

LETTER OPINION
2000-L-179

December 29, 2000

Honorable Karen K. Krebsbach
State Senator
PO Box 1767
Minot, ND 58702-1767

Dear Senator Krebsbach:

Thank you for your letter requesting my opinion on several questions regarding N.D.C.C. § 6-08-16 and the collection of insufficient funds checks.

Your first question asks "[a]t what point during the processing of a bad check at a collection agency does the service charge become due and payable?" Initially, you should note that N.D.C.C. § 6-08-16 does not provide for a "service charge." Instead, N.D.C.C. § 6-08-16(2) allows the holder of an insufficient funds check to recover "collection fees or costs," as well as a "civil penalty." As such, this opinion will interpret your questions regarding "service charges" as concerning collection fees or costs and civil penalties as a result of insufficient checks.

The allowable collection fees or costs and civil penalties are only "recoverable by civil action by the holder." N.D.C.C. § 6-08-16(2). Thus, it is my opinion that the only point at which a collection agency may demand one of these fees is after that agency has obtained an appropriate civil judgment against the insufficient funds check issuer.

Your second question asks "[i]s the checkwriter obligated to pay any previous outstanding service charges before any payments are applied to their next check that comes into the collection office?" Nothing in N.D.C.C. § 6-08-16 addresses this issue. However, since collection fees and civil penalties are only enforceable through a judgment, collection of those amounts would take place in the same manner as the collection of a judgment. Nonetheless, payment of the judgment does not necessarily have priority over a debt on which a judgment has not been obtained.

N.D.C.C. § 28-20-36 does contain provisions regarding application of partial payments, and states that a partial payment on a judgment will be applied first to post-judgment costs. Payment of an amount over the costs will be first applied to interest on the judgment, then to the judgment amount itself. N.D.C.C. § 28-20-36. However, the

Honorable Karen K. Krebsbach
December 29, 2000
Page 2

collection fees and civil penalty recoverable pursuant to N.D.C.C. § 6-08-16 are not post-judgment costs, but would instead be a part of the judgment itself. Thus, N.D.C.C. § 28-20-36 is inapplicable to your question.

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., does provide guidance on a collection agency's application of payments. 15 U.S.C. § 1692h states "[i]f any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector . . . shall apply such payment in accordance with the consumer's directions." Accordingly, it is my opinion a collection agency must apply any payment it receives as the debtor directs.

Your third question is what determines how a debtor's payment is applied when it is received by a collection agency. Again, 15 U.S.C. § 1692h is the only applicable authority. Thus, based on 15 U.S.C. § 1692h, it is my opinion the debtor may determine how the debtor's payment is applied when it is received by a collection agency.

Your fourth question asks the following: "Because the law specifically states that the person is 'obligated' for the service charge, doesn't that mean the money for the service charge can be taken from any payments received?" I find no language in N.D.C.C. § 6-08-16 that states a person is "obligated" for any collection fees. N.D.C.C. § 6-08-16 does state that a person is "liable for collection fees or costs," but only pursuant to civil action. Again, 15 U.S.C. § 1692h states that the debtor has control over how a payment is applied. Thus, the assertion in your question is incorrect, and money for the service charge, or, more appropriately, collection fees or costs or civil penalties, is not free for the collection agency to take from any payments received, but is instead dependent on how the debtor designates those payments to be applied.

Your fifth question is whether a second insufficient funds check may be collected for its full amount if the debtor pays off a first insufficient funds check, along with any collection fees or costs or civil penalties applicable to that first check. If payment is received on a judgment obtained on the first insufficient funds check, I find no restriction on a collection agency's collection of the full amount of a second check.

Your final question is whether a state's attorney's office may charge a research fee when a question arises on whether a check has been paid if the debtor alleges payment has been made to the applicable district court. The applicable district court appears to be a more appropriate entity to which to direct a question on whether a debtor has made

Honorable Karen K. Krebsbach
December 29, 2000
Page 3

payment to the court. If the state's attorney's office is not in possession of applicable records, it is not required to obtain them. Nonetheless, if an appropriate open records request is made of a state's attorney's office, N.D.C.C. § 44-04-18(2) allows a public entity to charge reasonable copy and mailing fees, as well as a fee "not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour." Those provisions do not apply if another statute provides for a different fee. N.D.C.C. § 44-04-18(2).

Sincerely,

Heidi Heitkamp
Attorney General

sam