

## ISSUANCE OF BAD CHECKS FYI & PROCEDURES

### A. Issuance of Bad Checks

1. A person commits an offense if he issues or passes a check or similar sight order for the payment of money knowing that the issuer does 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. (32.41(a) Penal Code—Issuance of Bad Check)

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

The person had no account with the bank or other drawee at the time the person issued the check or order; or

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 that refusal. (32.41(b)Penal Code—Issuance of Bad Check)

3. Notice of refusal may be actual notice or notice in writing that:

Is sent by registered or certified mail with return receipt requested, telegram with report of delivery requested, or by first class mail if the letter was returned unopened with markings indicating that the address is incorrect and that there is no current forwarding order;

Is addressed to the issuer at the address shown on:

The check or order;

The records of the bank or other drawee; or

The records of the person to whom the check or order has been issued or passed; and

Contains the required statement (32.41(c)Penal Code—Issuance of Bad Check)

4. If notice is given in accordance with the above provisions, it is presumed that the notice was received no later than 5 days after it was sent. (32.41(d) Penal Code—Issuance of Bad Check)

5. Restitution shall, with the approval of the court in which the offense is filed, be made through the court. (32.41(e)Penal Code—Issuance of Bad Check)

*A justice of the peace may consent to receive restitution on behalf of the holder of a dishonored check. Restitution so received is not “money belonging to a county” for purposed of 113.021 Local Government Code. Therefore, the justice of the peace in a county with a population under 190,000 need not deposit the money with the county treasurer. (Atty. Gen. Op. No. DM-396 (1996))*

6. A justice of the peace may collect from a defendant the \$30.00 fee for the holder of the check. (3.506 Business and Commerce Code)

*A fee was enacted in Article 102.0071, Code of Criminal Procedure, expressly permitting a justice of the peace to collect from a defendant convicted under (32.41 Penal Code—Issuance of Bad Check) the fee authorized by 3.506, Texas Business and Commerce Code.*

*Article 102.0071 states: “on conviction in justice court of an offense under Section 31.03 or 31.04, Penal Code, in which it is shown that the defendant committed the offense by issuing or passing a check that was subsequently dishonored, the court may collect from the defendant and pay the holder of the check the fee permitted by Section 3.506, Business and Commerce Code. It is discretionary for the court to assess the fee, and nothing requires that the merchant first be charged a fee by a bank in order for the justice of the peace to collect the fee for the holder of the check.*

*Section 3.506, Business & Commerce Code, states: “On return of a check to the holder following dishonor of the check by a payor, the holder, the holder’s assignee, agent, or representative, or any other person retained by the holder to seek collection of the face value of the dishonored check may charge the drawer or endorser a reasonable processing fee of not more than \$30.00.” This fee has been \$25.00 for the past decade; however Section 3.506 was amended in 2003 to increase it to \$30.00.*

**PENAL CODE 32.41  
ISSUANCE OF A BAD CHECK**

(a)

A person commits an offense if he issues 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 drawer 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 the purpose of this section, the issuer's knowledge is 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 with 30 days after issue and the issuer failed to pay the holder in full with 10 days after receiving notice of that refusal.

(c)

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

- (1) Is sent by registered or certified mail with return receipt requested, by telegram with report of delivery requested, or by first class mail if the letter was returned unopened with markings indicating that the address is incorrect and that there is no current forwarding order;
- (2) Is addressed to the issuer at the 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 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.”**

notice

(d)

If notice is given in accordance with Subsection (c), it is presumed that the notice was received no later than 5 days after it was sent.

(e)

A person charged with an offense under this section may make restitution for the bad checks plus a fine and court costs.

(f)

Except as otherwise provided in this subsection, an offense under this section is a Class C misdemeanor with a fine up to \$500 per check.