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Joan Claybrook, President

**TESTIMONY OF LIZ FIGUEROA**  
**Former California State Senator and**  
**Member of the Public Citizen Board of Directors**

***The Consumer-Protection Implications of A.B. 2606***

**Before the Committee on Public Safety of the California Assembly**  
**April 1, 2008**

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Thank you Chairman Solorio, and members of the Committee, for the opportunity to testify here today about the serious consumer-protection implications of A.B. 2606.

My name is Liz Figueroa. From 1999 to 2006, I served in the California State Senate, where I represented the 10th District and was Chair of both the Committee on Business and Professions and the Joint Committee on Boards, Commissions, and Consumer Protection. Before that, I was a member of this Assembly for two terms. Defending consumer rights has been one of my top priorities throughout my career in public service. I championed consumer privacy measures; fought for reform in the insurance industry; wrote the landmark law that gave California patients the right to sue negligent HMO's; helped create the Healthy Families Program, which has provided health care to more than 500,000 California children; and authored the legislation that created California's "Do Not Call List," which prompted the creation of the national "Do Not Call" program.

I am appearing here today on behalf of the national, non-profit consumer advocacy organization Public Citizen, in my capacity as a member of Public Citizen's board of directors.

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Public Citizen strongly opposes A.B. 2606 because it would legitimize the abusive collection practices of so-called "check diversion" companies—practices that have recently been the subject of critical coverage in the *Los Angeles Times*, the *San Jose*

*Mercury-News*, the *San Francisco Chronicle*, and the *Santa Rosa Press-Democrat*.<sup>1</sup> These practices should be *restrained*, not encouraged.

***What are check diversion companies?*** Check diversion companies are private, for-profit debt collectors. Using statutory authority that was originally intended to permit the diversion of real criminal cases, these companies rent out the name and authority of California prosecutors. They use the prosecutor's name to collect on debt owed to merchants that have received bounced checks.

***No review by a prosecutor.*** Participating businesses refer the checks directly to the private company for collection. Upon receiving the checks—and *without any review by a prosecutor or a determination that any crime has been committed*—the private company mails out a series of collection demands on official prosecutor letterhead, making escalating threats of arrest, prosecution, and jail to coerce payment.

***Steep collection fees.*** These companies demand payment of not only the check amount, but of steep collection fees. A low-income California consumer who mistakenly writes a dishonored check for \$10 to the local grocery store may be faced with a collection demand for as much as \$200. The company keeps the lion's share of these fees for itself and gives a cut to the prosecutors in exchange for the use of their name and authority.

***Deceptive conduct.*** All communication between the programs and consumers occurs through the private company and its commission-earning collection employees. Consumers who telephone the program believe they are speaking with neutral government employees. They are not told that they are speaking with employees of a private company, or that no prosecutor has actually reviewed their case. Consumers who explain that a check was returned because of mistake by the consumer or the bank are told they must pay nonetheless.

A.B. 2606 would harm consumers by placing the Legislature's stamp of approval on these abusive collection practices and eliminate important protections in current law. The bill would also directly interfere with pending federal-court litigation, in which Public Citizen represents a class of California consumers that have been unfairly targeted by the largest check diversion company—American Corrective Counseling Services (ACCS).

**1. This bill would encourage private companies to falsely threaten innocent consumers with jail to coerce them into paying collection fees.**

First, this 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.

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<sup>1</sup> A few of these articles are attached as appendix to this written testimony.

***No Intent to Defraud.*** 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. (Cal. Penal Code 476). People write dishonored checks for all kinds of reasons. Usually they are low-income consumers or senior citizens who maintain relatively small account balances and are living paycheck to paycheck. These people generally do not intend to defraud merchants but make mathematical mistakes, or errors in their checkbook, or fail to estimate the amount that they have on deposit.

***Use of Referral Criteria.*** A.B. 2606, however, would allow “any private entity conducting a diversion program” to determine whether to threaten these consumers with criminal prosecution by applying generic and unspecified “referral criteria,” without any independent review of individual cases by actual prosecutors.

