

**IN THE MAGISTRATE COURT OF WORTH COUNTY, STATE OF GEORGIA**

**PROCEDURES FOR CRIMINAL & CIVIL PROSECUTIONS OF DEPOSIT ACCOUNT FRAUD,  
“BAD CHECKS”**

Our Court handles numerous bad check cases each and every year. We hope this material will give you a brief overview of the law concerning “bad checks.” This material briefly outlines both the criminal and civil procedures generally available. You should consider consulting an attorney if you have any additional questions.

**CRIMINAL OFFENSES**

The crime of Deposit Account Fraud, formerly “bad checks,” can be a misdemeanor or felony offense. Since it is a criminal offense, the prosecutor is required to strictly comply with each and every one of the essential elements set forth in that code section. Failure to comply with any one of the statutory procedures may cause a denial or dismissal of the arrest warrant.

Under an arrest warrant, the person is taken into custody, fingerprinted and posts bond at a jail. If bond is posted then the case is transferred to the State Court for misdemeanor offenses or to the Superior Court for felony offenses. Oftentimes, a court date will be provided to the Defendant while at the Worth County Jail.

**CIVIL PROCEEDINGS**

Alternatively, the receiver of a “bad check” may choose to proceed to sue for damages in a civil proceeding. The reasons for this choice commonly include, a failure to meet the essential elements for a criminal action, a post-dated check, failure to strictly follow the statutory procedures, the person receiving the check did not witness the signature or simply the company/personal policy of the recipient. Damages for the face amount of the check, plus service charges, and in some instances, punitive damages of double the face amount of the check up to a maximum of \$500.00 may be awarded.

We hope this general information will be of help to you.

Casey Rouse, Chief Magistrate of Worth County

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## FREQUENTLY ASKED QUESTIONS - BAD CHECKS

### **I HAVE RECEIVED A BAD CHECK, WHAT CAN I DO?**

The issuance of a check on an account which is closed or has insufficient funds may constitute a crime for which the maker (writer) of the check may be prosecuted. The issuance of a check which is not honored may also give rise to a civil claim for damages. Which way you choose to proceed with your case will depend upon the circumstances of your case and your own personal or company preference.

### **CRIMINAL PROSECUTION OF BAD CHECK VIOLATIONS (DEPOSIT ACCOUNT FRAUD)**

#### **CAN I PURSUE A CRIMINAL PROSECUTION OF A BAD CHECK?**

Whether the issuance of a bad check is a crime will depend upon several factors. You should review these factors carefully against the particular facts in your case before applying for an arrest warrant. The elements of the criminal offense of Deposit Account Fraud (Bad Check) are contained in O.C.G.A. §16-9-20.

#### **WHAT ARE THE BASIC ELEMENTS OF THE OFFENSE OF DEPOSIT ACCOUNT FRAUD?**

1. **Dishonor of the Check** - the check must be dishonored by the bank (drawee) for one of the reasons set forth in the statute, i.e., insufficient funds, account closed, or no account. A check with a "stop payment" order, return to maker, or improper signature is not covered under the offense of deposit account fraud. The proper remedy for those checks would be a civil proceeding, not a criminal proceeding.
2. **Knowledge** by the maker of the check that it would not be honored. It is prima facie evidence of that knowledge if the accused: (1) had no account with the bank; (2) if the check was presented to the (bank) drawee within 30 days after delivery and the accused was served within 10 days of the notice received from the bank with the statutory letter in the form set forth below.
3. **Present Consideration** - the check must have been given for present consideration.
4. **Venue.** A criminal offense must be prosecuted in the county where the crime occurred, that is the county where the check was presented.

#### **WHERE SHOULD THE CRIMINAL OFFENSE OF DEPOSIT ACCOUNT FRAUD BE PROSECUTED?**

The proper venue for the prosecution of the offense of Deposit Account Fraud is the county in which the check was presented. This is true regardless of where your home office may be located, where the person who tendered the check resides, where the bank of the maker is located, or where you conduct your banking. Civil cases are different. You would file suit in the county where the defendant resides on a civil case.

