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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 27, 1998

James M. Hatchell, Sr., President
South Carolina Merchants Association
1735 St. Julian Place, Suite 304
Columbia, South Carolina 29204

Re: Informal Opinion

Dear Mr. Hatchell:

You note, by way of background, the following facts:

> [w]e have had concern expressed to us by members regarding the relationship of retail merchants and check guarantee or check collecting businesses. Many of our members use such firms to handle their returned checks.
>
> The basic question on which we need clarification or an opinion is this. Does the fact that a check collecting company acting as agent for a merchant enable the check collecting company or their representative to sign a warrant for a check violation on the merchant's behalf?
>
> It would seem to us that the collection company is merely an extension of the merchant and would have the same rights and responsibilities as would the merchant in a returned check situation.

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Request Letter

Law / Analysis

I have located an Opinion of this Office, authored by Assistant Attorney General Charles Richardson, dated December 18, 1990, which answers your question. In that Opinion, this Office characterized the question posed as follows:

> (m)ay the owner of a business retain a person, engaged in the practice of collecting bad checks for a set fee, for the purpose of sending out required notices and for procuring the warrant for the owner? Assume for the purposes of this question the following information is presented under oath prior to the signing of the fraudulent check warrant:
>
> 1. That the affiant is an agent of the owner;
>
> 2. That the affiant has not purchased the bad check from the owner, nor does the affiant receive a percentage of the amount received;
>
> 3. That the owner will appear at trial to testify and present the case; and
>
> 4. That any restitution money is paid to the owner.
>
> Is this any different than the owner sending over his book-keeper to sign a warrant?

Our earlier opinion, thoroughly reviewed the statutory law in this area as well as prior opinions of this Office which have interpreted those statutes. Moreover, the 1990 Opinion distinguished the situation where a check collection agency purchases the check or acts as an endorsee of the check, from the instance where the collection agency serves merely as an agent of the merchant. The distinction was described in the Opinion as follows:

> [p]ursuant to Section 34-11-70 (a) (1) a procedure for giving written notice so as to establish prima facie evidence of fraudulent intent against the maker of a check is established. If the maker fails to pay the amount of the check, along with

the service charge, "... within ten days after written notice has been sent by certified mail to the address ... (of the maker) ... then the check constitutes prima facie evidence of fraudulent intent against the maker." The statute further provides

> [f]or purposes of subsection (a), notice must be given by mailing the notice with postage prepaid addressed to the person at the address as printed or written on the instrument. The giving of notice by mail is complete upon the expiration of ten days after the deposit of the notice in the mail. A certificate by the payee that the notice has been sent as required by this section is presumptive proof that the requirements as to notice have been met, regardless of the fact that the notice might not actually have been received by the addressee.

A form of the notice required is set forth. Pursuant to subsection 2

> When any person instituting prosecution gives notice in substantially similar form provided in item (1) of this subsection to the person and the bank upon which the instrument was drawn and waits ten days from the date notice is mailed before instituting the criminal proceedings, there arises a presumption that the prosecution was instituted for reasonable and probable cause, and the person instituting prosecution is immune from civil liability for the giving of the notice.

These provisions refer to "a certificate by the payee" and statutory immunity for the person instituting prosecution. The applicability of these provisions to other individuals is not readily apparent.

However, pursuant to subsection (e) of Section 34-11-70 of the Code

> ... subsequent persons receiving a check, ... by endorsement from the original payee or a successor endorsee have the same rights that the original payee has against the maker of the instrument, if the maker of the instrument has the same defenses against subsequent persons as he may have had against the original party. However, the remedies available under this chapter may be exercised only by one party in interest.
>
> The "subsequent persons" referenced are therefore granted the same rights as the original payee.

