

2011 SENATE JUDICIARY


SB 2183

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2183
1/17/11
Job #12969

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to the penalties for issuing a check without sufficient funds or without an account

Minutes:

You may make reference to "attached testimony."

Senator Olafson conducts committee work

The committee discusses removing the word willfully. Senator Olafson says the problem here that exists as the States Attorney explained is this relates to 3 or more violations in 5 years. If they are going to charge under this section they have to go back and prove that the two prior convictions were willful. He thinks if they do it 3 times in 5 years that is willful in itself. Senator Sorvaag thinks most businesses like to handle it themselves. They think those that are writing checks with no accounts or funds are criminals and doing it for theft.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2183
1/17/11
Job #12971

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the penalties for issuing a check without sufficient funds or without an account.

Minutes:

There is no attached testimony

Senator Nething – Chairman

Senator Olafson – Vice Chairman opens the hearing on SB2183

Rosa Larson – States Attorney for Ward County – She explains that she asked for these changes. She continues to explain the bill.

Senator Olafson – Asks her to explain willfully.

Larson – She explains willfully, knowingly, recklessly and intentionally.

Aaron Birst – Representing the Association of Counties – He says the States Attorneys are in favor of this bill.

Mike Rud – Petroleum Marketers and Retailers Association – Support this bill.

Senator Olafson – Asks him how much of a burden this is for your industry.

Mike Rud – Replies it is a big issue. He said taking the willfully out takes a lot of the doubt out from their standpoint and makes it a lot easier to prosecute.

No opposition

No neutral

Close the hearing on SB2183

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2183
1/18/11
Job #13036

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to the penalties for issuing a check without sufficient funds or without an account

Minutes:

Senator Olafson conducts committee work

Senator Olafson recalls that the States Attorney from Ward County testified that having the word "willfully" in there creates problems for prosecutors that have to go back and prove willfully on prior violations.

Senator Lyson moves for a do pass
Senator Sitte seconds

Roll call vote

6 yes, 0 no

Senator Sorvaag will carry

Date: 1-18-11
Roll Call Vote # _____

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2183

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Lyson Seconded By Senator Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Sorvaag

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2183: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2183 was placed on the
Eleventh order on the calendar.

2011 HOUSE JUDICIARY

SB 2183

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2183
March 9, 2011
15196

Conference Committee

Committee Clerk Signature

D. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on SB 2183.

Sen. David Hogue: Sponsor, support. Explained the bill. I introduced SB 2183 at the request of our Ward County State's Attorney. I would represent to you that this is a bill that provides clarification; it also provides consistency. Our State's Attorney, Rosa Larson, is going to explain in detail why the bill is necessary, but I wanted to give you the background on NSF checks and some of our other offenses. They are what are considered strict liability offenses in the sense that if you write an NSF check you can't raise a defense that you didn't know that you didn't have the money in your account. If you write a single check, you can't raise that defense. However, our statutes also provide to enhance the penalty when you are a serial NSF writer. For some reason, our statute says that's going to be willful. If you were convicted of writing these NSF checks in prior events, where there didn't have to be proof of willfulness, now when we aggregate them together for a higher offense, at that point, now the prosecutor has to show willfulness of those other three priors. It's similar to when we increase the penalties for DUI's. The standard of proof, for the multiple offenses, should be the same as the underlying offenses. That's the purpose of the bill.

Chairman DeKrey: Thank you. Further testimony in support.

Rosa Larson, Ward County State's Attorney, President of the ND State's Attorney Association: Support. The NDSAA also is in support of the changes in the bill by taking willfully out of subsection d. If you looked at the entire statute, subsections b and c also provide for an enhancement for habitual offenders under this. They remain strict liability but for some reason when it got to "d", they put willful in there for the prior offenses, which would then cause us to go back and prove that they pled or were found guilty of willfulness of prior offenses, when we didn't have to prove that before. There's really no way that we can do that. That would also cloud the issues in jury trials. I have had other state's attorneys from ND tell me that some of their judges won't even sign off on the enhanced penalty of a felony check offense because they just plain told the state's attorney "you won't be able to prove willful, so

I'm not signing this warrant", then you have to go down to the Class A misdemeanor. Clearly, when someone has violated or has had this many violations in five years, the C felony is warranted under those situations. They still do have defenses available to them under strict liability, but it still would go forward and they have their other rights.

