

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-000637

RECEIVED
JUN 19 2015
SC Court of Appeals

Home Benefits, Inc. and the
American Traveler Motor
Club, Inc.,

Appellants,

v.

South Carolina Department of
Consumer Affairs,

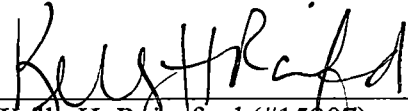
Respondent.

MOTION TO STRIKE

Respondent, the South Carolina Department of Consumer Affairs ("Department"), hereby moves to strike item 20 (Ogburn Affidavit) in Appellants' Designation of Matter. This motion is filed pursuant to Rules 240 and 209(b) and (c), SCACR and Rule 12(f), SCRCF. The Ogburn Affidavit is irrelevant to the issue on appeal and was improperly considered by the court below without ruling on a standing objection to its inclusion.

WHEREFORE, for the reasons stated above and in the Department's Memorandum in Support of its Motion to Strike, the Department respectfully moves for this Court to strike item 20 of Home Benefits/American Traveler's Designation of Matter.

Respectfully submitted,



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Danny R. Collins (#1340)

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Attorneys for Respondent

June 19, 2015

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DeAndrea G. Benjamin, Circuit Court Judge

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v.

South Carolina Department of
Consumer Affairs, Respondent.

MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE

INTRODUCTION

On October 15, 2013, a hearing was held before the Honorable DeAndrea G. Benjamin. At its conclusion, Judge Benjamin requested proposed orders from the parties. On November 6, 2013, Home Benefits/American Traveler sent to the Department and Judge Benjamin a letter accompanying a copy of the Affidavit of Derial L. Ogburn. Attachments A, B. By letter of November 8, 2013, the Department notified Judge Benjamin that it objected to including the Affidavit in deciding the matter as the Department had no opportunity to rebut the content at the hearing or address the content in the Department's proposed order. Attachment C. On April 29, 2014, Judge Benjamin issued an Order Granting Plaintiffs' [Appellants'] Partial Summary Judgment, including

reference to the Ogburn Affidavit, without addressing the Department's objection. Attachment D. The circuit court, in discussing the Ogburn Affidavit, incorrectly noted "[t]here was no objection by the Department to such Affidavit." Attachment D p. 2. On May 19, 2014, the Department served a Rule 59(e) Motion to Alter or Amend the Judgment on Home Benefits/American Traveler, asserting in the fourth ground that the Department in fact objected to the Ogburn Affidavit. On May 23, 2014, Home Benefits filed their Return in Opposition to Defendant's Rule 59(e) Motion to Alter or Amend the Judgment. Without holding a hearing on the Motion, the court issued a Form 4 Order on February 20, 2015, denying the Department's "first seven grounds," granting the Department's "seventh ground," ordering Home Benefits/American Traveler to bear the cost of their attorney's fees, and ending the case.

On March 23, 2015, the court issued an amended Form 4 Order, denying the Department's first seven grounds, granting the Department's "eighth ground," ordering Home Benefits/American Traveler to bear the cost of their attorney's fees, and ending the case. The court acknowledged there was a typographical error in the original Form 4 Order, which the court intended to correct by issuing the Amended Form 4 Order. On March 23, 2015, Home Benefits served Notice of Appeal on the issue of attorney's fees. On May 20, 2015, the Appellants filed their Designation of Matter, leading to this Motion.

ARGUMENT

I. Relevancy

The plain language of Rules 209 and 210, SCACR, contemplate that a Record on Appeal include the items specifically listed in the rules, as well as any other materials or

documents relevant to the appeal that were presented to the lower court. Rule 209(b), SCACR, states that a party may include various documents, such as transcripts and orders, as well as “other materials which may be properly included in the Record on Appeal.” The rule further requires the materials designated to be relevant to the appeal. Rule 209(b) and (c), SCACR. Rule 210(c), SCACR, puts forth the limitation that only those items presented to the lower court may be included in the Record on Appeal. The Ogburn Affidavit is irrelevant to the matter of attorney’s fees (See Attachment B), and should be excluded under Rule 209(b) and (c), SCACR.

