

Approved 3-22-90  
Date

MINUTES OF THE Senate COMMITTEE ON Labor, Industry and Small Business

The meeting was called to order by Senator Alicia Salisbury at  
Chairperson

1:30 ~~am~~ p.m. on March 14, 1990 in room 527-S of the Capitol.

All members were present except: Senator Daniels

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department  
Gordon Self, Revisor of Statutes Office  
Phil Lowe, Secretary to Committee

Conferees appearing before the committee:

Jim Ludwig, Kansas Power and Light Gas Service  
Bud Grant, Kansas Chamber of Commerce and Industry  
Jim Clark, Kansas County and District Attorney's Association  
Stan Lind, Kansas Association of Financial Services  
Gene Olander, Shawnee County District Attorney

The meeting was called to order at 1:35 p.m. by the Chairman, Senator Salisbury, for the purpose of hearing HB 2581.

HB 2581 - An Act concerning worthless and insufficient checks; amending K.S.A. 16a-2-501 and K.S.A. 1989 Supp. 21-3707 and 60-2610 and repealing the existing sections.

The Chairman stated that two conferees who were unable to attend the meeting supported HB 2581 and left written testimony to be distributed. One is from the Kansas Credit Union League (Attachment I), and the other is from the Kansas Food Dealers Association. (Attachment II).

Jim Ludwig, KPL Gas Service, said they support the recommendations of HB 2581 to strengthen the state's worthless check law. Mr. Ludwig said the bill contained two important recommendations: (1) To make the fact itself that a check is dishonored the determinant in civil prosecution instead of having to prove the check-writer knew the check would "bounce," and (2) to eliminate the bad check-writer's loophole found in the distinction between "exchange of present value" and "pre-existing debt." He pointed out that KPL receives approximately 19,200 bad checks each year, amounting to an average of \$1,152,000. See Attachment III for a copy of his testimony.

The next conferee, Bud Grant, Kansas Chamber of Commerce and Industry, said that HB 2581 was a product of an interim committee study and hoped this committee would give it a favorable recommendation. Mr. Grant said statutes show that the problem of bad checks in America is reaching epidemic proportions and would hope the committee would address the problem by extending the availability of civil remedies to worthless checks given in payment of a preexisting debt. See (Attachment IV) for a copy of his testimony.

Jim Clark, Kansas County and District Attorney's Association, appeared before the committee and offered a proposed amendment in Section 2 of HB 2581. Mr. Clark stated that in the past their Association has opposed any effort to add the preexisting debt to the criminal statute which would be a tremendous impact on our criminal judicial system. He said their Association was asking for some user fees in their proposed amendment to allow funding for the additional impact. With the adoption of their proposed amendment Mr. Clark urged the passage of HB 2581. (See Attachment V for a copy of the proposed amendment).

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE Senate COMMITTEE ON Labor, Industry and Small Business,  
room 527-S, Statehouse, at 1:30 ~~xxx~~ p.m. on March 14, 1990

The next conferee was Stan Lind, representing Kansas Association of Financial Services which is the State Trade Association of Consumer Finance Companies. He said the present law was enacted two or three years ago and it permits a service charge, it permits a civil penalty, it permits attorney fees, and the bill does all this without going through the County Attorney's office in order to collect it. He said the bill only applies to the present exchange of value situation and it does not apply to the situation of a preexisting debt. See Attachment VI for the explanation of his proposed amendments. Mr. Lind urged the committee to pass HB 2851 with the adoption of the proposed amendments.

Gene Olander, Shawnee County District Attorney, appeared in opposition to HB 2851. Mr. Olander distributed copies of a letter, (Attachment VII), written by Nola Foulston, District Attorney of Sedgwick County, concerning worthless and insufficient funds check. He said he shared the same concerns about the bill as outlined in Ms. Foulston's letter. He objected and had grave concerns in expanding the present worthless check statute K.S.A. 21-3707 to include filing criminal charges for all checks written for preexisting debts. In his opinion it is extremely difficult and almost impossible to predicate attempted defraud on a check that is written on a preexisting debt. He said to shift the burden of collecting worthless checks to the prosecution is not an appropriate response to the problem that exists and that the impact of this bill is way beyond what people would have you believe. In answer to a question as how to distinguish between a present exchange of value and a preexisting debt, Mr. Olander said a check is an instrument where merchandise wares are given up. He further stated that his objection to the bill was not the objection of the work load involved but that he thought it was a bad law.