The 1990 Opinion then referenced an earlier 1987 Opinion which had concluded that an endorsee of a dishonored check could not seek a warrant **as an endorsee**. We enclosed

> ... a copy of a prior opinion of this Office dated October 12, 1987 which dealt with the question of the authority of collection agencies to collect checks which they accept as endorsees even though the agency knows the checks have been dishonored. The opinion concluded that the above-referenced provision would not authorize a collection agency to accept a check as an endorsee in such circumstances and then seek a warrant pursuant to Section 34-11-60 as an endorsee. The opinion specifically referenced that the fraudulent check provisions are not applicable where the payee "... knows, has been expressly notified or has reason to believe that the drawer did not have an account or have on deposit with the drawee sufficient funds to insure payment thereof...."

However, we viewed the issue of whether the collection agency could seek the warrant **not as an endorsee**, but simply as **the agent of the merchant or payee**, in a different light altogether. We referenced Section 22-3-710 of the Code, which provides that "[a]ll proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." We further noted that "[i]t is generally stated that '[a]ny citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person whom he honestly and in good

faith believes to be the offender ... ." 22 C.J.S. Criminal Law, Section 326 p.392. Based upon this body of law, we concluded the following:

> **[t]herefore, any individual could act as an affiant on a warrant, including an individual engaged in the practice of collecting bad checks. Of course, it is within the magistrate's discretion as to whether probable cause has been shown and therefore whether any warrant should issue**. See: S.C. Bench Book, pgs. III 10-13. However, as set forth, by statute the payee on the check must provide the certificate that notice has been sent to the maker of the check and Section 34-11-70(a)(2) limits the immunity from civil liability to "the person instituting prosecution." Again, the applicability of these provisions to other individuals is not readily apparent. (emphasis added).

The 1987 and 1990 Opinions remain the Opinion of this Office. Indeed, there is authority elsewhere that supports the conclusions therein. A 1995 Georgia Attorney General's Opinion, U95-20 (September 14, 1995) appears to be in accord, for example. There, the Georgia Attorney General addressed the question whether "a company in the business of collecting worthless checks for merchants may procure an arrest warrant in its "own name" since such a company could not be considered a "holder in due course," as defined in Georgia's Commercial Code because it takes the check knowing they have been dishonored." The Attorney General of Georgia referenced Calhoon v. Mr. Locksmith Co., 200 Ga.App. 618, 409 S.E. 226 (1991) which held that even though an entity was not a "holder in due course" for purposes of the Uniform Commercial Code, it could be a "holder" for purposes of the Georgia Bad Check Law (§ 16-9-20). Thus, the Georgia Attorney General found, based upon Calhoon, that "[w]here the collection company legally acquires possession of the instruments from the merchants and is entitled to receive payment of the instruments, Calhoon appears to authorize the company to procure an arrest warrant in its own name and to prosecute a person who commits the offense of deposit account fraud." While this conclusion apparently differs from the law in South Carolina as to an endorsee, the Georgia Attorney General went on to conclude that the check collection company could as well seek the warrant as the agent of the merchant. Wrote the Attorney General,

> [o]n the other hand, where the collection company merely acts as an agent for the merchant, the agent/company would need express authorization from the principal/merchant in order to

> obtain an arrest warrant and prosecute a person who commits the offense of deposit account fraud.

While there is case law to the contrary, see, Professional Check Service v. Dutton, 560 So.2d 755 (Ala. 1990), there is other authority which is in agreement with our 1990 Opinion and the above-referenced opinion of the Georgia Attorney General. See, Campbell v. Thompson, BK 86-1697 (Bankr.N.D.Ala, Jan. 12, 1988); affd. CV 88-H-5105-NE (N.D. Ala., May 23, 1988), 1990 WL 71348; Tenn.Op.Atty.Gen. No. 90-63 (May 31, 1991). In the Campbell decision, the Court reasoned that

