

## **BAD CHECK QUESTIONS**

### **1. I have received a bad check, what can I do?**

The issuance of a check on an account that is closed or has insufficient funds may constitute a crime for which the maker of the check may be prosecuted. The issuance of a check that is not honored may also give rise to a civil claim for damages. Your option to proceed will depend on the circumstances in your case.

### **2. Can I pursue criminal prosecution of a bad check?**

CRIMINAL PROSECUTION OF BAD CHECK VIOLATIONS (DEPOSIT ACCOUNT FRAUD)

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

### **3. What are the elements of the offense of deposit account fraud?**

- A. Dishonor of the Check - the check must be dishonored by the drawee (who the check is made out to) for one of the reasons set forth in the statute;
- B. Knowledge by the maker of the check that it would not be honored;
- C. Present Consideration - the check must have been given for present consideration.

### **4. Where should the 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 or where the person who tendered the check resides.

### **5. What reasons for dishonor of the check will support a criminal prosecution?**

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

**A. No account or 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.

**B. Lack of funds** - the check must have been deposited or presented for payment within thirty (30) days of the date delivered, and the accused has failed to make 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 that will satisfy this requirement may be found in these materials.

There are many other reasons why a check may not be paid upon presentation. However, only the reasons set forth in the statute will support a criminal prosecution. If the check has been dishonored for another reason you should review the availability of civil remedies for bad checks contained in this file.

## 6. What is meant by present consideration?

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

Present consideration includes:

- A. Goods or services tendered for check
- B. Rent that is presently or past due
- C. Child support, pursuant to Court order or written agreement
- D. State taxes, whether or not past due
- E. Simultaneous agreement for the extension of additional credit where additional credit is being denied
- F. A written waiver of mechanic's or materialmen's lien rights

Present consideration does not include:

- A. Post-dated check
- B. Payment on an installment account or on an open account for goods/services previously received
- C. Request by Defendant to Victim to hold check, expects to deposit soon to cover balance.

## 7. What defenses may be raised to bad check prosecution?

A. Post-dated check. A check with 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.

B. Stopped payment on a check - a check that was dishonored because payment was stopped, and not because of insufficient funds, may not be prosecuted criminally.

C. Payment of antecedent debt - a check that represents payment of an antecedent debt (e.g. - repayment of a loan or payment on an account) may not be prosecuted criminally.

D. 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. In effect, the payee has agreed to extend credit and there is no present consideration.

E. Prior dealings of the parties.

F. Insanity:

- a. Inability to distinguish right from wrong
- b. Intoxication
  - i. Must be involuntary
  - ii. Voluntary intoxication is no defense

G. Forgery - a check that 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. It is therefore vital that the payee confirm the identity of the maker of the

check at the time the check is presented.

H. Lack of knowledge that check would not be honored (Example: the maker of the check did not know that someone else had withdrawn funds from the account); and

I. Good character of Defendant.

## **8. What steps should be taken to insure a bad check can be collected?**

Be sure clerks have followed all items on this checklist.

1. Keep a permanent record of home address of clerk who actually received check. This person will be an absolutely critical witness who must identify the person who made the check if the case goes to trial.
2. Deposit all checks within thirty (30) days of receipt.
3. Within ninety (90) days of receipt of check, mail certified demand letter to address given by maker of check. Give maker of check at least ten (10) days and three (3) days for mailing before prosecuting criminally. Try to telephone accused and keep a record of your efforts.
4. Make sure the check is actually one for present consideration.
5. Unusual situations such as: post-dating, stop payment, payment antecedent debt, prior dealings, agreement to hold check, forgery, often prevents the collection from proceeding under criminal prosecution. You may wish to seek legal counsel for further information.
6. If management has received part payment, proceed to civil remedy only.
7. Make photocopies of check (front and back), the ten (10) day demand letter, the certified mail notice, and/or the envelope mailed to the maker of the check if return unclaimed.
8. Proceed criminally for all checks that meet checklist in the county where the check was passed.
9. Proceed civilly (in Magistrate Court if the amount is \$15,000 or less) against all other checks in the county where the Defendant lives.
10. Refer all persons to the Magistrate Court who want to payoff bad check charges after criminal prosecution begins.
11. Be prepared to pay a filing fee and other Court fees and fines - generally \$75 and up.

## **9. What information should I bring to Court to start prosecution?**

Bring with you the original check and a copy of the check (front and back), the certified mail receipt or returned letter if unclaimed, and any notes you have kept related to your efforts to collect the check.

## **10. Are there any forms that I must fill out?**

Depending on the particular check, you will be asked to fill out an application for either an arrest warrant or a citation. These forms are available in the Magistrate Court Clerk's office.

**11. What is a bad check citation?**

Some Counties use a process called a "Bad Check Citation", which is similar to a traffic ticket. The accused maker of the check is notified that prosecution has commenced. The accused can dispose of the case by paying the check and a possible fine. The accused may also plead not guilty and request a trial of the case. If the accused does not dispose of the case or appear in Court by the date specified on the citation, an arrest warrant may be issued. Check with the Magistrate Court Clerk's office to see if this process is available.

