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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

December 1, 2015

RE: ICCC Informal Advisory 105

I have reviewed the previously drafted unnumbered ICCC Informal Advisory from March 30, 2000 (updated August 14, 2000), relating to payday loans, spousal liability and debt collection practices; *see* Iowa Fair Debt Collection Practices Act, Iowa Code section 537.7103; Iowa Code Chapters 533D, 537, 554; Iowa Code sections 597.17 and 537.3311 as well as United State Code 15 U.S.C. § 1691(a). I agree with the analysis and fully incorporate it herein.

Sincerely,

Jessica Whitney
Special Assistant Attorney General
Director-Consumer Protection Division
Administrator-Iowa Consumer Credit Code

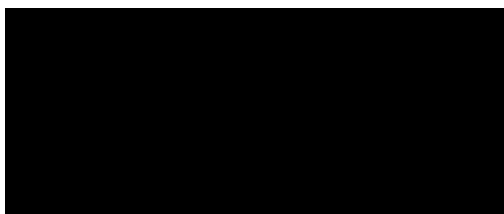
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March 30, 2000,
(Updated August 14, 2000)



RE: Payday Loans/ Spousal Liability

Dear [REDACTED]

Your office has asked us about the above complaint, in which a payday loan customer states that the payday lender is suing both her and her husband, though her husband did not sign the loan agreement, nor the post-dated check which acts as combination note/security and, sometimes, method of payment. In fact, you indicate that the husband was unaware of the wife's loan. You indicated that the lender stated they were suing the husband because it was a joint checking account, and that they had received a small claims judgment in a similar situation in the past.

First, I note that the earlier small claims judgment the lender submitted was a default judgment, hence the small claims court judge did not have the benefit of any factual or legal argument on the matter. We believe that nothing under Chapter 533D (the Delayed Deposit Services Act), Chapter 537 (the Iowa Consumer Credit Code), Chapter 554 (the Uniform Commercial Code), or common law makes a joint account holder liable on a loan, whether a check-loan or otherwise.¹ Furthermore, we believe that pursuing a non-obligated joint account-holder would violate the Iowa Fair Debt Collection Practices Act, Iowa Code § 537.7103, and raises questions about whether the Equal Opportunity Act, 15 U.S.C. § 1691(a) and Iowa Code § 537.3311 might be violated by such conduct.

¹ The lender also argued that the wife "put her husband on the account," but the facts as described by the lender do not have the effect of obligating the husband. See below.

PAYDAY LOANS

The lender is a 'payday' lender, or delayed deposit services lender licensed under Iowa Code Chapter 533D. These transactions are loans, and are subject to laws regulating credit. While there is no Iowa case on point, the reported decisions have consistently held that to be so. See, e.g. *Hamilton v. York, LLP*, 987 F. Supp. 953 (E.D. Ky, 1997); *White v. Check Holders*, 996 S.W.2d 496 (Ky. 1999); *Commonwealth v. Bar D. Financial Services*, 1994 WL 1031102 (Va. Cir. Ct., 1994); *Commonwealth v. Allstate Express Check Cashing*, No. HD-44-1 (Cir. Ct., Richmond, Va. Oct. 20, 1994); Maryland Attorney General (Rowe to Sen. Bromwell, Nov. 24, 1999). See also *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999). Truth in Lending disclosures must be given, see *Hamilton v. York*, supra..

The Iowa Division of Banking has informed all of its licensees that they must comply with Truth in Lending and the Iowa Consumer Credit Code. This lender did disclose the following:

\$445 amount financed

\$ 55 finance charge

loan term – 14 days (1 payment of \$500 due 14 days after the loan agreement was signed)

322.2% APR

Payday lenders differ from other consumer lenders in that the lenders may have the consumers sign both a contract which is combined with the TIL disclosure statement, and the lender simultaneously takes a post-dated check. The check is made out for the amount of the loan plus the finance charge authorized by Iowa Code Chap. 533D.9. The most common repayment term is 2-weeks. At the end of the two weeks, the options are: repayment by permitting the check to be deposited; repayment in cash or by money order, redeeming the check; writing a new check and paying a new fee.²

Because default on a loan is not a public offense, "bouncing" a payday loan check cannot be automatically be equating with bouncing a check. We discussed the Iowa law on bad checks and payday loans in Iowa in detail in ICCIC Informal Advisory # 87. See also *Turner v E-Z Check Cashing of Cookeville, TN*, 35 F.Supp. 2d 1042 (M.D. Tenn. 1999); cf. *Watson v. State*, 509 S.E.2d 87 (Ct. App. Ga. 1998) (payday lender prosecuted for perjury in making false statements to law enforcement officials in seeking warrants to have his customers arrested for bad checks.)

