

1979 WL 43504 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 6, 1979

\*1 Mr. Irvin D. Parker  
Administrator  
Department of Consumer Affairs  
Post Office Box 5757  
Columbia, South Carolina 29250

Dear Mr. Parker:

In a letter to this office you raised a question concerning the recent Fraudulent Check Act. Specifically you asked: Does Section 34-11-70 as amended apply to installment payments on a debt with the result that a five (\$5.00) dollar service charge is permitted in the circumstances outlined in Subsection (a) of that Section.

Section 34-11-70, as amended, states in part:

When any check, draft or other 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 such draft, check or other written order was drawn when presented or the draft, check or order has an incorrect or insufficient signature thereon, and the maker or drawer of such check, draft or other written order fails to pay the amount due thereon, together with a service charge of five (\$5.00) dollars, within fifteen (15) 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 such check shall constitute prima facie evidence of fraudulent intent against the maker.

You indicated in your letter that Section 34-11-60, as amended, states in part in Subsection (d) 'This Section shall not apply . . . to any check given only in full or partial payment of a preexisting debt . . . ' (Emphasis added.) You further stated that no similar language is included in Section 34-11-70, as amended, the section which provides by statute for a five (\$5.00) dollar service charge. Therefore, you have asked whether that limitation contained in Section 34-11-60, as amended, applies to Section 34-11-70, as amended, or does Section 34-11-70, as amended, stand on its own and permit the five (\$5.00) dollar service charge as to 'any check . . . not paid by the drawee' for those reasons indicated in Section 34-11-70(a). You specifically referenced the situation involving a check given by a consumer who makes installment payments to pay back obligations arising from consumer loans which under Section 34-11-60, as amended, would constitute a payment on a preexisting debt and therefore would not be deemed to be a fraudulent check.

With reference to the above, even though Section 34-11-70, as amended, does allow a five (\$5.00) dollar service charge on 'any check' returned because the maker or drawer did not have an account with or sufficient funds on deposit with the bank or the person upon which such draft, check or other written order was drawn when presented or the draft, check or order has an incorrect or insufficient signature thereon, that Section does go on to say that failure to pay in response to notice sent by certified mail constitutes prima facie evidence of fraudulent intent against the maker. Therefore it appears that the service charge of five (\$5.00) dollars is applicable by statute to those checks upon which prosecution for tendering a fraudulent check could result. Therefore, while in the first part of the sentence it does reference 'any check, draft or other order' not paid for those various reasons listed by Section 34-11-70, as amended, in the opinion of this Office, the limitation as to checks given in payment of a preexisting debt expressed in Section 34-11-60, as amended, applies to Section 34-11-70, as amended, with the result that the five (\$5.00) dollar service charge is not permitted by statute for

checks given as an installment payment on a debt which are returned for these reasons provided in Section 34-11-70, as amended. A construction of the Section in its entirety results in the conclusion that the Legislature provided a service charge only on those checks the makers of which could be prosecuted for issuing a fraudulent check and inasmuch as a check given as an installment payment on a debt would be a 'payment on a preexisting debt' the service charge is not permitted by statute.

\*2 If there is anything further do not hesitate to contact me.

Sincerely,

Charles H. Richardson  
Assistant Attorney General

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