

☞ **03hr\_JCR-AR\_Misc\_pt35**



☞ Details: Complaint

(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2003-04

(session year)

### Joint

(Assembly, Senate or Joint)

### Committee for Review of Administrative Rules...

#### COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

#### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

\* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

MICHAEL NOWAKOWSKI  
CIRCUIT COURT, BR. 13

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_\_\_

CIRCUIT COURT

03 FEB 21 AM 11:44  
DANE COUNTY

DANE COUNTY, WI

CYBRCOLLECT, INC.,

Plaintiff,

Case No. 03CV0572

v.

Case Classification Code: 30701  
Declaratory Judgment

THE WISCONSIN DEPARTMENT  
OF FINANCIAL INSTITUTIONS,

Defendant.

THIS IS AN AUTHENTICATED COPY OF THE  
ORIGINAL DOCUMENT FILED WITH THE DANE  
COUNTY CLERK OF CIRCUIT COURT.

**SUMMONS**

JUDITH A. COLEMAN  
CLERK OF CIRCUIT COURT

**THE STATE OF WISCONSIN, TO EACH PERSON NAMED ABOVE AS A  
DEFENDANT:**

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Joan L. Eads, of Foley & Lardner, plaintiff's attorney, whose address is Verex Plaza, 150 East Gilman Street, Madison, Wisconsin 53703-2808. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the complaint,

and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

If you require the assistance of auxiliary aids or services because of a disability, call 266-4678 (TDD 266-9138) and ask for the Court ADA Coordinator.

Dated this 21st day of February, 2003.

FOLEY & LARDNER



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Joan L. Eads, WI Bar No. 1000225  
Anat Hakim, WI Bar No. 1031587

**MAILING ADDRESS:**  
FOLEY & LARDNER  
150 E. Gilman Street  
Madison, WI 53703-1481  
(608) 257-5035

Attorneys for plaintiff, CybrCollect, Inc.

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_

COURT  
DANE COUNTY  
03 FEB 21 AM 11:44

DANE COUNTY, WI

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COUNTY CLERK OF CIRCUIT COURT.

**COMPLAINT**

JUDITH A. COLEMAN  
CLERK OF CIRCUIT COURT

Plaintiff, CybrCollect, Inc. ("CybrCollect"), by its attorneys, as its complaint for declaratory judgment pursuant to Wis. Stat. § 227.40, states as follows:

**PARTIES**

1. CybrCollect is a Wisconsin corporation with a principal place of business at 2350 South Avenue, Suite 101, La Crosse, WI 54601. CybrCollect is in the business of contracting with merchants to electronically collect checks which have been returned for insufficient or held funds.

2. The Department of Financial Institutions ("DFI") is a state "agency" as that term is defined by Wis. Stat. § 227.01(1), and as that term is used throughout Wis. Stat. chapter 227. Under Wis. Stat. §§ 220.02(2) and (3), the DFI has the authority to enforce all laws relating to banks and banking in this state and to enforce every law relating to the supervision and control thereof, including laws relating to various specifically enumerated types of entities, including collection agencies.

## JURISDICTION

3. Pursuant to Wis. Stat. § 227.40, this Court has exclusive jurisdiction in an action to determine the validity of an administrative rule.

## FACTS

4. Since 1999, CybrCollect has been licensed by the DFI as a debt collection agency in Wisconsin. Its license has been renewed yearly since 1999. The current license expires on June 30, 2003.

5. CybrCollect operates in all states except Hawaii and Rhode Island. Approximately one-third of CybrCollect's total revenue is generated by Wisconsin transactions.

6. CybrCollect's customers are merchants in the various states, including Wisconsin. Merchants enter into a Client Agreement with CybrCollect. The Client Agreement requires the contracting merchant to post at each point-of-sale location a notice that fees will be collected electronically. CybrCollect's required notice informs the consumer that if a check is returned for insufficient or held funds, the consumer's checking account will be debited electronically for both the face amount of the check plus a collection fee. A copy of CybrCollect's Wisconsin notice form is attached to the complaint as Exhibit A.

7. A merchant contracting for CybrCollect's services authorizes the merchant's financial institution to forward all returned checks directly to CybrCollect. When CybrCollect receives a check from the contracting merchant's bank, it uses proprietary software to scan the check into CybrCollect's computer, which converts the information into electronic data in the form of two debits: the first debit is for the face value of the check and the second debit is for the amount of the merchant's collection fee. CybrCollect sends notice (generally via e-mail, fax or occasionally by letter) to the merchant that it has received a returned check.

8. When sufficient funds become available in the check writer's account, the two electronic records are transmitted to the check writer's bank through the Automated Clearing House and the check writer's account is debited for both amounts. With a few exceptions for those merchants who prefer a paper check from CybrCollect, CybrCollect electronically directly deposits the face amount of the check in the merchant's bank account. Pursuant to its agreement with the merchant, CybrCollect retains all or a portion of the collection fee as compensation for its services to the merchant. The contracting merchants pay no fee to CybrCollect for its services.

9. The Automated Clearing House ("ACH") is the electronic network which transfers and clears funds between banking institutions on behalf of merchants and their customers.

10. In conducting its business, CybrCollect has relied in good faith on the federal Electronic Fund Transfer Act and Regulation E promulgated by the Federal Reserve Board. The Official Commentary to Regulation E provides that authorization for an electronic debit from an account "occurs where the consumer has received notice that a fee imposed for returned checks will be debited electronically from the consumer's account." Regulation E Official Staff Commentary, Comment 1 to 12 C.R.F. § 205.3(c)(1).

11. Section 915 of the Electronic Fund Transfer Act (15 U.S.C. § 1693m(d)) provides that there is no civil or criminal liability for "any act done or omitted in good faith in conformity with any rule, regulation or interpretation thereof by the [Federal Reserve] Board..."

12. On October 12, 2001, the DFI sent CybrCollect a letter addressed "TO THE COLLECTION AGENCY ADDRESSED." A copy of the DFI's October 12, 2001 letter is attached to this complaint as Exhibit B. The DFI's October 12, 2001 correspondence stated that the purpose of the letter was to "set forth the Division of Banking's ("Division") position on the

collection of returned check fees by an Automated Clearing House (“ACH”) transaction or a bank draft.”

13. The DFI’s October 12, 2001 letter set forth the DFI’s position that under Wis. Stat. § 404.401(1), a bank may only charge a customer’s account for a returned check fee if the fee was authorized by the customer. The DFI further stated that, therefore, “...a collection agency or creditor attempting to collect a returned check fee must, necessarily, also have the authorization of the customer.”

14. The DFI’s October 12, 2001 letter further stated that: “It is the Division’s position that, with respect to the collection of fees by an ACH transaction, notification does not equate [to] authorization and that the posting of a sign at the merchant’s place of business does not satisfy the requirement of obtaining a customer’s authorization. Acceptable authorization must, at a minimum, comply with National Automated Clearing House Association (“NACHA”) rules.”

15. NACHA is a private, non-governmental, voluntary organization headquartered in the Washington, D.C. area. NACHA’s direct voting membership is limited to large financial institutions. Non-financial and foreign institutions using the ACH Network may become non-voting affiliate members. NACHA’s purpose is to take actions for the benefit of banks who are its members.

16. NACHA has engaged in rule-making for the ACH Network and other payments systems. NACHA has a rule-making process which contemplates that its rules will change from time to time. NACHA’s current rule requires prior written authorization from all persons who pay for goods by check before a fee can be collected electronically.

17. Additionally, the DFI's October 12, 2001 letter stated that "[a] collection agency that attempts to collect an unauthorized fee is violating Rule DFI-Bkg 74.14(11), which provides that a licensee shall not engage in any deceptive or oppressive practices, including claiming or attempting to threaten to enforce a right with knowledge or reason to know that the right does not exist." See Exhibit B.

18. Subsequently, in a letter dated December 10, 2001, the DFI reiterated its policy that collection agencies must comply with NACHA rules regarding authorization of a collection fee by referencing and attaching its October 12, 2001 form letter. A copy of the DFI's December 10, 2001 letter is attached to this complaint as Exhibit C.