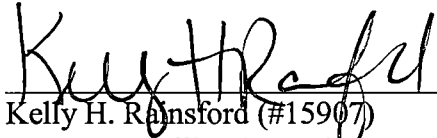
II. Affidavit Improperly Considered by Lower Court

The Department contends that items improperly considered by the lower court may not properly be included in the Record on Appeal. “A judge may not, after all testimony has been taken, receive additional contested evidence without reopening the case.” Johnson v. Johnson, 288 S.C. 270, 274, 341 S.E.2d 811, 814 (Ct. App. 1986). The Ogburn Affidavit was submitted after the hearing and the Department timely submitted to the lower court a letter objecting to its inclusion. As the circuit court improperly received additional testimony without reopening the case, the Ogburn Affidavit was improperly received. Admitting it to the Record on Appeal would compound that error and thus the Affidavit should be stricken from the Designation of Matter.

CONCLUSION

As the Ogburn Affidavit was improperly received at the lower court, the Department respectfully requests this Court strike it from the Designation of Matter submitted by Home Benefits/American Travel.

Respectfully submitted,



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DOCUMENTS SUPPORTING MOTION TO STRIKE

A. Home Benefits/American Traveler's letter dated November 6, 2013	8
B. Ogburn Affidavit dated November 6, 2013	9
C. Department's letter dated November 8, 2013	10
D. Excerpt from Order Granting Plaintiffs' Partial Summary Judgment	11

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shamm@RichardsonPlowden.com
Direct: 803-576-3713

November 6, 2013

VIA HAND DELIVERY AND
EMAIL TO: DBenjaminLC@sccourts.org

The Honorable DeAndrea G. Benjamin
Richland County Judicial Center
PO Box 192
Columbia, SC 29202-0192

RE: *Home Benefits, Inc. and the American Traveler Motor Club, Inc., v. South Carolina Department of Consumer Affairs*, Civil Action No. 2012-CP-40-06341
Our File No. 5758-001

Dear Judge Benjamin:

Please find enclosed a copy of an Affidavit of Derial L. Ogburn, which has been filed with the Richland County Clerk of Court in this matter. It is provided in support of, and for consideration by the Court with regard to Plaintiffs' Motion for Summary Judgment.

Your consideration of this matter is appreciated. Mr. Ogburn was not able to get his document to counsel prior to or at the time of argument. Therefore it is being forwarded to counsel and the Court upon receipt.

If you should have any questions please do not hesitate to contact this office.

Sincerely,


C. Jeanne Wessinger Hill
Steven W. Harp

JWH:kjt
Enclosure

cc: Danny R. Collins, Esq., w/enc. (via email)

of the supervised lender, as well as to the financial viability of the supervised lender office that employs local citizens in all communities of South Carolina. I have discussed such matters with the member lenders of the Association for many years.

8. Part of my duties as the Executive Director of the Association includes governmental relations and having personal knowledge of any legislative changes by the General Assembly that impact the financial industry.

9. I am not aware of any change in the underlying statutory law upon which this 1976 Declaratory Ruling was based. That is, I am not aware of any legislative change to the manner in which a supervised lender may or must sell such products. In addition, I am not aware of any efforts by the General Assembly to change the long-standing legislation or statutory construction of the Consumer Credit Code first announced by the Department in 1976.

10. It is my understanding that supervised lenders want to continue to make available these types of plans, products and services as a benefit to their customers and as part of their business plan as directly authorized by the 1976 Administrative Interpretation and Declaratory Ruling No. 3.202-7608.

11. If supervised lenders are forced and required to incorporate and include the amount of the premium or cost of such plans, products and services into its finance charge or annual percentage rate, supervised lenders will no longer sell, or offer for sale, any of the plans, products and services including but not limited to those of Home Benefits Inc. and the American Traveler Motor Club, Inc.

12. Any required incorporation of the cost for such plans, products and services into the finance charge or annual percentage rate charged by a supervised lender would result in a significant and drastic increase in the disclosed finance charge and annual percentage rate that a customer would have on the loan even when this is a voluntary plan or product purchased by a consumer that is not associated with the underlying loan or required to obtain a loan.