#### **WHAT REASONS FOR DISHONOR OF A CHECK WILL SUPPORT A CRIMINAL PROSECUTION?**

The check must be dishonored by the bank (drawee) for one of two reasons:

1. **No account / Account closed** - this is based on the status of the account at the time the check was made, drawn, uttered, or delivered, not at the time it was presented to the bank for payment.
2. **Lack of funds** - (1) the check must have been deposited or presented for payment by the maker's bank, (drawee), within thirty (30) days of the date of delivered to receiver of the check, **and** (2) the accused has failed to make "good" the payment of the check and a service charge within ten (10) days **after receiving written notice** that the check has been dishonored. A copy of the notice required by statute for both criminal and civil cases may be found in these materials.

There are many other reasons why a check may not be paid upon presentation, such as stop payment, return to maker or improper signatures. These reasons will not support a criminal action. In such an instance you should try to contact the person who wrote the check, or the individual whose name is listed on the check, to determine whether a civil remedy is appropriate. Please bear in mind that in many instances the person listed on the check is actually a crime victim whose checks have been stolen. This crime victim will place "stop payment" orders on their bank account. Use your best efforts to try to find out why a "stop payment, return to maker or signature improper" notation has been made on a check before you spend your time and money filing a civil action.

### **WHAT IS "PRESENT CONSIDERATION"?**

The check must have been given for either wages or present consideration to support a criminal action. The offense of Deposit Account Fraud is similar to a theft of the item or services received through the fraudulent presentation of worthless paper when immediate payment is expected. Anything that separates in time the exchange will negate the concept of present consideration.

#### **Present consideration includes:**

1. Goods or services tendered for check.
2. Rent which is past due or presently due.
3. Child support, pursuant to court order or written agreement.
4. State taxes, whether or not past due
5. Simultaneous agreement for the extension of additional credit where additional credit is being denied.
6. A written waiver of mechanic's or materialmen's lien rights.

#### **Present consideration does not include:**

1. Post-dated check.
2. Payment on an installment account or on an open account for goods/services previously received.
3. Request by the accused to victim to hold check, for a time period prior to depositing it.

## WHAT ARE THE MOST COMMON DEFENSES RAISED TO A CRIMINAL PROSECUTION FOR DEPOSIT ACCOUNT FRAUD?

These defenses are those most commonly raised. Whether or not they are a sufficient defense would be decided by the judge at the trial of the case. They include:

1. **Post-dated check** - a check with a date after the date on which the check was presented is considered a post-dated check and may not be prosecuted criminally. The post-dating of the check creates an extension of credit, even if only for a day, and converts the case to a bad debt situation for the purposes of this code section.
2. **Stop payment on a check** - a check which was dishonored because payment was stopped, and not because of insufficient funds, account closed or no account, may not be prosecuted criminally under the Deposit Account Fraud statute.
3. **Payment of antecedent (prior) debt** - a check which represents payment of an antecedent debt (e.g. - repayment of a loan or payment on an account) may not be prosecuted criminally under this code section.
4. **Statement by the maker of the check** at the time of tender that he has insufficient money in bank to cover the check, though he expects to have the money in the bank by the time the check is presented and agreement by the receiver of the check to hold it. In effect, the payee (receiver) has agreed to extend credit and there is no present consideration.
5. **Prior dealings of the parties.**
6. **Forgery** - a check which is forged (made by someone other than the account holder and without the account holder's consent) may not be prosecuted as a bad check against the account holder, who is a crime victim also. That is one of the reasons why it is vital that the person actually receiving the check confirm the identity of the person signing the check (maker) at the time the check is presented. The criminal code requires that the person receiving the check **shall** initial the check and **shall** obtain verification of the identity of the person signing the check, i.e., a driver's license, identification card, check cashing card, etc. This procedure of verifying the identity of the person passing the check also protects the victim from prosecuting another victim who has had checks stolen.
7. **Lack of knowledge that check would not be honored** (for example, the maker of the check did not know that someone else had withdrawn funds from the account).
8. **Good character of defendant.**
9. **Checks were lost or stolen.** The accused did not sign the check. (See forgery, above.)
10. **Bank error.**

This list is not exhaustive. In the event you are charged with the criminal offense of deposit account fraud, you should consult with an attorney or seek to have an attorney appointed to represent you if you are indigent. Forms to apply for appointed counsel are available at the clerks' office.

