

# State of South Dakota

## EIGHTIETH LEGISLATIVE ASSEMBLY, 2005

916L0047

SENATE BILL NO. \_\_\_\_\_

Introduced by: \_\_\_\_\_

1 FOR AN ACT ENTITLED, An Act to DAVISON-----Fraud and Bad Checks.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. That § 22-41-1 be amended to read as follows:

4 22-41-1. Any person who, for himself or herself or as agent or representative of another, for  
5 a present consideration, with intent to defraud, passes a check drawn on a financial institution  
6 knowing at the time of such passing that there are not sufficient funds in the account on which  
7 the check was drawn in the financial institution for the payment of such check and all other  
8 checks upon such funds then outstanding, in full upon its presentation, although no express  
9 representation is made with reference thereto, is guilty of ~~passing a check against~~ theft by  
10 insufficient funds check. ~~A person who passes a check of one hundred dollars or less against~~  
11 ~~insufficient funds is guilty of passing a check against insufficient funds in the third degree,~~  
12 ~~which is a Class 2 misdemeanor. A person who passes a check or a series of checks within any~~  
13 ~~thirty-day period in the amount of five hundred dollars or less but more than one hundred~~  
14 ~~dollars, against insufficient funds, is guilty of passing a check against insufficient funds in the~~  
15 ~~second degree, which is a Class 1 misdemeanor. A person who passes a check of more than five~~  
16 ~~hundred dollars, or a series of checks within any thirty-day period totaling more than five~~



1 ~~hundred dollars, against insufficient funds is guilty of passing a check against insufficient funds~~  
2 ~~in the first degree, which is a Class 6 felony~~ Theft by insufficient funds check is punishable as  
3 theft pursuant to chapter 22-30A. Any series of insufficient funds checks within any thirty-day  
4 period may be aggregated in amount to determine the degree of theft of such course of conduct.

5 Section 2. That § 22-41-1.2 be amended to read as follows:

6 22-41-1.2. Any person who, for himself or herself or as an agent or representative of  
7 another, for present consideration, with intent to defraud, passes a check drawn on a financial  
8 institution knowing at the time of such passing that ~~he or his principal does not have~~ neither the  
9 check passer or the check passer's principal has an account with such financial institution, is  
10 guilty of a Class 5 felony theft by no account check. Theft by no account check is punishable  
11 as theft pursuant to chapter 22-30A. In determining the degree of theft, the value of the property  
12 stolen or attempted to be stolen is the same as the face amount of the no account check. Any  
13 series of no account checks within any thirty-day period may be aggregated in amount to  
14 determine the degree of theft of such course of conduct.

15 It is a defense to prosecution pursuant to this section that the ~~actor's or his~~ check passer's or  
16 the check passer's principal's account was closed without the actor's check passer's knowledge.  
17 Evidence that the financial institution mailed a notice by certified or registered mail to the  
18 person in whose name the account was listed at the last address contained in the financial  
19 institution's records ~~shall be~~ is prima facie proof that the ~~actor~~ check passer had knowledge that  
20 ~~his or his principal's~~ such account was closed.

21 Section 3. That § 22-41-1.3 be amended to read as follows:

22 22-41-1.3. If a any person, who has been accused of a violation of § 22-41-1 or 22-41-1.2,  
23 restores or returns the property allegedly obtained as consideration or makes payment of the  
24 check before an indictment or information is laid before a magistrate, such fact may be

1 considered in mitigation of punishment. ~~The~~ However, the restoration or return of the property  
2 or payment of the check is not a defense to a violation of § 22-41-1 or 22-41-1.2, nor may it be  
3 considered by the finder of fact.

4 Section 4. That § 22-41-2 be amended to read as follows:

5 22-41-2. The passing of a check, described in § 22-41-1, is prima facie evidence that the  
6 person who passed it the check had knowledge of insufficient funds in the account on which the  
7 check was drawn in the financial institution.

8 Section 5. That § 22-41-2.1 be amended to read as follows:

9 22-41-2.1. Present consideration includes goods which are delivered or constructively  
10 delivered, and services which are completed, seven days, exclusive of the date of such delivery  
11 or completion and exclusive of legal holidays and Sundays, before or after payment therefor.  
12 Present consideration also includes payment made for goods and services, if the goods and  
13 services are obtained under an understanding that the goods and services ~~will~~ would be paid for  
14 at a specific time by written agreement or under an established method of payment of accounts.  
15 In addition, payment of taxes and any other obligation due the State of South Dakota or any of  
16 its political ~~subdivision thereof~~ subdivisions and payment of alimony or child support is  
17 constitutes present consideration for the purposes of this chapter.

18 Section 6. That § 22-41-2.2 be amended to read as follows:

19 22-41-2.2. The making of a postdated or hold check, knowingly received as such, or a check  
20 issued under an agreement with the payee that the check would not be presented for payment  
21 for a specified time ~~specified~~, does not constitute a violation of § 22-41-1.

