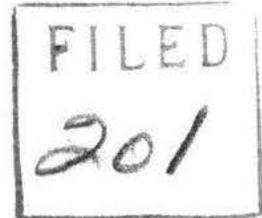


CHECKS: Corporate officer who makes or  
INSUFFICIENT FUND CHECKS: delivers insufficient fund check  
CRIMINAL LAW: of corporation to pay corporate  
CORPORATIONS: debt with intent to defraud and  
CORPORATION OFFICERS: with knowledge of insufficient  
funds subject to prosecution under  
Section 561.460.

OPINION NO. 201

August 6, 1964



Honorable Leroy Schantz, Director  
Division of Employment Security  
421 East Dunklin Street  
Jefferson City, Missouri

Dear Mr. Schantz:

This is in reply to your opinion request of May 18, 1964, in which you state:

"As you can appreciate, there are many corporations subject to the Employment Security Law who pay the taxes due thereunder by check. The question has arisen whether an officer, signing the check of a corporation which is returned because of insufficient funds, is subject to prosecution under the terms of Sections 561.460 and 561.470, RSMo 1959, as amended.

"The office of the Prosecuting Attorney in St. Louis has suggested that we request an opinion from you, pointing out, incidentally, that Section 561.460, as amended October 1963, provides for penalties coming within the separate jurisdictions of the Circuit Attorney and the Prosecuting Attorney.

"We would greatly appreciate having your opinion on this point."

Section 561.460, RSMo Cumulative Supplement 1963, provides:

"Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose, shall make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by confinement in the county jail for not more than six months, or a fine of not more than five hundred dollars, or both fine and confinement. If the check, draft or order is one hundred dollars or more the offense is a felony punishable by a fine of not more than one thousand dollars, or by confinement in the county jail for not more than one year, or by both such fine and confinement or by imprisonment by the department of corrections for not more than five years."

In prosecutions under "worthless check" statutes, the cases have generally held that where a corporate officer issues a worthless check in the corporate name, he may be held personally liable for violating a penal statute imposing criminal penalties on anyone who, with intent to defraud another of money or property, draws or issues a check on any bank with knowledge that he has not sufficient funds in such bank to meet the check on presentment. This personal liability is predicated on the principle that a corporate officer cannot shield himself from criminal responsibility for his own act on the ground that it was the act of the corporation and not his personal act. Thus, the contention that the corporate officer is not personally liable because he signed the check merely as an agent for the corporation or because the corporation, not the officer, is the actual maker of the check, has been held to be without merit.

In *Clifton v. State of Delaware*, 145 A. 2d 392, 68 A.L.R. 2d 1266, appellant, president of a corporation, was indicted and convicted of four charges of violating the Delaware statute relating to the making and uttering of worthless checks.

These checks were of the "Clifton Motor Co., Inc.", a corporation, and were signed "John E. Clifton, Pres.". The Delaware statute (11 Del. C. § 555), which was similar to Section 561.460, RSMo Cum. Supp. 1963, provided in part:

"Whoever makes, draws, utters or delivers any check, draft or order for the payment of money, to the value of \$100 or more, upon any bank or other depository knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full, upon its presentation, shall be fined in such amount, or imprisoned for such term, or both, as the court, in its discretion, may determine."

On appeal before the Delaware Supreme Court, appellant contended that the Delaware statute did not apply to the case of a person who in his official capacity as a corporate officer knowingly issued a worthless check on the corporate bank account because the corporation is the maker and utterer of the check and said statute does not include the officer who signs and delivers the worthless check.

In rejecting this contention and holding that appellant, a corporate officer who issues a worthless check in the name of his corporation, can be held liable under the Delaware worthless check statute, the Delaware Supreme Court stated:

"\* \* \* The statute is enacted in furtherance of a public policy to punish a special sort of commercial fraud, whether the fraud be committed in an individual or official capacity. To construe it as defendant seeks to do would be to emasculate it. Corporations must act through human beings, and the human being who violates the law is responsible for his acts. This principle is well settled.

"We find almost no dissent from the proposition that an officer of a corporation is criminally liable for his acts, though done in his official capacity, provided that he himself committed the act or aided or abetted in the doing of it. 3 Fletcher,

Cyclopedia Corporations, § 1348; 13 Am Jur, 'Corporations', §§ 1100-1102. For cases involving embezzlement or larceny, see State v Thomas, 123 Wash 299, 212 P 253, 33 ALR 781, and the cases collected in the annotation, pp. 787-792.

"The principle is applicable to violations of the worthless check statutes. State v Cooley, 141 Tenn 33, 206 SW 182; State v Stemen, 90 Ohio App 309, 106 NE2d 662. See also People v. Siman, 119 Misc 635, 197 NYS 713, sustaining an indictment against two corporate officers for violation of a worthless check statute.

"As has been said many times by the courts, one who commits a crime may not shield himself from punishment because he committed the crime in the name of the corporation."

See also: State v. Cooley, 141 Tenn. 33, 206 S.W. 182.

Although there are no Missouri cases directly on point regarding this subject, our Missouri Supreme Court, en banc, in State v. American Insurance Company, 140 S.W. 2d 36, indicated that a corporate officer who violated the criminal laws of this state could be prosecuted as an individual by stating at page 40 [3,4]:

"Conduct of officers and agents of a corporation, which is criminal under the laws of the state, is both a violation of the criminal law by the individual (and in some instances also by the corporation), for which there may be prosecution by criminal information and indictment \* \* \*."

Section 561.470, RSMo Cum. Supp. 1963, merely creates the legal presumption that a check refused by the drawee because of insufficient funds is made, drawn, uttered or delivered by the maker or drawer thereof with knowledge of such insufficient funds. Said section states:

"As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be

prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee."

CONCLUSION

It is the opinion of this office that a corporate officer who makes, draws, utters or delivers an insufficient funds check of his corporation to pay a corporate debt with intent to defraud and with knowledge of such insufficient funds is subject to prosecution under the provisions of Sections 561.460 and 561.470, RSMo Cum. Supp. 1963.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,



THOMAS F. EAGLETON  
Attorney General