IN THE SUPREME COURT OF VIRGINIA

Record No. 100287

WILMA L. RUBY, Petitioner-Appellant v. CASHNET, INC., d/b/a Cash Advance Centers Respondent-Appellee	From Shenandoah County Circuit Court Case No. CL08-41

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR APPEAL

Pursuant to Rule 5:30 of the Rules of the Virginia Supreme Court and with the approval of this Court, the National Association of Consumer Advocates (NACA) and the Virginia Poverty Law Center (VPLC) as *amici curiae* support the Petition for Appeal by Wilma L. Ruby (Ms. Ruby). *Amici* requests that the Supreme Court of Virginia grant Ms. Ruby an appeal of the final Order of the Circuit Court of the County of Shenandoah dated December 22, 2009, regarding her claims against Cashnet, Inc., (Cashnet).

ASSIGNMENT OF ERROR

Amici supports the three Assignments of Error proposed by Petitioner, and believes that they can be summarized as follows:

The Circuit Court erred in December 22, 2009, Order by ruling that a series of payday loans by Cashnet did not constitute a refinance, renewal, extension of a preceding payday loan in violation of the Payday Loan Act where a new payday loan was made immediately after an old loan was closed.

QUESTIONS PRESENTED

Amici supports the three Questions presented by Petitioner, and restates them below:

1. Is a payday loan, made immediately after a preceding payday loan is paid in full, a refinance, renewal and/or extension of the preceding payday loan prohibited by Va. Code § 6.1-459(6)? (Assignment of Error #1)
2. Is a payday loan, made immediately after a preceding payday loan is paid in full a refinance, renewal and/or extension of the preceding payday loan prohibited by Va. Code § 6.1-459(6) in substance regardless of the form of the transaction? (Assignment of Error #2)
3. Was the General Assembly's amendment of Va. Code § 6.1-459(6) in 2008 a reiteration, and not a new substantive restriction, that a payday loan, made immediately after a preceding payday loan is paid

in full, is a prohibited refinance, renewal and/or extension of the preceding payday loan? (Assignment of Error #3)

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Amici adopts Petitioner's Statement of the Nature of the Case and Material Proceedings as accurate. Ms. Ruby alleged that Cashnet violated the Payday Loan Act each time it wrote her subsequent payday loans immediately after she paid a prior payday loan. The Circuit Court held that a payday loan made immediately after a preceding payday loan was paid was not prohibited by Va. Code § 6.1-459(6). Ms. Ruby noted her objections to the ruling regarding Va. Code § 6.1-459(6), and then filed her Notice of Appeal. Her Petition for Appeal has already been filed in the Virginia Supreme Court.

STATEMENT OF FACTS

Amici adopts Petitioner's Statement of the Facts as accurate. Important to that statement is the context in which the repeated loans occur. From March 15, 2005, through November 2, 2007, Cashnet made 33 loans to Ms. Ruby. (Exhibit 1, Joint Stipulation of Facts). Cashnet made each loan immediately to Ms. Ruby immediately after receiving payment from her on the prior loan. (Joint Stipulation of Facts 13 through 59). The ten loans in 2005 averaged $170.00 per month, and this average increased to $420.83 per month in 2006. From March 2007 through November 2007, the amount each month was $500.00 and the fee on each was $75.00. Ms. Ruby explained why see took out these repeated $500.00 loans:

> After I did it I had to because I couldn't - - I had to keep paying it because I couldn't get away. I had my rent to pay and my lights and my phone and If I didn't, if I didn't, if I didn't I wouldn't be able to pay my rent and stuff.

(September 23, 2009, Trial Transcript, 42:4-8).

Ms. Ruby is a widow and at the time of the repeated loans her only source of income was Social Security benefits of $624.00 per month on her deceased husband's account. (September 23, 2009, Trial Transcript, 40:23-41:12). She initially needed money to repair her car, a 1988 Ford. (September 23, 2009, Trial Transcript, 44:12-25). As she repeatedly explained to Cashnet's counsel, each time a loan came due she took another loan because "I had to in order to pay my rent. I had no money left." (September 23, 2009, Trial Transcript, 48:10-11). "I had to do it every month because, you know, in order to pay my bills." (September 23, 2009, Trial Transcript, 48:20-21). "I usually paid them on the 3rd when I got my check because that’s when my rent was due and then I’d have to take the money and go pay my rent.” (September 23, 2009, Trial Transcript, 49:12-14).

Russell Ledbetter, the President and CEO of Cashnet explained to the trial court the process that was followed when Cashnet would immediately redo a loan for a customer.

