6525 Libel

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

October 21, 1998

The Honorable Bobby L. Morgan
Greenville County Magistrate
Cleveland Township
Post Office Box 506-3208
Marietta, South Carolina 29661

Re: Informal Opinion

Dear Judge Morgan:

You have asked for an opinion concerning the following situation:

> When a check that has been received for goods or services is returned by the financial institution, a handling fee/service charge is being charged to the individual or business that deposited the check into their account.

You distinguish this charge from the one typically assessed by a bank against its customer when the customer's own check is returned NSF. Your question is as follows:

> [i]s it permissible to request that the writer of the check also reimburse these fees charged by the business bank?

Example:
1. Customer writes check for goods . . . $5.00
2. Business deposits check
3. Customer bank returns check . . . NSF
4. Business bank returns check
5. Business bank charges business . . . $5.00

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Request Letter

You indicate that in this example, "if the customer just paid the check amount, the business would lose $5.00.

Law / Analysis

South Carolina's "bad check" law is set forth at S. C. Code Ann. Sec. 34-11-60 et seq. Section 34-11-70 (a) provides as follows:

> [w]hen a check, a draft, or other written order is not paid by the drawee because the maker or drawer did not have an account with or sufficient funds on deposit with the bank or the person upon which it was drawn when presented or the draft, check, or other written order has an incorrect or insufficient signature on it, and the maker or drawer does not pay the amount due on it, together with a service charge of twenty-five dollars, within ten days after written notice has been sent by certified mail to the address printed on the check or given at the time it is tendered or provided on a check-cashing identification card stating that payment was refused upon the instrument, then it constitutes prima facie evidence of fraudulent intent against the maker. Service charges collected pursuant to this section must be paid to the payee of the instrument.

Subsection (a) (3) also references a service charge, further providing that

> **[a] service charge of not more than twenty-five dollars is** payable by the drawer of a draft, a check, or other written order to the payee of the instrument when the draft, check, or other written order is presented for payment in whole or in part of a then existing debt including, but not limited to, consumer credit transactions, and is dishonored. **This service charge is solely to compensate the payee of the instrument for incurred expenses in processing the dishonored instrument** and is not related to a presumption of fraud so that it is not necessary to issue the notice to the person at the address as printed on the instrument set forth in items (1) and (2). (emphasis added).

Moreover, Subsection (c) addresses the specific situation relating to the authority of a magistrate to dismiss a prosecution under certain conditions:

> [a]ny court, including magistrate's, may dismiss any prosecution initiated pursuant to the provisions of this chapter **on satisfactory proof of restitution and payment by the defendant of all administrative costs accruing not to exceed twenty dollars submitted before the date set for trial after the issuance of a warrant.** (emphasis added).

Finally, § 34-11-90 (c) relates to assessment imposed upon conviction of a first offense "bad check" violation. Such provision states that

> [a]fter a first offense conviction for drawing and uttering a fraudulent check or other instrument in violation of § 34-11-60 within its jurisdiction, the court shall, at the time of sentence, suspend the imposition or execution of a sentence **upon a showing of satisfactory proof of restitution and payment by the defendant of all reasonable court costs accruing not to exceed twenty dollars**. (emphasis added).

In an earlier Opinion, this Office concluded that the "service charge" referenced in § 34-11-70 is not included as one of the charges for which the defendant is responsible after a conviction or plea for drawing a fraudulent check." Op. Atty. Gen., August 29, 1979. That Opinion also referenced § 34-11-90 (d) which further provides that

> [a]fter a conviction or plea for drawing and uttering a fraudulent check or other instrument in violation of § 34-11-60 and the defendant is charged or fined, he shall pay in addition to the fine all reasonable court costs accruing, not to exceed twenty dollars, and the service charge provided in § 34-11-70.

Thus, this Office concluded in the 1979 Opinion that ". . . pursuant to such section there is no provision which requires the further payment of a service charge to a payee in addition to a fine and court costs after a conviction or plea for drawing and uttering a fraudulent check." Id.

