



Auto Safety Group • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group  
Joan Claybrook, President

March 26, 2008

The Honorable Jose Solorio, Chairman  
Assembly Committee on Public Safety  
State Capitol, P.O. Box 942849  
Sacramento, CA 94249-0069  
FAX # (916) 319-2169

**Re: A.B. 2606 (Emmerson) – OPPOSE**

Dear Chairman Solorio:

Public Citizen, established in 1971, is a national, non-profit consumer advocacy organization. We join with consumer, anti-poverty, senior citizens', and civil liberties advocacy groups in strongly opposing A.B. 2606, a bill that attempts to legitimize the controversial practices of so-called "check diversion" companies – private, for-profit debt collectors that rent out the name and authority of prosecutors to collect on dishonored checks. Abuses by these companies have recently been the subject of critical coverage in the *Los Angeles Times*, *San Francisco Chronicle*, *San Jose Mercury-News*, and *Santa Rosa Democrat*.<sup>1</sup>

A.B. 2606 would harm consumers by eliminating important protections in current law and placing the Legislature's stamp of approval on those abusive collection practices.

- **This bill would encourage private companies to falsely threaten innocent consumers with jail to coerce them into paying collection fees. The bill would undermine the existing probable-cause requirement, permit private companies to make prosecutorial decisions, and contribute to the illegitimate criminalization of civil debt collection.**
  - **Current Law:** Bouncing a check by mistake is not a criminal offense; it is a crime only if done "willfully, with intent to defraud" and with knowledge that insufficient funds are available.<sup>2</sup> Diversion programs may not threaten a person with prosecution or jail unless an actual prosecutor has determined that "there is

---

<sup>1</sup> See, e.g., Lazarus, *Our civil liberties lose this round*, LOS ANGELES TIMES, Feb. 20, 2008; Selvin, *Government contractor not entitled to immunity*, LOS ANGELES TIMES, Feb. 8, 2008; *Check, Please: District attorney should keep debt collectors on a tighter leash*, SANTA ROSA PRESS-DEMOCRAT, March 5, 2008; McCallum, *Bad check bullying: Debt collection partnerships recoup losses for merchants, but draw fire over aggressive tactics*, SANTA ROSA PRESS-DEMOCRAT, March 2, 2008; Egelko, *Government contractors denied legal immunity*, SAN FRANCISCO CHRONICLE, Feb. 7, 2008; Mintz, *Court sides with consumers: Collections company used by district attorneys can be sued*, SAN JOSE MERCURY NEWS, Feb. 7, 2008; Mintz, *Debt collector under fire for practices*, OAKLAND TRIBUNE, Feb. 7, 2008.

<sup>2</sup> Cal. Penal Code § 476a(a). It is well-established that "intent to defraud the person to whom the check was delivered" is "the gist of the offense," *People v. North*, 182 Cal. Rptr. 126, 128 (Cal. Ct. App. 1982), for which "no presumption of law will suffice." *People v. Becker*, 137 Cal. App. 349, 352 (Cal. Ct. App. 1934).

probable cause to believe” that a crime has been committed—*i.e.*, that there is evidence of intent to defraud—and *only* a “[d]istrict attorney may refer a bad check to the diversion program.”<sup>3</sup>

- **A.B. 2606:** This bill would allow “any private entity conducting a diversion program” to determine whether to threaten criminal prosecution by applying generic and unspecified “referral criteria,” without any independent review of individual cases by actual prosecutors.
- **Practical Effect:** This creates an unacceptable risk that the criminal intent requirement will be ignored. The commission-earning employees of private collection firms would be free to (and would have a direct financial incentive to) threaten innocent consumers with criminal prosecution to coerce the payment of steep collection fees.
- **Constitutional Problems:** This change raises serious constitutional concerns. The bill would permit private, for-profit corporations with a direct, pecuniary interest in the outcome to decide whether to threaten people with prosecution and jail, using the name and authority of the state, in order to extract collection fees. Courts have consistently held that such arrangements violate due process.<sup>4</sup>
- In the bad-check context, these concerns are not new. Courts have long noted that if the intent requirement is eliminated or ignored, a criminal bad-check statute becomes “no more than a device to force payment of debt.”<sup>5</sup> Abuses are particularly likely to arise when financially interested parties are permitted to have a hand in enforcement and when the salutary practice of pretrial criminal diversion—which ordinarily occurs only after the filing of criminal charges—is twisted into a tool for civil debt collection.<sup>6</sup>

---

<sup>3</sup> Cal. Penal Code §§ 1001.60, 1001.61, 1001.62.

<sup>4</sup> See, e.g., *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985) (striking down arrangement under which private contractor was responsible for selecting which vehicles would be “booted” for parking violations, where company received a commission on fines collected); *Young v. United States ex rel. Vuitton Et Fils*, 481 U.S. 787 (1987) (stressing importance of financial distinterestedness of those vested with prosecutorial authority); see also *Haefner v. Apcoa Parking, Inc.*, 500 N.Y.S.2d 605 (1986); *Hubbell v. City of Bridgeport*, 1996 WL 66280 (Conn. Super. Ct. 1996); *City of Cleveland v. Martinez*, 801 N.E.2d 938 (2003).