> Question by court: If a customer comes in, again let’s use the $500.00 as an example, a $500.00 loan, they come in on the due date and they want to pay that off and get a new loan, do you ever simply cancel the first loan, do a new loan document and the only money that changes hands is the $75.00 fee?
>
> Answer: No, that would be a - - we do not do that. What we have to do is we have to take the full amount, whatever it is, since we’re talking about here which is $575.00, we have to take the full amount in and pay off the note, stamp it paid, and hand it back to the customer. Then we can redo another loan with that customer at any point in time they want to.

(September 23, 2009, Trial Transcript, 25:6-17).

Question by Court: Did they actually fill out an application?

Answer: They only filled an application out once every six months to a year.

(September 23, 2009, Trial Transcript, 29:1-4).

Cashnet knew that it could not make a loan to an existing customer by having the customer pay just the 15% fee that was due, and then write up a new loan for the unpaid balance. (September 23, 2009, Trial Transcript, 20:8-15). It knew that if on a $500.00 loan, it allowed a customer to just pay the $75.00 fee and then have a new $500.00 loan, then it would have impermissibly rolled over or extended the prior loan. (September 23, 2009, Trial Transcript, 20:16-25). It also knew that for a loan to be paid off, the loan needed to be paid with "good funds." (September 23, 2009, Trial Transcript, 18:19-25).

Each time Cashnet redid a loan to Ms. Ruby, it was required to provide the pamphlet that explains how its business was regulated. (Exhibit C to Defendant's Memorandum of Law submitted to the trial court, and September 23, 2009, Trial Transcript, 28:23-25). This notice explains that Cashnet "cannot refinance renew, extend, or rollover" a loan. It also states that if a borrower is unable to pay the loan on its due date, Cashnet is allowed to "begin accruing interest on the principal amount . . . at a maximum rate of 6% per year." Thus, if Cashnet did not redo a loan which Ms. Ruby could not pay, it knew it could only collect 6% per year interest, or $2.50 per month on a $500.00 loan, rather than collecting another immediate $75.00 fee by redoing the loan.

Although for each loan Cashnet had Ms. Ruby's check that it could submit for payment when a loan was due, Cashnet required Ms. Ruby to pay the total due in cash instead of submitting the check for payment. (Joint Stipulation of Facts, No. 7 and 8). Each time a loan was redone, Cashnet would collect the15% fee on the principal balance rather the 6% per year for an unpaid loan. Because the length of each loan would vary, when that 15% fee was amortized over a year to calculate its Annual Percentage Rate, the Annual Percentage Rate would vary from 182.5% to 322%. (Exhibits 3 through 35 of the Joint Stipulation of Facts).

Each time Cashnet immediately redid a loan for Ms. Ruby, it would open an entirely new account with a new loan document. (September 23, 2009, Trial Transcript, 15:20-16:19). At any one time, 35% to 40% of its loans files were the consequence of it immediately redoing a prior loan. (September 23, 2009, Trial Transcript, 23:24-24:4). Because a completely new set of documents were prepared each time, the active file of a redone loan would not refer to the prior loan.

The Bureau of Financial Institutions annual examination of Cashnet would look only at the active files. (Pg. 3 of Exhibit D to Defendant's Memorandum of Law submitted to the trial court Commonwealth of Virginia). That report states on its Page 2, that "[i]t is emphasized that this Examination is not to be construed as an audit, nor should this Report be considered an audit report." Despite that admonition, Cashnet's counsel repeatedly referred to it as an audit. (September 23, 2009, Trial Transcript, 23:25, 24:15, 32:24, and December 10, 2009, Transcript, 19:9, 15). After Cashnet's repeated use of this word, it is not surprising that the Court considered the examination an audit. (December 10, 2009, Transcript, 30:3, 12). Regardless of the name for what occurred, because Cashnet used new documents and a new account number for each time it redid a loan, an examination of an active file would not reveal the connection to the prior loan.

SUMMARY OF ARGUMENT

Amici are each very experienced with consumer laws and have developed expertise in the laws regulating credit transactions. *Amicus* NACA is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Throughout Virginia and the nation, NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers. *Amicus* VPLC provides leadership, support, training, public education, and advocacy to address the civil legal needs of Virginia's low-income population. VPLC has been extensively involved in the numerous legislative initiatives concerning payday lending that have come before the Virginia General Assembly over the past 10 years, including the adoption of the Virginia Payday Loan Act in 2002 and the major revision of the Act in 2008.

Amici urges the Court to grant the petition for appeal because the trial court erroneously construed Virginia Code § 6.1-459(6)'s prohibition against renewing, refinancing, or extending a payday loan. This significant error must be corrected to properly implement the protective measures of the statutory scheme by the General Assembly that allows payday loans to occur. The facts are not disputed that Defendant repeatedly redid a payday loan immediately after a preceding payday loan was paid. As shown by Ms. Ruby's thirty-three loans in three years, this process traps the borrower in a cycle of debt. This cycle of debt is exactly what the General Assembly enacted protective measures to prevent.