Senator Morris moved to approve the minutes of February 27, 1990, February 28, 1990, March 1, 1990, and March 5, 1990 as written. Senator Sallee seconded the motion. The motion carried.

The meeting was adjourned at 2:30 p.m.



TESTIMONY ON H.B. 2581

AN ACT concerning worthless and insufficient funds checks

Presented to the

SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS

March 14, 1990

by the

KANSAS CREDIT UNION LEAGUE

Madam Chairman, members of the Committee:

I am Jerel Wright, Governmental Affairs Director for the Kansas Credit Union League (KCUL). Our association represents 98% of the 147 state-chartered and 42 federally-chartered credit unions located in Kansas. KCUL member credit unions serve the personal financial needs of over 550,000 individual credit union members and have over \$1.5 billion in combined assets. Kansas credit unions range in asset size from \$29,000 to \$114 million and range in membership size from 58 to 43,000 members.

CREDIT UNIONS SUPPORT HB 2581

Every day, the average credit union may accept a hundred checks or more in payment for loans, in deposits to shares and in exchange for cash. Many of the checks accepted are returned because the member has insufficient funds to cover the check. The credit union then has the task of collecting the funds paid out to the member or collecting a back payment on a loan account.

*Attachment I*  
3-14-90

HB 2581 strengthens a credit union's ability to collect an insufficient funds check by increasing the ways a credit union may pursue collection of a worthless check. The bill amends the definition of "giving a worthless check" by including "presenting a check for payment of a preexisting debt" in the definition. This change would allow for the criminal prosecution of a person who gives a worthless check for payment of a preexisting debt.

The credit unions feel this is a positive change and one which will help reduce the number of worthless checks that are presented to a credit union. For this reason, we support the passage of HB 2581.

Thank you for considering our testimony.

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# Kansas Food Dealers' Association, Inc.

2809 WEST 47th STREET SHAWNEE MISSION, KANSAS 66205

PHONE: (913) 384-3838

March 14, 1990

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FRANCES KASTNER

EXECUTIVE DIRECTOR  
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Shawnee Mission

SENATE LABOR, INDUSTRY AND SMALL BUSINESS COMM.

SUPPORTING HB 2581--WORTHLESS CHECKS

We appreciate the opportunity to support HB 2581. Our membership consists of distributors, wholesalers, and retailers of food products throughout the state of Kansas.

As many of you have heard me say before, the Kansas Food Dealers Association supports ALL bills that will reduce losses suffered by individuals and businesses through theft of any sort. Whether the loss is from bad checks, shoplifting, or burglary the innocent victims should have some recourse of recovery that discourages those practices.

I am sure you will recall that we opposed raising the amount from \$150 to \$500 before it became a Class E Felony and while this does not address our desire to have the \$500 floor reduced, it will perhaps send the message that the Legislature agrees SOMETHING must be done to reduce crimes of this nature.

We urge your passage of HB 2581.

*Frances Kastner*  
Frances Kastner, Director  
Governmental Affairs for KFDA

*Attachment II*  
3-14-90



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TESTIMONY  
TO  
SENATE LABOR, INDUSTRY AND SMALL BUSINESS COMMITTEE  
HB 2581  
MARCH 14, 1990  
BY JIM LUDWIG, KPL GAS SERVICE

KPL supports the 1989 Special Agriculture and Livestock Committee's recommendations to strengthen the state's worthless check laws. The interim committee's recommendations are embodied in HB 2581.

Two of the committee's most important recommendations are: (1) to make the fact itself that a check is dishonored the determinant in civil prosecution instead of having to prove the check-writer knew the check would "bounce;" and (2) to eliminate the bad check-writer's loophole found in the distinction between "exchange of present value" and "pre-existing debt." For purposes of collection and prosecution, the distinction is made irrelevant. We believe these changes would help realize the intent of the law, which is to deter issuance of worthless checks.

-more-

*Attachment III*  
3-14-90

KPL receives approximately 19,200 bad checks each year, amounting to an average of \$1,152,000. Added to this is the cost of trying to collect on these checks. Although this does not represent a large percentage of KPL's total annual revenues, we are dealing with an accumulating amount significant enough to be a factor in the overall revenue requirements of a rate case. Through a rate case, we would ultimately recover from paying customers what had been written off as bad debt. This means honest customers pay the bills of those who get away with writing bad checks.

