



Declaratory Ruling -- Issues Under the North Carolina Check Cashers Act

November 30, 1998

Ms. Jennie Dorsett
Executive Director and General Counsel
North Carolina Check Cashing Association
Post Office Box 10373
Raleigh, NC 27605

RE: Declaratory Ruling -- Issues Under the North Carolina Check Cashers Act (11/98)

Dear Ms. Dorsett:

This will respond to certain issues raised by members of the North Carolina Check Cashers Association following our information forums on September 28, 1998, in Charlotte, and September 30, 1998, in Raleigh. Additionally, we met individually with representatives of Check Into Cash, Inc., McKenzie Check Advance, LLC, Advance America, and the Union Illinois Company.

Because we will administer and enforce the provisions of Article 22, the North Carolina check cashing law, consistent with the conclusions reached below, our response is being issued in the form of a Declaratory Ruling pursuant to N.C.G.S. § 150B-4 and 4 NCAC 3B .0105. Each issue is addressed separately by number. For the benefit of the industry, a copy is being provided to each licensee and to the attorneys who have requested a copy of the same.

For the purpose of this Ruling, reference to "Article 22" means Article 22 of Chapter 53 of the North Carolina General Statutes, N.C.G.S. §§ 53-275 through 289 (Cum. Supp. 1998). Reference to the "Act" means Senate Bill 312, enacted as Chapter 391 of the 1997 Session Laws, codified as Article 22 of Chapter 53. Also, reference to a delayed deposit check includes postdated checks.

The issues addressed are as follows:

- 1. Minimum Books and Records. The industry has asked for clarification on what minimum books and records must be maintained in order to comply with the check cashing law.**

N.C.G.S. § 53-282(a) provides that a licensee ". . . shall maintain in its offices such books, accounts, and records as the Commissioner may reasonably require." These books and records must be maintained separate from any other business in which the check cashing licensee is engaged. Subsection (b) expressly requires that ". . . each customer cashing a check shall be provided a receipt showing the name or trade name of the licensee, the transaction date, amount of the check, and the fee charged. Also, N.C.G.S. § 53-281(c) requires that each delayed deposit check be documented by a written agreement that has been signed by the customer and the licensee. The written agreement must contain a statement of the total amount of fees charged, expressed both as a dollar

amount and as an effective annual percentage rate (APR). The written agreement authorizes the licensee to defer deposit of the personal check until a specific date not later than thirty one (31) days from the date the check is cashed.

Until the books and records requirements can be defined more specifically by rules, we conclude that at a minimum a check casher licensee must maintain, and upon timely request, make available to the Office of the Commission of Banks, the following: (a) delayed checks currently held for deposit; (b) a daily transaction journal, or equivalent record, for both the traditional check cashing service and the delayed deposit check cashing service; (c) the written receipt required by N.C.G.S. § 53-282(b); (d) the written customer agreement required by N.C.G.S. § 53-281(c); (e) a history card, or its equivalent, for each delayed deposit check cashing customer which reflects the number of times that a particular customer has utilized this feature and whether the delayed deposit check was deposited or whether the customer was allowed to pick the check up for cash; and, (f) the bank statements of the licensee. If the statements are not maintained on the premises of the licensee, they must be made immediately available upon request by the Office of the Commissioner of Banks. These books and records should be kept for a period of not less than three (3) years.

2. Year 2001 Report. The industry has asked what information the Office of the Commissioner of Banks will collect and report to the 2001 General Assembly on the delayed deposit feature of Article 22.

The authority to accept delayed deposit checks, N.C.G.S. § 53-281, expires July 31, 2001, unless the General Assembly reenacts that authority or removes the sunset provision. Session Laws 1997-391, s.3. It is clear to the Commissioner's Office that the delayed deposit provision was given an experimental period of existence in order to determine the practices of check cashing firms that offer this service and its effect upon the consuming public. In fact, Section 2 of the Act provides that ". . . the Commissioner of Banks shall report to the 2001 General Assembly on the practices of licensees with regard to checks cashed pursuant to the provision of G.S. 53-281, including any evidence as to consumer complaints, unfair or deceptive trade practices, and the frequency of repeat use by individuals of delayed deposit checks" Session Laws 1997-391, s.2.

It is equally clear to the Commissioner's Office that the General Assembly authorized delayed deposit checks as a source of funds for an emergency or other extraordinary circumstances and that this feature was not intended to serve as a revolving line of credit. Therefore, the Commissioner's Office will examine carefully for repeat use of the delayed deposit feature by the same customer. We will also look at the interval between the deposit of a delayed deposit check and the date of a new transaction. We will also note whether or not a customer's check is deposited, or if a customer is permitted to pick up the check, i.e., a "cash-out" the transaction, and the period between the cash-out and a new delayed deposit transaction. The Commissioner will collect and quantify examination data; maintain a record of consumer complaints; and will compile data regarding administrative, civil and criminal actions taken against check cashing firms, including the outcome of any such proceedings.

