

BAD CHECK OFFENSES UNDER THE JURISDICTION OF A JUSTICE OF THE PEACE

Includes:

Understanding the Law
What to Expect in Court
Sample Letter to Defendant
Court Information Sheet for filing
Affidavits and Complaints for filing
Relevant Statutes and Case Law

BEFORE YOU FILE, ENSURE THAT:

Your bank has marked the check “Non-Sufficient Funds” (NSF) or “Account Closed”. No other type of marking can be filed.

NSF checks must be accompanied by a letter requesting reimbursement to the check writer sent by certified mail with return receipt requested. You may file the returned green card or the returned unopened letter. (Account Closed checks do not need this.)

By law, we cannot accept the following checks:

Accepted outside of Williamson County.
Part or all of the property has been returned
Part or all of the money owed has been paid
Payments on charge accounts
Post-dated checks
Two-party checks
Payroll checks

Your writing on the forms must be PRINTED and LEGIBLE and must be COMPLETELY filled out. If the information is not available, answer “unknown”, do not leave it blank.

Unless you will have them notarized outside our office before filing, do NOT sign the affidavit or complaint until you have given it to the clerk. She/he will notarize it and must witness your signing of the documents.

You have the check and, if applicable, the returned receipt or returned letter to Defendant, at the time of filing.

BE AWARE THAT:

After filing, YOU MAY NOT accept payment from the Defendant or from anyone for the Defendant. Any and all payments must be made through our office.

The check will not be returned to you or the Defendant, as it is part of the official record.

We cannot collect a merchant fee over \$30.00.

A warrant may be issued for the arrest of the Defendant.

We cannot guarantee restitution, though we wish we could.

We do not issue written status reports. To inquire about your case, please email us at jp4@wilco.org or call us at 512-352-4155.

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I. UNDERSTANDING THE LAW

The rather general term "Bad/Hot Check Offenses" is inclusive of two specific and different offenses: (1) Issuance of A Bad Check and (2) Theft by Check.

Article I, Section 18 of the Texas Constitution forbids imprisonment for failing to pay debts. The purpose of bad check laws is not to punish people for failing to pay their debts. The purpose is to discourage individuals from introducing worthless financial instruments into the stream of commerce.

A. How Issuance of a Bad Check Differs from Theft By Check

Issuance of a Bad Check is:

- * The introduction of a bad check into the stream of commerce;
- * A crime which occurs with the writing of the check itself;
- * An offense which does not require any intent to deprive the owner of property nor any receipt of property in return for the check;
- * A Class C Misdemeanor regardless of the amount of the check.

Theft by Check is:

- * The unlawful appropriation of property;
- * A crime in which the check is just the instrument used to commit the crime;
- * An offense which requires intent to deprive the owner of the property and receipt of the property in return for the check;
- * An offense for which the degree is determined by the amount of the check:

AMOUNT	DEGREE
Less than \$20.00	Class C Misdemeanor
\$20 but less than \$500.00	Class B Misdemeanor
\$500 but less than \$1500.00	Class A Misdemeanor
\$1,500.00 but less than \$20,000	State Jail Felony
\$20,000 but less than \$100,000	Third Degree Felony
\$100,000 but less than \$200,000	Second Degree Felony
\$200,000 or more	First-Degree Felony

The greatest difference between Issuance of a Bad Check and Theft by Check is the requirement to prove "intent" in a Theft by Check offense.

For the offense of Issuance of a Bad Check, the prosecution need only prove that the Defendant issued the check knowing there were not enough funds in the account to cover the check. There does not have to be any intent to unlawfully deprive the owner/merchant of anything. Stated simply, the offense is committed simply by writing the check.

For the offense of Theft by Check, the prosecution must prove that the Defendant issued the bad check knowing it would not clear and intending to acquire property from the owner/merchant unlawfully. It is the more stringent intent element required to be proven for this offense that makes Theft By check a more serious offense. Intent is difficult to prove in any offense, but even more so where the wrongful conduct is not discovered until the Defendant's check has bounced.

Another difference between the two offenses is that Issuance of a Bad Check is not a crime of moral turpitude, but Theft by Check is a crime of moral turpitude. This is an important difference. A crime of "moral turpitude" is a crime which may be used against the Defendant in the following ways: it may affect employment opportunities; will disqualify the Defendant from jury service; should the Defendant face charges for any offense after a theft conviction, the jury may be informed of this conviction if he takes the witness stand during the guilt/innocence phase of trial and also at the punishment phase of the trial regardless of whether the Defendant testifies or not.

This raises two questions: (1) "When would you file an Issuance of a Bad Check charge?" The short answer is ALMOST ALWAYS. The case is easier to prove in court as the prosecutor does not have to prove intent to steal but simply has to show that the Defendant wrote the bad check and that he knew (or was presumed to have known) that he did not have enough money in the account to cover the check. And (2) "When would you file Theft by Check charge?" The short answer is ALMOST NEVER. It is so much harder to prove the elements of this offense because the prosecution must prove the Defendant intended to steal the property from the owner and did receive the property in return for the check.

