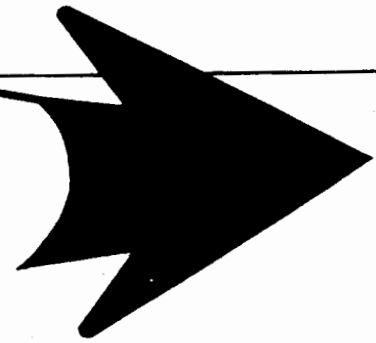


# THE ARROW

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## BAD CHECK SERVICE CHARGES

**M**ost, if not all, merchants are presented at one time or another with a cold check from a customer. Sometimes the merchant can recover the face value of the check by presenting the check for the second time to the issuer's bank. If the customer has not deposited sufficient funds in the interim, however, the merchant will usually attempt to collect the check by contacting the customer directly.

When the merchant attempts to collect directly, he or she will generally seek to collect a service charge in addition to the face value of the check. Although controversy over the customer's obligation to pay this service charge may frequently arise, courts infrequently deal with such controversies because the disputed service charge is unlikely to be the subject of litigation. Kentucky merchants can find authority for imposing such service charges, however, in the opinions of the Attorney General of Kentucky, specifically OAG 83-121 (1983) and OAG 83-412 (1983).

According to the Attorney General of Kentucky, the customer's legal obligation to pay the service charge as well as the amount a merchant can collect as a service charge are dictated by basic contract principals. OAG 83-412 (1983).

The customer's obligation to pay a service charge on a check returned for nonsufficient funds to the merchant is dependent on whether or not the customer had prior knowledge of the merchant's intent to charge a fee for checks returned "NSF", and the amount of that service charge. OAG 83-412 (1983).

A customer's knowledge that a merchant will impose a service charge for any returned checks can be presumed for certain circumstances; for example, a merchant may post a sign stating that a service charge will be imposed on any bad check and the amount of the charge in a place where the customer is bound to see it, the merchant may inform the customer orally of the imposition of a service charge for checks returned, or written terms on a check-cashing application may alert the customer. OAG 83-121 (1983),

83-412 (1983). The rationale is that once a customer has knowledge of a merchant's intent to impose a service charge for "cold checks", the customer agrees to this condition by then paying for services or merchandise with such a check.

The amount of the service a merchant may impose on bad checks is similarly governed by contract principals. The amount of the service charge should be reasonable in relation to the merchant's expenses incurred in collecting on the amount of the check. This is because the contract between the merchant and the customer tendering a cold check is subject to the unconscionability analysis of KRS 355.2-302.

The merchant attempting to collect a service charge on a check returned for nonsufficient funds should keep in mind that the service charge is considered an ancillary matter for purposes of criminal prosecution. In other words, the Kentucky Theft By Deception statute, KRS 514.040, is applicable only to the face amount of the returned

check. OAG 83-412 (1983).  
The state will not prosecute the issuer of an NSF check for an amount in excess of the face value of the check, nor for instances where the merchant has refused to accept payment because the service charge is not included in the amount offered. □

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