19. CybrCollect's attorneys responded to the DFI by letter on January 18, 2002, setting forth in specific detail responses to each point raised by the DFI, including various reasons why, in its opinion, CybrCollect was in compliance with Wisconsin and federal law.

20. Nine months later, on September 19, 2002, the DFI responded in conclusory fashion, restating its earlier policy pronouncement: "It remains the position of the department that collecting a returned check fee through the use of an ACH transaction without proper authorization from the customer is a violation of s. 404.401(1), Stats. Furthermore, with respect to the collection of fees by an ACH transaction, notification does not equate to authorization, and the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization..." The DFI continued "to insist that [CybrCollect] comply with National Automated Clearing House Association ("NACHA") rules regarding acceptable authorization." The DFI also restated its position that "a collection agency that attempts to collect a returned check through the use of an ACH transaction without proper authorization

from the customer is in violation of s DFI-Bkg 74.14(11). A copy of the DFI's September 19, 2002 letter is attached to this complaint as Exhibit D.

21. On December 23, 2002, again responding to CybrCollect's attorneys, the DFI reiterated its policy that "a collection agency who debits a customer's checking account for the returned check fee without the customer's written authorization would be in violation of Rule DFI-Bkg 74.14" and that proper authorization "must, at a minimum, comply with NACHA rules." A copy of the DFI's December 23, 2002 letter is attached to this complaint as Exhibit E.

22. By letter dated February 6, 2003, the DFI demanded that CybrCollect provide "written assurance that it is complying with DFI-Bkg 74.14" on or before February 21, 2003, which is clearly intended to mean that CybrCollect must show that it is complying with NACHA rules. A copy of the DFI's February 6, 2003 letter is attached to this complaint as Exhibit F.

23. The DFI has not promulgated as a rule its regulation, standard, or statement of policy that a collection agency must comply with NACHA's authorization rules.

24. Application of the DFI's rule that a collection agency must comply with NACHA's authorization rules threatens, interferes with or impairs, or threatens to interfere with or impair the legal rights and privileges of CybrCollect to conduct its business, because it contains the implied threat that the DFI will take adverse action against CybrCollect unless CybrCollect complies with the rules of NACHA, a private organization.

25. Any adverse action against CybrCollect would have serious effect on CybrCollect's business causing it to lose goodwill, customers and revenue and incur significant expense.

## CLAIM I

### **THE DFI'S RULE IS INVALID BECAUSE IT WAS PROMULGATED WITHOUT COMPLIANCE WITH STATUTORY RULE-MAKING PROCEDURES**

26. CybrCollect realleges and incorporates by reference paragraphs 1 through 25 above.

27. Under Wis. Stats. § 227.40(4)(a), a court shall declare a rule invalid if the rule was promulgated without compliance with statutory rule-making procedures.

28. The DFI's position that Wisconsin collection agencies must abide by NACHA rules concerning authorization for collection fees is a "rule" for purposes of Wis. Stat. chapter 227, because it is: (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by said agency as to govern the interpretation or procedure of such agency. *See* Wis. Stat. § 227.01(13).

29. The DFI's position that Wisconsin collection agencies must abide by NACHA rules concerning authorization for collection fees is a statement of general policy specifically adopted by an agency to govern its enforcement or administration of legislation.

30. The DFI's policy is one of general application because a collection agency is a class described in general terms and new members can be added to the class. The DFI's October 12, 2001 letter appears to be a form letter because it is addressed generally, further suggesting a rule of general application.

31. Although the DFI has not labeled its policy pronouncement as a rule, the fact that it is a rule is implicit in the terms, conditions and limitations that the DFI has imposed on Wisconsin collection agencies in the correspondence attached to this complaint.

32. The DFI is applying its requirement that collection agencies comply with NACHA rules as a regulation or standard of general application having the effect of law, issued by the DFI to implement or interpret legislation administered by the DFI.

33. Because it is a rule, the DFI was obligated to follow the rule-making procedures set forth in Wis. Stat. chapter 227, before it could impose a requirement that collection agencies must comply with NACHA authorization rules.

34. The DFI did not follow any of the rule-making procedures set forth in Wis. Stat. chapter 227.

35. Because the DFI did not comply with the rule-making procedures provided in Wis. Stat. chapter 227, the DFI's rule that collection agencies must comply with NACHA's authorization rules is invalid under Wis. Stat. § 227.40(4)(a).

#### **CLAIM II:**

#### **THE DFI RULE EXCEEDS THE AGENCY'S STATUTORY AUTHORITY**

36. CybrCollect realleges and incorporates by reference paragraphs 1 through 35 above.

37. Under Wis. Stat. § 227.40(4)(a), a court shall declare a rule invalid if the rule exceeds the statutory authority of the agency.

38. Because the DFI exceeded its statutory authority, the DFI's rule that Wisconsin collection agencies must comply with NACHA's authorization rules is invalid under Wis. Stat. § 227.40(4)(a).

#### **WIS. STAT. § 220.02**

39. Under its enabling statute, Wis. Stat. § 220.02, the DFI is the Wisconsin agency responsible for enforcing all laws relating to banks and banking and enforcing every law related to the supervision and control of collection agencies.

## **NACHA RULES**

40. The DFI has neither the express nor the implied authority to enforce rules of a non-governmental, private voluntary organization, such as NACHA, as if they were Wisconsin law.

41. NACHA rules have not been enacted by the legislature, nor promulgated as regulations by the DFI and published in the Wisconsin Administrative Code.

42. The DFI has exceeded its statutory grant of authority by imposing the rules of NACHA on Wisconsin collection agencies.

### **WIS. STAT. § 404.401(1)**

43. One of the laws that the DFI claims to be enforcing is Wis. Stat. § 404.401(1). However, the DFI has exceeded its statutory authority by interpreting Wis. Stat. § 404.401(1) to require written customer authorization before a collection fee can be recovered.

44. Wis. Stat. § 404.401(1) was adopted verbatim from Article 4-401 of the Uniform Commercial Code (the "UCC").

45. Wis. Stat. § 404.401(1) is not ambiguous. It does not address the issue of authorization for a bank to charge collection fees to a customer's account, but rather is merely a safe harbor for a bank that charges a customer's account for a properly payable item and thereby creating an overdraft.

46. Comment 1 to Article 4-401 of the UCC states that the customer authorization required for a properly payable item is implicit in the issued check itself.

47. Because the DFI's rule exceeds the bounds of correct interpretation of Wis. Stat. § 404.401(1), the DFI's rule is invalid.

**DFI-BKG 74.14(11)**

48. The DFI also asserts that it is enforcing DFI-Bkg 74.14(11) which prohibits oppressive and deceptive practices, including claiming or attempting to threaten to enforce a right with knowledge or reason to know that the right does not exist.” See Exhibit B.

49. The DFI has exceeded its statutory authority by establishing a rule that Wisconsin collection agencies, which comply with federal rules, rather than the rules of a non-governmental, private voluntary organization, such as NACHA, have committed an oppressive and deceptive practice within the meaning of DFI-Bkg 74.14(11).

50. The DFI has exceeded its statutory authority by extending DFI-Bkg 74.14(11) to require Wisconsin collection agencies to follow NACHA rules because failure to follow the rules of a non-governmental, voluntary, private organization does not rise to the comparable level of egregious action as do the other “unfair or deceptive” practices listed in DFI-Bkg 74.14.

51. Because the DFI’s interpretation of DFI-Bkg 74.14(11) exceeds the bounds of correct interpretation, its rule that a collection agency has engaged in an oppressive and deceptive practice by failing to follow NACHA’s authorization requirements is invalid.

**WIS. STAT. § 403.414(7)**

52. In the guise of enforcing laws related collection agencies, the DFI has exceeded its statutory authority by creating a rule inconsistent with Wis. Stat. 403.414(7).

53. Wis. Stat. § 403.414(7) states that a person who issues a check that is not honored upon presentment, because the drawer does not have sufficient funds in his or her account, “is liable for all reasonable costs and expenses in connection with the collection of the amount for which the check or draft was written...”