<sup>5</sup> *People v. Vinnola*, 494 P.2d 826, 831 (Colo. 1972). Courts have long warned that the use of bad check statutes “should be closely scrutinized,” *id.* at 828, because they “lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them.” *Tolbert v. State*, 321 So.2d 227, 232 (Ala. 1975) (“This court has repeatedly condemned the use of threat of prosecution as a means of collection of worthless checks.”). These concerns are not new. See, e.g., *Burnham v. Commonwealth*, 15 S.W.2d 256, 258 (Ky. 1929) (statute lacking intent requirement was “palpably designed merely to enforce the collection of debts”). As the Ninth Circuit observed recently in a bad-check case, although a creditor may always “try to collect its money . . . using the debt collection procedures it would employ for any other” debt, the mere failure to pay an obligation “is not a crime; the days of imprisoning insolvent debtors are long gone.” *Goldyn v. Hayes*, 444 F.3d 1062, 1069 (9th Cir. 2006). “Perhaps some would say that [the check writer’s] innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail.” *Id.* at 1070.

<sup>6</sup> See *State v. Orth*, 359 S.E.2d 136, 141 (W.Va. 1987) (declaring that “[t]he prosecutorial services of the state are not for private use in civil debt collection,” that prosecutors “are not authorized to divert cases prior to bringing formal charges where there is probable cause to believe the accused is guilty,” and that the

- **This bill would permit private companies to demand excessive “class” fees – without limitation, without court involvement, and without regard for ability to pay.**
  - **Current Law:** Existing law permits fees for educational classes only *after* a criminal complaint has been filed following a check writer’s failure to comply with the terms of the diversion program. In that event, “the court, after conviction . . . shall make inquiry into the financial condition of the defendant and, upon a finding that the defendant is able in whole or in part to pay the expense of the education class, the court may order him or her to pay for all or part of that expense.”<sup>7</sup>
  - **AB. 2606:** This bill would allow private check diversion companies to demand, under threat of criminal prosecution, payment of “class” fees without any statutory limit whatsoever, and without regard for the person’s ability to pay. No hearing would be required to determine the fee and no court would be involved in making the determination. The bill would also permit these companies to collect inflated bank charges, regardless of the amount actually incurred by the merchant. Finally, the bill would further increase the profit margins of check diversion companies by raising limits on collection fees that are already well in excess of what is required to pay for the programs.
  - **Practical Effect:** When the same change with respect to the class fee was proposed and rejected by the Senate in 2006 (A.B. 1022 (Bogh)), the Senate committee analysis concluded that conditioning diversion on the payment of unlimited fees regardless of the person’s ability to pay raised “profound policy implications” and would “create a situation that is ripe for abuse.”
  - **Constitutional Problems:** Conditioning the avoidance of criminal prosecution on the payment of fees regardless of the individual’s ability to pay raises serious constitutional problems. Every appellate court to confront the question has held that such arrangements violate due process in the context of pre-trial diversion programs.<sup>8</sup> For example, the Mississippi Supreme Court, in a case involving a pretrial check diversion program, held that “a standard practice of extracting a set fine from persons accused of writing bad checks on the pain of suffering a full criminal prosecution for failure to do so” was unconstitutional on Equal Protection and Due Process grounds.<sup>9</sup>

---

“threat of prosecution for the failure to make the required payments smacks of the generally discredited practice of imprisonment for debts”); *Moody v. State*, 716 So.2d 562 (Miss. 1998) (“Allowing the District Attorney, the county’s chief law enforcement officer, to process civil debt as a criminal proceeding, flies in the face of our constitution . . . [W]hen the District Attorney’s bread and butter depends upon, or is enriched by, the fees collected in bad check cases, the special interests arising therefrom cannot be ignored.”).

<sup>7</sup> Cal. Penal Code § 1001.65.

<sup>8</sup> See *Mueller v. State*, 837 N.E.2d 198 (Ind. Ct. App. 2005); *Moody v. State*, 716 So.2d 562 (Miss. 1998).

<sup>9</sup> *Moody*, 716 So.2d at 563.

- **This bill would delete all references to “collection,” in an attempt to evade the federal Fair Debt Collection Practices Act (FDCPA).**
  - **Current Law:** The Fair Debt Collection Practices Act is designed to eliminate abusive debt collection practices. The Act prohibits harassment, deception, and other unfair practices. One of the chief goals of the statute is to prevent private debt collectors from intimidating consumers with false threats of prosecution.
  - Every court to consider the question has held that check diversion companies are debt collectors and are covered by the Act’s basic federal consumer protections. In 2006, Congress amended the Act to strictly limit check diversion companies, making a company subject to a range of prohibitions unless it meets certain conditions.
  - **A.B. 2606:** The bill would eliminate all references to “collection” in an attempt to hide the fact that these companies are engaged in debt collection, and thereby attempt to evade federal collection-practices laws.
  - **Practical Effect:** The bill is clearly a response to a February 2008, decision of the U.S. Court of Appeals for the Ninth Circuit, which held that check diversion companies can be held accountable in federal court for allegedly unfair collection practices under the federal Fair Debt Collection Practices Act. In its ruling, the Ninth Circuit noted that the check diversion company in that case (ACCS) operated its collection programs “aggressively.” The court observed that the company’s activities were akin to “debt collection rather than law enforcement.” AB 2606 was introduced on February 22, just a few days after the Ninth Circuit's decision.

We urge you to reject A.B. 2606 in its entirety. We look forward to working with you and with members of the Committee to explain the consumer-protection implications of this misguided bill.

Sincerely,

Deepak Gupta  
Director, Consumer Justice Project

cc: Gabriel Caswell, Counsel, Committee on Public Safety  
The Honorable Members of the Committee on Public Safety  
The Honorable Paul Krekorian  
The Honorable Bill Emmerson