This case concerns the interpretation of that portion of Virginia's Payday Loan Act which provides that "[a] licensee shall not refinance, renew or extend any loan." Va. Code § 6.1-459(6). In the pamphlet required by Va. Code § 6.1-458, the State Corporation Commission states that "[t]he lender cannot refinance, renew, extend, or rollover your payday loan." 10 Va. Admin. Code § 5-200-80. Despite this prohibition on repeated transactions, Cashnet established a business model of repeated transactions with a customer. Cashnet now wants the judicial branch of the Commonwealth to give approval to its business model.

That the payday loan industry can create a negative cycle of debt was a known problem prior to it being allowed to do business in the Commonwealth. The General Assembly allowed this industry to come into Virginia with a cap of a 15% fee on the principal for its purported one-time and short-term loans. If a borrower could not repay the loan on time, the General Assembly then allowed the lender to collect interest on the principal at 6% per year. Under Va. Code § 6.1-459(6), the General

Assembly prohibited repeated transactions so that borrowers who could not pay a payday loan would be charged only the 15% fee one time, and then 6% per year. Cashnet's business model was to repeatedly charge that 15% fee rather than accept the 6% per year rate of return. Unfortunately, it succeeded in having the Shenandoah County Circuit Court approve this evasion of the law.

The Virginia General Assembly amended Va. Code § 6.1-459(6) in 2008 to reiterate that a payday lender may not "make a loan to a borrower on the same day that a borrower paid or otherwise satisfied in full a previous payday loan." Although this ended the practice at issue in this case, until the statute of limitations expires on all the unpaid "reloans," in collection cases throughout the Commonwealth, judges will be faced with the same arguments offered by Cashnet in this case.

Amici is especially concerned about the effect of the success of the argument made by Cashnet to the Circuit Court. As repeatedly held by this Court, usury law looks to the true substance of a transaction, not mere labels. *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 429, 337 S.E.2d 291, 295 (1985). Cashnet knew it was prohibited from allowing a consumer to repeatedly pay just the 15% fee and roll the balance due into a new loan, but did so anyway. Because the true nature of the transaction must control, this Court must correct the underlying decision and restate this important principle.

ARGUMENT

I.
AS ORGANIZATIONS COMMITTED TO PROTECTING CONSUMERS FROM UNLAWFUL PRACTICES, *AMICI* HAVE DEVELOPED SPECIAL EXPERTISE IN CREDIT MATTERS.

Amicus VPLC provides leadership, support, training, public education, and advocacy to address the civil legal needs of Virginia's low-income population. Its legal staff specializes in the diverse areas of law that affect low-income Virginians. Through training and communications, VPLC educates others about the legal rights of the poor and identifies systemic problems and issues. VPLC works collaboratively with Virginia's legal aid community, other organizations, and stakeholders to represent the interests of low-income Virginians in the courts, executive agencies, and legislative bodies.

VPLC has been extensively involved in the numerous legislative initiatives concerning payday lending that have come before the Virginia General Assembly over the past 10 years, including the adoption of the Virginia Payday Loan Act in 2002 and the major revision of the Act in

2008. It is recognized by the legislators, the media and the public as an expert on payday lending in Virginia.

Amicus NACA is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers.

NACA has over 1000 members nationally and approximately thirty-five in Virginia who regularly represent and advocate for citizens in the Commonwealth. NACA is committed to rebuilding an effective marketplace that is based on our nation's fundamental sense of fairness, equity and honesty. On both the federal and state level, NACA takes an active role in advocating consumer interests before the courts, legislatures, and administrative agencies.

NACA has filed amicus briefs in a number of leading consumer protection cases before the United States Supreme Court and other state and federal appellate courts across the country. It has also presented oral argument as amicus counsel in consumer cases in the United States Court of Appeal for the Fourth Circuit, and the Supreme Court of Ohio. For lawyers, advocates, and other interested people, it conducts training in Virginia and throughout the nation on the laws regulating credit transactions and its members are regularly consulted for their expertise in this area.

Many of its Virginia members have national reputations in such areas as the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and state consumer protection law. Its lead counsel on this brief has argued consumer cases in state and federal trial courts in Virginia, North Carolina, and Ohio and on the appellate level before the Virginia Supreme Court, the United States Court of Appeals for the Fourth Circuit and the Eighth Circuit, and the Ohio Supreme Court. Additionally, its members have been involved in the legislative efforts in Virginia regarding payday lending since Virginia first began to consider authorizing payday lending.

II.