3. Cash in Exchange for Checks. The question raised was whether or not a check casher licensee may issue a check, rather than cash, in exchange for a check.

N.C.G.S. § 53-275(2) defines a "check-cashing service" as ". . . any person or entity engaged in the business of cashing checks, drafts, or money orders for a fee, service charge, or other consideration." "Cashing" is defined by N.C.G.S. § 53-275(1) as ". . . providing currency for payment instruments . . ."

It is our view and we conclude that these two provisions of law, together with the intent and purpose generally of Article 22, mandates that a licensee under the check cashers statute provide cash to a customer in exchange for a check. We believe that the statute is clear and unambiguous on that point. Therefore, a check casher licensee may not issue a check in exchange for a check -- the customer must be provided cash in exchange for a check.

4. Extension or Renewal of Outstanding Checks. There seemed to be some confusion on the question of whether or not an outstanding delayed deposit check could be renewed or extended for an additional fee.

N.C.G.S § 53-281(e) very expressly provides that "[a] licensee shall not, for any consideration, renew or otherwise extend any postdated or delayed check or withhold such check from deposit for any period beyond the time set forth in the written agreement with the customer." It is clear that a check casher licensee may not renew, extend or "roll-over" a check beyond the date that it is to be deposited. When a statute is clear and unambiguous on its face, no interpretation is required and it would be the duty of this agency to enforce it accordingly. Rollovers violate the Act and, pursuant to N.C.G.G § 53-284(a)(1), constitute grounds for suspension or revocation of a license. Additionally, N.C.G.S. § 53-286, permits the Commissioner of Banks to impose a civil money penalty not to exceed \$1,000 per offense and recover any excessive fees charged to a customer.

5. Cash-Out Transactions. The industry sought clarification on the question of whether or not a delayed deposit customer could pick up a delayed deposit check on the date it is due to be deposited, or must the check casher licensee deposit a check (a practice referred to as a "cash-out" transaction).

A very substantial argument can be made that checks cashed and held for delayed deposit under the provision of N.C.G.S. § 53-281 must be deposited rather than cashed-out. For instance, N.C.G.S. § 53-281(a) provides that a licensee may defer the "deposit" of a check up to thirty-one (31) days; subsection (b) requires a written agreement to delay the "deposit" of a check up to thirty-one (31) days; and, subsection (c) prohibits a licensee from delaying the "deposit" of a check beyond the time described in the written agreement. Although this statute clearly implies that a delayed deposit check must be deposited, we do not think this would prohibit a delayed deposit customer from tendering cash in return for a delayed deposit check on or before the date it is due for deposit. This we believe is, however, the decision of the customer and not the licensee. In other words, it is our view and we conclude that a licensee may not require by contract or otherwise that a delayed deposit customer cash-out a delayed deposit check. If the customer chooses to have the check deposited, then it will be incumbent upon the licensee to deposit the check.

With regard to cash-out transactions, the question was asked whether or not a grace period is required between the time that a check is deposited by the licensee (or cashed-out by the customer) and when that customer may enter into another delayed deposit transaction. More than one licensee indicated that they customarily enter into "same day

transactions." We have not found any provision of Article 22 which expressly addresses this issue or would appear to authorize this office to impose a grace period between delayed deposit transactions. We do note, however, that a cash-out transaction followed simultaneously by another delayed deposit transaction raises the appearance of a renewal or extension, i.e., a "roll-over" of a delayed deposit check which is expressly prohibited by law. More importantly, as discussed under Item 2 above, the General Assembly has directed that the Commissioner of Banks report to them in the year 2001 on the frequency of repeat use by individuals of delayed deposit checks as well as deceptive trade practices. Therefore, cash-out and simultaneous delayed deposit transactions will be scrutinized carefully and if this office has reason to believe that these transactions are facilitating rollovers or extensions of outstanding checks prohibited by law, appropriate action will be taken. In any event, the Commissioner will report his findings on this practice to the 2001 General Assembly.

6. Delayed Deposit Check Cashing Limit per Customer. There also seemed to be some confusion on the maximum amount of a check that could be cashed for a customer and held for delayed deposit.

We do not understand why there would be any confusion on this point. N.C.G.S. § 53-281(a) provides that "[a] licensee may defer the deposit of a personal check cashed for a customer up to thirty-one (31) days" and subsection (b) provides that the face amount of a delayed deposit check ". . . shall not exceed three hundred dollars (\$300.00). It is our view that the law is clear and unambiguous on this issue. Therefore, a check casher licensee may not at any time have a delayed deposit check of more than three hundred dollars (\$300.00) outstanding for a customer. A check, or combination of checks, in excess of that amount would violate Article 22 and subject the licensee to administrative enforcement action as well as civil penalties and recovery of excess fees.

With further regard to this issue, the question was raised whether or not a check casher licensee could have multiple delayed deposit checks outstanding that do not in the aggregate exceed a maximum of three hundred dollars (\$300.00). While the statute at N.C.G.S. § 53-281(a) provides that a licensee may defer the deposit of "a personal check," we do not think this subsection would prohibit multiple checks provide that they do not at any one time exceed three hundred dollars (\$300.00) per customer. We do, however, intend to examine carefully for those customers who perpetually have outstanding delayed deposit checks. As noted above, this is the sort of information that the General Assembly has directed that we report to them in the year 2001.

Finally, with regard to the maximum limit per customer, the fact that two or more customers may hold a bank account jointly would not, in our view, prohibit a licensee from entering into a delayed deposit contract with each account owner to delay the deposit of a check up to the maximum period allowed by law.

7. Dating of Checks/Paid to the Order. Issues were raised with regard to the date a delayed deposit check must be dated and whether or not the check had to be made payable to the order of the licensee, or was it permissible to make it payable to "cash."

N.C.G.S. § 53-281, entitled "Postdated and delayed deposit checks" clearly contemplates that a licensee may accept postdated checks. See, N.C.G.S. §§ 53-281 (a),(b),(c) and (e). The act does not impose or favor a requirement that a delayed deposit check be postdated or dated the day it is cashed. Therefore, we do not take a position on this matter. This

would be a decision for the licensee after taking into consideration any applicable provisions of the Uniform Commercial Code, Chapter 25 of the North Carolina General Statutes.

With regard to whom the check must be made payable, the act is silent. All that is expressly required is that "[a] licensee shall endorse a check, draft, or money order presented by the licensee for payment in the name of the licensee." N.C.G.S. § 53-280(d). Thus, whether or not a licensee chooses to have a customer make a check payable to "cash" or to the licensee, that is a decision for the licensee, again after considering any applicable provisions of the Uniform Commercial Code, cited above. We do not take a position on this matter.

8. Collection of Returned Checks. Questions were raised with regard to the authority of a check casher licensee to enforce returned checks through civil or criminal actions in the North Carolina courts.

The check casher Act clearly contemplates two distinctive transactions. First, a traditional check cashing service -- cashing a check for a fee and depositing the check within three (3) business days. N.C.G.S § 53-280. Second, cashing a check for a fee, and by written agreement, delaying the deposit of that check up to a maximum of thirty one (31) days. N.C.G.S § 53-281.

In the first instance, it is implicit that a customer cashing a check under the provisions of N.C.G.S § 53-280 has sufficient funds in his or her account with which to pay the check when it is presented to the drawee bank. Under these circumstances, it would not, in our view, be inappropriate for a check casher licensee to pursue the collection of such an unpaid check under the provision of N.C.G.S. §§ 14-107 and 107.1 (the worthless check statutes).

On the other hand, in a delayed deposit transaction under N.C.G.S. § 53-281, there is no representation by the customer or understanding by the check casher that there are sufficient funds in the check cashing customer's account to cover a check at the time it is written. The check casher has, in consideration for a specific fee, which may not exceed fifteen percent (15%) of the face value of the check, agreed to withhold deposit of the check for a specified period, which may not exceed thirty-one (31) days. This is in essence a credit transaction. In fact, in January, 1992, the Attorney General's Office issued a formal opinion confirming that a delayed deposit arrangement was a credit transaction.

Although this opinion predates the check cashing Act, we believe the conclusions reached continues to be a valid construction of the law and we see no reason to vary from it. Thus, as a delayed deposit transaction is in essence a credit transaction, upon default by the borrower, i.e., the check cashing customer, a licensee would, in our view, be limited to a civil action to enforce the collection of delayed deposit checks. It would be inappropriate to pursue collection of these checks under the criminal statutes cited above. We note that the Institute of Government has taken substantially the same position in its outline of the check cashing laws distributed to North Carolina magistrates.

In Conclusion

We trust that the interpretations we have reached will provide guidance to licensees on the issues presented. Please understand that they are in response to specific questions

raised and to certain general practices of check casher licensees submitted to us for consideration. Nothing in this declaratory ruling should be construed to in any way prohibit the Office of the Commissioner of Banks from enforcing any provision of the check casher law on a case by case basis within the limitations prescribed by the General Statutes, nor from revisiting these conclusions.

Sincerely,

Hal D. Lingerfelt
Commissioner of Banks

HDL/sc

cc:

Monica L. Allie -- Director of Government Relations and Legal Affairs
Advance America

Joan Brannon -- Institute of Government, UNC at Chapel Hill

J. Samuel Choate, Jr. -- Executive Vice President and General Counsel,
Check Into Cash, Inc.

Denis J. O'Brien -- President and CEO, Union Illinois Company

Mollie Dockery Tackett -- Vice President of Operations, McKenzie Check
Advance, LLC

B. Davis Horne, Jr., Esq. -- Smith, Anderson, Blount, Dorsett, Mitchell
and Jernigan