Rep. Koppelman: With the ramping up of the penalty for repetitive offenders, do you think that willful was willfully up there, because the idea that it is a higher standard, it's a bigger penalty.

Ms. Larson: I think it was put there because some legislators don't like the fact that it's a felony and we are making it a strict liability. However, as Sen. Hogue pointed out, there are other strict liabilities throughout the Century Code, including DUI; there is for violations of protection orders, etc. I think that it was probably put in there just because somebody thought that by making it a felony, that maybe we need to throw in culpability. But under our constitution, strict liability for felony offenses is constitutional, as we've seen in DUI's and violations under Title 14 and elsewhere in the Code. Under the criminal code in Title 12.1 "willful" is implied if there isn't culpability, but outside of Title 12.1, you cannot imply it.

Rep. Koppelman: Could you walk through the options. We have willfully, knowingly, what are the options there in terms of the standard and what do they mean.

Ms. Larson: We have knowingly, and then there is intentionally, willfully, recklessly, and negligently. Willfully does cover intentionally, knowingly and recklessly encompasses all of those culpabilities. Again, going back to the enhanced penalties under this statute, when it was strict liability before, then we would have to actually be required to go back and prove the three prior offenses were willful, even if you go down to the lesser culpability of recklessly, it is still making us try a minimum of three cases that were already done with and then go forward on the new offense. We'd have to prove beyond a reasonable doubt three prior offenses where they pled guilty.

Rep. Koppelman: We understand that, but the question that's in my mind, and I suspect that this is why the standard is there in current law, is because when we are talking about people being charged with a felony, that's pretty serious business. I don't for a moment excuse this kind of activity, but I recognized that it's more work for you if we put any other standard there, whether it's willfully, knowingly, recklessly, whatever; but I can envision a possible scenario where someone could end up with this kind of offense either through no fault of their own or through an honest mistake where they really didn't intend to write a bad check, but maybe there was an electronic withdrawal out of their account before the check came in. They either had forgotten about it or they weren't aware. Those kinds of things can occur. So to tag somebody with a felony, without any kind of protection in terms of those extenuating circumstances is probably what troubled the legislature when this was originally written.

Ms. Larson: They do still have defenses that they can raise, such as mistake, accident, duress; they are still available under strict liability. You have to look that this is an enhancement if you've had three or more offenses in five years. The first part of subsection d is still strict liability if you write a check for over \$500, because of the amount it's a class C felony. They do still have protections, and you also need to remember that it comes down to prosecutorial discretion as well. You're right, some people do just make honest mistakes, or there's been a glitch in the banking bill pay system, that gets resolved before we even go so far as to the person coming to trial or even getting charged or arrested. You also have to remember that before it even comes to a State's Attorney office, it's gone through collection agencies and they've had the opportunities to make good on the check before they even get prosecuted. When they've had three prior offenses at least in five years, that takes away some of that "oops I didn't mean to" defense.

Rep. Koppelman: Someone writes a bad check, maybe one of them is intentionally or just sloppy bookkeeping, maybe the second one is similar, maybe the third one really was an unintentional, and they didn't expect something that happened. Obviously there is a pattern there. They are charged for each of those with a misdemeanor and their attitude is I don't like it, it really was a mistake but I'm not going to worry about it. All of a sudden a felony charge comes before them and they say, but wait a minute, if I'm going to be charged with a felony, this last time I wrote the check, this happened and it was an electronic transfer, are they still able to bring that defense up for a case that's already been adjudicated.

Ms. Larson: That is what is cumbersome about the way the statute is written right now, because now they would be able to do that; they pled under strict liability before and now we have to go back and retry closed cases.

Rep. Koppelman: You're talking about the defenses they have, but my point is, since this is a cumulative offense, they wouldn't have those defenses for those instances, because they've already been adjudicated.

Ms. Larson: They could go back and present that evidence to a jury the way the statute is written now.

Rep. Koppelman: But with this change they would not be able to.

Ms. Larson: They can still testify to any defense that they want quite honestly. During a jury trial, defendants can raise and say anything and they do. We hear those types of reasons why checks bounce all the time. When you have three or more offenses in five years, maybe you need to look at a better way of managing.