THE PETITION FOR APPEAL SHOULD BE GRANTED BECAUSE PAYDAY LENDERS WERE ONLY ALLOWED TO CHARGE A 15% FEE ON A SHORT-TERM LOAN IF THEY DID NOT ENGAGE IN REPEATED TRANSACTIONS.

Amici urges the Court to grant the petition for appeal because the trial court erroneously construed the Commonwealth's prohibition against renewing, refinancing, extending, or rolling over a payday loan. This prohibition was designed to avoid the known problem of repeated high-fee loan transactions trapping people in a cycle of debt. For the borrower, the payday loan is a temporary financial fix that becomes a self-sustaining negative spiral if the payday lender violates the law and engages in repeated transactions.

A. When Virginia allowed the payday industry into the Commonwealth, the known problem with the payday loan industry was the cycle of debt created by trapping people into repeatedly paying a high fee for a short-term loan.

The payday loan industry was allowed into Virginia by the creation of the Payday Loan Act in 2002. At that time, the payday loan industry was already the subject of extensive debate about the danger of its product. *See Fact v. Fiction: The Truth About Payday Lending Industry Claims*, by the Center for Responsible Lending, prepared January 1, 2001, found at http://www.responsiblelending.org/payday-lending/research-analysis/fact-v-fiction-the-truth-about-payday-lending-industry-claims.html. As explained by the Center for Responsible Lending, the payday loan product traps borrowers in a cycle of debt.

> While fast cash and no credit checks makes it easy for a consumer to get a payday loan, it usually only postpones the financial crisis for two weeks until the loan comes due. Because payday loans are targeted to people in financial trouble, there

are few borrowers who can pay off their loan at that point. 91% of all payday loans are made to borrowers caught in a cycle of repeat borrowing with five or more payday loans per year.

Borrowers, on average, receive 8 to 13 payday loans per year from a single payday shop. Typically these are loan flips - rollover extensions or back to back transactions loans where the borrower is basically paying a fee for no new money, never paying down the principal owed. The typical borrower's situation is even worse since borrowers often go to more than one shop (1.7 shops on average), therefore taking out 14 to 22 loans per year. In fact, **only one percent (1%) of all payday loans go to one-time emergency borrowers** who pay their loan within two weeks and don't borrow again within a year.

With such a high payback on their loans, payday lenders are willing to lend to virtually anyone with a checking account and some kind of regular income. This "open door" policy is described by the industry as "serving people who have been denied access to credit by traditional lenders." But payday lenders are actually providing access to debt, not credit. And as bankruptcy and credit card industry statistics confirm, American consumers are awash in more debt than they can handle. For people living paycheck to paycheck, a 400% payday loan is not the answer.

As the Center for Responsible Lending documented prior to 2002,

[p]eople with legitimate, short-term needs who will pay off their loan within two weeks aren't that attractive to payday lenders. Instead, payday lenders make most of their profits from borrowers who cannot pay off their loans, and instead renew them repeatedly, quickly paying more in fees than they originally borrowed. Borrowers who get five or more loans account for 91% of payday lender revenues.

This customer "churning" -- not additional consumer demand -- is fueling the growth of the payday industry. For example, while payday revenues in North Carolina grew 27% from 1999 to 2000, the vast majority of this increase came from lenders getting their customers to take out more and larger payday loans."

> *"[Lenders] may say they are providing a service to people who just need some money once in awhile until payday. But we were trained to encourage customers the day they paid a loan off to make another loan as early as the next day…We tried to get customers to keep getting loans and borrow up to their maximum approval amount whether they wanted it or not."* Ex-employee of payday lender in West Virginia

Id.

Just like the payday lender in West Virginia, Cashnet established a business model of repeated transactions with a customer. Its first step is not to submit the prior check for payment, but instead to require the customer to come into the store with cash in hand. Knowing that its customers are in a financial bind, it then redoes the loan rather than accept the 6% annual rate of return allowed by the legislature. The debtor gives cash to Cashnet and Cashnet gives it back while the person is still at the counter. Under this business model, the new loan is a refinance or renewal of the old loan, and Cashnet collects another 15% fee.

The business model of repeated transactions without a reasonable expectation of repayment had already been criticized by the federal bank regulators prior to 2002. As explained by the Officer of the Comptroller of the Currency,

> A bank should not renew a payday loan except upon a written request by the borrower that certifies an inability to repay the loan, states a specific reason that occurred subsequent to the date of origination or last renewal, and states why the borrower

> will be able to repay the loan at the new maturity date. Multiple renewals—particularly renewals without a reduction in the principal balance, and renewals in which interest and fees are added to the principal balance, are an indication that a loan has been made without a reasonable expectation of repayment at maturity.

OCC Advisory Letter 2000-10, November 27, 2000, Subject: Payday lending, pg. 7, http://www.occ.treas.gov/00rellst.htm. The OCC specifically explained how a loan could be renewed or rolled-over.