> [a]lthough the language of the Alabama Worthless Check Act does speak in terms of rights running to the "holder" of worthless checks, this court agrees with the Bankruptcy Court that holders may enlist agents to sign the affidavits leading to the issuance of arrest warrants. Otherwise, merchants must leave their businesses and in many cases travel a considerable distance in order to initiate prosecution against worthless check writers. This court sees no error in hiring an agent to perform such tasks, if in fact the agent acts upon the instruction of the merchant, and the decision to initiate prosecution rests with the merchant, not the agent. In this case there is ample evidence to support a finding that defendants were acting as agents of the area merchants when they signed the affidavits to initiate prosecution. Defendants and the merchants testified that merchants were contacted and questioned specifically as to whether they wanted to proceed with prosecution. There is no evidence that defendants signed the affidavits without express instructions. In contrast to the factual situation presented in the case cited by plaintiff, Lynch Jewelry Company v. Bass, 124 So. 222, 260 Ala. 96 (Ala. 1929), the evidence before this court suggests that limitations were placed on the authority of defendant PCS and Thompson, and that area merchants did retain some supervision and control over the activities of PCS. With regard to the initiation of prosecution, there is no indication that this aspect of PCS services was in any way "out of the hands" of the area merchants. Alabama law defines agency in terms of "control;" based on the record this court concludes that such control was present and therefore defendants in signing the affidavits did not violate the Alabama Worthless Check Act.

Likewise, the Attorney General of Tennessee has concluded that "a representative of a collection agency, which represents a business victimized by a defendant's worthless check, [may] make and sign the affidavit of complaint ... to secure an arrest warrant" for the defendant. Inasmuch as "any person capable of taking an oath can make and sign an affidavit complaint", the Tennessee Attorney General found that such could include a representative of a check collection agency. The Tennessee Opinion went on to note that

> [w]hether the information supplied in the affidavit amounts to probable cause for the issuance of the warrant is a separate question dependant upon the facts of each case. If the affidavit is based on the personal observations of the complainant, only probable cause is required; if based on information from a third person which is heresay, the basis of the knowledge of the third person and his credibility, as well as probable cause, must be shown.

Based upon the foregoing, the 1987 and 1990 Opinions remain the opinions of this Office. Accordingly, those opinions should be followed in answering your question. If the check collection agency or a representative thereof is an endorsee of a check which has been dishonored, such endorsee may not seek a warrant pursuant to the Bad Check Law because the "fraudulent check provision are not applicable where the payee '... knows, has been expressly notified or has reason to believe that the drawer did not have an account or have on deposit with the drawee sufficient funds to insure payment thereof ...'". However, if the magistrate determines that the check collection agency or a representative thereof is seeking to procure the warrant **not as endorsee**, but simply as an agent of the merchant or payee, such representative of the check collection agency could, in accord with the 1990 Opinion, do so upon a proper showing to the magistrate. The 1990 Opinion of the Office assumed the following criteria had been met in this regard:

1. That the affiant is an agent of the owner (merchant or payee);

2. That the affiant has not purchased the bad check from the owner (merchant or payee), nor does the affiant receive a percentage of the amount received;

3. That the owner (merchant or payee) will appear at trial to testify and present the case; and

4. That any restitution money is paid to the owner.

Of course, as with the issuance of any warrant, it will be a matter within each magistrate's discretion to determine, based upon all the facts of the case and the criteria referenced above, whether to issue a warrant upon the affidavit of a representative of a check collection agency. Issues such as whether the check collection agency is acting as an agent of the merchant are uniquely factual in nature and must be decided on a case-by-case basis before each magistrate. What we reiterate here is the conclusion reached by this Office in 1990 that an individual engaged in the practice of collecting bad checks who is acting as an agent of the owner (merchant or payee) of the check is not legally foreclosed upon the proper showing before a magistrate from obtaining a bad check warrant, not as endorsee of the check, but as agent of the owner of the check. Of course, as we emphasized in 1990, it is "within the magistrate's discretion as to whether probable cause has been shown and therefore whether any warrant should issue."

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph