

2001

# First Security Bank v. Gordon E. Johnosn : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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UTAH SUPREME COURT

BRIEF

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1 Attached to the original complaint  
2 was a cardholder agreement. Based upon that  
3 agreement defendant answered and filed a coun-  
4 erclaim alleging the monthly finance charges  
5 actually added were greater than permitted by  
6 said agreement.

7 Thereupon, plaintiff filed a motion  
8 to amend his complaint. The proposed amended  
9 complaint was identical to the original com-  
10 plaint except a different cardholder agree-  
11 ment, more favorable to plaintiff, was attac-  
12 Over defendant's objection plaintiff's Motion  
13 To Amend His Complaint was granted.

14 During the discovery procedure def-  
15 ant propounded his Second Set Of Interroga-  
16 tories which plaintiff partially declined to  
17 answer. At a hearing the court upheld some  
18 ot plaintiff's objections, but specifically  
19 ordered the plaintiff to answer two interro-

1                   So defendant filed a Motion For Sum-  
2 mary Judgment based upon plaintiff's failure  
3 to answer the two interrogatories. Before  
4 the hearing plaintiff merely refiled the An-  
5 swers To Second Set Of Interrogatories it had  
6 previously answered.

7                   While still in default of a court  
8 order to answer the two interrogatories, pla-  
9 tiff filed a motion and order to show cause  
10 why the matter should not be set for trial  
11 on the ground the defendant refused to sign  
12 a notice of readiness for trial. This notice  
13 of readiness included a paragraph that obli-  
14 gated the signator to certify that discovery  
15 was completed. Again defendant pursued his  
16 Motion For Summary Judgment on ground that  
17 plaintiff had refused to answer the two inte-  
18 rogatories ordered almost two years to be  
19 answered.

1 interrogatories within 15 days. Plaintiff  
2 answered only one of them before trial.

3 Defendant filed a Motion For Con-  
4 tinuance 9 days before the trial on the grou  
5 that defendant was acting as his own attorne  
6 in U.S. District Court, Central Division for  
7 California, and the schedule of the two pro-  
8 ceedings conflicted. The court denied defen  
9 sant's Motion For Continuance, and trial was  
10 held without him.

11

12 Summary of the Pleadings

13 Exhibit "A" attached to the original  
14 complaint permits the plaintiff to add mon-  
15 thly finance charges of 1% of unpaid balance  
16 from \$500.00 up.

17 Defendant admitted this is the agr  
18 ment between the parties and attached to his  
19 answer and counterclaim statements which sho  
20 plaintiffs had been adding monthly finance



1 plaintiff was now estopped from denying exhi-  
2 bit "A" attached to the original complaint  
3 was not the agreement between the parties,  
4 the court granted plaintiff's motion to ame:  
5 its complaint by attaching a new agreement  
6 which permitted a finance charge of 1½% per  
7 month. Both agreements obligate the defen-  
8 dent to pay reasonable attorney's fees in th  
9 event of a lawsuit.

10           Thereupon, defendant alleged the  
11 method of computing the monthly finance char  
12 rendered usurious on its face exhibit "A"  
13 attached to the amended complaint.

14

15                           Summary of the Findings

16           The trial court found Exhibit "A"  
17 attached to the Findings Of Fact And Conclu-  
18 sion Of Law was the revolving charge agreem  
19 between the parties, and "that the defendan

1           As will be shown later in this brief  
2 all finance charge payments in accordance with  
3 this agreement were usurious.

4

5                           Summary of the Evidence

6           All evidence was documentary, and  
7 exhibits relevant to this appeal are in the  
8 clerk's transcript.

9           Not forwarded are photocopies of billings,  
10 lings, cancelled checks, and monthly statements  
11 representing approximately five years of Bank  
12 Americard use. These may be relevant if the  
13 case is remanded.

14

15                           ISSUES PRESENTED BY THIS APPEAL

16           1. Was plaintiff estopped to substitute  
17 a different cardholder's agreement?

18           2. Should defendant's Motion For Summary Judgment have been granted for plaintiff  
19 refusal to answer interrogatories?



1 his account which had not, in fact, been re-  
2 ceived. It was held that the paymaster was  
3 estopped to deny that the money had not been  
4 received, though the only change in position  
5 that was shown was the presumed accommodation  
6 of the officer to his supposed income.

7 PLAINTIFF'S REFUSAL TO ANSWER INTERRO-  
8 GATORIES JUSTIFIED SUMMARY JUDGMENT FOR  
9 DEFENDANT

10 In Hammond Packing Co. v. Arkansas  
11 212 U.S. 322 the Court ruled that a state  
12 court, consistently with the Due Process Clause  
13 of the Fourteenth Amendment, could strike the  
14 answer of and enter a default judgment against  
15 a defendant who refused to produce documents  
16 in accordance with a pretrial order.

17 In the case at bar plaintiff to  
18 this date has not answered on interrogatory  
19 and answered another approximately two years  
20 after being ordered to do so following re-

1 its order had been complied with when in fact  
2 it hadn't.

3 THE COURT ERRORED IN DENYING DEFENDANT'S  
4 MOTION FOR CONTINUANCE

5 The trial in Bairas v. Johnson  
6 (1962), 13 Utah 2d 269, 373 P. 2d 375 was  
7 postponed from June 14, 1961 until June 28,  
8 1961 "to accomodate the personal convenience  
9 of one of plaintiff's counsel."

10 Thereafter, he was granted two more  
11 continuances even though his last motion was  
12 not timely per Rule 6 (d). Defendant in the  
13 case at bar was not granted one continuance.

