

Hot Check Cases

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Abbreviations

- CCP = Code of Criminal Procedure
- PC = Penal Code

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Agenda

- **Resources**
- **Issuance of Bad Check vs. Theft by Check**
- **Criminal Case vs. Small Claims Case**
- **Pre-trial Diversion & Deferred Disposition**
- **2019 Legislative Change – Processing Fees for Bad Checks**

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Note About Content

- This webinar does not include any information regarding the Supreme Court and Court of Criminal Appeals emergency orders, OCA guidance, or other information related to the Coronavirus epidemic.
- That information can be found by visiting TJCTC's Coronavirus Updates, Information, and Resources webpage: <https://www.tjctc.org/coronavirus.html>

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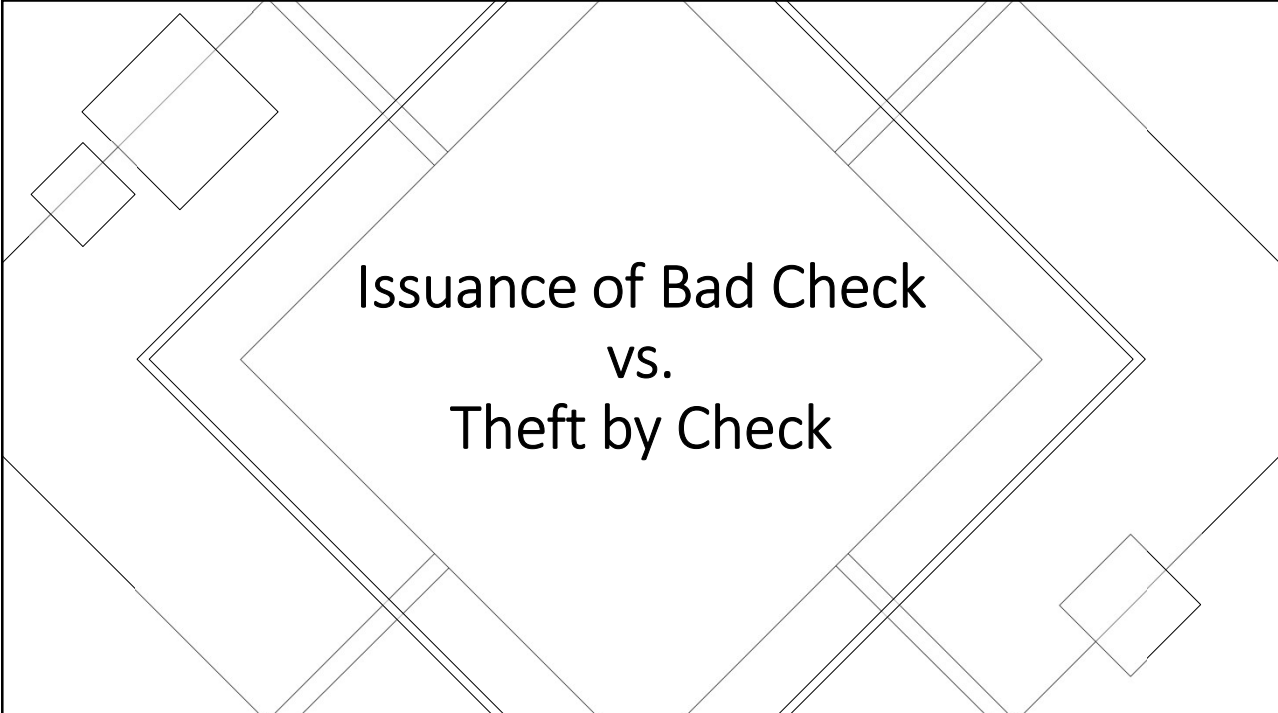


Resources

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TJCTC's Criminal Deskbook	<ul style="list-style-type: none">• https://www.tjctc.org/tjctc-resources/Deskbooks.html
TJCTC's Legal Question Board	<ul style="list-style-type: none">• https://www.tjctc.org/tjctc-resources/legal-question-board.html
Texas Constitution & Statutes Website	<ul style="list-style-type: none">• https://statutes.capitol.texas.gov/• Specific statute citations are included on the slides

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Issuance of Bad Check
vs.
Theft by Check

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Issuance of Bad Check: Elements

A person commits an offense if they:

- Issue or pass a check or similar sight order,
- For the payment of money,
- Knowing that they do not have sufficient funds for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

PC 32.41(a)

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Issuance of Bad Check: Elements

While it can also be proven in other ways, the defendant's knowledge of insufficient funds is *presumed* (except in the case of a postdated check or order) if:

- They had no account with the bank at the time they issued the check or order; or
- Payment was refused for lack of funds or insufficient funds within 30 days after issue and the defendant failed to pay in full within 10 days after receiving **notice** of that refusal.

PC 32.41(b)

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Issuance of Bad Check: Elements

The “**notice**” may be actual notice or notice in writing that:

- Is sent by:
 - first class mail, evidenced by an affidavit of service; or
 - registered or certified mail with return receipt requested;
- Is addressed to the issuer at the issuer's address shown on
 - the check or order;
 - the records of the bank; or
 - the records of the person to whom the check or order has been issued or passed; and
- 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."

