

Dear Friends:

Mid-summer marks the end of our year (fiscally speaking), and I'm happy to report that we've enjoyed a banner year at Szabo Associates. There was a lot of celebrating at our annual Szabo Picnic this month, and all our employees are excited about the additional funding of our profit-sharing plan in addition to the match on their 401K Plan. Many thanks to all our clients who have helped us have our best year ever.

It was great to see so many of our friends at the Broadcast Cable Financial Management Association convention in Las Vegas. Upcoming calendar events include the Florida Magazine Association in St. Petersburg, Florida, August 10th through 12th and the Eastern Cable Show in Atlanta, Georgia, August 28th through 30th.

This issue's feature article focuses on a seemingly simple subject that can suddenly become quite complicated when you're the victim of check fraud. "Bad Checks . . . Ain't it a Crime?" can help to clarify your options should you find yourself on the receiving end of an NSF check.

Best wishes for a summer of fun,



Pete Szabo, President
Szabo Associates, Inc.

BAD CHECKS . . . Ain't It A Crime?

Bad checks aren't just a nuisance, they're a crime, right? And if so, shouldn't you, as a victim of the crime, seek recompense through the criminal justice system? The answer is sometimes . . . but probably not. You can use state statutes to pursue either civil or criminal remedies, and your choice should depend on the outcome you hope to achieve. First, let's take a look at how the law regards the problem of bad checks.

Wading Through the Statutes

All states have criminal statutes to deal with check fraud. And while these statutes differ in details, the principle is essentially the same: A maker who issues and the holder who negotiates a check, knowing there are insufficient funds or credit to honor it, are guilty of wrongdoing and may be subject to penalties.

Bad check laws generally provide that the offense must include "intent to defraud." Because the issuer of a check doesn't usually say publicly, "I meant to defraud the payee," proof that a check, draft, or order was made or delivered and that payment was refused by the drawee because of lack of funds or credit establishes a "prima facie" case of intent to defraud in most states. In other words, such evidence is sufficient for a judgment to be made unless the evidence itself is contested.

The presumption of intent to defraud is, however, rebuttable.

Some states, for example, provide that the presumption of intent to defraud is rebutted upon payment, after receipt of notice, of the amount of the check plus a service charge within the grace period as provided by statute. Additionally, not all states presume intent to defraud in the first place. In California, for example, intent to defraud must be affirmatively proved by the prosecution.

In many states, a period of time is specified within which the issuer, after receiving notice that the check has been dishonored, can "make good." Some statutes provide that prosecution cannot begin until this time period has expired, and some provide that prosecution is dismissed if the check is made good within the time specified.

Bad Checks and Bankruptcy

Often, after dishonored checks have been issued, the issuer files for protection under one of the chapters of the Bankruptcy Code. The filing of a bankruptcy petition invokes an automatic stay, which prevents or stops civil actions to collect on bad checks. In the area of criminal prosecutions, however, the issue is more complex. The Bankruptcy Code lists areas where the automatic stay does not apply, and criminal prosecution is one of them. A

—continued on page 2

Bad Checks

—continued from page 1

number of courts have held, however, that a criminal prosecution on a bad check is nothing more than an attempt to collect the debt, preventing creditors from proceeding. Because the Bankruptcy Code permits bankruptcy court to impose damages for violating the automatic stay, caution should be exercised if a criminal prosecution is pending and bankruptcy is filed.

Competent counsel should review the issues and determine whether the stay will affect the criminal proceedings.

When the Law Does Not Apply

Bank checks do not constitute payment until they are paid. Simply remitting a check for payment on a note or open account does not erase the debt. Subsequently, bad check laws do not apply to remittance of a bad check to pay a note or open account. Most bad check laws clearly provide for civil or criminal prosecution for a check given on a COD purchase. If the check is in payment of a pre-existing debt (past consideration), such as one for an open account, the individual laws must be reviewed to determine the applicability, if any, to the check being held.

Bad check laws do not apply when an individual stops payment on a check issued on an account with sufficient funds. If it can be proved, however, that the issuer intended, when the check was given, to stop the check, the bad check law may apply.

In most states, giving a postdated check does not constitute a present fraud and does not fall within the scope of bad check laws. The reason is that the Uniform Commercial Code defines a check as "a draft drawn on a bank and payable on demand." A post-

dated check is not payable on demand and so does not satisfy this definition.

What To Do First If You Get A Bad Check

If a check is returned, give the maker a written notice along with a demand that the check be made good within the number of days specified in the statute. The notice should identify the check by reference to the names of the maker and the payee, the amount, the date of the check, and the number of the check. Reference to the civil and/or criminal statute may add purpose to the notice.

Many states authorize the recipient of a bad check to collect a service charge as compensation for costs incurred. The amount and terms of the charges vary state to state. No legal proceedings are necessary to collect these service charges. You may demand payment of the service charge, in addition to the amount of the check, when you serve written notice that the check was dishonored.

The Civil Approach

As the problem of bad checks becomes increasingly obvious, the system for providing civil remedies

is becoming more responsive to its victims. Subsequently, there is less need these days to resort to criminal prosecution for bad check offenses. Many states impose civil penalties, which require the person to honor the check and to be responsible for attendant costs, on persons who issue bad checks. Legal proceedings are necessary to collect civil penalties, the amounts and terms of which vary state to state. For example, in Georgia, the penalty is defined as follows: "Upon 30 days following certified written demand by payee to maker, the maker shall be liable to the payee for damages of double the amount owing on the check not to exceed \$500 and service charge not to exceed \$15." In Colorado, the civil penalty is "treble the amount of such check and in no case less than \$100, including reasonable fees."