If the Defendant is the average citizen who has never been in trouble before, why charge the Defendant with a crime of moral turpitude? However, if the Defendant continually writes bad checks and you can prove there is intentional theft, it may be worthwhile to file the theft charge because the penalties are greater and the theft conviction can be used against him/her.

B. Proving the Elements - Issuance of a Bad Check Case

Texas Penal Code Ann. Section 32.41 is the statute governing this offense. The elements of the offense that must be proved are:

- 1) Defendant
- 2) Issued and passed a Check or Similar Sight Order
- 3) For the Payment of Money
- 4) On a Certain Date
- 5) In Williamson County, Texas, Precinct Four
- 6) Intent: knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance

Element 1: Identification of the Defendant:

One of two possible scenarios will apply: (1) the complainant remembers the defendant and can identify by personal knowledge, which is rare but may be likely occur in small towns; or (2) the complainant does not remember the Defendant, which happens in the majority of cases. This is not fatal but does make the case more difficult to prove. In these cases, identification can be proved by using circumstantial evidence from the normal routine business practices of the owner/merchant such as looking at the person's driver's license and writing down the number when the check is passed.

Sample testimony of Checkout Clerk: It is the policy of Wal-Mart to ask for picture identification on every check we take. We have been instructed to do this always. I do not take a check without

looking at a picture ID and writing the number of the ID on the check. Because the defendant's name and driver's license number are on the check, and because I check to make sure the driver's license picture matches the customer, I am certain that the Defendant is the person who wrote the check.

Element 2: Defendant issued and passed the check or Similar Sight Order:

Generally, this can be proved easily. If the complainant is the actual clerk who took the check, the clerk can testify that the check was presented. If the complainant is not the clerk who took the check, the witness must explain how there is certainty that a clerk of the store took the check by explaining the receiving clerk's ID numbers that are written on the check when it was taken.

Element 3: For the Payment of Money:

The check or similar sight order must be presented to the banking institution for payment within 30 days of receipt by the complainant. There are different markings, which may be placed on a check by the banking institution that affect the prosecution of the case.

Insufficient Funds or "NSF" Checks:

If the check is presented for deposit within 30 days after issuance and the Defendant failed to pay the complainant within ten days after receiving notice that the check bounced then the statute aids the prosecution by allowing for a "presumption" regarding the Defendant's knowledge of insufficient funds.

No Account or Account Closed Checks:

If the Defendant writes a check on an account at a banking institution where he has no actual account or the account has been closed, the prosecution gains the benefit of the "presumption" of knowledge of insufficient funds allowed under the statute. There is no requirement to notice the Defendant that the check has bounced but notice can be given to attempt collection. There is also no requirement that the check be presented within 30 days of issuance. With a "closed account" check, many times a Defendant day claim the bank is in error. However, an examination of the bank's records (subpoenaed by the court) may reveal a history of abuse, such as a frequently over drawn account and an agreement with the bank that provided for automatic termination of the account under such circumstances.

Element 4: On a Certain Date:

Usually the date the check was issued will be the same date as written on the check. In that case, the date is easily proven when the witness testifies that on that date the check was given to the witness or an employee of the owner/merchant.

However, there may be two problem scenarios:

- (1) Hold Checks are checks which are issued on a given date but held until a later date for deposit. The complainant who holds a check without presenting it for deposit within 30 days will affect the prosecution's ability to prove intent and knowledge of insufficient funds. In most cases these checks are held by a financing company awaiting financing for a sale for a car or large item. Essentially, these cases are credit transactions giving

rise to a civil suit and not a good case for a criminal matter.

- (2) Postdated Checks are checks presented on a certain date but dated for a later date. These checks raise the question of whether the instrument is a "check" or a "promissory note".

(a) *Argument for filing Postdated Check cases:* The language of the statute specifically refers to postdated checks in Section 32.41(b) where it reads that the State is afforded the presumption that a defendant knows he has insufficient funds in the account under certain circumstances, "except in the case of a postdated check or order". Why would the legislature specifically refer to postdated checks if they were promissory notes to which the law did not ever apply? The language implies that the law does apply to postdated checks, but the State simply loses the presumption of knowledge assigned in non-postdated check cases.

While the statute does say that the issuer must have had insufficient funds at the time of issuance, and while both parties may know that the defendant had insufficient funds at the time of issuance in a postdated check case, this does not mean that simply because all the parties knew the defendant was violating the law, that the defendant is permitted to violate the law. It is illegal to write checks for which no funds are available at the time the check is issued even with a postdated check. It is still a bad check placed in the stream of commerce and the knowledge of both parties is irrelevant.

