

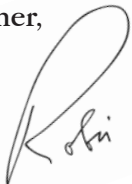
Dear Friends:

The old adage, “The more things change, the more they remain the same,” surely applies to the nagging problem of bad checks. Whether they’re old-fashioned ink on paper or electronic “substitute” checks, NSF checks continue to rob media of much-needed profits. This issue’s feature article offers an overview of legal considerations as well as practical tips for dealing with this troubling issue.

The annual MFM convention was informative, fun, and rewarding! We were pleased to present the 2011 Peter F. Szabo Career Achievement Award to Pete Gallo, retired Director of Credit, USA Today, for his valuable contributions to the organization and to the media credit and collections industry. I was so honored to receive this year’s Rainmaker Award from Media Financial Management, in which Szabo has been an active and proud participant for 40-plus years.

Our busy summer calendar includes the Broadcast Cable Credit Association (BCCA) Seminar, July 13 in Chicago, Illinois; the Media Financial Management (MFM) CFO Summit, July 20-21 in Williamsburg, Virginia; the Szabo Quality Awards, August 29 in Atlanta; and the MFM Regional Seminar, September, in New York, New York.

Best wishes for a wonderful summer,



Robin Szabo, President
Szabo Associates, Inc.

When Checks Go Bad ... Know the Law and Take Action!

Even with the soundest credit policies in place, a bad check will occasionally slip through your system. That one lost payment can cost your company in several ways, including bank and legal fees incurred, and time and productivity lost. Also, keep in mind that money lost to a bad check ultimately has to be made up elsewhere, typically through top-line growth. You are left with the unenviable responsibility of chasing down the debtor for recompense.

Returned checks call for immediate action. The sooner you address a bounced check, the greater your company’s chances to recoup some, if not all, of the payment. What steps do you need to take to get the money you are owed?

Bad Checks 101.

When someone (termed the “maker” or “drawer”) writes a check from a bank account with non-sufficient (NSF) funds, the bank will refuse to honor the check when presented. Though bad check laws vary considerably from state to state, knowingly writing an NSF check is commonly considered a civil offense or a misdemeanor. First time offenders are typically penalized by probation or a fine, while repeat offenders can be sentenced to jail time.

The check amount plays a role in how several states determine whether the charge is a

misdemeanor or felony. In Wisconsin, a bad check counts as a misdemeanor as long as the amount is less than \$2,500. In Louisiana, Kansas, Mississippi and Massachusetts, an NSF check written for more than \$100 is considered a felony, and in Florida, any check over the amount of \$50 is considered a felony. In Vermont, Alabama, Washington, New York and Minnesota, all bad checks regardless of the amount are counted as a misdemeanor.

Civil penalties typically award the creditor the amount owed, but in many states (including Indiana, Illinois, New Jersey and Ohio) the creditor can receive up to three times the amount of the bad check. In other states (for example, Alabama, California and South Dakota), the penalty will cover the original amount due plus any debt collection, legal fees or court charges that were incurred recovering the lost funds. In Kentucky, there is no civil penalty. Criminal felony penalties can range from three months of jail in New York to imprisonment of up to 15 years in Maryland.

Pursuing felony criminal charges for writing an NSF check is usually discouraged. Most states’ legal and law enforcement systems are overloaded by more severe criminal offenses, and as a result

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tend to be less responsive to bad check cases. To warrant prosecution in a criminal court, the alleged fraud would have to be extreme, involving bad checks written for an egregiously large amount of money.

Other factors that vary by state include provisions for prima facie evidence of a maker's intent to defraud, amount of damages awarded, number of days allotted for a customer to make good on a check, and qualifying parameters of a bad check.

It's the thought that counts.

Since defendants, by nature, usually deny deliberately committing fraud, the creditor must produce prima facie evidence to establish the maker's intent to defraud. The evidence can include a check, draft or order that was made or delivered, then was refused by the drawee because of non-sufficient funds.

In most states, the simple making, drawing, uttering or delivering of a bad check is considered prima facie evidence of intent to defraud. The intent to defraud is sufficient; it is not necessary for the payee to have actually been defrauded. These presumptions are not conclusive, but are rebuttable. Prima facie allows that such evidence is enough to prove the case unless substantial contradictory evidence is presented.

