

CHECK ABUSE AMENDMENTS

1999 GENERAL SESSION

STATE OF UTAH

Sponsor: John E. Swallow

AN ACT RELATING TO COLLECTING ON DISHONORED INSTRUMENTS; AMENDING PROVISIONS RELATED TO DISHONORED CHECKS OR OTHER INSTRUMENTS; PROVIDING EXCEPTIONS; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

7-15-1, as last amended by Chapter 245, Laws of Utah 1997

7-15-2, as last amended by Chapter 245, Laws of Utah 1997

35A-4-305, as last amended by Chapter 13, Laws of Utah 1998

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **7-15-1** is amended to read:

7-15-1. Definitions -- Civil liability of issuer -- Notice of action -- Collection costs.

(1) As used in this chapter:

(a) "Check" means a payment instrument on a depository institution including a:

(i) check;

(ii) draft;

(iii) order; or

(iv) other instrument.

~~[(1) Any]~~ (b) "Issuer" means a person who makes, draws, signs, or issues [any] a check[; draft, order, or other instrument upon any depository institution], whether as corporate agent or otherwise, for the purpose of:

(i) obtaining from any person[; firm, partnership, or corporation] any money, merchandise, property, or other thing of value; or

(ii) paying for any service, wages, salary, or rent.

(c) "Mailed" means the day that a notice is properly deposited in the United States mail.

(2) (a) An issuer of a check is liable to the holder of the check[; draft, order, or other

instrument] if:

~~[(a)]~~ (i) the check~~[- draft, order, or other instrument]~~:

~~[(i)]~~ (A) is not honored upon presentment; and

~~[(ii)]~~ (B) is marked "refer to maker"; ~~[or]~~

~~[(b)]~~ (ii) the account upon which the check~~[- draft, order, or other instrument has been]~~ is

made or drawn:

~~[(i)]~~ (A) does not exist;

~~[(ii)]~~ (B) has been closed; or

~~[(iii)]~~ (C) does not have sufficient funds or sufficient credit for payment in full of the check~~[- draft, or other instrument.]; or~~

(iii) (A) the check is issued in partial or complete fulfillment of a valid and legally binding obligation; and

(B) the issuer stops payment on the check with the intent to:

(I) fraudulently defeat a possessory lien; or

(II) otherwise defraud the holder of the check.

(b) If an issuer of a check is liable under Subsection (2)(a), the issuer is liable for:

(i) the check amount; and

(ii) a service charge of \$20.

~~[(2)]~~ (3) (a) The holder of ~~[the]~~ a check~~[- draft, order, or other instrument]~~ that has been dishonored may:

(i) give written or ~~[verbal]~~ oral notice of dishonor to the ~~[person making, drawing, signing, or issuing]~~ issuer of the check~~[- draft, order, or other instrument]~~; and

(ii) ~~[impose a]~~ waive all or part of the service charge ~~[that may not exceed \$20]~~ imposed under Subsection (2)(b).

(b) Notwithstanding Subsection (2)~~[(a)]~~(b), a holder of a check~~[- draft, order, or other instrument]~~ that has been dishonored may not ~~[charge]~~ collect and the issuer is not liable for the service charge ~~[permitted]~~ imposed under Subsection (2)~~[(a)]~~(b) if:

(i) the holder redeposits the check~~[- draft, order, or other instrument]~~; and

(ii) that check~~[, draft, order, or other instrument]~~ is honored.

(4) If the issuer does not pay the amount owed under Subsection (2)(b) within 15 calendar days from the day on which the notice required under Subsection (5) is mailed, the issuer is liable for:

(a) the amount owed under Subsection (2)(b); and

(b) collection costs not to exceed \$20.

~~[(3)]~~ (5) (a) [Prior to] A holder shall provide written notice to an issuer before:

(i) charging collection costs under Subsection (4) in addition to the amount owed under Subsection (2)(b); or

(ii) filing an action based upon this section~~[, the holder of a dishonored check, draft, order, or other instrument]~~.