The State does lose its presumption of knowledge assigned the Defendant in all postdated check cases, but the State can still prove the Defendant's knowledge by direct evidence. In a postdated check case, that should not be difficult because the Defendant is usually postdating the check because funds are not available.

(b) *Argument against filing Postdated Checks:* The statute applies to a "check or similar sight order". These are defined in the Uniform Commercial Code as instruments that are payable "on demand". Since a postdated check is by definition not payable on demand, it may not be a "check or similar sight order" by definition.

The statute refers to a violation when the issuer does not have sufficient funds in the account to cover the check "at the time of issuance". In a postdated check case, the issuer and presumably the complainant understood and agreed to this at the time of issuance. Since all parties agreed that the check would be cashed when funds were available and that there were not such funds at the time of issuance, the element of deception is lacking in this case. Pursuant to Texas Penal Code Section 32.41, the State loses the presumption of knowledge on the part of the Defendant in all postdated check cases. This applies even when the Defendant had a closed account or no account.

Element 5: In Williamson County, Texas, Precinct Four:

This element requires that the check must have been written in the county in which the case is prosecuted. The county will be plead in the complaint and must be proved by soliciting testimony from the witness. All justice courts have jurisdiction in their respective counties but if the specific precinct is plead in the complaint, it must be proved up through testimony also.

Under Texas Code of Criminal Procedure, Article 4.12, a misdemeanor case to be tried in Justice Court shall be tried in the precinct in which the offense was committed, or in which the defendant resides, or with written consent of the State and the defendant or the defendant's attorney, in any precinct of the county. This technically allows for the case to be filed but not tried in a different precinct than where the offense occurred. If the Case is filed in a different precinct than where the offense occurred and the Defendant pleads guilty/no contest, no problems would arise. However, if the case is filed in a precinct different than where the offense occurred and the Defendant pleads not guilty, the case may have to be dismissed and filed in the proper precinct.

Depending on the size of the county in which the Justice Court sits, there may be a requirement to present the offense in the Justice Court sitting in the precinct in which the offense occurred. This applies to counties with a population of more than 225,000 but less than 2 million under the Texas Code of Criminal Procedure Article 45.22. This statute provides criminal penalties to the justice, constable or deputy constable violating the act.

Element 6: Intent: Knowing that funds are insufficient:

The prosecution does not have to prove that the Defendant intended to steal the property but does have to prove that the Defendant knew at the time the check was issued that the account had insufficient funds to cover the check.

- (a) **Proving by the presumption of knowledge:** The State may rely on the statutory presumption provided in Penal Code Section 32.41 Issuance of a Bad Check if certain prerequisites are followed:

Defendant had no account with the bank or other drawee at the time the check or sight order was issued

Check holder presented the check or similar sight order for payment within 30 days of the date of issuance and payment was refused by the bank or other drawee for lack of funds or insufficient funds

Defendant fails to pay the holder of the check in full within 10 days after receiving notice the check was dishonored.

Requirements of the Notice:

- * May be written and contain at least statutory language
- * Sent by registered or certified mail with return receipt requested; or, sent by telegram with report of delivery requested; or, letter sent first class mail if the letter was returned unopened with markings indicating that the address is incorrect and there is no current forwarding order.
- * Addressed to issuer/defendant 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 was issued
- * Notice above is presumed received no later than 5 days after it was sent
- * Notice may be actual notice (given in person) rather than written and should consist of same minimum requirements as written

Note: For a Defendant to receive notice does not necessarily require that the Defendant actually receive the notice letter. The prosecution only has to show that the notice was timely mailed. The requirement is not for actual contact but to try and contact the Defendant where the Defendant said he/she would be. If the letter was returned and opened, the complainant can remedy this by sending a new mail notice and filing the case after the appropriate time has expired.

Things that will destroy the presumption:

- * Waiting longer than 30 days from the date of issuance to present the check for payment
- * Accepting a postdated check
- * Not giving proper notice
- * Filing before the Defendant has had the ten-day period to pay in full. This requires a total of 15 days if the letter is mailed.

(b) **Proving by Direct Evidence:** The Penal Code expressly states that the State can always prove on direct evidence. Section 32.41 serves only as an aid to the prosecution and does not require that the prerequisites be met before a case can be prosecuted. If the State does not meet the conditions set under Section 32.41, then the State must prove by direct evidence.

Direct evidence includes: (1) testimony from a bank teller/bank officer regarding financial information on the Defendant's account on the day the check was issued; (2) testimony from a bank officer stating the bank sent the Defendant a statement prior to the issuing of the check which showed insufficient funds in the account; (3) bank records which show a pattern of writing overdrawn checks; (4) testimony showing the Defendant received a bank statement prior to issuing the check showing insufficient funds in the account; or (5) other testimony which can show the Defendant knew he had insufficient funds in the account.

