

# 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: Worthless Checks

DATE: March 17, 2003 REVISED: \_\_\_\_\_

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

## I. Summary:

The bill changes the means of making a demand in a civil action for the payment of a worthless check, draft, or order of payment. The bill allows notice of a demand for payment to be made by regular mail that is evidenced by an affidavit of service or mailing. The bill provides that notice may be sent to the address on the check or other instrument, the address given by the drawer when the instrument was issued, or the drawer's last known address. The bill also states that notice is conclusive 3 days after the affidavit is executed. The bill applies this demand provision 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 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 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.

Before recovery for the amount owed plus triple damages may be made under subsection (1), a written demand must be delivered to the drawer. (s. 68.065(3), F.S.) The demand must be delivered via certified or registered mail, evidenced by return receipt. The demand is to be

delivered to the drawer of the check, draft, or order of payment and gives notice that the drawer 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 defines 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 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. (See "Criminal Prosecution for Worthless Checks" discussion below.) 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 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 drawer, so long as they give notice to the drawer 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 drawer 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 drawer of the check is also liable for all attorney's 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 and 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. (s. 832.07, F.S.)

## **U.S. Postal Service (USPS) Methods of Mailing**

The USPS offers a variety of mailing options including registered mail, certified mail, first-class mail, express mail, priority mail, and standard mail. Registered mail costs \$7.50 without postal insurance, and 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, a copy of the signature can be obtained with Return Receipt. Return Receipt may be combined to receive 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.

## **Notice Provisions in Other Florida Statutes**

Florida Statutes regarding notice vary on what type of mail service must be utilized and when notice is considered received. Several examples are described below.

- Section 48.183(2), F.S., service of process in action for possession of premises, allows the clerk of the court to send the summons to the defendant by first-class mail, and service is effective on the date of posting or mailing, whichever occurs later. At least 5 days must elapse from the date of service before a judgment for final removal of the defendant may be entered.
- Section 48.194(2)(c), F.S., personal service outside the state, specifies: "Service under this subsection shall be considered obtained upon the signing of the return receipt by the person allowed to be served by law."
- Section 61.13015(5), F.S., petition for suspension or denial of professional licenses and certificates, states: "Notice shall be served under this section by mailing it by certified mail, return receipt requested, to the obligor at his or her last address of record with the local depository. If the obligor has no address of record with the local depository, or if the last address of record with the local depository is incorrect, service shall be by publication as provided in chapter 49. When service of the notice is made by mail, service is complete upon the receipt of the notice by the obligor."
- Section 61.14(6)(b)3., F.S., enforcement and modification of support, maintenance, or alimony agreements or orders, states: "When service of the notice is made by mail, service is complete on the date of mailing."

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

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

The bill expands the means of delivery for a written demand by permitting 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 evidenced by return receipt. Currently, the only evidence of delivery is the return receipt. The drawer may refuse to sign the return receipt

and thereby refuse delivery of the certified letter, or the return receipt may be signed by whoever is at the drawer's home at the time of delivery. As an alternative to using the return receipt from the drawer for evidence of delivery or non-delivery, the bill provides a method to show the demand was mailed through the affidavit of service of mailing.

The bill provides the written demand may be mailed to three possible locations:

- 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 change may allow the payee to send notice to an incorrect address even if the payee is aware of the drawer's last known address. The term "last known address" is used throughout Florida Statutes and is defined in at least two chapters. In s. 717.101(13), F.S., last known address "means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail." In s. 83.803(6), F.S., last known address "means that address provided by the tenant in the latest rental agreement or the address provided by the tenant by hand delivery or certified mail in a subsequent written notice of a change of address." Last known address encompasses whatever the payee has received from the drawer to indicate the drawer's address, which may include a check or the address given by the drawer at the time the instrument is issued. The Legislature may wish to amend the bill to require that the payee send notice only to the last known address.

The bill states notice is conclusive three days after the affidavit of service is executed. The term "conclusive" appears to mean that the drawer of the check could not rebut in court the notice date resulting from the affidavit of service of mailing.

The bill creates a potential timing conflict between the date the notice is considered conclusive and the date the notice is received by the drawer of the check. The notice mailed to the drawer, an example of which is described in s. 65.065(3), F.S., states that the 30-day time period to pay begins upon receipt of the notice. However, the payee may begin counting the 30-day time period earlier because notice will be considered conclusive three days after the affidavit is executed. The drawer may not have actually received the notice by the third day.

The bill applies the changes made in s. 68.065(3), F.S., to the entire section by deleting "subsection (1)" and inserting the word "section" in the first sentence of s. 68.065(3), F.S.

The bill also contains a technical correction that changes the word "shall" to "must" in the first sentence.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

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

None.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

Through this bill, the delivery of a demand letter to a drawer may more easily be accomplished with the option of regular mail. The bill may also reduce the costs of mailing a written demand for the payment of a worthless check. Currently, each demand costs a minimum of \$4.05 by certified mail with return receipt. However, the regular mail alternative also removes the certainty the return receipt provided that the letter was delivered to the drawer or at least delivery was refused by the drawer. This alternative may make it easier for the payee to begin civil suit proceedings against the drawer under this statute.

**C. Government Sector Impact:**

None

**VI. Technical Deficiencies:**

The meaning of the term “regular mail” is somewhat unclear, although this term probably indicates the use of first-class mail.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.