If notice is given as described here, it is presumed that the notice was received no later than five days after it was sent.

PC 32.41(c)-(d)

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Issuance of Bad Check: JP Jurisdiction

This offense is always a Class C misdemeanor, regardless of the value of the check, unless the check is for court-ordered child support.

PC 32.41(f)

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Issuance of Bad Check: Restitution

- Restitution shall be made through the prosecutor's office if collection and processing were initiated through that office. In other cases restitution may be, with the approval of the court in which the offense is filed:
 - Made through the court; or
 - Collected by a law enforcement agency if a peace officer of that agency executes a warrant against the person charged with the offense.
- The amount of restitution may not exceed \$5,000.

Note: a restitution judgment can be enforced by the victim like a civil judgment, and it cannot be paid off through jail credit or community service.

PC 32.41(e); CCP 45.041(b-1)

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Theft by Check: Elements

- Theft (PC 31.03): A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
- Theft of Service (PC 31.04): A person commits theft of service if, with intent to avoid payment for service that the actor knows is provided only for compensation:
 - The actor intentionally or knowingly secures performance of the service by deception, threat, or false token; or
 - The actor intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make full payment after receiving notice demanding payment.

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Theft by Check: Elements

While it can also be proven in other ways, it is *presumed* that the defendant intended to deprive the owner of property (PC 31.03) or services (PC 31.04) without paying – except in the case of a postdated check or order – if:

- The defendant had no account with the bank at the time they issued the check or sight order; or
- Payment was refused for lack of funds or insufficient funds within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving **notice** of that refusal.

PC 31.06(a)

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Theft by Check: Elements

The “**notice**” may be actual notice or notice in writing that:

- is sent by:
 - first class mail, evidenced by an affidavit of service; or
 - registered or certified mail with return receipt requested;
- is addressed to the issuer at the issuer's address shown on
 - the check or order;
 - the records of the bank; or
 - the records of the person to whom the check or order has been issued or passed; and
- 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."

If notice is given as described here, it is presumed that the notice was received no later than five days after it was sent.

PC 31.06(b)-(c)

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Theft by Check: Elements

For Theft (PC 31.03), the actor's intent to deprive the owner of the property is also *presumed* – except in the case of a postdated check or order – if:

- The actor ordered the bank to stop payment on the check or order;
- The bank refused payment to the holder on presentation of the check or order within 30 days after issue;
- The owner gave the actor notice of the refusal of payment and made a demand to the actor for payment or return of the property; and
- The actor failed to:
 - pay the holder within 10 days after receiving the demand for payment; or
 - return the property to the owner within 10 days after receiving the demand for return of the property.

PC 31.06(f)

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Theft by Check: Defense

It is a defense to prosecution for Theft of Service (PC 31.04) that:

- The defendant secured the performance of the service by giving a post-dated check or similar sight order to the person performing the service; and
- The person performing the service or any other person presented the check or sight order for payment before the date on the check or sight order.

PC 31.04(g)

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Theft by Check: JP Jurisdiction

Theft (PC 31.03) and Theft of Service (PC 31.04) are both Class C misdemeanors if the value of the property or service stolen is less than \$100.

PC 31.03(e); 31.04(e)

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Theft by Check: JP Jurisdiction

Theft (PC 31.03) is increased to a Class B if it is shown at trial that any of the situations listed under PC 31.03(f) apply (this would also need to be alleged in the charging instrument).

Here are a few examples:

- The actor was a public servant at the time of the offense and the property appropriated came into the actor's custody, possession, or control by virtue of his status as a public servant.
- The actor was in a contractual relationship with government at the time of the offense and the property appropriated came into the actor's custody, possession, or control by virtue of the contractual relationship.
- The owner of the property appropriated was at the time of the offense:
 - an elderly individual, or
 - a nonprofit organization.

PC 31.03(e)-(f)

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Theft by Check: Restitution

- May be ordered as in any criminal case under CCP 45.041(b)(2).
- No specific laws like for Issuance of Bad Check offense.

Remember: a restitution judgment can be enforced by the victim like a civil judgment, and it cannot be paid off through jail credit or community service.

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Issuance of Bad Check PC 32.41	Theft by Check PC 31.03, 31.04, 31.06
Must prove knowledge of insufficient funds (but could be a failed attempt to “float” a check where defendant did intend to pay)	Must prove intent to deprive the seller of goods/services without paying
Class C misdemeanor unless for court-ordered child support, regardless of amount	Class C misdemeanor if the value of the property or service stolen is less than \$100 (unless an enhancement applies).
Restitution allowed (\$5,000 cap, specific procedures)	Restitution allowed (same as any criminal case)

So which offense gets charged?

This is up to law enforcement or the prosecutor, not the court.

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Proof of Identity of Check Writer

- No matter which offense is charged, the prosecutor will need to prove that the defendant was the person who wrote the check.
- This must be established by someone with actual knowledge.

