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## CONTRACTS Bad Checks: Provide for Civil Remedies and Defenses

M. Ramey

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## CONTRACTS

### *Bad Checks: Provide for Civil Remedies and Defenses*

**CODE SECTION:** O.C.G.A. § 13-6-15 (new)  
**BILL NUMBER:** SB 256  
**ACT NUMBER:** 644  
**SUMMARY:** The Act adds a new section to the chapter of the Code dealing with damages in contract actions to provide for a civil remedy for the payee of a dishonored check. The Act permits double damages up to a maximum of \$500, a service charge, and court costs and also provides for certain affirmative defenses and waivers in an action for such damages.  
**EFFECTIVE DATE:** April 3, 1987

#### *History*

Americans frequently use checks to pay for household expenditures.<sup>1</sup> Unfortunately, some of this extensive use of checks leads to abuse since approximately one million bad checks per day are written.<sup>2</sup> This abuse has disproportionately affected small businesses, which often have been unwilling to pursue those writing bad checks in civil actions because of the time and expense of going to court with the hope of recovering only the small damages of the face value of the check.<sup>3</sup> Furthermore, while writing a bad check is a criminal offense,<sup>4</sup> prosecutors often consider its enforcement a low priority.<sup>5</sup> This situation has left small business people without a means of discouraging the writing of bad checks or of being compensated for their losses.

Because of this situation, the National Federation of Independent Business (NFIB) has lobbied in state legislatures nationwide to introduce bills providing for the availability of triple or double damages for payees

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1. American households paid for 57% of expenditures with checks in 1986. Riche, *How Americans Pay*, AM. DEMOGRAPHICS, July 1986, at 46, col. 1.

2. Bad checks amount to about one percent of checks written. Wessel, *States Pass Laws in Drive to Curb Check Bouncing*, Wall St. J., Dec. 2, 1985, at 23, col. 2.

3. Telephone interview with Bert Fridlin, Georgia State Director, National Federation of Independent Business (Apr. 21, 1987) [hereinafter Fridlin Interview].

4. See O.C.G.A. § 16-9-20 (Supp. 1987) (criminal bad check statute).

5. Fridlin Interview, *supra* note 3. See also Wessel, *supra* note 2.

of bad checks. Georgia SB 256 was supported not only by the state NFIB, but also by local chambers of commerce and other small business interests.<sup>6</sup> The language of the Georgia law was modeled after statutes from North Carolina<sup>7</sup> and California.<sup>8</sup>

### SB 256

The Act amends the Code section that addresses damages and costs in contract actions. Following general principles of contract law, Georgia law generally restricts contract damages to provide only compensation, with little possibility of recovering exemplary damages<sup>9</sup> or litigation expenses.<sup>10</sup> The final section of the chapter, added by SB 256, creates an exception to these general rules of contract law.

O.C.G.A. § 13-6-15 provides that the payee of a check, draft, or order, which is dishonored because the maker has insufficient funds or credit or no account, may bring an action to recover double damages in addition to the amount of the instrument up to a limit of \$500.<sup>11</sup> Recovery of court costs is also allowed.<sup>12</sup> The Act also provides for the payee to collect "a service charge not to exceed \$15.00 or 5 percent of the face amount of the instrument, whichever is greater."<sup>13</sup>

SB 256 originally was drafted to provide for treble damages with a minimum limit of \$100 and a maximum of \$2,500, and attorneys' fees.<sup>14</sup> After the Senate passed the bill in that form, the House Judiciary Committee modified it because of concerns about the bill's severity.<sup>15</sup> The committee substitute provides for double damages with a \$500 maximum limit, but allows the court or jury to waive double damages in the case of economic hardship.<sup>16</sup> It also was modified to include costs rather than attorneys' fees because many actions under this statute would be brought in small claims courts.<sup>17</sup>

The Act provides that the payee must make a written demand upon

6. Telephone interview with Senator Tom Coleman, Senate District No. 1 (Apr. 13, 1987).

7. N.C. GEN. STAT. § 6-21.3 (1983).

8. CAL. CIV. CODE § 1719 (West Supp. 1985).

9. O.C.G.A. § 13-6-10 (1982) (exemplary damages never available in contract actions "[u]nless otherwise provided by law").

10. O.C.G.A. § 13-6-11 (Supp. 1987) (costs available only in instances of bad faith, stubborn litigiousness, or where defendant has caused unnecessary trouble and expense).

11. O.C.G.A. § 13-6-15(a) (Supp. 1987).

12. *Id.*

13. O.C.G.A. § 13-6-15(b) (Supp. 1987).

14. SB 256, as introduced, 1987 Ga. Gen. Assem.

15. Fridlin Interview, *supra* note 3.

16. O.C.G.A. § 13-6-15(a), (h) (Supp. 1987).

17. O.C.G.A. § 13-6-15(a) (Supp. 1987).

the maker and see that it is delivered by certified mail.<sup>18</sup> After delivery of this demand, the payee has thirty days to tender payment, and only after the maker's failure to do so may the payee file the action. The Act sets out a form which requires that the demand include notice of the possible double damages and notice of costs for which the payee may be liable.<sup>19</sup> The Act also provides that jurisdiction for an action by the payee shall be in the county where the defendant resides.<sup>20</sup>

Several affirmative defenses are available in an action brought pursuant to the Act. These defenses are full satisfaction of the amount of the instrument plus the service charge, bank error in dishonoring the check, and knowledge by the acceptor of the instrument that there were insufficient funds when the instrument was accepted.<sup>21</sup> The House committee substitute added a provision to allow satisfaction of the payee's claim subsequent to the filing of the action, but prior to the hearing. This additional paragraph permits the defendant to tender payment for the amount of the dishonored instrument plus the service charge and any court cost incurred by the plaintiff.<sup>22</sup>

The Act also provides for waiver of all or part of the double damages in two situations. First, waiver is permissible if the defendant has failed to satisfy the dishonored check because he or she received a dishonored check or instrument from a third person.<sup>23</sup> Second, the House committee substitute added a provision for waiver of double damages if the court determines that failure to satisfy the dishonored check occurred because of economic hardship. The defendant, however, remains liable for the face amount of the check, any service charges, and court costs.<sup>24</sup>

The affirmative defenses and waiver provisions in the Georgia law obviate some of the criticism lodged against similar laws in other states on the grounds that they may be used against those who write such checks through honest error.<sup>25</sup> The Georgia law is not intended to punish inadvertent mistakes.<sup>26</sup>

*M. Ramey*

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18. O.C.G.A. § 13-6-15(a) (Supp. 1987).

19. O.C.G.A. § 13-6-15(c) (Supp. 1987). *Cf.* O.C.G.A. § 11-3-508 (1982) (providing for notice of dishonor, but not specifying a form for such notice).

20. O.C.G.A. § 13-6-15(d) (Supp. 1987).

21. O.C.G.A. § 13-6-15(e) (Supp. 1987).

22. O.C.G.A. § 13-6-15(g) (Supp. 1987).

23. O.C.G.A. § 13-6-15(f) (Supp. 1987).

24. O.C.G.A. § 13-6-25(h) (Supp. 1987).

25. *See* Wessel, *supra* note 2.

26. Fridlin Interview, *supra* note 3.