54. The “reasonable costs and expenses” set forth in Wis. Stat. § 403.414(7) include a collection fee.

55. Wis. Stat. § 403.414 (7), is not ambiguous; it does not condition liability for a collection fee upon the check writer's prior written authorization.

56. Merchants may collect these fees themselves, or they may contract with a debt collection service to collect on their behalf.

57. The DFI has exceeded its statutory authority by limiting the statutory liability imposed by Wis. Stat. § 403.414(7) on a writer of dishonored checks to exclude any liability for collection costs if the collection fee is debited electronically without prior written permission from the check writer.

#### **WIS. STAT. § 402.204**

58. In the guise of enforcing laws related collection agencies, the DFI has exceeded its statutory authority by creating a rule inconsistent with Wis. Stat. § 402.204.

59. Wis. Stat. § 402.204 states that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

60. Section 402.204 was adopted verbatim from Article 2-204 of the UCC.

61. A conspicuous posted notice stating that, in the event of a dishonored check, the face amount and a collection fee may be collected electronically is a term of sale offered by a merchant.

62. The Electronic Fund Transfer Act and Regulation E permit a merchant to collect a fee electronically if the merchant has posted a notice to customers informing them that the fee will be collected in that manner.

63. A customer who does not wish to enter into a contract which may be subject to an electronically collected fee may pay cash for the goods or services, pay by credit card, or simply refuse to make a purchase.

64. The DFI has neither the express or implied authority to enforce laws relating to the conditions under which every merchant in this state may enter into a contract with his/her customers.

65. The DFI has exceeded its statutory authority by requiring merchants, who desire to contract with a third party to electronically collect the fees provided by Wis. Stat. § 403.414(7), to go through the onerous process of requiring prior written authorization from all persons who pay for goods by check, even though only relatively few checks are likely to be returned for insufficient or held funds.

#### **INCONSISTENT STANDARDS**

66. The DFI has exceeded its statutory authority by effectively creating a different standard for electronic fund transfers initiated by merchants from the standard which the DFI applies to collection agencies who serve as the merchants' agents in collecting the dishonored checks and fees.

67. The DFI does not have either the express or the implied authority to create one standard for merchants and another for their agents, when both are enforcing the same right (to recoup collection costs) by the same means (Electronic Fund Transfer).

#### **RELIEF REQUESTED**

WHEREFORE, CybrCollect respectfully requests that the Court:

A. Declare that the Department of Financial Institutions' rule that collection agencies must abide by NACHA rules is invalid because it was not promulgated in compliance with statutory rule-making procedures;

B. Declare that the Department of Financial Institutions' rule that collection agencies must abide by NACHA rules is invalid because it exceeds the agency's statutory authority;

C. Grant a stay under Wis. Stat. § 227.54 or a temporary injunction prohibiting the DFI from taking any adverse action against CybrCollect until final resolution of this action, including but not limited to imposition of any fines, forfeitures, or compliance orders, or revocation, suspension or failure to renew CybrCollect's Wisconsin collection agency license;

D. Grant a permanent injunction against the DFI prohibiting it from enforcing an invalid rule; and

E. Grant such other and further relief as the court deems just and equitable.

Dated this 21<sup>st</sup> day of February, 2003.

FOLEY & LARDNER



Joan L. Eads, WI Bar No. 1000225  
Anat Hakim, WI Bar No. 1031587

**MAILING ADDRESS:**

FOLEY & LARDNER  
150 E. Gilman Street  
Madison, WI 53703-1481  
(608) 257-5035

Attorneys for plaintiff, CybrCollect, Inc.

Exhibit A

## Check Policy

In the unlikely event that your check is returned for **Insufficient or Held Funds**, we will debit your checking account *electronically* for the face amount of the check **PLUS** the fee listed below. This policy allows us to resolve the problem without reporting you to a credit bureau and harming your credit rating. The transaction will appear on your bank statement and no one will have to contact you about payment.

**\$30**



CybrCollect, Inc.  
**1-888-340-5205**  
[www.getmychecks.com](http://www.getmychecks.com)

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Exhibit B



State of Wisconsin  
Department of Financial Institutions

Scott McCallum, Governor

John F. Kunder, Secretary

October 12, 2001

TO THE COLLECTION AGENCY ADDRESSED:

The purpose of this letter is to set forth the Division of Banking's ("Division") position on the collection of returned check fees by an Automated Clearing House ("ACH") transaction or a bank draft.

Section 404.401(1), Wis. Stats., indicates that a bank may charge a properly payable item against the account of a customer. It also indicates that an item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.

Because a bank may only charge a customer's account for a returned check fee if the fee is authorized by the customer, a collection agency or creditor attempting to collect a returned check fee must, necessarily, also have the authorization of the customer. A collection agency that attempts to collect an unauthorized fee is violating Rule DFI-Bkg 74.14(11), which provides that a licensee shall not engage in any deceptive or oppressive practices, including claiming or attempting to threaten to enforce a right with a knowledge or reason to know that the right does not exist.

Collecting a returned check fee through the use of an ACH transaction without the proper authorization from the customer would be a violation of Section 404.401(1), Wis. Stats., and Rule DFI-Bkg 74.14(11). It is the Division's position that, with respect to the collection of fees by an ACH transaction, notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization. Acceptable authorization must, at a minimum, comply with National Automated Clearing House Association ("NACHA") rules. Also, the collection agency or creditor initiating the ACH transaction must be able to document that they have such an authorization.

Collecting a returned check fee through the use of an unauthorized paper draft would violate Sections 404.401(1), 403.401, and 403.402, Wis. Stats., and Rule DFI-Bkg 74.14(11). As in the use of ACH transactions, it is the Division's position that notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization.

If you have questions regarding this matter, you may contact Examiner Ray Hellmer at 608-267-3776, Examiner Maggie Schmeider at 608-261-2310, or me at 608-266-0447.

Sincerely,  
  
Jean Plale, Director  
Licensed Financial Services

JMP/jp

Exhibit C



State of Wisconsin  
Department of Financial Institutions

Scott McCallum, Governor

John F. Kunder, Secretary

December 10, 2001

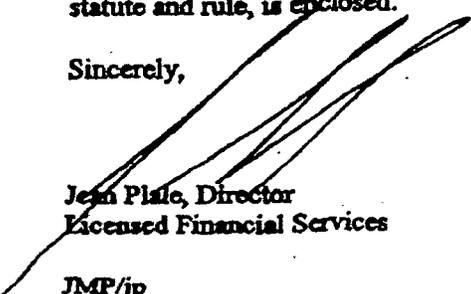
Mr. Gary Doherty, President  
CybrCollect, Inc.  
2350 South Avenue, Suite 107  
La Crosse, WI 54601

Dear Mr. Doherty:

It continues to be the position of the Division of Banking ("Division") that CybrCollect, Inc. ("CybrCollect") is engaging in the business of collecting or receiving for payment for others an account, bill, or other indebtedness and that CybrCollect must be licensed as a collection agency. Your arguments to the contrary are unpersuasive. The definition of indebtedness, as found in Black's Law Dictionary and The American Heritage Dictionary, support our position.

Your response to Examiner Hellmer's October 19, 2001 letter, as well as your written assurance that CybrCollect is complying with Sections 404.401(1), Wis. Stats., and Rule DFI-Bkg 74.14(11), must be in our office by the close of business on December 21, 2001. As you know, the Division's position on the collection of returned check fees by an Automated Clearing House transaction or a bank draft was set forth in our letter dated October 12, 2001. A copy of that letter, which references the above noted statute and rule, is enclosed.

Sincerely,

  
Jean Plale, Director  
Licensed Financial Services

JMP/jp  
Enclosure  
Federal Express

Exhibit C



State of Wisconsin  
Department of Financial Institutions

Scott McCallum, Governor

John F. Kunder, Secretary

October 12, 2001

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Section 404.401(1), Wis. Stats., indicates that a bank may charge a properly payable item against the account of a customer. It also indicates that an item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.

