

May 6, 1999

RE: Iowa Debt Collection Practices Act
Threats of Criminal Prosecution

Dear Mr. ***:

The Iowa Banking Division asked our office recently for our view *as* to whether it would violate the Iowa Debt Collection Practices Act for a payday lender to threaten criminal prosecution for "bad checks" as a means of collecting delinquent payday loans. We have reason to believe that one or more ***** offices in Iowa may have been using such threats as part of their collection efforts. For that reason, we wanted to make you aware of our response to the Banking Division. A copy of Informal Advisory # 87 is enclosed.

It is illegal for creditors to threaten debtors with criminal prosecution. Fundamentally, criminal prosecution is something that is not within the purview of any private citizen. A court has recently made that point in holding that a payday lender violated the Tennessee Consumer Protection Act (TCPA) by threatening its borrower with criminal prosecution. The decision notes that under Tennessee law, writing a cold check is not a prosecutable crime when a payee knows or has reason to know that a check had insufficient funds in it when written.' It went on to say that the lender's conduct in threatening criminal prosecution violated the TCPA in a second way, as well:

Furthermore, criminal prosecution is the state's remedy, not that of a private citizen. Thus [the lender's] actions are violative in two ways: no "deferred presentment" borrower can be prosecuted under [Tennessee's] worthless check law,

The law in a number of states is that when a payee takes a check knowing that there are not sufficient funds, the payee in essence is essentially extending credit, and consequently there is no criminal conduct implicated. See Inf. Adv. # 87, page 12. See also *Watson v. State*, 509 S.E.2d 87 (Ct. App. Ga. 1998), in which a payday lender was prosecuted for perjury in conjunction with statements made to law enforcement officials in seeking warrants to have his customers arrested for bad checks.

and, even if such prosecution was possible, the creditor could not bring the prosecution.

For these reasons, a payee in a deferred presentment transaction cannot criminally prosecute a deferred presentment drawer. Defendant's threat to do so constitutes a representation the [the lender] had a remedy it did not have. That is a violation of [the TCPA.]

Turner^y. *E-Z Check Cashing of Cookeville, TN, Inc.*, F.Supp. ___, 1999 WL 98521 (M.D. Tenn. 1999).

Criminal prosecution in Iowa is a governmental responsibility, just as it is in Tennessee and any other state; it is not a remedy available to private citizens. While a creditor may provide law enforcement with information concerning a possible violation of law, that referral is the extent of the creditor's right. Just as any responsible citizen would not make such a referral without good faith belief that a crime has been committed, and a sound basis for that belief, neither would a responsible creditor. This, in turn, has further implications in connection with Iowa's Fair Debt Collection Practices Act, Iowa Code § 537.7103 and Consumer Fraud Act, Iowa Code § 714.16.

It is a violation of the IFDCPA to make false representations about the legal status of a debt, to make a false threat that nonpayment- may result in arrest, or a false threat to accuse someone of a crime. Iowa Code § 537.7103(1)(a),(e); (4)(e). Threats which imply that the creditor will -- or even could -- criminally prosecute are false, deceptive and misleading, since the creditor cannot do so. Consequently, such threats violate the Iowa Debt Collection Practices Act, and the Iowa Consumer Fraud Act. Further, threats which imply that the creditor will make a referral to law enforcement authorities in order to trigger governmental prosecution will violate the law except when the creditor actually has good faith grounds to believe a crime and been committed and genuinely intends to make such a referral. And, as the advisory concludes, it would only be in exceptional circumstances that default on a payday loan could, in good faith, be thought criminal. The *Turner case*, which was reported after the Advisory was written, supports our interpretation of the law in this respect.

As to the issue of whether non-payment of a check-loan implicates the bad check laws under any circumstances, Iowa's law differs somewhat from Tennessee's and some other states' laws. Iowa's law is not an absolute prohibition against criminal prosecution in situations like the payday loan, but, as the Advisory makes clear, the Iowa Supreme Court has opened the door for prosecution in a situation such as the check loan transaction -- when the payee knows there are insufficient funds at the time the check is written and takes it nonetheless -- only in very narrow circumstances. While the Iowa Supreme Court has not had occasion to rule on the issue in the context of payday loans, we believe that it would not view the check-loan situation *as an* appropriate one to expand criminal liability.

We believe that the Court would view routine default on a payday loan, in most circumstances, to be a private, civil matter, just as is true of default on any other type of loan. Default alone should not be deemed evidence of the requisite fraudulent; criminal intent, for that

would make all defaulting consumers criminals. That a payday lender takes checks instead of promissory notes as evidence of and security for a debt does not automatically turn its customer's default into a crime. It is not a presumption created when business borrowers default, nor auto borrowers, nor credit card borrowers, nor mortgage borrowers, nor any other kind of borrower,^d and it is not a presumption that can be made of payday loan borrowers.

We urge you to take steps to see that all Iowa ***** personnel are informed of this position and to assure compliance by all Iowa offices. Given the inherently coercive and oppressive nature of a threat to expose someone to the criminal justice system, our office intends to strictly enforce our Debt Collection Practices Act and Consumer Fraud Act in this regard.

If you have any questions, please feel free to contact our office.

Sincerely,

Kathleen E. Keest
Assistant Attorney General
Deputy Administrator, Iowa
Consumer Credit Code