Rep. Onstad: On the first section, the \$500, have you ever prosecuted on a one-time offense of that case; or what level does it get where you would actually prosecute on the \$500.

Ms. Larson: We actually have charged out checks for first time offense that have been over \$500 as a class C felony. Generally, those go by disposition or plea agreement, or some sort of way, they will get reduced down prior to a conviction, either we amend the information to a class A misdemeanor and restitution is paid, or by disposition, it would go down to a Class A misdemeanor which is allowed under Title 12.1-2. Generally on a first offense, the defendant has no criminal history, they get plea bargained away usually. We do start with what the offense is at the beginning. That actually affords them more rights too, because then they have the preliminary hearing, they have a right to an attorney where even if they aren't going to see any jail time, if they are charged with a felony they get those additional rights.

Rep. Onstad: Does Small Claims Court ever come into play in this matter.

Ms. Larson: Not by the time it gets to us, generally Small Claims Court has not been in the proceedings any more. Most of the checks that we get come from the collection agencies who've already tried to get the money for their merchants. They have 120 days to do that, even prior to it coming to us for charging. A lot of checks get cleared up before they come to our office. We do still have some private merchants that bring in checks to us, but again, they've sent out notices, given them an opportunity to pay that prior to it being charged out.

Rep. Onstad: The three violations in the last five years and you quote that the judges are not willing to take it up. How many of those situations have you actually run across in the last couple of years?

Ms. Larson: I only heard that from one state's attorney and that was out of Wells County. We've not had problems with that but I suspect that we will now. This actually came to light because I had a defendant in Ward County who had two felony check files going because she had subsequent offenses. I started looking at the statute and the defense attorney filed a motion. I could have gone to trial but I would have had to prove the three priors were willful offenses or that she pled as a willful offense, when in fact she pled as a strict liability. So I had to plea bargain that away, she is cleaning today.

Rep. Onstad: So you're assuming that this would be used.

Ms. Larson: I think it would be used, and we've actually been charging it and going about our day in a regular fashion as far as our office is concerned. In general, these defendants, I can think of other files where they have thousands and thousands of dollars worth of checks and they have multiple six or seven time offenses on their criminal history. In general, they're not going to jail but we're putting them on probation and making sure that they are paying the restitution and that the merchants get paid back. We may put other restrictions on them like they can't have checking accounts so that they can learn some money management skills. Obviously they are showing a pattern if this is your third offense. Sometimes

there are family issues raised where someone drained an account and they get caught up and don't know about it. All of that goes into play when we're charging and negotiating deals.

Rep. Onstad: So in those cases, they're not charged with the class C felony, but a lesser charge as long as they are showing restitution.

Ms. Larson: I guess I don't understand your question. Originally we did charge the felony if it gets to us; if they come in and talk to us we will look at that and do some negotiating with them. It's not unusual sometimes where we have people who wrote a check in January and it will come into our office in March; then another check they wrote in February and will come into our office in June, and so forth. Then all of a sudden they had three infractions possibly, or an infraction and a B misdemeanor and now you're looking at your subsequent offense and it's been enhanced when actually it all happened at one time. We try to work with those defendants. But when we have defendant A who's had three offenses in the last five years and they've written a lot of bad checks and a pattern is emerging there, and then we're less likely to negotiate the C felony away.

Rep. Klemin: You've got two sections here. The first section deals with NSF checks where you do have an account and section 2 deals with issuing a check when you don't have an account. I'm thinking that there might be a distinction between the willfully in sections 1 vs. the willfully in section 2. In section 1, you have subsection d, which really has two clauses. The willfully part, in my opinion, only applies to the second clause.

Ms. Larson: That's my reading of it too.

Rep. Klemin: If we look at subdivisions a, b and c, it is gradually increasing; a is an infraction, b is class B misdemeanor, c is class A misdemeanor and they all have the same language and none of them include the word willfully. You get up to d and the first clause is consistent with the other three and doesn't say willfully. But the second clause is where the willfully is used and it is only talking about prior, multiple offenses within five years. So it would be somewhat inconsistent to not require willfully when they did it in those individual cases. But then to require willfully when you accumulate them and look back at what they did.

