When Is There Sufficient Evidence that a Check Writer Knew that He or She Had Insufficient Funds?

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If a person writes a check and the check bounces, is that enough to charge the person with the misdemeanor offense of writing a worthless check? What about if the recipient of the check notifies the check writer that the check bounced and the check writer doesn't pay off the check? This post explores when a criminal charge is a permissible response to a worthless check.

Statutory provision. Under G.S. 14-107, it is a crime for "any person . . . to . . . make . . . and deliver to another[] any check . . . knowing at the time of the making . . . and delivering . . . that the maker . . . [h]as not sufficient funds . . . or credit . . . with which to pay the check . . . upon presentation."

The statute requires knowledge of insufficient funds. The statute requires that the maker "know[] at the time of the making" that the check is worthless. Apparently, the bad check laws in all but a few states contain similar *mens rea* provisions. Elwood Earl Sanders, Jr., *Time to Close the Collection Agency: Addressing the Abuse of Bad Check Laws*, 2 Charleston L. Rev. 215 (2007) (reporting that three states have strict liability bad check laws while the remainder require knowledge of insufficient funds or intent to defraud).

The fact that a check bounces is not enough to show knowledge. In some states, the law presumes that people know their bank balances and so know whether the checks they write are worthless. See, e.g., N.Y. Penal Law § 190.10 ("When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the . . . drawer . . . is presumed to know of such insufficiency."). Other states do not so presume, perhaps in recognition of the fact that people often bounce checks through inadvertence or lack of careful bookkeeping. North Carolina is in the latter camp. As the court of appeals stated in *Semones v. Southern Bell Tel. & Tel. Co.*, 106 N.C. App. 334 (1992):

[T]he mere issuing of a check which is returned due to insufficient funds or lack of credit, without more, is not evidence from which the requisite knowledge can be inferred. To allow such an inference would essentially eliminate knowledge as a separate element of the criminal offense . . . and would raise serious questions about the statute's constitutionality.

What facts would support an inference of knowledge? If the fact that a check bounces, standing alone, does not support a criminal charge, under what circumstances would such a charge be appropriate? The case law provides some possible answers.

- *Multiple worthless checks.* In *Semones*, the court said that "the knowledge required . . . can be inferred from evidence that the defendant issued other worthless checks within the same time period as the check at issue."
- *Admissions or incriminating statements.* In *State v. Monroe*, 83 N.C. App. 143 (1986), the court found sufficient evidence that the defendant knew his checks were worthless, in part because when the payee confronted the defendant about the checks, the defendant "made no assurance that the checks were good . . . [and instead] responded, 'Oh, yeah, I'll take care of those.'" The court reasoned that the defendant's response "implied that he knew that there was an insufficient amount in the account when the checks were drawn."
- *Requests to hold checks.* In *State v. Mucci*, 163 N.C. App. 615 (2004), the court found sufficient evidence that

the defendant knew he had insufficient funds, in part because "defendant actually requested [the payee] to hold the checks . . . and not deposit them immediately," which the court saw as "circumstantial evidence . . . that defendant knew that at the time he issued the checks they were worthless."

- *Large overdrafts and other circumstances.* An out-of-state case, *Delay-Wilson v. State*, 264 P.3d 375 (Alaska Ct. App. 2011), found sufficient evidence of knowledge where "there was nowhere near a sufficient amount of money in the account" and the defendant "was an experienced business woman who owned multiple businesses" and was not likely to have "merely made a mistake" about the amount of money available in the account.

The fact that a recipient has complied with the statutory bad check procedures is not enough to show knowledge.

I have heard the argument that while a defendant's knowledge of insufficient funds may not be inferred from the fact of a bounced check alone, it may properly be inferred when the payee has followed the procedures set forth in G.S. 14-107.1. I don't think that's correct, based on the statute itself and on the relevant case law.

