STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

September 29, 1975

ATTORNEY GENERAL OPINION NO. 75-381

Mr. Richard E. Samson
Stevens County Attorney
P. O. Box 759
Hugoton, Kansas 67951

RE: Crimes and Punishments -- Crimes Against Property -- Worthless Checks

SYNOPSIS: The worthless check statute applies generally to checks given in payment for antecedent debts. However, whether a violation may be said to exist in a particular situation will depend upon whether the totality of the circumstances demonstrate the existence of the requisite "intent to defraud."

The worthless check statute applies to checks given in exchange for services.

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Dear Mr. Samson:

You inquire whether K.S.A. 21-3707, the worthless check statute, applies to worthless checks given for pre-existing debts and to such checks given in exchange for services. This response will address the questions raised in the order of their presentation.

K.S.A. 21-3707(1) provides as follows:

> "Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank or depository for the payment of money or its equivalent with intent to

> defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft as aforesaid, that the maker or drawer has no deposit in or credits with such bank or depository or has not sufficient funds in, or credits with, such bank or depository for the payment of such check, order or draft in full upon its presentation."

The primary consideration in determining whether this statute proscribes the giving of worthless checks for pre-existing debts would seem to be the meaning of the phrase, "intent to defraud". This key phrase is defined in K.S.A. 21-3110(a) as follows:

> "'Intent to defraud' means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." (Emphasis supplied.)

From a perusal of this definition, it becomes apparent that the mere giving of a worthless check for a pre-existing obligation, without more, would not constitute a violation of the statute.[1] Only when the subsequent giving of the check is simultaneously accompanied by an "intent to defraud" will the act come within the prohibitions of the statute. Thus, the giving of the check coupled with the requisite fraudulent intent to induce the payee to alter some existing right he possesses respecting property or to refrain from exercising such right, would seem to fall within the conduct prohibited by K.S.A. 21-3707(1). As an example, a check given for merchandise already received but not paid for in order to fraudulently forestall the vendor's accrued right of foreclosure or repossession would violate the statute. See generally, Annotation, 59 ALR2d 1159; State v. Blasi, 64 N.J. 51, 312 A.2d 135 (1973); State v. Riccardo, 32 N.J. Super. 89, 107 A.2d 807 (1954).

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[1] If the statutory presumption of §21-3707(2) commences to operate after notice of dishonor by the drawee to the drawer, a prima facie case of a statutory violation would seem to be established even though the check was given for an antecedent consideration. However, the presumption could be rebutted by the introduction of competent evidence on the intent question. For a general discussion of the mechanics of the statutory presumption, see State v. Haremza, 213 Kan. 201, 515 P.2d 1217 (1973).

Past consideration or no, whether an intent to defraud exists in a particular situation must be determined from the totality of the circumstances of each case. State v. Goerdes, 48 N.J. Super. 293, 137 A.2d 100 (1957). However, in the usual setting where a worthless check is subsequently given in payment for a pre-existing obligation, no criminal conduct will occur because of the absence of an attempt by the drawer to simultaneously obtain something of value therefor, i.e., an "intent to defraud" will be absent. State v. Blasi, supra; State v. Davis, 26 N.M. 523, 194 P. 882 (1921); 35 C.J.S. False Pretenses, §21c.

Secondly, you ask whether the Kansas statute applies to checks given in exchange for services. Although the question is not free from doubt, we believe that the prohibition of K.S.A. 21-3707 extends to the obtaining of another's services by means of a fraudulent check.

The Kansas statute is facially silent concerning the subject of fraudulently obtaining services via a worthless check. However, some indication of legislative intent is provided by an examination of the phrase "intent to defraud" in K.S.A. 21-3110(a), wherein the phrase is defined in terms of inducing another to modify his rights concerning "property". This latter term is itself defined in K.S.A. 21-3110(16) and means "anything of value, tangible or intangible, real or personal."

If read in a literal fashion, this expansive definition would seem to include services since they are definitely "of value" and are the product of one's property interest in the labor of his person. In light of the overall legislative intent to modernize this area of the criminal law in the 1970 revisions by eliminating archaic common law precepts, it seems reasonable to read the statute according to its terms and conclude that services are within the ambit of §21-3707. This conclusion does not render K.S.A. 21-3704 (theft of services) mere surplusage since that statute is much broader in scope than §21-3707 and prohibits a broad area of misconduct not within the worthless check law.

Therefore, upon review of the initial question posed by your inquiry, we conclude that a worthless check given for an antecedent debt can constitute a violation of K.S.A. 21-3707 under the appropriate circumstances. Secondly, we believe that the statute likewise proscribes the deceptive taking of services by means of a worthless check.

Sincerely,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

CTS:RMT:en