## WHAT STEPS SHOULD MANAGEMENT CONSIDER WHEN PROSECUTING THE CRIMINAL OFFENSE OF DEPOSIT ACCOUNT FRAUD?

1. Be sure clerks have followed all items on this checklist. A separate checklist for clerks is set forth as follows:
  - (a) Ask if the information on the front of the check is correct.
  - (b) Confirm/ask for current home telephone and current work telephone number. Write information on the face of the check.
  - (c) Watch the person actually sign the check.
  - (d) Confirm identity of the person presenting the check, i.e., check cashing card, driver's license or state identification card, etc. and match it against the check and the signature on check. Write information on check, especially driver's license numbers and date of birth.
  - (e) If company policy permits, the following information should be listed on the check if the company wants bad checks listed on law enforcement computers, G.C.I.C.: name, date of birth, gender & race. Driver's license information is helpful. This greatly increases the likelihood that the accused will be arrested prior to the expiration of the statute of limitations, which in most cases is two years.
2. Keep permanent record of the home address of the clerk who actually received check. This person will be the key essential witness who must be able to identify the person who made the check if the case goes to trial and to identify his/her initials on the check and to confirm means used to verify the identity of the accused., i.e. driver's license, identification card, check cashing card, etc.
3. Create a policy that requires that the person receiving the check get the current home address, work telephone number, home telephone number and driver's license number of each individual who presents a check. You might also consider whether you want to have sufficient information so a warrant could be listed on the state-wide criminal computer network. Those warrants are much more likely to be served in the event the accused tries to conceal himself, moves with no forwarding address or flees the jurisdiction of the court. To implement this procedure all checks received must have a recording mechanism or internal code to list the gender, race and date of birth of each individual who presents a check, in addition to the above listed information.
4. Deposit all checks within thirty (30) day of receipt.
5. Within ninety (90) days of receipt of check, mail certified demand letter in the **exact** form as set forth in statute to the address given by maker of check. Give maker of check at least ten (10) days plus three (3) days for mailing before prosecuting criminally. You need not wait for actual receipt of notice. Try to telephone accused. Keep a written log of all your efforts.
6. Is this check actually one for present consideration?
7. Are there any defenses, including, but not limited to: post-dating, stop payment, payment antecedent debt, prior dealings, agreement to hold check, forgery, or refer to maker?
8. Has management received part payment? If so, proceed civil remedy only.
9. Make photocopies of check (front and back), ten (10) day demand letter, certified mail notice, and/or envelope mailed to maker if return unclaimed. Present these items to the court. Have them ready when your representative appears to seek an arrest warrant.
10. You may proceed with a criminal prosecution of all checks which meet the requirements in the county where the check was presented.

11. You may proceed with a civil lawsuit on all other checks in the county where the defendant resides. You can file a civil action in Magistrate Court, if the check amount is \$15000.00 or less. If the sum of the check exceeds the amount of \$15000.00 you must file your civil action in the State or Superior Court in the county where the defendant resides.
12. Refer all persons who want to pay off bad checks after criminal prosecution has begun to the Court issuing the criminal warrant. Do not accept payment directly after a criminal prosecution has been initiated.
13. Filing fee \$20.00 per Bad Check.
14. Keep the Sheriff's Department advised of any new information you acquire concerning a new address, telephone number or work number for the accused. The more you help the Sheriff's Department, the more likely they will be able to locate and serve the defendant.

