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Department of Justice

June 3, 2011

Re: Questions About the Iowa Consumer Credit Code & Debt Collection Practices Act

Dear _____,

Thank you for your inquiry regarding _____ (hereinafter _____), compliance with the Iowa Consumer Credit Code (hereinafter "ICCC"). Please keep in mind that our response represents only the informal opinion of the Attorney General's office; it is not a formal opinion, nor is it legal advice. We recommend that you consult with your own legal counsel.

Based upon the information included in your letter and the accompanying Funeral Purchase Agreement, it is our understanding that _____ customers provide health care and funeral services and hire _____ to collect their purchasers' overdue accounts. As explained below, FAB and its customers initially undertake the collection of "accounts receivable" and thus are not subject to certain provisions of the ICCC. However, in the collection of purchasers' delinquent accounts, _____ still subject to the portion of the ICCC concerning "debt collection" generally. Therefore, while _____ and its customers may require the purchasers of their services to pay collection costs for payment owed, they may only do so if purchasers agree to the charge in writing *and* if the four requirements of §§537.7103(5)c - (5)d are satisfied.

The moneys collected by _____ and its customers are considered "accounts receivable" under the ICCC. "Account receivable" means "a debt arising from the retail sale of goods or services or both on credit." §535.11(5). The transactions of _____ and its customers satisfy this definition, since, according to the information provided in your letter, the moneys collected by FAB arise from the sale of medical and funeral services, and payment is not collected in installments nor is a finance charge imposed. Consequently, the initial activities of _____ and its customers are governed by the rules set forth in §535. Specifically, under §535.11(1), _____ and

its customers may contract with the purchasers of their services to impose a finance or delinquency charge upon overdue "accounts receivable," provided that the charge is agreed upon in writing. Your inquiry indicates that at least some of _____ customers *do* include an express provision in their contracts regarding collection costs, attorney's fees, and interest on overdue payments. As long as all of _____ customers do so as well, the requirements of §535.11(1) will be satisfied. See, e.g., Carson Grain & Implement, Inc. v. Dirks, 460 N.W.2d 483, 485 (Iowa Ct. App. 1990) (also noting that "the interest rate of one and one-half percent monthly does not exceed the amount authorized in section 537.2202(3)").

Once _____ begins engaging in the collection of delinquent accounts, it is subject to the Iowa Debt Collection Practices Act (hereinafter "IDCPA"). I.A.C. §537 Article 7 of the IDCPA defines "debt" as "an actual or alleged obligation arising out of" (a) "a consumer credit transaction," (b) a "consumer rental purchase agreement," or (c) a "transaction which would have been a consumer credit transaction either if a finance charge was made, if the obligation was not payable in installments, if a lease was for a term of four months or less, or if a lease was of an interest in land." §537.7102(3). Based upon the information you provided, _____'s activities do not meet the requirements of (a) or (b), since, in order to be a "consumer credit transaction" – either a loan or credit sale – a finance charge must be imposed¹ or payment must be made in installments.² See §537.1301(15)(4).³

¹ See §537.1301(21)(b)(1) (providing that finance charges *do not include* "charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence unless the parties agree that these charges are finance charges") However, if in the ordinary course of business, _____'s customers allow patients' accounts to remain open after a default or delinquency charge has been imposed, that charge would then constitute a "finance charge" sufficient to transform those transactions worth *less than* \$25,000 into "consumer credit transactions," thus subjecting them to additional requirements under the ICC. See §537.1301(21)(b)(1).

² See §537.1301(33) (defining "payable in installments" as payment that "is required or permitted by agreement to be made in more than four periodic payments, excluding a down payment"). However, if _____'s customers allow purchasers of their services to arrange, either orally or in writing, to pay in installments, then the fourth element of §537.1301(15) will be satisfied. Cf. §537.1301(4) (noting that agreements may be express or implied). In the context of medical services such as those provided by _____'s customers, such an arrangement is arguably quite likely. See, e.g., Bright v. Ball Memorial Hospital Ass'n, Inc., 616 F.2d 328, 336 (7th Cir. 1980) ("[g]iven the size of the [h]ospital's bills, there is no doubt that some patients are offered installment plans payable in more than four installments.").

