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ATTORNEY GENERAL OPINION NO. 90- 93

The Honorable Nancy Parrish
State Senator, 19th District
3632 SE Tomahawk Drive
Topeka, Kansas 66605

The Honorable Alicia L. Salisbury
State Senator, 20th District
1455 SW Lakeside Dr.
Topeka, Kansas 66604-2556

The Honorable Susan Roenbaugh
State Representative, 114th District
R.R.
Lewis, Kansas 67552

Re: Crimes and Punishments -- Crimes Against Property -- Giving a Worthless Check; Statutory Service Charge; Intent to Defraud; Preexisting Indebtedness; Notice; Refusal of Payment

Consumer Credit Code -- Consumer Credit Transactions; Other Charges and Modifications -- Additional Charges; Statutory Service Charge; Preexisting Indebtedness; Notice; Refusal of Payment

Procedure, Civil -- General Provisions -- Civil Liability for Worthless Check; Statutory Service Charge; Preexisting Indebtedness; Notice; Refusal of Payment

Synopsis: In comparing and contrasting the three Kansas worthless check statutes, this opinion reaches the following conclusions: Pursuant to the criminal

code, the civil procedure code and the uniform consumer credit code, the maximum allowable service charge for a worthless check is ten dollars; while it is unclear whether the criminal worthless check statute covers preexisting indebtedness, the civil procedure code and the uniform consumer credit code provide legal remedies to the holder of a worthless check given in payment of a preexisting debt; notice requirements vary between the criminal code, the civil procedure code and the uniform consumer credit code regarding worthless checks; actual refusal of payment is not an element of a criminal offense of giving a worthless check, but notice is a prerequisite to a civil cause of action and of the uniform consumer credit code prior to adding the allowable statutory service charge. Cited herein: K.S.A. 16a-2-501, as amended by L. 1990, ch. 209, § 2; K.S.A. 21-3103; 21-3110; K.S.A. 1989 Supp. 21-3707; 60-2610, as amended by L. 1990, ch. 209, § 1.

* * *

Dear Senators Parrish and Salisbury, and Representative Roenbaugh:

As members of the Kansas Legislature you ask our opinion on several issues relating to the three Kansas worthless check statutes.

Initially you ask whether the statutory $10.00 service charge provided for by K.S.A. 1989 Supp. 21-3707 (criminal code), by K.S.A. 1989 Supp. 60-2610, as amended by L. 1990, ch. 209 (civil cause of action), and by K.S.A. 16a-2-501, as amended by L. 1990, ch. 209 (uniform consumer credit code) is the maximum fee a holder may charge against a maker who issues a worthless check. This question is asked in light of Merrel v. Research and Data, Inc., 3 Kan.App.2d 48 (1979), wherein the court held that the $3.00 maximum statutory service charge found within the criminal code did not limit the right of merchants to expressly contract for a higher service charge on worthless checks by way of a conspicuously posted sign. The court found that "the fee contracted for might in some cases be so large as to be unconscionable," Id. at 52, but did not find the element of unconscionability under the facts presented (fee of $5.00 per check and ten percent of the face amount of those over $20.00).

At the time of the Merrel decision in 1979, neither K.S.A. 60-2610 nor the worthless check provision of K.S.A. 16a-2-501 had been enacted. However, the Kansas criminal code pursuant to K.S.A. 21-3707 then authorized the holder of a worthless check to charge the maker a service fee of not more than $3.00. Merrel sued Research and Data, Inc. civilly on a theory of unjust enrichment for charging a higher fee than allowed by K.S.A. 21-3707. In reaching its holding, the court specifically noted that "that statute is part of the criminal code, and contains nothing which by its terms or by implication limits the right of parties to enter into a specific contract such as we have here." Id. at 52. Pursuant to Merrel the amount which could be lawfully charged as a worthless check service fee was limited only by the standard of unconscionability.

With the enactment of K.S.A. 60-2610 in 1986, a civil cause of action was established allowing the holder of a worthless check to sue for damages equal to three times the amount of the check but not exceeding the amount of the check by more than $500.00 or for $100.00, whichever was greater. As originally enacted, K.S.A. 60-2610 allowed but did not provide for a specific dollar amount service charge. K.S.A. 1989 Supp. 60-2610 was amended by the 1990 legislature to include recovery of a service charge as authorized by subsection (2) of K.S.A. 21-3707 and subsection (1)(e)(iii) of K.S.A. 16a-2-501. Both of those subsections provide for a $10.00 insufficient check service charge. K.S.A. 16a-2-501 also had been amended in 1988 to include the $10.00 insufficient check fee as an additional charge a creditor could contract for and receive in connection with a consumer credit transaction.