### **WHAT INFORMATION SHOULD I BRING TO COURT TO START A CRIMINAL PROSECUTION?**

You should bring with you the original check, a copy of the check (front and back), a copy of the statutory letter you mailed, the certified mail receipt or returned letter and certified mail receipt, if the letter was unclaimed, and any notes you have kept related to your efforts to collect the check. Have copies already made of all documents.

### **WHAT FORMS MUST I FILL OUT?**

Depending on the particular check, you will be asked to fill out an application for an arrest warrant. These forms are available in our clerk's office or on our website. If your business regularly prosecutes these cases, please take a sufficient supply of the forms to your office so that you can have the basic information already filled out when you file for the arrest warrant.

### **WHAT IS A BAD CHECK ARREST WARRANT?**

An arrest warrant is an order of the court directing any duly authorized law enforcement official to arrest the person named in the warrant for the offense charged (in this case, the offense of Deposit Account Fraud). The accused will be arrested and, in most instances, allowed to post bond to secure the Accused's appearance at trial. If the offense is a misdemeanor the case is remanded to the State Court of Worth County and if the offense is a felony, the prosecution will take place in the Superior Court of Worth County.

### **WHAT CASES ARE PROSECUTED BY WARRANT?**

All felony cases are prosecuted by an arrest warrant. The offense of Deposit Account Fraud is a felony where the check is for an amount in excess of five hundred dollars (\$1500.00) or where the check is drawn on an out of state bank, regardless of the amount of the check.

Also, arrest warrants can be issued for misdemeanor bad check cases.

### **WHERE ARE DEPOSIT ACCOUNT FRAUD CASES TRIED?**

Cases prosecuted by arrest warrant are tried in the State Court if the offense is a misdemeanor or in the Superior Court if the case is a felony. The defendant can elect to be tried by a jury.

### **WHAT WRITTEN NOTICE MUST BE SENT? IS IT DIFFERENT FOR CRIMINAL VERSUS CIVIL PROCEEDINGS?**

The form of the notice follows: NOTE: Some differences in Civil and Criminal Demand Letters.

**DEMAND LETTER PURSUANT TO CRIMINAL STATUTE O.C.G.A. § 16-9-20**

Date: \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_\_.

TO: \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Address)  
\_\_\_\_\_  
(City, State, Zip Code)

FROM: \_\_\_\_\_  
(Name of Sender)  
\_\_\_\_\_  
(Address)  
\_\_\_\_\_  
(City, State, Zip Code)

**YOU ARE HEREBY NOTIFIED** that the following check(s) or instrument(s):

Check Number	Check Date	Check Amount	Name of Bank
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

The above listed check(s) or instrument(s) were drawn upon: **(HAS OR HAVE BEEN DISHONORED)**

\_\_\_\_\_  
Account Number

\_\_\_\_\_  
Payable To

Dear Sir/Madam:

Pursuant to Georgia Law, you have **ten (10) days** from the receipt of this notice to tender payment of the total amount of the check(s) or instrument(s) plus applicable service charge(s) as calculated below:

\$ \_\_\_\_\_: Service charge(s)

\$ \_\_\_\_\_: Total amount due

Unless this amount is paid in full within the specified time above, a presumption in law arises that you delivered the check(s) or instrument(s) with the intent to defraud and the dishonored check(s) or instrument(s) and all other available information relating to this incident may be submitted to the Magistrate Court of Worth County for the issuance of a criminal warrant.

Sincerely,

\_\_\_\_\_  
Name of Sender



**DEMAND LETTER PURSUANT TO CIVIL STATUTE O.C.G.A. § 13-6-15**

Date: \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_.