Because a bank may only charge a customer's account for a returned check fee if the fee is authorized by the customer, a collection agency or creditor attempting to collect a returned check fee must, necessarily, also have the authorization of the customer. A collection agency that attempts to collect an unauthorized fee is violating Rule DFI-Bkg 74.14(11), which provides that a licensee shall not engage in any deceptive or oppressive practices, including claiming or attempting to threaten to enforce a right with a knowledge or reason to know that the right does not exist.

Collecting a returned check fee through the use of an ACH transaction without the proper authorization from the customer would be a violation of Section 404.401(1), Wis. Stats., and Rule DFI-Bkg 74.14(11). It is the Division's position that, with respect to the collection of fees by an ACH transaction, notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization. Acceptable authorization must, at a minimum, comply with National Automated Clearing House Association ("NACHA") rules. Also, the collection agency or creditor initiating the ACH transaction must be able to document that they have such an authorization.

Collecting a returned check fee through the use of an unauthorized paper draft would violate Sections 404.401(1), 403.401, and 403.402, Wis. Stats., and Rule DFI-Bkg 74.14(11). As in the use of ACH transactions, it is the Division's position that notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization.

If you have questions regarding this matter, you may contact Examiner Ray Hellmer at 608-267-3776, Examiner Maggie Schmelzer at 608-261-2310, or me at 608-266-0447.

Sincerely,

Jean Plale, Director  
Licensed Financial Services

JMP/jp



State of Wisconsin  
Department of Financial Institutions

Exhibit D

Scott McCallum, Governor

John F. Kundert, Secretary

September 19, 2002

Ms. Jennifer G. Karron, Esq.  
Foley and Lardner  
777 East Wisconsin Avenue, Suite 3800  
Milwaukee, WI 53202-5367

Re: CybrCollect, Inc.

Dear Ms. Karron:

This letter is in response to your letter to the Department of Financial Institutions ("department"), dated January 18, 2002.

After review of the matters raised therein, it remains the position of the department that collecting a returned check fee through the use of an ACH transaction without proper authorization from the customer is a violation of s. 404.401(1), Stats. Furthermore, with respect to the collection of fees by an ACH transaction, notification does not equate to authorization, and the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization. The department continues to insist that your client comply with National Automated Clearing House Association ("NACHA") rules regarding acceptable authorization. Lastly, it remains the position of the department that a collection agency that attempts to collect a returned check through the use of an ACH transaction without proper authorization from the customer is in violation of s. DFI—Bkg 74.14(11).

Having reviewed the matter, the department again reiterates its determination that your client must be licensed as a collection agency.

Your client must provide the department with written assurance that it is complying with s. 404.401(1), Stats., and s. DFI-Bkg 74.14(11). If your client intends to attempt to collect returned check fees by ACH transactions or bank drafts in the future, this assurance must be accompanied by a copy of the form it will use to obtain written authorizations from consumers for returned check fees.

According to Mr. Ray Hellmer of this department, the following also remains to be accomplished in connection with the department's Report of Examination ("report"):

- You indicated that Mr. Doherty will contact Examiner Hellmer to discuss the implementation of internal controls for remittances. Mr. Hellmer has not been contacted by Mr. Doherty regarding this matter since the date of your letter. The department is, therefore, requesting a written response to concern #10 of its report, which pertains to internal controls for remittances.

Office of the Secretary

Mail: PO Box 8861 Madison WI 53708-8861

Voice: (608) 264-7800

Fax: (608) 261-4DFI

Courier: 345 W. Washington Ave. 5<sup>th</sup> Floor Madison, WI 53703

TTY: (608) 266-8818

Internet: www.wdfi.org

Exhibit D

- With regard to Form D, you explained that it would be revised to refer to the "fee listed below." A copy of the revised Form D should be forwarded to the department.
- With regard to Form E, the department objects to the revision referred to in your letter because any advertisement or sign containing any reference to commission rates must disclose all the commission rates of the collection agency. The department asks that the comments regarding Form E in Mr. Hellmer's October 2, 2001 letter be reviewed, Form E be revised and a copy of the revised form be forwarded to the department.

The department expects that CybrCollect, Inc. will fully comply with these matters by October 21, 2002. Should your client need additional assistance in completing these matters, your client should contact Ms. Jean Plale, Director, Department of Financial Institutions, Licensed Financial Services Section at 266-0447.

Sincerely,



Mark Schlei  
Deputy General Counsel



Exhibit E

**State of Wisconsin**  
*Department of Financial Institutions*

Scott McCallum, Governor

John F. Kundert, Secretary

December 23, 2002

Ms. Jennifer Karron, Esq.  
Foley & Lardner  
777 E. Wisconsin Avenue, Suite 3800  
Milwaukee, WI 53202-5367

Re: CybrCollect, Inc.

Dear Ms. Karron:

Pursuant to ss. 220.02(2) and (3), Stats., the Department of Financial Institutions – Division of Banking (“division”) has the jurisdiction and responsibility to enforce and cause to be enforced every law relating to the supervision and control of collection agencies licensed under s. 218.04, Stats. As part of this broad authority, we have taken the position that a collection agency who debits a customer’s checking account for the returned check fee without the customer’s written authorization would be in violation of Rule DFI-Bkg 74.14 and the Federal Fair Debt Collection Practices Act (“FDCPA”). To give collection agencies guidance on the type of authorization that would be acceptable, we have indicated the authorization must, at a minimum, comply with NACHA rules. We have not, as you asserted, adopted NACHA rules as Wisconsin law.

We understand that our position in this matter results in a level of consumer protection that is higher than that required by Regulation E. Pursuant to 12 CFR 205.12(b), we believe this does not result in an irreconcilable conflict.

Your client must provide to the division by January 22, 2003, written assurance that it is complying with DFI-Bkg 74.14 and the FDCPA. If your client intends to attempt to collect returned check fees by ACH transactions or bank drafts in the future, this assurance must be accompanied by a copy of the form it will use to obtain written authorizations from consumers for returned check fees.

All other concerns set forth in your client’s Report of Examination that are still outstanding will be addressed in a letter written by Examiner Ray Hellmer and sent to Ms. Kathy Monroe.

Sincerely,

Mark Schlei  
Deputy General Counsel

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*Division of Banking*

Mail: PO Box 7876 Madison, WI 53707-7876  
Voice: (608) 261-7578

Fax: (608) 267-6889

Courier: 345 W. Washington Ave. 4<sup>th</sup> Floor Madison, WI 53703  
TTY: (608) 266-8818  
Internet: [www.wdfi.org](http://www.wdfi.org)

Exhibit F



**State of Wisconsin**  
*Department of Financial Institutions*

Jim Doyle, Governor

February 6, 2003

Ms. Jennifer Karron, Esq.  
Foley & Lardner  
777 E. Wisconsin Avenue, Suite 3800  
Milwaukee, WI 53202-5367

Re: CybrCollect, Inc.

Dear Ms. Karron:

Based on our discussions with Ms. Mary Schnell, president of the Wisconsin Automated Clearing House Association, it is our understanding that there are no proposed rule changes that relate to RCK (NSF) fees and no such rule changes are in the forecast.

It continues to be the division's position that CybrCollect, Inc.'s ("CybrCollect") practices and procedures, as they relate to the collection of NSF checks fees, are in violation of Rule DFI-Bkg 74.14, and must be changed to bring CybrCollect into compliance. Your client's written assurance that it is complying with DFI-Bkg 74.14 and the FDCPA must be received in the division's office on or before February 21, 2003.

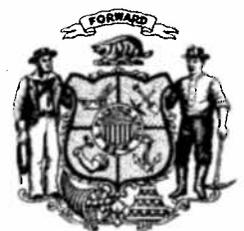
All other concerns set forth in your client's Report of Examination that are still outstanding will be addressed in a letter written by Examiner Ray Hellmer and sent to Ms. Kathy Monroe.

