

RESOLUTION 02-02-2013 (As Amended and Adopted)

DIGEST

Criminal Law: Decriminalization of Minor Bad Checks and Ending Abuse of Bad Check Diversion Program

Amends Penal Code section 476a to decriminalize insufficient fund checks for less than ~~one thousand dollars (\$1,000)~~ *nine hundred fifty (\$950)* and make a first offense a simple misdemeanor, *and to address abuses of the Bad Check Diversion law by prohibiting district attorneys and law enforcement from contracting out enforcement authority to collection agencies and similar entities.*

RESOLUTIONS COMMITTEE RECOMMENDATION

~~DISAPPROVE~~ *(Reasons for Disapproval addressed by amendments)*

History:

Similar to Resolution 06-01-2012, which was withdrawn.

Reasons:

This resolution amends Penal Code section 476a to decriminalize insufficient fund checks for less than ~~one thousand dollars (\$1,000)~~ *nine hundred fifty dollars (\$950)* and make a first offense a simple misdemeanor. This resolution should be disapproved because this is not an appropriate solution to the problem the proponent seeks to address and ~~\$1,000~~ *(\$950)* is too high a floor for such prosecutions.

Currently, writing a bad check for \$450 or more may be charged as a misdemeanor or a felony, while anything smaller is punishable only as a misdemeanor. This resolution would raise the floor for the wobbler offense to ~~\$1,000~~ *(\$950)*, with a first offense limited to misdemeanor prosecution. The result would be to decriminalize the writing of a bad check for anything under ~~\$1,000~~ *(\$950)*, regardless of the intent of the writer or whether he/she is a habitual offender.

The resolution, as amended, would also prohibit a district attorney or law enforcement agency from entering into an agreement with any person, including but not limited to a collection agency, to contact persons who may be prosecuted pursuant to this or any other statute for making, drawing, or uttering a check, draft, or order, and shall not permit any person, including but not limited to a collection agency, to represent itself in any manner as associated or affiliated with such District Attorney or law enforcement agency for the purpose of collection of amounts allegedly due for alleged offenses under this statute.

The proponent's ~~stated~~ goal is to address the abuse of Bad Check Restitution Programs ("BCRP") sponsored by many prosecutorial agencies across the country. These are programs that work to retrieve funds from bad check writers in order to repay the recipients. About half of all states offer some type of BCRP, and these services vary in many ways. Some programs are handled internally by the prosecutorial agency, which often generates a portion of its overall budget from the check fees it collects. Others are contracted out to private collection agencies, which pay the law enforcement agencies a small portion of the fees they collect in

exchange for being able to send demand letters on the official letterhead of the agency. Consumer advocates oppose these programs, stating the writers of bad checks are falsely threatened with criminal prosecution to extort payment. Numerous federal lawsuits have been brought nationwide to address these abuses, including a 2008 California action that concluded restitution programs in two dozen cities violated the Fair Debt Collection Practices Act by making false threats of prosecution and charging illegal fees. The problem of abuse within BCRPs is real and it raises serious ethical concerns regarding prosecutorial agencies enabling sometimes extortionary tactics. However, it should be addressed by better regulation of the programs, and not by decriminalizing bad checks under \$1,000.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code Section 476a to read as follows:

§ 476a. (a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depository, or person, or firm, or corporation, for the payment of money in an amount exceeding nine hundred fifty dollars (\$950) in one transaction, knowing at the time of that making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with the bank or depository, or person, or firm, or corporation, for the payment of that check, draft, or order and all other checks, drafts, or orders upon funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in a county jail for not more than one year, or in the state prison.

(b) However, if ~~the total amount of all such checks, drafts, or orders that~~ the defendant is ~~charged with and~~ convicted of making, drawing, or uttering such check, draft, or order as a first offense does not exceed four hundred fifty dollars (\$450), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475 or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475 or 476 or of this section.

(c) Where the check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with the bank or depository, or person, or firm, or corporation.

(d) In any prosecution under this section involving two or more checks, drafts, or orders, it shall constitute prima facie evidence of the identity of the drawer of a check, draft, or order if both of the following occur:

(1) When the payee accepts the check, draft or order from the drawer, he or she obtains from the drawer the following information: name and residence of the drawer, business or mailing address, either a valid driver's license number or Department of Motor Vehicles identification card number, and the drawer's home or work phone number or place of employment. That information may be recorded on the check, draft, or order itself or may be retained on file by the payee and referred to on the check, draft, or order by identifying number or other similar means.

(2) The person receiving the check, draft, or order witnesses the drawer's signature or endorsement, and, as evidence of that, initials the check, draft, or order at the time of receipt.

(e) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository or person or firm or corporation for the payment of such check, draft or order.

(f) If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect.

(g) A sheriff's department, police department, or other law enforcement agency may collect a fee from the defendant for investigation, collection, and processing of checks referred to their agency for investigation of alleged violations of this section or Section 476.

(h) The amount of the fee shall not exceed twenty-five dollars (\$25) for each bad check in addition to the amount of any bank charges incurred by the victim as a result of the alleged offense. If the sheriff's department, police department, or other law enforcement agency collects any fee for bank charges incurred by the victim pursuant to this section, that fee shall be paid to the victim for any bank fees the victim may have been assessed. In no event shall reimbursement of the bank charge to the victim pursuant to this section exceed ten dollars (\$10) per check.

(i) No District Attorney or law enforcement agency shall enter into an agreement with any person, including but not limited to a collection agency, to contact persons who may be prosecuted pursuant to this or any other statute for making, drawing, or uttering a check, draft, or order, and shall not permit any person, including but not limited to a collection agency, to represent itself in any manner as associated or affiliated with such District Attorney or law enforcement agency for the purpose of collection of amounts allegedly due for alleged offenses under this statute.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Under Penal Code section 476a, providing an NSF check, no matter how small, is a crime. It would be a gross waste of resources for a District Attorney to prosecute the remitter of such an NSF check. Many District Attorneys do not provide prosecutors for the trial of such infractions. In some counties, at least Los Angeles and San Diego, someone who writes a check that bounces, for an amount as small as \$25.00, can be hit up by what appears to be an arm of the District Attorney. If the recipient of the notice has brains enough to recognize the fraud and ignore the notice, nothing happens.

This Solution: This Resolution would amend Section 476a to provide that an NSF check is not a crime unless it exceeds \$1,000 ~~\$950.00~~, and that prison would only be available after a first offense. ~~This would remove the incentive for the~~ *It would also prohibit a District Attorney to have a deal from contracting* with a third party entrepreneur which uses the District Attorney's office to threaten prosecution so as to convince the accused into enrolling in a "diversion" program which would requires not only the payment of the check balance and all fees, but also a large fee for a "class," put on by the entrepreneur. *In addition to the prohibition, there* ~~There~~ would no incentive for the District Attorney to allow the documentation propounded by such an entrepreneur to falsely imply that if the recipient does not "enroll" in the program and remit the relatively large check, the person will be prosecuted. Anyone who suffers a loss from a bad check will still have a civil remedy.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: K. Martin White, P.O. Box 1826, Carlsbad, CA 92018-1826; (760) 729-1696; marnew@sbcglobal.net.

RESPONSIBLE FLOOR DELEGATE: K. Martin White