October 12, 1978

ATTORNEY GENERAL OPINION NO. 78-330

Mr. Doug Brunson
221 South Main
Greensburg, Kansas 67054

Re: Crimes And Offenses--Worthless Checks--Prosecution

Synopsis: Pursuit of civil remedies by a holder of a worthless check does not bar criminal prosecution of the maker.

*     *     *

Dear Mr. Brunson:

You inquire whether criminal prosecution of the maker of a worthless check is barred if the holder sues the maker in a civil suit, obtains a judgment, executes on the judgment by garnishing the maker's bank account thereby recovering part of the money owed.

The relevant portion of K.S.A. 21-3707 is set forth below:

"(2) In any prosecution against the maker or drawer of a check, order or draft payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank or depository, providing such maker or drawer shall not have paid the holder thereof the amount due thereon and a service charge not exceeding three dollars ($3) for each check, within seven (7) days after notice has been given to him that such check, draft, or order has
not been paid by the drawee. The word "notice," as used herein, shall be con-
strued to include notice to the person entitled thereto given orally as well
as notice given to such person in writing. Notice in writing shall be presumed to
have been given when deposited as re-
stricted matter in the United States mail,
addressed to the person to be charged with
notice at his address as it appears on
such check, draft or order."

The statute provides that prosecution cannot ensue if the maker has
paid the holder the amount due within seven days after notice has
been given. Full payment makes the holder complete again. Partial
payment with a promise to repay the balance changes the nature of
the transaction. Where the maker pays or agrees to pay the check
voluntarily, and within the time prescribed, there is little basis
upon which to infer intent to defraud.

However, if the holder merely pursues his or her legal civil remedies
there is no bar to prosecution. The intent to defraud may still be
inferred from the maker's refusal to pay the check voluntarily. Pay-
ment after judgment, execution and garnishment is involuntary and not
made with the intent to renegotiate the debt.

The general provisions of the criminal code, K.S.A. 21-3103, states
that civil remedies are preserved:

"This code does not bar, suspend or
otherwise affect any civil right or
remedy, authorized by law to be en-
forced in a civil action, based on
conduct which this code makes punish-
able; and the civil injury caused by
criminal conduct is not merged in the
crime."

Nothing in K.S.A. 21-3707 takes exception to this general rule.
Accordingly it is my opinion that the holder's action in pursuing
a civil suit against the maker of a bad check does not bar criminal
prosecution of the maker.

Sincerely,

CURT T. SCHNEIDER
Attorney General

CTS:LCD:jj