

**NONSUFFICIENT FUND CHECK PROSECUTION
IN
STUTSMAN COUNTY**

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INTRODUCTION

Prosecution of bad checks is an important service the State's Attorney's Office supplies to Stutsman County. In 1996, the Stutsman County State's Attorney recognized providing this service had become more problematic. Not only had the number of requests for prosecution of non-sufficient fund checks increased, so too had other crimes involving the use of checks.

A common defense raised to these charges was that someone else passed the check. If the clerk who accepted the check did not verify that the defendant is the person who passed the check, then the prosecution will be unsuccessful. Use of the processes outlined in this packet has diminished the amounts of cases in which this sort of defense is asserted.

By adopting a policy of taking checks only from persons who present a valid acceptable form of photo ID, or from persons who are personally known by the clerk, two things will be accomplished: (1) an NSF defendant will be blocked from claiming (s)he did not pass the check; and (2) forgery and other crimes involving the use of another's check will be blocked.

REQUIRED PROCEDURES

These procedures are effective 1 August 2013. If the Stutsman County State's Attorney's Office is to prosecute an NSF check after 1 August 2013, these procedures must be used.

1. The check must have been presented in Stutsman County.
2. A driver's license or other photo ID issued by a government agency must have been used to verify the identification of the person offering the check. Indicate that this was done by writing on the check the date of birth and the expiration date of the driver's license or the date of birth appearing on the other form of ID. (There are two exceptions to the ID requirement. One is noted just below in paragraph 3. The other is for checks mailed to a business in Stutsman County, for payment of a debt that is in the name of the person signing the check and sending the check.)
3. If the clerk personally knows the customer passing the check, the clerk must indicate it on the check by marking PK for **personally known**. This can be done instead of the ID process, but only if the clerk knows the name of the customer who passes the check simply by seeing the customer's face and will testify to this ability and the basis for it.
 - A. Examples of "personally known". I personally know my friends, my next door neighbors, and my relatives. I do not need an ID card to tell you who they are. I know them.
 - B. Example of "personally known". My day care provider knows me simply by seeing my face. I have been dropping off my children at her facility for several years and writing checks to her for several years. She knows my name, my wife's name, and my children's names because she has seen us many times. She bills us and has my address, emergency numbers, place of employment, and signature on file at her business. I am personally known to her. She knows my name, without question, on sight and she has a basis for that knowledge that would stand up in court. She does not need an ID card to identify me.
 - C. One example of **what is not "personally known"**. As the customer approaches the counter, the customer's face is familiar to the clerk but the clerk does not know the customer's first and last name. This is not "personally known". The personally known exception to the ID requirement does not apply to these circumstances.
4. Ensure that the name, address, and phone number of the person offering (**passing**) the check are on the check and according to the offeror, are correct.
5. Initial or code the check so that it is clear who accepted the check.
6. Present request for prosecution to this office within 105 days of its first presentment and refusal for payment at the bank. To ensure that your complaint will be completed inside the 120 days allotted by statute, please bring it to the State's Attorney's office within 105 days of receiving it.
7. Request for prosecution must include a completed *Stutsman County State's Attorney's Office Request for NSF Prosecution* form and the *Felony NSF Information Paper* if the check or aggregate totals of insufficient funds checks are a felony, which is more than \$1,000.00.

**STUTSMAN COUNTY STATE'S ATTORNEY'S OFFICE
REQUEST FOR NSF PROSECUTION**

INFORMATION ABOUT PERSON WHO PASSED THE CHECK:

NAME: _____ DATE OF BIRTH: _____

ADDRESS: _____

CHECK #: _____ DATE OF CHECK: _____ AMOUNT: _____

(circle one) NSF or Closed Account (date closed: _____)

INFORMATION ABOUT PERSON WHO ACCEPTED THE CHECK:

NAME: _____ PH #: _____

ADDRESS: _____

CAN THE PERSON WHO ACCEPTED THE CHECK IDENTIFY THE PERSON WHO PASSED THE CHECK?

(circle one) YES NO

If the person who accepted the check can not identify the person who passed (not wrote; but passed) the check, then we will be unable to prosecute it. This person who accepted the check would be a state's witness.