Sincerely,

*Mark Schlei*  
Mark Schlei  
Deputy General Counsel



# WISCONSIN STATE LEGISLATURE



MAY 08 2003

May 2, 2003

**FOLEY & LARDNER**  
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150 EAST GILMAN STREET  
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epevehouse@foleylaw.com EMAIL

CLIENT/MATTER NUMBER  
075083-0101

**VIA HAND DELIVERY**

Judith Coleman Nispel  
Clerk of Court  
Dane County Circuit Court  
210 Martin Luther King, Jr. Blvd.  
Madison, WI 53709

Re: CybrCollect, Inc. v. The Wisconsin Department of Financial  
Institutions, Case No. OSCV0572

Dear Ms. Coleman-Nispel:

Enclosed please find one original and one copy of CybrCollect's Brief in Opposition to Defendant's Motion to Dismiss. Please file the original, and return a conformed copy to the courier. If you have any questions, please do not hesitate to contact me.

Very truly yours,



Elizabeth Erickson Pevehouse

**Enclosures**

cc: Attorney Stephen J. Nicks (w/encl., via hand delivery)  
Ms. Patricia Struck (w/encl., via U.S. mail)  
Senator Joseph Leibham (w/encl., via U.S. mail)  
✓ Representative Glen Grothman (w/encl., via U.S. mail)

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CYBRCOLLECT, INC.,

Plaintiff,

Case No. OSCV0572

v.

Case Classification Code: 30701  
Declaratory Judgment

THE WISCONSIN DEPARTMENT  
OF FINANCIAL INSTITUTIONS,

Defendant.

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**BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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**INTRODUCTION**

This Court should deny defendant Wisconsin Department of Financial Institution's ("DFI") motion to dismiss this declaratory judgment action because the complaint states a claim that the DFI's policy pronouncement is an unpromulgated rule and that the DFI overstepped the bounds of its power in making the rule.

**FACTS**

CybrCollect has operated as a licensed debt collection agency in Wisconsin since 1999. (Complaint ¶ 4) Although CybrCollect operates in all states except Hawaii and Rhode Island, approximately one-third of CybrCollect's total revenue is generated by Wisconsin transactions. (Complaint ¶ 6) When CybrCollect's current license expires on June 30, 2003, it must be renewed by the DFI, the state agency with the authority to enforce laws relating to banks and banking, including laws relating to collection agencies. *See* Wis. Stat. §§ 227.01(1) and 220.02(2), (3); Complaint ¶¶ 2,4.

CybrCollect contracts with merchants to collect electronically checks that have been returned for insufficient or held funds. (Complaint ¶ 6) CybrCollect enters into Collection Agreements with merchants that require the merchant to post at each point-of-sale location a notice that fees will be collected electronically. (Id.) The required notice informs the consumer that if a check is returned for insufficient or held funds, the consumer's checking account will be debited electronically for both the face amount of the check and a \$30 collection fee. (Complaint ¶ 6, Ex. A) Under Wisconsin Statutes § 403.414(7) a person who issues a check that is not honored upon presentment "is liable for all reasonable costs and expenses in connection with the collection of the amount for which the check or draft was written." The statute does not place any restriction on the manner or means by which such costs and expenses may be collected.

When CybrCollect receives a dishonored check from the contracting merchant's bank, it uses proprietary software to scan the check into CybrCollect's computer. (Complaint ¶ 7) The computer converts the information into electronic data in the form of two debits: one for the face value of the check and another for the amount of the merchant's collection fee. (Id.) When sufficient funds become available in the check writer's account, the two electronic records are transmitted to the check writer's bank through the Automated Clearing House<sup>1</sup> and the check writer's account is debited for both amounts. (Complaint ¶ 8) Pursuant to its agreement with the merchant, CybrCollect retains all or a portion of the collection fee as its only compensation for its services to the merchant. (Id.)

In conducting its business, CybrCollect has relied in good faith on the federal Electronic Funds Transfer Act ("ETFA") and Regulation E promulgated by the Federal Reserve

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<sup>1</sup> The Automated Clearing House ("ACH") is the electronic network which transfers and clears funds between banking institutions on behalf of merchants and their customers.

Board. (Complaint ¶ 10) The purpose of the ETFA is “to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.” 15 U.S.C. s. 1693(b). The EFTA and Regulation E explicitly apply to the electronic collection of returned check fees. See, Regulation E Official Staff Commentary, Comment 1 to 12 C.R.F. § 205.3(c)(1). The Official Commentary to Regulation E provides that the requisite authorization for an electronic debit from an account “occurs where the consumer has received notice that a fee imposed for returned checks will be debited electronically from the consumer’s account.” Id. (Complaint ¶ 10) Congress accorded great deference to the Federal Reserve Board’s interpretation of Regulation E, as set forth in the Official Staff Commentary. Section 915 of the Electronic Fund Transfer Act (15 U.S.C. § 1693m(d)) provides that there is no civil or criminal liability for “any act done or omitted in good faith in conformity with any rule, regulation or *interpretation thereof* by the [Federal Reserve] Board...” (Complaint ¶ 11) (Emphasis added).

On October 12, 2001, CybrCollect received a form letter from DFI addressed “TO THE COLLECTION AGENCY ADDRESSED.” (Complaint ¶ 12, Ex. B) The letter stated that its purpose was to “set forth the Division of Banking’s (“Division”) position on the collection of returned check fees by an Automated Clearing House (“ACH”) transaction or a bank draft.”

(Complaint ¶ 12) The letter further stated that:

Collecting a returned check fee through the use of an [Automated Clearing House] transaction without the proper authorization from the customer would be a violation of Section 404.401(1), Wis. Stat., and Rule DFI-Bkg 74.14(11). It is the Division’s position that, with respect to the collection of fees by an ACH transaction, notification does not equate authorization and that the posting of a sign at the merchant’s place of business does not satisfy the requirement of obtaining a customer’s authorization. **Acceptable authorization must, at a minimum, comply with National Automated Clearing House Association (NACHA) rules.**

(Complaint Ex. B, emphasis added) The DFI further stated that, therefore, “a collection agency or creditor attempting to collect a returned check fee must, necessarily, also have the authorization of the customer.” (Complaint ¶ 13) The DFI has not promulgated as a rule its regulation, standard, or statement of policy that a collection agency must comply with NACHA’s authorization rules. (Complaint ¶ 23)

The Wisconsin statute the DFI’s October 12, 2001 letter referenced states:

A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.

Wis. Stat. § 404.401(1).

Additionally, the DFI’s October 12, 2001 letter stated that “[a] collection agency that attempts to collect an unauthorized fee is violating Rule DFI – Bkg 74.14(11). . .” (Complaint ¶ 17, Ex. B).

Wis. Admin. Code § DFI-Bkg 74.14(11) provides:

Oppressive practices prohibited. A licensee shall not engage in any oppressive or deceptive practices. In attempting to collect an alleged debt, a licensee shall not:

(11) Claim or threaten to claim to enforce a right with knowledge or reason to know that the right does not exist.

NACHA is a private, non-governmental, organization whose direct voting membership is limited to large financial institutions. (Complaint ¶ 15) NACHA’s purpose is to take actions for the benefit of banks who are its members and has engaged in rule-making for the ACH Network and other payments systems. (Complaint ¶¶ 15, 16) Although NACHA’s rule-making process contemplates that its rules will change from time to time, the current rules requires prior written authorization from all persons who pay for goods by check before a fee can be collected electronically. (Complaint ¶ 16)

Subsequent to October 2001, in letters to CybrCollect dated December 10, 2001, September 19, 2002 and December 23, 2002, the DFI reiterated its policy and continued “to insist that [CybrCollect] comply with National Automated Clearing House Association (“NACHA”) rules regarding acceptable authorization.” (Complaint ¶ 17, 20 , Ex. C, D & E) By letter dated February 6, 2003, the DFI demanded that CybrCollect provide “written assurance that it is complying with DFI-Bkg 74.14” on or before February 21, 2003. (Complaint Ex. F)

On February 21, 2003, CybrCollect filed an action requesting that the Court declare the DFI’s rule invalid because it was promulgated without compliance with statutory rulemaking procedures and because the rule exceeds the DFI’s statutory authority. (Complaint) The DFI responded by filing a motion to dismiss CybrCollect’s complaint for failure to state a claim upon which relief can be granted. (DFI Motion)

### **ARGUMENT**

This Court cannot dismiss CybrCollect’s complaint unless it finds that there are no conditions under which relief can be granted. *See Gritzner v. Michael R.* , 2000 WI 68, ¶18, 235 Wis. 2d 781, 790, 611 N.W.2d 906, 912; *Kohlbeck v. Reliance Constr.*, 2002 WI App 142, ¶ 9, 256 Wis. 2d 235, 243, 647 N.W.2d 277, 281. For purposes of the motion to dismiss, this Court must construe the complaint liberally, accepting all factual allegations in the complaint as true and making all reasonable inferences in favor of the plaintiff. *See Kohlbeck*, 2002 WI App 142, ¶ 9, 256 Wis. 2d at, 243, 647 N.W.2d at 280. This Court must evaluate the case de novo, giving no weight to the agency’s opinion. *See Marquardt v. Milwaukee County*, 2000 WI App 77, ¶ 10 234 Wis. 2d 294, 300, 610 N.W.2d 496, 499; *Coutts v. Wisconsin Ret. Bd.*, 209 Wis. 2d 655, 664 562 N.W.2d 917, 921 (1997); *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659, 539 N.W.2d 98, 102 (1995).