**12. What cases are done on citation?**

Only misdemeanor cases may be prosecuted by citation. Where Court records indicate there have been prior citations against the same individual, a warrant will be issued rather than another citation.

**13. 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 their appearance at trial.

**14. What cases are prosecuted by warrant?**

All felony cases are prosecuted by warrant. The offense of Deposit Account Fraud is a felony where the check is for an amount in excess of five hundred dollars (\$500.00) or where the check is drawn on an out of state bank, regardless of the amount of the check. Also, warrants are issued in the following cases: the accused has failed to respond to a citation; the accused could not be located so that a citation could be served; or the accused has had previous citations.

**15. Where are deposit account fraud cases tried?**

Cases prosecuted by citation are tried in the Magistrate Court, unless the accused demands a jury trial. In that event, the case is transferred to the State Court for trial. Cases prosecuted by warrant are tried in the State Court if the offense is a misdemeanor or in the Superior Court if the case is a felony.

**16. What is the deposit account fraud (bad check) statute?**

Georgia has criminal charges for the issuance of a bad check. This statute is found in OCGA 16-9-20

**CIVIL BAD CHECK COLLECTION PROCEDURES**

**17. What if a criminal prosecution cannot be made on a bad check that I have received?**

You may still be able to collect the check, which is a contractual promise by the maker of the instrument that it may be presented for cash at the maker's bank for cash on demand.

**18. When can I proceed to collect damages in a civil case?**

If you have received any check for which payment was refused for either lack of funds or no account, 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 OCGA 13-6-15.

**19. What damages 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, plus Court costs.

**20. How can I recover additional damages?**

First, you must attempt to negotiate the check. 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 \$30.00, 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 tender to 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.

**21. What should my letter say? (See Sample Collection Letters)**

The statute sets forth a form letter that you may use. If you use another letter, it must substantially comply with the statutory form.

SAMPLE: BAD CHECK LETTER – CRIMINAL ISSUE:

# Returned Check Notice

## Pursuant to O.C.G.A. § 16-9-20

(Deposit Account Fraud)

From: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

You are hereby notified that the following check(s) or instrument(s)

Check No.	Check Date	Check Amount	Name of Bank
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

drawn upon \_\_\_\_\_ (Bank) and payable to \_\_\_\_\_, (has) (have) been dishonored. Pursuant to Georgia Law, you have **TEN (10) DAYS** from receipt of this notice to tender payment of the total amount of the check(s) or instrument(s) plus the applicable service charge(s) of \$\_\_\_\_\_, the total amount due being \_\_\_\_\_ dollars and \_\_\_\_\_ cents. Unless the amount is paid in full with the specified time above, a presumption in law arises that you delivered the item(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 for the issuance of a criminal warrant or citation or to the district attorney or solicitor for **CRIMINAL PROSECUTION.**

\_\_\_\_\_

Memo: Certified Mail No. \_\_\_\_\_ Date Mailed \_\_\_\_\_

**SAMPLE: BAD CHECK LETTER – CIVIL ISSUE:  
Ten-day Double Damages Letter Pursuant to O.C.G.A. § 13-6-15**

To: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

You are hereby notified that a check or instrument numbered \_\_\_\_\_ by you on \_\_\_\_\_ (Date), drawn upon \_\_\_\_\_ (Name of Bank) and payable to \_\_\_\_\_, has been dishonored. 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 or instrument plus a service charge of \$30.00 or 5% 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 TEN (10) 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 (Five Hundred Dollars), in addition to the amount of the check or instrument, plus any court costs incurred by the payee in taking the action.

**SEND PAYMENT TO:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Memo: Certified Mail No. _____ Date Mailed _____
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**22. What if I do not 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 statutory damages.

**23. Who do I sue?**

You should sue the maker of the check. This is generally the same person who gave you the check. However, in the case of a third-party check, it will be the person who actually wrote the check.

**24. 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 detailed discussion of venue, please refer to the Civil Claims FAQ.

**25. What defenses may be raised to a claim for statutory damages?**

The maker of the check may raise several possible defenses to an action for statutory damages. These include:

Full satisfaction of the check plus service charge was made prior to the commencement of the action;

The bank erred in dishonoring the check;

The acceptor of the check knew at the time of acceptance that there were insufficient funds on deposit for the check to be honored.

**26. Will damages always be awarded in civil bad check cases?**

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.

**27. What if my case does not fit either criminal or civil bad check damages criteria?**

You may still seek to collect the amount of the check, or the debt represented by the check, by suing the maker of the check for the amount of money owed to you.

The fact that elements of the criminal or civil statutes do not apply to your case does not negate the fact that the person who made the check owes you money.

**28. What is the statute governing civil collection of bad checks?**

Georgia has criminal charges for the issuance of a bad check. This statute is found in OCGA 13-6-15.