C. Proving the Elements - Theft by Check Case (Less Than \$20)

Texas Penal Code Ann. Sections 31.03 and 31.06 are the statutes governing this offense. The elements of the offense that must be proved are:

- 1) Appropriation
- 2) Intent to Deprive the Owner of Property or Service

Element 1: Appropriation

Theft by Check is a Class C Misdemeanor only if the property stolen is less than \$20. For a theft to have occurred, there needs to have been a simultaneous exchange of the check for the property or the service. This means the Defendant must give the complainant a check and in return receive merchandise or some service. Without a simultaneous exchange, the transaction is basically a credit transaction and the loss requires the filing of a civil suit for damages.

Example: Defendant receives goods from owner/merchant on credit. A bill is mailed at the end of the month. Defendant sends a check to owner which is dishonored for insufficient funds. In this scenario, there is no theft because the exchange of the check for the goods did not occur simultaneously. However, the offense of Issuance of a Bad Check has occurred.

Example: Defendant hires complainant to mow his yard and complainant is paid at the end of the job by a check which bounces. Although it appears the exchange did not occur simultaneously, it did occur within a very short time period following the performance of the service and is considered sufficiently simultaneous. However, the longer the time period between the delivery of goods or services and payment, the more likely the exchange will be considered a credit transaction requiring civil action.

Example: Defendant receives 2 boxes of goods from the owner and is billed for the cost. The Defendant's check bounces due to insufficient funds. The Defendant brings the owner a new check to cover the amount due and promises it is good. At the same time the Defendant takes an additional box of goods. The Defendant's second check bounces. Assuming intent to deprive the owner exists, the second transaction would be a Theft By Check but only for the value of the new goods acquired because only the new goods were obtained in the simultaneous exchange for the check.

For the original amount due, the exchange was a credit transaction and the complainant must file a civil suit. However, in both cases the Defendant could be charged with Issuance of a Bad Check offense.

Element 2: Intent to Deprive the Owner of Property or Service

The prosecution must prove the Defendant issued the check knowing it would not be honored and intending to acquire the property or service wrongfully.

(a) Proving Presumption of Intent for Theft By Check:

The Texas Penal Code in Section 31.06 provides certain guidelines aiding the prosecution in establishing the element of intent in the offense of Theft By Check. There are two different scenarios to consider. Provided the requisite conditions are met under either scenario, the court must find that "prima facie" evidence has been established with respect to the element of intent. Simply, this means the prosecution cannot suffer a directed verdict based on the element of intent.

Scenario 1: Check Designated "No Account" or "Account Closed"

It is much easier for the prosecution to gain the benefit of Section 31.06 with this type of bad check. If a Defendant writes a check on an account at a bank where he has no account, or the account has been closed, the prosecution gains the benefit of Section 31.06 and "prima facie" evidence is established that the Defendant intended to commit the theft. No notice to the Defendant that the check bounced is required and there is no requirement that the check be presented for payment within 30 days of issuance.

Scenario 2: Check Designated "Insufficient Funds" or "NSF":

It is more difficult for the prosecution to gain the benefit of Section 31.06 when dealing with this type of bad check. The prosecution can establish the intent to steal on the part of the Defendant if the check was presented for payment within 30 days of issuance and the Defendant failed to pay the holder within 10 days after receiving notice that the check was bad.

There are two parts of this prerequisite which must be met to obtain the benefits of

presumption of theft. First, the check must be presented within 30 days of issuance. If a check is given on a certain date but "held" for deposit on a date later than 30 days, the prosecution can never gain the benefit under 31.06. Second, notice to the Defendant must be sent by registered or certified letter/return receipt requested, or by telegram with report of delivery requested and must contain at least the language stated in Section 31.06.

The notice must be sent to the address on the check, or to the address on the Defendant's bank records, or to the address the complainant has in his records for the Defendant.

NOTE: For a Defendant to receive notice does not require the Defendant actually receive the letter. Rather the statute requires that the notice be mailed under certain conditions. The prosecution only has to prove that the complainant did try to contact the Defendant not that actual contact was made. If the letter was returned to the complainant, it should not be opened as the court cannot tell what was inside. If it is opened, the prosecution will lose the aid of Section 31.06. If this happens, the complainant may mail a new notice and file the case after the appropriate time has expired.

Things that Destroy the Presumption for Theft by Check:

- * Accepting a postdated check -- In this case the intent must be proved by direct evidence.
- * Conditions under Section 31.06 are only an aid to prosecution, not prerequisites. If they are not met, the prosecution must prove intent by direct evidence.
- * Restitution in full by the Defendant does not stop prosecution, but serves to deprive the prosecution of "prima facie" evidence of intent. Partial restitution does not help the Defendant in any way except possibly in the punishment phase to establish good faith.