³ A "consumer credit sale" is a transaction in which *all* of the following are applicable: (1) The person is "regularly engaged in the business of making [such sales]. (2) The debtor is a

The moneys collected by [redacted] are, however, considered “debt” under part (c) of the IDCPA’s definition, which states that an activity that *would be* considered a “consumer credit transaction” *if either* a finance charge was imposed *or* the obligation was made payable in installments is, in fact, “debt.” That is, a transaction – like those conducted by FAB – that satisfies all but the fourth element of §537.1301(15) is nevertheless considered “debt” under the IDCPA. Consequently, although they are not covered by the rules governing “consumer credit transactions” specifically, the transactions of [redacted] and its customers worth *less than* \$25,000 are nevertheless subject to the rules set forth in the remainder of the IDCPA. Of particular relevance to your inquiry, the transactions of [redacted] and its customers *are* governed by §§537.7103(5)c - (5)d. These provisions impose four requirements upon creditors, several of which you inquired about in your letter: (1) the fee must be “reasonably related to the actions taken by the debt collector,” §537.7103(5)c, (2) the debt collector must be “legally entitled to collect the fee from the debtor,” *Id.*, (3) the fee must be “expressly authorized by the agreement creating the obligation,” §537.7103(5)d, and (4) the fee must be “legally chargeable to the debtor.” *Id.* Each of these requirements will be fleshed out in turn.⁴

First, the fee must be “reasonably related to the actions taken by the debt collector.” §537.7103(5)c. Several cases may be of particular utility to you in determining which fees would be allowable under this “reasonably related” prong. In Bondanza v. Peninsula Hospital & Medical Center,⁵ the Supreme Court of California held that, even though a hospital’s customers had signed written agreements providing that collection costs and attorney’s fees would be charged on overdue accounts, the hospital’s levying a collection fee of one-third of the amount due, without regard to actual collection costs incurred, was not “reasonable” and thus not

person other than an organization. (3) The debt is incurred primarily for a personal, family or household purpose. (4) Either the debt is payable in installments or a finance charge is made. (5) The amount financed does not exceed twenty-five thousand dollars.” §537.1301(15) (emphasis added). See, e.g., Anderson v. Nextel Partners, Inc., 745 N.W.2d 464, 467-68 (Iowa 2008) (conducting the five-part inquiry set forth in §537.1301(15)). Although in the context of medical and funeral services (1), (2), and (3) are likely met, (5) varies with the circumstances and (4) may not be satisfied here.

⁴ There is no Iowa case law directly addressing the questions you raise. Thus, our response includes consideration of precedent from other jurisdictions. Though not dispositive in Iowa courts, such extra-jurisdictional precedent nevertheless has persuasive value and is thus relevant to your inquiry.

⁵ 590 P.2d 22 (Cal. 1979).

allowable under California's unfair and deceptive practices act.⁶ In particular, the court took issue with the fact that there was "no relationship whatever between the charge assessed against the patient and the actual expense required to collect an account."⁷ Given the "reasonably related" language of I.A.C. §537.7103(5)c, it is likely that such a flat fee would be impermissible under the ICCC.⁸

Second, the debt collector must be "legally entitled to collect the fee from the debtor." §537.7103(5)c. This second prong would clearly *not* be satisfied if the law expressly prohibited

⁶ See also Durham v. Continental Cent. Credit, Inc., 600 F. Supp. 2d 1124, 1127 (S.D. Cal. 2008) (holding that a 40% "collection fee [bore] no relationship to the actual cost of collection" and was thus unlawful). The court in Durham applied the rule set forth in Bondanza, notwithstanding the fact that, in contrast to Bondanza, the agreement sub judice was not an adhesion contract. Id.

⁷ See also Ballard v. Equifax Check Services, Inc., 158 F. Supp. 2d 1163, 1175 (E.D. Cal. 2001). Referring favorably to Bondanza, the Ballard court found that a collection agency could not calculate its collection costs so as to require individuals who actually paid the collection charge to, in effect, subsidize the agency by also paying the collection costs of those individuals whose debts remained outstanding. Id.

⁸ In determining which fees, if any, to levy upon purchasers, and its customers may also want to consider other courts' interpretations of "reasonably related." See, e.g., Coastal Production Credit Ass'n v. Goodson Farms, Inc., 319 S.E.2d 650, 656 (N.C. App. 1984) (defining "reasonably related" as activities "'connected' to" collection); Newman v. Checkrite California, Inc., 912 F. Supp. 1354, 1368 (E.D. Cal. 1995) (noting that charges must be the "commercially reasonable incidental damage to the merchant," which cannot be calculated "by referring to its own charge to the merchant as evidence of reasonable or actual cost"); Richard v. Oak Tree Group, Inc., 614 F. Supp. 2d. 814 (W.D. Mich. 2008) (holding that "plaintiffs agreement to pay... 'collection costs and expenses incurred,' is not an agreement to pay a collection agency's maximum potential commission based upon a percentage of plaintiffs' unpaid account balance"); Stolicker v. Muller, Muller, Richmond, Harms, Myers, and Sgroi, P.C., 2005 WL 2180481 at *4 (W.D. Mich. Sept. 9, 2005), cited in Richard, 614 F. Supp. 2d at 823 (where a plaintiff agreed to pay a "reasonable attorney fee" related to the collection of credit card debt, and the collecting attorneys added a 25% attorney fee to the account balance upon collection, the court determined that "[i]t would take a leap of logic" to find that the plaintiff agreed to a liquidated amount of 25% of the principal debt as attorney fees in the event she defaulted); cf. Kojetin v. CU Recovery, 1999 WL 1847329 at *2 n.3 ("[t]he FDCPA would provide little protection to a debtor ... if, in agreeing to pay 'reasonable collection costs,' a debtor was held to have agreed to pay whatever percentage fee a debt collection service happened to charge a lender").

