

PAYDAY LENDING AND CHECK DECEPTION & CHECK FRAUD

FREQUENTLY ASKED QUESTIONS

1. Is a licensee under the Small Loan Act a “financial institution” for purposes of IC § 35-43-5-8 (Fraud on Financial Institutions)?

No. While licensees under the UCCC, including small lenders, are defined as financial institutions in IC 28-1-1-3, the definition only applies to IC 28-1. The only definition of a financial institution in IC 35 is at IC 35-43-5-12, and it clearly excludes small lenders.

2. IC 35-43-5-5(c) indicates that dishonor of a check by the drawee (bank, thrift, or credit union) is conclusive evidence that the issuer of the check knew the check would not be paid. Is this sufficient to allow small lenders to seek damages under this section?

No. IC 35-43-5-5(f) clearly indicates that, notwithstanding the language in subsection (c), if the small lender knew, at time of receipt, that the account had insufficient funds, *or* that the check was postdated, the issuer has not committed the crime of Check Deception, which precludes recovery under IC 34-24-3-1.

3. Does a borrower’s act of stopping payment on a check, or closing his/her account, after securing a payday loan, constitute fraud under IC 35-43-5-12?

In most cases it is simply a matter of a bad debt with impaired security. Actual cases of fraud might arise if the account was closed at the time the loan was made. Keep in mind that that law requires the payday lender to prove that the borrower had the intent to defraud, and knew the check would not be paid, both at the time of the loan.

4. What else constitutes fraud under IC 35-43-5-12?

Using false or altered *evidence of identity or residence*, using a false or altered account number, or using a false or altered check or ACH instrument. Once again, any claim for damages under these provisions would be fact specific.

5. Is the DFI imposing requirements on attorneys hired by payday lenders to do collection work?

No. As the state agency charged with enforcing the provisions of IC § 24-4.5, the DFI is obligated to promote and enforce compliance with the statute. With the Policy Statement on Payday Lending and Check Deception & Check Fraud, the DFI is imposing requirements on its licensees with respect to collections. Specifically, in order to evaluate compliance with IC § 24-4.5-7-409, and as part of the required record retention requirement for licensees under IC § 24-4.5-3-505(1), the DFI is requiring that any fraud complaint seeking treble damages and/or attorney fees provide sufficient detail to allow for an analysis by DFI staff of the appropriateness of the complaint, and that the lender retain complete documentation of collection records. In order to monitor compliance, the DFI will review small claims court dockets.

6. Do the provisions of IC 26-2-7 (penalties for stopping payments or permitting dishonor of checks and drafts) bring liability absent a finding of liability under another statute?

No. IC 26-2-7-4 specifically states that a person must be found liable under another applicable law before liability arises under this chapter.

7. Were Indiana's criminal Check Deception and Check Fraud statutes intended to protect payday lenders from bad debt losses?

No. These laws were enacted long before payday lending began. These statutes were intended to protect merchants who unknowingly accept bad checks from consumers as payment for goods and services. Recovery under these statutes is the merchants' only recourse. In the payday loan setting, the check represents collateral/security for a loan, and not payment for goods or services. Additionally, the creditor retains the recourse of suing on the loan contract for recovery. Included in recovery on the contract are the total amount due, one NSF fee of \$20 if contracted for, court costs, and post judgment interest at 8% if awarded by the court. Treble damages and/or attorney fees are not allowed.

8. Under what authority is the DFI interpreting these laws?

As noted earlier, the DFI is the state agency charged with enforcing the provisions of IC § 24-4.5. As members of the staff of the DFI participated in the drafting of the original Small Loan Act in 2002, and the 2004 amendments, the agency has a clear understanding of the intent of the legislature regarding this act, particularly with respect to the availability of attorney fees and treble damages. Indiana courts have repeatedly afforded state agencies "great weight" in interpreting the statutes and regulations with which they are charged with enforcing, as long as their interpretations are reasonable. The DFI is the regulatory agency responsible for interpreting IC § 24-4.5-7-409, and agency management is confident that its interpretation of the statute is reasonable. While the DFI does not currently anticipate requiring offenders to make restitution with respect to judgments awarded prior to the issuance of this policy statement, this does not preclude an individual's private right of action.

9. What actions are contemplated by the DFI to ensure compliance with the policy statement?

The DFI intends to institute enforcement actions, up to and including revocation procedures, against any licensee that does not comply with this agency directive. Additionally, the DFI intends to notify Indiana's small claims courts of its interpretation and position on these issues.