Payday Loan Companies

and MCL 600.2952

By Hon. Laura R. Mack

Have you noticed how many businesses have sprung up in the last few years with names like "Payday Advance" and "Cash Now"? These organizations make short-term loans, or "payday advances," to tide cash-strapped borrowers over until payday. These businesses are often referred to as "payday loan" companies.

MORE ▶

Fast Facts:

The Deferred Presentment Service Transactions Act changed the law so that a payday loan company can only collect $25 for a borrower's check dishonored for insufficient funds.

Despite the act, some payday loan companies continue to attempt to use MCL 600.2952 to sue for triple damages on checks returned for insufficient funds.

District court judges should carefully review proposed default judgments submitted by payday loan companies to make sure the judgments are in compliance with the act.

When I became a district court judge in 2004, I was shocked to learn that certain local payday loan companies were using MCL 600.2952 to sue for three times the value of dishonored checks (returned for insufficient funds) given by borrowers to the payday loan companies to repay their loans. Most of the time, the suits were brought in small claims court, and default judgments were entered against the borrowers. Passage of the Deferred Presentment Service Transactions Act, 2005 PA 244, MCL 487.2122 *et seq.,* effective November 28, 2005 (the act), changed the law, but some payday loan companies continue to sue under MCL 600.2952 when a borrower's post-dated check is returned for insufficient funds.

Before passage of the act, the payday loan industry was unregulated. There were no restrictions on (1) the fees that payday lenders could charge, (2) the number of outstanding loans a borrower could have, or (3) the number of times a borrower could renew a loan. Before the act, payday loan companies were, in the view of consumer advocates, acting as legal loansharks by taking unfair advantage of poor and financially vulnerable citizens.

Here's how payday loan companies used to operate before the act. A customer/borrower would receive a loan from a payday loan company (PLC) and would promise to repay it within a short time. The PLC would charge a fee for this service that was often usurious (i.e., a $90 fee for a $500 two-week loan, which equates to an annualized interest rate of 469.29 percent!). As a form of security for the repayment of the loan, the borrower would write a personal check to the PLC for the amount of the loan, plus the PLC's service fee. The check would be postdated to the due date of the loan. The PLC would then hold the check until the due date. If the borrower paid the amount due (loan amount plus fee) pursuant to the agreement, the PLC would return the check to the borrower. However, if the borrower failed to pay the amount due, the PLC would negotiate the borrower's check. If the borrower's check was returned marked "NSF" (for "not sufficient funds"), the PLC could sue the borrower for civil damages under MCL 600.2952, which entitles the payee of a dishonored check to sue for three times the value of the check, plus costs of $250. So, not only could the PLC collect three times the amount of the original loan, it could legally collect three times the amount of its often outrageous fee. In addition, the PLC could collect "costs" under the statute of $250. If the original loan was for $500, and the service fee was $90, the amount the PLC could collect on a dishonored check would be $2,020. This is more than four times the amount of the original loan!

Passage of the act was a step in the right direction. Among other things, the act:

- Requires payday lenders to be licensed with the Commissioner of the Office of Financial and Insurance Services (the commissioner).
- Limits a deferred presentment service agreement to a maximum of $600 and 31 days.
- Allows a PLC to charge a service fee of between 11 percent and 15 percent only, depending on the amount of the transaction.
- Prohibits PLCs from having more than one transaction open with a customer at one time or from providing service to a customer having more than one open transaction with any other PLC.

From my perspective, the act's key feature is located in MCL 487.2158, which limits the amount a PLC can charge for a check that is returned for insufficient funds to $25. The statute reads:

> (1) A licensee shall endorse a check given to it by a drawer with the actual name under which the licensee is doing business before the licensee negotiates or presents the check for payment.
>
> (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*

Before the act, payday loan companies were, in the view of consumer advocates, acting as legal loansharks by taking unfair advantage of poor and financially vulnerable citizens.

> *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 receive 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 described in subsection (2) is $25.00. Beginning in March, 2011, and by March 1 of every fifth year after March 1, 2011, the licensee may adjust the maximum returned check charge by an amount determined by the commissioner to reflect the cumulative percentage change in the Detroit consumer price index over the preceding 5 calendar years. As used in this subsection, "Detroit consumer price index" means the most comprehensive index of consumer prices available for the Detroit area from the bureau of labor statistics of the United States department of labor. [Emphasis added.]

While MCL 487.2158 permits a PLC to sue for civil damages under MCL 600.2952 if the check is returned because of a closed account, subsection (2) plainly states that a PLC may only collect a returned-check charge that does not exceed the amount provided in subsection (3) for insufficient funds. Thus, PLCs cannot sue for civil damages under MCL 600.2952 if a borrower's check is dishonored for insufficient funds.

I decided to write this article because some payday loan companies in my jurisdiction continue to attempt to use MCL 600.2952 to sue for triple damages on checks returned for insufficient funds, apparently relying on the fact that most PLC customers will not retain counsel to defend themselves and that the PLC will be able to secure default judgments. Some even engage in forum shopping to avoid courts that scrutinize proposed default judgments to require compliance with the act.

Borrowers, and attorneys for borrowers, need to be aware of their rights under the new law. MCL 487.2168 provides that noncompliant PLCs can face civil fines, levied by the commissioner, as follows:

- A fine of not less than $1,000 or more than $10,000 for each violation, plus costs of investigation; or
- A fine of not less than $5,000 or more than $50,000 for each violation if the commissioner finds that a person has violated this act and that person knew or reasonably should have known that he or she was in violation of this act, plus costs of investigation.

In addition, MCL 487.2173 provides that a

> person injured by a licensee's violation of this act may maintain a civil cause of action against the licensee and may recover actual damages and an amount equal to the service fee paid in connection with each deferred presentment service transaction that is found to violate this act, plus reasonable attorney fees.

The availability of attorney fees is an important aspect of the remedy for aggrieved borrowers. Borrowers and their attorneys should start exercising their rights under the act and punish PLCs that continue to use MCL 600.2952 to collect triple damages on borrowers' checks dishonored for insufficient funds. Also, district court judges should carefully review proposed default judgments submitted by PLCs to make sure that the will of the legislature is carried out and that they are not facilitating the further victimization of this state's poor and financially vulnerable citizens. ■

Judge Laura R. Mack has been chief judge of the 29th District Court in Wayne, Michigan, since 2004. Before becoming a judge, she practiced law in the areas of tax, estate, and retirement planning at Seyburn, Kahn, Ginn, Bess and Serlin, P.C. She co-authored Chapter 15, "Revising the Trust After the Grantor's Death," in Michigan Revocable Grantor Trusts, *published by ICLE in 2000.* *Judge Mack thanks Judge David Parrott, 34th District Court, for critiquing and editing this article.*