

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 738

SPONSOR: Senator Bennett

SUBJECT: Collection of worthless checks, drafts, or orders of payment

DATE: March 10, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>                    </u>	<u>                    </u>	<u>CM</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>JU</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

The bill would change the means of making a demand in a civil action for the payment of a worthless check, draft, or order of payment. The bill would allow notice of a demand for payment to be made by regular mail that is evidenced by an affidavit of service or mailing. The bill also states that such notice may be sent to the address on the check or other instrument rather than the current requirement that certified or registered mail be used along with return receipt. The bill provides that notice may be sent to the address given by the drawer when the instrument was issued, or to the drawer's last known address. The bill also states that notice is conclusive 3 days after the affidavit is executed. The bill applies the demand provisions of s. 68.065(3), F.S., to all of s. 68.065, F.S.

This bill substantially amends section 68.065, Florida Statutes.

## II. Present Situation:

### Civil Action for Collection—Written Demand of Payment

Presently, a civil action may be brought to collect a check, draft, or order of payment when payment was refused by the drawee because of lack of funds, credit, or an account, and where the maker or drawer fails to pay the amount owing, in cash, to the payee within 30 days following a written demand from the payee. (s. 68.065(1), F.S.) If the payee prevails in the civil action, the maker or drawer is liable to the payee for the amount owing on the check plus damages of three times the amount owing, court costs, and reasonable attorney's fees incurred by the payee in the civil action.

Presently, before recovery for the amount owed plus triple damages may be made under subsection (1), a written demand must be delivered to the payor. (s. 68.065(3), F.S.) The demand must be delivered via certified or registered mail, along with return receipt. The demand is to be delivered to the maker or drawer of the check, draft, or order of payment. The demand gives notice that the payor must tender payment in cash for the full amount of the check plus the appropriate service charge within the 30-day period. The demand also states that if payment is not made within the 30-day period, the payee may file a civil action for three times the amount of the check, plus bank fees, attorney's fees, and court costs. Florida case law indicates that the statutory requirement of a return receipt does not require a signed receipt, but rather to define the type of service that must be used under s. 68.065, F.S. See *L & F Partners, LTD v. Miceli*, 561 So.2d 1227 (Fla. 2d. DCA 1990).

### **Service Charge Provision**

When making a written demand for payment, the payee may also require the maker or drawer of the check, draft, or order of payment to pay a service charge. (s. 68.065(2), F.S.) The service charge is not to exceed the fees authorized under s. 832.08(5), F.S. or 5 percent of the face amount of the instrument, whichever is greater. If judgment is rendered for the payee, interest may be added to the total amount due as described in s. 55.03, F.S. Also, any bank fees incurred by the payee may be charged to the maker or drawer of the check, draft, or order of payment.

### **Additional Provisions of s. 68.065, F.S.**

Subsequent receivers of a check have the same rights against the original payor, so long as they give notice to the payor in a fashion that is substantially similar to the requirements of subsection 3. (s. 68.065(4), F.S.) Also, after the commencement of the civil action, but before the hearing, the maker of the check may pay to the payee the amount of the check plus bank fees, the service charge, and court costs. (s. 68.065 (5), F.S.) The maker of the check is also liable for all attorney fees and collection costs the payee has incurred as a result of the claim. A court or jury may waive all or part of the statutory damages if it determines the dishonored check was due to economic hardship. (s. 68.065(6), F.S.)

### **Criminal Prosecution for Worthless Checks**

Criminal prosecution for passing a worthless check is also available. Under current Florida law, criminal prosecution for worthless checks is governed under ch. 832, F.S. It is unlawful to issue a check with the intent to defraud and stop payment in furtherance of such intent to defraud. (s. 832.041, F.S.) Further, it is unlawful to issue a check when the person knows he or she does not have sufficient funds on deposit to pay the check amount. (s. 832.05, F.S.) In any prosecution or action under ch. 832, F.S., notice to the maker or drawer of the check must be mailed by certified or registered mail, evidenced by return receipt, to the address printed on the check or given at the time of issuance. Such notice is deemed sufficient and equivalent to notice having been received by the maker or drawer, whether such notice shall be returned undelivered or not. Payment of the full face value of the check plus a service charge must be made within 7 days, or the holder of the check may turn information of the incident over to the state attorney for criminal prosecution. Failure to pay within 7 days also produces potential liability in a civil action pursuant to s. 68.065, F.S., for triple the amount of the check.

### **Civil Remedy for Theft or Dealing in Stolen Property**

Florida law also provides civil remedies for various criminal practices. Any person who can prove through clear and convincing evidence that he or she has been injured by another's violation of ss. 812.012-812.037, F.S., (dealing with theft and dealing in stolen property) has a cause of action for the greater of threefold the actual damages sustained or \$200. (s. 772.11, F.S.) Before an action under s. 772.11, F.S. may be filed, the person claiming injury must make a written demand for \$200 or the treble damage amount of the person liable for damages. The statute contains no specific provisions regarding how the written demand must be made. If the demand is met within 30 days, then a written release from further civil liability for the specific act at issue is to be made.

### **U.S. Postal Service Methods of Mailing**

The USPS offers a variety of shipping options. Registered mail costs \$7.50 without postal insurance and the USPS says it is the most secure method of mailing an item. The day and time of delivery along with delivery attempts may be tracked online. Certified mail costs \$2.30, and includes a receipt stamped with the date of mailing and an article number to verify delivery. The recipient's signature is obtained at the time of delivery and a record is maintained by the post office. For \$1.75 at the time of mailing, a copy of the signature can be obtained with Return Receipt. Return Receipt may be combined to get both proof of mailing and proof of delivery. Return Receipt can also be purchased for Registered Mail, mail insured for more than \$50, mail sent COD and Express Mail.

## **III. Effect of Proposed Changes:**

### **Civil Action for Collection—Written Demand for Payment**

The bill amends s. 68.065, F.S. by applying the notice provisions of s. 68.065(3), F.S. to all of s. 68.065, F.S.

The bill amends s. 68.065(3), F.S. by expanding the means by which a written demand may be delivered. The bill permits delivery of the written demand by regular mail, evidenced by an affidavit of service of mailing. Demands may also continue to be made by certified or registered mail that is evidenced by return receipt, however, it is unlikely that the other methods would be used because of the reduced cost of using regular mail.

The bill also states that the written demand may be mailed to the address on the check, to the address given by the drawer at the time the instrument was issued, or to the drawer's last known address. This language indicates that proper notice may be sent to a locality the payor is known or thought to be at.

The bill states that notice is conclusive 3 days after the affidavit of service is executed.

The bill also contains a technical correction that changes the word "shall" to "must" in the first sentence of s. 68.065(3), F.S.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The bill raises a Constitutional issue of separation of powers by stating that Notice is conclusive 3 days after the affidavit of service is executed. Generally, the Florida courts will permit the legislature to say that certain facts are “prima facie” evidence, but frown on attempts to define certain facts as conclusive in a legal proceeding.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill would reduce the costs of mailing a written demand for the payment of a worthless check. Currently, each demand costs a minimum of \$4.05 to comply with s. 68.065, F.S. The bill would only require the cost of “regular mail” and the cost of executing an affidavit of service. The drafter of a bad check may more easily be subject to the civil cause of action provisions of s. 68.065, F.S.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

The requirement that “regular mail” be used is perhaps unclear. Though this probably indicates the use of first class postage, the statute does not specifically state this. A second possible problem is in determining what the drawer’s “last known address” is. The statute is unclear as to how this term “last known address” is to be defined. Thus, difficulties could arise regarding whether the address notice was sent to was, in fact, the drawer’s last known address.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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