

LAW MEMO

Bounced checks: what to do

Bad checks, also known as bounced checks, rubber checks, insufficient checks, NSF checks and bogus checks, can be a pesky problem for arts organizations that charge tuition, operate box offices or sell merchandise. Most banks charge recipients a bad check fee, and you'll have the unpleasant task of trying to collect from the "deadbeat."

More than 450 million bad checks are written in the United States every year. This includes both innocent record keeping mistakes, like checks written without sufficient funds in the account, and outright fraud.

According to the Federal Reserve, check fraud and counterfeiting are among the fastest-growing problems affecting the nation's financial system, producing estimated annual losses of \$10 billion.

Not only are the dollar amounts involved in fraud increasing each year, but the types of fraud and their levels of sophistication also are growing.

Among the common forms of check fraud are:

- Forged signatures (legitimate blank checks with an imitation of the account holder's signature);
- Forged endorsements (often involving theft of a valid check, which is then endorsed and cashed or deposited by someone other than the payee);
- Counterfeit checks (the fastest-growing source of fraudulent checks, due to advances in color copying and desktop publishing capabilities);
- Altered checks (defined as valid check stock with certain information, such as the payee or written amount, changed to benefit the perpetrator);
- Check kiting (the process of depositing a check from one bank into a second bank without sufficient funds to cover it, then taking advantage of the conditional credits offered by the second bank to write a check for deposit back to the first bank to cover the original check).

Writing a bad check is a crime in every

state. There are both civil and criminal penalties for breaking the law, though it is more difficult to prove a criminal case. In all but a very few instances, you'll be more interested in recovering the money owed than in punishing the check writer.

This issue of *Arts Law Memo* provides tips for avoiding bad check problems and suggestions for dealing with them. It also summarizes applicable state laws.

SUGGESTED SAFEGUARDS

After cash, personal checks are the most popular form of payment in retail settings, so your organization cannot afford to alienate customers by not accepting them. Furthermore, because banks do not add a service charge, like the percentage withheld by credit card companies, your arts organization may actually want to encourage payment by check.

Following a few sensible rules can help minimize your losses:

- Make sure a current home address (not a p.o. box) as well as home and work phone numbers are printed or written on the check.
- When payment is made in person, ask for a picture ID, such as a current driver's license. Write the number on the front of the check, not on the back, because banks often cover up important information with inked stamps. Compare the signature on the check with the signature on the ID.
- Examine the date for accuracy of day, month, and year. Don't accept the check if it is not dated, if it is postdated, or is more than 30 days old.
- Don't accept third-party checks.
- Use extra care in examining a check that is drawn on a non-local bank.
- Do not accept a check that is not written legibly. It should be written and signed in ink.
- Be careful when the check has a low number. Ninety percent of returned checks have low numbers (100 to 500). Low check numbers indicate new accounts, which are considered more risky.
- Pay attention to the feel of the check.

Published by the St. Louis

Volunteer Lawyers and Accountants for the Arts (VLAA), *Arts Law Memo* is mailed, free of charge, to more than 850 Missouri and Southwestern Illinois arts organizations, VLAA volunteers and corporate sponsors.

VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



This issue was written by Sue Greenberg, VLAA's executive director, and Christina Cheshier, VLAA summer associate. Special thanks to VLAA volunteer Timothy M. Bosslet, Esq.

This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.

St. Louis Volunteer Lawyers and Accountants for the Arts

3540 Washington
St. Louis, MO 63103
314/652-2410
FAX 314/652-0011
vlaa@stlrac.org
www.vlaa.org

© St. Louis Volunteer Lawyers and Accountants for the Arts, 2002

Most check paper is the same weight and texture. Also, most checks are perforated on one side.

- Consider allowing customers to use their debit cards. If the money isn't in the customer's account, the transaction will not be approved.

- If there is any doubt as to whether a check is fraudulent, don't hesitate to call the bank on which the check is drawn.

- Make photocopies of all checks for your records. Deposit checks right away. A check is technically valid for six years, unless a time limitation is printed on the front. However, most

banks are reluctant to honor a check that is more than 180 days old.

- Review your organization's check acceptance policies with employees on a regular basis.

WHEN A CHECK BOUNCES

When a check is returned to your organization, what steps can you take? In *Legal Guide for Starting and Running a Small Business*, Fred S. Steingold offers these six strategies:

- **Call the customer.** Arts organizations say that most bad checks are innocent mistakes, so be polite and understanding. If the customer has genuine financial problems, consider

extending the time for payment. Call the day before payment is due to be sure that the customer plans to honor your agreement. Keep notes on all phone conversations.

- **Write a demand letter.** If a few phone calls do not settle the matter, send a letter by regular *and* certified or registered mail. Avoid threats. You may want to prepare a series of letters to use in routine cases. Save copies of all correspondence.