(b) The written notice required under Subsection (5)(a) shall ~~[give the person making, drawing, signing, or issuing]~~ notify the issuer of the dishonored check~~[, draft, order, or other instrument written notice of intent to]~~ that:

(i) if the amount owed under Subsection (2)(b) is not paid within 15 calendar days from the day on which the notice is mailed, the issuer is liable for:

(A) the amount owed under Subsection (2)(b); and

(B) collection costs under Subsection (4); and

(ii) the holder may file civil action~~[, allowing]~~ if the ~~[person seven]~~ issuer does not pay to the holder the amount owed under Subsection (4) within 30 calendar days from the ~~[date]~~ day on which the notice ~~[was]~~ is mailed ~~[to tender payment in full, plus the service charge imposed for the dishonored check, draft, order, or other instrument]~~.

(6) (a) If the issuer has not paid the holder the amounts owed under Subsection (4) within 30 calendar days from the day on which the notice required by Subsection (5) is mailed, the holder may offer to not file civil action under this section if the issuer pays the holder:

(i) the amount owed under Subsection (2)(b);

(ii) the collection costs under Subsection (4);

(iii) an amount that:

(A) is equal to the greater of:

(I) \$50; or

(II) triple the check amount; and

(B) does not exceed the check amount plus \$250; and

(iv) if the holder retains an attorney to recover on the dishonored check, reasonable attorney's fees not to exceed \$50.

(b) (i) Notwithstanding Subsection (6)(a), all amounts charged or collected under Subsection (6)(a)(iii) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (6)(a)(iii).

(iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (6)(a)(iii).

~~[(4)]~~ (7) (a) A civil action may not be filed under this section unless the issuer fails to pay the amounts owed under Subsection (4) within 30 calendar days from the day on which the notice required by Subsection (5) is mailed.

(b) In a civil action, the [person making, drawing, signing, or issuing] issuer of the check[; draft, order, or other instrument] is liable to the holder for:

~~[(a)]~~ (i) the check amount [of the check, draft, order, or other instrument];

~~[(b)]~~ (ii) interest; [and]

~~[(c)]~~ (iii) all costs of collection, including all court costs and reasonable attorneys' fees; and

(iv) damages:

(A) equal to the greater of:

(I) \$100; or

(II) triple the check amount; and

(B) not to exceed the check amount plus \$500.

~~[(5) As used in this section, "costs of collection" includes reasonable compensation, as approved by the court, for time expended if the collection is pursued personally by the holder and not through an agent.]~~

(c) If an issuer is held liable under Subsection (7)(b), notwithstanding Subsection (7)(b), a court may waive all or part of the amounts owed under Subsections (7)(b)(ii) through (iv) upon a finding of good cause.

(d) (i) Notwithstanding Subsection (7)(b), all amounts charged or collected under Subsection (7)(b)(iv) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (7)(b)(iv).

(iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (7)(b)(iv).

(8) This section may not be construed to prohibit the holder of the check from seeking relief under any other applicable statute or cause of action.

Section 2. Section **7-15-2** is amended to read:

7-15-2. Notice -- Form.

(1) (a) "Notice" means notice given to the [~~person making, drawing, or issuing the~~] issuer of a check [~~, draft, order, or other instrument~~] either [~~in person~~] orally or in writing.

(b) [~~A~~] Written notice may be given by United States mail that is:

(i) first class; and

(ii) postage prepaid.

(c) Notwithstanding Subsection (1)(b), written notice is conclusively presumed to have been given when the notice is:

(i) properly deposited in the United States [~~mails;~~] mail;

(ii) postage prepaid [~~, by~~];

(iii) certified or registered mail [~~;~~];

(iv) return receipt requested [~~;~~]; and

(v) addressed to the signer at the signer's;

(A) address as it appears on the check [~~, draft, order, or other instrument~~]; or [at the signer's]

(B) last-known address.

(2) Written notice [~~as applied in~~] under Subsection 7-15-1[~~(3)~~] (5) shall take substantially

the following form:

Date: _____

To: _____

You are hereby notified that the check(s) described below issued by you has (have) been returned to us unpaid:

[Instrument] Check date: _____

[Instrument] Check number: _____

Originating institution: _____

Amount: _____

Reason for dishonor (marked on [instrument] check): _____

~~[This instrument,]~~ In accordance with Section 7-15-1, Utah Code Annotated, you are liable for this check together with a service charge of \$20, which must be paid to the undersigned [within seven days from the date of this notice].