13. An example of the significant and drastic increase in the disclosed finance charge and annual percentage rate to a consumer taking out a \$4,500 loan with a 25% APR, would be that the interest rate would change from 24.95% to 31.37%. When that same \$4,500 loan is made with a 36% APR, the interest rate changes from 36% to 43.05%. See, Exhibit A for more examples of these significant and drastic increases in the disclosed finance charge and annual percentage rate with different loan amounts.

14. Any incorporation of the dollar cost for such plans, products and services into the finance charge and annual percentage rate charged by a supervised lender to its customers will be detrimental to supervised lenders and will result in an arbitrary and additional economic or market place barrier for supervised lenders to compete in its market place.

FURTHER AFFIANT SAYETH NOT THIS 6th DAY OF NOVEMBER, 2013.

SWORN TO AND SUBSCRIBED
before me this 6th day of November, 2013.

Sonya Hancock
Notary Public for the State of South Carolina
My Commission expires 9/5/2022

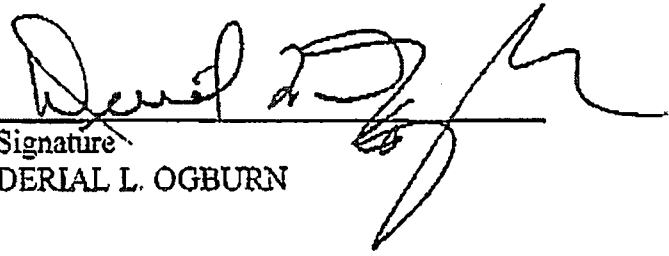

Signature
DERIAL L. OGBURN

EXHIBIT A

**CALCULATION OF INTEREST RATES WITH AND WITHOUT PRODUCT DOLLAR COST
REQUIRED TO BE ADDED AS PART OF INTEREST RATE**

	\$4,500	
36%		
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	4,500.00	4,050.05
Finance Charge	4,048.80	4,498.75
Total of Payments	8,548.80	8,548.80
Monthly Payment	178.10	178.10
APR	36.00%	43.05%

	\$5,000	
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	5,000.00	4,550.05
Finance Charge	4,498.72	4,948.67
Total of Payments	9,498.72	9,498.72
Monthly Payment	197.89	197.89
APR	36.00%	42.29%

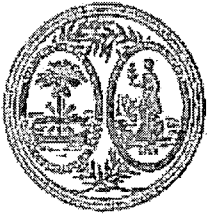
	\$5,500	
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	5,500.00	5,050.05
Finance Charge	4,948.64	5,398.59
Total of Payments	10,448.64	10,448.64
Monthly Payment	217.68	217.68
APR	36.00%	41.68%

	\$4,500	
25%		
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	4,500.00	4,050.05
Finance Charge	2,655.84	3,105.79
Total of Payments	7,155.84	7,155.84
Monthly Payment	149.08	149.08
APR	24.95%	31.37%

	\$5,000	
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	5,000.00	4,550.05
Finance Charge	2,951.20	3,401.15
Total of Payments	7,951.20	7,951.20
Monthly Payment	165.65	165.65
APR	24.95%	30.69%

	\$5,500	
Loan Term	48	48
Motor Club Fee	449.95	449.95
Amount Financed	5,500.00	5,050.05
Finance Charge	3,246.08	3,696.03
Total of Payments	8,746.08	8,746.08
Monthly Payment	182.21	182.21
APR	24.95%	30.13%

5/20



ATTACHMENT C

The State of South Carolina Department of Consumer Affairs

2221 DEVINE STREET, STE 200
PO BOX 5757
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Carri Grube Lybarker
Administrator

Celebrating Over 35 Years of Public Service

November 8, 2013

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Vice Chair
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Mark Hammond
Secretary of State
Columbia
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Terrell A. Parrish
Greer
Magaly P. Penn
Simpsonville
W. Fred Pennington, Jr.
Taylors

Honorable DeAndrea Benjamin
Richland County Judicial Center
P.O. Box 192
Columbia, SC 29202-0192

Re: Home Benefits, Inc. and American Traveler Motor Club, Inc. v. SC Dept. of
Consumer Affairs
Docket No. 2012-CP-40-6341

Dear Judge Benjamin:

I am attaching a copy of Defendant's Proposed Order to Deny the Plaintiffs' Motion for Summary Judgment. I am copying Plaintiffs' counsel with this letter and Proposed Order.