HB 2581 would protect businesses that sell services on credit. Current law is interpreted so that a merchant who receives a bad check in return for an article of merchandise is entitled to recover the loss because an "exchange of present value" has occurred. The legal recourse is less clear for a business that sells products or services on credit and later receives a worthless check in payment of the "pre-existing debt." KPL delivers electricity and natural gas to our customers in advance of payment. All our customers' checks may be seen as payments for pre-existing debts. If a check is bad, we have a problem. In our experience, many district and county attorneys feel that there must be an exchange of present value in order to prove "intent to defraud," which is impossible to prove in pre-existing debt cases because there is no change in the positions of the respective parties when a bad check bounces. HB 2581 corrects this problem.



The bill is also fair to consumers. It would allow the writer of a bad check fourteen days to make good the bad check before any civil action could be brought against him or her. If a customer, for example, inadvertantly wrote a bad check, he or she would have fourteen days, under this bill, to pay the amount before any civil action could be initiated. In other words, anyone who makes an honest mistake would have a chance to correct it before being accused of a civil offense. Before anyone could be convicted under the criminal code, the district or county attorney would still have to show that the defendent knew the check was bad when it was written.

We urge the committee to approve HB 2581 for passage.

# LEGISLATIVE TESTIMONY

## Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321



A consolidation of the  
Kansas State Chamber  
of Commerce,  
Associated Industries  
of Kansas,  
Kansas Retail Council

HB 2581

March 14, 1990

### KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the  
Senate Committee on Labor, Industry and Small Business

by

Bud Grant  
Vice President

Madam Chairperson and members of the Committee:

My name is Bud Grant, and on behalf of the Kansas Chamber of Commerce and Industry and the Kansas Retail Council, thank you for the opportunity of appearing before you today in support of HB 2581.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

*Attachment IV*  
3-14-90

During the 1989 legislative session, HB 2068 was introduced and addressed the same problem as HB 2581. It was the House Committee's decision to delay action on HB 2068 and to request an interim study of the issue to determine if changes in Kansas law were needed. That interim study determined changes were needed and HB 2581 is the result.

In 1986, the Kansas Legislature enacted legislation authorizing civil remedies, in addition to the criminal remedies already available, for those seeking relief from losses suffered from worthless checks. It has made a difference. You have heard since the enactment of that legislation from the food dealers and others, testifying that the incidence of bad checks has been reduced by that legislative action. Retailers are now urging that you extend the same remedies to worthless checks written in payment of a pre-existing debt. We are confident that they will again make a difference.

Statistics show that the problem of bad checks in America is reaching epidemic proportions. According to the Fraud Information Bureau, over 425 million bad checks are returned in the United States each year and 62% of these are not made good on deposit. This is a 200% increase over the last five years. The U.S. Department of Commerce estimates that annual losses to business due to bad checks now exceed \$1.5 billion. These losses are reflected in the prices you and I pay for the products we buy.

Kansas has addressed part of the problem. We urge that you address the rest of the problem by extending the availability of civil remedies to worthless checks given in payment of a pre-existing debt.

The following is a quote from a letter written to Senator Jim Allen, Chairman of the interim committee which studied this issue, from a Garden City motel employee; "This segment of the law dealing with pre-existing debt has been a thorn in my side ever since the day I took on this job. Not only do we as businessmen have to incur the expense of carrying someone on our books, but, if payment for their debt is given in the form of a worthless check, we must absorb that as well. You must infer by now that I could continue on my soap box all day on this subject. So, in closing, let me say that it is far past time for the lawmakers of this state to remove their heads from the sand and face the fact

that honest businesses are losing thousands of dollars each year because of a ludicrous law which only makes it easier for the guilty to get something for nothing."

I urge your support for passage of HB 2581 and would be pleased to attempt to answer any questions.

(S)

(S)

Sec. 2. K.S.A. 1989 Supp. 21-3707 is hereby amended to read as follows: 21-3707. (1) Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent with intent to defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft, that the maker or drawer has no deposit in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of such check, order or draft in full upon its presentation.

