



Releasing Your Rights by Cashing a Check

by Michael C. Loulakis and Jeffrey G. Gilmore

Virtually every business has been faced with the dilemma of receiving a customer's check for partial payment of a debt, only to realize that the check includes a notation stating that the amount constitutes "full and final" payment.

The party receiving such a check generally has two options: accepting and cashing the check, or returning the check to the debtor with a demand for full payment. Obviously, the best alternative would be to accept the check as partial payment and pursue the balance.

Most jurisdictions construe cashing such a check as a "full accord and satisfaction," which precludes additional claims or suits for the unpaid balance. In essence, the partial payment becomes a settlement offer, and, if it is accepted, it releases the debtor from any further obligation.

When faced with this situation, contractors must choose between waiving any further claims or returning the partial payment to the debtor. Unfortunately, returning the payment means relinquishing the cash in hand. Further, once the cash is relinquished, depending upon the financial strength of the debtor, recovering any sum whatsoever may depend upon the outcome of lengthy litigation and post-judgment collection efforts.

Depending upon the amount at stake,

tion 1-207 in a full-payment situation and allowed the creditor to seek additional claims against the debtor.

The specifics of the case are these: Horn Waterproofing was retained by Bushwick to repair a leaky roof. After completing the initial repair work, Horn determined that a new roof was necessary and submitted a bill for its initial services in the amount of \$1,241.

Bushwick disputed the amount and eventually sent Horn a check for \$500. On the reverse side of the check, Bushwick included the following:

This check is accepted in full payment, settlement, satisfaction, release and discharge of any and all claims and/or demands of whatsoever kind and nature.

Although Horn disagreed with the amount tendered, the company opted to cash the check and therefore printed the words "under protest" before depositing the check in its account. Horn then sued for the balance.

At trial, Bushwick moved for summary judgment on grounds of accord and satisfaction. However, both the trial court and the appellate court held that Horn had preserved the right to sue for the unpaid balance by printing the words "under protest."

held that Section 1-207 does *not* change the common-law doctrine of accord and satisfaction.

Whether the Horn Waterproofing precedent will be adopted in other jurisdictions is not clear. Assuming the check (or cover letter accompanying the check) clearly states that the amount is in "full payment," the law of accord and satisfaction will succeed if the amount is in dispute and the party cashing the check understands that cashing the check constitutes final payment.

With the exception of New York, Missouri, Alabama, Oregon, South Dakota, Florida and North Carolina, language of protest will be ineffective.

To avoid waiving their rights to collect unpaid amounts, therefore, contractors should be cautious when presented with a full-payment check. Unless the amount tendered is acceptable, creditors should be aware that cashing the check is likely to eliminate any further right of recovery. ■

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In most jurisdictions, cashing a contested 'final payment' check precludes claims or suits for the unpaid balance. In essence, the partial payment becomes a settlement offer. Accepting it can release the debtor from any further legal obligation.

therefore, electing to return the partial payment may be uneconomical when weighed against the cost of taking collection action.

The Legal Principle

The common law of "accord and satisfaction" in the context of full-payment checks is a widely accepted principle. One of the few emerging changes in this law, however, has been accomplished through a provision in the Uniform Commercial Code (the "Code"). The Code has been adopted in some form by every state.

Section 1-207 of the Code suggests that a creditor receiving a full-payment check can preserve the right to sue for the additional balance by writing the words "under protest" or "without prejudice" before endorsing the check.

Although this provision may appear to be the perfect antidote for a long-standing problem, the highest courts in most states have held that Section 1-207 does not change the common law of accord and satisfaction in the context of full-payment checks.

A Recent Case

Recently, in the case of *Horn Waterproofing v. Bushwick Iron and Steel Co., Inc.*, 66 N.Y.2d 321 (1985), the Court of Appeals of New York upheld the application of Sec-

Implications

The finding in this case appears extremely favorable to creditors, but it may not be as advantageous as it seems. Primarily, the broad rule eliminates an inexpensive method for resolving payment disputes. Lacking a straightforward means of tendering a "settlement proposal," similar disputes may be resolved only through litigation—and litigation, of course, generally entails greater expense to

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all parties involved as well as further strain on an already overcrowded court system.

Nevertheless, few jurisdictions have accepted the broad interpretation of Section 1-207 adopted by the New York court in the Horn Waterproofing case. In fact, several—including Alaska, Maine, Wisconsin and Wyoming—have expressly