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CRIMES AND OFFENSES

Bad Checks: Extend Right to Initiate Prosecution to Subsequent Holders in Due Course

CODE SECTION:	O.C.G.A. § 16-9-20(k) (new)
BILL NUMBER:	SB 556
ACT NUMBER:	1261
SUMMARY:	The Act allows subsequent holders in due course to institute prosecution of the initial drawer of a bad check.
EFFECTIVE DATE:	July 1, 1988

History

Writing a bad check constitutes a criminal offense in Georgia.¹ It has long been illegal for any party to issue a check in exchange for present consideration with knowledge that the check will not be honored upon presentment.² Further, prima facie evidence of the drawer's requisite knowledge³ can be found if the drawer did not have an account with the drawee bank at the time the check was drawn⁴ or payment of the check was refused for insufficient funds.⁵

Historically, the right to initiate criminal prosecution for issuance of a bad check has been limited to the individual who first received the worthless check.⁶ Thus, a subsequent holder in due course⁷ who received a bad check through the process of negotiation⁸ could not initiate the prosecu-

1. O.C.G.A. § 16-9-20(a) (1988).

2. 1959 Ga. Laws 252.

3. O.C.G.A. § 16-9-20(a)(1), (2) (1988). *See also* Brooks v. State, 146 Ga. App. 626, 247 S.E.2d 209 (1978).

4. O.C.G.A. § 16-9-20(a)(1) (1988).

5. O.C.G.A. § 16-9-20(a)(2) (1988).

6. Interview with Professor Corneill Stephens, Georgia State University College of Law, in Atlanta (Apr. 7, 1988) [hereinafter Stephens Interview].

7. A holder is defined by O.C.G.A. § 11-1-201(20) (Supp. 1988) as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank." A holder in due course, on the other hand, is one "who takes the instrument: (a) For value; and (b) In good faith; and (c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." O.C.G.A. § 11-3-302 (1982). Both definitions correspond verbatim to U.C.C. §§ 1-201(20) and 3-302 (1972), defining holders and holders in due course, respectively.

8. Negotiation is the process of transferring an instrument "in such form that the transferee becomes a holder." O.C.G.A. § 11-3-202(1) (1982) (adopting U.C.C. § 3-202

tion of the drawer.

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The Act amends O.C.G.A. § 16-9-20 by adding subsection (k) which specifies those parties permitted to prosecute an action under the Code section.⁹ Specifically, the Act provides that “the party initially receiving a worthless check, draft, or order or by any subsequent holder in due course possessing of any such worthless check, draft, or order” may initiate prosecution of same.¹⁰ The purpose of the Act is to extend the right to institute prosecution of a bad check to subsequent holders in due course.¹¹

The prosecution of a bad check may be commenced once a party provides the drawer with notice and waits the requisite time period for the drawer to tender payment.¹² Upon the drawer’s failure to pay in full, the possessor of the check may turn the check, and other pertinent information, over to the magistrate, district attorney, or solicitor for criminal prosecution.¹³

In the past, it was necessary to ascertain whether the party initiating the prosecution was the same party who initially received the worthless check. If not, no authority existed to issue an arrest warrant.¹⁴ The rationale for this distinction can be based on the drawer’s intent at the time the check was issued; the drawer must know that the check will not be honored by the drawee.¹⁵ It is easier to determine this intent with respect to the party initially receiving the check than to subsequent holders in due course since the latter takes the check at some later time in the negotiation process.¹⁶

The Act changes this policy in Georgia and allows a subsequent holder in due course who possesses a bad check to initiate prosecution.¹⁷ The drawer’s knowledge and intent are issues to be addressed at trial and thus

(1972)).

9. O.C.G.A. § 16-9-20(k) (1988).

10. *Id.*

11. Telephone interview with Patsy Turner, Assistant Legislative Counsel, Office of Legislative Counsel (Apr. 6, 1988).

12. O.C.G.A. § 16-9-20(a)(2)(B) (1988) provides the form of notice required and states that 10 days is the period within which the drawer of the dishonored check must respond.

13. *Id.*

14. Stephens Interview, *supra* note 6.

15. *See* O.C.G.A. § 16-9-20(a)(1), (2) (1988).

16. For example, a drawer may write a check knowing there are sufficient funds in his account at the time. The check subsequently is negotiated further and, at some later indeterminate point in time, ends up in the possession of a holder in due course. When this subsequent holder in due course attempts to cash the check, it is dishonored due to lack of sufficient funds currently in the drawer’s account. Events occurring over a passage of time rather than the criminal intent of the drawer may have led to the dishonored check. Stephens Interview, *supra* note 6.

17. O.C.G.A. § 16-9-20(k) (1988).

no longer constitute a total bar to initiation of prosecution by a subsequent holder in due course.¹⁸

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18. In furtherance of the policy designed to expedite the prosecution of bad checks, HB 1392 (Act No. 1089) also was passed in the 1988 legislative session. The Act amends O.C.G.A. § 16-9-20(a)(2)(B) (the "notification" requirement). The section previously stated that once an individual was notified that he had issued a bad check, he had 10 days to pay the instrument in full. Upon failure to do so, all relevant information regarding the incident was turned over to the district attorney or solicitor for criminal prosecution. The amendment to O.C.G.A. § 16-9-20(a)(2)(B) provides that such relevant information will now be given "to the magistrate for the issuance of a criminal warrant or citation or to the district attorney or solicitor for criminal prosecution." O.C.G.A. § 16-9-20(a)(2)(B) (1988) (emphasis added).