STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

March 13, 1981

ATTORNEY GENERAL OPINION NO. 81-70

Mr. Ward P. Ferguson
P. O. Box 429
Sixth and Main Streets
McPherson, Kansas 67460

Re: Crimes and Punishments -- Crimes Against Property -- Giving A Worthless Check

Synopsis: Under various programs established by credit unions for their respective members, whereby certain written instruments, payable either on or through a bank, are used by such members for the withdrawal of money from their credit union accounts, the making, drawing, issuing or delivering of any such instrument is embraced by K.S.A. 21-3707, the worthless check statute, in the event there are insufficient funds on deposit to cover such instrument. Cited herein: K.S.A. 21-3707, 84-3-102, 84-3-104, 84-3-120, R.S. 21-554.

* * *

Dear Mr. Ferguson:

You request our opinion on the applicability of K.S.A. 21-3707 ("worthless check statute") to instruments written in accordance with credit union "share draft" or "expandachek" programs. More specifically, you inquire whether there is a need to amend the existing statute to cover these instruments.

Before examining the pertinent statutory provisions, it is appropriate to determine the nature of the instruments prompting your inquiry. The credit unions' programs involved here were established so that credit union members could write "checks" which would be covered by the members' credit union funds. While these "checks" are eventually covered by the members'

funds in the credit union, they are not made directly payable on the credit union, but are made payable on or through a bank specified on the instrument. This arrangement is made possible through an agreement between the credit union, the bank and the credit union member. Pursuant to the agreement, the bank accepts a member's "check" and then collects sufficient funds to cover such "check" from the credit union, which transfers the funds out of the member's credit union account.

Generally speaking, these instruments are very much like ordinary bank checks. They contain blanks for the signature of the drawer, for the name of the payee (along with a direction to pay thereto), the amount in both words and figures, the date and a number for the drawer's convenience. They usually contain the name of the credit union where the drawer has an account and the name of the bank on or through which the instrument is payable, and they also contain the normal transit numbers and encoded symbols along the bottom.

It is with this brief description of these instruments in mind that we have considered the scope and coverage of K.S.A. 21-3707 and its applicability to instruments written under the various credit union programs and accounts. That statute, in describing the offense of giving a worthless check, states in pertinent part:

> "(1) Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of <u>any check, order or draft on any bank or depository</u> 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." (Emphasis added.)

The scope of this statute and its applicability to the instruments in question are controlled by the above-emphasized phrase, "any check, order or draft on any bank or depository." This phrase was originally used when the statute was first enacted in 1969 (L. 1969, ch. 180, §21-3707) and was retained unchanged when the statute was amended in 1972. L. 1972, ch. 117, §1. To gain an understanding of this phrase, however, we must resort to rules of statutory construction.

The primary rule of construction is disclosed by the following statement in Southeast Kansas Landowners Ass'n. v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

> "The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n. v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

The Court also has provided guidance in ascertaining the legislature's intent, and we believe the following statement of the Court to be of relevance here:

> "A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the Act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

Of similar import is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

> "[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.) When a statute is plain and unambiguous this court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. (Amoco Production

> Co. v. Armold, Director of Taxation, 213 Kan. 636, 647, 518 P.2d 453; Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204, 519 P.2d 1391.)" 221 Kan. at 214.

Also of pertinence to our consideration is the fact that K.S.A. 21-3707 is a penal statute. In this context, the rule of construction reiterated in State v. Howard, 221 Kan. 51 (1976), is relevant:

> "We are not unaware or unmindful of the rule requiring strict construction of penal statutes in favor of the persons sought to be subjected to their operation. State, ex rel., v. American Savings Stamp Co., 194 Kan. 297, 398 P.2d 1011; State v. Bishop, 215 Kan. 481, 483, 524 P.2d 712. The rule simply means that ordinary words are to be given their ordinary meaning. It does not permit or justify a disregard of manifest legislative intention appearing from plain and unambiguous language. State v. Walden, 208 Kan. 163, 166, 167, 490 P.2d 370." 221 Kan. at 54.

