Opinion No. 65-157

August 17, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Representative Arthur L. Dow, State Representative, Bernalillo County, District 15, 3718 Candelaria, N.E., Albuquerque, New Mexico

QUESTION

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May a business collect a $ 2.00 service charge fee on a returned check?

CONCLUSION

Yes, but see analysis.

OPINION

*{*265}* ANALYSIS

We have been unable to locate any statute either authorizing or prohibiting the assessing of a *{*266}* service charge on a returned check. Therefore, the only authority for collecting such a fee on a returned check must arise from the circumstances of the transaction itself. If a person gives a business establishment a check with the understanding that he will pay a $ 2.00 fee if the check is returned, then the charge is enforceable as an express agreement entered into between the parties. However, before the duty to pay such a service charge arises there must be an express understanding that the charge will be made if the check is returned. The only other situation where a party would be liable for the service charge is if an implied contract is entered into. The general rule concerning implied contracts is quoted as follows from 17 C.J.S. "Contracts" § 4, 557:

". . . A 'contract implied in fact,' . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract."

From this it follows that if in past dealings with the business, a returned check charge has been imposed and the party issuing the check knows of it, an implied contract to pay such service charge would arise. The implied contract to pay such service charge could arise also if notice is brought to the attention of the party seeking to cash the

check. Such notice could be by way of printed announcement displayed in a conspicuous place in the store advising that a service charge would be made for returned checks. Contracts arising from these circumstances and inferred from the conduct of the parties have been recognized by the courts. **Bush v. Lane,** Cal., 326 P.2d 640; **Iusi v. Chase,** Cal., 337 P.2d 79. On the basis of the foregoing, it follows that, inversely, if a person does not have the understanding brought to his attention, either expressly or impliedly from the circumstances, the service charge is unenforceable against the party whose check is returned. If the store refuses to allow the party to redeem the check without payment of the fee and if, as a result of the refusal to pay the fee, the check is turned over to some collection agency, then their claim is also limited to the amount of the check. There would be no legal basis to enforce the collection of the service charge over and above the value of the check. This would be true in either civil or criminal proceedings.

In enforcement of such a contract the burden of showing that a contract existed would be on the party asserting the existence of the contract, **Noyes v. Gold,** 310 Ill. App. 1, 34 N.E.2d 1; **Shaw v. Waterhouse,** 79 Me. 180, 8 A. 829.

Trusting that this answers your inquiry.