

1979 WL 43000 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 17, 1979

*1 Mr. James M. Hatchell
Executive Vice President
South Carolina Merchants Association
Suite 105, 1215 Lady Street
Columbia, South Carolina 29201

Dear Mr. Hatchell:

In your letter of May 4, 1979 you asked whether pursuant to the recently enacted fraudulent check act, a check given as a down payment on merchandise when credit terms are subsequently arranged is included in the referenced act.

As you are aware, [Section 34-11-60 of the 1976 Code](#) was amended to read:

(i)t shall be unlawful for any person, with intent to defraud, in his own name or in any other capacity, to draw, make, utter, issue or deliver to another, any check, draft or other written order on any bank or depository for the payment of money or its equivalent, whether given to obtain money, services, credit or property of any kind or nature whatever, or anything of value, when at the time of drawing, making, uttering, issuing or delivering such check or draft or other written order the maker or drawer thereof does not have an account in such bank or depository or does not have sufficient funds on deposit with such bank or depository to pay the same on presentation, or if such check, draft or other written order has an incorrect or insufficient signature thereon to be paid upon presentation.

It is further provided by paragraph (d) of such section that:

(t)he word 'credit' as used in this section shall be construed to mean securing further advances of money, goods or services by means of a check, draft or other written order, given in whole or in part payment of a then existing account . . . This section shall not apply to any postdated check or to any check given only in full or partial payment of a preexisting debt, or 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.

In the opinion of this Office, a check given as a down payment on merchandise when credit terms are subsequently arranged may be included within the definition of a fraudulent check as above defined. Therefore, unless such check comes within one of the descriptions of checks expressly precluded from being determined to be fraudulent by the referenced paragraph (d) of [Section 34-11-60](#), supra, prosecution of the maker of such check could be initiated.

As to the question put forth in your letter of May 10, 1979 concerning whether the fraudulent check notice used by the K-Mart Corporation (a sample of which was included in your letter) is sufficient to comply with the provisions of the recent fraudulent check act, please be advised that, in the opinion of this Office, it does. As you referenced in your letter, Paragraph (a) of [Section 34-11-70 of the 1976 Code](#) of Laws, as amended, states that prima facie evidence of fraudulent intent against the maker is provided by mailing notice to the maker that the drawee has refused payment on a check. A suggested form is supplied by such section. However, it is also indicated that the 'form of notice shall be substantially as follows . . .' It appears that the K-Mart Corporation's form is 'substantially' the same as the suggested form and

therefore may be used to provide prima facie evidence of fraudulent intent against the maker. However, it is specifically provided by the act that a fifteen day time period is required to be given to make payment and a service fee of five dollars may be charged. Therefore, even though the K-Mart form has blanks where such information would be supplied, reference should be made to such time period and service charge amount.

*2 If there are any questions, do not hesitate to contact me.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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