(2) In any prosecution against the maker or drawer of a check, order or draft payment, of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, the drawee unless the maker or drawer pays the holder thereof the amount due thereon and a service charge not exceeding \$10 for each check, within seven 14 days after notice has been given to the maker or drawer that such check, draft or order has not been paid by the drawee. *Prima facie evidence of "intent to defraud," as that term is used in this section, shall not be rebutted by evidence that the check, order or draft was given as payment of a preexisting debt.* As used in this section, "notice" includes oral or written notice to the person entitled thereto. Written notice shall be presumed to have been given when deposited as restricted matter in the United States mail, addressed to the person to be given notice at such person's address as it appears on such check, draft or order or to the last known address.

(5) ~~(3)~~ It shall be a defense to a prosecution under this section that the check, draft or order upon which such prosecution is based:

(a) Was postdated, or

(b) was given to a payee who had knowledge or had been informed, when the payee accepted such check, draft or order, that the maker did not have sufficient funds in the hands of the drawee to pay such check, draft or order upon presentation.

(6) ~~(4)~~ Giving a worthless check is a class D felony if the check, draft or order is drawn for \$50,000 or more. Giving a worthless check is a class E felony if the check, draft or order is drawn for at least \$500 but less than \$50,000. Giving a worthless check is a class A misdemeanor if the check, draft or order is drawn for less than \$500.

*put*

New Section(3) A county or district attorney may collect a fee for processing and collecting any check, order or draft which is made, drawn, issued or delivered in violation of K.S.A. 21-3707 or 21-3708, and amendments thereto, from the maker or drawer, not exceeding \$10 for each check.

New Section(4) Fees collected under this section shall be paid to the county treasurer who shall deposit them in the county treasury and credit them to a separate, special fund, which shall be used exclusively to defray the expenses of the county or district attorney's office. Expenditures from the fund shall be made only upon the order of the county or district attorney. In no event shall the fund be used to supplement the salary of the county or district attorney. Nothing in this section shall be construed to decrease the total salaries, expenses and allowances which a county or district attorney's office is receiving at the time this act takes effect.

*Attachment V  
3-14-90*

Explanation of Proposed Amendments

1. Page 1, line 13: See explanation numbered 5 below.
2. Page 1, line 14: The amendments by the House Committee of the Whole found in New Section 4 essentially repeals K.S.A. 58-2312 by implication. This amendment would repeal it outright since the House Amendment is inconsistent with 58-2312.
3. Page 1, line 15: K.S.A. 16a-2-507 of the Uniform Consumer Credit Code repeats the prohibition found in K.S.A. 58-2312. If K.S.A. 58-2312 is repealed, K.S.A. 16a-2-507 should also be repealed since the U.C.C.C. provides that there can be no repeal by implication.
4. Page 1, line 20: There are presently three different Codes of the Kansas Statutes dealing with "worthless" checks, namely, the Code of Civil Procedure, the Criminal Code and the Uniform Consumer Credit Code. Presently, The U.C.C.C. refers to these checks as "insufficient checks". Amendments proposed on page 4 would make uniform the use of the phrase "worthless checks". This amendment ties into those amendments for consistency and to insure that the purposes of H.B. 2581 are applicable to all three of the Codes named above when this bill is published in the statute books.
5. Page 4, lines 14, 16, 28, 30, 35, 36, 41 and 42 and Page 5, line 2: All of these proposed amendments would make uniform the terminology "worthless checks" throughout the Kansas statutes pertaining to this subject, namely, the Code of Civil Procedure, the Criminal Code and the Uniform Consumer Credit Code.
6. Page 5, line 35: This amendment would make this section consistent with the present requirement of "restricted mail" as found in K.S.A. 1989 Supp. 21-3707, which is set-out in this bill on page 3, line 19.
7. Page 5, lines 39 and 40: There are several reasons for this proposed amendment. The first question pertains to a grammatical construction. Because the disjunctive "or" precedes the word "contract" on line 39, does this mean that the verbiage proposed to be deleted on lines 39 and 40 applies solely to the word "contract" -or- does the verbiage proposed to be deleted modify all of the items enumerated on lines 37 and 38?

Secondly, if the intent of the verbiage proposed to be deleted is to only permit attorney fees on notes and accounts for the sale of goods or services, why should there be a distinction between a note for goods or services as opposed to a note for money lent? Both represent value given by the creditor. It is a distinction without reason.

