

## Consumer Credit

### **Eleventh Circuit Blocks Bank's Bid To Force Arbitration of Payday Loan Suit**

**A** federal appeals court has given new life to a lawsuit that claimed First Premier Bank of South Dakota violated federal anti-racketeering laws by facilitating illegal online lending (*Flagg v. First Premier Bank*, 2016 BL 50321, 11th Cir., No. 15-cv-14052, unpublished 2/23/16).

Lisa Flagg sued First Premier in 2015, framing her complaint as a class action alleging violations of the Racketeer Influenced and Corrupt Organizations Act. Although Flagg agreed to arbitrate disputes under procedural codes of the National Arbitration Forum (NAF), the NAF no longer accepts consumer arbitration claims.

A district court denied First Premier's motion to force the case into arbitration, and the U.S. Court of Appeals for the Eleventh Circuit affirmed in an unpublished Feb. 23 decision, saying the NAF's role was "integral" to the agreement.

"Because the choice of the NAF as the arbitral forum was an integral part of the agreement to arbitrate, we conclude that the district court properly denied First Premier's motion to compel arbitration and appoint a substitute for NAF, and to stay or dismiss the proceedings," the Eleventh Circuit said.

Darren T. Kaplan of Stueve Siegel Hanson in New York, who represents Flagg, Feb. 24 said the decision means action in the underlying case will resume in the U.S. District Court for the Northern District of Georgia.

"While we are not surprised with this ruling, we are certainly pleased that the Eleventh Circuit Court of Appeals has affirmed the district court's denial of the defendant's motion to compel arbitration, and we look forward to litigating this class-action case on the merits," Kaplan told Bloomberg BNA.

**Wrongful Action Alleged.** Flagg, a citizen and resident of Georgia, said First Premier facilitated payday loans by First International SRS of South Sandy, Utah, and others that are illegal in Georgia and several other

states. First Premier did so, according to the suit, by allowing debiting and crediting borrowers' bank accounts on the automated clearing house (ACH) network.

"First Premier, acting as an [Originating Depository Financial Institution], actively participated in this unlawful scheme by granting Illegal Payday Lenders' requests to 'initiate' ACH entries representing payday loan credits and debits to and from consumer checking accounts, and knowingly taking the affirmative steps to 'originate' these illegal entries into the ACH Network, thereby enforcing debts First Premier knew to be unlawful," the suit said.

First Premier knew it was crediting and debiting borrowers' accounts for unlawful purposes, according to the complaint, "because it was required to undertake extensive due diligence procedures on all merchants attempting to initiate credit or debit entries on the ACH Network before entering into contractual arrangements with them."

Flagg claims to represent two classes of consumers in Arizona, Arkansas, Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Vermont, West Virginia and Washington, D.C. The court has not yet certified any classes in the case.

First Premier, based in Sioux Falls, could not be reached for comment. Lawyers for the bank did not immediately respond to a request for comment on the ruling.

First Premier's website says the bank is the 12th-largest ACH originating bank in the U.S.

By CHRIS BRUCE

To contact the reporter on this story: Chris Bruce in Washington at [cbruce@bna.com](mailto:cbruce@bna.com)

To contact the editor responsible for this story: Mike Ferullo at [mferullo@bna.com](mailto:mferullo@bna.com)

*The ruling is at <http://www.bloomberglaw.com/public/document/>*

*LISA FLAGG on behalf of herself and all others similarly situated. Flagg's complaint is at <http://www.bloomberglaw.com/public/document/>*

*Flagg\_v\_First\_Premier\_Bank\_Docket\_No\_115cv00324\_ND\_Ga\_Jan*