

6313 *Lilbury*



The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

September 12, 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 sought an opinion regarding the following situation:

1. 34-11-60(d).

[i]s it legal for a magistrate to permit a check collection agency to sign a criminal warrant on dishonored checks when this agency has accepted said checks, paid in full for them and knowing that they have been dishonored.

2. Merchants are turning over their dishonored checks to these agencies; the agencies are paying the merchants in full for said checks. Some agencies are even advertising ... payment in full within fifteen days.

3. This court is of the opinion that if someone accepts a check knowing that it is bad, then their only recourse for collection is [through] the civil courts. I have discussed this matter with Sheriff Brown and Solicitor Ariail and they both agree with this court's opinion.

*Respectfully,  
Charles Molony Condon*

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4. This court is aware that it has the right to refuse to issue a warrant, and has done so for some of the companies. We also have some questions/problems with permitting an affiant [to] sign a warrant on behalf of another and them not being a police officer.

I agree with your, Sheriff Brown's and Solicitor Ariail's reading of the law. In an Opinion of this Office, Op. Atty. Gen., Op. No. 94-31 (May 19, 1994), we addressed the same situation about which you inquire in your letter. There, a "check cashing" store cashed post dated checks for customers for a fee. A customer needing to borrow \$150 "writes one of these businesses a check for \$200 and dates it for several days in the future. The customer received \$150 in cash from the business and promises repayment by the issuance of the post dated check." The question posed therein was "whether a fraudulent check warrant can be issued in such circumstances." We referenced Section 34-11-60(a) which provides in pertinent part that:

[i]t is unlawful for a person, with intent to defraud ... to draw ... a check ... for the payment of money or its equivalent, whether given to ... obtain the time ... the drawer does not have an account in the bank ... or does not have sufficient funds on deposit ... to pay the same on presentation ... .

Also referenced therein was Subsection (d) which states that

[t]his section does not apply ... to the giving of any check, ... 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 of the check ... . It is also unlawful for any person to induce, solicit, or to aid and abet any other person to draw, make, utter, issue, or deliver to any person including himself any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, being informed, knowing, or having reasonable cause for believing at the time of the inducting, soliciting, or the aiding and abetting that the maker or the drawer of the check, draft, or other written order has not sufficient funds on deposit in, or an account with, the bank or depository with which to pay the same upon presentation.

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While we did not state expressly in the Opinion that a criminal warrant could never be issued in such situation, we did note that "the fraudulent check statute does not apply to situations where the payee knows, has been notified or has reason to believe that sufficient funds are not on deposit to pay the check being issued or that the drawer does not have an account with the bank."

In addition, an Informal Opinion written by me and dated February 6, 1995 concluded that "[d]espite the removal of language [from Subsection (d)] expressly exempting post-dated checks, it is our belief that the statute continues to exempt such checks." We noted also that

[s]ome courts have held that the fact that a worthless check is post-dated, "in and of itself precludes a conviction for making and passing the check in violation of a bad check statute." 52 A.L.R.3d 464, 470. A post-dated check on its face implies notice that there is no money presently on deposit available to meet it. Commonwealth v. Kelson, 199 Pa.Super. 135, 184 A.2d 374 (1962). Moreover our Supreme Court has held that a post-dated check is merely a promise on the part of the drawer to do a future act and have funds in the bank at the future time stated in the check, and this would be no more than an obligation to pay in the future and the check would be an evidence of debt. State v. Winter, 98 S.C. 294, 82 S.E. 419 (1914). (New trial granted where trial court failed to allow defendant to show by the prosecuting witness that check was dated ahead).

Other cases have held that where a bad check statute is made inapplicable if the payee is notified of insufficient funds in the bank to pay the check, or where the payee of any check has information that the maker has insufficient funds on deposit, post-dated checks are exempted from the statute's coverage. Seaboard Oil Co. v. Cunningham, 51 F.2d 321, cert den., 284 U.S. 657, 76 L.Ed. 557, 52 S.Ct. 35 (5th Cir. 1931). Even though the Legislature has now removed the former provision expressly exempting postdated checks from the statute, a fact often creating the presumption of repeal, see 1A Sutherland Statutory Construction, Section 23-12 (4th ed.). I would advise that post-dated checks are still exempt from the statute because of the language therein exempting criminal

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liability where the payee "knows, has been expressly notified or has reason to believe that the drawer did not ... have on deposit with the drawee sufficient funds to insure payment of the check ...". Thus, the bad check law covers neither post-dated checks, checks given for a prior or pre-existing debt or those known by the payee to be bad at the time they are received.

These guiding principles would typically apply to a check-cashing business or service. While this Office cannot determine facts in an Opinion, see Op. Atty. Gen. Dec. 12, 1983, it is evident that in the typical situation, a check-cashing business either "knows, has been expressly notified or has reason to believe that the drawer did not have on deposit with the drawee sufficient funds to insure payment of the check." As I understand it, checks cashed by these businesses are usually post-dated and the person is charged a fee for the service of the check-cashing. Thus, typically the cashier of the check would have reason to believe there were insufficient funds in the person's account.

Accordingly, where the magistrate has facts to indicate such, no warrant should issue for a violation of the bad check law. Thus, I agree with you, Sheriff Brown and Solicitor Ariail that a criminal warrant generally could not be issued in this type of situation. The remedy of the holder would normally be 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