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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 16, 1997

The Honorable Thomas Ed Taylor
Summary Court Judge, Greenville County
8150 Augusta Road
Piedmont, South Carolina 29673

Re: Informal Opinion

Dear Judge Taylor:

You have asked as a follow-up to my letter written to you on September 12, 1997, whether a so-called "check collection agency" may seek a criminal warrant for a "bad check" violation. I apologize as to my confusion as to your original question. You have advised that the check collection agency will first attempt to collect the amount of the check, and if unsuccessful, will then seek a criminal warrant. You further note that when a group of checks is turned over to the agency for collection, these checks are typically stamped "dishonored." In other words, it is your information that when the agency accepts the checks for the purpose of collection, such agency is fully aware that the individual does not have sufficient funds in his or her account to pay the check. It is your position, along with the view of Sheriff Brown and Solicitor Ariail, that a criminal warrant does not lie in this instance because the person knows or has reason to believe that the individual is without sufficient funds in his account to pay the check.

Law / Analysis

Your question has been resolved by a prior opinion of this Office. In an Opinion dated October 12, 1987 we addressed the following factual situation:

> [y]ou have indicated that collection agencies are now accepting endorsements to themselves of checks that have already been dishonored. Relying on the amendment [Section

> 34-11-70 (d)], these agencies are claiming the same rights as the original payee and, according to your information, are initiating prosecutions under the fraudulent check statutes in their own names as endorsees. You have questioned whether the referenced amendment [§ 34-11-70 (d)] authorizes collection agencies to collect checks which they accept as endorsees even though the agency knows the checks have been dishonored. (emphasis added).

We referenced therein § 34-11-70 (d) as an argument made by the check collection agency that such criminal warrant could be sought. Such Section provides as follows:

> [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 maker 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.

However, we concluded that § 34-11-60 (d) is controlling with respect to the foregoing situation. Such section sets forth the following defense:

> [t]his section shall not apply ... to the giving of any check, draft or other written order 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 nor to any check which has not been deposited to an account of the payee within a period of ten days from the date such check was presented to the payee.

Based upon this Section of the "bad check" law, it was our conclusion that a criminal warrant could not be issued. Our reasoning was as follows:

> [i]n the situation you addressed, the collection agency has been informed that a check has been dishonored. Assuming that such is within the scope of the defenses above, in the opinion of this Office, the referenced amendment to Section

> 34-11-70 would not authorize a collection agency to accept a check as an endorsee and then seek a warrant pursuant to Sections 34-11-60 et seq. of the Code as an endorsee. As noted, the fraudulent check provisions are not applicable when 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 ... ."

The foregoing remains the Opinion of this Office. The check collection agency typically has knowledge that the check has been dishonored. Accordingly, pursuant to Section 34-11-60 (d), no warrant could be issued in such a situation.

I would note also that authority in other jurisdictions supports the above legal analysis. In an Opinion dated December 27, 1984, the Mississippi Attorney General, for example, noted that "[t]he term 'collection agency' pretty well defines the nature of its business activity which is to collect and adjust on behalf of its clients, accounts, notes, or other indebtedness for profit, or a fee or commission." The Mississippi Attorney General concluded that

> ... the filing of a criminal affidavit by a collection agency for and on behalf of the holder of a bad check is tantamount to utilizing the criminal process of this State as a means of coercing payment of a civil debt. "[T]he institution of a criminal proceeding under the 'Bad Check Law,' if merely for the purpose of collecting a debt, could render a prosecution malicious." Kitchens v. Barlow, 164 So.2d 745, 751 (Miss. 1964), citing Odum v. Tally, 160 Miss. 797, 134 So. 163 (1931).

In the Kitchens case, the payee of certain bad checks turned the checks over to his agent for collection. The agent sought criminal warrants on the checks as affiant. The plaintiff sued for abuse of process and malicious prosecution, alleging that the warrants were sought on the basis of erroneous information as to the true identity of the signer of the check. The plaintiff contended, in other words, that he was not in fact the person who executed the check to the store. The Mississippi Supreme Court held that the complaint stated sufficient facts to state a cause of action. The Court noted that "the institution of a criminal proceeding under the 'Bad Check Law,' if merely for the purpose of collecting a debt, could render a prosecution malicious."

And in Professional Check Service, Inc v. Dutton, 560 So.2d 755 (Ala. 1990), the Alabama Supreme Court addressed the situation of a check collection agency. The Court described the company's operations as follows:

> Professional Check is a corporation that processes bad checks for merchants. Pursuant to arrangements among the merchants, Professional Check, and various banks, the banks would return dishonored checks directly to Professional Check. Professional Check would then notify the drawer of the check by letter or telephone that the check has been returned and would request payment of the check plus a $10.00 service charge. If the drawer did not respond, Professional Check would send the drawer a certified letter threatening criminal prosecution. Then, if the drawer did not respond to this letter, Professional Check would contact the merchant for further instruction.
>
> If the merchant instructed Professional Check to take the dishonored check to the magistrate, the merchant would complete an information sheet to determine whether the check would be suitable for prosecution. If the check was suitable for prosecution, the president of Professional Check, David Thompson, would present the check to Melba Dutton, clerk of the Morgan County District Court. Mr. Thompson would then testify under oath as to the items on the information sheet and give Ms. Dutton a copy of the certified letter and the returned check. If she found reasonable grounds to believe the drawer was guilty, Ms. Dutton would issue a warrant.

560 So.2d at 756. The Alabama Supreme Court held that it was not proper for the check collection agency to seek the criminal warrant. Reasoned the Court,

> Professional Check argues that it is the agent of the merchants involved and, thus, that it should be allowed to sign the affidavit. The circuit court found that Professional Check was not an agent of the merchants but was "a contractor in the business of collecting money owed for worthless checks given to merchants, i.e., a collection agency." As noted by the circuit court, the settled public policy of this State is that "criminal courts may not and must not be used for the purpose of collecting debts." See Harris v. State, 378 So.2d 257 (Ala.

> Cr. App.), cert. denied, 378 So.2d 257 (Ala. 1979); Tolbert v. State, 294 Ala. 738, 321 So.2d 227 (1975). The circuit court also found that Professional Check was not a holder of the instrument entitled to payment of the check or a holder in due course ... . The record supports the trial judge's findings that the representatives of Professional Check are not agents, holders, or holders in due course.

560 So.2d at 756-757.

Accordingly, the Opinion of this Office of October 12, 1987 is reaffirmed. It is my Opinion that a check collection agency, which has notice or knowledge that checks it seeks to collect have been dishonored, may not seek criminal warrants under the Bad Check Law. Thus, I agree with you, Sheriff Brown and Solicitor Ariail that the remedy of a check collection agency for the collection of bad checks it receives (whether from the bank or the merchant) is civil in nature.

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/an