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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 15, 1999

Investigator Todd Johnson
Newberry County Sheriff's Office
Post Office Box 247
Newberry, South Carolina 29108

Dear Investigator Johnson,

Thank you for your letter, dated September 12, 1999, to the Office of the Attorney General, which has been referred to me for a response. You have several questions concerning the stopping of payment on a check and third party merchants.

By way of background, you provide the following information: A trucking company in your county issued a final paycheck to a former driver. After issuing the check, the company realized the amount was incorrect and called the driver's wife to notify him they were stopping payment on the check. The company then notified the bank to stop payment. Upon receipt of the check, the driver took it to a merchant and cashed the check at that business. The check was returned to the merchant as payment stopped.

You first ask whether the company's actions would constitute a violation of South Carolina Code Section 34-11-80, or stopping payment on check, draft, or order with intent to defraud. Section 34-11-80 states, in part:

It shall be unlawful for any person with intent to defraud to stop payment on any check, draft, or other written order on any bank or depository for the payment of money or its equivalent when such check, draft, or other written order was given to obtain money, credit, goods, or services; *provided*, that such money, credit, goods or services were as represented at the time of the issuance of any check, draft, or written order.

Although there appears to be no statutory or case authority in South Carolina on the definition of intent to defraud with respect to this statute, the circumstances you describe do not likely constitute proof of the requisite intent. The fact that the company stopped payment on the check because of a clerical mistake and then attempted to notify the payee of its actions negates any inference that the

Respectfully,
Charlie Condon

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company intended to defraud the driver, or payee, when it issued the check and then stopped payment. Furthermore, an argument could be made that the check was not given "to obtain . . . services," but was for payment for past services, the distinction being that in the former the check is actually tendered to induce the payee to act. In this case, the tendered check and following stop payment order was not to defraud the driver into providing services without pay, but was to rectify an honest mistake of overpayment for past services. Thus, in the opinion of this Office, the circumstances you describe would not be a violation of South Carolina Code Section 34-11-80.

Your second question asks whether the correct affiant for the Stop Payment With Intent to Defraud warrant, under the circumstances, would be the third party merchant who cashed the check or the payee/driver. Because the circumstances do not constitute a violation of Section 34-11-80, it is not necessary to answer this question.

Your third question asks about the standing, generally, of the third party merchant to the maker of the check. The answer to this question can be found in South Carolina's version of the Uniform Commercial Code. These code provisions, however, are extremely complicated, and the slightest factual variation may result in a different conclusion. Therefore, we will attempt to answer your questions generally, but caution against a broad application of this opinion to any other circumstances.

Section 36-3-302 defines a holder in due course, in part, as one who takes a negotiable instrument:

- (a) for value; and
- (b) in good faith; and
- (c) without notice that it is overdue or has been dishonored or any defense against or claim to it on the part of any person

Thus, if a third party merchant has given value for the endorsed over check, has taken the instrument as part of a good faith exchange, and does not have any notice of the impending stop payment order due to the employer's mistake, then the third party merchant is a holder in due course.

Generally, as a holder in due course, the third party merchant takes the instrument, or check, free from "all defenses of any party to the instrument with whom the holder has not dealt." S.C. Code Ann. §36-3-305. In other words, the holder in due course may cut off the defenses of the maker of the check. Therefore, although the drawer of the check generally has a right to stop payment on the check, he will remain liable on the instrument to the holder in due course. See S.C. Code Ann. §36-3-403; *Specialty Flooring Co. v. Palmetto Federal Savings Bank of South Carolina*, 302 S.C. 107, 394 S.E.2d 13 (S.C. Ct. App. 1990); *Bank of Fort Mill v. Rollins*, 217 S.C. 464, 61 S.E.2d 41 (1950). In the circumstances you describe, the employer who made the check would be liable on the check to the third party merchant who is a holder in due course.

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Finally, you ask what liability the indorser assumes when he cashes the check by indorsing it. South Carolina Code of Laws Section 36-3-414 provides:

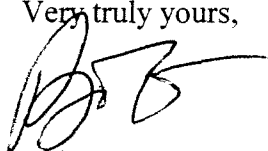
Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

In other words, the indorser assumes indorser liability, or becomes liable on the check, upon dishonor and necessary notice of dishonor, to the holder in due course. In the circumstances you describe, upon dishonor and necessary notice to the driver that the check has been dishonored, the driver becomes liable to the third party merchant for the amount of the check.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to be "R. D. Cook", written over a horizontal line.

Robert D. Cook
Assistant Deputy Attorney General