

## THE PROPOSED EXEMPTION FOR CHECK DIVERSION COMPANIES WOULD BE HARMFUL TO CONSUMERS

---

Check diversion companies are *private, for-profit debt collectors* that contract with prosecutors to collect returned checks. Some of these companies – most notably, California-based American Corrective Counseling Services, Inc. (ACCS) – are systematically engaging in abusive and deceptive collection practices. Using the name and authority of the DA, these companies are demanding that consumers pay not only the check amount, but also *excessive collection fees* (often \$100 to \$200) that are not authorized by state law; and are *deceiving consumers* into believing that if they do not pay the fees they will be criminally prosecuted, even where no prosecutor has ever determined that the critical requirement of criminal intent has been satisfied and even where the DA’s office would never actually prosecute.

The courts have uniformly concluded that check diversion companies are subject to the standards that apply to all debt collectors – they may not engage in deception or collect excessive amounts.<sup>1</sup> The proposed amendment would give these companies a blanket exemption from those standards, permitting them to make false statements, collect illegal fees, and offer consumers no opportunity to show they had no criminal intent. Congress should reject this dangerous proposal.

- **There is no need for a blanket exemption from federal consumer protections.** The Fair Debt Collection Practices Act prohibits only deception and abuse and requires that consumers be given an opportunity to show that they do not owe a particular debt.<sup>2</sup>

The FDCPA *does not stop or inhibit the legal activities of check diversion companies*. Check diversion companies can comply with current federal law and continue to go about their business, so long as they do not make false statements or attempt to collect more than they are authorized to collect. Specifically, current federal law requires only that:

- (1) the company may not falsely imply that the DA has reviewed the consumer’s case and found that a crime has been committed, unless the DA has really done so;<sup>3</sup>
- (2) the company may only collect fees that can be legally charged;<sup>4</sup> and
- (3) the letter to the consumer must include the required notice of the consumer’s right to request validation of the debt.<sup>5</sup>

- **Current law does not interfere with the legitimate law-enforcement interests of district attorneys.** Check diversion companies and district attorneys have very different incentives. Unlike the private companies, whose main interest is maximizing the profits derived from collection fees, the district attorneys’ main interest is in fair and efficient enforcement of the law. Current federal law does not interfere with those legitimate law-enforcement interests. Rather, the FDPCA merely requires that check diversion companies refrain from deceptive or abusive practices, practices that the DA’s themselves would have no incentive to engage if they were to operate the programs on their own.

District attorneys already have a choice between running check restitution programs themselves or contracting them out to private debt collectors. In fact, the majority of district attorneys do not use check diversion companies, finding alternative ways to enforce the law, such as dispute settlement programs. Current law does not interfere with these policy choices.

- **The exemption would encourage abuses.** Check diversion companies have been found by the courts to have engaged in, or have settled cases involving, three types of illegal conduct. If the exemption is passed, each of these abuses will be encouraged.

*Deceptive behavior* – Companies such as ACCS are sending deceptive letters that look like they come from the DA and falsely suggest that the DA has determined that the consumer has committed a crime. In fact, no DA has ever reviewed the individual cases before the letter threatening criminal prosecution is mailed and no criminal prosecution would have been threatened if the DA had reviewed the case. This is because bouncing a check, in itself, is not a crime. It is only a crime if the check writer *intended to deceive* the merchant. Indeed, discovery obtained in a pending class action against a check diversion company shows that *only 1% of all consumers threatened with prosecution are actually referred to the DA* to determine whether there is probable cause to believe a crime has been committed.<sup>6</sup>

*Failure to provide an opportunity to verify the debt* – Unlike all other private debt collectors that collect on returned checks, check diversion companies are refusing to provide notice to consumers that they have a right to request verification of the debt. In many situations, this right would allow consumers to explain that they had no criminal intent or have already paid the amount of the check.

*Collection of illegal fees* – Check diversion companies are extracting excessive fees from consumers, in many cases despite state law to the contrary. This means that a consumer who inadvertently writes a \$10 or \$20 check with insufficient funds may be forced to pay \$200 in illegal fees.

- **The exemption would competitively disadvantage scrupulous debt collectors.** One of the stated purposes of the FDCPA is “to insure that those debt collectors who refrain from using abusive collection practices are not competitively disadvantaged.”<sup>7</sup> There are over **400 private debt collection businesses** that specialize in the collection of bad checks. If the proposed amendment is passed, each of these companies will be competitively disadvantaged, because they will be required to refrain from deceptive and abusive practices designed to extract more money from consumers, while check diversion companies will be permitted to engage in those same practices. This competitive disadvantage will harm both the debt collectors *and* consumers.
- **State law provides inadequate and inconsistent protection.** Most states do not have statutes that address deception by debt collectors or provide a right to verify a debt. The FDCPA, by contrast, provides uniform federal standard with 30 years of case law interpreting it. In most cases, the FDCPA is the only legal protection prohibiting debt collectors from deceiving or overcharging consumers. Some states, such as California, have statutes restricting the operation of check diversion programs in some respects – for instance, regulating the amount of fees they may charge – but even those restrictions are meaningless unless they can be enforced through the FDCPA.

#### References

1. See, e.g., *Liles v. American Corrective Counseling Services, Inc.*, 131 F.Supp.2d 1114 (S.D. Iowa 2001)
2. 15 U.S.C. §§ 1692c-1692g
3. 15 U.S.C. § 1692e
4. 15 U.S.C. § 1692f(1)
5. 15 U.S.C. § 1692g
6. *Schwarm v. Craighead*, No. Civ S-05-1304 (E.D. Cal.)
7. 15 U.S.C. § 1692(a)