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RE: Inapplicability of C.R.S. § 13-21-109 to consumer credit transactions including post-dated checks/payday loans

Dear :

The Executive Director of the Colorado Collection Agency Board referred your recent inquiry to me for a response. Your company is considering accepting assignment of NSF checks from post-dated check cashers. You question whether you may assess and collect costs, including treble damages, pursuant to section 13-21-109, C.R.S. (1987 and Supp. 1994), on these post-dated checks or payday loans. In most instances, the answer will be no because such returned checks represent payment of an obligation on a consumer credit transaction.

The function of post-dated check cashers is obvious--they cash post-dated checks. A consumer writes a check bearing a date one to two weeks in the future for a relatively small amount, usually between \$50 and \$200. The check casher advances funds to the consumer immediately and agrees not to deposit the check until the date reflected on the check. The check casher will charge a fee of up to \$25 for this service, and this amount is withheld from the funds advanced to the consumer.

The resulting debt is a consumer loan as defined by C.R.S. § 5-3-104 of the Uniform Consumer Credit Code ("UCCC") because (1) the debtor is an individual; (2) the debt is incurred primarily for a personal, family or household purpose; (3) a loan finance charge is made; and (4) the principal does not exceed \$25,000. In addition, because the finance charge when converted to an annual percentage rate can be well in excess of 12 percent per year, the debt is a supervised loan as defined by C.R.S. § 5-3-501(1). As a consequence, most post-dated check cashers are licensed supervised lenders pursuant to the UCCC. Therefore, a post-dated check represents a "consumer credit transaction" as defined by

C.R.S. § 5-1-301 of the UCCC.

C.R.S. § 13-21-109(1) specifically excludes consumer credit transactions from the type of obligations to which that section applies. If a returned post-dated check is assigned to a collection agency, the amounts that may be collected in addition to the face amount of the check are limited by the UCCC. C.R.S. § 5-3-405. There is no provision for the recovery of collection costs in the UCCC other than the contractual \$20 returned check charge authorized by C.R.S. § 5-3-202(1)(f)(II). This charge must be part of the written agreement between the consumer and the check casher. The check casher's posting of the charge will not suffice.

Attorneys' fees are limited to those fees paid to an attorney who is not the salaried employee of the check casher not exceeding 15 percent of the unpaid debt after default. C.R.S. § 5-3-514. No other default charges are authorized by the UCCC with respect to supervised loans. The collection agency may not assess collection costs in the amount of \$20 or 20 percent of the face amount of the check pursuant to subsection (1)(b)(II), nor may it seek treble damages pursuant to subsection (2) of C.R.S. § 13-21-109.

Any attempt to collect amounts under the provisions of C.R.S. § 13-21-109 in connection with returned post-dated checks violates not only that law but also the UCCC and the Colorado Fair Debt Collection Practices Act ("CFDCPA"). An attempt to collect an amount in excess of that authorized by law constitutes a false representation of the character, amount or legal status of the debt in violation of C.R.S. § 12-14-107(1)(b)(I) and an unfair practice in violation of C.R.S. § 12-14-108(1)(a) of the CFDCPA. I would suggest that your standard contract be revised for post-dated check collections to delete any and all references to the remedies provided by C.R.S. § 13-21-109.

By the time a check is assigned for collection, the collection agency may not be able to tell if the check was originally post-dated. In addition, not all checks from a particular client may be post-dated as that client may engage in other activities besides post-dated check cashing. However, it is incumbent upon the collection agency to know whether debts placed for collection are consumer credit transactions. If there is any question regarding the character of the debt, the collection agency should contact its client for clarification.

Our office also administers the UCCC. Supervised lenders' licenses are issued and examinations of post-dated check cashing operations are conducted by our staff. As a result, violations of C.R.S. § 13-21-109 with respect to returned post-dated checks placed for collection can be detected through this process. If

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any amounts have been collected in excess of that authorized by law, the collection agency should make refunds to the affected consumers.

Sincerely,

A handwritten signature in cursive script that reads "Tammy Campbell". The signature is written in black ink and is positioned above the typed name.

TAMMY CAMPBELL
Assistant Attorney General
Consumer Protection Section
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