***Unacceptable Risk of Abuse.*** 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. In the United States, we do not threaten to put people in prison simply because they have not paid a debt—whether on a credit card, a mortgage, or an unpaid check.

- 2. This bill would permit private companies to demand excessive collection fees. In particular, the bill would authorize so-called “class” fees—without limitation, without court involvement, and without regard for a consumer’s ability to pay.**

A second major problem with A.B. 2606 is that it authorizes increases in what are already excessive and unjustified collection fees.

***No Statutory Limit, No Hearing, and No Regard for Person’s Ability to Pay.*** In particular, this bill would allow private check diversion companies to demand, under threat of criminal prosecution, payment of educational “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.

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.”

There are other problems with this bill as well. The ACLU has objected to the bill because it tramples on Californians’ civil liberties. The Privacy Rights Coalition has raised concerns about the use of consumers’ confidential bank records by these private companies. The AARP has raised concerns about the disproportionate impact on seniors. For all of these reasons, the Committee should reject this misguided bill in its entirety.

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# San Jose Mercury News

October 29, 2007 / Page 1

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## Bad-check writers cite collector's jail threats



Lisa Johnston, of San Jose, poses with letters she received after writing a bad check in 2002. A class action lawsuit claims that the company that wrote the letters, ACCS, is masquerading as prosecutors and threatening people with criminal charges to not only get the checks paid, but to gouge them with exorbitant fees. Johnston is one of the lead plaintiffs in the case. She says the bad check of \$41 she wrote was to Goodwill to pay for her kids' clothes.

**By Howard Mintz**

Oct. 29--Short on money and trying to buy clothes for her four children, Lisa Johnston went to a San Jose Goodwill five years ago, writing a check for \$41.74 that she hoped would clear her teetering bank account.

The single mom's check bounced. And Johnston, like tens of thousands of other Californians who float bad checks each year, wound up in a prosecutor-backed debt-collection program that has become the subject of a bare-knuckled legal battle in San Jose federal court and other courts around the country. By the time Johnston was done dealing with her bounced check, she'd been threatened with criminal prosecution, forced to pay more than \$200 -- five times the original check -- and ordered to attend an eight-hour

class designed to keep her from writing bad checks again. Her experience has made her one of the lead plaintiffs in a 6-year-old class-action lawsuit against American Corrective Counseling Services, a private San Clemente company that contracts with dozens of California district attorneys, including Santa Clara County's, to collect on bad checks.

The lawsuit claims the company poses as a local district attorney, intimidating people who've mistakenly bounced checks and making them believe they could go to jail when in most instances it would never happen. "It says they are going to prosecute you," said Johnston, describing the warning letters she got from the company on official district attorney letterhead. "They really do scare you."

### **1985 legislation**

The case raises questions about whether the company and district attorneys have run amok with a check-collection program that sprouted from 1985 state legislation aimed at ridding local court systems of a flood of small-time bad-check cases.

Instead of charging people with misdemeanors or letting the proliferation of bounced checks go unpunished altogether, the state approved a way to get merchants their money back while bad-check writers clear their debts and avoid the courts. Prosecutors, who turned to private companies like American Corrective to handle the task, have a major stake in the outcome because they consider the program an effective tool. The California District Attorneys Association has backed American Corrective Counseling, filing a brief on the company's behalf in the 9th U.S. Circuit Court of Appeals. Last month, the court heard arguments on an important issue that may decide whether the legal challenge survives.

Both the company and prosecutors insist there is no deceit in the bad check program. But the lawsuit says the company uses the misleading threat of criminal charges to gouge bad-check writers with exorbitant fees, often targeting vulnerable people who can't afford the tariff. On the surface, the diversion program is a way for local prosecutors to use a private company to handle the high-volume, low-level work of helping merchants collect on bounced checks. It's a win-win for district attorneys: They don't need to staff low-level crimes they might not be able to pursue otherwise, and they get a windfall from the company on collected fees that adds some extra cash to their money-strapped offices.