Changes in the types of checks considered in Theft by Check:

In 1995, the legislature added to the situations under which a check could be considered for Theft By Check in Section 31.06.

* Third Party Holders who in due course deposit a check which then bounces can file against the Defendant.

* Stop Payment Checks were added and Section 31.06 now provides that intent to commit theft is presumed when a complainant has received a check in return for property and the Defendant then stops payment on the check. To obtain this presumption, the prosecution must show that the Defendant (1) received goods in return for a check; (2) ordered the bank to stop payment; (3) the check was presented for payment within 30 days of issuance; (4) the bank actually stopped payment on the check; and (5) the complainant gave the Defendant notice of the refusal of payment and demanded payment or return of the property and the Defendant failed to do either within 10 days of receiving the notice. The presumption of theft does not apply to situations in which there is a stop payment check where the Defendant has received services.

D. Punishment Ranges - Penal Code 32.41 and 31.03

Issuance of Bad Check - Class C Misdemeanor - Fine: \$1 to \$500

Theft by Check Less Than \$20 - Class C Misdemeanor - Fine: \$1 to \$500

E. Related Issues

1. Handwriting Analysis

In many cases the Defendant will claim that he is not the person who wrote the check. In these cases, testimony is often heard regarding the similarity between the signature on the check and the handwriting of the Defendant. Sometimes an expert will testify as to the similarity of the handwriting. Often a jury will get to compare the signature on the check to the handwriting of the Defendant. All this is perfectly appropriate.

However, the Texas Code of Criminal Procedure Article 38.27 mandates that proof by comparison alone shall not be sufficient to establish the handwriting on the check as the Defendant's if the Defendant denies it is his/her signature under oath.

2. Company Checks and Officer Liability

Officers are liable for the bad checks they sign on behalf of their company. If the business is a sole proprietorship or partnership, the officer who signs the bad check is liable both criminally and civilly for acts made in the capacity of officer of the company. If the business is a corporation, the officer is not civilly liable for the bad checks signed on behalf of the company. But the courts have generally held that as a matter of public policy officers and directors will not be permitted to hide behind the corporate shield. It is generally accepted that officers of a corporation are responsible for criminal conduct.

Remember, in issuance cases all that is necessary is for the Defendant to write a bad check, but in theft cases, the state must prove it was the intent of the Defendant to deprive the owner of property by using a bad check.

3. Evidentiary Matters

A. **Extraneous Crimes and Bank Records in Bad Check Cases:** Generally, extraneous crimes are impermissible under Texas Rules of Evidence Rule 404. However, extraneous bad check cases should be admitted under Rule 404 (b), not to show the character of the Defendant, but to show opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.

Bank records showing the Defendant has written bad checks in the past should also be admissible on two grounds. First, the bank records are not being used to show the Defendant's character or impeach the Defendant, but are being used under Texas Rules of Evidence 404(b) to show opportunity, intent, preparation, plan knowledge, or absence of mistake or accident.

Second, under Texas Rules of Evidence 406, the Defendant's habitual bad check writing may be admitted to "prove that the conduct of the person ... on a particular occasion was in conformity with the habit or routine practice."

B. **Undue Prejudice to Defendant:** Defense counsel will undoubtedly object at the admission of any of this evidence as irrelevant and prejudicial. This is a call that judges must make, but while admission of prior hot checks is certainly prejudicial to the Defendant, it is also certainly relevant to the case to show intent, pattern, and lack of mistake on the part of the Defendant.

C. Admission of Prior Thefts Where Defendant Testifies: If the Defendant takes the stand, any prior thefts including thefts by check are admissible because they are crimes of "moral turpitude". Under Texas Rules of Evidence Rule 609, any felony or crime of moral turpitude for which the Defendant was convicted within 10 years from the time of the testimony is admissible if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect.

Prior Issuance of a Bad Check cases cannot be used against the defendant because they are not a felony or crime of moral turpitude.

No crimes regardless of what they are, can be used against the Defendant if the Defendant does not take the stand. The purpose of allowing these prior crimes into testimony is to help judge the credibility of the witness. However, if a witness "opens the door" by testifying without being asked by the prosecutor that the Defendant has never broken any law or makes any similar statement that implies the Defendant has no criminal history, the prosecutor may then introduce the prior criminal history to impeach the witness. This is true whether the Defendant testifies or not. The prosecutor needs to clear this with the judge before admitting.

F. Procedure for Filing with Court and Order for Trial Proceedings

A. Procedure for Filing with Justice Court

(1) Probable Cause Affidavit and Complaint are prepared and filed

- a. Original check is attached to filings
- b. Appropriate documents are attached to probable cause affidavit
- c. Separate case initiated for each bad check

(2) Court sends courtesy letter to Defendant

(3) Defendant's Options:

- a. Plead guilty/no contest with or without restitution. Judge sets fine plus court costs and check fees on each case.
- b. Defendant granted Deferred Adjudication with restitution as a term.
- c. Defendant pleads not guilty and set for trial.

