CYNTHIA H. COFFMAN
Attorney General

MELANIE J. SNYDER
Chief Deputy Attorney General

LEORA JOSEPH
Chief of Staff

FREDERICK R. YARGER
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 6th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Consumer Protection Section
Consumer Credit Unit

September 22, 2017

ADMINISTRATOR'S OPINION

Re: Medical Lien Transactions

The Uniform Consumer Credit Code ("UCCC") regulates consumer credit transactions in Colorado. C.R.S. § 5-1-101 *et seq*. This opinion provides a framework for analyzing whether medical lien transactions fall within the UCCC. A medical lien transaction arises when an uninsured or underinsured consumer is injured and needs medical care that he or she cannot afford to pay up front, and the consumer enters into a lien agreement that allows the consumer to receive treatment funded by a third party, which is repaid following resolution of the consumer's personal injury lawsuit. Because the UCCC regulates "consumer credit transactions," including "consumer loans," determining whether a transaction falls within the ambit of the UCCC requires a step-by-step analysis of several definitions within the code.

First, the concept of a "loan" must be addressed. The UCCC's definition of "loan" includes "[t]he creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer." C.R.S. § 5-1-301(25).

The Colorado Supreme Court's analysis of litigation finance transactions—where a consumer receives a non-recourse loan that is repaid from the proceeds of litigation—is instructive here. *See Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400 (Colo. 2015). After reciting the various formulations that a loan can take under the UCCC, the court noted that "all of the definitions feature the crucial concept of debt." *Id.* at 406-07. "Debt" is not a defined term in the UCCC, so the court looked to definitions in other statutes and Black's Law Dictionary and concluded that "a debt is an obligation to repay." *Id.* at 407. The court determined that the litigation finance transactions "create debt because the plaintiffs receive a payment of money and, in exchange, they commit to fully compensate the finance companies from the future litigation proceeds." *Id.* at 407-08. Noting, however, that not all "debts" are "loans" under the UCCC, the court then analyzed other characteristics of litigation finance transactions that were like loans. *Id.* at 408.

In evaluating these transactions, the court focused "on how they are designed to work and how they actually work most of the time," which it described as follows:

(1) The finance company investigates a plaintiff's claim;

(2) The parties sign an agreement;

(3) The plaintiff receives a payment of money;

(4) The litigation moves forward; and

(5) After a settlement or successful trial, the plaintiff gives the finance company an amount of money equal to the amount advanced, plus an extra amount based on how long it took the plaintiff to pay.

Id. at 408. The court concluded: “the ordinary life of a litigation finance agreement is characterized by the creation and repayment of debt.” *Id.* The court also noted that the obligation to pay grows with time, which indicates the presence of a “finance charge” under the UCCC. *Id.* at 409-10. Thus, the transaction constitutes a loan. *Id.* at 410. The court rejected the contention that the agreement constituted an assignment or sale: “even though [consumers] are purportedly selling their rights to a portion of the proceeds from that litigation[, the litigation finance companies] do not step into the tort plaintiffs’ shoes; the agreements provide them only with the rights that any creditor would have to receive payment of the amount due.” *Id.*

Accordingly, to determine whether medical lien transactions are loans, the Administrator will analyze medical lien transactions for the existence of debt and whether they have loan-like characteristics, consistent with the Colorado Supreme Court’s approach in *Oasis.*[1]

A typical medical lien transaction operates as follows:

(1) A medical lien company enters into agreements with medical providers to purchase at a discount future accounts of injured uninsured or underinsured consumers that are secured by a lien agreement;

(2) An injured uninsured or underinsured consumer applies to a medical lien company to obtain medical care from one of the medical lien company’s approved providers;

(3) The medical lien company evaluates the consumer’s application and approves or denies the request;

(4) The consumer signs a lien agreement that requires the consumer to repay the debt incurred for medical care from the proceeds of the lawsuit;

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[1] In determining how medical lien transactions are designed to work, the Administrator analyzed contracts and business models provided by several medical lien companies, as well as information on the companies’ websites.

(5) The consumer receives medical care from a provider;

(6) The medical lien company purchases the account from the provider; and

(7) After a settlement or successful trial, the consumer pays the medical lien company the amount originally owed to the provider, and, depending on the parties' agreement, additional interest or fees.

In a typical medical lien transaction, the consumer becomes obligated to repay the medical lien company for debt incurred when medical services were provided. As in *Oasis*, "the ordinary life of [the agreement] is characterized by the creation and repayment of debt." *Id.* at 408. A medical lien transaction, therefore, creates a debt. Because not all debts are loans, the characteristics of a medical lien transaction are also considered. *See id.*

Unlike a litigation finance transaction, a medical lien transaction involves a third party. Rather than giving funds directly to the consumer, funds are used to pay the medical provider for the consumer's account. The consumer agrees to pay the full amount of the service, typically in a contract executed by the medical lien company itself.