Accordingly, the issue is whether the five dollar service charge referenced by you as compensation to the payee for the bank's "charge back fee" is specifically authorized prior to conviction by statute. As I understand it, the twenty dollar payment for "all administrative costs" referenced in § 34-11-70 (c) goes to the county, not to the merchant or payee. On the other hand, the payee is specifically authorized to receive a twenty-five dollar fee by § 34-11-70 (3) "to compensate the payee of the instrument for incurred expenses in processing the dishonored instrument . . . ." No mention is made elsewhere specifically of recovery of the "charge back" fee which may have been imposed upon the payee by the payee's bank. The only other possible provision which could cover such a fee would be within the term "restitution" which is authorized by § 34-11-70 (c).

A number of principles of statutory construction must be considered to determine the answer to your question. First and foremost, is the well-recognized tenet of interpretation that the intent of the General Assembly must govern any question of statutory construction. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). An Act as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Truesdale v. S.C. Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975). Words used therein should be given their plain and ordinary meaning. First South Sav. Bank, Inc. v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990).

Moreover, full effect must be given to each part of the statute, and in the absence of ambiguity, words must not be added or taken from the statute. Home Building & Loan Assn. v. City of Sptg., 185 S.C. 313, 194 S.E. 139 (1938). Statutes in apparent conflict with each other must first be read together and reconciled if possible so as to give meaning to each and to avoid an absurd result. Powell v. Red. Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984). Where, in a legislative enactment, a special provision is made as to a subject which might otherwise be embraced in a general provision on the same subject, the special provision is an exception, and is not to be embraced in the general provision. State v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912).

It is conceivable that the General Assembly intended to include the referenced "charge back" fee imposed by the bank upon the payee in the phrase "restitution" contained in § 34-11-70 (c). However, in general law, restitution means return of a sum of money, an object, which the defendant wrongfully obtained in the course of committing a crime. Op. Atty. Gen., Op. No. 87-97 (December 1, 1987). In addition, typically in a "bad check" case, "restitution" is thought to mean the face value of the check. See, e.g., State v. Pilch, 35 Conn. Supp. 536, 394 A.2d 1364 (1977); Dorsey v. Commonwealth, 132 Pa. Cmwlth. 476,

537 A.2d 628 (1990); In re Inquiry Concerning a Judge, 421 So.2d 1023 (Miss. 1987). Fees charged must usually be expressly authorized by statute. See, Op. Atty. Gen., Op. No. 78-192 (November 13, 1978). Furthermore, an interpretation which concludes that recovery for the additional fee imposed by a bank upon the payee of the check is authorized by use of the term "restitution" would seem to undermine the Legislature's use of the phrase "[a] service charge of no more than twenty-five dollars is payable by the drawer . . . to the payee . . ." and that such service charge "is solely to compensate the payee . . . for incurred expenses in processing the dishonored instrument . . ." in §34-11-70 (3). If an additional five dollars (or thereabout) is authorized to the payee beyond what is mandated by § 34-11-70 (3), it is reasonable to believe the Legislature would have so specified. Such fees are specifically provided by statutes in other states. See, e.g., § 8.01-27.1 (A) (Code of Va.).

Thus, in my opinion, the better construction of the statute is that the $25.00 fee is the exclusive service charge paid to the payee in a "bad check" situation. Certainly, the "charge back" fee imposed by the bank to the payee can be included therein. If it is not the intent of the General Assembly, that this fee be exclusive in terms of the payee's recovery for administrative costs (in addition to "restitution") then, the Legislature should clarify the "bad check" statute to make it express that a bank "charge back" fee imposed upon the payee may be collected in addition to the twenty-five dollar fee referenced in § 34-11-70 (3). Until such clarification occurs, however, I would advise that the statute should be construed conservatively so as to authorize a $25.00 service charge for the payee.

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