In Santa Clara County alone, 1,200 to 1,500 people go through the program each year, said Assistant District Attorney Stephen Gibbons. The office does not pay the company for its services but gets a cut of the fees collected, or about \$36,000 to \$45,000 a year. "We think it's a fair program," Gibbons said. "Bad-check writing is a real problem out in the community. It would be a shame if we didn't have their service around." But critics, led by the Washington, D.C.-based consumer watchdog Public Citizen, portray a different, sinister side to the program, which is now entrenched in 18 states. Half of California's counties, including Alameda, Contra Costa and Marin, rely on the service.

When a company such as Wal-Mart or Fry's refers a bad check to the district attorney's office, the matter is turned over to American Corrective, which sends a letter on official district attorney stationery to the wayward check writer -- alerting them to fees, costs and potential criminal prosecution. Under the law, someone can't be prosecuted simply for bouncing a check -- criminal charges require proof of deliberately floating a bad check. A person who bounces a check can avoid the prospect of criminal charges by agreeing to enter the diversion program -- but plaintiffs lawyers say the problem is that American Corrective goes overboard when it intervenes.

### **Fear of jail**

Plaintiffs lawyers say people who receive the threatening letters believe they are going to jail if they don't pay back the check and fees, which can be as much as 10 times the amount of the original check. And once the matter is turned over to American Corrective, people can't just go back to a store and offer to pay their debt. The suit contends the program violates a federal law against unfair debt collection. "They have to be overly aggressive because that's how they make their money," said Paul Arons, a plaintiffs attorney. American Corrective strongly defends its program, arguing that it has been a success and is a way for bad-check writers to steer clear of the justice system.

Charles Jenkins, the company's lawyer, denies any misrepresentation. He insists the company is acting for district attorneys, with their support, knowledge and approval. "There is a lot of time and a lot of chances for them to fix an innocent mistake," Jenkins said of those caught up in the program. The company is attempting to short-circuit the San Jose legal challenge, as well as an identical case in Florida, by arguing that it is immune from being sued because it is acting as an arm of government prosecutors. Two federal judges have disagreed, and now the issue is before the appeals courts.

Meanwhile, plaintiffs who paid their debts but still feel embittered by the program want their day in court. Lois Artz, a 71-year-old former bank teller from Petaluma, is one plaintiff who got drawn into the system when she bounced a \$28 check at a local Cigarettes Cheaper store. She wound up paying more than \$250 to make the debt go away. But she is still shaken by what she thought was the real threat of going to jail, bouncing a check at a time when she was caring for her terminally ill daughter. "I'd never done anything wrong in my life," Artz said. "I have never been so terrified. I just knew they were coming to get me.

I don't want that to happen to anyone else."

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EDITORIAL / MARCH 5, 2008

## Check, please

### *District attorney should keep debt collectors on a tighter leash*

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There are two kinds of people who bounce checks: Those who rarely and unintentionally write overdrafts and those who habitually or purposefully pass bad checks.

The distinction may not matter to merchants who are left holding a worthless piece of paper. But the difference should matter to Sonoma County District Attorney Stephan Passalacqua.

After all, the person who unintentionally writes a bad check generally isn't intent on defrauding anyone. More likely, the check writer simply miscalculated what was in the bank account or assumed that a deposited check had already cleared -- and then failed to act quickly after learning of the mistake.

Yet, a debt collection company hired by the District Attorney's Office through its Bad Check Restitution Program treats everyone who fails to quickly clear bad checks the same.

In Sunday's Business Section, Staff Writer Kevin McCallum highlighted the plight of 72-year-old Lois Artz, who bounced a check for \$26.61. Artz, who was caring for a daughter who was battling cancer, forgot to go to the bank to cover the check. She soon received an official looking letter (with Passalacqua's name and the seal of his office) informing her that she would be prosecuted for her crime unless she paid a fine and attended an education class -- for a total cost of \$192.62. The letter came from American Corrective Counseling Services (ACCS), a San Clemente firm that contracts with the District Attorney's Office to collect bad checks.