Despite the differences between a litigation financing transaction and a medical lien transaction, a medical lien may also constitute a "loan" under the UCCC. A loan is "[t]he creation of debt by the lender's payment of or agreement to pay money … to a third party for the account of the consumer." C.R.S. § 5-1-301(25). Thus, payment to a third party on the consumer's behalf is specifically included in the definition of loan. One key characteristic of a loan is that a medical lien company is often involved in the creation of the debt—generally, the consumer would not have obtained the medical care and incurred the debt but for the medical lien company's up-front involvement.[2] In contrast, factoring—the purchase of an account receivable—does not involve creation of a debt because the purchaser generally has no involvement with the consumer prior to the debt's existence.

Oasis instructs that the transactions must be evaluated by "how they are designed to work," and they may work like a lender facilitating the purchase of a service from a seller to a buyer who needs financing—in other words, a loan.[3]

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[2] In some business models, medical lien companies do not sign an agreement directly with the consumer but instead contractually require the provider to obtain the consumer's agreement, which is then assigned to the medical lien company upon purchase of the lien. Whether the medical lien company is initially a party to the agreement or not, the medical lien company typically has a preexisting relationship with the consumer before the consumer incurs the debt.

[3] A medical lien company does not necessarily charge the consumer a specified interest rate like a traditional loan often does; however, interest is a measure of the loan's "finance charge" rather than a necessary component of the loan itself.

Having concluded that a medical lien transaction may, under some circumstances, be a loan does not end the inquiry, however, because not all "loans" are "consumer loans" regulated by the UCCC.[4]

A "consumer loan" is a "loan made or arranged by a person regularly engaged in the business of making loans in which:

(I) The consumer is a person other than an organization;

(II) The debt is incurred primarily for a personal, family, or household purpose;

(III) Either the debt is by written agreement payable in installments or a finance charge is made; and

(IV) Either the principal does not exceed seventy-five thousand dollars or the debt is secured by an interest in land."

C.R.S. § 5-1-301(15). Medical lien transactions involve consumers and debt that is incurred for a personal, family, or household purpose. Some medical lien transactions do not exceed $75,000.

The remaining element, "payable in installments or a finance charge is made," requires some additional explanation. "'Payable in installments' means that payment is required or permitted by agreement to be made in more than four periodic payments, excluding a down payment. If any periodic payment other than the down payment under an agreement requiring or permitting two or more periodic payments is more than twice the amount of any other periodic payment, excluding the down payment, the consumer credit transaction is 'payable in installments.'" C.R.S. § 5-1-301(32).

A "finance charge" is the "sum of all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit," which includes interest, service charges, and other fees. C.R.S. § 5-1-301(20)(a). In a medical lien transaction, the medical lien company typically purchases the account from the medical provider at a pre-negotiated discount, and the consumer pays the original amount owed to the provider. The amount of the discount may not be included in the finance charge

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[4] Another form of consumer credit transaction is a "consumer credit sale." C.R.S. § 5-1-301(11). A primary difference between loans and consumer credit sales is that a consumer credit sale involves the sale of goods or services. *Id*. The person selling the goods or services is the person who grants credit to the consumer to finance the purchase. *Id*. Depending on how a medical lien transaction is structured, it may alternatively meet the definition of a consumer credit sale. Persons who make consumer credit sales and charge or collect a finance charge must comply with certain notification and fee requirements set forth in the UCCC, among other obligations. *See* C.R.S. §§ 5-6-201 – 203.

pursuant to Section 5-1-301(20)(c), but the rates for the services provided to a consumer involved in a medical lien transaction must be equivalent to the rates for the same services provided to consumers who have not engaged in medical lien transactions. Any price differential for medical lien consumers above the usual rate may constitute a hidden finance charge. Any other interest, service charge, or fee that otherwise falls within the definition of a "finance charge" must also be considered when determining whether a finance charges is made in a medical lien transaction.

In summary, the Administrator's framework for determining whether a medical lien transaction falls within the jurisdiction of the UCCC is a fact-specific analysis that will determine whether an individual transaction is a "loan," and, if so, whether it is a "consumer loan." The critical elements of a consumer loan for purposes of this analysis are whether the transaction is less than $75,000 and is payable in installments or a finance charge is made. The existence of a finance charge may require some scrutiny to ensure that the billed charges by the provider do not include a hidden finance charge. If a medical lien transaction is a consumer loan, it must comply with all the requirements of the UCCC, including interest rate caps, disclosure requirements, and other consumer protections. *See, e.g.*, C.R.S. §§ 5-2-201, 5-3-301, 5-5-109. If the finance charge exceeds 12 percent, the loan constitutes a "supervised loan" and the medical lien company must also comply with applicable licensing requirements. C.R.S. § 5-2-301.

THE ADMINISTRATOR OF THE
UNIFORM CONSUMER CREDIT CODE

Julie Ann Meade