

NONSUFFICIENT FUND CHECK PROSECUTION IN STUTSMAN COUNTY

LIST OF ENCLOSURES

Introduction and recommendations	1
Required Procedures	3
<i>Felony NSF Information Paper</i>	5
<i>Stutsman County State's Attorney's Office Request for NSF Prosecution Form</i>	6
<i>N.D.C.C. § 31-15-05 Declaration in Support of Probable Cause Form</i>	7
Framework of Nonsufficient Fund (NSF) Check Prosecution Process	8
Copy of North Dakota Century Code Section 6-08-16.....	9

Stutsman County State's Attorney's Office
511 Second Avenue SE
Jamestown, ND 58401
(701) 252-6688

INTRODUCTION

In 1996, the Stutsman County State's Attorney recognized non-sufficient fund check prosecution had become quite problematic. The number of requests for prosecution of non-sufficient fund checks was over 1,000 a year. Crimes such as forgery and conspiracy using checks were increasing.

When the person who accepted the check did not verify the identity of the person who passed the check, the person whose name was on the front of the check commonly argued they did not pass the check and their argument was often successful. We needed to implement a process for verifying the identity of the check passer and stop taking in the cases where no verification was done.

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) it will be harder for an NSF defendant to successfully argue the defendant did not pass the check; and (2) it will make it more difficult for someone to pass another's forged check.

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. Carefully consider taking any out of state check. This office's power to obtain jurisdiction over residents in other states is very limited. We don't extradite from another state for misdemeanors. Checks under \$1,000.01 are misdemeanors.
3. Present all checks to your bank for payment within 14 days of receipt.

REQUIRED PROCEDURES

These procedures are effective 1 July 2000 the following procedures must be used to access criminal prosecution for nonsufficient fund checks from the Stutsman County State's Attorney's Office.

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 by the recipient 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. When 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 this situation.
4. Verify the name, address, and phone number of the person offering 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 the check to the bank for payment within 14 days of receipt of the check.

7. Within 90 days of your bank refusing to pay you money for the check due to there being non-sufficient funds in the drawer's account, present the following items to the state's attorney's office
 - A. **The check** with the bank's markings on it showing it was refused due to non-sufficient funds (If you can't get the original check back from the bank, get us a copy with the bank's markings front and back and we'll try to work with that);
 - B. A completed ***Stutsman County State's Attorney's Office Request for NSF Prosecution Form.***
 - C. A completed ***N.D.C.C. § 31-15-05 Declaration in Support of Probable Cause.*** North Dakota Century Code section 6-08-16(5) requires the complaint to be filed within 120 days of the banks first refusal of the check. The state's attorney needs to evaluate your packet, draft a charging document, forward your packet and the charging document to the court, and the judge needs to evaluate the packet and charge. There are lines of cases waiting both at the state's attorney's office and the judge's office. So, we need your packet in this office within 90 days of the bank's refusal.

FELONY NSF INFORMATION PAPER

NSF checks over \$1,000 are felonies.

- After a felony complaint is signed, the defendant may be arrested.
 - You will probably lose the defendant as a customer.

Felonies are criminal prosecutions; not civil collections.

- If all you want is your money back, 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).

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

- loss of right to own or possess firearms. Check passer is frequently adamantly opposed to losing firearm rights and fights the NSF charge tooth and nail to beat the charge and keep the firearm rights. That means a trial and you testifying.
 - 5 years' imprisonment and/or \$10,000 fine
 - 23 conditions of probation including:
 - no alcohol, search clause–house & car, supervised probation fee of \$55/month

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.

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

Name _____ date _____

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

DATA ON PERSON WHO PASSED THE CHECK:

NAME: _____ DATE OF BIRTH: _____

ADDRESS: _____

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

circle one: NSF Closed Account date closed: _____

DATA ON 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 are 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.

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

State of North Dakota)
Plaintiff)
)
v)
)
)
Defendant)

IN DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT

**N.D.C.C. § 31-15-05 Declaration
in Support of Probable Cause**

47 2022 CR

1. Attached and incorporated by reference herein are documents supporting the claim that the defendant committed the offense of issuing a check or draft without sufficient funds or credit, conduct prohibited by North Dakota Century Code section 6-08-16.
2. I declare, under penalty of perjury under the law of North Dakota, that the content of the incorporated attached documents in support of probable cause are true and correct.
3. I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the _____ day of _____, 20____ at

_____.
(location)

printed name of Declarant

signed name of Declarant

FRAMEWORK FOR NONSUFFICIENT FUND CHECK PROSECUTION

When you request prosecution of an nonsufficient fund (NSF) check and provide us with the check, the *Stutsman County State's Attorney's Office Request for NSF Prosecution Form*, and the *N.D.C.C. § 31-15-05 Declaration in Support of Probable Cause*, we'll evaluate the packet and if there are no obvious problems, prepare a charging document.

We advance the packet to a judge for evaluation. If the judge approves filing of the charge, the defendant is usually summoned to court.

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. When the defendant is indigent counsel is provided to the defendant at government expense. Our witness coordinator contacts you and notifies you of the date of trial. The prosecutor subpoenas 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 sent to the clerk of court's office, not directly to the business. The clerk tracks how much restitution was received and disperses restitution to the business. This way the court knows if the defendant failed to make restitution and may consider holding a contempt hearing for failure to make payments as scheduled.

After a charge is approved by the judge, we do not dismiss it prior to prosecution just because the check is paid. The North Dakota Supreme Court held that a policy of dismissing charges because the check amount is paid to the merchant is a policy that violates equal protection. *State v. Wilt*, 371 N.W.2d 159 (N.D. 1985). What that means is, once you start the process, you are in it until the end. This is more than a collection process. It's a criminal prosecution such as impingement on the right to possess firearms. If you are only looking for collection, you may be in the wrong place.

If you use a collection agency, they must use the processes outline in N.D.C.C. section 6-08-16(4) and 6-08-16(5).

North Dakota Century Code Section 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 or 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 the holder's agent or representative the lesser of two hundred dollars or three times the amount of each 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 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 of dishonor 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.