

SUBJECT: Expanding presumption of intent to commit theft by check

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Hinojosa, Dunnam, Garcia, Keel, Nixon, Wise
0 nays
3 absent — Green, Smith, Talton

WITNESSES: For — Don Ward, Livestock Marketing Association of Texas
Against — None
On — Lynn Ellison, Texas District and County Attorneys Association; Bruce Isaacks

BACKGROUND: Penal Code sec. 31.03 makes theft illegal if an individual appropriates property without the owner's consent and with the intent to deprive the owner of the property.

Penal Code sec. 31.06 establishes a presumption of intent for theft by check. If someone obtains property or service by issuing a check without sufficient funds in the bank account to cover that check, plus all other outstanding checks, it is considered prima facie (on its face) evidence of intent to deprive someone of property under the theft statute.

The writer of the check must be given 10 days after receiving notice of the refusal of the bank to pay the amount in full. In general, punishments for theft range from a Class C misdemeanor to a first-degree felony, depending on the value of the property stolen.

Under Penal Code sec. 32.41 it is a Class C misdemeanor (maximum fine of \$500) for an individual to issue a check knowing there are not sufficient funds in the account to pay that check and all other outstanding checks.

DIGEST: CSHB 2190 would establish prima facie evidence of intent to commit theft if a person issued a check within seven days of taking possession of property without having sufficient funds on deposit to pay that check as well as all other outstanding checks on that account.

CSHB 2190 would take effect September 1, 1999, and would apply to offenses committed on or after that date.

SUPPORTERS SAY: By creating a new presumption of intent to commit theft, CSHB 2190 would close what is, in effect, a loophole in current law affecting situations when bad checks are written for products that are delivered several days or a week before the seller receives payment.

Under interpretations of current law, property and a bad check must be exchanged simultaneously for prosecutors to presume that the person writing the check intended to commit theft. Many prosecutors say that if time has elapsed between the delivery of a product and the arrival of a bad check, they may not presume intent to steal, but instead must be able to prove intent to defraud. Thus, they are reluctant to prosecute using the presumption of theft by check statute. Furthermore, the current offense of issuing a bad check is only a Class C misdemeanor, punishable by a \$500 fine, not serious enough to deter this practice.

CSHB 2190 would be especially beneficial to sellers of agricultural products, who need the same protections from bad check writers as other businesses receive. Agricultural products often are transported from the point of sale before payment is received because many agricultural products are perishable and must be delivered rapidly, and because agents often purchase products on behalf of third parties. This long-standing practice of delayed payment in agricultural marketing is not considered to be a long-term extension of credit, which agricultural markets customarily avoid.

There have been too many cases in Texas in which sellers of agricultural products have discovered the buyer has insufficient funds to cover checks arriving a few days after a sale. One livestock market has reported receiving more than \$21,000 in bad checks from a single buyer.

CSHB 2190 would allow prosecutors to presume intent to commit theft if the check arrived within seven days and then bounced. The bill would apply the

same burden of proof for checks received within seven days of delivery of the product that would apply when checks and goods are exchanged at the same time.

Delays of more than seven days between the exchange of goods and payment would continue to be considered credit arrangements under current law. As in all bad check cases, the individual writing the bad check would have to be given 10 days after receiving notice of the bad check to pay the check holder in full.

Changing business practices for the agricultural industry would be difficult, especially in the livestock industry. Federal law requires prompt payment to livestock producers, and ultimate purchasers are reluctant to give blank checks to the agents doing the buying. Because agricultural auctions often conclude after business hours or on weekends, the markets cannot call banks to verify deposits. If auction houses have to wait for checks to clear, that means they would have to hold cattle or other products at least overnight, and perhaps for several days. This could result in loss of weight or quality. In the case of cattle, it can be difficult for markets to recover livestock after they have been moved to a distant location and may have become security for a loan.

**OPPONENTS
SAY:**

CSHB 2190 would turn poor business practices into criminal offenses. Current law can deal with these situations. When individuals do not pay for their purchases, they may be charged with issuing bad checks, a Class C misdemeanor.

When agricultural products, or any other products, are sent by the seller to someone who promises to pay later, that purchase has, in effect, been made on credit. All sellers should have to bear the normal risk of extending credit.

If the agricultural industry is having a problem with its long-standing business practices, then it should change those practices. Agricultural markets could demand payment before goods are removed. They also could operate the way other businesses do when they sell on credit, setting up accounts backed by collateral or conducting background checks before an account is set up.

If goods and checks are not exchanged simultaneously, it is impossible to presume theft. Failure to pay later does not necessarily mean the buyer

intended to steal the goods at the time they were exchanged. For example, the purchaser of a load of cattle could have planned on re-selling them later, but then that deal fell through, leaving the purchaser without ready cash to pay the original owner of the cows.

Proving the intent to deprive someone of property is a key element in proving theft. CSHB 2190 would add an unreasonable presumption to the theft statute, possibly calling into question the legality of the statute. Furthermore, because it would apply to situations in which as many as seven days have elapsed between the purchase and the receipt of payment, CSHB 2190 could have far-reaching, unintended consequences on businesses that now extend credit to their customers.

NOTES:

The original bill would have made it prima facie evidence of intent to deprive someone of property if the person obtained property by promising the delivery of a check and failed to deliver the check within seven days after obtaining the property.

In 1997, the House passed a similar bill, HB 3377 by Hinojosa, on the Local and Consent Calender, but the bill died in the Senate Criminal Justice Committee.