The statute contains two relevant provisions. In summary:

- If (a) a check is not honored by a bank and is returned to the payee stamped with the reason it was not honored; (b) the payee sends the check writer a certified letter explaining that the check bounced and "requesting rectification of any . . . error in connection with the transaction"; (c) the payee prepares an affidavit explaining what happened and attaching certain documents, including a copy of the check and a copy of the certified letter; and (d) the payee files the affidavit with the court, then the court has "prima facie evidence of the facts of dishonor" and that "the check passer had no credit with the bank . . . for payment of the check." G.S. 14-107.1(e).
- If (a) the "name and . . . address of the check passer are written or printed on the check"; and (b) the payee identifies the check passer using a driver's license or similar form of identification and writes the identification number on the check, then there is "prima facie evidence that the person charged was in fact the identified check passer." G.S. 14-107.1(d).

Put simply, the statute provides ways to prove *the fact that the check bounced* and *the identity of the check writer*. Nothing in the statute addresses the check passer's knowledge that he or she lacked sufficient funds to cover the check. As *Semones* points out:

In 1979, our Legislature enacted a statute which sets forth methods by which the State can establish a prima facie case of the first two elements of the crime of issuing a worthless check. . . . However, [G.S.] 14-107.1 does not set forth a method by which the State can establish a prima facie case of the essential element of knowledge.

Therefore, even in a case in which the statutory procedures have been followed, additional evidence of knowledge is required before criminal charges are appropriate. And that additional evidence is needed at the probable cause stage, not merely in order to convict. *Semones* was a civil malicious prosecution case in which the question before the court was whether the defendant phone company had probable cause when it sought criminal charges against the plaintiff for writing a bad check. The court of appeals found that it "did not have probable cause" even though the check had bounced and the phone company had apparently sent the plaintiff a letter in compliance with G.S. 14-107.1.

As an aside, I can imagine *Semones* having come out differently. There's a reasonable argument that when a check writer receives a letter saying that a check bounced, and does nothing to rectify the situation, that is after-the-fact

evidence that the overdraft wasn't an inadvertent mistake. In fact, there's one sentence in *Monroe* that provides some support for that idea. The court there noted that even after being informed that his checks bounced, **"**the defendant never cleared up the matter by making payment," and that was part of the evidence that the court viewed as sufficient evidence of the defendant's knowledge. There are out-of-state cases along the same lines. *See, e.g., Brown v. State*, 703 P.2d 1097 (Wyo. 1985) (stating that showing that a defendant failed to pay after being notified of a bad check "is . . . one way by which the State may attempt to show fraudulent intent and knowledge of the worthlessness of the check"). Indeed, it appears that many states expressly allow for this type of inference. *See* Sanders*, supra* (stating that "inferring criminality based on a failure to pay within a certain time" is permitted "in almost every state," though criticizing this practice because "it discriminates . . . against the poor" who may be unable to pay and arguing that practice "violates constitutional protections against wealth classifications").

But even if *Semones* could have come out differently, it didn't. And its holding is clear. In North Carolina, a person's failure to pay after being notified that he or she wrote a bad check isn't enough to infer that the person knew the check was bad when he or she wrote it. Perhaps the person inadvertently overdrafted, then ignored the letter because he or she didn't have the ability to pay off the check, or simply didn't care to do so. In any event, nothing in the statute provides for an inference of knowledge from failure to repay, and *Semones* rejects it.

Remedies for recipients. It is my understanding that in many counties, criminal charges are routinely issued based on a payee's showing that he or she received a worthless check. Local merchants may support this practice because the threat of criminal prosecution helps them collect on bad checks. If judicial officials were to require specific evidence that a check writer was aware that he or she had insufficient funds before issuing criminal charges, merchants would have less leverage to collect on checks. No one wants merchants to get stiffed. So what are their other options?

I don't claim any special expertise in civil debt collection, and I would be interested in others' thoughts on this issue. It seems to me that some merchants might choose to reduce their risk up front by declining to accept checks or by subscribing to a service such as TeleCheck that may help identify checks that are likely to bounce before they are accepted. Of course, that won't be feasible for some businesses. After a bad check is received, a merchant may pursue civil remedies. North Carolina has a statute that lays out a civil collection process for bad checks and allows payees to collect triple damages if not promptly compensated. G.S. 6-21.3. And of course, criminal charges will still be appropriate in some cases, such as when a merchant receives multiple bad checks from a customer.

Readers, let me know what you think. Am I missing something about how checks are written, received, and processed these days? Are there local practices that are effective and don't implicate the considerations above?