In accord is State v. Logan, 198 Kan. 211 (1967), wherein the Court states: "A penal statute should not be read so as to add that which is not readily found therein, or to read out what, as a matter of ordinary language, is in it." Id. at 213.

All of the foregoing authority suggests that, where a statute is plain and unambiguous, its meaning is to be derived from the language of the statute itself, and that the words used are to be understood by their plain and ordinary meanings, particularly where the statute is penal in character. Although we have discerned no ambiguity in the provisions of 21-3707, the statute does not specifically define the terms used therein, nor are they defined elsewhere for specific application to this statute. However, we note that certain of the key terms are defined elsewhere in the statutes (see K.S.A. 84-3-102, 84-3-104) and that these definitions were in existence at the time 21-3707 was enacted as part of the Kansas Criminal Code. We think it appropriate to utilize these statutory definitions in discerning the plain and ordinary meanings of terms used in 21-3707, because of the contextual similarity of their respective usage. The statutory definitions in question have application in the Uniform Commercial Code (UCC) with respect to the issuance of commercial paper, and this is the same context in which these terms are used in 21-3707.

We note that support for this conclusion is found in other well-established rules of construction. Citing Motor Equipment Co. v. Winters, 146 Kan. 127 (1937), the Court in State, ex rel, v. Shawnee County Commissioners, 159 Kan. 87 (1944), found that it is essential to a determination of legislative intent "to consider statutes in existence when the statutes involved were enacted." Id. at 90. Furthermore, "[t]he words of a statute must be taken in the sense in which they were understood at the time the statute was enacted." State ex rel., v. Moore, 154 Kan. 193, 201 (1941).

The sections of the UCC referenced above (84-3-102 and 84-3-104) were enacted in 1965 (L. 1965, ch. 564, §§123, 125) and, thus, were in existence at the time 21-3707 was enacted in 1969. The UCC, of course, contains a vast body of statutory law designed to govern the significant majority of all commercial transactions. Similarly, 21-3707 is concerned with fraudulent commercial transactions. As was said by the Kansas Supreme Court with respect to the statute which preceded 21-3707, the object of such statutes is "to discourage overdrafts and bad banking and to stop the practice of check-kiting and avert the mischief to trade and commerce which the circulation of worthless checks inflicts." State v. Williams, 141 Kan. 732, 733 (1935).

For these reasons, and based on the authorities cited herein, we believe it necessary and appropriate not only to attribute to the legislature that enacted 21-3707 in 1969 a knowledge and understanding of the terms used in the UCC, but to ascribe to that legislature a further intent that the terms "check," "order" and "draft" used in the criminal statute be understood within the context of the UCC.

K.S.A. 84-3-102(1)(b) defines "order" as follows:

> "An 'order' is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession."

K.S.A. 84-3-104 prescribes the requirements for a writing to be considered a negotiable instrument, requiring that such writing must

> "(a) be signed by the maker or drawer; and
> "(b) contain an unconditional promise or order to pay a sum certain in money and no other

> promise, order, obligation or power given by the maker or drawer except as authorized by this article; and
> "(c) be payable on demand or at a definite time; and
> "(d) be payable to order or bearer." (Emphasis added.)

Subsequently, this same section classifies the various negotiable instruments, providing in part that:

> "(2) A writing which complies with the requirements of this section is
> "(a) a 'draft' ('bill of exchange') if it is an order;
> "(b) a 'check' if it is a draft drawn on a bank and payable on demand; . . . ."

From the foregoing, it is apparent that all of the instruments used in connection with the various credit union programs discussed herein satisfy the definitional requirements of an "order" contained in 84-3-102(1)(b), since such instruments contain a direction to pay money to a specified person. However, to fit the definition of "draft" in 84-3-104, such instrument additionally must either be payable on demand or at a specified time, and to qualify as a "check" pursuant to its definition in 84-3-104, the instrument must be a draft that is drawn on a bank and payable only on demand.

