UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-268-H

KATHY L. CORUM, ET. AL PLAINTIFF

v.

FIFTH THIRD BANCORP and
FIFTH THIRD BANK, KENTUCKY DEFENDANT

MEMORANDUM OPINION

Plaintiff, Kathy Corum, seeks relief under the federal Consumer Leasing Act, 15 U.S.C. § 1667, *et. seq.* ("CLA").[1] She and the other putative class members paid $20.00 late fees under their motor vehicle leases with Defendants Fifth Third Bancorp and Fifth Third Bank, Kentucky. Plaintiff alleges that these late fees violated the CLA. Defendants contend that the late payment fees at issue fall outside the scope of § 1667b(b) and have moved to dismiss Plaintiff's Amended Complaint for failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6).[2] In the alternative, Defendants contend that even if § 1667b(b) can be construed to apply to late payment fees, the

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[1]Plaintiff brings this action on behalf of herself and all other similarly situated individuals. Although the parties have briefed the issue, the Court has not yet determined whether this action should be certified as a class action pursuant to Federal Rule of Civil Procedure 23.

[2]In a remarkably similar case, Judge Charles R. Simpson III held that the reasonableness of late fees was not regulated by 15 U.S.C. § 1667b(b). *See Deusner v. Firstar Corp.*, 186 F.Supp.2d 766 (W.D. Ky. 2001). The *Deusner* decision was appealed to the Sixth Circuit. At the request of the parties, the Court stayed the present action pending the outcome of the *Deusner* appeal. The *Deusner* case settled before the Sixth Circuit could hear the appeal and the Sixth Circuit dismissed the case accordingly. As a result, this Court lifted its stay and ordered the parties to file briefs on the applicability of § 1667b(b) to late fees. Shortly thereafter relying almost exclusively on *Deusner*, Defendants moved to dismiss Plaintiff's complaint as a matter of law. Ordinarily, the Court will try to follow the conclusions of other judges in this district. However, their decisions are not binding. After carefully considering the language and purposes of the CLA the Court concludes that it must respectfully disagree with the analysis in *Deusner*.

amounts assessed by Defendants are reasonable. For the reasons set forth below, this Court concludes that §1667b(b) requires that all late fees imposed by a lessor of consumer goods be reasonable. Because the reasonableness of late fees is a factual determination, the Court is unable at this juncture to conclusively find as a matter of law that $20.00 is a reasonable fee. The reasonableness of the $20.00 late fee is more properly an issue for summary judgment.

I.

Plaintiff leased a Dodge Neon from Fifth Third Bank of Kentucky ("Fifth Third Bank") on July 30, 1996. The terms of the lease agreement required Plaintiff to make monthly payments in the amount of $199.00 over a five year term. Plaintiff's lease contained a late fee provision which provided:

> 2) LATE CHARGE; LESSOR PAYMENT; COLLECTION CHARGES. Any payment not made by Lessee on its due date shall be subject to a late charge of **$20.00.** If Lessee's delinquency requires collections calls or activity, a charge determined on the basis of the cost incurred and in accordance with Lessor's collection charge schedule may be made. Although not required to, if Lessor pays any amount required to be paid hereunder by Lessee, Lessee shall immediately reimburse Lessor this amount. If the amount is not so remitted, Lessee shall pay interest thereon at the highest rate permitted by law, and if no such rate is established then at 21% per annum. A fee of **$20.00** may, at Lessor's discretion, be imposed whenever a check offered in payment on this Lease is returned to the Lessor unpaid for any reason.

(07/30/1996 Corum Lease Agreement at 2) (emphasis in original). Although Plaintiff ultimately made all the monthly payments required under her lease, Fifth Third Bank received twelve of the payments after their respective due dates. In accordance with the lease agreement, Fifth Third Bank imposed a late fee of $20.00 against Plaintiff for each late payment. Plaintiff paid the fees as required under the lease. Plaintiff now alleges that the $20.00 late fees violate § 1667b(b) because the fees are unreasonably high in light of the anticipated or actual harm suffered by Fifth

Third Bank on account of the late received payments.

II.

In considering a motion to dismiss, all factual allegations in the complaint must be accepted as true. *See Minger v. Green*, 239 F.3d 793, 797 (6th Cir. 2001). To dismiss any part of the claim, "it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir. 2001) (*quoting Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 346 (6th Cir. 2000)). "To survive a motion to dismiss under Rule 12(b)(6), 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Rippy v. Hattaway*, 270 F.3d 416, 419 (6th Cir. 2001) (*quoting Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). A motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief. *See Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978).

III.

The Court begins its analysis by examining "the language of the statute itself" to determine if its meaning is plain. *U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 500 (1993); *see also The Limited, Inc. v. Commissioner*, 286 F.3d 324, 332 (6th Cir. 2002). Plain meaning is examined by looking at "the language and design of the statute as a whole." *United States v. Meyers*, 952 F.2d 914, 918 (6th Cir. 1992). Only if the language is ambiguous does the Court

resort to extrinsic evidence to glean the statutory intent. A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (holding statute is ambiguous where it "could just as easily be read to" have one meaning as another).