22 Section 7. That § 22-41-2.3 be amended to read as follows:

23 22-41-2.3. For purposes of establishing probable cause that a criminal offense has been  
24 committed in violation of § 22-41-1 or 22-41-1.2, probable cause is established if the

1 prosecution has presented as evidence at the preliminary hearing, or before the grand jury, a  
2 check bearing reasonable indicia that the check has been presented for payment and it that the  
3 check has not been paid or honored by the financial institution because of insufficient funds in  
4 the account upon which it the check was drawn or that the account did not exist. Upon the offer  
5 and acceptance of the check as evidence at the preliminary hearing, or before the grand jury, it  
6 is not necessary for an official or employee of the financial institution to testify at the  
7 preliminary hearing, or before the grand jury, concerning the financial institution's records with  
8 respect to the account upon which the check has been drawn.

9 Section 8. That § 22-41-2.4 be amended to read as follows:

10 22-41-2.4. The passing of a check, described in § 22-41-1, that bears the name and address  
11 of an account holder and bears a signature, purporting to be that of the account holder, is prima  
12 facie evidence that an account holder executed the check.

13 Section 9. The code counsel shall transfer §§ 22-41-1 to 22-41-3.4, inclusive, to chapter 22-  
14 30A and shall renumber the sections accordingly and adjust all appropriate cross references.

15 Section 10. That § 22-41-3.1 be amended to read as follows:

16 22-41-3.1. The holder of an insufficient funds check shall, before presenting it the check to  
17 the state's attorney for prosecution, serve a notice of dishonor upon the writer of the check, by  
18 registered or certified mail, return receipt requested, or by first class mail, supported by an  
19 affidavit of mailing sworn and retained by the sender, in the United States mail and addressed  
20 to the recipient's most recent address known to the sender. If the notice is mailed, and not  
21 returned as undeliverable by the United States Postal Service, notice ~~shall be~~ is conclusively  
22 presumed to have been given on the date of mailing. The holder of the dishonored check shall,  
23 upon return of the receipt, hold it the check for a period of at least five days, or eight days if  
24 notice is given by first class mail, and upon the expiration of that period shall present the check

1 with the attached bank return, return receipt or affidavit of mailing, and copy of the dishonor  
2 notice to the state's attorney for prosecution.

3 Section 11. That § 22-41-3.2 be amended to read as follows:

4 22-41-3.2. The notice of dishonor required by § 22-41-3.1 shall be in substantially the  
5 following form:

6 Date \_\_\_\_\_

7 Name of issuer \_\_\_\_\_

8 Bank on which drawn \_\_\_\_\_

9 Date of check \_\_\_\_\_

10 Amount of check \_\_\_\_\_

11 Merchant holding check \_\_\_\_\_

12 You are hereby notified that your check described above has been dishonored and is now  
13 being held by the above merchant for a period of five days from the above date. Civil liability  
14 incurred by a check issuer pursuant to § 57A-3-420 is not a defense to a violation of this chapter.

15 Section 12. That § 22-41-3.3 be amended to read as follows:

16 22-41-3.3. The service of a notice of dishonor in accordance with §§ 22-41-3.1 and 22-41-  
17 3.2 is not a element of the crime of ~~passing a check against theft by insufficient funds check~~, nor  
18 is it an element of proof thereof or a defense to any prosecution therefor.

19 If the notice required by §§ 22-41-3.1 and 22-41-3.2 is returned undelivered, or if it appears  
20 to the state's attorney that there is reasonable cause to believe that the writer of the check intends  
21 to remove himself or herself from the jurisdiction of the court, the state's attorney ~~shall not~~  
22 require may elect to prosecute without such notice.

23 Section 13. That § 22-41-3.4 be amended to read as follows:

24 22-41-3.4. ~~A~~ Any criminal prosecution under § 22-41-1 or 22-41-1.2 ~~must~~ shall be

1 commenced within six months after the holder of a check receives notice of its dishonor. Failure  
2 to prosecute a complaint within six months ~~shall be~~ constitutes a bar to any criminal action  
3 under those sections.

4 Section 14. That § 22-41-10 be repealed.

5 ~~— 22-41-10. No person shall publish in a newspaper, magazine, or other publication, or in any  
6 other way, an advertisement or announcement of any sort regarding merchandise, securities,  
7 service, employment, real estate, or anything of value offered by him for use, purchase, or sale,  
8 which advertisement or announcement is untrue, or made with intent to defraud. Violation of  
9 this section is a Class 1 misdemeanor.~~

10 Section 15. That § 22-41-11 be repealed.

11 ~~— 22-41-11. Any person who, in any manner, or by any means of advertisement, or other  
12 means of communication, offers for sale any merchandise, commodity, or service, as part of a  
13 plan or scheme with the intent not to sell the merchandise, commodity, or service so advertised  
14 at the price stated therein, or with the intent not to sell the merchandise, commodity, or service  
15 so advertised is guilty of a Class 1 misdemeanor.~~

16 Section 16. That § 22-41-12 be repealed.

17 ~~— 22-41-12. Nothing in § 22-41-10 or 22-41-11 shall apply to any broadcasting station or to  
18 any publisher or printer who broadcasts, publishes, or prints an advertisement in good faith  
19 without knowledge of its false, deceptive, or misleading character.~~

20 Section 17. That § 22-41-14 be repealed.

21 ~~— 22-41-14. Any person engaged in the production, manufacture, selling, or distribution of any  
22 commodity who intentionally and for the purpose of deceiving any customer or purchaser,  
23 misbrands or misrepresents the kind, weight, quantity, or quality of the commodity offered for  
24 sale, or sells or offers an imitation for sale under the distinctive name of another article, is guilty~~

1 of a Class 1 misdemeanor.