FORM OF ID USED TO VERIFY PASSER'S IDENTITY: _____

If a driver's license is the form of ID given, what is the **EXPIRATION DATE:** _____

If other form of government ID was given, what is the **DATE OF BIRTH ON ID:** _____

yes no

- Was the check accepted in Stutsman County?
- Have you contacted the check passer or account owner by mail or phone?
- Was the check received on the date written on the face of the check?
- Was the check presented by you for payment by the bank within 14 days?
- Was the check post-dated?
- Was there an agreement to hold the check?
- Was the check a two party check?
- Is stopped payment the reason for refusal by the bank?
- Have you received other NSF checks from this passer?
- Was this check mailed to you to pay a bill in the same name as the one on the check?
- Has the check been turned over to a collection agency?
- If you are a check collection agency, have you mailed a notice of dishonor to the passer?

YOUR INFORMATION:

NAME: _____ PHONE #: _____

TITLE: _____ STORE: _____

STORE ADDRESS: _____

Please notify us if restitution is received or if your address changes.

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FELONY NSF INFORMATION PAPER

NSF checks over \$1,000 are felonies.

- Once a felony complaint is signed, the defendant may be arrested and has to post bail
- Once a felony complaint is signed you may lose the defendant as a customer

Felonies are criminal prosecutions; not just civil collections.

- If you just want your money back, you need to hire a civil attorney.
- Once the NSF charge is filed, it **can not** be dismissed simply because the person paid the check, State of ND v. Ohnstad, 392 NW2d 389 (1986).
- I prosecute to get a conviction on the record and obtain punishment that will deter

Felony prosecutions involve testifying

You will be subpoenaed to testify for the preliminary hearing and the trial.

I expect you will be able to testify under oath to the information you provided on the request for prosecution form.

Court may be scheduled at a time that is inconvenient for you.

If a person is convicted of a C felony the defendant faces:

- loses right to carry firearms (check passer often direly wants this to not be imposed)
- 5 years' imprisonment and/or \$10,000 fine
- faces more than 20 potential conditions of probation including:
 - no alcohol, search clause–house & car, supervised probation fee of \$55/month
- If a person on supervised probation willfully fails to pay restitution, then I will likely move to revoke the probation and ask that the person be incarcerated violating probation.

I have read this and I am want to go forward with a felony prosecution for NSF.

Name

date

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FRAMEWORK

FOR NONSUFFICIENT FUND CHECK PROSECUTION

When you request prosecution of an nonsufficient (NSF) check and provide us with the check and the request for prosecution form, we prepare a complaint for you to sign in front of an officer authorized by law to administer oaths in North Dakota. After the merchant signs the complaint, a District Judge signs it and the defendant is summoned to court. Please note that when you execute a document before a notary public, you are signing the document under oath.

At the initial appearance, the judge informs the defendant of his/her rights. In misdemeanor and felony cases a defendant may request court appointed counsel. Counsel is appointed (when the defendant is indigent) and then a trial date is set. Our office will arrange for issuance of the subpoena for the person from your business who accepted the check and for a representative from the defendant's bank.

If the defendant pleads guilty, the normal sentence includes an order to pay restitution to the business. Restitution is first sent to the Clerk of Court's office, not directly to the business. The Clerk of Court disperses restitution to the business. This way the court knows if the defendant failed to make restitution and can hold the defendant in contempt for failing.

Our office prosecutes these cases because they are crimes. We seek a criminal conviction including a criminal record and a sentence. The Clerk of Court's office reviews the Judge's orders and determines which defendants have failed to make restitution and then schedules these people to come before the judge and show cause why the judge should not hold the defendant in contempt.

Once a NSF complaint is signed, we do not dismiss it prior to prosecution because the check is paid. The crime of NSF occurs when the person passes the check and there is not enough money in the account. Later payment of the check does not erase that crime.

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STATUTE

§ 6-08-16. Issuing check or draft without sufficient funds or credit--Notice--Time limitation--Financial liability--Penalty.