The Defendant received a copy of the Affidavit of Derial Ogburn on November 6, 2013, but the Defendant objects to the use of it in deciding this matter. Mr. Ogburn may have provided additional facts that the Defendant had no chance to rebut at the hearing nor in preparing its Proposed Order.

Please do not hesitate to contact me if you have trouble opening this document or if you have any questions or requests.

Sincerely,

Danny R. Collins
Attorney for Defendant
South Carolina Department of Consumer
Affairs
2221 Devine Street, Suite 200
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dcollins@scconsumer.gov

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Fax: 803-734-4229

CONSUMER ADVOCACY
803-734-4200
Fax: 803-734-4287
13

ENFORCEMENT/
INVESTIGATORS
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Fax: 803-734-4286

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Toll Free In SC: 800-922-1594

repeal a thirty-two year state law administrative interpretation and declaratory ruling when there has been no change by the General Assembly to the underlying statutory code section.

In addition to the Plaintiffs' Supporting Memorandum presented as part of its Motion, the Plaintiff provided three affidavits for consideration by the Court: (1) Affidavit of Steven Spiegel, (2) Affidavit of Irvin D. "Pete" Parker, and (3) Affidavit of Derial Ogburn. Originally, the Defendant objected to that certain portion of Mr. Parker's Affidavit related to any conversations with the members of the General Assembly in paragraph 11; however, the Plaintiffs clarified that they were not offering the affidavit concerning the truth of what the conference with members of the General Assembly was about, but to confirm that Mr. Parker, as the Administrator and Consumer Advocate for the Department, had first done his due diligence and research when he issued the 1976 Code Interpretation allowing the sale of such products in the offices of supervised lenders on October 1, 1976. The Department stated that it did not object to such offering and use of the Affidavit of Mr. Parker by the Court. Following oral arguments of counsel, and prior to the submission of the proposed Orders by the parties, the Plaintiffs submitted a supplemental affidavit of Derial Ogburn for consideration by the Court in its findings. There was no objection by the Department to such Affidavit or submission.

The Department submitted on the day of oral argument its Memorandum in Opposition as well as an Affidavit of the current Code Administrator, Ms. Lybarker, concerning the procedure followed by the Department. The Plaintiffs' claim and argue that the Department's sudden reversal of a thirty-two year old state law statutory construction, without any change by the General Assembly to the statutory section being interpreted, is an arbitrary, capricious act and such action constitutes an abuse of discretion by the Department. Plaintiffs argue that the

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v.

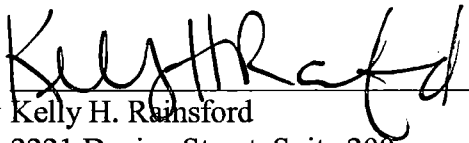
South Carolina Department of
Consumer Affairs,

Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served Appellant/Respondent's Motion to Strike on Home Benefits, Inc., and the American Traveler Motor Club, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2015, addressed to their attorneys of record, Steven W. Hamm and C. Jo Anne Wessinger Hill, Richardson Plowden & Robinson, P.A., Post Office Drawer 7788, Columbia, South Carolina 29202.

June 19, 2015


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The State of South Carolina
 Department of Consumer Affairs

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Carri Grube Lybarker
 Administrator/
 Consumer Advocate

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
 Clerk, South Carolina Court of Appeals
 1220 Senate Street
 Columbia, South Carolina 29211

RE: Home Benefits, Inc. and the American Traveler Motor Club, Inc. v. South Carolina
 Department of Consumer Affairs, Appellate Case No. 2015-000637

Dear Ms. Kitchings:

Enclosed for filing are an original and seven copies of a Motion to Strike, along with a Proof of Service, on behalf of Appellant/Respondent South Carolina Department of Consumer Affairs. Please return a clocked copy to us.

If you have any questions, please feel free to contact me at (803)734-4236.

Sincerely,


 Kelly H. Rainsford

Enclosures

cc: Steven W. Hamm, Esq. (via email and U.S. Mail)
 C. Jo Anne Wessinger Hill, Esq. (via email and U.S. Mail)

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