If you do not pay the check amount and the \$20 service charge within 15 calendar days from the day on which this notice was mailed, you are required to pay within 30 calendar days from the day on which this notice is mailed:

- (1) the check amount;
- (2) the \$20 service charge; and
- (3) collection costs not to exceed \$20.

If you do not pay the check amount, the \$20 service charge, and the collection costs within 30 calendar days from the day on which this notice is mailed, in accordance with Section 7-15-1, Utah Code Annotated, [or] an appropriate civil legal action may be filed against you for:

- (1) the check amount [due and owing together with];
- (2) interest[;];
- (3) court costs[;];
- (4) attorneys' fees[;and];
- (5) actual costs of collection as provided by law; and
- (6) damages in an amount equal to the greater of \$100 or triple the check amount, except that

damages recovered under this Subsection (6) may not exceed the check amount by more than \$500.

In addition, the criminal code provides in Section 76-6-505, Utah Code Annotated, that any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check.

The civil action referred to in this notice does not preclude the right to prosecute under the criminal code of the state of Utah.

(Signed) _____

Name of Holder: _____

Address of Holder: _____

Telephone Number: _____

Section 3. Section **35A-4-305** is amended to read:

35A-4-305. Collection of contributions -- Unpaid contributions to bear interest.

(1) (a) Contributions unpaid on the date on which they are due and payable, as prescribed by the division, shall bear interest at the rate of 1% per month from and after that date until payment plus accrued interest is received by the division.

(b) (i) Contribution reports not made and filed by the date on which they are due as prescribed by the division shall be subject to a penalty to be assessed and collected in the same manner as contributions due under this section equal to 5% of the contribution due if the failure to file on time was not more than 15 days, with an additional 5% for each additional 15 days or fraction thereof during which the failure continued, but not to exceed 25% in the aggregate and not less than \$25 with respect to each reporting period.

(ii) If a report is filed after such time and it is shown to the satisfaction of the division or its authorized representative that the failure to file was due to a reasonable cause and not to willful neglect, no addition shall be made to the contribution.

(c) (i) If contributions are unpaid after ten days from the date of the mailing or personal delivery by the division or its authorized representative, of a written demand for payment, there shall

attach to the contribution, to be assessed and collected in the same manner as contributions due under this section, a penalty equal to 5% of the contribution due.

(ii) A penalty may not attach if within ten days after the mailing or personal delivery, arrangements for payment have been made with the division, or its authorized representative, and payment is made in accordance with those arrangements.

(d) The division shall assess as a penalty a service charge, in addition to any other penalties that may apply, in an amount not to exceed the ~~[maximum]~~ service charge ~~[allowed]~~ imposed by ~~[Subsection]~~ Section 7-15-1~~[(2)]~~ for dishonored instruments if:

(i) any amount due the division for contributions, interest, other penalties or benefit overpayments is paid by check, draft, order, or other instrument; and

(ii) the instrument is dishonored or not paid by the institution against which it is drawn.

(e) Except for benefit overpayments under Subsection 35A-4-405(5), benefit overpayments, contributions, interest, penalties, and assessed costs, uncollected three years after they become due, may be charged as uncollectable and removed from the records of the division if:

(i) no assets belonging to the liable person and subject to attachment can be found; and

(ii) in the opinion of the division there is no likelihood of collection at a future date.

(f) Interest and penalties collected in accordance with this section shall be paid into the Special Administrative Expense Fund.

(g) Action required for the collection of sums due under this chapter is subject to the applicable limitations of actions under Title 78, Chapter 12, Limitation of Actions.

(2) (a) If an employer fails to file a report when prescribed by the division for the purpose of determining the amount of the employer's contribution due under this chapter, or if the report when filed is incorrect or insufficient or is not satisfactory to the division, the division may determine the amount of wages paid for employment during the period or periods with respect to which the reports were or should have been made and the amount of contribution due from the employer on the basis of such information as it may be able to obtain.

(b) The division shall give written notice of the determination to the employer.

(c) The determination is considered correct unless:

(i) the employer, within ten days after mailing or personal delivery of notice of the determination, applies to the division for a review of the determination as provided in Section 35A-4-508; or

(ii) unless the division or its authorized representative of its own motion reviews the determination.

(d) The amount of contribution so determined shall be subject to penalties and interest as provided in Subsection (1).

