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RE: Pursuit of Civil Penalties Arising From Shoplifting Violations

Dear :

The Executive Director of the Colorado Collection Agency Board referred your recent letter to me for a response. You ask whether collection efforts to recover civil penalties under C.R.S. § 13-21-107.5 for alleged shoplifting violations are covered by the Colorado Fair Debt Collection Practices Act ("CFDCPA"). The answer to this question hinges on whether such civil penalties fit the definition of a "debt" under the CFDCPA.

It is clear, based upon a recent Federal Trade Commission ("FTC") informal staff opinion letter, that this type of obligation does not fit the definition of a debt under the Federal Fair Debt Collection Practices Act ("FFDCPA"). Palmer, FTC Informal Staff Letter (Aug. 27, 1992) (law firm's pursuit of civil damages arising from shoplifting violation was a tort action and thus was not covered by the FFDCPA). However, the FFDCPA's definition of a debt ("any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes") is much narrower than that of the Colorado act.

The CFDCPA defines "debt" as follows:

"Debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction, whether or not such obligation has been reduced to judgment.

C.R.S. § 12-14-103(6). While the FFDCPA has been interpreted to exclude unpaid taxes, fines, alimony and tort claims because they are not debts arising from a transaction involving the purchase

of property or services for personal, family or household purposes, the CFDCPA has been interpreted to cover tax liabilities, spousal maintenance and child support. FTC Official Staff Commentary on the FFDCPA § 803(5), comment 2, 53 Fed. Reg. 50,102 (December 13, 1988); Executive Director of the CFDCPA Opinion Letter (May 11, 1988); and Executive Director of the CFDCPA Opinion Letter (July 9, 1993). This expansive interpretation of the CFDCPA's definition of "debt" also encompasses civil penalties of the type in question.

Under the CFDCPA's definition of debt, any transaction resulting in an obligation or alleged obligation to pay money on the part of the consumer falls under the act. A transaction "consist[s] of an act or agreement, or several acts or agreements having some connection to each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." BLACK'S LAW DICTIONARY 1341 (5th ed. 1979). In the case of civil penalties arising from a shoplifting violation, the act is the theft itself. There is obviously more than one person concerned, namely, the thief and the store owner. The legal relations between the two are altered in that the thief has become potentially liable to the store owner for the civil penalties set out in C.R.S. § 13-21-107.5. Therefore, these civil penalties fit the definition of a debt, and any efforts on the part of a collection agency to recover this debt must comply with the CFDCPA.

C.R.S. § 13-21-107.5(2) imposes a civil penalty of from \$100 to no more than \$250 in addition to actual damages for shoplifting. The statute does not clearly indicate the procedure to be followed for collection of the penalty. However, it appears that the legislature contemplated the store owner's filing a civil action in order to recover the penalty based upon the language in paragraph (5): "A conviction for theft . . . shall not be a condition precedent to *maintaining a civil action* pursuant to the provisions of this section." (Emphasis added.) It is the opinion of the Executive Director that the specific amount of the penalty must be determined by a judge in a civil action filed by the store owner.

Unless the action is filed in small claims court, in most instances, the store owner will have to be represented by counsel in an action to recover civil penalties for shoplifting.¹ C.R.S. § 13-6-407 does permit an officer of a corporation to represent the corporation in small claims court. Therefore, an officer of the store owner could go to small claims court to

¹ C.R.S. § 13-1-127 permits a closely held Colorado corporation to be represented by an officer in court under certain circumstances if the amount in controversy does not exceed \$10,000.

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attempt to collect the civil penalties for shoplifting. But note that generally, the right to recover a penalty is not assignable. Hence, the store owner may not assign his right of action to a collection agency. In fact, C.R.S. § 13-6-407(1) specifically prohibits an "assignee or other person not a real party to the transaction" from commencing an action in small claims court. Therefore, a collection agency may not maintain a civil action on behalf of the store owner to recover civil penalties.

If a collection agency is attempting to collect civil penalties for shoplifting on behalf of its clients prior to an entry of judgment, it should be very cautious in its assertions to the alleged shoplifter. Simply demanding some amount between \$100 and \$250 that has been arbitrarily determined by either the store owner or the collection agency could be construed as a false or misleading representation in violation of C.R.S. § 12-14-107(1)(b)(I) (false representation of the character, amount, or legal status of any debt). Because a sum certain cannot be determined until the entry of judgment, collection agencies are advised to do no more than inform the individual of the existence of C.R.S. § 13-21-107.5 and the civil penalties it imposes.

Sincerely,



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