The U.S. government passed the Check Clearing for the 21st Century Act (also known as the "Check 21 Act") in 2004. The Check 21 Act permitted electronic fund transfers between banks through the use of "substitute

checks." Legally deemed the same as paper checks, substitute checks are accepted as prima facie proof in litigation.

Timing is everything.

Sometimes the issuer is given a time period in which to "make good" on the check after receiving notice that the check was returned. Prosecution is dismissed in some states if the check is made good within the time period. In other states, prosecution cannot begin until the time period expires. Under some statutes, if the check is made good within the time period, the presumption that the check was passed with fraudulent intent is simply dismissed.

The number of days allowed depends on the state. In Michigan the debt must be paid within five days of receipt of certified mail; in New Jersey, the maker has 35 days to pay. Failure to pay the check, draft or order within the specified number of days after demand is considered presumptive evidence of intent to defraud and knowledge of insufficient funds.

Some states don't allow presumptive intent alone. In California, for example, intent to defraud must be affirmatively proven by the prosecution. The creditor must have proof of insufficient funds or credit. Further, a number of states allow that presumption of intent to defraud is rebutted if the maker pays the creditor the full amount plus a service charge within the statute's grace period.

In order for a case to hold up in criminal court, the state statutes require additional elements than those required for civil penalties. Remember that under our form of jurisprudence, the burden of proof in a criminal action is on the state. A defendant is presumed inno-

cent unless proven guilty beyond a reasonable doubt, and the burden of proof is substantially higher than that which is necessary to prevail in a civil case.

When is a bad check *not* a bad check?

In most cases, NSF checks are not considered under the bad check law if they are used to pay an antecedent debt. Therefore, if a debtor gives a creditor an NSF check to pay a note payment or an invoice that originally had open terms of credit, issuing an NSF check generally does not fall within the bad check law of most states and jurisdictions. However, if the debtor provides a creditor with an NSF check for a cash in advance (CIA) order, then that act does fall within the bad check laws.

Postdated checks are excluded from the laws by a strict technical definition. Under the Uniform Commercial Code (UCC), a check is defined as "a draft drawn on a bank and payable on demand." A postdated check, since it is not payable on demand, does not satisfy this definition. Consequently, it has generally been held by most states that the giving of a postdated check does not constitute a present fraud nor is it within the scope of the bad check laws.

Hiding under bankruptcy.

After issuing a bad check, some makers will file for protection under one of the chapters of the Bankruptcy Code. The bankruptcy petition invokes an automatic stay, which prevents or stops civil actions to collect. In criminal prosecutions, however, automatic stays do not apply. Because the Bankruptcy Code permits bankruptcy court to

impose damages for violating an 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.

Now what?

Taking action to resolve a bad check situation may seem overwhelming, but don't give up hope. There are procedures in place to support your efforts. But remember: Timely follow up and persistence are critical.

Now that you have a general understanding of what constitutes a bad check and how the legal system addresses check fraud, let's look at some of the steps you can take to collect your money. Some of these steps can and should be done simultaneously.

Contact the customer. In many instances, a bad check is written unintentionally. One phone call might quickly

prompt the customer to fix the mistake. You should ask the customer to make a bad check good by immediately paying in cash or via wire transfer. Inform the customer that you are placing his account on credit hold until the situation is resolved. Request payment courteously and avoid making threats. If the check is made good and you decide to continue the business relationship, you must determine the appropriate credit terms for the future. The standard practice is to close open-ended credit accounts and change the account terms to CIA or certified check.

Send a certified letter.

Follow up your initial phone call immediately by sending the customer a certified letter with a return receipt request. The letter should outline the situation and terms of repayment, reference the check number, date and amount, and cite the state's civil and/or criminal repercussions. If your state

authorizes a service charge on the maker as compensation for the costs you've incurred, include that information as well. In the event that more than one state is involved, you should look at both of the states' laws, and cite the one with the tougher statutes.

