

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

COMMITTEE: Law Enforcement — favorable, without amendment

VOTE: 6 ayes — Driver, Latham, Allen, Frost, Ortiz, Vo
0 nays
1 absent — West

SENATE VOTE: On final passage, March 28 — 30-0, on Local and Uncontested Calendar

WITNESSES: For — Dwain James, American Collectors Association of Texas;
(*Registered, but did not testify:* Wendy R. Wilson, Texas Apartment Association)

Against — None

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 the offense of 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.

Business and Commerce Code, sec. 3.506 (a) allows the holder of a bad check or a collection agent to assess a processing fee of \$25.

The U.S. Postal Service provides for an affidavit of service of mail. For a 75 cent fee, along with first class postal, the USPS will match the name and address of the person listed on the affidavit with the final delivery notice. If the names and addresses match or the letter is not returned unopened, the delivery is presumed to have been made.

DIGEST:

SB 548 would amend Penal Code, sec. 31.06 and sec. 32.41, to authorize first class mail, with evidence of an affidavit of service, as adequate notice to a person who has committed theft by check or issuance of a bad check. The bill would keep provisions authorizing delivery by registered or certified mail but would eliminate authorization of delivery by telegram.

SB 548 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 equal to the cost of notification by registered or certified mail with return receipt requested, if that method had been used. The fee would go to the check holder. The bill also would amend the Business and Commerce Code to add sec 3.507, which would allow the check holder or a collection agent to collect a fee equal the cost of notification by registered or certified mail with return receipt requested, if that method had been used and the fee had not been collected under Code of Criminal Procedure, art. 102.007.

The bill would apply only to offenses committed on or after its effective date of September 1, 2007.

**SUPPORTERS
SAY:**

SB 548 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 to notify a delinquent customer. Allowing a business to demand payment from a delinquent customer through first class mail would make it easier for a business to fulfill its obligations before taking criminal action against the customer.

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. SB 548 would help clamp down on criminals who write bad checks for small amounts with impunity.

SB 548 would save money for many Texas businesses. While sending a letter through regular first-class mail may cost a business only 41 cents, plus the 75-cent fee for the affidavit of service, certifying a letter with a return receipt requested can cost as much as \$9. Requiring a victim of theft by check to use certified mail to notify the perpetrator creates a needless and unfair expense and delays the process. About 95 percent of those receiving registered or certified mail refuse to pick up the letter. In contrast, almost 97 percent respond to requests from the courts, which are sent by first class mail. As a result, only about 3 percent of all bad check cases go to trial, and bad check writers still wait to the very last moment to respond. Eliminating the additional step would save time and money for the businesses.

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 potential falsification of affidavits of service sworn for this purpose are unfounded. A business's primary concern is obtaining payment for its services, and it would have 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:**

SB 548 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.

SB 548 would provide no safeguard against the filing of a false affidavit of service by a business. Because it would be impossible to prove an affidavit false in court, a court could rely only on the word of the person who filed the affidavit. While certified mail or a telegram can 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 funds to cover necessary expenses. Bad check writers already have to pay fees to cover court costs in addition to penalties imposed by check companies.

NOTES: During the 2005 regular session, House passed a similar bill, HB 746 by Bonnen, but it died in the Senate Criminal Jurisprudence Committee.