collectors from imposing such fees.⁹ Nevertheless, it is not clear whether “legally entitled” simply means the law must not prohibit a debt collector from imposing a particular fee or whether it means that the fee must be expressly authorized by law. While there are no cases interpreting this particular provision of the Iowa statute, courts have interpreted similarly-worded laws as requiring express authorization of collection charges.¹⁰ However, as discussed above, §535.11(1) not only permits, but also expressly authorizes, the imposition of finance charges and rates of interest on overdue accounts receivable like the moneys collected by [redacted] and its customers. Thus, based upon our understanding of the information you provided, the activities of [redacted] and its customers satisfy this second prong of the §537.7103(5)c - (5)d analysis, irrespective of which of the two interpretations of “legally entitled” is applied.

Third, the fee must be “expressly authorized by the agreement creating the obligation.” §537.7103(5)d. The information you provided indicates that at least some of [redacted] customers expressly contract with their purchasers to impose interest charges, collection costs, and attorney’s fees upon them. As long as the remainder of [redacted] customers also have their purchasers explicitly agree to those fees, the third prong of the §537.7103(5)c - (5)d analysis will be satisfied.

Finally, under the fourth prong of the §537.7103(5)c - (5)d analysis, the fee must be

⁹ For example, “with respect to a consumer credit transaction,” §537.2507 states that “the agreement may not provide for the payment by the consumer of attorney fees.” Thus, if the activities of [redacted] and its customers were considered “consumer credit transactions,” any imposition of attorney’s fees upon their purchasers would be per se invalid under both §537.2507 and the second prong of §537.7103(5)c.

¹⁰ For instance, courts have held that, under the federal Fair Debt Collection Practices Act, see 15 U.S.C.A. § 692(f)(1) (providing that a “debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt,” which includes “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or *permitted by law*”) (emphasis added), “permitted by law” does not mean “not prohibited by law,” but, rather requires an affirmative authorization. See West v. Costen, 558 F. Supp. 564 (W.D. Va.1983) (holding that “if state law does not expressly permit or prohibit a debt collector from collecting a service charge in addition to the amount of a dishonored check, then such charge is lawful only if the agreement creating the debt expressly authorizes it”); see also Newman v. Checkrite California, Inc., 912 F. Supp. 1354, 1368 (E.D. Cal. 1995) (holding that “as a matter of plain meaning, the word ‘permitted’ requires that defendants identify some state statute which ‘permits,’ i.e. authorizes or allows, in however general a fashion, the fees or charges in question”).

“legally chargeable to the debtor.” §537.7103(5)d. The analysis under this prong is akin to that under the second, “legally entitled” prong (see above). Thus, based upon the information you provided, the fourth and final element is most likely met as well.

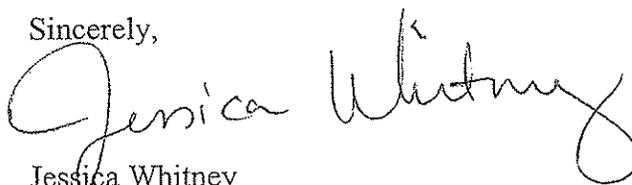
Therefore, based upon our preliminary analysis, the transactions of [redacted] and its customers seem to satisfy all but the first requirement of §537.7103(5)c - (5)d. In order to ensure that this first prong is also met, [redacted] and its customers should be careful to only impose those fees that are “reasonably related” to their collection actions. Please keep in mind that our analysis of what might satisfy that prong, as set forth above, does not represent the official opinion of our office. Thus, in making your determination of which, if any, fees to impose, we strongly urge you to seek the advice of your own counsel.

In sum, it is our understanding that [redacted] and its customers may require debtors to pay attorney’s fees and the costs of collection, so long as the contracts used by [redacted] and its customers satisfy the four requirements set forth in §§537.7103(5)c - (5)d *and* include an express provision as to the delinquency charges. If, however, [redacted] or its customers change their contracting practices such that (a) the requirements set forth above are not met, (b) the charge is reclassified as a finance charge, or (c) their activities are “considered consumer credit transactions,” then different rules will apply.

Please note again that this response letter represents only an advisory opinion of the Administrator. It is not the official opinion of the Attorney General, nor does it constitute legal advice. We recommend that you discuss these matters with your own legal counsel.

Thank you for your inquiry, and if you have any additional questions or concerns, please contact me at the above address or telephone number.

Sincerely,



Jessica Whitney
Assistant Attorney General
Deputy Administrator of the
Iowa Consumer Credit Code

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