TO: \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Address)  
\_\_\_\_\_  
(City, State, Zip Code)

FROM: \_\_\_\_\_  
(Name of Sender)  
\_\_\_\_\_  
(Address)  
\_\_\_\_\_  
(City, State, Zip Code)

**YOU ARE HEREBY NOTIFIED** that the following check(s) or instrument(s):

Check Number	Check Date	Check Amount	Name of Bank
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

The above listed check(s) or instrument(s) were drawn upon: **(HAS OR HAVE BEEN DISHONORED)**

\_\_\_\_\_  
Account Number

\_\_\_\_\_  
Payable To

Dear Sir/Madam:

Pursuant to Georgia Law, you have **ten (10) days** from the receipt of this notice to tender payment of the full amount of the check(s) or instrument(s) plus a service charge of \$20.00 or five (5%) percent of the face amount of the check(s) or instrument(s), whichever is greater.

\$ \_\_\_\_\_: Total amount due

Unless this amount is paid in full within the specified time above, the holder of the check(s) or instrument(s) may file a civil suit against you for two (2) times the amount of each check or instrument, but in no case more than \$500.00, in addition to the payment of the check(s) or instrument(s) plus any court costs incurred by the payee in this action.

Sincerely,

\_\_\_\_\_  
Name of Sender

## WHAT IS THE DEPOSIT ACCOUNT FRAUD (BAD CHECK) CRIMINAL STATUTE?

### 16-9-20. Deposit account fraud.

(a) A person commits the offense of deposit account fraud when such person makes, draws, utters, executes, or delivers an instrument for the payment of money on any bank or other depository in exchange for a present consideration or wages, knowing that it will not be honored by the drawee. For the purposes of this Code section, it is prima-facie evidence that the accused knew that the instrument would not be honored if:

- (1) The accused had no account with the drawee at the time the instrument was made, drawn, uttered, or delivered;
- (2) Payment was refused by the drawee for lack of funds upon presentation within 30 days after delivery and the accused or someone for him or her shall not have tendered the holder thereof the amount due thereon, together with a service charge, within ten days after receiving written notice that payment was refused upon such instrument. For purposes of this paragraph:

(A) Notice mailed by certified or registered mail evidenced by return receipt to the person at the address printed on the instrument or given at the time of issuance shall be deemed sufficient and equivalent to notice having been received as of the date on the return receipt by the person making, drawing, uttering, executing, or delivering the instrument. A single notice as provided in the previous demand letter form shall be sufficient to cover all instruments on which payment was refused and which were delivered within a ten-day period by the accused to a single entity, provided that the form of notice lists and identifies each instrument; and contains the information so stated in the previous demand letter form; or

- (3) Notice mailed by certified or registered mail is returned undelivered to the sender when such notice was mailed within 90 days of dishonor to the person at the address printed on the instrument or given by the accused at the time of issuance of the instrument.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as follows:

- (A) When the instrument is for less than \$100.00, a fine of not more than \$500.00 or imprisonment not to exceed 12 months, or both;
- (B) When the instrument is for \$100.00 or more but less than \$300.00, a fine of not more than \$1,000.00 or imprisonment not to exceed 12 months, or both; or
- (C) When more than one instrument is involved and such instruments were drawn within 90 days of one another and each is in an amount less than \$100.00, the amounts of such separate instruments may be added together to arrive at and be punishable under subparagraph (B) of this paragraph.

(2) Except as provided in paragraph (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for an amount of not less than \$300.00 nor more than \$499.99, shall be guilty of a misdemeanor of a high and aggravated nature. When more than one instrument is involved and such instruments were given to the same entity within a 15 day period and the cumulative total of such instruments is not less than \$300.00 nor more than \$499.99, the person drawing and giving such instruments shall upon conviction be guilty of a misdemeanor of a high and aggravated nature.

(3) Except as provided in subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for \$1500.00 or more, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than \$500.00 nor more than \$5,000.00 or by imprisonment for not more than three years, or both.

(4) Upon conviction of a first or any subsequent offense under this subsection or subsection (c) of this Code section, in addition to any other punishment provided by this Code section, the defendant shall be required to make restitution of the amount of the instrument, together with all costs of bringing a complaint under this Code section. Costs shall be determined by the court from competent evidence of costs provided by the party causing the criminal warrant or citation to issue; provided, however, that the minimum costs shall not be less than \$25.00. Restitution may be made while the defendant is serving a probated or suspended sentence.