> When the loan comes due, the borrower may repay the loan by allowing the check to be cashed or by bringing in the full $115 in cash. However, the borrower may also “roll over” the loan by renewing the old loan (or taking out another loan) and giving a new postdated check either for $130 (the $115 balance due plus an additional $15 fee) or for $100 (if the fees have been paid in cash). Because payday loans have such short terms to maturity, the cost of borrowing, expressed as an APR, is very high. For example, the APR on a two-week $100 loan with a $15 lender fee is 391 percent.

Id. at 2.

As shown by Ms. Ruby’s facts, the business model of Cashnet was effective at establishing that destructive cycle of debt where a debtor repeatedly pays the alleged “one-time” 15% fee. As a widow on Social Security benefits of $624.00 per month, she was unable to pay any loan when due, and over the course of 33 months was repeatedly charged the “one-time” 15% fee. From April through November 2007, this means Cashnet collected over 12% of her benefits.

Although Cashnet argued to the trial court that each loan was her own volition (Defendant's Memorandum of Law, pg 13), that argument ignored the undisputed testimony that Ms. Ruby needed her Social Security money to pay rent each month. As correctly pointed out by Petitioner, "[i]t has long been considered in law, that in usurious transactions the borrower acts somewhat under duress; that he is not altogether a free agent in the business; in the language of some of the books, that he is the slave of the lender." *Moseley v. Brown*, 76 Va. 419, 424-6 (1882). Thus, this Court has repeatedly recognized "the willingness of borrowers to concede whatever may be demanded or to promise whatever may be extracted in order to obtain temporary relief from financial embarrassment, as would naturally be expected . . . ." *VanDyke v. Commonwealth*, 178 Va. 418, 423, 17 S.E.2d 366, 369 (1941) (quoting *Boulware v. Newton*, 59 Va. 708 (1868)).

Ms. Ruby's situation is unfortunately the norm for the payday industry both in Virginia and around the country.

> A full three quarters of loan volume of the payday lending industry is generated by borrowers who, after meeting the short-term due date of the loan, must re-borrow before their next pay period
>
> Repeat borrowing of what is marketed as a short-term loan of a few hundred dollars has long been documented, but this report verifies for the first time how quickly most payday lending customers must turn around and re-borrow after paying off their

> previous loan. Among the over 80 percent of payday borrowers who conduct multiple transactions:
>
> - Half of new loans at the borrower's first opportunity (immediately or after a 24-hour or more waiting period where required).
> - 87% of new loans are opened within two weeks, or generally before their next payday.
> - Only 6 percent of subsequent payday loans are taken out longer than a month after the previous loan was paid off.
>
> This rapid re-borrowing indicates that most payday borrowers are not able to clear a monthly billing cycle without borrowing again.
>
> Payday lenders generate loan volume by making a payday loan due in full on payday and charging a sizeable fee—now nearly $60 for an average $350 loan. This virtually guarantees that low-income customers will experience a shortfall before their next paycheck and need to come right back in the store to take a new loan. This churning accounts for 76 percent of total loan volume, and for $20 billion of the industry's $27 billion in annual loan originations.

Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume, by the Center for Responsible Lending, prepared July 9, 2009, found at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-short-term-due-date-generates-need-for-repeat-payday-loans-accounting-for-76-of-total-volume.html.

Cashnet's arguments to the trial court ignored both the reality of the cycle of debt and the evidence that Ms. Ruby needed the funds to pay rent.

Instead, Cashnet argued that Ms. Ruby did not need to take out a new loan after paying the old one, and that "Ms. Ruby was free to go home empty handed." (December 10, 2009 Trial Transcript, 14:19-20). Consequently, although the problem of the cycle of debt was known before these high-rate loans were allowed in Virginia, and graphically illustrated by Ms. Ruby's situation, even when faced with a widow on a fixed income of $624.00 per month, Cashnet still cannot see the problem. If Ms. Ruby had paid $575.00 of her benefits (or 82.8%), she could not have paid her rent with her empty hands and would not have had a home to go to.

B. The Commonwealth sought to suppress the cycle of debt problem by prohibiting repeated payday loans, and Cashnet must be subject to the mandated remedies for violating those prohibitions.