**I. THE DFI'S RULE WAS NOT PROPERLY PROMULGATED**

The DFI's "position" is that collection agencies are required to follow NACHA rules regarding prior written authorization in order to collect costs and expenses incurred as a result of a returned check. This an unpromulgated rule. An administrative rule is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by said agency as to govern the interpretation or procedure of such agency. Wis. Stat. § 227.01(13); *see also Mack v. DHFS*, 231 Wis. 2d 644, 647, 605 N.W.2d 651, 653 (Ct. App. 1999); *Wisconsin Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 232, 287 N.W.2d 113, 118-19 (1980).

Conceding that it did not use rulemaking procedures, the DFI nevertheless challenges only two elements of the test set forth above to argue that its "position" on electronic collection of returned check fees is not a rule. The DFI does not contest that (1) its "position" is a regulation, standard, statement of policy or general order, (2) issued by the DFI (3) to implement, interpret or make specific legislation enforced or administered by the DFI as to govern the interpretation or procedure of the DFI. Instead, the DFI argues only (1) that the DFI's position is not a rule because it does not have the effect of law but rather is "merely compliance advice" (DFI Brief pp. 6-7); and (2) that the DFI's position is not generally applicable, but rather a disposition of a particular set of facts. (DFI Brief pp. 7-9) Both arguments are fatally flawed.

**A. THE DFI'S RULE HAS THE EFFECT OF LAW**

The DFI's demand that collection agencies comply with the NACHA rule on electronic collections has the effect of law. In the October 12, 2001 letter "TO THE COLLECTION AGENCY ADDRESSED," the DFI stated that "an acceptable authorization [for

electronically collecting a returned check fee] must, at a minimum, comply with National Automated Clearing House Association (“NACHA”) rules. (Complaint Ex. B, emphasis added). Because compliance with this NACHA rule is mandatory, the DFI’s “position” is a rule. *See Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 321-22, 493 N.W.2d 744, 753 (Ct. App. 1992) (holding that a manual containing mandatory requirements for apprenticeship programs was a rule). The DFI has the power to enforce its rule by denying CybrCollect the license it needs to do business as a collection agency in the state of Wisconsin. *See* Wis. Stat. §§ 218.04(4)(5).

In contrast to Regulation E, which permits authorization by notice, NACHA rules currently require written authorization from an account owner before an electronic debit is made. The DFI argues that its adoption of the NACHA rule is merely compliance advice setting out the plain meaning of Wis. Stat. § 404.401(1). (DFI Brief pp. 6-7) However, this argument fails for four reasons. First, assuming the DFI has the authority to interpret Wis. Stat. § 404.401(1), which it has not established, the statute does not regulate the methods that collection agencies use to collect returned check fees. Rather, this statute, adopted verbatim from the Uniform Commercial Code (“UCC”), permits a bank to charge a properly payable “item” against a customer’s account “even though the charge creates an overdraft.” Wis. Stat. § 404.401(1) (emphasis added). The language is unambiguous, and does not require “compliance advice.” Second, even if “compliance advice” is warranted, it should be directed to banks, not to the agents of third party payees on checks. Third, the “compliance advice,” even if it were directed to banks, is misplaced because an electronic debit of a returned check fee is not an “item” within

the meaning of section 4-401.<sup>2</sup> Fourth, there is no need for “compliance advice” as to when a bank may initiate an electronic debit because such advice has already been issued by the Federal Reserve Board in Regulation E<sup>3</sup> and the Commentary thereto. Regulation E expressly authorizes a bank to debit the collection fee from the customer’s account upon notice to the customer. Comment 1 to 12 C.R.F. § 205.3(c)(1). To prescribe the conditions under which collection agencies, as parties to an electronic fund transfer, may electronically debit a returned check fee in contravention of Regulation E, the DFI must, and did, make a rule.

The DFI improperly promulgated this rule in its October 12, 2001 letter. Prior to that letter no Wisconsin law or rule directed collection agencies to use any particular method for obtaining authorization from account holders to collect fees for returned checks. CybrCollect conducted its business in compliance with the Official Commentary to Federal Regulation E, and there is no dispute that CybrCollect requires merchants using its services to post a notice to consumers in compliance with that regulation. Because CybrCollect complies with federal law, and no state law limits the methods collection agencies may use to electronically collect returned check fees, CybrCollect was not, and is not, in knowing violation of any law.

Under similar circumstances, the Wisconsin Supreme Court has found that an agency improperly promulgated a rule. In *Wisconsin Electric Power Company v. Department of Natural Resources*, the DNR imposed limits on the amount of chlorine that power plants could

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<sup>2</sup> “Item” is defined in Wis. Stat. § 404.104(i) as an “instrument or a promise or order to pay money handled by a bank for collection or payment”. “Instrument” is defined as a “negotiable instrument”, (Wis. Stat. § 403.014(2)), which is in turn defined as an “unconditional promise or order to pay a fixed amount of money”. Wis. Stat. § 403.104(1). “Promise” is defined as “a written undertaking to pay money”. Wis. Stat. § 403.103(i) (emphasis added), and “order” is defined as “a written instruction to pay money”. Wis. Stat. § 403.103(f). Therefore, an electronic debit does not meet the definition of “item”.

<sup>3</sup> By its terms, Regulation E “applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer’s account.” 12 C.F.R. 205.3(a).

discharge which were stricter than standards ultimately adopted by the EPA and the state of Wisconsin. *See* 93 Wis. 2d 222, 226-27, 287 N.W.2d 113, 116 (1980). The Supreme Court held that the DNR's statement had the effect of law and was a rule. *See id.* at 235, 287 N.W.2d at 120. Similarly, in *Frankenthal v. Wisconsin Real Estate Brokers' Board*, 3 Wis. 2d 249, 88 N.W.2d 352 (1958), the Wisconsin Supreme Court held that a letter stating the Wisconsin Real Estate Board's position that all partners in a brokerage must be licensed constituted a rule. *Id.* at 253-54, 88 N.W.2d at 355. The letter had the effect of law because the statement changed the rules under which brokerages operated. *See id.* at 255, 88 N.W.2d 356. Likewise, the DFI's adoption of the NACHA rules imposes a new requirement on collection agencies not previously set forth by any statute or regulation and for this reason, has the effect of law. *See also Mack v. DHFS*, 231 Wis. 2d 644, 647, 605 N.W.2d 651, 653 (Ct. App. 1999) (holding that the DHFS's decision to recoup benefit overpayments to the plaintiff by deducting 10% from her future benefits fund was a rule because there was no statute or rule authorizing this method of recoupment).