In this regard, we have noted that certain of the instruments about which you have inquired are "payable through" a bank, rather than being payable by such bank on demand. Such instruments are defined in K.S.A. 84-3-120, as follows: "An instrument which states that is is 'payable through' a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument." The Official UCC Comment following this section in Volume 7 of Kansas Statutes Annotated explains the scope and authority of a "payable through" bank, in part, as follows:

> "The bank is not named as drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect. It is merely designated as a collecting bank through which presentment is properly made to the drawee." (Emphasis added.)

Thus, the foregoing would suggest that an instrument devised by agreement of a bank, credit union and members of such credit union that draws upon such members' accounts by being "payable through" such bank do not qualify as either a "draft" or "check." However, there is some authority that where the draft closely resembles an ordinary check and is generally treated by the bank as such and where the "through" is printed inconspicuously, the instrument will be treated as a check. Berman v. United States Nat. Bank, 197 Neb. 268, 249 N.W.2d 187 (1976).

Notwithstanding the negotiability or non-negotiability of such "payable through" instruments, it is apparent that these instruments are, at the least, "orders" within the meaning of the UCC. Moreover, even though such instruments are not drawn on a bank, we believe such instruments fit within the contemplation of 21-3707, since they are ultimately drawn upon the credit union where the drawer maintains an account. It is to be noted that 21-3707 requires that the check, order or draft be drawn "on any bank or depository." (Emphasis added.) In our judgment, a credit union is a depository, since it is in the business of accepting deposits and maintaining accounts for its members. Had the legislature intended to limit the payors of such instruments to banks, it would not have included the additional language, "or depository." In State v. Williams, supra, the Court considered whether a draft drawn on a packing house fell within the purview of R.S. 21-554, a predecessor of 21-3707. In concluding that such draft was not covered by the then existing worthless check statute, which applied to a check or draft drawn on "any bank or depository," the Court stated:

> "The statute provides that it shall be a bank or place like it, where money is deposited subject to be drawn out on a check or draft. There may be some other institutions, like trust companies or treasuries, where money is deposited subject to be drawn out at the option of the drawer, but it is insisted that a packing house where animals are sold and slaughtered is not one of these. . . . The statute is plain that the place must be one where money is deposited to be drawn out on the option of the depositor . . . ." (Emphasis added.) 141 Kan. at 733.

It is clear, therefore, that the Court also recognizes that financial institutions other than banks are included under the worthless check statute.

Thus, it is our opinion that the instruments used to implement the various credit union programs that are payable on demand by a bank are either "drafts" or "checks" within the context of the UCC and, accordingly, must be considered as such for the purposes of K.S.A. 21-3707. Also, while it is possible that those instruments that are "payable through" a bank may, under certain circumstances, be viewed as "checks" or "drafts," these instruments are in any event "orders" and, for the reasons just stated, must be considered as such for the purposes of 21-3707.

In summary, it is our opinion that, under, programs established by credit unions for their respective members, whereby certain written instruments, payable either on or through a bank, are used by such members for the withdrawal of money from their credit union accounts, the making, drawing, issuing or delivering of any such instrument is embraced by K.S.A. 21-3707, the worthless check statute, in the event there are insufficient funds on deposit to cover such instrument.

In concluding, we wish to acknowledge the assistance provided us by the Kansas Banker's Association and the Kansas Credit Union League, through the submission of briefs by their respective counsel. We note that both briefs addressed the issue of whether the various credit union programs discussed herein are authorized by law. That issue was not addressed herein, since it was unnecessary to do so in providing a response to your specific inquiries. However, the absence of commentary on that proposition in this opinion should not be construed as indicating our support for either side of the issue.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

W. Robert Alderson

W. Robert Alderson
First Deputy Attorney General

RTS:WRA:hle