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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 31, 2004

The Honorable Edward H. Overcash, Jr.
Associate Chief Judge
Spartanburg Magistrate Court
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, South Carolina 29306-2392

Dear Magistrate Overcash:

In a letter to this office you referenced the implementation of Worthless Check Units in solicitor's offices which result from a provision in the 2004-2005 General Appropriations bill. Such provision states in part that:

A Circuit Solicitor may establish, under his direction and control and with the agreement of the county governing body, a Worthless Check Unit for the purpose of processing worthless checks and to assist the victims of these cases in the collection of restitution. The fee schedule shall be fifty dollars for checks up to \$500, one hundred dollars for checks \$501-\$1,000, and one hundred-fifty dollars for checks \$1,001 or greater. An amount equal to the allowable administrative costs contained in Section 34-11-70(c)...(not to exceed forty-one dollars)... must be added to the fee. All fees, other than court costs and an amount equal to the allowable administrative costs contained in Section 34-11-70(c) which must be remitted to the treasurer for deposit in the county general fund, collected by the Worthless Check Unit in accordance with the fee schedule promulgated under this proviso must be deposited into a fund known as the Worthless Check Fund maintained by the county treasurers of the counties comprising the circuit...The Worthless Check Unit shall disburse to the victim all restitution collected in connection with the original complaint filed.

Such fees are in addition to those fees established by the fraudulent check provisions of the State Code. Pursuant to S.C. Code Ann. Section 34-11-70 (a) (Supp. 2003)

When 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

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drawer does not pay the amount due on it, together with a service charge of thirty 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.

(1) For 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 actually might not have been received by the addressee. The form of notice must be substantially as follows:

"You are notified that a check or instrument, numbered ____, issued by you on ____ (date), drawn upon ____ (name of bank), and payable to ____, has been dishonored. Pursuant to South Carolina law, you have ten days from the date this notice was mailed to tender payment of the full amount of the check or instrument plus a service charge of thirty dollars, the total amount due being ____ dollars and ____ cents. Unless this amount is paid in full within the specified time above, the holder of the check or instrument may turn over the dishonored check or instrument and all other available information relating to this incident to the solicitor or other appropriate officer for criminal prosecution."

(2) When a person instituting prosecution gives notice in substantially similar form provided in item (1) to the person 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.

Pursuant to S.C. Code Ann. Section 34-11-70 (c) (Supp. 2003)

Any court, including magistrates, 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 forty-one dollars submitted before the date set for trial after the issuance of a warrant.

You also forwarded a copy of a letter from a solicitor's office intended to be sent to potential defendants which outlines the fees referenced above. Such letter states in part that "(u)nless this

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amount is paid in full by the specified time above, a warrant will be issued for your arrest.” You have requested an opinion from this office as to the appropriateness of issuing a fraudulent check warrant based upon this type letter. You also questioned the potential liability of a merchant who signs a fraudulent check warrant based upon a letter similar to the one described in your letter.

Without question, the fees set forth by the referenced provision in the Appropriations Act are legitimate fees duly enacted by the General Assembly. These fees are, however, distinctive from those fees established pursuant to Section 34-11-70 in that the Appropriations Act fees are part of a diversionary program established by the solicitors. The fees authorized by the Appropriations Act provision are not part of the probable cause determination for purposes of Section 34-11-70. As clearly set forth by Section 34-11-70, when a check is not paid by the maker together with a service charge of thirty dollars within ten days after written notice is sent by certified mail, then prima facie evidence of fraudulent intent against the maker is statutorily made. No such similar determination is made as to those fees authorized by the Appropriations Act provision. As a result, the failure to pay those fees authorized by the Appropriations Act provision does not factor into the finding of prima facie evidence of fraudulent intent. If the drawer of the check pays the thirty dollar fee, there is no longer the statutorily granted presumption of fraudulent intent.

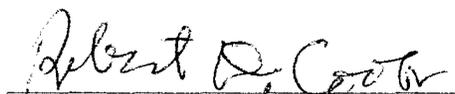
As to your question as to the potential liability of a merchant resulting from the issuance of the letter from the solicitor’s office referenced by you, as stated in the provision referenced above, when an individual “...instituting prosecution gives notice in substantially similar form provided in item (1) to the person 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.” The proposed letter in including the additional language referenced above regarding the fees beyond the thirty dollar fee, is not “substantially similar” to that set forth in Section 34-11-70 (a)(1). The General Assembly has not seen fit to go beyond the payment of the thirty dollar fee in terms of providing statutory immunity.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General