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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 23, 1996

The Honorable Hugh K. Leatherman, Sr.
Senator, District No. 31
205 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Leatherman:

You seek clarification of Section 34-11-60. You state that the issue arises in the context where "an employee receives his payroll check, goes to the grocery store and cashes that check to buy groceries." You further state that

> [i]f the check is returned due to insufficient funds, then a warrant is taken out against the employee who cashed the check. As was pointed out to me, the employee then not only has to make the check good but actually has a bad credit record due to this action. The comment was, and I concur, that the poor worker has no way of knowing that his payroll check is bad and is not at fault but suffers all the consequences. It seems that the real perpetrator is the person who wrote the check who knew (or should have known) that there were insufficient funds to cover it.
>
> I would like to know is § 34-11-60 can be interpreted so that a warrant can be taken out against either the writer of the check or the person to whom the check was given.

S.C. Code Ann. Sec. 34-11-60 (a) provides that it is unlawful

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Request Letter

> for any person, with intent to defraud, in his own name or in any other capacity, to draw, make, utter, issue or deliver to another, any check, draft or other written order on any bank or depository for the payment of money or its equivalent, whether given to obtain money, services, credit or property of any kind or nature whatever, or anything of value, when at the time of drawing making, uttering, issuing or delivering such check or draft or other written order the maker or drawer thereof does not have an account in such bank or depository or does not have sufficient funds on deposit with such bank or depository to pay the same on presentation, or if such check, draft or other written order has an incorrect or insufficient signature thereon to be paid on presentation.

Section 34-11-90 defines the criminal penalties for such violation. Thus, the question you raise is whether an employee who receives a payroll check from his employer and merely endorses the check for purchase at the grocery store, without any knowledge or information that the check is "bad" as defined in Section 34-1-60, may be criminally prosecuted.

The following is a fundamental principal in the prosecution of cases under a bad check law:

> [a]lthough certain distinctions have been indicated, the crimes denounced by worthless-check statutes are generally regarded as more or less akin to the broader offense of obtaining money or property by false pretenses, and the elements are to a certain extent the same. Thus, an intent to defraud is generally held to be an essential element of the offense under such statute; so, too, are knowledge by accused of the insufficiency or lack of credit, willfulness on his part, and the securing of credit or other thing of value.

35 C.J.S., False Pretenses, § 21. It is also stated elsewhere that

> [i]n order to be convicted under a "worthless check" statute, the defendant when giving the check, must have known of the insufficiency of the funds or the absence of bank credit that would meet the check in full on its presentation.

32 Am.Jur.2d, False Pretenses, § 69.

In an Opinion dated October 3, 1979, we cited an earlier opinion of February 25, 1974 which addressed the issue of whether or not an endorser could be criminally liable under the fraudulent check statute in effect at that time. The 1974 Opinion stated:

> "[t]he worthless check acts are ordinarily not applicable to an endorser, unless it can be established that such person was a party to the scheme to defraud or that he had knowledge thereof." Anderson, Wharton's Criminal Law and Procedure, Vol. 2, Section 613 (1957).

The 1974 opinion also stated that the provision relating to prima facie evidence of fraudulent intent applied only to the drawer or maker of a check.

The October 3, 1979 reaffirmed the 1974 opinion even though there had just been enacted new fraudulent check legislation. There, we stated:

> [w]ith reference to such, it would appear that even pursuant to the recent fraudulent check legislation (R84, R137), such provisions are not applicable to an endorser of a fraudulent check unless the endorser was a knowledgeable party to the scheme to defraud. The law references for the most part actions of the drawer or maker of a check. Also those matters that go to the establishment of prima facie evidence of fraudulent intent apply for the most part to the maker or drawer. Furthermore, as to the definition of the offense of issuing a fraudulent check, it is unlawful for any person "with intent to defraud" to issue a check when at the time of issuance:
>
> > "... the maker or drawer thereof does not have an account in such bank ... or does not have sufficient funds on deposit with such bank or depository to pay the same on presentation, or if such check ... has an incorrect or insufficient signature thereon to be paid upon presentation." ... [citing Section 34-11-60(1)(a)].

> Therefore, the original maker or drawer of the fraudulent check would be criminally liable if the above conditions were established.

This Opinion remains the Opinion of this Office. Unless the facts show that the endorser "was a knowledgeable party to the scheme to defraud", the endorser would not meet the requirement of Section 34-11-60 (a). I would thus see no basis for any prosecution against an endorser unless there was evidence of an intent to defraud.

Baird v. Collier, 123 Ga.App. 276, 180 S.E.2d 577 (1971), a Georgia case, supports this conclusion. There, Collier cashed his weekly pay checks at the defendant's grocery store. Two of the checks were dishonored when presented for payment. Mrs. Baird, the store owner swore out warrants against Collier. Then, Collier's employees met with Mrs. Baird and settled the matter. Some time later Mrs. Baird swore out another warrant against Collier.

In a malicious prosecution brought by Collier against Mrs. Baird, the Court upheld the jury verdict in Collier's favor. The Court concluded:

> Collier would certainly be civilly liable on the check in the capacity in which he indorsed it, but the mere fact that Collier had indorsed a payroll check drawn by his employer at that point in time is not evidence of criminal intent. In our view the jury was authorized to believe from the evidence and from Mrs. Baird's testimony [that she swore out the warrants "to get my money] that Mrs. Baird had no ground to cause a criminal proceeding against Collier. The jury was authorized to infer malice. ...
>
> The jury's verdict and the judgment thereon are supported by the evidence ... .

180 S.E.2d at 578.

Likewise, in OAG 83-121 (April 7, 1983), the Kentucky Attorney General stated that in a criminal prosecution for a "bad check", the "issuing business", not the endorser, is the proper defendant. All of these authorities fully support the principle that merely by endorsing a payroll check, an employee is not subject to criminal prosecution under the "bad check" law. There must be evidence that he or she knew that the funds were insufficient and the endorser was therefore, a "knowledgeable party to the scheme to defraud".

Of course, as the Baird case states, and as we also opined in the October 3, 1979 opinion, an endorser may be civilly liable as an endorser. However, Section 34-11-70 (d) makes it clear that the endorser or payee has a remedy back against the drawer by providing that

> [f]or purposes of this chapter, subsequent persons receiving a check, draft, or other written order 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 make of the instrument has the same defenses against subsequent persons as he may have had against the original payee. However, the remedies available under this chapter may be exercised only by one party in interest.

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