

3rd Circ. Says CashCall Can't Arbitrate Lending Suit

By **Adam Lidgett**

Law360 (February 27, 2018, 9:41 PM EST) -- A Third Circuit panel on Tuesday backed a lower court that shot down CashCall and another loan service's bid to compel arbitration in a suit from a New Jersey man claiming he was charged an illegally high interest rate on his \$5,000 loan.

In a precedential ruling, the three-judge panel affirmed a district court's denial of the request from CashCall Inc., WS Funding LLC and Delbert Services Corp. to arbitrate John S. MacDonald's suit over a loan agreement. While a provision in the agreement said any issues have to be resolved in arbitration "conducted by the Cheyenne River Sioux Tribal Nation," no such tribal arbitration forum actually exists, the panel found.

"Because the loan agreement's forum selection clause is an integral, non-severable part of the arbitration agreement and because the CRST arbitral forum designated in that clause is illusory, the entire arbitration agreement, including the delegation clause, is unenforceable," the panel said.

The instant suit is part of a controversy **over the contentious lending practices** of CashCall and nonparty Western Sky Financial LLC.

In a separate suit involving the Consumer Financial Protection Bureau, California's U.S. District Judge John F. Walter **in January** ordered CashCall and its affiliates to pay a penalty in light of his **2016 finding** that CashCall was the "true lender" of payday loans that were issued to borrowers in 16 states by Western Sky, a firm based on the Cheyenne River Sioux Tribe's reservation, according to court documents.

According to MacDonald's May 2016 complaint, **he had borrowed** \$5,000 from Western Sky in 2012 at an annual percentage rate of 116.73 percent. Western Sky told him that it sold the loan to WS Funding and that CashCall and Delbert took over the servicing, Tuesday's decision said.

As of April 2016, the defendants had collected a total of \$15,493 from MacDonald on his \$5,000 loan, according to the panel.

"We are gratified that the Third Circuit, like every other court of appeals, has refused to allow these payday lenders to avoid being held accountable through the use of a sham arbitration clause," MacDonald's attorney Matthew W.H. Wessler of Gupta Wessler PLLC said in a statement Tuesday to Law360. "We're eager to press ahead against these defendants, who will have to account for their conduct in a court of law."

Counsel for the defendants did not immediately respond to requests for comment Tuesday.

Circuit Judges Thomas M. Hardiman, Thomas I. Vanaskie and Patty Shwartz sat on the panel for the Third Circuit.

MacDonald is represented by Brock J. Specht of Nichols Kaster PLLP and Matthew W.H. Wessler of

Gupta Wessler PLLC.

The defendants are represented by Andrew Muscato, Joseph L. Barloon and Austin K. Brown of Skadden Arps Slate Meagher & Flom LLP.

The case is MacDonald v. CashCall Inc. et al., case number 17-2161, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Kat Sieniuc, Daniel Siegal, Kat Greene and Evan Weinberger. Editing by Edrienne Su.