Ms. Larson: That's the whole point is to make that statute consistent. Under the no account offense, it's the same thing again where it was willful if you had three or more prior offenses and that needs to track. With closed account charges too, a lot of times the defenses that have been raised there, the individual doesn't know that their account has been closed. I personally don't know how that happens, but if they have a lot of bad checks going through the bank, the bank will close the account and then send notice out to their customer. A lot of times, those notices apparently get lost in the mail and then the defendant ends up with multiple offenses

for a closed account. In general, we actually see more multiple offenders NSF checks than closed account individuals.

Rep. Klemin: Well, you still have to show intentional conduct.

Ms. Larson: Willful conduct.

Rep. Klemin: In section 2, if we take willful out.

Ms. Larson: We still have to show that it was strict liability, and they would still have their defenses available to them; because writing a check on a closed account is a strict liability offense as well.

Chairman DeKrey: Thank you. Further testimony in support of SB 2183.

Mike Rud, ND Petroleum Marketers, and ND Retail Association: We stand in support of SB 2183. This is a huge issue with many of our members and I think we are a little more callused than a lot of people in the room. We simply look at this, and in a lot of these cases, it's chronic behavior; repeat offenders. We simply view it as theft of property. The tighter we can make these laws the better for our retailers. Then they can collect the money that is owed to them in a timely fashion.

Chairman DeKrey: Thank you. Further testimony in support of SB 2183. Testimony in opposition. We will close the hearing. We'll take a look at SB 2183, what are the committee's wishes.

Rep. Koppelman: My only concern about this is that I think that, as we discussed during the hearing, "willfully" was probably put there for a reason when this bill was passed. We're talking about a felony here. I don't want to excuse people that write bad checks or make a habit of it. This is a three time matter. I understand what the state's attorneys are saying that it's a little more work for them and they have to prove a higher standard, but maybe you should have to prove a higher standard to convict someone of a felony; that's the point. I know that today, with the electronic transfers and transactions that can happen, with automatic withdrawals that happen and people don't always know what date money might go into or out of their account. You can argue that they should know what is going on, but I still think it can happen where there is an error and we could see somebody being convicted of a felony under those circumstances. The response that I got was that they can always offer that defense. They said that they could offer it as an affirmative defense now because it requires willfully. If we take willfully out, the answer was well they can argue anything they want as a defense, ha ha ha, as though it's not going to go anywhere. I'm not sure that this is a good bill.

Chairman DeKrey: According to what Rep. Klemin was saying during the hearing, that it does make the bill more consistent with the Century Code.

Rep. Koppelman: It's consistent but when we passed this three times and you're out for a felony, we put willfully in there for a reason I think. So for them to have to prove a higher standard to convict for a felony I don't think is a bad thing.

Rep. Delmore: I have concerns especially as you look at young college kids that I have in my town. My son had a rude awakening when he made a deposit the same day that he wrote out checks. Had this been in effect, and they counted all three of those checks that he wrote, none of them over \$10, he could have been charged with a felony. I agree, there's a reason that somebody tried to do that.

Chairman DeKrey: I've been talking about bad checks since I've been in the legislature since 1991. I think we've had a bad check bill just about every session since then. It is a habitual problem for businesses. I have never found a state's attorney yet that likes prosecuting bad checks. They will do everything to get the matter resolved before it gets to them. So, by the time you get to the state's attorney's office, you would have written a vast amount of bad checks; more than 3 bad checks. Those three that will get there will be the worst of the worst that never had any intention whatsoever of making that check good. I think they do deserve a felony because everybody has held their hand up to that point and tried to give them every break in the book to make that check good. These are the people that absolutely refuse to make it good. I think the bill is justified.

Rep. Beadle: If it is that bad, and it's been habitual, they are clearly willfully doing it, I think you can prove the willfully if they are clearly that bad.

Rep. Koppelman: I move a Do Not Pass.

Rep. Beadle: Second the motion.

10 YES 3 NO 1 ABSENT DO NOT PASS CARRIER: Rep. Koppelman

Date: 3/9/11
 Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2183

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Beadle

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin			Rep. Guggisberg	✓	
Rep. Beadle	✓		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury		✓			
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos		✓			
Rep. Steiner	✓				

Total (Yes) 10 No 3

Absent 1

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2183: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). SB 2183 was placed on the Fourteenth order on the calendar.