(c) A person who commits the offense of deposit account fraud by the making, drawing, uttering, executing, or delivering of an instrument on a bank of another state shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine in an amount of up to \$1,000.00, or both.

(d) The prosecuting authority of the court with jurisdiction over a violation of subsection (c) of this Code section may seek extradition for criminal prosecution of any person not within this state who flees the state to avoid prosecution under this Code section.

(e) In any prosecution or action under this Code section, an instrument for which the information required in this subsection is available at the time of issuance shall constitute prima-facie evidence of the identity of the party issuing or executing the instrument and that the person was a party authorized to draw upon the named account. To establish this prima-facie evidence, the following information regarding the identity of the party presenting the instrument shall be obtained by the party receiving such instrument: the full name, residence address, and home phone number.

(1) Such information may be provided by either of two methods:

(A) The information may be recorded upon the instrument itself; or

(B) The number of a check-cashing identification card issued by the receiving party may be recorded on the instrument. The check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(2) In addition to the information required in this subsection, the party receiving an instrument shall witness the signature or endorsement of the party presenting such instrument and as evidence of such the receiving party shall initial the instrument.

(f) As used in this Code section, the term:

(1) "Bank" shall include a financial institution as defined in paragraph (21) of Code Section 7-1-4.

(2) "Conviction" shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail.

(3) "Financial institution" shall have the same meaning as defined in paragraph (21) of Code Section 7-1-4.

(4) "Holder in due course" shall have the same meaning as in Code Section 11-3-302.

(5) "Instrument" means a check, draft, debit card sales draft, or order for the payment of money.

(6) "Present consideration" shall include without limitation:

(A) An obligation or debt of rent which is past due or presently due;

(B) An obligation or debt of state taxes which is past due or presently due;

(C) An obligation or debt which is past due or presently due for child support when made to the custodian of a minor child for the support of such minor child and which is given pursuant to an order of court or written agreement signed by the person making the payment;

(D) A simultaneous agreement for the extension of additional credit where additional credit is being denied; and

(E) A written waiver of mechanic's or materialmen's lien rights.

(7) "State taxes" shall include payments made to the Georgia Department of Labor as required by Chapter 8 of Title 34.

(g) This Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3.

(h)(1) Any party holding a worthless instrument and giving notice in substantially similar form to that provided in subparagraph (a)(2)(B) of this Code section shall be immune from civil liability for the giving of such notice and for proceeding as required under the forms of such notice; provided, however, that, if any person shall be arrested or prosecuted for violation of this Code section and payment of any instrument shall have been refused because the maker or drawer had no account with the bank or other depository on which such instrument was drawn, the one causing the arrest or prosecution shall be deemed to have acted with reasonable or probable cause even though he, she, or it has not mailed the written notice or waited for the ten-day period to elapse. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(2) Except as otherwise provided by law, any party who holds a worthless instrument, who complies with the requirements of subsection (a) of this Code section, and who causes a criminal warrant or citation to be issued shall not forfeit his or her right to continue or pursue civil remedies authorized by law for the collection of the worthless instrument. It shall be deemed conclusive evidence that any action is brought upon probable cause and without malice where such party holding a worthless instrument has complied with the provisions of subsection (a) of this Code section regardless of whether the criminal charges are dismissed by a court due to payment in full of the face value of the instrument and applicable service charges subsequent to the date that affidavit for the warrant or citation is made. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(i) Notwithstanding paragraph (2) of subsection (a) of this Code section or any other law on usury, charges, or fees on loans or credit extensions, any lender of money or extender of other credit who receives an instrument drawn on a bank or other depository institution given by any person in full or partial repayment of a loan, installment payment, or other extension of credit may, if such instrument is not paid or is dishonored by such institution, charge and collect from the borrower or person to whom the credit was extended a bad instrument charge. This charge shall not be deemed interest or a finance or other charge made as an incident to or as a condition to the granting of the loan or other extension of credit and shall not be included in determining the limit on charges which may be made in connection with the loan or extension of credit or any other law of this state.