- **Contact the bank.** Customers often make deposits a few days after their checks bounce. Try sending the check back to the bank.

State Bad Check Laws in a Nutshell

MISSOURI

Under Section 570.120 of the Missouri Revised Statutes, the holder of a bad check may elect to seek a remedy under civil (570.123) or criminal law, however, the holder may not seek a both civil AND criminal remedies.

CIVIL: Any individual who issues a check which is not honored because of lack of funds or credit to pay, because he/she does not have an account with the depository, or because he/she has fraudulently stopped payment on the check, may be civilly liable to the payee. The issuer of the check must be given a written demand (send the letter by regular and certified mail) for payment and allowed thirty (30) days following receipt of that demand to pay the outstanding amount in cash. Should that thirty-day period lapse without payment, the amount of recoverable damages will be three times the face amount of the check OR \$100.00, whichever is GREATER, however the maximum amount of damages may not exceed \$500.00. Note that in a civil action, the original check holder (not a secondary payee) may also recover attorney fees.

CRIMINAL: Any individual who purposefully issues a check to defraud another, or with the knowledge that there are insufficient funds in the individual's account or that the individual has no account or affiliation with the depository may be criminally prosecuted. The check writer must receive actual notice in writing that the check has been dishonored and must be given ten (10) days in which to cover the amount of the check in cash. If payment is not made within that period, the issuer may be prosecuted for a) a misdemeanor if the check is for less than \$150.00; or b) with a felony if the amount exceeds \$150.00 OR if the issuer had no account or the depository does not exist.

ILLINOIS

CIVIL: Under Illinois Statutes Chapter 720, Section 5/17, any individual who issues a bad check because the writer does not have an account with the depository or because the writer's account contains insufficient funds to cover the check may be liable for both the amount of the check and for either \$25.00 OR the amount of the injured party's costs and expenses, including any attorney's fees, and interest, whichever is greater. Costs and expenses will only be awarded in excess of \$25.00 in a "nonlitigated collection action" if the payee sends the writer a written demand and notification of liability for costs and expenses, via certified mail, return receipt requested, AND via first-class mail to the writer's last known address. This demand must inform the writer that he/she has thirty (30) days from the date the demand was mailed to make payment. If the demand by certified mail is returned to the sender marked "refused" or "unclaimed" the writer may be liable for treble damages of no less than \$100 but no more than \$1,500 plus the amount of the check and attorneys fees and costs. These actions may be pursued in either small claims court or any other appropriate court.

CRIMINAL: A person may be charged with a Class A misdemeanor if he/she issues a check from a depository, real or fictitious, knowing that the amount will not be paid by the depository and fails to cover the amount of the check in cash. If the amount of the check in this scenario is in excess of \$150.00 and is not covered in cash within seven (7) days of the check writer receiving actual notice of the bounced check from either the depository or the payee, the first offense is a Class A misdemeanor – if the individual commits this identical crime a second time, however, he/she can be charged with a Class 4 felony.

Remember that "bad check" laws are not applicable when there is a bona fide dispute between the check writer and the payee as to the quality of the goods or services provided in their exchange.

– Christina Cheshier, VLAA summer associate

• **Request assistance from law enforcement officials.** Your district or prosecuting attorney or your local police department may be willing to help you collect. However they usually do not want to act as a collection agency, unless the problem involves a habitual bad check writer.

• **Go to small claims court.** Small claims court can hear your case without long delays, the need for representation by a lawyer, complicated paperwork, or rigid rules of evidence. For more information, download VLAA's *Guide to Small Claims Court* from our web site (vlaa.org).

• **Hire a collection agency or an attorney.** Third party debt collectors can save you time, but their fees typically range from one to two thirds of the money recovered.

The Fair Debt Collection Practices Act, which covers personal, family and household debts, requires debt collectors to treat consumers fairly. Prohibited actions include using threats making false statements, or contacting the consumer before 8:00 a.m. or after 9:00 p.m. The debt collector also must send the consumer a written notice containing the amount of the debt, the name of the creditor, and what the consumer can do if he or she believes that he or she does not owe the money.

Note that the Fair Debt Collection Practices Act regulates professional debt collectors, including attorneys, who work as outside agents for creditors. It does not apply to creditors collecting their own debts. However, many creditors choose to follow the Act's requirements.

WHEN PAYMENT IS STOPPED

Bad check laws do not apply when an individual stops payment on a check— unless it can be proven that the issuer intended to stop payment when the check was presented. (Fraudulently stopping payment is a misdemeanor.)

If an unhappy customer stops payment on a check, your best recourse is to promote your organization's goodwill by trying to settle the matter amicably.