Passed by Congress in March, 1976, as an amendment to the TILA the CLA is aimed at protecting consumers leasing rather than buying goods, especially automobiles. Plaintiff brings her claim under § 1667b(b) which states:

> (b) Penalties and charges for delinquency, default, or early termination
> Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

15 U.S.C. § 1667b(b). Plaintiff maintains that this section requires that all fees imposed by the lessor on account of late payments must be reasonable.

Fifth Third Bank argues that this section of the CLA does not govern penalties imposed by the lessor for late payments. Fifth Third Bank bases its argument on the fact that another section of the CLA, 15 U.S.C. § 1667a(11), expressly requires that the "amount or method of determining any penalty or other charge for delinquency, default, *late payments*, or early termination" be stated clearly and conspicuously in the lease. 15 U.S.C. § 1667a(11) (emphasis added). Fifth Third Bank contends that interpreting the language of § 1667b(b) to include late payment fees contradicts the "*expressio unius est exclusio alterius*" (the expression of one thing implies the exclusion of another) and the "avoidance of surplusage" canons of statutory interpretation.

Cannons of construction are designed to help courts make sensible interpretations. The

Supreme Court recently cautioned: "[C]anons are not mandatory rules. They are guides that 'need not be conclusive' . . . other circumstances evidencing congressional intent can overcome their force." *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94 (2001). Courts should be careful when any cannon of construction appears to produce an absurd result. *See U. S. v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with.") The context for using any cannon of construction begins with considering the ordinary and natural meaning of the relevant words. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994). Here, the question is whether late or tardy payments by the lessee fall within the scope of "penalties or charges for delinquency."[3]

"Delinquency" is defined as: "1. negligence or failure in doing what is required. 2. A delinquent act." Webster's II New Riverside University Dictionary 359 (1994). "Delinquent" is defined as: "1. failing to do what is required by law or obligation. 2. Overdue in payment, as an account." *Id.* Late is defined as "1. coming, occurring or remaining after the usual or proper time." *Id.* at 678. Based on their dictionary definitions, the terms "late" and "delinquent," at least in regard to a payment, appear fairly synonymous. Indeed, Fifth Third Bank's own lease uses the term "late payment" interchangeably with "delinquency": "Any payment not made by Lessee on its due date shall be subject to a **late charge** of $20.00. If Lessee's **delinquency** requires additional collection calls or activity, a charge determined on the basis of cost incurred in accordance with Lessor's collection charge schedule may be applied . . ." (07/30/1996 Corum Lease Agreement at 2) (emphasis added). The Sixth Circuit also uses the terms "delinquency" and "late payment" interchangeably. *See, e.g., Bricklayers Pension Trust Fund v. Rosati, Inc.*,

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[3]Neither the term "delinquency" nor "late payment" is defined in the CLA.

23 Fed.Appx. 360, 361 (6th Cir. 2001); *In re Tennessee Chem. Co. v. Shell Canada Ltd.*, 112 F.3d 234, 237 (6th Cir. 1997); *Valen Mfg. Co. v. U.S.*, 90 F.3d 1190, 1194 (6th Cir. 1996); *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509, 1512 (6th Cir. 1989); *Olga's Kitchen v. Papo*, 1987 WL 36385 at *5 (6th Cir. Feb. 16, 1987).

Were it not for Congress's use of both terms (late payment and delinquency) in § 1667a(11), based on the dictionary definitions and common usage of the terms "late payment" and "delinquency" one would not hesitate to declare that § 1667b(b) clearly and unambiguously regulates fees imposed on account of late payments. However, "when different words are used in the same provision they are presumed to have a different meaning." *National Data Corp. v. U.S.*, 50 Fed. Cl. 24, 30 (Ct. Cl. 2001). Because Congress separately used the term late payment and delinquency in § 1667a(11), the Court must engage in a more comprehensive analysis. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The Court believes that this is one of those circumstances where the context does dictate otherwise.

The Court has struggled to define the terms "late payment" and "delinquency" so that each word is assigned a distinct meaning within the context of the CLA and neither is rendered superfluous. *See Fulps v. City of Springfield, Tenn.*, 715 F.2d 1088, 1093 (6th Cir. 1983) (holding that statutes should be construed to avoid making any word superfluous). It is possible to assign slightly different meanings to "late payment" and "delinquency." For example, one could define a fee on account of a "delinquency" as a penalty on an overdue account on which the payment has not yet been made, and a late fee as a penalty imposed for a payment which has

made but after the due date. Such distinctions are possible when the terms are examined in isolation. However, within the framework of the CLA the Court is unable to apply the distinction in a manner which accords with the intent and purposes behind the statute. In this context, it appears more likely that the natural reading of the term "late payment" is that of a type of "delinquency" and that Congress simply used terms with overlapping definitions. *See Tyler v. Cain*, 533 U.S. 656, 657 (2001); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (construing statutory terms as synonymous).