As explained by Petitioner, this issue of first impression concerns the interpretation of a portion of Virginia's Payday Loan Act. Because the cycle of debt was well documented prior to 2002, the General Assembly allowed this industry into Virginia subject to a strict prohibition against repeat transactions. The Act provides that "[a] licensee shall not refinance, renew or extend any loan." Va. Code § 6.1-459(6). Pursuant to the authority granted to it by Va. Code § 6.1-458, the State Corporation Commission interpreted this section to also prohibit a "rollover" of a payday loan. In the pamphlet required by Va. Code § 6.1-458, the State Corporation Commission states that “[t]he lender cannot refinance, renew, extend, or rollover your payday loan.” 10 Va. Admin. Code § 5-200-80. The reference to “rollover” initially appeared in the State Corporation Commission’s Fiscal Impact Statement on the legislation, where it states “Lenders are prohibited from renewing or “rolling over” such loans.” HB 940 Fiscal Impact Statement, as passed both houses, http://leg1.state.va.us/cgi-bin/legp504.exe?021+oth+HB940FER171+PDF.

To allow the payday industry into Virginia, the General Assembly first had to exempt its lending from the existing Virginia usury laws. Under Va. Code § 6.1-330.55, no lender may charge more than 12% interest per year unless an exception is granted, and the 2002 Act inserted an exception for payday loans into Va. Code § 6.1-330.55. A second exemption also had to be made to the Consumer Finance Act by amending Va. Code § 6.1-249(A). This allowed the payday lenders to charge more than the 36% interest allowed to licensees under that Act.

Consequently, payday lending industry knows that by choosing to do business in Virginia it is choosing to live within this double exemption and under the specific requirements of Va. Code §§ 6.1-445, 447, 448, 450, 451, 452, 453, 454, 457, 459, 460, 461, 462, and 463. To ensure the industry's compliance, the General Assembly determined that the Payday Loan Act would have multiple methods of enforcement. For private citizens to enforce the Payday Loan Act, the General Assembly provided a private right of action in Va. Code § 6.1-469. In Va. Code § 6.1-471 it provided that a violation of the Act was a violation of the Virginia Consumer Protection Act. It also allowed the State Corporation Commission to institute administrative proceedings, Va. Code § 6.1-467, and allowed that Commission to refer matters to the Attorney General for enforcement. Va. Code § 6.1-470.

Along with the prohibition against repeat transactions, one of the primary protections in the Payday Loan Act was the restrictions on "Additional Charges" in Va. Code § 6.1-461.

> In addition to the loan principal, and the fee permitted under § 6.1-460, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, collected, received or recovered except (i) any deposit item return fee incurred by the licensee, not to exceed $25, if the check given by the borrower as security is returned because the account on which it was drawn was closed by the borrower or contained insufficient funds, or the borrower stopped payment on the check, and (ii) if judgment is obtained against the borrower, court costs and reasonable attorneys' fees if awarded by the court, incurred as a result of the returned check in an amount not to exceed $250. A licensee shall not be entitled to collect or recover from a borrower any sum otherwise permitted pursuant to § § 6.1-330.54, 8.01-27.2 or 8.01-382.

(§ 461 as in effect at the time of the transaction). Thus, after being charged the 15% fee, a debtor who cannot pay the loan back will then only face interest of 6% per year. If sued, the debtor does not face additional bad check penalties and because a check is so simple to collect on, the attorney's fees are capped. This section provides a reasonable rate of return to the payday lender when the borrower is unable to pay a payday loan.

In applying this statute, the well established law in Virginia is that usury law looks to the true substance of a transaction, not mere labels. *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 429, 337 S.E.2d 291, 295 (1985) (citing usury cases going back over 150 years). More broadly, the historical rule of statutory construction required the trial court to examine the "true reason of the remedy" provided by the statute, and then to construe the statute so as to "advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief." *Heydon's Case* 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (1584)(cited approvingly in *Evelyn v. Com*., 46 Va. App. 618, 621 S.E.2d 130, 136 (2005); *Board of Sup'rs of King and Queen County v. King Land Corp*., 238 Va. 97, 102-03, 380 S.E.2d 895, 897 (1989) stating "[f]our centuries later the "mischief rule" retains its vitality."), Thus, the mischief that is to be punished is excess profiting by creating and perpetuating the cycle of debt.

A payday lender who choose to comply with Payday Loan Act had two possible outcomes when it made a payday loan: receiving a straight 15% one-time return if the loan was paid when due, or accruing interest at 6% per year plus that 15% one-time fee if the loan was not timely paid. Because the payday lender was prohibited though from flipping the borrower into repeated transactions, it could not continue to charge the 15% fee every month. In response to the trial court's question on page 25 of the September 23, 2009 transcript, a lender complying with the Act would have said "if the borrower needs another loan, it means the borrower cannot pay back the initial loan, and in those circumstances we are only allowed to collect 6% interest per year on the unpaid amount in addition to the 15% fee we already charged on that principal."