Thus, since Merrel, two separate statutes which are not part of the criminal code have been enacted which by their terms limit the right of parties to enter into a contract regarding the allowable amount of a service charge in connection with a worthless check. Both K.S.A. 1989 Supp. 60-2610 and K.S.A. 16a-2-501 limit the amount of a worthless check service charge to $10.00. We therefore conclude that $10.00 is the maximum amount which may be charged as a service fee by a holder of a worthless check.

As the remainder of Senator Parrish's questions involve construction of the three worthless check statutes, a review of the purposes and differing provisions of these statutes is in order. We note initially that the enactment of K.S.A. 1989 Supp. 60-2610 and K.S.A. 16a-2-501, as amended by L. 1990, ch. 209, has created an awkward statutory scheme regarding

worthless check remedies. Three sets of inconsistent statutory requirements now challenge the holders of worthless checks. The only provision which is consistent between the three statutes is the allowable $10.00 service charge.

Two of the questions raised present issues relating to worthless checks given in payment of preexisting debts. Turning first to the criminal code, K.S.A. 1989 Supp. 21-3707 requires proof of the element of "intent to defraud" which is defined as:

> "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." K.S.A. 21-3110(9).

Given this definition of "intent to defraud," it is unclear whether K.S.A. 21-3707 proscribes as criminal conduct the giving of a worthless check in payment for a preexisting debt. Kansas case law does not provide any definitive resolution of this issue.

K.S.A. 1989 Supp. 60-2610 provides the holder of a worthless check with a civil cause of action for treble damages against the maker of the check. To prevail in such a lawsuit a plaintiff must prove the check was given "with intent to defraud or in payment of a preexisting debt." K.S.A. 1989 Supp. 60-2610(g)(1)(A).

K.S.A. 16a-2-501 provides that in addition to the finance charge permitted for consumer credit sales and consumer loans, a creditor may contract for and receive certain additional charges, including a $10.00 service charge for insufficient checks. For purposes of this statute, an "insufficient check" is one "delivered in payment, in whole or in part, of preexisting indebtedness of the drawer or maker." K.S.A. 16a-2-501(1)(i).

To summarize, the criminal worthless check statute, K.S.A. 1989 Supp. 21-3707, may cover preexisting debts. The civil treble damages statute on worthless checks, K.S.A. 1989 Supp. 60-2610, does cover preexisting indebtedness as well as transactions where merchandise or cash is received at the time the check is issued. The worthless check provision of the consumer credit code, K.S.A. 16a-2-501, covers only preexisting debts. If there is both a preexisting debt and an

intent to defraud, the holder of a worthless check may request initiation of criminal proceedings under K.S.A. 1989 Supp. 21-3707 and may also file a civil lawsuit pursuant to K.S.A. 1989 Supp. 60-2610. If the worthless check was issued pursuant to a consumer credit transaction, the holder may add a $10.00 insufficient check service charge as an additional allowable charge in connection with the transaction.

Your last question relates to the notice requirements of the worthless check statutes. Again, differences exist between these statutes.

The criminal statute, K.S.A. 1989 Supp. 21-3707, contains a "prima facie evidence" provision, i.e. a statutory presumption of "intent to defraud" and of "knowledge of insufficient funds" by the maker. This permissive rule of evidence is applicable when the state proves (1) that the defendant made or drew a check, (2) that payment for such check was refused by the bank because of insufficient funds, and (3) that the defendant failed to pay the amount due on the check within seven days after notice had been given to him that the check has not been paid by the bank. State v. Haremza, 213 Kan. 201 (1973).

> "The statutory presumption created is invariably rebuttable and a conviction may not be had where the drawer of the check can show he had some reasonable expectation that it would be paid as a result of some arrangement or understanding with the bank, or because he expected to make a deposit sufficient to cover the check before its presentation for payment, or where for any reason he shows he had a reasonable expectation that the check would be paid on presentation." Haremza, 213 Kan. at 205.