The CLA, like the TLIA, is a remedial consumer protection statute and, therefore, should be liberally construed to effectuate its underlying purpose. *See Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1280 (11th Cir. 2002); *Pettola v. Nissan Motor Acceptance Corp.*, 44 F.Supp.2d 442, 447 (D.Conn. 1999). Congress could not have intended to require lessors to set out the amount and method of determining any penalty or other charge for *late payments* but not also require that the amount of those charges be reasonable. The Court finds it unequally fathomable why Congress would regulate the reasonableness of fees imposed on account of a delinquency but not on account of a late payment. There is simply no plausible reasonable for treating "late payments" differently than penalties or charges on account of delinquency and default. Congress must have intended to regulate all fees imposed on account of any delinquency or default including fees imposed on account of late payments.

In light of the purpose of the CLA, the Court cannot say that the statute is ambiguous or "fairly capable" of two reasonable interpretations. The only reasonable interpretation is that

Congress intended § 1667b(b) to regulate the reasonableness of fees for late payments.[4]

IV.

Fifth Third Bank argues even if § 1667b(b) applies to late payment fees, Plaintiff's Complaint must still be dismissed because the late payment fees are reasonable as a matter of law. Section 1667b(b) requires that all covered penalties or other charges must be "reasonable in the light of the anticipated or actual harm caused by the delinquency, default or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." 15 U.S.C. § 1667b(b). Certainly, Fifth Third Bank has a right under the CLA to charge fees for late payments. The only requirement is that those fees must be reasonable in light of the anticipated or actual harm. On its face the $20.00 fees seem entirely reasonable. Late payment fees are necessary for encouraging on time payments and create a financial incentive for the lessee to do so. The Court finds it difficult to believe that Plaintiff will be able to show that $20.00 is an unreasonable amount.[5] Nevertheless, the Court is unable

[4]Because the Court has concluded that there is only one reasonable interpretation of § 1667b(b), it need not consult other secondary sources of statutory interpretation such as legislative history and agency interpretations. It is worth noting, however, that both agency interpretation and legislative history would support the outcome reached by the Court. When faced with an ambiguous statute, courts "look to the interpretation of the government agency charged with enforcing the statute in question." *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 995 (6th Cir. 1999). The Federal Reserve Board has been given the authority to issue rules implementing the CLA. *See* 15 U.S.C. § 1604. Pursuant to its mandate, the Federal Reserve Board promulgated "Regulation M." Section 213.4(q) of Regulation M entitled "Penalties and other charges for delinquency" provides that every consumer lease subject to the CLA must disclose "the amount or the method of determining the amount of any peanlty or other charge for delinquency, default, or *late payments which must be reasonable*." 12 C.F.R. § 213.4(q) (emphasis added). Furthermore, the legislative history does not support Fifth Third Bank's contention that the sole purpose of § 1667b was to protect consumers from balloon payments at the conclusion of a lease. While § 1667b(a) was designed primarily to protect consumers from balloon payments, the relevant portion of the legislative history clearly reveals that Congress intended to regulate more than just balloon payments under § 1667b(b): "Subsection 183(b) [now § 1667b(b)] is intended to protect consumers from unwarranted penalties or forfeitures for delinquency or default, or whenever the lease is terminated prior to its scheduled expiration. It thus does not overlap subsection (a)." Sen. Rep. 94-590 (1976).

[5]As Fifth Third Bank points out, the $20 late payment charge is $5 less than the late charge specified in the Federal Reserve Board's own TILA Model Form G-10(B). While this might be strong evidence that the fee is reasonable, it is not conclusive. The TILA Model Credit provisions do not directly regulate late fees under the CLA.

to declare the amount unreasonable as a matter of law at this time. The issue is currently before the Court on a motion to dismiss. A determination of the reasonableness of Fifth Third Bank's late payment charge requires consideration of three factors--(1) anticipated or actual harm; (2) difficulties of proof of loss; and (3) nonfeasibility of otherwise obtaining an adequate remedy. These are factual inquiries and there is no factual record before the Court.

Despite the Court's own skepticism, fairness requires that Plaintiff have an opportunity to show that the $20.00 late fee is not reasonable. Therefore, accepting the factual allegations as true and construing the complaint in Plaintiff's favor, it appears she has stated a claim upon which relief may be granted with regard to the reasonableness of the late fee provision.

The Court will enter an order consistent with this Memorandum Opinion.

JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

Furthermore, none of the CLA model lease forms include a dollar amount in those spaces addressing the amount to be charged as "late charges."

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ORDER

Defendants have moved to dismiss Plaintiff's complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The Court has filed a Memorandum Opinion. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to dismiss for failure to state a claim is DENIED.

IT FURTHER ORDERED that the Court will set a conference at a later date to discuss any remaining pending motions.

This is not a final and appealable order.

This ___ day of July, 2003.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record