Scenario: Amber owns a small business and Bronson works at the cash register. Randy gave a check to Bronson to buy an item. Amber was in her office in the back of the store at the time. When Randy's check bounced, Amber filed a complaint with the police. Randy says he never wrote that check and that someone must have gotten his checkbook and used it. Who can testify in court about if Randy is the one that wrote the check?

a). Amber b). Bronson c). Either One

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Criminal Case vs. Small Claims Case

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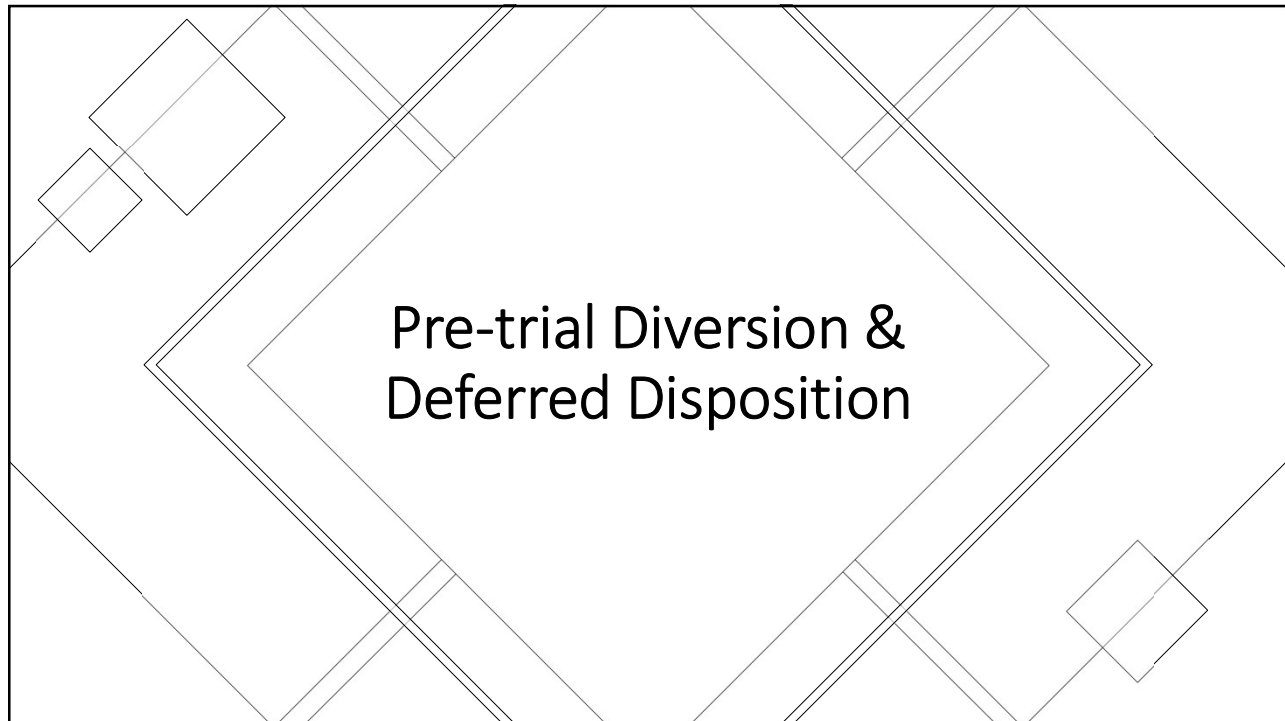
- A person can always file a small claims case in addition to or instead of filing a criminal complaint.
- It is up to that person to decide what they want to do. The court may not give any advice about or have any involvement in the decision.

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Scenarios


- Thea writes Rebecca a check for \$5,000 for some contract work that Rebecca did. The check bounces. Rebecca files a criminal report against Thea. Thea is found guilty of Issuance of Bad Check and is ordered to pay restitution to Rebecca in the amount of \$5,000. Thea begrudgingly pays the restitution. Can Rebecca also file a small claims case against Thea for the \$5,000?
- What if the check that bounced was for \$9,000? Should Thea be ordered to pay \$9,000 in restitution? What could Rebecca sue for in a small claims case?

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- Many counties have pre-trial diversion programs where the prosecutor will dismiss the case if the defendant pays in full and meets any other requirements.
 - The court does not decide this and is not part of the process.
 - If the defendant does everything that is required, the prosecutor will submit a motion to dismiss.
- Deferred disposition (CCP 45.051) is another option in these cases.
 - **Question:** What conditions do you think should typically be included if a court orders deferred disposition in a hot check case?



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- Section 3.506 of the Business & Commerce Code allows the holder of a dishonored check or similar sight order to charge a fee of up to \$30 against the person who issued it.
- Previously, when a defendant was convicted under any of the offenses we have discussed, the court could collect this fee and give it to the holder.
- After the 2019 legislative session, the holder can still charge this fee, but **the justice court may no longer collect** it on their behalf. (CCP 102.0071, which allowed this, was repealed).
- Note that this is unrelated to any fines, fees, or costs that the court assesses.

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