These strong-arm tactics may make sense when it comes to people who make a habit of writing bad checks. But when it comes to the person who makes a one-time mistake, the approach is excessive.

We understand the need to privatize this kind of service, but Passalacqua needs to put his bad check blood hounds on a shorter leash.

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MARCH 2, 2008

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## Bad check bullying:

*Debt collection partnerships recoup losses for merchants but draw fire over aggressive tactics*

By Kevin McCallum

Photo by Christopher Chung, The Press Democrat

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Lois Artz made an honest mistake.

The 72-year-old Petaluma resident wrote a check for \$26.61 to buy a carton of cigarettes back in 2005, and it bounced.

Distracted by the burdens of caring for a daughter with breast cancer, Artz, a retired Bank of America manager who lives on a fixed income, said she simply didn't keep a close enough eye on her checking account balance.

"My daughter was so ill, my attention had been totally on her," Artz said. "I was going to make the deposit, but I completely forgot."

Artz soon received a letter from the Sonoma County District Attorney Bad Check Restitution Program. The letter informed her that she could avoid prosecution for her crime if she paid a fine and completed an education program. The cost: \$196.62 -- more than seven times the amount of her bad check.

If she did not, the letter informed her, she could be prosecuted and sent to jail or prison for up to a year and face up to \$1,000 in fines.

"It scared the living hell out of me," Artz said recently



from the mobile home where she has lived for more than 25 years. “I’ve never done anything wrong in my life.”

The official-looking letter did not come from Sonoma County District Attorney Stephan Passalacqua, even though it carried his name and was embossed with the seal of his office.

Instead, it was sent by a San Clemente firm that works with hundreds of county prosecutors to collect bad checks and divert people from the court system.

The company, American Corrective Counseling Services, is at the center of a legal battle over the way district attorneys across the nation have entered into partnerships with private companies to go after people who owe money.

Supporters say the company helps merchants recover debts, allows prosecutors to reduce costs, and gives offenders an alternative that keeps them out of the crowded court system.

But critics say ACCS intentionally blurs the lines between a company pursuing profits and government officials charged with protecting the public. It doesn’t do enough to distinguish between people who make inadvertent mistakes and criminals who intentionally commit fraud, according to critics.

### **Shakedown allegations**

Artz is part of a nationwide class-action lawsuit accusing ACCS of shaking down innocent customers for excessive fees.

The company lost a key round last month when a federal appeal court rejected its claims that it acts as an arm of the government and therefore is immune from civil prosecution.

“As two appellate courts have recognized, they are not the government,” said Paul Arons, one of the attorneys who sued ACCS. “The reality of the situation is they are a

very, very profitable private enterprise collection agency renting the name of the district attorney in order to scare people into paying money they don't owe."

ACCS did not return a call for comment.

Arons claims the company has systematically defrauded hundreds of thousands of Californians who accidentally bounced checks, but were bullied into paying steep fines under a false threat of prosecution.

Not everyone who bounces a check has committed a crime. For that, prosecutors must demonstrate an intent to defraud the merchant. In most cases, people who have made honest errors quickly learn of the problem, make restitution to the merchant, and pay the bank's insufficient funds charge.

If, however, merchants try but can't collect the debt within a reasonable period, they can report the person to the Bad Check Restitution Program, which has been in existence in Sonoma County since 2001.

### **Hundreds use service**

Since its inception, more than 1,500 local merchants have taken advantage of the program, helping them recover nearly \$1 million, Passalacqua said.

About 4,000 people have gone through the program, which requires them to make restitution and complete a course on the ills of bad check writing. Those who successfully complete the program never have to appear in court and will not have a criminal record.

The program has helped free prosecutors to spend time on higher priority cases and reduces court caseloads, Passalacqua said.