(j) For purposes of this Code section, no service charge or bad instrument charge shall exceed \$25.00 or 5 percent of the face amount of the instrument, whichever is greater.

(k) An action under this Code section may be prosecuted by the party initially receiving a worthless instrument or by any subsequent holder in due course of any such worthless instrument.

### **CIVIL "BAD CHECK" COLLECTION PROCEDURES**

#### **WHAT IF I (CAN'T/WON'T/DON'T WANT TO) PROCEED WITH A CRIMINAL PROSECUTION OF A BAD CHECK I HAVE RECEIVED, DO I HAVE OTHER WAYS TO SUE FOR MY MONEY?**

You may still be able to take a civil action to collect the check. A check is a contractual promise by the maker (person signing check) of the instrument that it may be presented for cash at the maker's bank for cash on demand. You can sue for the face amount of the check, service charge, interest, and in some instances if you have given the civil statutory notice, you can seek punitive damages of either double the face amount of the check to a maximum of \$500.00, plus court costs.

#### **WHEN CAN I SUE TO COLLECT DAMAGES IN A CIVIL CASE?**

You may choose to sue for damages for any "bad check" you receive which meets the statutory requirements. You may sue the maker of the check for the amount of the check and, in some instances, additional damages. Civil damages for writing bad checks are provided for and fully set forth in O.C.G.A. § 13-6-15.

#### **WHAT AMOUNTS CAN I RECOVER?**

You may be able to collect the amount of the check, plus damages of twice the amount of the check, but in no case more than \$500.00, plus court costs. You can only recover the additional damages of twice the amount of the check if you have sent the proper statutory notice to the defendant prior to filing suit.

## **HOW CAN I RECOVER ADDITIONAL DAMAGES?**

First, you must attempt to cash (negotiate) the check. Make certain the teller stamps the check after you present it. After you have received notice that the check will not be paid, you must then make a written demand upon the maker of the check for payment in cash of the amount of the check plus a service charge of 5% or \$20.00 (*this is different amount than the criminal service fee*), whichever is greater. The notice must be mailed to the maker of the check by certified mail.

If the maker of the check does not pay you the amount of the check plus the service charge within ten days of receipt of the letter, you may make a claim for the additional statutory damages set forth above.

## **WHAT SHOULD MY LETTER SAY?**

The statute sets forth a form letter that you may use. If you use another letter, it must substantially comply with the statutory form as set forth previous in the demand letter form titled:

**DEMAND LETTER PURSUANT TO CRIMINAL STATUTE O.C.G.A. § 16-9-20.**

## **WHAT IF I DON'T GET THE MONEY AFTER SENDING THE LETTER?**

The maker of the check has ten days from receipt of the letter to tender payment, in cash, of the amount of the check plus service charges. Failure of the maker of the check to pay the above sum will entitle you to proceed with an action for damages. Failure to accept the letter after given notice shall constitute notice.

## **WHO DO I SUE?**

You should sue the maker of the check. This is generally the same person who signed and gave you the check. However, in the case of a third-party check, it will be the person who actually wrote the check. If the check was written by an individual, then you would sue the individual. If the check was written by a partner in the course of partnership business you could generally sue any partner. If the check was written on a corporate bank account you would sue the corporation.

## **WHERE DO I SUE?**

You must file your lawsuit in the county in which the defendant resides, regardless of where the check was given to you. For a more detailed discussion of venue, please refer to the Statement of Claims section.

## **WHAT DEFENSES ARE COMMONLY RAISED TO A CLAIM FOR CIVIL DAMAGES?**

The most common defenses to a civil action include the following: (1) full satisfaction of the check plus service charge was made prior to the commencement of the action; (2) the bank erred in dishonoring the check; and (3) the acceptor of the check knew at the time of acceptance that there were insufficient funds on deposit for the check to be honored; (4) the goods/services received were defective; (5) forgery, the checks were stolen.