The three cases DFI cites to support its motion to dismiss either support CybrCollect's position or are inapplicable. First, *Barry Laboratories, Inc. v. State Board of Pharmacy*, 26 Wis. 2d 505, 132 N.W.2d 833 (1965) supports the position that the DFI's adoption of NACHA rules is an administrative rule. In *Barry Labs* the Court held that a letter from the Pharmacy Board to a business selling prescription drugs in Wisconsin was not a rule because the letter merely informed the business of statutory language and because the Pharmacy Board did not have the power to enforce compliance. 26 Wis. 2d at 514, 516-17, 132 N.W.2d at 837, 839. In the instant case, the DFI's adoption of the NACHA rule is an administrative rule because it does not merely restate the language of an applicable statute. Rather, it creates entirely new

requirements for Wisconsin collection agencies—and the DFI has the power to enforce the new requirement. *See* Wis. Stat. §§ 220.02(2)(3) (providing the DFI the authority to enforce all laws relating to banks and banking in this state and to enforce every law relating to the supervision and control of collection agencies, such as CybrCollect); Wis. Stat. §§ 218.04(4)(5) (providing the DFI’s Division of Banking the authority to issue, suspend or revoke licenses of collection agencies, such as CybrCollect.); Wis. Stat. § 218.04(7) (granting the Division of Banking the power and authority to issue orders, rules and regulations to protect the public from oppressive and deceptive practices of collection agencies).

Next, the DFI cites two cases that are irrelevant to the issues here, *State v. Amoco Oil Co*, 97 Wis. 2d 226, 241-243, 293 N.W.2d 487, 494-96 (1980) and *Schoolway Transport Co. v. Division of Motor Vehicles*, 72 Wis. 2d 223, 236 240 N.W.2d 403, 410 (1976). *Amoco Oil* addressed whether federal interpretative regulations set forth by the Federal Trade Commission in an “interpretive guide” pre-empted state law. *See id.* at 239-250, 293 N.W.2d at 296-301. The Federal Trade Commission Act specifically allows the FTC to inform businesses of factors that would guide commission enforcement. *See id.* The Court held that interpretative rules promulgated under this provision were not rules because businesses were not required to follow them. *See id.* These facts differ significantly from the facts at hand. The DFI has required that collection agencies “must” comply with NACHA rules.

In *Schoolway Transport*, the Division of Motor Vehicles’ rule governing dual licensing of busses directly contradicted a statute, and the Division changed the rule without using rulemaking procedures. *See Schoolway Transport Co.*, 72 Wis. 2d at 225, 240 N.W.2d at 405. The Court carved out a narrow exception allowing the Division to correct its rule without using rulemaking procedures because the Division was acting outside its authority in applying

the original rule and because the Division had a duty to correct its error. The instant case raises an entirely different issue—whether the DFI must use rulemaking procedures to promulgate a new rule. *Schoolway Transport* is simply not applicable because the DFI is not correcting a rule that contradicts a statute.

As the DFI's letters to CybrCollect suggest, CybrCollect's punishment for failure to comply with the DFI's new "position" on authorization will be harsh. (Complaint Ex. B-F) The DFI could and undoubtedly will refuse to renew CybrCollect's license as a debt collection agency if CybrCollect fails to comply. Because the DFI is compelling CybrCollect to comply with new requirements articulated in the NACHA rules, the NACHA rules have the effect of law.

**B. DFI'S RULE IS OF GENERAL APPLICATION**

None of the exceptions to rulemaking set forth in Wis. Stat. § 227.10(1) apply to the DFI's adoption of NACHA rules. The DFI does not clarify which exception shelters its actions from rulemaking procedures. Despite the fact that the October 12, 2001 letter was not issued in a contested case or as a private letter ruling, the DFI apparently contends that its decision to adopt NACHA rules decides a particular matter as applied to a specific set of facts. However, the DFI's adoption of NACHA rules impacts the methods all collection agencies in Wisconsin must use to collect returned check fees. *See Mack*, 231 Wis. 2d at 649, 605 N.W.2d at 654 (holding that a policy was not an individual determination when it was a "rigid, numerical policy invariably applied across the board to all claimants without regard to individual circumstances or mitigating factors.") (citation omitted).

A rule is generally applicable if it applies without variation to a class to which new members may be added. *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 816, 280 N.W.2d 702, 707-08 (1979) (holding that individuals who owned property in a flood plain,

though a small group, constituted a class because new members could be added to the group). Collection agencies, the entities directly impacted by the DFI's new rule, comprise a class whose membership can increase or diminish. Because the DFI's rule impacts the methods all current and future collection agencies may use to collect returned check fees in Wisconsin, it is a rule of general application. *See, e.g., Josan Mfg Co. v. State Bd. of Health*, 26 Wis. 2d 587, 590, 595, 133 N.W.2d 301, 303-06 (1965) (holding that position taken by the Board of Health in a letter addressed "to whom it may concern" and distributed to all plumbers in Wisconsin constituted a rule of general application); *Frankenthal*, 3 Wis. 2d at 253-54, 88 N.W.2d at 355 (holding that a memorandum discussing general requirements for obtaining a brokerage license was of general application and constituted a rule).

The DFI relies on *Gibson* to support its argument. But contrasting the adoption of NACHA rules with the *Gibson* case only reinforces that the DFI's rule is of general application, not a decision pertaining to a specific set of facts. The *Gibson* Court did not address whether an attorney's private letter created a rule, but rather assumed that even if it did, the administrative agency's construction and interpretation of the statute was entitled to deference. The Court then held that the Department of Transportation's decision to deny Gibson a license to drive a school bus based on his conviction for armed robbery was a decision pertaining to a specific set of facts. *See Gibson v. DOT*, 103 Wis. 2d 595, 603, 309 N.W.2d 858, 862-63 (Ct. App. 1981). The decision did not impact bus drivers generally, but resolved an unusual factual issue peculiar to Gibson's circumstance. *Id.* at 606, 309 N.W.2d at 864. In contrast, the DFI's adoption of NACHA standards uniformly affects the daily business of every agency collecting returned check fees in the state of Wisconsin because it sets the standards for a regularly recurring part of collection agencies' business. The DFI's October 12, 2001 letter appears to be a form letter

because it is addressed generally, further suggesting a rule of general application. Further, in its brief, the DFI acknowledges that the letter was intended to inform a broad class of “licensed collection agencies, such as the plaintiff.” (DFI Brief at 9)

The DFI suggests that the *Gibson* decision indicates that the legislature did not intend for an agency to follow the procedure required for rulemaking in every instance where it applied a statute or rule to a set of facts or denied the application for a permit of license. Even assuming that this proposition is true, the legislature certainly intended to allow for public input and review when a rule had wide application. Implementing the DFI’s rule could affect virtually every business transaction in the state because it would require merchants to insist that every purchaser who pays for goods by check sign a form authorizing collection fees in the event the check is returned. A rule that directly affects every collection agency and nearly every merchant doing business in Wisconsin, as well as every consumer who writes a check, demands such input. As discussed above, the DFI’s decision to adopt NACHA standards is far more than compliance advice. In this situation, collection agencies, merchants and the general public are entitled to provide input on the rule that proper rule promulgation allows. In fact, the very purpose of the rulemaking procedure is to allow for public comment.

The DFI’s power and authority is not unfettered. The DFI was obligated to follow the rule-making procedures set forth in Wis. Stat. chapter 227, before it could impose a requirement that collection agencies must comply with NACHA authorization rules. The DFI, however, shirked this obligation. Because the DFI did not comply with the rule-making procedures provided in Wis. Stat. chapter 227, the DFI’s rule that collection agencies must comply with NACHA’s authorization rules is invalid under Wis. Stat. § 227.40(4)(a).

## II. THE DFI'S RULE IS INVALID BECAUSE IT EXCEEDS THE DFI'S STATUTORY AUTHORITY

At best, the DFI obliquely challenges the sufficiency of CybrCollect's claim that the DFI exceeded its statutory authority to promulgate the rule at issue. Even if the DFI has mounted such a challenge, it must fail. An administrative rule is invalid if it exceeds the statutory authority of the promulgating agency. Wis. Stat. § 227.40(4)(a); *Grafft v. DNR*, 2000 WI App 187 ¶ 6, 238 Wis. 2d 750, 755, 618 N.W.2d 897, 900. Wisconsin courts have long adhered to the proposition that "an administrative agency has only those powers that are expressly conferred or necessarily implied from the statutory provisions under which it operates." *Conway v. Board of Police and Fire Com'rs of City of Madison*, 2002 WI App 135 ¶ 7, 256 Wis. 2d 163, 174, 674 N.W.2d 291, 296; *Grafft v. DNR*, 2000 WI App 187 ¶ 6, 238 Wis. 2d 750, 755, 618 N.W.2d 897, 900; *The Avenue, Inc. v. LaFollette*, 183 Wis. 2d 409, 415, 515 N.W.2d 339, 342 (Ct. App. 1994).