"We're trying to make sure we use our limited resources in an effective manner," he said.

Last year, the District Attorney's Office received \$17,000 from ACCS, for a total of \$102,000 since its inception.

Outsourcing the program reduces the need to run the program with tax dollars, and the money from ACCS helps fund other programs, including victims' services and community outreach, according to a statement from the District Attorney's Office.

Critics, however, say ACCS has a financial incentive to cast the net as wide as possible and to make its letters forceful and even misleading.

### **No word from merchant**

Artz said she never received a letter from the merchant telling her the check had bounced, as the program guidelines require. When she realized what she had done, she went to the store but was told her case had already been submitted to collections, she said.

The subsequent letter informed Artz, in underlined and bold letters, that “The Sonoma County District Attorney's Office has received a **CRIME REPORT** alleging that you have violated Penal Code 476(a) of the California State Statute: Issuing a Worthless Check.”

It was signed by Kenneth J. Gness, chief deputy district attorney.

But in fact, the report didn't go to the district attorney. It went directly to ACCS, which runs the program and its Web site. Once there, the company followed guidelines to determine who should get a notice letter.

### **No official review**

While the guidelines have been approved by Passalacqua's office, prosecutors do not review individual cases before demand letters are sent out. That's what Arons has a real problem with -- the law does not allow prosecutors to outsource legal judgments, he said.

And while Artz was instructed to mail her payment to “Sonoma County District Attorney” at a Santa Rosa address, that payment actually went directly to ACCS.

The District Attorney's Office is aware of the criticisms and is reviewing the program, particularly the wording dealing with the punishments, Passalacqua said.

"We are always evaluating our services, striving to achieve public safety while treating all people involved in the criminal justice system with fairness, respect and dignity," his office said in a statement.

"With that goal in mind, we are in the process of reviewing the letter to see if the way we inform individuals that they have written a worthless check and are responsible for repaying the debt . . . can or should be revised."

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**A.B. 2606:**  
*Misguided Legislation that Would Legitimize  
Abusive Debt-Collection Practices*

**PROPONENTS' CLAIMS DEBUNKED**

The proponents of A.B 2606 have attempted to downplay the significance of their bill as merely “clarifying” existing law, and have circulated a number of misleading claims that are not backed up by the facts. In fact, the overwhelming weight of the evidence—in the form of numerous court decisions, newspaper articles, and real-world examples—shows that these claims are false, and that the bill is an attempt to legitimize the abusive debt collection practices of a single firm: American Corrective Counseling Services (ACCS).

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*The Attempt to Bypass Legitimate Probable-Cause Determinations*

**PROPONENTS' CLAIM:**

**A.B. 2606 is merely a “clean up” bill intended to “clarify” that private collection agencies may use generic “referral criteria” to determine which consumers may be sent collection demands on prosecutor letterhead.**

**REALITY:**

Permitting the employees of private collection agencies to apply generic criteria to determine which consumers to threaten with prosecution undermines the key requirements of review by a prosecutor for probable cause and criminal intent. This bill would do much more than “clarify” the law. Rather, it would be a radical transformation and would encourage the criminalization of civil debt collection.

The fundamental flaw in the check collection programs operated by companies like ACCS is that innocent consumers are threatened with prosecution even though their case has never crossed a prosecutors’ desk, and even though they would never really be prosecuted. When ACCS commences collection demands,

no prosecutor has reviewed the evidence to determine whether there is probable cause to believe a crime has been committed—*i.e.* that someone wrote a check with intent to defraud.

In fact, ACCS's high-profit margin depends on bypassing probable-cause review by using its own "referral criteria" checklist, which it asks the prosecutors to review in advance. Nothing in those criteria addresses probable cause or intent to defraud. Instead, the criteria simply screen out checks that are too large, too old, or the like. Under those criteria, ACCS may threaten to prosecute a consumer even if the funds were on deposit but the check was dishonored because the bank had a hold on the funds. The fact that a dishonored check has not been paid does not establish probable cause.