Seven Deadly Debt Collection Practices

Whether you're a professional debt collector or just chasing you overdue account, federal and state laws dictate the methods you may use. Alan D. Reffkin, former senior trial attorney for the Federal Trade Commission and expert on collection law, offers the following list of debt collection practices that can get you into trouble:

1. Jeopardizing consumers' jobs by revealing the purpose of calling or writing them at work. In most states, the law permits you to contact debtors at work, but you must guard their privacy. Even when state law permits such calls, you shouldn't phone people unless company policy at the debtor's place of work allows personal calls. Never reveal to any third party that the person owes a debt. Letters are even more risky, because of the possibility that someone else will open the mail. If you must write, mark any correspondence "personal and confidential."

2. Suggesting to any third parties (like neighbors, friends, or business associates) that a consumer is in debt. If you (or one of your employees) are calling these individuals to try and track someone down, you may only ask: Where does the debtor live? What is his or her home phone number? Where does he or she work? Federal law also requires you to say you are "confirming or correcting location information" about the consumer.

3. Publicly announcing that a consumer is in debt. This means mentioning debts on a postcard, tacking a note on someone's door, or publishing a list of people who owe you money.

4. Calling consumers at home during "inconvenient" times. That generally means before 8 AM or after 9 PM.

5. Using deceptive tactics to collect information. It's perfectly legal to encourage customers to disclose financial facts and figures. What you can't do is trick them into it. Examples: sending a debtor a check, hoping he'll cash it at his bank and thereby lead you to his account.

6. Faking documents. This includes phony court papers and dunning letters that look like telegrams.

7. Making empty threats. Don't say (or even imply) that you'll sue unless you intend to. Likewise, unless you plan to notify a credit-reporting bureau about a delinquent account, avoid statements like: "nonpayment will affect you credit rating" or "delinquent accounts are reported to credit bureaus."

Source: *Small Business Legal Smarts* by Deborah L. Jacobs

WHITAKER FOUNDATION
Publication of *Arts Law Memo* is made possible by grants from the
Whitaker Foundation; Regional Arts Commission; the Illinois Arts
Council, a state agency; and the Missouri Arts Council, a state agency.



CHANGE SERVICE
REQUESTED

3540 WASHINGTON
ST. LOUIS, MO 63103

NONPROFIT ORG.
U.S. POSTAGE
PAID
ST. LOUIS, MO
PERMIT NO. 3363



Martha Graham Center Wins Rights to 54 Dances

The Martha Graham Center of Contemporary Dance is getting back to work. Last month, the Hon. Miriam Goldman Cedarbaum of the Southern District of New York issued a decision confirming that the Center owns the copyright in the overwhelming majority of Martha Graham's dances. Cedarbaum determined that the Center owns 54 works; ten works are in the public domain; five are owned by commissioning entities; and Ronald Protas owns only one dance, "Sephardic Dialogue."

Contentious relations between Ronald Protas and the Martha Graham Center resulted in a vicious legal battle, which forced the company to suspend operations. The dispute also shed light on a question that continues to trouble the dance world: Who owns a choreographer's work?

Protas, who had no formal training in dance, first became acquainted with Graham in the late 1960s. A law school-drop out, he was 26 years old. While initially her assistant, Protas eventually became much more. Upon her death in 1991, he succeeded Graham as artistic director of the Center. He also became her sole heir.

"After listening to [Mr. Protas'] evasive and inconsistent testimony and observing his demeanor," the judge said he was not a credible witness. She also found that Protas "profited improperly at the defendants' expense and did not act 'with an eye single to the interests' of the defendants to whom he owed a fiduciary duty."

Finally, Cedarbaum said that in his "desire to undermine the

Center's ownership of the works, sets and costumes, Protas did not accurately inform the Board of the underlying facts."

The Court awarded the Center more than \$240,000 for Protas' improper licensing of works actually owned by the Center and for selling the Center's property to the Library of Congress.

The judge's 110-page decision confirmed that Martha Graham assigned the majority of her choreographic works to the Center and that most of her remaining dances were created in her capacity as an employee of the Center. For copyright purposes, works created by employees within the scope of their regular employment are owned by the employer.

Cedarbaum also found, as argued by the Center, that ten of the 70 dances at issue have now entered the public domain. In a press release, the Center said it is very pleased that the ten dances, including "Appalachian Spring," will be available to the public for study and performance.

In a related case, the Federal Court of Appeals recently affirmed that the Martha Graham Center owns the "Martha Graham" trademark and name for all purposes associated with its mission.

Graham's legal legacy is clear: Arts organizations involved in creating new works should clarify, in advance, who owns the copyright. VLAA can supply sample contracts and encourages members of the arts community to include mediation clauses in their agreements.