²In theory, this refinancing or renewing payday loans is prohibited by Iowa Code § 533D.10(1)(e), but lenders circumvent it by either using two checks (permitted so long as they do not exceed \$500) or by using a 1-day turn-around. In the case of the complaint, it appears as though, as a matter of practical economics, this \$400 loan was rolled over 34 times over approximately 18 months.

This background is offered simply to highlight the fact that these transactions are loans, that credit laws apply to the lenders making them, and that the checks involved in these loans are serving the function that a promissory note serves in other types of loans.

The documentation for this loan unambiguously identifies only one borrower

The "Loan Agreement & Disclosure Form" identifies the borrower as Wife, and there is only one "signature of borrower" on the loan agreement – that of Wife. The loan agreement states that "I [signator Wife] have provided a check payable to the creditor for the amount indicated in the "Amount of Payment box above." (\$500). That check (# 2241) is signed solely by Wife. Your information indicates that at no time during the life of this "circle of payday loans" (as the lender called it) did Husband's signature appear on any loan agreement or any check.

Wife is unambiguously the sole obligor on this payday loan.

Married persons have a right to obtain credit individually

Iowa Code § 597.17 states that husbands and wives are "not liable for the debts of each other contracted after marriage; nor are the wages, earnings, or property of either, nor is the rent or income of the property of either, liable for the separate debts of the other."³ The loan agreement is signed solely by Wife, and identifies her solely as the borrower. Certainly a bank or finance company who had only a wife's signature on a promissory note or car loan could not argue that the husband became liable by virtue of the wife's having made the loan payments with checks from a joint checking account. That, in essence, appears to be the claim being made by this lender.

The spouse is not a "maker" on the check, and is not liable on the check.

Under Article 3 of the UCC, which governs checks, there is also no basis for holding a joint account holder liable simply because he or she is a joint account holder. Husband is not a "maker" of the check. A "maker" is the person who signs or is identified in a note as a person undertaking to pay. Iowa Code § 554.3103(1)(e). Both the loan agreement and check bear only Wife's signature. A person is not liable on an instrument (which includes a check) unless the person signed it, or the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person. Iowa Code § 554.3401. There is no indication whatsoever on the note or the check that the signature was or purported to be in a

³ That chapter creates certain exceptions: in the case of abandonment or imprisonment, the remaining spouse make seek court authority to manage, sell, and encumber the other's property. Iowa Code § 597.10-.11. The other is that the 'reasonable and necessary expenses of the family and the education of the children " are chargeable to both husband and wife. Iowa Code § 597.14.

representative capacity for Husband.⁴

Providing information about a spouse's income in connection with a credit application does not does not create contractual liability for the spouse

The response to you from the lender states that the obligor "put him [her husband] on this account." The lender states that the obligor wished the husband's income considered along with hers so that she could have a higher credit limit. (Note that the law limits the maximum loan amount for payday lenders to \$500. Iowa Code § 533D.10(1)(b).) That, however, relates solely to the lender's underwriting decision process; it does not relate to the lender's next step of extending the credit and creating the legal obligation for the debt.⁵ The legal significance of a wife providing information concerning the husband's income in connection with a credit application is that, if the lender's underwriting standards are such that the husband's income is considered necessary to support the debt, then the lender could require the husband to become obligated without running afoul of the Equal Credit Opportunity Act.

Under the Equal Credit Opportunity Act and Federal Reserve Board Regulation B, enacted pursuant thereto, a creditor cannot request information about an applicant's spouse, unless, among other things:

- * the spouse will be permitted to use the account;
- * the spouse will be contractually obligated on the account; [or]
- * the applicant is relying on the spouse's income as a basis for repayment.

12 C.F.R. § 202.5(c). These are three different situations. Permitting a spouse to use the account

⁴ Wife did not purport to sign it in a representative capacity. But in any event, "the act of an agent not within the scope of his authority does not bind his principal." *Brannen v. State Exchange Bank*, 180 N.W. 886, 888 (Iowa 1921).

The lender states that Wife "put [Husband] on the account" by relying upon his income to establish creditworthiness in the amount of credit requested. That does not make him contractually liable, it only means that she supplied them with that information for them to consider in evaluating their application, as is discussed in the next section.