(3) (a) If, after due notice, any employer defaults in any payment of contributions, interest, or penalties on the contributions, or any claimant defaults in any repayment of benefit overpayments and penalties on the overpayments, the amount due shall be collectible by civil action in the name of the division, and the employer adjudged in default shall pay the costs of the action.

(b) Civil actions brought under this section to collect contributions, interest or penalties from an employer, or benefit overpayments and penalties from a claimant shall be:

(i) heard by the court at the earliest possible date; and

(ii) entitled to preference upon the calendar of the court over all other civil actions except:

(A) petitions for judicial review under this chapter; and

(B) cases arising under the workers' compensation law of this state.

(c) (i) To collect contributions, interest or penalties, or benefit overpayments and penalties due from employers or claimants located outside Utah the division may employ private collectors providing debt collection services outside Utah. Accounts may be placed with private collectors only after the employer or claimant has been given a final notice that the division intends to place the account with a private collector for further collection action. The notice shall advise the employer or claimant of the employer's or claimant's rights under this chapter and the rules applicable of the department.

(ii) A private collector may receive as compensation up to, but no more than, 25% of the lesser of the amount collected or the amount due, plus the costs and fees of any civil action or post-judgment remedy instituted by the private collector with the approval of the division. The employer or claimant shall be liable to pay the compensation of the collector, costs, and fees in

addition to the original amount due.

(iii) A private collector is subject to the federal Fair Debt Collection Practices Act, 15 U.S.C. Sec. 1692 et seq.

(iv) A civil action may not be maintained by any private collector without specific prior written approval of the division. When division approval is given for civil action against an employer or claimant, the division may cooperate with the private collector to the extent necessary to effect the civil action.

(d) (i) Notwithstanding Section 35A-4-312, the division may disclose the contribution, interest, penalties or benefit overpayments and penalties, costs due, the name of the employer or claimant, and the employer's or claimant's address and telephone number when any collection matter is referred to a private collector under Subsection (3)(c).

(ii) A private collector is subject to the confidentiality requirements and penalty provisions provided in Section 35A-4-312 and Subsection 35A-4-104(4), except to the extent disclosure is necessary in any civil action to enforce collection of the amounts due.

(e) An action taken by the division under this section may not be construed to be an election to forego other collection procedures by the division.

(4) (a) In the event of any distribution of an employer's assets under an order of any court under the laws of Utah, including any receivership, assignment for benefits of creditors, adjudicated insolvency, composition, or similar proceedings, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for wages of not more than \$400 to each claimant, earned within five months of the commencement of the proceeding.

(b) If an employer commences a proceeding in the Federal Bankruptcy Court under any chapter of the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 et seq., as amended, contributions, interest, and penalties then or thereafter due shall be entitled to the priority provided for taxes, interest, and penalties in the Bankruptcy Reform Act of 1978.

(5) (a) In addition and as an alternative to any other remedy provided by this chapter and provided that no appeal or other proceeding for review provided by this chapter is then pending and the time for taking it has expired, the division may issue a warrant in duplicate, under its official seal,

directed to the sheriff of any county of the state, commanding the sheriff to levy upon and sell the real and personal property of a delinquent employer or claimant found within the sheriff's county for the payment of the contributions due thereon, with the added penalties, interest, or benefit overpayment and penalties, and costs, and to return the warrant to the division and pay into the fund the money collected by virtue of the warrant by a time to be therein specified, not more than 60 days from the date of the warrant.

(b) Immediately upon receipt of the warrant in duplicate, the sheriff shall file the duplicate with the clerk of the district court in the sheriff's county. The clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the delinquent employer or claimant mentioned in the warrant, and in appropriate columns the amount of the contribution, penalties, interest, or benefit overpayment and penalties, and costs, for which the warrant is issued and the date when the duplicate is filed.

(c) The amount of the warrant so docketed shall:

(i) have the force and effect of an execution against all personal property of the delinquent employer; and

(ii) become a lien upon the real property of the delinquent employer or claimant in the same manner and to the same extent as a judgment duly rendered by any district court and docketed in the office of the clerk.

(d) After docketing, the sheriff shall:

(i) proceed in the same manner as is prescribed by law with respect to execution issued against property upon judgments of a court of record; and

(ii) be entitled to the same fees for the sheriff's services in executing the warrant, to be collected in the same manner.

