STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES

Before the Commissioner of Financial and Insurance Services

In the matter of charges on checks returned due to insufficient funds under the Deferred Presentment Service Transactions Act

Order No. 08-015-M

Issued and entered
this 3rd day of April 2008
by Ken Ross
Commissioner

ORDER RESPECTING INSUFFICIENT FUND CHECKS

It has come to the Commissioner's attention that some licensees under the Deferred Presentment Service Transactions Act ("Act") are violating the Act with regard to insufficient fund checks. The only remedy available to a licensee under the Act with respect to a check returned due to insufficient funds is the collection of $25.00. Licensees are limited with respect to a check returned due to insufficient funds to recovering the face amount of the check, a returned check charge of $25.00 and, in the event of a lawsuit, court costs.

Nonetheless, some licensees, in filing lawsuits to collect on insufficient fund checks and returned check charges, are seeking to exercise additional remedies, subjecting the drawers to judgments that are in excess of twice the amount of the checks.

A licensee under the Act must adhere to standards and constraints contained in the Act. MCL 487.2158 governs returned check charges:

* * *

> (2) A licensee may contract for and collect a returned check charge that does not exceed the maximum returned check charge determined under subsection (3) if the drawer's check that the licensee is holding in a deferred presentment service transaction is returned by the drawee due to insufficient funds, a closed account, or a stop payment order. The licensee may only contract for and collect 1 returned check charge under this subsection in a transaction with a customer. In addition to the charge authorized by this section, a licensee may exercise any other remedy

> available under any law applicable to the return of a check because of a closed account or a stop payment order.
>
> (3) The initial maximum amount of a returned check charge described in subsection (2) is $25.00....

Therefore, as to the return of a check due to insufficient funds, a licensee may only collect a $25.00 returned check charge. A licensee "may exercise any other remedy" only with regard to checks returned because of a closed account or a stop payment order.

Because the Act provides that other remedies apply to only two kinds of returned checks, the statutory construction principle of *expressio unius est exclusio alterius* applies. That is, to express or include one thing implies the exclusion of the other. Insufficient fund checks are not included in "any other remedy," so a licensee may not pursue additional remedies and is limited to just the $25.00 returned check charge.

Some licensees are acting in violation of this $25.00 limitation. In suing to collect on an insufficient fund check, they go beyond seeking to collect on the check and the $25.00 returned check charge. They have also sought remedies under MCL 600.2952, which include a $25.00 to $35.00 processing fee, costs of $250.00, and damages of two times the amount of the dishonored check, or $100.00, whichever is greater.

MCL 487.2140(1) grants the Commissioner broad authority to issue orders to enforce and implement the Act:

> The commissioner may issue orders and rules that he or she considers necessary to enforce and implement this act. The Commissioner shall make a copy of any order or rule issued under this subsection available to each licensee within a reasonable time after issuance.

To stop current practices by some licensees and to prevent the spread of these unlawful actions, it is necessary and appropriate to issue an order directing licensees to conform to the limitations in MCL 487.2158 regarding checks returned due to insufficient funds.

MCL 487.2167 gives the Commissioner the power to revoke licenses for violations of the Act and his orders, such as this Order, if he finds that a licensee has done so "knowingly or through lack of due care."

MCL 487.2168 authorizes the Commissioner to impose civil fines for violation of the Act. If the Commissioner finds that a licensee "knew or reasonably should have known" that he or she was in violation of the Act, the Commissioner may order the licensee to pay a civil fine of not less than $5,000 or more than $50,000 for each violation.

To ensure that licensees are well-informed of this Order, the agency will post the Order on its website and send copies to licensees.

When the staff of this agency examines the books and records of a licensee, the staff will evaluate compliance with this Order as part of its examination.

Therefore, it is ORDERED that licensees shall not, with respect to a check returned due to insufficient funds, recover anything other than the face amount of the check, a returned check charge of $25.00, and, in the event of a lawsuit, court costs. In particular, a licensee shall not seek any remedy under MCL 600.2952 with respect to any check returned due to insufficient funds.

Ken Ross
Commissioner