#### **AN EXAMPLE:**

Under the referral criteria used by ACCS, a consumer like 81-year-old June Saftenberg, who can establish that she did not realize there was a problem with her \$12 check, is treated like a criminal and told that to avoid prosecution she must enroll in an expensive "diversion" program. No legitimate prosecutor who looked at the evidence would have concluded that she had fraudulent intent. (Source: Stories of Actual Consumers Targeted by "Check Diversion" Companies, [www.citizen.org/documents/victimstories.pdf](http://www.citizen.org/documents/victimstories.pdf).)

#### **WHAT THE COURTS HAVE SAID:**

- "There is no attorney review prior to" collection by ACCS. "During the time ACCS processes the bad checks and seeks payment from the bad check writers, the prosecutor does not have regular contact with ACCS. There is no supervision of the day-to-day activities of ACCS."<sup>2</sup>
- "In exchange for its fees, ACCS runs nearly every aspect of the bad check program. . . . The DA provides 'intake criteria'—a two-page checklist—designating the checks that are appropriate for the program. The contract imposes no obligation on the DA initially to decide whether overdrawn checks should be referred to the program because they appear to indicate that a crime has been committed, requiring only that the DA review all cases transferred by ACCS to the DA for failure to comply its program."<sup>3</sup>

#### **THE BOTTOM LINE:**

Probable cause *cannot* be adequately determined through a computerized process that merely screens out a few checks. And it *should not* be determined by a private, for-profit corporation with a financial interest in the outcome.

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<sup>2</sup> *Rosario v. American Corrective Counseling Services, Inc.*, (11th Cir. 2007), 506 F.3d 1039.

<sup>3</sup> *Del Campo v. American Corrective Counseling Services, Inc.* (9th Cir. 2008), 2008 WL 320772.

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*The Innocence of the Majority of Consumers Targeted by ACCS*

**PROPONENTS' CLAIM:**

The consumers targeted by ACCS are not innocent because they have written back checks and have failed to make good on their debts after an average of 100 days.

**REALITY:**

This claim is wrong both in principle and in fact. The difference between criminal conduct and civil debt is not a mere technicality. Whether it's an unpaid mortgage, an unpaid credit card, or an unpaid check, few people who have debts that they have not paid are criminals, and absent real evidence of criminal intent, they should not be falsely threatened with prosecution.

**ACCS does *not* require any minimum waiting period for referral. It does not require proof that the merchant made prior notice or demands, or that prior demands were received.** It tells consumers that their failure to pay the check before it was sent to ACCS automatically subjects them to potential criminal prosecution and jail.

Even assuming that the time prior to collection is 100 days on average, that average means that for many consumers the delay is far less. Even a check writer who has not paid a check for 100 days is not automatically a criminal.

**AN EXAMPLE:**

ACCS started threatening Lois Artz—a 70-year old woman living on Social Security and taking care of a sick daughter—only 40 days after she wrote a \$28 check that did not clear. She **never received any notice** from the merchant and had not idea there was a problem with the check. She was treated like a criminal and told she a choice of paying almost \$200 in fees or facing prosecution

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*The Coercive Nature of Debt Collection via Threats of Jail*

**PROPONENTS' CLAIM:**

The collection programs are purely voluntary. Consumers are offered a "choice" between diversion and prosecution. They are merely offered the "option to participate" and avoid prosecution.

**REALITY:**

If a consumer is instructed that they must pay \$200 to avoid criminal prosecution or jail, consumers will pay up even if the threat of prosecution is false. Consumers targeted by ACCS are told, by letter and phone, that their choice is diversion or prosecution. They are instructed, ostensibly by the district attorney, that they may not pay the merchant directly. If consumers try to pay the merchant through ACCS, ACCS keeps half the payment for itself – unless and until all ACCS fees have been paid.