## **WILL "DOUBLE DAMAGES" ALWAYS BE AWARDED?**

No. There are several factors that may be considered by the court in ruling on a claim for statutory damages. The court may waive all or part of the statutory double damages if it finds that the defendant's failure to satisfy the dishonored check was caused either by the defendant having received a dishonored check or economic hardship.

The defendant may also avoid statutory double damages after suit has been filed by paying to the plaintiff the amount of the check, service charges on the check, plus all court costs.

## WHAT IS THE STATUTE GOVERNING CIVIL COLLECTION OF BAD CHECKS?

O.C.G.A. 13-6-15. Damages for writing bad checks.

(a) Notwithstanding any criminal sanctions which may apply, any person who makes, utters, draws, or delivers any check, draft, or order upon any bank, depository, person, firm, or corporation for the payment of money, which drawee refuses to honor the instrument for lack of funds or credit in the account from which to pay the instrument or because the maker has no account with the drawee, and who fails to pay the same amount in cash to the payee named in the instrument within ten days after a written demand therefore, as provided in subsection (c) of this Code section, has been delivered to the maker by certified mail shall be liable to the payee, in addition to the amount owing upon such check, draft, or order, for damages of double the amount so owing, but in no case more than \$500.00, and any court costs incurred by the payee in taking the action.

(b) The payee may charge the maker of the check, draft, or order a service charge not to exceed \$20.00 or 5 percent of the face amount of the instrument, whichever is greater, when making written demand for payment.

(c) Before any recovery under subsection (a) or (b) of this Code section may be claimed, a written demand in substantially the form which follows shall be sent by certified mail to the maker of the instrument at the address shown on the instrument:

"You are hereby notified that a check or instrument numbered \_\_\_\_\_, issued by you on \_\_\_\_\_ (date), drawn upon \_\_\_\_\_ (name of bank), and payable to \_\_\_\_\_, has been dishonored. Pursuant to Georgia law, you have ten days from receipt of this notice to tender payment of the full amount of the check or instrument plus a service charge of \$20.00 or 5 percent of the face amount of the check or instrument, whichever is greater, the total amount due being \$ \_\_\_\_\_. Unless this amount is paid in full within the ten-day period, the holder of the check or instrument may file a civil suit against you for two times the amount of the check or instrument, but in no case more than \$500.00, in addition to the payment of the check or instrument plus any court costs incurred by the payee in taking the action."

(d) For purposes of this Code section, the holder of the dishonored check, draft, or order shall file the action in the county where the defendant resides.

(e) It shall be an affirmative defense, in addition to other defenses, to an action under this Code section if it is found that:

- (1) Full satisfaction of the amount of the check or instrument plus the applicable service charge was made prior to the commencement of the action;
- (2) The bank or depository erred in dishonoring the check or instrument; or
- (3) The acceptor of the check or instrument knew at the time of acceptance that there were insufficient funds on deposit in the bank or depository with which to cause the check or instrument to be honored.

(f) In an action under this Code section, the court or jury may, however, waive all or part of the double damages upon finding that the defendant's failure to satisfy the dishonored check or instrument was due to the defendant receiving a dishonored check or instrument written to the defendant by another party.

(g) Subsequent to the commencement of the civil action under this Code section, but prior to the hearing, the defendant may tender to the plaintiff as satisfaction of the claim an amount of money equal to the sum of the amount of the dishonored check, service charges on the check, and any court costs incurred by the plaintiff in taking the action.

(h) In an action under this Code section, if the court or jury determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court or jury has the discretion to waive all or part of the double damages. However, if the court or jury waives all or part of the double damages, the court or jury shall render judgment against the defendant in the amount of the dishonored check plus service charges on the check and any court costs incurred by the plaintiff in taking the action.