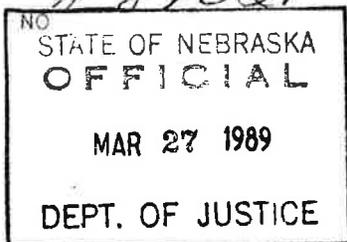


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 24, 1989

SUBJECT: Validity and Construction of Legislative Bill 490
Which Provides for the Criminal Offense of
Defrauding Suppliers

REQUESTED BY: Senator Jerry Chizek, Chairperson
Judiciary Committee

WRITTEN BY: Robert M. Spire, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to the request of the Judiciary Committee for an Opinion of this office concerning whether LB 490 violates the constitutional prohibition against imprisonment for debt.

The express legislative purpose of LB 490 is "to make defrauding a supplier a crime and to provide for penalties." Section 2 of the bill provides that a person, firm, or corporation commits the offense of defrauding a supplier if he or she, as a contractor or subcontractor, fails to pay any supplier or subcontractor for materials, goods, or labor furnished within twenty days of final receipt of payment under the contract. Further, a contractor and owner commits the offense if he or she knowingly and willingly transfers title of property upon which improvements were made without paying for materials, goods, or labor contracted for and furnished to the project.

Article I, Section 20, of the Nebraska Constitution provides that "[n]o person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." Although the constitutional language refers to civil, not criminal actions, the Nebraska Supreme Court long has held the provision applicable to criminal prosecutions initiated to aid a civil creditor.

The constitutional question arises because the proposed act does not expressly provide or require the requisite mens rea, the intent to defraud, for conviction of the offense. In Norton v.

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Janing, 182 Neb. 539, 156 N.W.2d 9 (1968), a statute which permitted prosecution for failure to pay a contractual obligation without proof of fraud was found unconstitutional. The statute criminalized the nonpayment by a contractor of debts owing to laborers or materialmen without first having obtained lien waivers. The court held that proof of fraudulent intent was necessary to imprison for failure to pay civil obligations.

Thus, the absence of an express provision or requirement of intent to defraud for conviction renders the act proposed by LB 490 constitutionally suspect.

Our Supreme Court has endeavored to interpret statutes which make criminal offenses for failure to pay contractual debts in a manner consistent with the Constitution. The constitutional validity of statutes which did not expressly provide or require an intent to defraud in prosecutions for failure to pay civil obligation have been upheld. In State v. Hocutt, 207 Neb. 689, 300 N.W.2d 198 (1981), a statute which did not expressly require fraud was upheld because judicial construction of the act had established that proof of fraud was required for a conviction.

A statute which made the issuance of insufficient fund checks a crime without expressly providing for or requiring intent to defraud was upheld in State v. Kock, 207 Neb. 731, 300 N.W.2d 824 (1981). The court determined that the mere drawing of a check was not sufficient to constitute a violation and, reading the statute in its entirety, the essential elements of the offense stated in the act was sufficiently descriptive of an intent to defraud. The court chose an interpretation which gives effect to the statute over one which defeats the statute and gives effect to the entire language of the statute as against one which does not.

While the proposed statute does not expressly provide or require fraudulent intent, Section 3 of the bill provides that failure to pay shall be prima facie evidence that the failure to pay was with intent to defraud. Based on our review of the cases, it is our conclusion that the court would endeavor to interpret the proposed act in a manner consistent with the Constitution and would determine that, by reading the act in its entirety, an intent to defraud is required for prosecutions under the act.

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Accordingly, it is our opinion that LB 490 would not violate the constitutional prohibition against imprisonment for debt.

Sincerely,

ROBERT M. SPIRE
Attorney General



Fredrick F. Neid
Assistant Attorney General

21-01-14.1

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:



Attorney General