

SUBJECT: Using first class mail service to provide notice of theft by check

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Keel, Riddle, Pena, Hodge, Raymond, Reyna

0 nays

3 absent — Denny, Escobar, P. Moreno

WITNESSES: *(On original version:)*

For — Dwain James, American Collectors Association of Texas; Dudley Kidwell, Instacheck; John "Wade" Kuehler, CHECKS.

Against — John Boone, Harris County District Attorney's Office

BACKGROUND: Under Penal Code, sec.31.06, a person commits theft by check if the person buys an item or service by issuing a check without sufficient bank funds for payment. Under sec. 32.41, a person commits issuance of a bad check if the person writes a check knowing there are not sufficient funds to cover it. Issuance of a bad check is a class C misdemeanor (maximum fine of \$500), unless the check was passed for a child support payment, which is a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000).

For both offenses, the person who is owed the money may notify the debtor of delinquency by sending the debtor a notice demanding payment through registered or certified mail with return receipt requested or by telegram with report of delivery requested.

Code of Criminal Procedure, art. 102.007, authorizes a county attorney, district attorney, or criminal district attorney to collect fees of between \$10 and \$75, depending on the amount of the bad check, to be deposited in a special fund in the county treasury to cover salaries and expenses of the prosecutor's office.

DIGEST: CSHB 746 would amend Penal Code, sec. 31.06 and sec. 32.41, to authorize as adequate notice to a person who has committed theft by check or issuance of a bad check the use of either first class mail or a public or

private delivery service. The bill would keep provisions authorizing delivery by registered or certified mail but would eliminate authorization of delivery by telegram.

For first class mail, the affidavit of service would have to evidence that the notice was sent with a return address affixed and the letter containing the notice was not subsequently returned unopened. Written notice also could be sent by a public or private express delivery service with a signed receipt evidencing delivery or a report of delivery attempt.

CSHB 746 also would amend Code of Criminal Procedure, art. 102.007, to make the issuer of a bad check or similar sight order liable for a fee of up to \$15 in an amount equal to the cost of notification by means other than affidavit of service. The fee would go to the check holder.

The bill would apply only to offenses committed on or after its effective date of September 1, 2005.

**SUPPORTERS
SAY:**

CSHB 746 would update an archaic statute by expanding the options for a business to obtain payment for goods or services obtained by a bad check. In contrast to the telegraph, an antiquated technology that rarely is used any more, a business easily could use regular mail sworn by an affidavit or an express delivery service to notify a delinquent customer. Allowing a business to demand payment from a delinquent customer through these other methods would make it easier for a business to fulfill its obligations before taking criminal action against the customer.

CSHB 746 would save money for many Texas businesses. Whereas sending a letter through regular first-class mail may cost a business only 37 cents, certifying a letter can cost at least two to three dollars more. Requiring a victim of theft by check to use certified mail to notify the perpetrator creates a needless and unfair expense. Under the bill, if notice were sent by certified mail or express delivery service, the bill would allow businesses to recover the expense by imposing a fee of up to \$15 on the bad check writer. This is a modest fee that should be included with court fees and other costs associated with prosecuting bad check cases.

The bill would improve enforcement efforts against perpetrators of theft by check. Because some bad checks are written for only a few dollars, it often is not worth the trouble or expense for a business to track down a person who has stolen goods or services. CSHB 746 would help clamp

down on criminals who write bad checks for small amounts with virtual impunity.

Certified mail is no more reliable than first-class mail with an affidavit. Both types of notification rely on the U.S. Postal Service, and there is no reason to favor one type of service over the other.

Concerns about the falsification of affidavits sworn for this purpose are unfounded. A business's primary concern is obtaining payment for its services, and that business has no reason to avoid or fabricate contact with the crime's perpetrator. A business owner is not likely to risk jail time for perjury by inaccurately testifying that a notice has been sent.

OPPONENTS
SAY:

CSHB 746 could introduce uncertainty into the process of prosecuting theft by check. While a certified mail notice can verify that the addressee received a letter, regular mail provides no such certainty, even if the sender attested by affidavit to sending it. If the person who wrote the check no longer lived at the address to which the letter was mailed, that person likely would never see the notice. Because bad checks often are written by a person other than the account holder, the state would need to ensure that the account holder was made aware of the violation to prevent wrongful prosecution.

CSHB 746 would provide no safeguard against the filing of a false affidavit by a business. Because it would be impossible to prove an affidavit false in court, a jury could rely only on the word of the person who filed the affidavit. While certified mail or a telegram could prove that a letter was sent, regular mail with an affidavit offers less certainty.

Banks and check writing businesses should have to cover the cost of delivery of notices as part of doing business. The reason many people write bad checks is because they do not have sufficient income to cover necessary expenses. Bad check writers already have to pay fees to cover court costs in addition to penalties imposed by check companies. They should not also have to pay for expensive express delivery services. Requiring the check writers to cover this cost could encourage companies to use this form of delivery because they know they will not be responsible for the expense.

NOTES:

The committee substitute restored the use of registered or certified mail, added express delivery service as an authorized method of delivery, and added the requirement for check writers to pay a fee to cover the cost of delivery notification other than affidavit of service.