



STATE OF KANSAS

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October 12, 1978

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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

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not been paid by the drawee. The word "notice," as used herein, shall be construed 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 restricted 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.

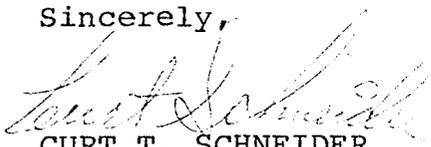
However, if the holder merely pursues his or her legal civil remedies there is no bar to prosecution. The intent to defraud may still be inferred from the maker's refusal to pay the check voluntarily. Payment after judgment, execution and garnishment is involuntary and not made with the intent to renegotiate 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 enforced in a civil action, based on conduct which this code makes punishable; 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