Crime and Punishment

Recourse through the criminal justice system should be taken only when the intended result is punishment of the offender as opposed to collection on the bad check. In order for the case to

collector's corner

"Collector's Corner" is our readers' forum for suggestions, comments, and idea swapping. If you have information to share or input on how our newsletter can better serve you, please write or call. We want to hear from you!

Question: In what event might I have the option of pursuing criminally the maker of a bad check?

P.L., Omaha, NE

Answer: In the media industry, usually the only case in which you might invoke the criminal statutes is for an NSF cash-in-advance check. All others involve payments for past consideration, to which bad check laws generally do not apply.

hold up in criminal court, the statutes require elements in addition to those required for civil penalties. Remember that under our form of jurisprudence, the burden of proof is on the state in a criminal action. A defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt, and the burden of proof is substantially higher than that necessary to prevail in a civil case.

If you choose this recourse, forward a legible copy of the NSF check along with any demand letters, related correspondence, and the names and addresses of any necessary witnesses to the prosecuting attorney in your district. He or she will then decide whether or not to prosecute.

It is important to review the rules of evidence in your state prior to pursuing criminal action. In some areas, there are prosecutors assigned to commercial crimes. Talking to the local prosecutor may help in the prepara-

tion of materials and may increase the likelihood that the case will be accepted.

Some states have held that it is not necessary that the payee be actually defrauded as a result of the bad check and that intent to defraud is sufficient. This means that even if you finally receive payment for the dishonored check, the intent to issue the worthless check may justify pursuit of criminal action. Note, however, that once a complaint is initiated to begin the criminal proceeding, you may not be able to stop the process just because the check was made good.

If the case is tried in the criminal justice system, criminal penalties may be imposed according to the various state criminal statutes and depending on whether the offense is deemed a misdemeanor or a felony. Misdemeanors are usually punishable by up to one year in jail and a smaller fine. A felony offense is usually punishable by more than one year in prison and a substantial fine. Each bad check is regarded as

a separate offense. In some states the dividing line between a misdemeanor and a felony is monetary. In Alaska, for example, an amount less than \$500 is regarded as a misdemeanor; any amount above \$500 is a felony. In Arizona, any amount above \$25 is considered felonious, while in Wisconsin, any amount is a misdemeanor. And in California, whether or not the offense is a misdemeanor or a felony is determined by the court, regardless of the amount involved. The penalties also vary widely state to state.

A Final Note

If you receive a bad check, the issuer fails to pay upon written notice, and you are contemplating legal action, consider the following questions:

What are you trying to accomplish by your legal action? Repayment or punishment of the offender? What are the civil penalties as opposed to the criminal penalties in your state, and which ones best address your intentions?

The filing of a criminal complaint and proceeding with criminal prosecution will not necessarily result in your getting the money. Additionally, many states have strict laws regarding the utilization of criminal proceedings for civil purposes. And finally, most prosecutors and judicial officials are hesitant to use the criminal process in the bad check area, particularly if they feel that the criminal court is being used to collect the bad check. So while you may justifiably think, "I received a bad check, I've been defrauded, and that's a crime," carefully consider civil remedies before utilizing the criminal statutes. ♦



"OKAY, IT'S A DEAL. AND AS SOON AS MY TAX REFUND COMES IN, I'LL CALL YOU SO YOU CAN CASH THE CHECK."

Why We Work the Way We Do Proprietary Software

We know of no other collection service that has a computer system that does so much (1) to help us collect more effectively and (2) to provide clients with invaluable information on an ongoing basis.

The reason is simple. While most collection services use a canned software package, we have our own in-house system. We've been enhancing our software and expanding our database since 1978.

The system is designed specifically for media collections. It gives our personnel the information they need to collect media debts more quickly and efficiently.

It also converts every step in every collection process into data. Do you want to know what

phone numbers we called to collect your debt? We can tell you, precisely. Do you want to know when we called? We can tell you that, too.

Using our software, we can quickly issue reports regarding your account, and we can put them in the form that best matches your internal data management system. We can give you historical data on any aspect of your account or of the industry in general. And of course we can give you up-to-the-minute status reports. We never purge your firm's data; it's always on-line and available for your use.

By collecting and preserving data on all our transactions, we've compiled the world's most extensive database on media clients. It includes information on more than 200,000 agencies and advertisers.

It's all based on our own first-hand experience, and it's available to our clients.

Our computer system includes one more convenience for our clients. Claims submissions, collections, and invoicing for monies collected can all be handled instantly through Electronic Data Interchange.

What's more, the Szabo Computer System is a continuously improving system. It changes as our clients' systems change, as technology improves—or simply when you need something done a little bit differently. It never stops growing. ♦



Collective Wisdom® is a publication of Szabo Associates, Inc., 3355 Lenox Rd., Suite 945, Atlanta, Georgia 30326, Tel: 404/266-2464, Fax: 404/266-2165

©Szabo Associates, Inc. 1995. All rights reserved. Materials may not be reproduced or transmitted without written permission.

BULK RATE
U.S. Postage
PAID
Atlanta, GA
Permit No 747