



ISSUANCE OF BAD CHECK AND THEFT BY CHECK

JUDGE JAMES R. DePIAZZA
JUSTICE OF THE PEACE - DENTON COUNTY PRECINCT TWO

CAN I GET RESTITUTION ?

Issuance of Bad Check (IBC) and Theft by Check cases filed in the Justice Court are "Class C Misdemeanors" punishable by fine (\$500 maximum) and restitution to any victim of the offense.

IBC cases of any amount can be filed in the Justice Court; However, the maximum amount of restitution allowed by law is \$5000.00 (effective 9/1/2007).

Theft by Check Cases filed in the Justice Court must be less than \$20. If you want to proceed with a Theft by Check case in an amount of \$20.00 or above, you must file with the District Attorney's office.

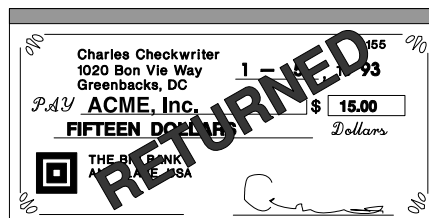
State law requires that fines and court costs be paid before restitution can be given. The Justice Court may consider the payment of restitution as an exhibition of good faith by the defendant, or require restitution as a condition for final disposition of the case. If filed with the DA's office, the prosecutor will do his or her best to plea bargain with the defendant to offer a reduced fine if the defendant pays restitution

to the victim.

While restitution for an IBC check may be for any amount up to \$5000, occasionally a Defendant will pay only the fine without restitution being made to the victim, and the Court may be unable to compel the Defendant to pay the restitution. This might

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occur if the Defendant is jailed long enough to get credit towards the full fine. This means that a Justice Court may not be able to obtain restitution for a merchant, although a defendant can be jailed for contempt for not paying court-ordered restitution.



IN ALL CHECK CASES:

- ☆ *The check must have been personally handed by the checkwriter to you or your agent.*
- ☆ *Checks received in the mail may not be prosecuted, because of the difficulty in identifying the actual checkwriter.*
- ☆ *Post-dated checks cannot be prosecuted.*

Please make it a practice to require:

- ☆ *Driver's License identification for each check at the point of issuance.*
- ☆ *Copy DL #, State, and birthdate.*
- ☆ *Work and Home telephone numbers are also helpful.*

ISSUANCE OF BAD CHECK

PENAL CODE 32.41

(a) A person commits an offense if the issuer or passes a check or similar sight order for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

(b) This section does not prevent the prosecution from establishing the required knowledge by direct evidence; however, for purposes of this section, the issuer's knowledge of insufficient funds is presumed (except in the case of a postdated check or order) if:

(1) he had no account with the bank or other drawee at the time he issued the check or order; or

(2) payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within 30 days after issue and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

(c) Notice for purposes of Subsection (b)(2) may be actual notice or notice in writing that:

(1) is sent by:

(A) first class mail, evidenced by an affidavit of service; or
(B) registered or certified mail with return receipt requested;

(2) is addressed to the issuer at his address shown on:

(A) the check or order;
(B) the records of the bank or other drawee; or
(C) the records of the person to whom the check is issued or passed; and

(3) contains the following statement:

THEFT BY CHECK OR "IBC"?

★ ***"Theft by Check" is a different offense from "Issuance of Bad Check" (IBC).***

★ ***File "Theft by Check" on stop payment orders and third-party checks.***

★ ***File Theft by Check in the Justice Court only on checks under \$20.00. Theft by Check on checks \$20.00 or over must be filed with the District Attorney.***

★ ***File "Issuance of Bad Check" on an "NSF" or "Account Closed" checks for any amount up to \$5000 through the Justice of the Peace.***

"This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

(d) If notice is given in accordance with Subsection (c), it is presumed that the notice was received no later than five days after it was sent.

(e) A person charged with an offense under this section may make restitution for the bad checks. Restitution shall be made through the prosecutor's office in collection and processing were initiated through that office. In other cases restitution may, with the approval of the court in which the offense is filed:

(1) made through the court; or
(2) collected by a law enforcement agency if a peace officer of that agency executes a warrant against the person charged with the offense.

WHEN THE CHECK IS RETURNED...

★ When the check is returned "*NSF*" or "*Other*," you must attempt to notify the checkwriter by certified or regular mail (See Page 3 sample letter for mandatory wording in boldface type).

★ When the check is returned "*Account Closed*" it is not necessary to send a demand notification letter, although it is not prohibited if that is your practice.

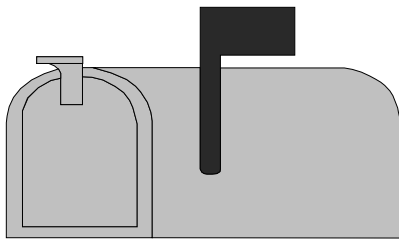
★ You may file the issuance of bad check complaint, with the check attached, along with either (a) the signed green return receipt or (b) the unopened returned letter itself. There is no charge to file a criminal case.