14 In Patton v. Evans (1937), -Utah-,  
15 69 P. 2d 969 sole counsel for the appellant  
16 was engaged in Federal Court and did not make  
17 a motion for continuance in State Court until  
18 the venue had already arrived. His motion  
19 for continuance was properly denied because  
20 a continuance would have been at the expense

1 counsel could not have notified the court  
2 or the clerk in time to avoid the calling  
3 of the jurymen." Id @ 971.

4 Defendant in the case at bar made his  
5 Motion For Continuance 9 days before trial and  
6 sent a telegram the day before the scheduled  
7 trial. This was sufficient to avoid the calling  
8 of jurymen. Exhibits attached to Defendant's  
9 Motion For A New Trial indicates the  
10 defendant's involvement in Federal Court in  
11 Los Angeles on the eve of his trial in District  
12 Court in Brigham City, Utah.

13 "And certainly a trial court desiring  
14 to be fair would, unless there were  
15 very important and urgent counter considerations,  
16 not force to trial a case  
17 where sole counsel was engaged in the  
18 trial of another case." Id @ 971

19 The trial court in its Memorandum

1 he would thereby certify falsely that discove  
2 was completed.

3 CARDHOLDER AGREEMENT IS USURIOUS AND VOI

4 Exhibit "A" attached to the Finding  
5 Of Fact And Conclusion Of Law provides:

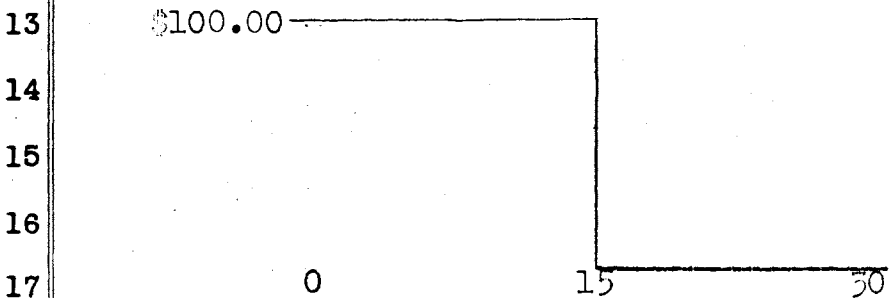
6 "If Cardholder elects to extend payment  
7 under paragraph 3 (b) above, a FINANCE  
8 CHARGE of  $1\frac{1}{2}$  per cent per month on the  
9 previous balance, consisting of cash  
10 advances and purchases, after deducting  
11 payments and credits posted during the  
12 billing cycle. This is an ANNUAL PER-  
13 CENTAGE RATE of 18%. (Emphasis added)

14 The United States Court of Appeals,  
15 Fifth Circuit explains why computing finance  
16 charges on the previous balance is objection-  
17 able:

18 "8. This arrangement is further objec-  
19 tionable because as heretofore indica-  
20 ted, the monthly finance charge is made

1 days, or only one day, and regardless o  
2 whether it was going to continue to exi  
3 thirty days or only one day." Bertain  
4 First National Bank of Montgomery (1972  
5 467 F 2d @ 177

6 The hypothetical example diagramed  
7 below should held the Court understand the  
8 previous balance method. At time 0 after  
9 adding cash advances and purchases assume  
10 the amount owed is \$100.00. Also, assume  
11 the cardholder pays \$100.00 on his account  
12 15 days later.



13  
14  
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17  
18 It is seen that the cardholder owe  
19 \$100.00 for 15 days and 0.00 for 15 days so  
20 the average balance is 50.00 for 30 days.



1 of 1 $\frac{1}{2}$ % computed on the average balance, the  
2 amount added at time 30, along with the cash  
3 advances and purchases, would be 30.75.

4 Under Utah Code Ann. 70B-3-201 (4)  
5 (a) (ii) the finance charge added would be  
6 0.00

7 With the previous balance method  
8 the finance charge of 1 $\frac{1}{2}$ % per month would be  
9 computed on the previous balance of \$100.00,  
10 and \$1.50 added along with the cash advances  
11 and purchases.

12 "Every person, or in the event of his  
13 death his personal representatives,  
14 who shall pay or deliver any greater  
15 sum or value than is allowed by this  
16 title to be received for or on any loan  
17 or forbearance, or who shall pay the  
18 principal or any part thereof of a usu  
19 ous loan or forbearance, may recover  
20 from the person who shall have taken o

1            principal and interest, provided the action  
2            is brought within one year after such  
3            payment or delivery." Morgan Motor &  
4            Finance Co. v. Oliver (1942) 124 P. 2d  
5            at 781

6

7

Conclusion

8            In the case at bar plaintiff is at-  
9            tempting to collect principal, interest, and  
10           attorney's fees on a usurious contract which,  
11           if collected, under the above cited case would  
12           enable the defendant to immediately bring an  
13           action to recover the sums back. So the  
14           cardholder's agreement is void.

15           For refusal to make discovery  
16           defendant's Motion For Summary Judgment should  
17           be granted on his counterclaim.

18           In any event the case should be re-  
19           manded so defendant can appear in person at

20           his trial and defend against either cardholder

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Certification of Mailing

I hereby certify that on the following date I mailed two copies of the foregoing, postage prepaid to Jack H. Molgard, Attorney At Law, P.O. Box 461, Brigham City, Utah 84302 and one copy, postage prepaid to Clerk, Box Elder District Court, Brigham City, Utah 84302.

Dated Dec. 13, 1974 at Los Angeles, Calif.

Respectfully Submitted

Gordon E. Johnson  
Gordon E. Johnson