

April 27, 1992

Mr. J.D. Hancock
Rexburg City Attorney
SMITH & HANCOCK
P.O. Box 427
Rexburg, ID 83440

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Requests for Prosecution of Insufficient Funds Checks by Local Credit
Bureau

Dear Mr. Hancock:

The Attorney General has asked me to respond to your letter of January 9, 1992, regarding requests for prosecution of insufficient funds checks by a local credit bureau. You have asked whether the credit bureau may stand in the shoes of the original receiver of the bad check for the purpose of pursuing criminal prosecution. Finally, you have asked whether a representative of the credit bureau can sign a criminal complaint against the utterer of a bad check.

Your letter raises several issues, both legal and practical. In responding to these questions, it is important to begin with the statute criminalizing the writing of insufficient funds checks. Idaho Code § 18-3106 does not criminalize the mere delivery of a bad check. Rather, a specific intent to defraud is required, as is the showing that there were insufficient funds to cover the check at the time it was written. Further, it has been held that no crime has been committed if the party passing the check informs the payee at the time the check was tendered that the deliverer did not have funds on hand to meet the check. State v. Eikelberger, 72 Idaho 245, 239 P.2d 1069 (1951). It has further been held that Idaho Code § 18-3106(d), which creates a virtual presumption of intent to defraud upon the making of a check with insufficient funds, is unconstitutional. State v. Hebner, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985).

Given the law, from a practical standpoint it is unlikely that any private entity would have the necessary information to show probable cause that a crime has been committed. A proper police investigation and records showing the status of the account on the day the check was written would be required. In the absence of such information, it would be improper for the credit bureau to attempt to initiate a criminal filing.

Assuming that probable cause to believe that a crime occurred does exist, any private party, including a representative of a credit bureau, may file a criminal complaint:

[U]pon proper proceedings before a magistrate a complaint may be filed by someone other than the prosecutor. It is immaterial whether that person is acting as a private citizen or on behalf of a public officer.

Clark v. Meehl, 98 Idaho 641, 642, 570 P.2d 1331 (1977); *reaff'd.* in State v. Bacon, 117 Idaho 679, 791 P.2d 429 (1990).

However, this does not end the analysis. It is one thing to file a criminal complaint. It is quite another to prosecute someone for a crime. The legislature has placed the sole duty of prosecuting criminal actions in the hands of the county prosecuting attorney, Idaho Code § 31-2604, and, in cases of misdemeanors committed within municipal limits, the city attorney. Idaho Code § 15-208A. Clearly, a credit bureau cannot attempt to prosecute an individual, nor can it direct the prosecutor or city attorney as to how he or she should proceed in a given case.

Hence, it can readily be seen that even if a credit bureau does file a criminal complaint against someone, the prosecutor or city attorney, in his or her sole discretion, may move to dismiss the complaint immediately. Assuming that such a dismissal is granted by the court, it would be an absolute bar to further criminal proceedings. Idaho Code § 19-3506.

Nor can a credit bureau be considered a "victim" under the Victims Rights Act. Those rights are reserved for persons who suffer economic loss or injury as a result of the defendant's criminal conduct who are named in the criminal complaint as the original victim. Idaho Code § 19-5304. Hence, a credit bureau may not act to influence a criminal proceeding in the guise of a successor in interest.

In summary, any private citizen, including a representative of a credit bureau, may file a criminal complaint. However, such a person can have no control over the ensuing prosecution. Because of this, it would be entirely fruitless for the private citizen to file the criminal complaint without the complete cooperation of the county prosecutor or the city attorney.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division