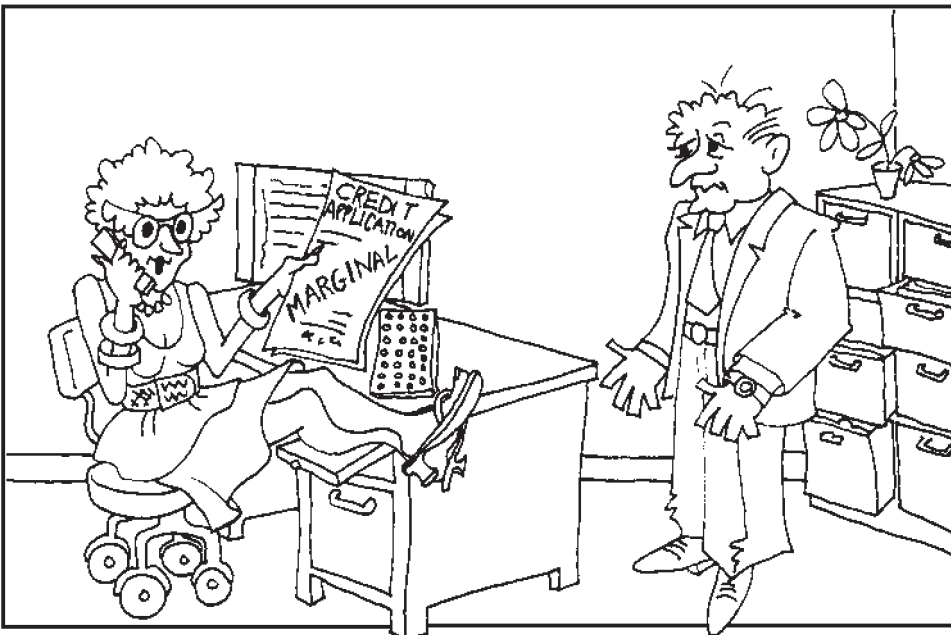
Presenting the customer with a notice is necessary before you can move forward with prosecution if the customer refuses to pay. The vast majority of states have bad check laws that are particularly favorable to businesses. Sending a written demand for payment, you may be able to collect extra damages in court, often two or three times the value of the check, if the maker doesn't come through.

Discontinue contracted services. Until the situation is resolved, pull any of the customer's advertising that is still on the schedule. You might have time to find a paying customer to fill the inventory.

Redeposit the check.

Instruct your bank to put the check through again. If the NSF check doesn't clear after a second presentment, consider asking your bank to employ its collection services. The bank will place the NSF check for collection by forwarding it to the maker's bank, typically requesting between 10 and 30 days to verify funds. The maker's bank will monitor the account daily and if the funds become available in the maker's account, the bank will collect and forward the funds to your bank for further credit to your account.

Do not return a bounced check to a customer until a replacement payment is received and cleared. The NSF check proves that a debt was



"Mr. Farnsworth says he's more than happy to send us a cash-in-advance check today, as long as he can postdate it a couple of weeks from now."

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owed and that the check was dishonored. You might be able to use it later in court as evidence of the customer's intent to defraud.

Hire a collection agency.

If you are making no progress recouping your loss, you might want to hire a collection agency. Letting a professional chase down the money can save you time and aggravation.

Take care to choose a reputable debt collection service. Research your options carefully to make sure that the agency you hire is experienced in and compliant with state and federal bad check laws. Not only can you face legal penalties for

the improper actions of your debt collection agency, but their practices could also reflect negatively on your company.

Take legal action. Only when all other avenues for recompense are exhausted should you consider legal action. Going to court can be costly and time-consuming. Be aware that prosecution and even conviction in a criminal action does not guarantee repayment or restitution. Your attorney's knowledge of bad check laws can help determine whether litigation is prudent.

Reevaluate your credit policies. Use the knowledge gained from a bad check experience to improve your company's credit policies. Take stock of your company's processes: How

thoroughly are you vetting your new customers? Was this situation avoidable? Are there any lessons to learn from it?

Protect your company against bad checks by maintaining carefully crafted and administered credit policies that are clearly communicated to your customers. Penalty interest and bad check fees are critical. For CIA accounts, request payment early enough to ensure that the check clears prior to the date the advertising is scheduled to run. If the bank doesn't clear a customer's check, you should have enough time to stop their order and resell to a more worthy customer.

Getting a bad check from a customer is unavoidable. Taking a loss isn't. ♦



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