B. Order for Trial Proceedings

(1) State and Defense make opening statements

(2) State puts on case by calling witnesses. For example:

Owner/merchant or clerk testifies to identity of defendant, issuance and passing of check, date of check, amount of check, location of place where passed in county and precinct, common business practices used to show defendant issued and passed check, defendant was sent notice to pay and the manner of notice, check was presented to bank for payment within 30 days of issuance.

Bank officer testifies on check being presented to bank within 30 days of issuance and rejected and reason rejected, that defendant had an account at the bank at the time of issuance or had no account or account closed.

Other witnesses testify (can be people to whom bad checks written, other banks where accounts overdrawn or closed, handwriting experts, people to whom defendant has admitted writing bad checks).

- (3) Defense cross examines State's witnesses
- (4) State re-directs on any witness
- (5) State rests
- (6) Defense puts on case. For example:

Defendant may be called to testify that he/she did not write check, checkbook stolen, never in the store, never received notice of bad check, didn't know funds were insufficient, tried to make restitution but not accepted.

- (7) State cross examines Defense witnesses
- (8) Defense re-directs on any witness
- (9) State and Defense rests
- (10) State and Defense make closing statements
- (11) Judge/Jury decides case and announces verdict
- (12) Judge enters judgment

Typical Evidence Introduced at trial include: (a) Bad Check; (b) Bank Statement of Defendant; (c) Notice Letter sent to Defendant; (d) Sample of Defendant's handwriting

G. Miscellaneous Information

1. General

- (a) Bankruptcy is not a defense to a criminal case.
- (b) Under Section 31.03 (e)(2)(B) of the Texas Penal Code, a Theft by Check of property or services will be treated as a Class B Misdemeanor if the defendant has previously been convicted of a Class C Theft By Check. Therefore, the Justice Court will not have jurisdiction on the second offense.
- (c) The amount of the check is irrelevant in Issuance of a Bad Check cases.
- (d) The amount of the check must be less than \$20 in a Theft by Check Class C Misdemeanor case.
- (e) Property Code Section 70.001 allows for mechanic to repossess the automobile when bad check given for automobile repairs.
- (f) If bad check is for rent, lease should be filed with court.

2. Procedures When Taking a Check

- (a) Checks should be dated the same date they are given.
- (b) Do not accept checks previously signed. Have them signed in your presence and compare picture ID to person issuing check.
- (c) Require a permanent street address not a P.O. Box number unless you know the writer personally. For students get a permanent home address.

- (d) Confirm identity with a valid picture ID and record the ID numbers on the face of the check and the initials or ID number of the person accepting the check.
- (e) Make sure the written amounts and numbers correspond as the bank will not honor checks with discrepancies.

3. Checks to Avoid

- (a) Refer to Maker/Drawn Against Uncollected Funds/Unable to Locate Account
- (b) Postdated
- (c) Out-of-state bank
- (d) More than one year old when it is passed
- (e) Less than \$5
- (f) Given in exchange for a returned check
- (g) Received in the mail
- (h) Cannot be presented to bank within 30 days
- (i) Involves two or more parties
- (j) Not passed within the county where business is located

4. Clues for Detecting Bad Checks

- (a) Many hot checks are on new accounts with check numbers 101 to 150.
- (b) Check the finish on the black magnetic computer numbers on the bottom. Magnetic ink is very dull -- not shiny.
- (c) Check the first four magnetic numbers to the left of the account number. Each area of the state has its own bank routing number -- learn yours.
- (d) Most checks (except government or computer produced) are perforated.
- (e) Beware of "photocopier color". Watch for shiny, tacky, uneven letters. This is the best sign of a photocopied check.

5. Procedure When A Check Is Returned

- (a) Present the check to the bank even if you know it will not be honored; it MUST be stamped by the bank with the reason for the return.
- (b) Send the notice to the Defendant as required by statute in one of the manners provided for by statute. Keep a copy of the notice sent.
- (c) If the notice is returned, do not open it. Keep it for the court filing and trial.
- (d) If the Defendant fails to pay the amount in full within 10 days, file the case with the appropriate court. Provide to the court the original check; the green card or receipt from the certified or registered letter or proof on the notice being sent; the name, address and phone number of the person who accepted the check and can identify the maker of the check.
- (e) Obtain specific identification information on the maker of the check including driver's license number, date of birth, physical description if possible.

Sample Letter to Defendant from Check Holder

January 1, 2021

Mr./Mrs. Checkwriter:
123 Any Street
Whatever City, Texas 99999

Dear Mr./Mrs. Checkwriter:

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." (Required Notice pursuant to Texas Penal Code Section 32.41.)

