

*Advisory*  
*not 1000*



THOMAS J. MILLER  
ATTORNEY GENERAL

ADDRESS REPLY TO:  
HOOVER BLDG., SECOND FLOOR  
1300 EAST WALNUT  
DES MOINES, IOWA 50319  
515/281-5926

## Department of Justice

CONSUMER PROTECTION DIVISION

September 25, 1985

Dear

We have received your request for an opinion on the question whether a holder of a dishonored check may recover both treble damages under the new Iowa Code section 554.3806 and a ten-dollar (\$10.00) surcharge under Iowa Code section 554.3507(5) (1985).

Your questions ask us to define what remedies a court may order in a civil action. Thus, the issue would necessarily be determined by a court in litigation in which the parties have a right to be heard and to present argument. This office declines to issue opinions in matters which are pending in litigation because to do so could interfere with the jurisdiction of the Court. 120 I.A.C. 1.5(3)(a); 1972 Op. Att'y. Gen. 686. For the same reason, we would decline to issue an opinion here but will instead provide you this advisory letter setting forth our views to assist you in determining whether further legislation should be sought. As this is a question which will arise in litigation between private parties, we would further caution that persons should seek the advice of their own attorney to guide their own conduct and should not rely on this letter as definitively resolving the issue. This letter is written to provide you our views on the legislation and not to provide persons guidance as to what actions they should take to minimize the potential consequences of their actions.

As you know, the legislature took action to protect the holders of dishonored checks when it enacted new Code § 554.3806 (S.F. 309). Effective July 1, 1985, that section permits recovery of treble damages in a civil action against the maker of a dishonored check. The new Iowa Code § 554.3806, however, makes no reference to § 554.3507(5) which, effective July 1, 1984, created the statutory right of a holder of a dishonored check to assess a surcharge against the maker.

*CPAD-31*

The new Iowa Code § 554.3806 is one of three known statutory remedies for dishonored checks. The other remedies are:

- 1) Iowa Code section 625.22 which provides that in an action on a dishonored check, the plaintiff may recover costs, attorneys fees and any other surcharges permitted by law; and
- 2) Iowa Code section 554.3507(5) which provides that the holder of a dishonored check may assess a surcharge of no more than \$10.00 against the maker.

The issue raised by your question is the extent to which a person may cumulate these remedies.

In 1984, Iowa Code § 625.22 was amended to expressly permit recovery also of surcharges; however, new Iowa Code § 554.3806 contains no such provision. In addition, §§ 554.3806(1) and (2) define the amount a plaintiff may recover as "damages triple the amount for which the dishonored check...is drawn. However, damages under this section shall not exceed by more than five hundred dollars the amount of the check...." In a case where the failure of the defendant to satisfy the dishonored check is found to be due to economic hardship, recovery may be limited to the amount of the dishonored check and the actual cost of the plaintiff in bringing the action. The limitations contained in new § 554.3806(1) and (2) suggest that the legislature did not intend the surcharge to be available in addition to treble damages. Finally, new Iowa Code § 554.3806(4) expressly states that a plaintiff may not recover both treble damages and the remedy provided under Iowa Code § 625.22. The remedy under the latter section includes the recovery of the § 554.3507 surcharge.

It appears that the legislative intent of the 1984 amendment to § 625.22 was to provide that a plaintiff who sued to recover payment on a dishonored check could also recover the surcharge provided by § 557.3507(5). There is no question that Iowa Code §§ 554.3507(5) and 625.22 (1985) must be read together. In construing a statute, all provisions of the act of which it is a part and other pertinent statutes must be considered. Maguire v. Fulton, 179 N.W.2d 508, 510 (Iowa 1970). However, it seems equally clear that when the Legislature created the new civil remedy of treble damages in a civil action on a dishonored check by specifically prohibiting the costs allowed in § 625.22, it intended that a plaintiff in a suit seeking treble damages under new Iowa Code § 554.3806 may not recover both treble damages and the costs allowed by § 625.22 which include the § 554.3507(5) surcharge. When the question of what costs may be recovered under a particular statute arises, the situation must fall clearly within the terms of the statute before a specific cost may be recovered. Goodwin v. Iowa State Highway Comm., 369 N.W.2d 816, 819 (Iowa 1985).

Based on this construction of Iowa Code §§ 554.3507(5) and 625.22 (1985) and the new Iowa Code § 554.3806, we conclude that, unless the maker cures the dishonor by the procedures set forth in the new § 554.3806(1)(b), a holder of a dishonored check who files suit under the new § 554.3806 may not recover in that lawsuit both the § 554.3507(5) surcharge and treble damages. The Legislature may wish to clarify the statute by an express provision in the new § 554.3806 providing or denying the right to recover a § 554.3507(5) surcharge in a treble damages action. Again, please note that this is not an opinion of the Attorney General.

Sincerely,

LINDA THOMAS LOWE  
Assistant Attorney General

cf