The enabling statutes are to be "strictly construed to preclude the exercise of a power not expressly granted," and "any reasonable doubt as to the existence of an implied power should be resolved against [the agency]." *Wisconsin Dep't of Rev. v. Hogan*, 198 Wis. 2d 792, 816-17, 543 N.W.2d 825, 835 (Ct. App. 1994)(citing *State Public Intervenor v. DNR*, 177 Wis. 2d 666, 671, 503 N.W.2d 305, 308 (Ct. App. 1993)). This limitation on the authority of agencies is set forth in Wis. Stat. § 227.11, which provides in relevant part:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

When construing a statute involving the scope of an agency's power, this Court interprets the statute de novo, giving no deference to the agency's opinion. *Conway*, 2002 WI App 135 at ¶ 9, 256 Wis. 2d at 175, 647 N.W.2d at 297; *Grafft*, 200 WI App 187 at ¶ 4, 238 Wis. 2d at 754.

Under Wis. Stat. §§ 220.02(2)(b) and 220(3), the DFI has the authority to enforce laws relating to the supervision and control of collection agencies. However, nothing in the enabling statute grants the DFI the authority to adopt the NACHA rules as Wisconsin law. NACHA rules have not been enacted by the legislature, nor promulgated as regulations by the DFI and published in the Wisconsin Administrative Code. Furthermore, there is no case law in Wisconsin that suggests that the rules of a private organization may be treated as law.

**A. THE DFI EXCEEDED ITS AUTHORITY IN INTERPRETING WIS. STAT. § 404.401(1)**

One of the laws that the DFI claims to be enforcing "indirectly" is Wis. Stat. § 404.401(1). However, the DFI has exceeded its statutory authority by interpreting Wis. Stat. § 404.401(1) to require written authorization before a collection fee may be debited electronically from a consumer's account. The statute addresses when an "item" is properly payable by a bank. Because an electronic debit is not an "item" as defined in § 404.104(1) of the Wisconsin Statutes, the DFI's "compliance guidance" is tantamount to a redefinition of the statutory term. Wis. Stat. § 227.10 (2) prohibits a state agency from promulgating a rule which conflicts with state law. When a conflict occurs between a statute and a rule, the statute prevails. *DeBeck v. DNR*, 172 Wis. 2d 382, 388, 493 N.W.2d 234, 237 (Ct. App. 1992). This is because an agency charged with administering a law may not substitute its own policy for that of the legislature. *Id.* A rule out of harmony with a statute is "a mere nullity." *Village of Plain v.*

*Harder*, 268 Wis. 507, 511, 68 N.W.2d 47, 50 (1955). Because the DFI's rule exceeds the bounds of correct interpretation of Wis. Stat. § 404.401(1), the DFI's rule is invalid.

**B. THE DFI EXCEEDED ITS AUTHORITY TO ENFORCE DFI-BKG § 74.14(11)**

The DFI has also asserted that it is enforcing DFI-Bkg 74.14(11) which prohibits oppressive and deceptive practices, including claiming or attempting to threaten to enforce a right with knowledge or reason to know that the right does not exist.” (Complaint, Ex. B) The DFI has exceeded its statutory authority by establishing a rule that Wisconsin collection agencies, which comply with federal rules, rather than the rules of a non-governmental, private voluntary organization, such as NACHA, have committed an oppressive and deceptive practice within the meaning of DFI-Bkg 74.14(11). The DFI has exceeded its statutory authority by extending DFI-Bkg 74.14(11) to require Wisconsin collection agencies to follow NACHA rules because failure to follow the rules of a non-governmental, voluntary, private organization does not rise to the level of egregious action as to constitute an “unfair or deceptive” practices listed in DFI-Bkg 74.14. Because the DFI's interpretation of DFI-Bkg 74.14(11) exceeds the bounds of correct interpretation, its rule that a collection agency has engaged in an oppressive and deceptive practice by failing to follow NACHA's authorization requirements is invalid.

**C. THE DFI'S RULE IS INCONSISTENT WITH WIS. STAT. § 403.414(7)**

In the guise of enforcing laws related to collection agencies, the DFI has exceeded its statutory authority by creating a rule inconsistent with Wis. Stat. § 403.414(7). Wis. Stat. § 403.414(7) states that a person who issues a check that is not honored upon presentment, because the drawer does not have sufficient funds in his or her account, “is liable for all reasonable costs and expenses in connection with the collection of the amount for which the check or draft was written.” Wis. Stat. § 403.414 (7) is not ambiguous; it does not condition

liability for a collection fee upon the check writer's prior written authorization. Merchants may collect these fees themselves, or they may contract with a debt collection service to collect on their behalf. The DFI has exceeded its statutory authority by limiting the statutory liability imposed by Wis. Stat. § 403.414(7) on a writer of dishonored checks to exclude any liability for collection costs if the collection fee is debited electronically without prior written permission from the check writer.

**D. THE DFI'S RULE IS INCONSISTENT WITH WIS. STAT. § 402.204**

In the guise of enforcing laws related collection agencies, the DFI has also exceeded its statutory authority by creating a rule inconsistent with Wis. Stat. § 402.204. Wis. Stat. § 402.204 states that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Section 402.204 was adopted verbatim from Article 2-204 of the UCC. A conspicuous posted notice stating that, in the event of a dishonored check, the face amount and a collection fee may be collected electronically is a term of sale offered by a merchant. The Electronic Fund Transfer Act and Regulation E permit a merchant to collect a fee electronically if the merchant has posted a notice to customers informing them that the fee will be collected in that manner. A customer who does not wish to enter into a contract which may be subject to an electronically collected fee may pay cash for the goods or services, pay by credit card, or simply refuse to make a purchase.

The DFI has neither the express nor implied authority to enforce laws relating to the conditions under which every merchant in this state may enter into a contract with his/her customers. The DFI has exceeded its statutory authority by requiring merchants, who desire to contract with a third party to electronically collect the fees provided by Wis. Stat. § 403.414(7),

to require prior written authorization from all persons who pay for goods by check, even though only relatively few checks are likely to be returned for insufficient or held funds.

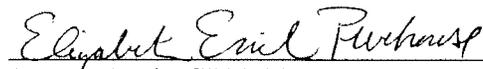
The DFI also has exceeded its statutory authority by effectively creating a different standard for electronic fund transfers initiated by merchants from the standard which the DFI applies to collection agencies who serve as the merchants' agents in collecting the dishonored checks and fees. The DFI does not have either the express or the implied authority to create one standard for merchants and another for their agents, when both are enforcing the same right (to recoup collection costs) by the same means (electronic fund transfer).

### CONCLUSION

CybrCollect has adequately stated claims that the DFI's policy pronouncement is an unpromulgated rule and that the DFI exceeded its authority in making the rule. This Court should deny the DFI's motion to dismiss these claims.

Dated this 2<sup>nd</sup> day of May, 2003.

FOLEY & LARDNER

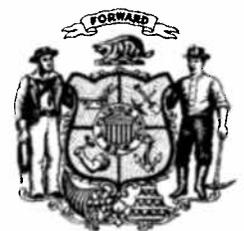
  
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# WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 13

DANE COUNTY

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CYBRCOLLECT, INC.,

Plaintiff,

Case No. OSCV0572

v.

Case Classification Code: 30701  
Declaratory Judgment

THE WISCONSIN DEPARTMENT  
OF FINANCIAL INSTITUTIONS,

Defendant.

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**CERTIFICATE OF SERVICE**

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I, Elizabeth Erickson Pevehouse, hereby certify that I am an employee for the law firm of Foley & Lardner, and that on this day I caused Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss to be served on the following:

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May 2, 2003

  
Elizabeth Erickson Pevehouse