

RESOLUTION 2-05-2002

DIGEST

Limitation on Damages for Post-Dated NSF Checks

Amends Civil Code section 1719 to prevent merchants from taking advantage of treble damage remedies when they encourage their customers to use post-dated checks

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Civil Code section 1719 to prevent merchants from taking advantage of treble damage remedies when they encourage their customers to use post-dated checks. This resolution should be approved in principle because it corrects an injustice in the application of Civil Code section 1719.

In general, Civil Code section 1719 provides that anyone who passes a check on insufficient funds is liable to the payee for damages equal to three times the amount of the check, up to a maximum of \$1,500. Knowing of that statutory sanction, some merchants encourage low-income customers, who cannot afford down payments or qualify for credit cards, to purchase items using a series of post-dated checks. These merchants anticipate that one or more checks may not clear, in which case the merchants obtain judgments for treble damages on each bad check. The trebled debts are collected by wage garnishment, placing an even greater burden on the hapless consumer.

The policy behind the NSF law is to give confidence that the check is “good” at the time it is presented. When the checks are post-dated, however, the merchant accepts them with the knowledge that they are not “good” at that time, and that they are no more than promises to pay in the future. Therefore, the policy considerations underlying the statute do not come into play. To the contrary, under those circumstances the checks are equivalent to an installment contract, the breach of which does not expose the consumer to treble damages.

This resolution removes the main incentive behind this predatory practice by allowing the consumer to avoid the treble damages by proving that post-dated checks were used in the purchase of the item.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Civil Code section 1719 as follows:

- 1 §1719
- 2 (a) (1) Notwithstanding any penal sanctions that may apply, any person who passes a
- 3 check on insufficient funds shall be liable to the payee for the amount of the check and a service
- 4 charge payable to the payee for an amount not to exceed twenty-five dollars (\$25) for the first
- 5 check passed on insufficient funds and an amount not to exceed thirty-five dollars (\$35) for
- 6 each subsequent check to that payee passed on insufficient funds.
- 7 (2) Notwithstanding any penal sanctions that may apply, any person who passes a
- 8 check on insufficient funds shall be liable to the payee for damages equal to treble the amount of
- 9 the check if a written demand for payment is mailed by certified mail to the person who had
- 10 passed a check on insufficient funds and the written demand informs this person of (A) the
- 11 provisions of this section, (B) the amount of the check, and (C) the amount of the service
- 12 charge payable to the payee. The person who had passed a check on insufficient funds shall
- 13 have 30 days from the date the written demand was mailed to pay the amount of the check, the
- 14 amount of the service charge payable to the payee, and the costs to mail the written demand for
- 15 payment. If this person fails to pay in full the amount of the check, the service charge payable
- 16 to the payee, and the costs to mail the written demand within this period, this person shall then

17 be liable instead for the amount of the check, minus any partial payments made toward the
18 amount of the check or the service charge within 30 days of the written demand, and damages
19 equal to treble that amount, which shall not be less than one hundred dollars (\$100) nor more
20 than one thousand five hundred dollars (\$1,500). When a person becomes liable for treble
21 damages for a check that is the subject of a written demand, that person shall no longer be
22 liable for any service charge for that check and any costs to mail the written demand.

23 (3) Notwithstanding paragraphs (1) and (2), a person shall not be liable for the service
24 charge, costs to mail the written demand, or treble damages if he or she stops payment in order
25 to resolve a good faith dispute with the payee or the payee accepted more than one check at
26 the same time from the payor and at least one of them was post-dated. The payee is entitled to
27 the service charge, costs to mail the written demand, or treble damages only upon proving by
28 clear and convincing evidence that there was no good faith dispute, as defined in subdivision
29 (b). The payor bears the burden of proving that the payee accepted more than one check at
30 the same time from the payor and at least one of them was post-dated.

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[Subdivisions (a)(4) through (a)(6) and (b) through (k), remain unchanged]

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: The law allows treble damages for NSF checks regardless of whether the payee is a bona fide payee or not.

The Problem: The NSF check treble damage provision has led to a cottage industry of creditors accepting many post-dated checks from debtors as their down payments for goods precisely because the debtor then does not have the cash for the down payment. These circumstances put the payee on notice that the checks are NSF and that the debtor is likely to default on them and the contract. Nonetheless, the law as written allows these creditors to sue on each separate NSF check and collect the full amount of treble damages for each check. (See, *P.H. Automotive Holding Corp. dba Pacific Honda v. Debra Clark* (July 3, 2001) San Diego Superior Court Case No. SC113579, in which the creditor admitted to filing at least 120 similar actions for compensatory and treble damages and obtaining approximately \$180,000 in judgments from the technique of accepting multiple post-dated checks for the down-payment on the purchase of consumer goods).

This Resolution: This resolution would clarify that only bona fide creditors qualify for treble damages for NSF checks.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute, or rule.

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