



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 29, 2004

The Honorable David L. Thomas
Senator, District No. 8
23 Wade Hampton Boulevard
Greenville, South Carolina 29609

Dear Senator Thomas:

In a letter to this office you referenced the provisions of proviso 33.6 of Act 248 of 2004, the appropriations act, which state:

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) 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. All funds collected and deposited in this fund shall be applied first to defray the costs of operation of the Worthless Check Unit with the balance thereof to be used by the Solicitor to pay normal operating expenses of his office. Withdrawals from this account shall be made only at the request of the Solicitor. The funds generated pursuant to this proviso must not be used to reduce the amount budgeted by the county to the Solicitor's office. The Solicitor shall further maintain an account for the purpose of collection and disbursement of restitution of all funds collected for the benefit of the victims of the worthless check. The Worthless Check Unit shall disburse to the victim all restitution collected in connection with the original complaint filed. If the victim cannot be located after a reasonable time and upon diligent efforts to locate him, the restitution due the victim must be transferred to the general fund of the county.

The Honorable David L. Thomas

Page 2

October 29, 2004

You have questioned the legality of such provision, particularly questioning the use of the color of law enforcement/criminal action to achieve a civil result. You also questioned whether such provision conflicts with the Unfair Trade Practices Act or Section 37-5-108 of the Consumer Protection Code. You further questioned the provision's legality based upon a possible federal 1983 violation.

As noted in an opinion of this office dated August 11, 2004, the fees set forth by the cited proviso in the Appropriations Act 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 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.

As to your question regarding the use of the color of law enforcement/criminal action to achieve a civil result, to the extent that it is asserted that in the establishment of a Worthless Check Unit in a solicitor's office there is the utilization of a criminal process in order to achieve a civil result, the Legislature has specifically authorized by the referenced provision 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.

Such is consistent with Section 34-11-70 (c) that a court "... may dismiss any prosecution initiated...on satisfactory proof of restitution and payment by the defendant of all administrative costs...."

Such enactments are consistent with the plenary authority of the State Legislature to enact legislation. It is a well-recognized principle that

The General Assembly is a creature of the Constitution. Ours is not a grant of authority to the General Assembly; it is a limitation on the General Assembly. The legislature, under its plenary powers, may enact any law not specifically, or by implication prohibited.

Duncan v. County of York, 267 S.C. 327,336, 228 S.E.2d 92,96 (1976). Therefore, in this case and in any other, the General Assembly has the power to enact any law not prohibited by the Constitution. Referencing Section 34-11-70(c) and the referenced provision of the Appropriations Act, the Legislature has authorized the establishment by solicitors of a Worthless Check Unit along with the dismissal of any prosecution initiated on a bad check charge upon proof of restitution and payment by the defendant of all administrative costs. Therefore, the compromise of a criminal action, the making and giving of a fraudulent check, is specifically authorized by law. I know of no constitutional impediment to such statutory provisions. Consistent with such, an opinion of this office dated May 2, 1980 noted that it has been held that an individual who accepts payment of an amount due him and who thereafter causes criminal charges against the debtor to be dismissed, is not liable for an abuse of criminal process charge where there is statutory authority, such as Section 34-11-70(c), for such a compromise.

Moreover, as to the establishment of Worthless Check units in solicitors' offices in association with the handling of bad check cases by a solicitor, it is generally held that the motives of a prosecutor as to the handling of a particular case cannot be questioned absent some violation of constitutional mandates. Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000). Such is consistent with the general rule that the motives of a prosecutor on whether or not to launch a prosecution cannot be second-guessed. See: Op. Alabama Attorney General dated March 15, 2004. In that same opinion of the Alabama Attorney General it was stated that

A prosecutor is not subject to judicial supervision in determining what charges to bring...he is protected from judicial oversight by the doctrine of separation of powers.

As determined by the Court of Appeals in Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396 (Ct.App. 1999),

Under the separation of powers doctrine...the executive branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.

Such is consistent with the statement by the Florida District Court of Appeal in State v. Bauman, 425 So.2d 32, 34 (1983) that

...there is considerable authority for the proposition that prosecutorial discretion is itself an incident of the constitutional separation of powers, and that as a result the courts are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over criminal prosecutions.

See also: State v. Kinchen, 707 A.2d 1255, 1260 (Conn. 1998) ("There can be no doubt that the doctrine of separation of powers requires judicial respect for the independence of the

prosecutor...Prosecutors, therefore, have a 'wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law.'"). In my opinion, the establishment of Worthless Check units in solicitors' offices in association with the handling of bad check cases by a solicitor are within the scope of prosecutorial authority of a solicitor.

With regard to your particular questions regarding the Unfair Trade Practices Act and the Consumer Protection Code, the prior August, 2004 opinion of this office noted that "(w)ithout question, the fees set forth by the referenced provision in the Appropriations Act are legitimate fees duly enacted by the General Assembly". Therefore, the provision authorizing Worthless Check Units in solicitors' offices was duly authorized by the General Assembly and the solicitors' offices establishing such units are merely implementing the law as enacted. Being a lawful enactment of the legislature, the provision cannot be considered as violating other State statutory provisions. Such analysis is somewhat akin to the general rule of statutory construction that different statutes in *pari materia*, although enacted at different times, and not referring to each other must be construed together as one system and as explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934). Such rule is instructive in the conclusion that there can be no question of illegality based upon this State's Unfair Trade Practices Act¹ or Section 37-5-108 of the Consumer Protection Code as the provision authorizing the Worthless Check Units stands on its own merit as a lawful enactment of the General Assembly.

As to your question regarding a possible federal 1983 violation, it is similarly my conclusion that there is no constitutional claim at issue with regard to the provision cited above. In my opinion, the establishment of the Worthless Check Units by the solicitors in this State does not violate any right or privilege protected by the federal Constitution. Moreover, a prosecutor, for reasons of public policy, enjoys absolute immunity under the common law from civil liability in tort actions brought in state courts and in Title 42 U.S.C. § 1983 actions in federal court when acting within the scope of his or her prosecutorial duties. See Imbler v. Pachtman, 424 U.S. 409 (1976). In Imbler, the Court stated that

The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the

¹Regardless of our conclusion that the legislation authorizing Worthless Check Units stands on its own merit as a lawful enactment of the General Assembly, S.C. Code Ann. Section 39-5-40 (1985), a provision of this State's Unfair Trade Practices Act, states in part that nothing in such Act "...shall apply to (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State...or actions or transactions permitted by any other South Carolina State law."

The Honorable David L. Thomas
Page 6
October 29, 2004

independence of judgment required by his public trust...The common law rule of immunity is thus well settled. We now must determine whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under Section 1983. We think they do.

Id. at 422-424.

Such immunity includes a prosecutor's activities "intimately associated with the judicial phase of the criminal process." Id. at 430. An opinion of the Texas Attorney General dated January 24, 2000 concluded that "...the collection and processing of bad checks by...(the prosecutor's office)...done in connection with criminal prosecutions...is, in our view, "intimately associated with the judicial phase of the criminal process." With regard to checks processed by a Worthless Check Unit, potential criminal prosecution awaits those individuals who fail to make restitution. Consistent with such, again, it is my conclusion that there is no constitutional claim nor possible federal 1983 violation at issue with regard to the provision authorizing the establishment by solicitors of Worthless Check Units.

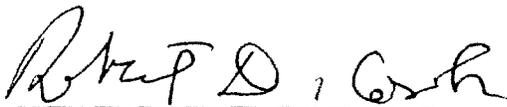
With kind regards, I am,

Very truly yours,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General