(6) (a) Contributions imposed by this chapter are a lien upon the property of any employer liable for the contribution required to be collected under this section who shall sell out the employer's business or stock of goods or shall quit business, if the employer fails to make a final report and payment on the date subsequent to the date of selling or quitting business on which they are due and payable as prescribed by rule.

(b) An employer's successor, successors, or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of the contributions and interest or penalties due and payable until such time as the former owner shall produce a receipt from the division showing that they have been paid or a certificate stating that no amount is due. If the purchaser of a business or stock of goods fails to withhold sufficient purchase money, the purchaser shall be personally liable for the payment of the amount of the contributions required to be paid by the former owner, interest and penalties accrued and unpaid by the former owner, owners, or assignors.

(7) (a) If any employer is delinquent in the payment of any contribution, the division may give notice of the amount of the delinquency by registered mail to all persons having in their possession or under their control, any credits or other personal property belonging to the employer, or owing any debts to the employer at the time of the receipt by them of the notice.

(b) Any persons notified under Subsection (7)(a) shall neither transfer nor make any other disposition of the credits, other personal property, or debts until:

- (i) the division has consented to a transfer or disposition; or
- (ii) 20 days after the receipt of the notice.

(c) All persons notified under Subsection (7)(a) shall within five days after receipt of the notice, advise the division of credits, other personal property, or other debts in their possession, under their control or owing by them, as the case may be.

(8) (a) Each employer shall furnish the division necessary information for the proper administration of this chapter and shall include wage information for each employee, for each calendar quarter beginning October 1, 1984. The information shall be furnished at a time, in the form, and to those individuals as the department may by rule require.

(b) Each employer shall furnish each individual worker who is separated that information as the department may by rule require, and shall furnish within 48 hours of the receipt of a request from the division a report of the earnings of any individual during the individual's base-period. The report shall be on a form prescribed by the division and contain all information prescribed by the division.

(c) For each failure by an employer to conform to this Subsection (8) the division shall,

unless good cause is shown to the satisfaction of the division for the failure, assess a \$50 penalty to be collected in the same manner as contributions due under this chapter.

(9) If any person liable to pay any contribution or benefit overpayment imposed by this chapter neglects or refuses to pay the same after demand, the amount, including any interest, additional amount, addition to contributions, or assessable penalty, together with any additional accruable costs, shall be a lien in favor of the division upon all property and rights to property, whether real or personal belonging to the person.

(10) (a) The lien imposed by Subsection (9) arises at the time the assessment, as defined in the department rules, is made and continues until the liability for the amount so assessed, or a judgment against the taxpayer arising out of the liability, is satisfied.

(b) The lien imposed by Subsection (9) is not valid as against any purchaser, holder of a security interest, mechanics lien holder, or judgment lien creditor until a warrant which meets the requirements of Subsection (5) has been filed with the clerk of the district court. For the purposes of Subsection (10)(b):

(i) "Judgment lien creditor" means a person who obtains a valid judgment of a court of record for recovery of specific property or a sum certain of money, and who in the case of a recovery of money, has a perfected lien under the judgment on the property involved. A judgment lien does not include inchoate liens such as attachment or garnishment liens until they ripen into a judgment. A judgment lien does not include the determination or assessment of a quasi-judicial authority, such as a state or federal taxing authority.

(ii) "Mechanics lien holder" means any person who has a lien on real property, or on the proceeds of a contract relating to real property, for services, labor, or materials furnished in connection with the construction or improvement of the property. A person has a lien on the earliest date the lien becomes valid against subsequent purchasers without actual notice, but not before the person begins to furnish the services, labor, or materials.

(iii) "Person" means:

(A) an individual;

(B) a trust;

- (C) an estate;
- (D) a partnership;
- (E) an association;
- (F) a company;
- (G) a limited liability company;
- (H) a limited liability partnership; or
- (I) a corporation.

(iv) "Purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest, other than a lien or security interest, in property which is valid under state law against subsequent purchasers without actual notice.

(v) "Security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time:

(A) the property is in existence and the interest has become protected under the law against a subsequent judgment lien arising out of an unsecured obligation; and

(B) to the extent that, at that time, the holder has parted with money or money's worth.