Thirdly, present statutes permit attorney fees in actions for the recovery of damages up to \$3,000 for the negligent operation of motor vehicles. (K.S.A. 60-2006). H.B. 2688, now in the Senate Judiciary Committee proposes to increase this to \$10,000. Again, the concept is to attempt to place the expense upon the person causing the expense. There is no reasonable difference between permitting attorney fees for a suit to recover damages for the negligent operation of a car and a suit to recover on a defaulted note. In both cases, the purpose is to place the expense required to collect on those who cause the expense.

8. Page 6, line 1: See explanations numbered 2 and 3 above.

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HOUSE BILL No. 2581

By Special Committee on Agriculture and Livestock

Re proposal No. 3

12-21

K.S.A. 58-2312

13 AN ACT concerning worthless ~~and insufficient~~ checks; amending  
14 K.S.A. 16a-2-501 and K.S.A. 1989 Supp. 21-3707 and 60-2610 and  
15 repealing the existing sections.  
16

and K.S.A. 16a-2-507

17 *Be it enacted by the Legislature of the State of Kansas:*

18 Section 1. K.S.A. 1989 Supp. 60-2610 is hereby amended to read  
19 as follows: 60-2610. (a) If a person gives a worthless check, as defined  
20 by K.S.A. ~~21-3707~~ and amendments thereto subsection (g), the  
21 person shall be liable to the holder of the check for the amount of  
22 the check plus an amount equal to the greater of the following:

and subsection  
3(1)(e)(i) herein

23 (1) Damages equal to three times the amount of the check but  
24 not exceeding the amount of the check by more than \$500; or

25 (2) \$100.

26 (b) The amounts specified by subsection (a) shall be recoverable  
27 in a civil action brought by or on behalf of the holder of the check  
28 only if: (1) Not less than ~~21~~ 14 days before commencing the action,  
29 the holder of the check made written demand on the maker or  
30 drawer for payment of the amount of the check *and the incurred*  
31 *service costs* charge; and (2) the maker or drawer failed to tender  
32 to the holder, prior to commencement of the action, an amount not  
33 less than the amount demanded. The written demand shall be sent  
34 by restricted mail, as defined by K.S.A. 60-103 and amendments  
35 thereto, *to the person to be given notice at such person's address*  
36 *as it appears on such check, draft or order* or to the last known  
37 address of the maker or drawer and shall include notice that, if the  
38 money is not paid within ~~21~~ 14 days, triple damages *in addition to*  
39 *an amount of money equal to the sum of the amount of the check,*  
40 *the incurred court and costs, service costs charge and the costs of*  
41 *collection, including but not limited to reasonable attorney fees,*  
42 may be incurred by the maker or drawer of the check.

43 (c) Subsequent to the commencement of an action under this



1 section but prior to the ~~hearing~~ *judgment of the court*, the defendant  
 2 may tender to the plaintiff as satisfaction of the claim, an amount  
 3 of money equal to the sum of the amount of the check, the incurred  
 4 court ~~and~~ costs, service ~~costs~~ charge and the costs of collection,  
 5 including but not limited to reasonable attorney fees.

6 (d) If the ~~court or~~ jury trier of fact determines that the failure  
 7 of the defendant to satisfy the dishonored check was due to economic  
 8 hardship, the court ~~or jury~~ may waive all or part of the damages  
 9 provided for by this section, but the court shall render judgment  
 10 against defendant for not less than the amount of the dishonored  
 11 check, the incurred court ~~and~~ costs, service ~~costs~~ charge and the  
 12 costs of collection, including but not limited to reasonable attorney  
 13 fees.

14 (e) Any amount previously paid as restitution or reparations to  
 15 the holder of the check by its maker or drawer shall be credited  
 16 against the amount for which the maker or drawer is liable under  
 17 subsection (a).

18 (f) Conviction of giving a worthless check or habitually giving a  
 19 worthless check, as defined by K.S.A. 21-3707 and 21-3708 ~~and~~  
 20 ~~subsection (g)~~, and amendments thereto, shall not be a prerequisite  
 21 or bar to recovery pursuant to this section.

