. The Tenth Circuit held that the burden on Quik Payday of acquiring a license did not outweigh the benefit gained by Kansas from imposing that requirement.

Additionally, in *Silver v. Woolf*, 694 F.2d 8 (2d Cir. 1982), *cert. denied* 460 U.S. 1070 (1983), the Court of Appeals for the Second Circuit upheld a Connecticut statute requiring any person acting as a collection agency to be licensed by the Department of Banking. The Second Circuit stated that under *Pike*, the first question is whether the statute discriminated against out-of-state or interstate commerce. The Second Circuit determined that the statute did not exhibit any preference or protection of any sort for local as opposed to non-resident, collection agencies. *Silver*, 694 F.2d at 19. The court then applied the *Pike* balancing test to hold that the state had a legitimate interest in regulating debt collection practices and that requiring out-of-state companies to obtain the same license as in-state companies was not such an excessive burden on interstate commerce that it was prohibited by the Commerce Clause. *Silver*, 694 F.2d at 27-28.<sup>4</sup>

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<sup>4</sup> Other courts have also looked beyond simply where the loan was made or executed to determine whether a state may regulate transactions that affect its

As noted by counsel for the out-of-state lender whose conduct precipitated this request, one court has taken a more narrow view of a state's ability to regulate out-of-state small loan lenders. In *Midwest Title Loans, supra*, the Court of Appeals for the Seventh Circuit relied on the extraterritorial element of the test to find that an Indiana law requiring a company to get a license to make consumer loans and abide by a ceiling on interest rates violated the Commerce Clause. Midwest Title Loans, Inc. ("Midwest") was an Illinois company with no offices in Indiana and that made loans in person in its Illinois office. The Indiana law at issue provided that a loan was deemed to be made in Indiana if a resident of Indiana "enters into a consumer sale, lease or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means." Ind. Code § 24-4.5-1-201(1)(d). While recognizing that Indiana had an interest in protecting its residents from the type of loan offered by Midwest, the Seventh Circuit determined that the Indiana law improperly attempted to regulate activities in another state. *Midwest Title Loans*, 593 F.3d at 665-66. The court noted that

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citizens. In *Quik Payday, Inc. v. Stork*, 509 F. Supp.2d 974 (D. Kan. 2007), *aff'd* 549 F.3d 1302 (10<sup>th</sup> Cir. 2008), *cert. denied* 129 S. Ct. 2062 (2009), the district court stated that "a state may regulate the consequences of commercial transactions on its citizens which arise or are directed from outside its borders, while expressly rejecting any reliance on the presence concept or the place of sale, delivery, contract, or performance." *Id.* at 982 (Internal quotation marks omitted). The district court also stated that it agreed with the opinion of the Court of Appeals for the Third Circuit in *A.S. Goldman & Co. v. New Jersey Bur. Of Securities*, 163 F.3d 780, 787 (3d Cir. 1999), which recognized that

contracts formed between citizens in different states implicate the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract.

*Quik Payday, Inc. v. Stork*, 509 F. Supp.2d at 982 (Internal citations omitted). The *Quik Payday* court concluded that Quik Payday's entering into loan contracts with Kansas citizens was not conduct occurring wholly outside Kansas. *Id.* at 983.



each loan made to an Indiana resident was in the form of a check drawn on an Illinois bank that was handed to a borrower in Midwest's Illinois office, that the transfer of title of collateral was made in Illinois, and that the payments required by the loan agreement were received by Midwest in Illinois. The Seventh Circuit concluded that the "contract was, in short, made and executed in Illinois, and that is enough to show that the [Indiana law] violates the commerce clause." *Midwest*, 593 F.3d at 669.

With respect to Connecticut's out-of-state small loan lender law, because some element of the loan is required to take place in Connecticut under § 36a-573(b), the law's application to out-of-state small loan lenders can be distinguished from facts considered in *Midwest Title, Inc.*, *supra*. As in *Quik Payday, Inc.* *supra*, Connecticut would not be regulating conduct occurring wholly outside Connecticut. Similar to *Silver*, *supra*, out-of-state small loan lenders are subject to the same licensing requirements as in-state small loan lenders, and Connecticut's legitimate interest in regulating small loan lenders outweighs any burdens imposed on small loan lenders by § 36a-555.

Therefore, applying the foregoing law and court decisions to § 36a-555, I conclude that application of § 36a-555 to out-of-state small loan lenders is constitutional.

Very truly yours,

GEORGE JEPSEN  
ATTORNEY GENERAL