1. A person may not, for that person, as the agent or representative of another, or as an officer or member of an organization, make, draw, utter, or deliver any check, draft, or order, or authorize an electronic funds transfer, for the payment of money upon a bank, banker, or depository, if at the time of the making, drawing, uttering, electronically authorizing, or delivery, or at the time of presentation for payment, if the presentation for payment is made within fourteen days after the original delivery thereof, there are not sufficient funds in or credit with the bank, banker, or depository to meet the check, draft, electronic funds transfer, or order in full upon its authorized presentation. Violation of this subsection is:

a. An infraction if the amount of insufficient funds or credit is not more than one hundred dollars;

b. A class B misdemeanor if the amount of insufficient funds or credit is more than one hundred dollars but not more than five hundred dollars, or if the individual has pled guilty or been found guilty of a violation of this section within three years of issuing an insufficient funds check, draft, or order;

c. A class A misdemeanor if the amount of insufficient funds or credit is more than five hundred dollars but not more than one thousand dollars, or if the individual has pled guilty or been found guilty of two violations of this section within three years of issuing an insufficient funds check, draft, or order; or

d. A class C felony if the amount of insufficient funds or credit is more than one thousand dollars, or an individual has pled guilty or been found guilty of three or more violations of this section within five years of willfully issuing an insufficient funds check, draft, or order.

2. The grade of an offense under this section may be determined by individual or aggregate totals of insufficient funds checks, drafts, electronic funds transfer authorizations, or orders.

a. In addition to the criminal penalty, the person is liable for collection fees or costs, not in excess of forty dollars, which are recoverable by the holder of the check, draft, electronic funds transfer authorization, or order by the holder's agent or representative. If the holder of the check, draft, electronic funds transfer authorization, or order or the holder's agent or representative uses the automated clearinghouse network to collect the collection fees or costs, that person shall comply with the network's rules and requirements. If the state's attorney or holder determines the person identified as the issuer of the instrument did not make, draw, utter, or deliver the instrument in violation of this section but instead is the victim of fraud, that state's attorney or holder shall provide the holder or the holder's agent or representative written notice of the fraud and upon receipt of the notice that holder or the holder's agent or representative may not collect fees or costs under this subdivision.

b. A collection agency shall reimburse the original holder of the check, draft, electronic funds transfer authorization, or order any additional charges assessed by the depository bank of the check, draft, electronic funds transfer authorization, or order if recovered by the collection agency.

c. If the person does not pay the instrument in full and any collection fees or costs not in excess of forty dollars within ten days from receipt of the notice of dishonor provided for in subsection 4, the holder of the check, draft, electronic funds transfer authorization, or order or the holder's agent or representative is entitled to bring a civil action to recover a civil penalty. The civil penalty is payment to the holder of the instrument or its agent or representative the lesser of two hundred dollars or three times the amount of the instrument.

d. The court may order an individual convicted under this section to undergo an evaluation by a licensed gaming, alcohol, or drug addiction counselor.

3. The word "credit" as used in this section means an arrangement or understanding with the bank, banker, or depository for the payment of the check, draft, electronic funds transfer authorization, or order. The making of a postdated check knowingly received as such, or of a check issued under an agreement with the payee that the check would not be presented for payment for a time specified, does not violate this section.

4. A notice of dishonor may be mailed by the holder of the check upon dishonor or by the holder's agent or representative upon dishonor. Proof of mailing may be made by return receipt or by an affidavit of mailing signed by the individual making the mailing. The notice must be in substantially the following form:

Notice of Dishonored Check

Date _____

Name of Issuer _____

Street Address _____

City and State _____

You are according to law hereby notified that a check dated, drawn on the Bank of in the amount of has been returned unpaid with the notation the payment has been refused because of nonsufficient funds. Within ten days from the receipt of this notice, you must pay or tender to (Holder or agent or representative) sufficient moneys to pay such instrument in full and any collection fees or costs not in excess of forty dollars.

The notice also may contain a recital of the penal provisions of this section and the possibility of a civil action to recover any collection fees or costs or civil penalty authorized by this section.

5. An agent acting for the receiver of a check in violation of this section may present the check to the state's attorney for prosecution if the holder, or the holder's agent or representative, mailed a

notice under subsection 4. During the first one hundred twenty days after the drawer received notice under this subsection the state's attorney shall accept the instrument presented by the agent. The criminal complaint for the offense of issuing a check, draft, electronic funds transfer authorization, or order without sufficient funds under this section must be executed within not more than one hundred twenty days after the dishonor by the drawee of said instrument for nonsufficient funds. The failure to execute a complaint within said time bars the criminal charge under this section.

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RECOMMENDATIONS

1. Do not accept two party checks, post dated checks, or checks that you must hold for some time before you present them for payment.
2. Consider taking any out of state check carefully. This office's power to obtain jurisdiction over residents in other states is very limited.
3. Present all checks for payment within 14 days of receipt. We suggest that you deposit all checks no later than the next business day.

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