**WHAT THE COURTS HAVE SAID:**

- \* "The message is transparent: pay . . . or go to jail. Taken in sum, the documents place the Debtor in a virtual debtor's prison by holding the threat of prosecution over his head until he plays in full, at which the prosecution threat subsides."<sup>4</sup>
  
- \* The check diversion programs are "part of a nationwide program run by American Corrective Counseling Services." ACCS is a "collection agency" that "exists to facilitate payments of bad checks" and "operates under typical debt collection rules." ACCS's demand letters are "strongly worded and promise the imposition of substantial sanctions including criminal charges unless certain conduct occurs." The first notice warns the recipient that failure to contact the Restitution Program "could result in criminal prosecution," the second notice "threatens the recipient with potential arrest and prosecution if she does not contact the Restitution Program immediately," and the third notice "suggested that criminal prosecution was imminent if she did not pay."<sup>5</sup>
  
- \* The court gives "no credence" to the argument that [the consumer] *voluntarily* chose to enter the program. Instead, he was "prompted under pressure to pay an amount equivalent to the debt . . . plus

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<sup>4</sup> *In re Simonini* (2002), 282 B.R. 604

<sup>5</sup> *In re Reisen*, (2004), 2004 WL 764628.



finer, without having the benefit of judicial overview or discretion.”<sup>6</sup>

**WHAT ACCS’S DEMAND LETTERS SAY:**

Despite ACCS’s lack of good cause to threaten people with criminal prosecution, their letters send an unmistakable signal:

**IF YOU WISH TO AVOID ARREST AND PROSECUTION, YOU NEED TO CALL THIS OFFICE IMMEDIATELY!**

**PLEASE CONTACT THIS OFFICE TO AVOID CRIMINAL PROSECUTION!**

**Due to your failure to complete the requirement of the District Attorneys’ Bad Check Restitution Program . . . we are now initiating formal prosecution proceedings against you. Criminal charges of Penal Code 476(a) are being prepared.**

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*The Excessiveness of the Collection Fees*

**PROPONENT’S CLAIM:**

**ACCS’s fees are neither excessive nor illegal.**

**REALITY:**

ACCS’s fees are well in excess of those charged by legitimate collection agencies. The diversion “class” fee is the big profit center for ACCS. It now charges up to \$170 for the class, whether the check writer attends class or not. Even if consumers have paid the amount of the check in full, either to the merchant directly or to ACCS, ACCS still aggressively insists upon payment of the class fee. Up until it felt the pressure of litigation within the last year or so, ACCS always added a \$10 bank charge, even when the merchant’s bank charges were \$1 or less.

ACCS is prohibited from charging the class fee without judicial supervision—a court must decide whether a fee is appropriate and must assess the individual’s ability to pay. Even assuming that criminal prosecution is a real possibility, conditioning the avoidance of prosecution on the payment of a set fee as high as what ACCS charges raises profound public policy problems and serious constitutional concerns.

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<sup>6</sup> *In re Byrd*, (2000) 256 B.R. 246

**WHAT THE 2006 SENATE COMMITTEE ANALYSIS SAID:**

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."

**WHAT THE COURTS HAVE SAID:**

Every appellate court to confront the question has held that such arrangements violate due process in the context of pre-trial diversion programs.<sup>7</sup> For example, a state 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.

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*ACCS Is Engaged in Debt Collection*

**PROPONENT'S CLAIM:**

**ACCS is engaged in law enforcement, not debt collection**

**REALITY:**

ACCS does not distinguish between those who have been unable to pay their debts and those who have been unwilling. A consumer who has not paid a dishonored check even after they have been given an "adequate opportunity" to resolve an honest mistake has violated no criminal law. In the United States, we do not put debtors in jail because they have not paid their debts. California has a more than adequate civil remedy for people whose checks are dishonored: They automatically owe a \$25 service charge and can owe treble damages if they still do not pay after being given proper notice. California Civil Code 1719.

A civil debt does not become a crime merely because the district attorney permits a private debt collector to send demand letters on district attorney letterhead demanding payment for that debt.