22 (g) As used in this section, ~~“giving”~~

23 (1) *“Giving a worthless check” means the making, drawing, is-*  
 24 *ssuing or delivering or causing or directing the making, drawing,*  
 25 *issuing or delivering of any check, order or draft on any bank,*  
 26 *credit union, savings and loan association or depository for the*  
 27 *payment of money or its equivalent:*

28 ~~(1)~~ (A) *With intent to defraud or in payment for a preexisting*  
 29 *debt; and*

30 ~~(2)~~ (B) *which is dishonored by the drawee because the maker or*  
 31 *drawer had no deposits in or credits with the drawee or has not*  
 32 *sufficient funds in, or credits with, the drawee for the payment of*  
 33 *such check, order or draft in full upon its presentation.*

34 (2) *“Service charge” means the dollar charge authorized by sub-*  
 35 *section (2) of K.S.A. 21-3707 and subsection (1)(e)(iii) of K.S.A. 16a-*  
 36 *2-501, and amendments thereto.*

37 Sec. 2. K.S.A. 1989 Supp. 21-3707 is hereby amended to read  
 38 as follows: 21-3707. (1) Giving a worthless check is the making,  
 39 drawing, issuing or delivering or causing or directing the making,  
 40 drawing, issuing or delivering of any check, order or draft on any  
 41 bank, credit union, savings and loan association or depository for  
 42 the payment of money or its equivalent with intent to defraud and  
 43 knowing, at the time of the making, drawing, issuing or delivering

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1 of such check, order or draft, that the maker or drawer has no  
2 deposit in or credits with the drawee or has not sufficient funds in,  
3 or credits with, the drawee for the payment of such check, order  
4 or draft in full upon its presentation.

5 (2) In any prosecution against the maker or drawer of a check,  
6 order or draft payment, of which has been refused by the drawee  
7 on account of insufficient funds, the making, drawing, issuing or  
8 delivering of such check shall be prima facie evidence of intent to  
9 defraud and of knowledge of insufficient funds in, or on deposit with,  
10 the drawee unless the maker or drawer pays the holder thereof the  
11 amount due thereon and a service charge not exceeding \$10 for each  
12 check, within ~~seven~~ 14 days after notice has been given to the  
13 maker or drawer that such check, draft or order has not been paid  
14 by the drawee. *Prima facie evidence of "intent to defraud," as that*  
15 *term is used in this section, shall not be rebutted by evidence that*  
16 *the check, order or draft was given as payment of a preexisting*  
17 *debt.* As used in this section, "notice" includes oral or written notice  
18 to the person entitled thereto. Written notice shall be presumed to  
19 have been given when deposited as restricted matter in the United  
20 States mail, addressed to the person to be given notice at such  
21 person's address as it appears on such check, draft or order *or to*  
22 *the last known address.*

23 (3) It shall be a defense to a prosecution under this section that  
24 the check, draft or order upon which such prosecution is based:

25 (a) Was postdated, or

26 (b) was given to a payee who had knowledge or had been in-  
27 formed, when the payee accepted such check, draft or order, that  
28 the maker did not have sufficient funds in the hands of the drawee  
29 to pay such check, draft or order upon presentation.

30 (4) Giving a worthless check is a class D felony if the check,  
31 draft or order is drawn for \$50,000 or more. Giving a worthless  
32 check is a class E felony if the check, draft or order is drawn for  
33 at least \$500 but less than \$50,000. Giving a worthless check is a  
34 class A misdemeanor if the check, draft or order is drawn for less  
35 than \$500.

36 Sec. 3. K.S.A. 16a-2-501 is hereby amended to read as follows:  
37 16a-2-501. (1) In addition to the finance charge permitted by the  
38 parts of this article on maximum finance charges for consumer credit  
39 sales and consumer loans (parts 2 and 4), a creditor may contract  
40 for and receive the following additional charges in connection with  
41 a consumer credit transaction:

42 (a) Official fees and taxes;

43 (b) charges for insurance as described in subsection (2);

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7-9

1 (c) annual fees payable in advance or monthly fees, delinquency  
2 charges, insufficient check charges as provided in paragraph (e) of  
3 this subsection, over-limit fees and cash advance fees, for the priv-  
4 ilege of using a lender credit card which entitles the user to purchase  
5 goods or services from at least 100 persons not related to the issuer  
6 of the lender credit card, under an arrangement pursuant to which  
7 the debts resulting from the purchases are payable to the issuer;

8 (d) charges for other benefits, including insurance, conferred on  
9 the consumer, if the benefits are of value to the consumer and if  
10 the charges are reasonable in relation to the benefits, are of a type  
11 which is not for credit, and are excluded as permissible additional  
12 charges from the finance charge by rules and regulations adopted  
13 by the administrator;