⁵ In *Worthen Bank & Trust v. Adair*, 690 S.W.2d 727 (Ark. 1985), the Arkansas Supreme Court examined a credit card account in which the application had two places where boxes could be checked. One box was to be checked if "another person will be liable upon or permitted to use the bank card account." This box was not checked. The second box was to be checked "if the applicant is relying on another person's income in paying the bank card account." Given that only the second box was checked, the court held that the wife's signature on the application did not make the wife contractually liable on the husband's credit card account. There is far less ground in the instant case to suggest that Wife's information in connection with the application automatically translates into legal obligation on the part of a third party.

does not make the spouse contractually liable for the entire account,⁶ nor does the applicant's providing information about the spouse's income, (see note 5, supra.).

Under the Equal Credit Opportunity Act, a lender

"shall not require the signature of an applicant's spouse or other person, other than a joint applicant⁷ if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."

12 C.F.R. § 202.7(d)(1). However, if an applicant who requested unsecured credit relies in part on property that the applicant owns jointly with another person to establish creditworthiness,

"the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

12 C.F.R. § 202.7(d)(2). Similarly, if the creditor's standards of creditworthiness requires the personal liability of an additional party, the creditor

"may request a cosignor, guarantor, or the like."

12 C.F.R. § 202.7(d)(5).

In this case, the lender did not obtain or seek to obtain the signature of another party necessary to make the other person liable on the checking account (or any other property), nor did it require a co-signer on the loan. Since this lender extended the credit without making the spouse contractually liable, it cannot now claim that the spouse is liable nonetheless.⁸

Taking collection actions against non-obligated parties violates the Iowa Debt Collection Practices Act

⁶ See *Sears, Roebuck & Co. v. Ragucci*, 495 A.2d 923 (N.J. Super. 1985); *Cleveland Trust Co., v. Snyder*, 380 N.E.2d 354 (Ohio Ct. App. 1978); *State Home Savings Card Center v. Pinks*, 540 N.E.2d 338 (Ohio Mun. Ct. 1988), all holding that an "authorized user" on a credit card is not contractually liable on the account and is not liable for all the debts incurred by use of the card.

⁷ An "applicant" is one who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit." 12 C.F.R. § 202.2(e). "Contractually liable" means "expressly obligated to repay all debts arising on an account by reason of an agreement to that effect. 12 C.F.R. § 202.2(i). Husband was not a joint applicant.

⁸ See *Worthen Bank & Trust Co. v. Adair*, supra. note 5.

The Iowa Fair Debt Collection Practices Act prohibits illegal threats, coercion, oppressive or coercive actions in collecting a debt, and strictly limits the dissemination of information concerning a debt – even to the debtor’s spouse. It is a violation to threaten to take an illegal action or to take an illegal action. Iowa Code § 537.7103(1)(f). In this case, the lender has filed a lawsuit against someone not obligated on a debt, and has admitted that it has done so previously. Accord, *Heard v. Bonneville Billing & Collections*, 216 F.3d 1087 (Table, 10th Cir. 2000), 2000 WL 825721 (10th Cir., June 26, 2000) (attempting to collect on bad check against someone simply a joint account holder violated federal FDCPA.).

In filing such lawsuits, it has communicated the existence of a debt to persons not reasonably expected to be liable on the debt. Iowa Code § 537.7103(3). Communication with spouses of debtors is limited by law to communications “with the consent of the debtor, or responding to inquiry from the debtor’s spouse.” Iowa Code § 537.7103(3)(a)(8).⁹

The practice of suing non-obligated joint account holders also raises the question of whether that collection practice violates the state or federal Equal Credit Opportunity Act.

The federal Equal Credit Opportunity Act prohibits discrimination against a protected class member in any aspect of a credit transaction, and marital status is a protected class. 15 U.S.C. § 1691(a)(1). The ECOA prohibits conduct which has a discriminatory impact on a protected class, as well as prohibiting discriminatory treatment. Regulation B, Official Staff Commentary § 202.6(a)-2. While not all consumer household bank accounts which are joint accounts are spousal accounts, it seems likely that a large portion are. When a lender then files collection actions against joint checking account-holders who are not contractually obligated on the underlying consumer debt, that raises serious questions about whether there is a collection practice which has a discriminatory impact on married consumers.

The same question arises under the Iowa equal credit law, Iowa Code § 537.3311, which prohibits creditors from imposing terms or conditions more onerous on the basis of, among other things, marital status.

⁹ Supplying a spouse’s income information in connection with an application, cannot by any reasonable stretch of the imagination be construed as granting consent to make debt collection contacts. Waivers of rights under the Act, like other waivers of legal rights, must be knowing, voluntary, and intelligent. Further, waivers of rights under the ICCA are not valid and enforceable, except in settlement of a bona fide dispute. Iowa Code § 537.1107. Had the lender conditioned the extension of credit upon making the spouse obligated on the debt, the spouse, of course, would have been a “debtor” himself.

If you wish any further assistance or information, please contact me.

Sincerely,

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