**WHAT THE COURTS HAVE SAID:**

Two federal appeals courts—the Ninth Circuit in *Del Campo v. ACCS* and Eleventh Circuit in *Rosario v. ACCS*—have both recognized that ACCS is a debt collector and that it is not immune from potential liability for unfair collection practices in federal court. ACCS has never succeeded in establishing that it is not a debt collector, despite numerous attempts. In Illinois, the state consumer-

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<sup>7</sup> See *Mueller v. State* (2005), 837 NE2d 198; *Moody v. State* (1998) 716 So.2d 562.

protection agency forced ACCS to register as a debt collector. In 2006, Congress made clear that the federal Fair Debt Collection Practices Act *does* cover companies like ACCS unless they meet a number of conditions, including having a prosecutor actually determine that there is probable cause to believe a crime has been committed. One of the purposes of AB 2606 is to distort probable cause into an automated checklist that ACCS programs into its computers

ACCS hires marketing staff to “market the Program to local merchants” and “art of the marketing pitch to merchants is that the program provides local merchants with a better financial result than other collection companies can offer.”

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*This Bill Would Interfere with Pending Consumer-Protection Litigation  
Challenging ACCS's Unfair Collection Practices*

**PROPONENT'S CLAIM:**

**This bill is not intended to legitimize ACCS's collection practices.**

**REALITY:**

One company, ACCS, dominates the check diversion field and is a defendant in several pending lawsuits. It has contracts with most of the California prosecutors who use a private company. It paid over \$1,000,000 in reported lobbying fees in a failed attempt to exempt itself from any federal liability. It is the moving force being the proposed amendment. The proposed changes specifically address issues that have come up in the litigation.

It is notable that no lawsuit has ever challenged the conduct of a district attorney's in-house program. No consumer group challenges the right of a district attorney to have an outside contractor conduct a diversion class. Consumers have nothing to fear if the a district attorney actually reviews evidence and makes a legitimate probable-cause determination as to whether there was intent to defraud and refers cases to diversion based on that review.

Rather, what consumer groups challenge is the activities of high-volume debt collector like ACCS that increase profits by bypassing district-attorney review. ACCS keeps for itself about 50 cents of every dollar it collects. That is not what the legislature intended in passing the check diversion statute, and it should not be tolerated now.

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*The U.S. Court of Appeals for the Ninth Circuit Held that ACCS Can Be Held Accountable in Federal Court if it Violates Basic Legal Norms Governing the Collection of Consumer Debts*

**PROPONENTS' CLAIM:**

**In holding that ACCS could be sued for abusive debt-collection practices, the Ninth Circuit made no findings of fact.**

**REALITY:**

This claim, like many others made by the bill's proponents, attacks a straw man. The Ninth Circuit had before it the collection demand letters that ACCS uses. Based only on a review of those demand letters and ACCS's contract, the Ninth Circuit characterized ACCS's operation of the program as "aggressive" and observed that it was akin to "debt collection rather than law enforcement." It is true that this decision was not a final decision that ACCS had violated federal law, but only a decision that ACCS may be held accountable for its actions. But that is all consumer groups insist upon – that check diversion programs be made to comply with the same basic consumer protections that apply to all debt collectors.

Every court that has addressed the issue has held that ACCS is a debt collector subject to the federal Fair Debt Collection Practices Act, and that it may be held accountable for its actions in court.

Last November, a unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit – the federal appeals court that covers Alabama, Georgia, and Florida – also concluded that ACCS could be held accountable for its actions in federal court. Notably, the Eleventh Circuit had before it a complete summary-judgment record concerning ACCS's practices, which are uniform nationwide. Based on that evidence, the court concluded that

- \* ACCS operates in competition with "other collection firms" and promises merchants that it can achieve better recovery rates by using the District Attorney Brand.
  - \* ACCS demands collection fees from consumers using threats of prosecution, even though no attorney in the prosecutor's office has actually reviewed the cases prior to those collection attempts.
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