

To Cash or Not To Cash?

by Michael Groves

Let's assume your company has just completed a remodeling project and is owed final payment of \$18,500. The owner intends, however, to withhold \$8,500, claiming that some of the work does not conform to spec and that certain change order work was too expensive. After arguing unsuccessfully, you finally threaten to lien the property if payment of the full amount of \$18,500 is not forthcoming. The owner subsequently sends you a check for \$10,000 with the following language typed on the back of the check above the endorsement line:

This check constitutes payment in full and endorsement hereof releases payer from all other claims by the payee.

If you cash the check, do you forfeit your right to collect the other \$8,500?

Accord and Satisfaction

The answer depends on the legal doctrine known as *accord and satisfaction*. An "accord" is an agreement to discharge an existing contractual duty; "satisfaction" is performance of the accord. If cashing the check creates an accord, then the creditor will not be entitled to any further payment from the debtor.

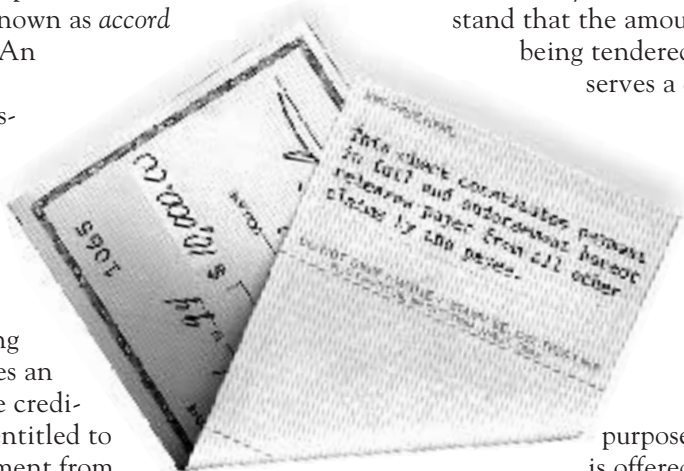
Since an accord is actually a new agreement between the parties, it requires the three basic elements of a contract: offer, acceptance, and consideration. An *offer* is a promise or commitment to do something or refrain from doing something in exchange for some *consideration*. In the hypothetical case described above, the owner is offering to discharge his contractual obligation to

the builder with a consideration of \$10,000.

Acceptance is an unequivocal assent to an offer. It can be express, but it can also be implied by conduct that reasonably indicates the offeree intended to accept. In the example, cashing the check might be sufficient to show implied acceptance of the offer.

Common law. Under common law, acceptance is strictly limited to the terms of the offer, and any attempt to alter those terms is considered a counteroffer that, by implication, rejects the original offer. Consequently, at common law, crossing out the payer's full payment language, or writing "under protest" or some other indication of nonacceptance when cashing the check, does not prevent an accord and satisfaction.

This may appear to be unfair to the creditor, unless you understand that the amount being tendered serves a dual



purpose. It is offered not

solely as payment of the amount in dispute, but also to induce the creditor to settle the dispute by waiving any additional claims he may have. The creditor cannot accept one part of the offer — the money — while rejecting the other part — the waiver of all claims to the remaining balance. Since it is contradictory to forfeit a claim while at the same time purporting to preserve it, courts simply assume under common law

that "what is said is overridden by what is done."

New rule. Passage of the Uniform Commercial Code (UCC), however, has altered this common law rule in some states. Section 1-207 of Article 1 of the UCC states:

A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

At first, it would seem that the UCC effectively eliminates the common law doctrine of accord and satisfaction when payment is made by check. But courts differ in how they apply the rules. The common law approach appeals to courts because settlement is an easy and inexpensive method of disposing of legal disputes that would otherwise clog an already overburdened court system. On the other hand, some courts don't like the perceived fundamental unfairness of allowing a debtor to force a creditor to choose between accepting less than he genuinely believes he is legally owed and turning down the money so he can take a chance on collecting the full amount of the debt.

To date, the highest courts in Connecticut, Colorado, Maine, Nebraska, Utah, Wisconsin, and Wyoming have ruled that UCC Section 1-207 does not change the doctrine of accord and satisfaction. In those states, if you accept the check, you also release your claim on the owner for additional amounts owed. Similar rulings have also been made on less clear-cut cases in Alaska and Virginia.

On the other hand, the highest courts of New York, Ohio, South Dakota, Oregon, and West Virginia have ruled that UCC Section 1-207 preempts the accord and satisfaction doctrine. In those states, you can accept a full payment check and still reserve your right to assert a claim for the additional amount owed by the owner. A statute in California has the same effect.

Payee Beware

In most states, cashing the check will release the owner from any further obligation under that agreement and will forfeit your right to assert a

claim for the balance owed. In some states, however, you can accept the check, and still assert a claim for the remaining amount owed if you explicitly reserve the right to do so. So what should you do if an owner offers you as full payment a check for an amount that is less than what is owed? Should you take the money and cut your losses, or hold out for the full amount (with no guarantee you'll get it)?

First, do not hold the check too long. In some states, mere failure to promptly return a check may constitute implied acceptance, creating an accord and satisfaction. Such implied acceptance will bar you from asserting any further claim for the balance owed. This is true even in those states that otherwise allow you to preserve your claim, because you will not have explicitly reserved any rights to do so. What is considered "prompt" depends on the facts of the case and differs from state to state. Consult an attorney early to plan a course of action.

Second, some courts have held that there must be "unmistakable communication" to the creditor that acceptance will completely satisfy the debtor's obligation. Words such as "balance," "final payment," or "payment in full," written by the owner on the back of the check, may not be sufficient to create an accord. Have your attorney review the language the owner has used.

Finally, even in states that allow you to cash a check and reserve your rights to obtain the remaining amounts owed, you must be careful to satisfy statutory requirements. Some courts have indicated that merely scratching out the accord and satisfaction language on the check is not sufficiently explicit and unambiguous to reserve your rights. To be prudent, you must indicate that by negotiating the check, you do not intend to waive — and expressly reserve — the right to assert any and all additional claims. Again, consult an attorney before crossing out or adding language to the check. ■

Michael Groves received his J.D. degree from Tulane University School of Law in 1990. He practices construction litigation in Atlanta, Ga.