14 (e) ~~charges~~ a service charge for ~~an insufficient~~ check as defined  
15 and authorized by this subsection:

a worthless

16 (i) For the purposes of this subsection, "~~insufficient~~ check" means  
17 any check, order or draft drawn on any bank, credit union, savings  
18 and loan association, or other financial institution for the payment  
19 of money and delivered in payment, in whole or in part, of preex-  
20 isting indebtedness of the drawer or maker, which is refused payment  
21 by the drawee because the drawer or maker does not have sufficient  
22 funds in or credits with the drawee to pay the amount of the check,  
23 order or draft upon presentation, provided that any check, order or  
24 draft which is postdated or delivered to a payee who has knowledge  
25 at the time of delivery that the drawer or maker did not have  
26 sufficient funds in or credits with the drawee to pay the amount of  
27 the check, draft or order upon presentation shall not be deemed ~~an~~  
28 ~~insufficient~~ check.

a worthless

29 (ii) "Written notice" shall be presumed to have been given a  
30 drawer or maker of ~~an insufficient~~ check when notice is deposited  
31 in the United States mail sent by restricted mail as defined by  
32 K.S.A. 60-103, and amendments thereto, addressed to the person to  
33 be given notice of such person's address as it appears on the in-  
34 sufficient check or to such person's last known address.

a worthless

35 (iii) When ~~an insufficient~~ check has been given to a payee, the  
36 payee may charge and collect a \$10 ~~insufficient check~~ fee service  
37 charge from the drawer or maker if the payee has given the drawer  
38 or maker oral or written notice of demand that the amount of the  
39 insufficient check plus the \$10 insufficient check fee service charge  
40 be paid to the payee within ~~seven~~ 14 days from the giving of notice.

a worthless

41 (iv) If the drawer or maker of ~~an insufficient~~ check does not pay  
42 the amount of the ~~insufficient~~ check plus the ~~insufficient check~~ fee  
43 service charge provided for in subsection (iii) to the payee within

6-7

1 ~~seven~~ 14 days from the giving of notice as provided in subsection  
2 (iii), the payee may add the \$10 ~~insufficient check fee service charge~~  
3 to the outstanding balance of the preexisting indebtedness of the  
4 drawer or maker to draw interest at the contract rate applicable to  
5 the preexisting indebtedness.

6 (2) An additional charge may be made for insurance written in  
7 connection with the transaction, including vendor's single interest  
8 insurance with respect to which the insurer has no right of subro-  
9 gation against the consumer but excluding other insurance protecting  
10 the creditor against the consumer's default or other credit loss:

11 (a) With respect to insurance against loss of or damage to prop-  
12 erty, or against liability, if the creditor furnishes a clear and specific  
13 statement in writing to the consumer setting forth the cost of the  
14 insurance if obtained from or through the creditor and stating that  
15 the consumer may choose the person through whom the insurance  
16 is to be obtained; and

17 (b) with respect to consumer credit insurance providing life, ac-  
18 cident and health, or loss of employment coverage, if the insurance  
19 coverage is not a factor in the approval by the creditor of the ex-  
20 tension of credit, and this fact is clearly disclosed in writing to the  
21 consumer, and if, in order to obtain the insurance in connection  
22 with the extension of credit, the consumer gives specific affirmative  
23 written indication of the consumer's desire to do so after written  
24 disclosure to the consumer of the cost thereof.

25 [New Sec. 4. (a) In any civil action to enforce payment of or  
26 to collect upon a check, order or draft on any bank, credit union,  
27 savings and loan association or depository for the payment of money  
28 or its equivalent, payment upon which such instrument has been  
29 refused because of insufficient funds or no account, the party pre-  
30 vailing on such cause of action shall be awarded reasonable attorney  
31 fees, such fees to be assessed by the court as costs against the  
32 losing party. The fees shall not be allowed unless the plaintiff offers  
33 proof during the trial of such action that prior to the filing of the  
34 petition in the action demand for payment of the check, order or  
35 draft had been made upon the defendant by ~~registered~~ mail not  
36 less than 14 days prior to the filing of such suit.

restricted

37 [(b) In any civil action to recover on an open account, a state-  
38 ment of account, account stated, note, bill, negotiable instrument,  
39 or contract ~~relating to the purchase or sale of goods, wares, or~~  
40 ~~merchandise, or for labor or services,~~ unless otherwise provided  
41 by law or the contract which is the subject of the action, the  
42 prevailing party shall be allowed reasonable attorney fees to be set  
43 by the court, to be taxed and collected as costs.]