The difference in revenue between a lender complying with the law and one violating it is huge. A lender making a $500.00 loan under the Act can recover $75.00, and then 6% per year, or $2.50 per month, until the consumer pays off the debt. A lender violating the Act can collect the $75.00 fee twice a month for as long as it can keep the customer coming and doing a repeat loan. Thus, using just the $500.00 loans in Ms. Ruby's case as an example, a lawful lender with a customer unable to pay the $500.00 loan due on March 30, 2007, would be able to collect the $75.00 upfront fee, and then $2.50 per month; by October 31, 2007, this $17.50 in interest could be collected for a total fee of $92.50. Instead of accepting this $92.50, Cashnet repeatedly flipped Ms. Ruby such that in this time period it collected eight $75.00 “one-time fees” for a total of $600.00.

Cashnet knew that it could only accept “good funds” as payment of a loan, knew it could not renew the loan, and knew that it could not allow a customer to pay only the 15% fee and get a new loan. Functionally, Cashnet knew that 40% of its customers were like Ms. Ruby and that when they came in to “pay” a loan, they needed the money reloaned to them. It knowingly redid the loan by passing the money back and forth. Thus, the funds passing back and forth were not really “good funds” because both sides knew that they were not really available to pay the debt. Instead of impermissibly engaging in a repeated transaction, Cashnet was required to follow the restrictions imposed on its business practice that were intended to stop that destructive cycle of debt.

The lender complying with the Act would be at a severe competitive disadvantage to Cashnet, or to the other lenders who engaged in repeated transactions. (See e.g., Petitioner’s Brief and Amicus Brief on file in Bussey

v. Approved Cash Advance Centers (VA) LLC, Record No. 100286 of the Virginia Supreme Court.). Furthermore, given that Ms. Ruby paid $600.00 in fees between March 31, 2007, and November 2, 2007, if she had borrowed that $500.00 loan from a lawful lender, it would have been fully paid by that time. Instead, Cashnet's unlawful practice of redoing the loans meant she still owed the principal of $500.00, and that Cashnet intended to collect $75.00 again, and again, and again.

This extensive regulatory structure and its enforcement mechanisms were designed to allow the payday loan product into Virginia without allowing payday lenders to profit from the cycle of debt. Although Virginia law prohibits renewing, extending, refinancing, or rolling over a payday loan, Cashnet convinced the Shenandoah County Circuit Court judge that this law does not prohibit immediately redoing loans for borrowers who cannot pay them. As explained by the OCC in its Advisory letter in 2000 (*supra),* when a payday lender makes another loan that is rolling over the loan. Whether called refinances, renewals, or roll overs, the subsequent loans were all prohibited transactions. The Circuit Court's decision rewarded Cashnet at the expense of those payday lenders who tried to run a business in compliance with Virginia law, and denied Ms. Ruby the protection against the cycle of debt.

These repeated high-rate transactions trap the least advantaged of the citizens of this Commonwealth in a cycle of debt, and Cashnet wants the judicial branch of the Commonwealth to give its seal of approval to this predatory business model. *Amici* urges the Court to accept the petition so that this argument can be rejected and the Payday Loan Act enforced as written.

C. The 2008 amendments strengthened the enforcement capabilities of the Payday Loan Act and provided other limitations while preserving the prohibition on repeated transactions.

After the payday industry was allowed into Virginia in 2002, the problem caused by the cycle of debt became evident. "As borrowers have taken out cash advances against their paychecks, the industry has exploded, leaving thousands of Virginians in a cycle of debt they cannot escape." *Washington Post*, December 3, 2007, B1, "Pressure Mounts on Va. Payday Lenders, Coalition Plans to Push Legislature for Limits" by Anita Kumar, found at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/02/AR2007120202038.html. "One of the chief sponsors of the 2002 law that opened Virginia to payday lending now calls the industry "an open sore." "I'm embarrassed I was ever affiliated with it at all," said Del. Harvey B. Morgan (R-Gloucester)." *Id.*

In 2007 local governments throughout Virginia started calling for a 36% annual interest rate cap and other restrictions on payday loan, and the City of Staunton was the first to adopt such a provision on September 13, 2007.

> The number of localities having passed resolutions exceeded fifty, with others still considering it. These communities included some of Virginia's largest cities — Alexandria, Chesapeake, Hampton, Newport News, Norfolk, Richmond and Roanoke — as well as larger counties, including Arlington, Chesterfield, Fairfax, and Henrico. More than half the population of Virginia lives in the localities that have called on the General Assembly to protect the citizens of Virginia by capping payday loan interest rates at 36 percent APR. Nor is the effort limited to Virginia's most populated areas. Communities in every Congressional District in Virginia have passed this resolution, including small ones like Duffield (population 62) in far Southwest Virginia and Montross (population 315) on the Northern Neck.