The check/order referred to above was written on December 25, 2001. It was your Check # 0001 payable to John Doe Company at 1234 This Street, My City, Texas. The check/order in the amount of \$54.16 was drawn on Your Bank account #000000 and was returned marked: "NSF" (INSUFFICIENT FUNDS)

THE TOTAL AMOUNT DUE IS \$ 79.16 which includes the check/order amount of \$ 54.16 plus the processing fee of \$ 25.00 allowed under Article 9022 Vernon's Texas Civil Statutes.

Payment will be accepted only in the form of a cashier's check or money order or cash if presented in person. DO NOT MAIL CASH. We will not be responsible if cash is mailed.

Sincerely,

Janie Clerk
John Doe Company

Sent: 1) Registered Mail #99G8KSLF864DFG /Return receipt requested
 2) Certified Mail #LLE8036FLLUY /Return receipt requested
 3) Telegram with report of Delivery
 4) First Class Mail on 12/20/2020

COURT INFORMATION SHEET

INFORMATION PERTAINING TO DEFENDANT:

Name: _____
Home Address: _____ Zip: _____
Work Address: _____ Zip: _____
Home Phone: _____ Work Phone: _____
TDL or ID: _____

INFORMATION PERTAINING TO BAD CHECK:

CHECK #: _____ DATED: _____ AMOUNT: \$ _____
Deposited on: _____ Reason returned: _____
Certified Letter Mailed on: _____
Return Receipt Dated Received on: _____

Original Check Attached: Yes _____ No _____
Green Card for Certified Mail Attached: Yes _____ No _____
Copy of Demand Letter Attached: Yes _____ No _____

INFORMATION PERTAINING TO HOLDER OF CHECK:

Holder/Contact Person for Holder of Check: _____
Phone Number: _____ Email: _____
Address: _____ Zip: _____
Employee Who Accepted Check: _____
Home Address of Employee: _____ Zip: _____
Phone Number: _____

Processing/Merchant Fee Charged: \$ _____

Probable Cause Affidavit - **Issuance of A Bad Check**
Penal Code Section 32.41

I, _____ being duly sworn, upon oath, state that I have good reason to believe and do believe and charge before the making of this complaint, that:

On or about _____, 20__ in Williamson County, Texas., Precinct. Four, _____, "Defendant", issued and passed Check No. _____, dated _____, 20__ , payable to the order of _____, drawn on _____ for the payment of money without having sufficient funds on deposit with the bank for the payment in full of the check.

Affiant affirms that on _____, 20__, Mr./Ms. _____ accepted Check No. _____ from _____, "Defendant", for the payment of money.

Affiant affirms that the check was presented for payment within (30) thirty days after it was issued, and it was returned unpaid, marked "_____". Affiant further affirms that on _____, 20__, a written notice was sent to the Defendant by certified mail with return receipt requested, and further show that as of the date of this Affidavit, the Defendant has not paid the check.

Affiant

SWORN TO AND SUBSCRIBED BEFORE ME ON _____. 20__

Notary Public/Court Clerk/Judge

PROBABLE CAUSE APPROVAL

On this, the _____ day of _____, 20__, I hereby acknowledge that I have examined the above affidavit and have determined that probable cause exists for the issuance of an arrest warrant for the individual accused therein.

Justice of the Peace, Pct. One
Williamson County, TX

COMPLAINT

Issuance of a Bad Check ~ Penal Code 32.41

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

Before me, the undersigned authority, on this day personally appeared the undersigned affiant, who, after being duly sworn on oath, deposes and says that affiant has good reason to believe and does believe and charge that _____, hereafter referred to as Defendant, on or about _____, 20____, and before the making and filing of this complaint, in Williamson County, Texas, did then and there unlawfully issue and pass a check or similar sight order dated _____, 20____, payable to the order of _____ in the amount of \$_____ drawn on _____ for the payment of money knowing that there were not sufficient funds in and on deposit with the bank for payment in full of the check as well as all other checks and orders outstanding at the time of issuance,

Against the peace and dignity of the State.

Affiant

Name of Business

Address

Phone Number

Sworn to and subscribed before on the _____ day of _____, 20____.

Court Clerk/ Notary Public/ Judge
Williamson County, Texas

Probable Cause Affidavit - **Theft by Check - Less than \$ 20**
Penal Code Section 31.03 (e) (1) (B)

KNOW BY ALL MEN PRESENT: BEFORE ME, the undersigned authority, on this day personally appeared _____, the undersigned Affiant who, being first duly sworn by me, on oath made the following statements:

"My name is _____. I am **Custodian of Records** of the business known as _____. I have good reason to believe and do believe, based upon personal knowledge and/or information contained in the records of which I am Custodian, that the person named below as the Defendant, on or about _____, 20____, in Williamson County, Texas, did then and there intentionally, knowingly, and unlawfully appropriate property, to wit: _____, without the effective consent of the owner thereof, and with the intent to deprive said owner of said property. My belief is based upon the following facts:

