



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-010

May 1, 2014

The Honorable Jeremy Hutchinson
Assistant Pro Tempore
Arkansas State Senate
201 East North Street
Benton, Arkansas 72015

Dear Senator Hutchinson:

You have asked for my opinion regarding A.C.A. § 4-60-103, which addresses certain fees associated with dishonored checks. You give the following background information:

[M]any small businesses accept personal checks as payment for goods and services. Some of these checks are dishonored. Arkansas law provides a process for restitution that includes a statutory fee above the face value of the check. Questions have arisen as to when a fee can be claimed on dishonored checks under A.C.A. § 4-60-103.

With this background in mind, you ask two questions:

1. Is the \$30 fee an inherent part of the restitution process becoming a valid and due obligation only on written demand mailed or delivered to the drawer of the check, or is the fee an obligation predicated solely on the condition that the check was not paid?
2. If the holder of a dishonored check forgoes the process of restitution covered by the statute and presents the check again for payment through the bank, whereby it is paid, is a fee still a valid obligation because the check was not honored the first time it was presented for payment?

RESPONSE

In addressing these questions, it will be helpful to first distinguish the statute's treatment of the holder's rights and the drawer's obligations. If the check is not paid due to insufficient funds, then the check's holder immediately acquires the right to demand, among other things, a collection fee not to exceed \$30. But the drawer's obligation to pay that fee only arises upon receipt of a written demand for it. Thus, in response to your first question, the drawer's obligation to pay the collection fee only arises upon receipt of a written demand for it. In response to your second question, the holder's right to the collection fee arose when the check was initially dishonored. But the drawer's obligation to pay the fee never arose because the holder never issued a written demand. So the underlying issue is whether the holder's right to issue a written demand continues even after the check was subsequently honored when it was resubmitted to the financial institution. For reasons explained below, I believe a court would probably hold that, though the right to issue a written demand does not exist indefinitely, it does continue even after the subsequent payment.

DISCUSSION

Before addressing your questions, I must make a preliminary note about the scope of my analysis. Lest I engage in the private practice of law, I will only be addressing your questions from the perspective of an interpretation of A.C.A. § 4-60-103. Thus, I will not consider how the statute (or the factual scenario you provide) relates to federal laws or to any agreement (implied or express) between the parties. I must also emphasize that this opinion is not provided for the benefit of private parties, which should consult private counsel for any legal advice.

For purposes of this opinion, we can say that section 4-60-103 has two primary parts. The first part—contained in subsection -103(a)—addresses the initial phase of the collections process. The second part—contained in subsection -103(b)—addresses what happens if the drawer of the check fails to comply with the procedures in the first phase. Because the resolution of your questions hinges mostly on an exposition of the initial phase, I will focus my analysis on it.

Subsection -103(a) states:

A person who issues a check that is not paid because the check was written on an account with insufficient funds has fifteen (15) days following the date of a written demand mailed or delivered to the

drawer of the check at the address shown on the check or his or her last known address to pay to the holder of the check or his or her agent the amount of the check and a collection fee not to exceed thirty dollars (\$30.00), plus the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored.

This statute establishes three clear steps in the collection process. First, a person—who is later called the “drawer”—must have issued a check that was not paid due to “insufficient funds.” The second step is obscured by the provision’s syntax: “A person who issues a check that is not paid because...[of] insufficient funds has fifteen (15) days *following the date of a written demand*...to pay the holder of the check....” (Emphasis added.) The emphasized language contains the second step: a written demand must be sent to the drawer. The provision goes on to describe where the letter must be sent (if mailed) and the maximum amount that may be demanded. The maximum demand is the sum of the check’s original amount, plus a collection fee “not to exceed” \$30, plus any fees charged to the check’s holder by a financial institution “as a result of” the check being dishonored. Third, upon receiving such a letter, the drawer has 15 days to pay the required amount.

With this brief exposition in mind, we can now turn to your two questions.

Question 1: Is the \$30 fee an inherent part of the restitution process becoming a valid and due obligation only on written demand mailed or delivered to the drawer of the check, or is the fee an obligation predicated solely on the condition that the check was not paid?

I understand this question to be asking about what triggers the drawer’s obligation to pay the \$30 fee: the check being dishonored or the receipt of the demand letter issued in compliance with section 4-60-103(a). As noted above, the demand for the collection fee—which cannot exceed \$30—is conveyed by the written demand. There is nothing in the statute that requires the holder to demand any collection fee at all. Section 4-60-103 leaves the holder with the discretion whether to demand a collection fee and, if so, the fee’s amount (though it cannot exceed \$30). It is only at the point of receiving the demand letter that the drawer knows whether and how much the holder will demand for the collection fee.

Accordingly, the answer to your question (as I understand it) is that the collection fee becomes “a valid and due obligation” only upon receipt of a written demand letter from the holder.

Question 2: If the holder of a dishonored check forgoes the process of restitution covered by the statute and presents the check again for payment through the bank, whereby it is paid, is a fee still a valid obligation because the check was not honored the first time it was presented for payment?

The response to this question will be clearest if we distinguish between the holder's rights and the drawer's obligations. As soon as the check is dishonored, the holder has a right (by virtue of section 4-60-103) to demand payment of the check's face value, a collection fee not to exceed \$30, and any fees charged to the holder by the holder's bank for the check's nonpayment. But the drawer's obligation (under section 4-60-103) to pay these fees does not arise until the drawer receives the written demand for them.

Under the question you pose, when the check was initially dishonored, the holder had a right to send the written demand discussed above. When you say that the holder decided to "forgo[] the process of restitution," I assume you mean that the holder never sent a written demand. As noted above, the drawer's obligation to pay the collection fee only arises upon receipt of the written demand. Therefore, the drawer's obligation to pay the fee never arose in the first place. In order for the collection fee to *become* a "valid obligation," the holder would have to issue a written demand in compliance with section 4-60-103.

Thus, the answer to your question turns on whether the holder still has a right to send a written demand for the fees after the check was subsequently honored. While section 4-60-103 does not expressly address this issue, I think a court would probably draw several inferences from the text of section 4-60-103 to conclude that the holder's right to issue the written demand does continue to exist.

First, the statute does not fix any timeline on the exercise of the holder's right to demand payment. Second, the purpose of the statutory fees appears to be designed to make the holder whole. The collection fee is designed to compensate the holder for having to attempt to secure payment. And the holder is entitled to be compensated for "the amount of any fees charged to the holder of the check by a financial institution as a result of the check's not being honored." The fact that the check was subsequently honored by the financial institution only addresses the payment of the debt, not the payment of the restitution reflected in statutory fees. Thus, the fact of subsequent payment alone does not make the holder whole, which seems to indicate that the holder's right to be made whole persists. I hasten to add that, at some point, the holder's right will be cut off. Because the only issue

here is whether the holder's right continues after the subsequent payment, I will not address when it might end.

I must close by reiterating that this opinion is not provided for the benefit of private parties and should not be relied upon for that purpose. Any private parties interested in resolving a dispute arising under section 4-60-103 should consult private counsel for any needed legal service.

Assistant Attorney General Ryan Owsley prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL
Attorney General

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