1       Sec. 4 [5]. K.S.A. 16a-2-501 and K.S.A. 1989 Supp. 21-3707 and  
2       60-2610 are hereby repealed.  
3       Sec. 5 [6]. This act shall take effect and be in force from and  
4       after its publication in the Kansas register.

, K.S.A. 16a-2-507,  
K.S.A. 58-2312

8-9

4φ  
3-1

OFFICE OF THE DISTRICT ATTORNEY  
EIGHTEENTH JUDICIAL DISTRICT  
SEDGWICK COUNTY COURTHOUSE  
535 N. MAIN  
WICHITA, KANSAS 67203

NOLA FOULSTON  
District Attorney



(316) 268-7281

T E S T I M O N Y

TO: SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS  
FROM: NOLA FOULSTON, DISTRICT ATTORNEY, SEDGWICK COUNTY  
RE: HOUSE BILL NO. 2581 -- AN ACT CONCERNING WORTHLESS AND  
INSUFFICIENT FUNDS CHECKS  
SUBMITTED: MARCH 9, 1990

I would like to thank the Chair and this committee for allowing me the opportunity to submit comments on the proposed amendments to the criminal statute governing the passing of worthless checks. I feel it is essential to vigorously prosecute those who use bad checks as a means of fraudulently obtaining goods and services. However, for the reasons set forth below, I oppose House Bill No. 2581 in its present form.

House Bill No. 2581 would amend K.S.A. 21-3707, the statute which governs criminal liability for the passing of a worthless check. This bill would change the statute in three ways. First, the bill would extend, by seven days, the amount of time one has to pay off the check after receiving notice that the check has been returned unpaid. Secondly, the bill would allow written notice to be mailed to either the address as it appears on the check or the makers last known address. Under current law, the notice must be mailed to the address as it appears on the check. Finally, the bill would allow the prosecution of those who give insufficient fund checks in payment of a pre-existing debt.

My main concern with House Bill No. 2581 centers around that portion of the Bill which pertains to checks given on pre-existing debts. Specifically, the Bill states that, "Prima facie evidence of 'intent to defraud' as that term is used in this section, shall not be rebutted by evidence that the check, order or draft was given as payment of a pre-existing debt." Under current Kansas Law, there are differing opinions among prosecutors and judges as to whether or not there is a legal basis to prosecute on checks given on pre-existing debts. It has been the policy of my office not to file such cases.

*Attachment VII*  
3-14-90

Testimony  
RE: House Bill No. 2581  
March 9, 1990  
Page Two

My first concern is that prosecuting one who gives a bad check for payment on a debt would pose constitutional problems. Our Kansas Supreme Court has held that intent to defraud is a necessary element of the worthless check statute in order to avoid running afoul of the constitutional prohibition on imprisonment for nonpayment of a debt. Prosecuting on checks given for a pre-existing debt may violate this constitutional principle. One who takes a bad check from a debtor is no worse off than one would be had the debtor merely refused to pay. Thus, a creditor, upon accepting a worthless check, has not really been defrauded out of anything. His position remains unchanged; he was owed a debt before he took the check and he is still owed a debt even after accepting the check.

Secondly, I am concerned that amending the statute to include pre-existing debts may, at times, involve the District Attorney's Office in disputes which are essentially civil in nature. Contractual disputes as well as disagreements between landlord/tenant and employer/employee could result in the institution of criminal proceedings.

Additionally, unscrupulous creditors, having remedies available to them for the collection of a debt, could use the statute to coerce a check out of a debtor and then use the check to institute a criminal proceeding. The temptation for a creditor to do this is increased due to the fact that by going the criminal route, they avoid the expense of hiring their own attorney.

My office will continue to aggressively prosecute offenders who use bogus checks as a means of defrauding merchants and citizens out of property. However, due to the fact that I believe constitutional issues may arise, and given the potential for abuse by creditors having mere civil remedies, I feel I must oppose that portion of the Bill amending K.S.A. 1989 Supp. 21-3707.

Respectfully submitted,

  
NOLA FOULSTON  
District Attorney