In K.S.A. 1989 Supp. 21-3707, by which a criminal prosecution may be initiated, this prima facie evidence provision of the worthless check statute is "nothing more or less than a rule of evidence which governs the sufficiency of the evidence to take the case to the jury." Haremza, 213 Kan. at 206.

In marked contrast to the criminal statute, K.S.A. 1989 Supp. 60-2610 permits treble damages to be recovered in a

civil action brought by or on behalf of the holder of the check only if:

> "(1) Not less than 14 days before commencing the action, the holder of the check has made written demand on the maker or drawer for payment of the amount of the check and the incurred service charge; and (2) the maker or drawer failed to tender to the holder, prior to the commencement of the action, an amount not less than the amount demanded. The written demand shall . . . include notice that, if the money is not paid within 14 days, triple damages in addition to an amount of money equal to the sum of the check, the incurred court costs, service charge and the costs of collection, including but not limited to reasonable attorney fees, may be incurred by the maker or drawer of the check." K.S.A. 1989 Supp. 60-2610(b).

Here written demand sent by restricted mail is a prerequisite to recovery in a civil action and not merely a rebuttable statutory presumption as found within the criminal worthless check statute. Further, the criminal statute allows for notice to be provided in either oral or written form, while in the civil action notice is required to be in written form.

Turning now to K.S.A. 16a-2-501 within the consumer credit code, before the creditor may charge and collect the $10.00 insufficient check service charge, oral or written notice of demand for payment of the amount of the check plus the $10.00 service charge must be given. If payment is then not made within 14 days from the giving of notice, then the $10.00 insufficient check service charge may be added to the outstanding balance of preexisting indebtedness, on which interest may also be charged. K.S.A. 16a-2-501(1)(e)(iii) and (iv). A statutory presumption of written notice arises if notice is sent by restricted mail. K.S.A. 16a-2-501(1)(e)(iii). Here the notice requirement is a condition precedent to the creditor being able to add the $10.00 insufficient check service charge to the preexisting indebtedness of the drawer or maker.

We note one additional difference between the three Kansas worthless check statutes. Pursuant to the criminal statute, the gravamen of the offense of giving a worthless check as

prescribed by K.S.A. 1989 Supp. 21-3707 is the act of putting a negotiable instrument into circulation with knowledge that sufficient funds or credit are not on deposit to pay the amount specified in the instrument. The offense is complete when such an instrument is issued with intent to defraud, and it is not necessary to show that the check was presented for payment at the drawee bank in order to prove the crime. State v. Ringi, 238 Kan. 523 (1986). The refusal of the bank to pay a check on presentation for payment is not one of the elements of the offense. State v. Haremza, supra. The civil cause of action as set forth in K.S.A. 1989 Supp. 60-2610 requires the check actually be dishonored because of lack of deposits or credits for payment of such check. K.S.A. 60-2610(g)(1)(B). Likewise, the worthless check provision within the consumer credit code requires actual refusal of payment due to lack of funds or credits to cover the check. K.S.A. 16a-2-501(1)(e)(i).

As mentioned, this statutory scheme involving three separate worthless check laws is ripe for the creation of confusion to those holders of worthless checks seeking legal remedies. The appropriate applicable statute may depend upon whether a holder wishes to pursue civil and/or criminal remedies. While the criminal code does not bar, suspend or otherwise effect any civil right or remedy authorized by law to be enforced in a civil action, K.S.A. 21-2103, because of differing provisions between the civil and criminal worthless check statutes, a holder of a worthless check may be required to make a pragmatic decision regarding the choice of remedies. For example, if a holder sends a notice consistent with the criminal statute, he will not have complied with the notice requirement of the civil cause of action statute and will thereby be precluded from suing civilly.

In conclusion, in comparing and contrasting the three Kansas worthless check statutes, this opinion reaches the following conclusions: Pursuant to the criminal code, the civil procedure code and the uniform consumer credit code, the maximum allowable service charge for a worthless check is ten dollars; while it is unclear whether the criminal worthless check statute cover preexisting indebtedness, the civil procedure code and the uniform consumer credit code provide legal remedies to the holder of a worthless check given in payment of a preexisting debt; notice requirements vary between the criminal code, the civil procedure code and the uniform consumer credit code regarding worthless checks; actual refusal of payment is not an element of a criminal offense of giving a worthless check, but notice is a

prerequisite to a civil cause of action and of the uniform consumer credit code prior to adding the allowable statutory service charge.

Very truly yours,

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