★ "*Third-Party*" or "*Stop-Payment Order*" checks may *not* be filed under Penal Code 32.41 ("*Issuance of Bad Check*"). You may file "*Theft by Check*" under Penal Code 31.06 and/or you may choose to sue the writer for the amount of the check in a civil action. Civil actions in Justice Court may be filed for amounts up to \$10,000.00.

**Issuance of Bad Check
continued...**

**PRESUMPTION FOR THEFT
BY CHECK PENAL CODE 31.06**

Note that Section (c)(1) provides for notice by regular mail in addition to the certified mail. Notice, however, that regular mail is only sufficient in the event the letter is returned **unopened. It is left to the merchant to determine whether it is more reasonable to send all letters by regular mail first, and then send certified mail at a later date if the letter is not returned (in an effort to save postage), or to simply send everything certified.*



(a) If the actor obtained property or secured performance of service by issuing or passing a check or similar sight order for the payment of money, when the issuer did not have sufficient funds in or on deposit with the

There is mandatory language that must be included in your notification/demand letters to the checkwriter. Your letters must contain the exact wording contained in the statute.

bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, it is prima facie evidence of his intent to deprive the owner of property under Section 31.03 (Theft) including a drawee or third-party holder in due course who negotiated the check or to avoid payment for service under Section 31.04 (Theft of Service) (except in the case of a postdated check or order) if:

(1) he had no account with the bank or other drawee at the time he issued the check or order; or

(2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

(b) For purposes of Subsection (a)(2) or (f)(3), notice may be actual notice or notice in writing that:

(1) is sent by:

- (A) first class mail, evidenced by an affidavit of service; or
- (B) registered or certified mail with return receipt requested;

(2) is addressed to the issuer at his address shown on:

- (A) the check or order;
- (B) the records of the bank or other drawee; or
- (C) the records of the person to whom the check or order has been issued or passed; and

(3) contains the following statement:

“This is a demand for payment in full for a check or order not paid because

A SAMPLE DEMAND LETTER:

CHECKWRITER'S NAME
CHECKWRITER'S ADDRESS
CHECKWRITER'S CSZ

RE: CHECK NO. 000 DATED 00/00/00 IN THE AMOUNT OF \$00.00

[] This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

[] This is a demand for a check or order not paid because of a stop payment placed on the check or order. If you fail to make payment in full within 10 days or you do not return the property 10 days after the date of receipt of this notice, the failure to pay or return the property creates a presumption for committing an offense, and this matter may be referred for criminal prosecution.

You may pay in person at the store or mail a money order only (no checks) to the above address to the attention of “Check Department.”

_____ Certified Mail/RRR No. _____
_____ Regular Mail

Presumption of Theft by Check Statute continued...

of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution."

(c) If written notice is given in accordance with Subsection (b), it is presumed that the notice was received no later than five days after it was sent.

(d) Nothing in this section prevents the prosecution from establishing the requisite intent by direct evidence.

(e) Partial restitution does not preclude the presumption of the requisite intent under this section.

(f) If the actor obtained property by issuing or passing a check or similar

sight order for the payment of money, the actor's intent to deprive the owner of the property under Section 31.03 (Theft) is presumed, except in the case of a postdated check or order, if:

(1) the actor ordered the bank or other drawee to stop payment on the check or order;

(2) the bank or drawee refused payment to the holder on presentation of the check or order within 30 days after issue;

(3) the owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and

(4) the actor failed to:

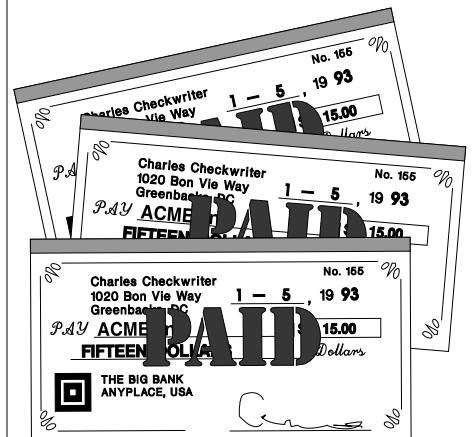
(A) pay the holder within 10 days after receiving the demand for payment; or

(B) return the property to the owner within 10 days

after receiving the demand for return of the property.

Collection of Merchant/Processing Fee

Section 3.506(b) of the Business and Commerce Code allows the holder of a bad check to collect a processing fee. This statute allows a maximum fee of \$30 to be collected.



ISSUANCE OF BAD CHECK AND THEFT BY CHECK OFFENSES

JUDGE JAMES R. DePIAZZA

DENTON COUNTY JUSTICE OF THE PEACE PRECINCT TWO
 6301 MAIN STREET, SUITE 100
 THE COLONY, TX 75056
 (972) 434-7200/(972) 434-7201 - FAX
www.dentoncounty.com/jp2