Local governments drive movement to cap payday loans at 36 percent APR http://www.virginia-organizing.org/magazine/jan08_local.php. As part of this dispute, the payday loan industry responded with ads that repeated its lobbying position that payday loans are one-time loans with only one fee that is assessed. *See Exhibit A,* (ad that ran in the Daily News Record in Harrisonburg, Virginia on January 2, 2008, pg. A3.)

As a result of the dispute around the state, payday lending was on the legislative agenda in 2008. As published by the Richmond Times Dispatch on January 6, 2008, on its opinion page, "Partisanship fortunately does not hold sway on the subject of predatory payday lending, a usurious practice that borders on fraud. The industry depends for success on trapping people in dependency on revolving high-interest loans. It cries out for reform. Perhaps this year a coalition that spans the philosophical spectrum from the economic left to the religious right will win the stricter controls it could not win last year." Staff Reports, found at http:///www2.timesdispatch.com/rtd/news/opinion/op_ed/article/-RTD_2008_01_06_0073/43525/.

After becoming aware that the industry was improperly engaging in repeated transactions, the Virginia General Assembly amended the Virginia Payday Loan Act to provide additional enforcement remedies and other protections. In Va. Code § 6.1-459(6) it left in the prohibition that a licensee shall not "refinance, renew, or extend" and added additional text such that it now reads:

> A licensee shall not (i) refinance, renew or extend any payday loan; (ii) make a loan to a person if the loan would cause the person to have more than one payday loan from any licensee outstanding at the same time; (iii) make a loan to a borrower on the same day that a borrower paid or otherwise satisfied in full a previous payday loan; (iv) make a payday loan to a person within 90 days following the date that the person has paid or otherwise satisfied in full a payday loan through an extended payment plan as provided in subdivision 26; (v) make a payday loan to a person within 45 days following the date that the person has paid or otherwise satisfied in full a fifth payday loan made within a period of 180 days as provided in subdivision 27

> a; or (vi) make a payday loan to a person within the longer of (a) 90 days following the date that the person has paid or otherwise satisfied in full an extended term loan or (b) 150 days following the date that the person enters into an extended term loan, as provided in subdivision 27 b.

The 2008 amendments created the database so that these additional provisions could be followed by payday lenders. Va. Code § 6.1-453.

As a consequence of the 2008 amendments, the current statute does not raise the legal issue presented by Petitioner. Although the practice at issue in this case is now ended, the legal issue presented by this case is not moot. Until the statute of limitations expires on all the unpaid redone loans, in collection cases throughout the Commonwealth judges will be faced with the arguments offered by Cashnet in this case. Furthermore, many of these loan contracts contain mandatory binding arbitration agreements, and arbitrators will need guidance on the validity of Cashnet's arguments. As presented by Petitioner, several cases are in various stages of litigation on this issue and guidance from the Virginia Supreme Court would resolve the competing decisions.

Finally, *amici* is especially concerned about the precedent of the Circuit Court's decision. If any lender can avoid the express prohibitions on its business practice by claiming it is merely "redoing a loan" rather than refinancing it or renewing it or rolling it over, then the law is nothing more than a linguistic game. A different lender engaged in this same predatory practice called its practice "reloaning." (See Bussey v. Approved Cash Advance Centers (VA) LLC, Record No. 100286 of the Virginia Supreme Court.)   Rather than a game, "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice." *Morrel v. Nationwide Mutual Fire Insurance, 1*88 F.3d 218, 224 (4th Cir. 1999)*(citing U.S. v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947). Virginia law does not specifically include in its prohibitions the redoing, the restoring, the recommencing, the reaffirming, the replenishing, the reinstating, the recreating, the reestablishing, the replacing, the resuming, or the reviving of a payday loan; our statutes would be too cumbersome if they needed to be written this way to be enforced. Consequently, no business should be able to avoid the law by merely using a thesaurus to describe its behavior.

<u>CONCLUSION AND RELIEF SOUGHT</u>

Amici argues that this significant error must be corrected to ensure that that the will of the General Assembly is properly enforced throughout the Commonwealth. The law, and especially its prohibitions against usury and overreaching by creditors, is not concerned with superficial labels but instead looks to the true substance of events. Repeated transactions that trap a borrower in a cycle of debt are exactly what the General Assembly prohibited.

Amici respectfully requests that this Court grant appellant's Petition for Appeal so that this matter can be reviewed by the full Court, the judgment of the trial court reversed, and the case remanded to the trial court for an award of damages in Ms. Ruby's favor.

DATED: March 22, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. Domonoske, do hereby certify that on this 22nd day of March, 2010, I filed in the Office of the Clerk of the Supreme Court of Virginia seven copies of this Amici Brief and on the same day mailed a copy of the foregoing Amici Brief by United States mail, postage pre-paid, to the following counsel of record and party:

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