Defendant: _____
Date of Birth: _____ Texas DL# _____
Address: _____ City/State/Zip: _____
Home Phone #: _____ Work # _____

Property taken (select one):

_____ Cash in the form of coin and/or currency
_____ Miscellaneous items offered for sale from stock and inventory which cannot be identified with specificity or certainty.
_____ Service (describe): _____ If rent, attach signed copy of the lease

Check Number: _____; Date Written: _____; Amount: \$ _____

Was the check (select all that apply):

_____ Thought to be good when accepted? _____ Deposited within 30 days? _____ A down-payment, partial payment, payment on charge account? _____ Post-dated? _____ Marked "Stop Payment" or "Account Held"? _____ Suspected forgery, two-party, or given to you outside of Williamson County? _____ Did the bank stamp the check "NSF" or "Account Closed"? _____ If NSF and over 30 days old, was a certified letter mailed to Defendant?

The Affiant: _____ Job Title: _____
Business Name: _____
Mailing Address: _____ City/State/Zip: _____
Business Phone#: _____ Home #: _____

I swear that the above information is true and correct to the best of my knowledge and belief.

DATE: _____, 20____ AFFIANT: _____

Sworn to and subscribed before me this the _____ day of _____, 20____.

Notary Public/Court Clerk/Justice of the Peace

COMPLAINT

(Theft by Check - Less than \$ 20 ~ TX Pen - 31.03)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

I, _____, being duly sworn, do state upon my oath that I have good reason to believe and do believe based upon the information contained in the Probable Cause Affidavit sworn to by the Affiant, and I charge that heretofore, and before the making and filing of this complaint, on or about the _____ day of _____, 20____, in Williamson County, Texas, _____, Defendant, did then and there intentionally, knowingly and unlawfully appropriate by acquiring and otherwise exercising control over property, to wit: _____, of the value of less than \$ 20.00 from _____, the owner thereof, being a person having a greater right to possession of the property than the Defendant, without the effective consent of said owner and with intent to deprive said owner of said property.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Complainant

SWORN TO AND SUBSCRIBED BEFORE ME BY _____,
a credible person, on _____, 20 _____.

Notary Public/ Court Clerk / Judge

APPENDIX A

STATUTE GOVERNING ISSUANCE OF A BAD CHECK: *TEXAS PENAL CODE ANN. SECTION 32.41*

STATUTE GOVERNING THEFT BY CHECK: *TEXAS PENAL CODE ANN. SECTIONS 31.03 to 31.06*

STATUTES GOVERNING VENUE FOR ISSUANCE OF A BAD CHECK:

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 4.12
TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 45.22

STATUTE GOVERNING HANDWRITING ANALYSIS: *TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 38.27*

STATUTES GOVERNING DISHONORED CHECK FEE:
TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 102.0071
VERNON'S TEXAS CIVIL STATUTES ARTICLE 9022

CASE LAW

Colin v. State, 168 S.W.2d 500 (Tex. Crim. App. 1943) - The Issuance of a Bad Check statute is constitutional. It is not imprisonment for debt.

Christiansen v. State, 575 S.W.2d 42 (Tex Crim. App. [Panel Op.] 1979) - There is no conflict between the Issuance of a Bad Check statute and the Theft by Check statute. Issuance of a Bad Check is not a lesser-included offense of Theft by Check.

King v. State, 213 S.W.2d 541 (Tex. Crim. App. 1948) - The State may prosecute for either Theft by Check or Issuance of a Bad Check or both. They are distinct and separate offenses.

Jones v. State, 226 S.W.2d 437 (Tex. Crim. App. 1949) – The presumption afforded the State that the Defendant knew he had insufficient funds under Section 32.41 (b) (1) & (2) of the Penal Code is rebuttable by the Defendant.

Harbin v. State, 60 S.W.2d 775 (Tex. Crim. App. 1993) - In Issuance of a Bad Check cases, issuing the check without saying more is enough. There is no requirement that the Defendant made statements concerning the value of the check.

Brigham v. State, 15 S.W.2d 243 (Tex. Crim. App. 1929) - Bank accounts are admissible as evidence.

McCormick v. State, 323 S.W.2d 462 (Tex. Crim. App. 1959); Kuykendahl v. State, 160 S.W.2d. 525 (Tex. Crim. App. 1942) – An essential element of Theft by Check is an intent to defraud.

Kuykendahl v. State, 160 S.W.2d, 525 (Tex. Crim. App. 1942) - Defendant must not have had sufficient funds in the account to be found guilty of Issuance of a Bad Check and the prosecution must introduce bank records to prove the insufficiency of funds.

Hutson v. State, 227 S.W.2d 813 (Tex. Crim. App. 1950) - In Theft by Check cases, the Defendant must have received some property from the complaining witness.