



Can I Just Cross Out The Words "Payment In Full"?

By Gail S. Kelley, P.E.

Disputes over payment are seldom pleasant. They can be particularly unpleasant when a client claims that the work was in some way deficient or less than what was required by its contract, and refuses to pay the full amount of the contract. If the amount in question is large and the claim is unjustified, it may be worth taking legal action. Unless the client can prove that the work was less than what was contracted for, refusal to pay the contract price constitutes a material breach of contract.

Negotiating a Reduction in the Contract Amount

If the amount in question is not large, it may make more sense to negotiate a reduction in the contract price. The legal term for this is *accord and satisfaction*. The agreement on the amount owed is the accord; payment of this amount is the satisfaction. The legal basis for the accord is that because the client allegedly did not receive what it bargained for, it does not actually owe the contract amount. The amount owed is thus considered *unliquidated*, which means that it cannot be determined from the contract.

The doctrine of accord and satisfaction evolved from common law principles that encourage parties to settle a disputed debt without judicial intervention. The client must believe, in good faith, that the work done was in some way less than what was contracted for; it cannot simply refuse to pay in order to reduce the contract amount. The client is considered a debtor since it owes some amount of money for the work done. The party that did the work is considered a creditor.

The accord is a second contract between the parties; as such, it should specify not only the amount that will be paid, but also when the payment will be made, and any other relevant payment terms. The accord does not replace the original contract, but the original contract is suspended until the payment is made. When the payment is made, both the original contract and the accord are discharged. If the payment is not made, there is no satisfaction and the creditor can take legal action based on either the original contract or the accord.



Receiving a Check for Less than the Contract Amount

Sometimes, there is no negotiation on the amount of the reduction, the client simply sends a check for less than the amount of the contract and writes a notation such as "payment in full" on the face of the check or the accompanying voucher. The creditor's rights in such a situation require a little more discussion.

Historically, this was simply considered an accord and satisfaction. As long as the check or voucher made it clear that the check was intended to be full payment, the creditor, by cashing the check, was deemed to have agreed to the amount. The creditor could not avoid the accord by crossing out the payment-in-full language. Similarly, it could not avoid the accord by adding "Cashed under protest" or "Cashed with reservation of rights" to its endorsement. In some cases, the creditor may have been forced to cash the check in order to pay its own bills. Nevertheless, courts generally held that the creditor had accepted the accord, even in cases of extreme financial hardship. The only way the creditor could avoid the accord was by either returning or destroying the check.

Changes in the Uniform Commercial Code

In the 1970s, however, a new version of the Uniform Commercial Code (UCC) was published. The UCC is a model code

whose goal is to harmonize the law related to sales and financial transactions between the different states. Like other model codes such as the International Building Code, the UCC does not become the law in any state until it is adopted by that state. A state may adopt all or part of a model code, or may adopt it with amendments that modify or add sections.

The new version of the UCC included a section (§1-207) which stated that if a party accepted performance with an explicit reservation of rights, it did not prejudice the rights reserved. The new version of the UCC also included a section that allowed a creditor who had cashed a full payment check to "undo" the satisfaction by returning the money within 90 days. Although the UCC strictly applies only to the sale of goods, several states have extended its provisions to transactions involving services. In addition, some states have held that UCC provisions apply to services when payment is by check, because such a payment would fall within the UCC provisions on Negotiable Instruments.

After adoption of the new version of the UCC, courts in several states held that if the recipient of a full payment check made it clear that the check was being cashed under protest, the recipient did not lose its rights to sue for the balance owed. Words such as "without prejudice" or "under protest" (so-called words of protest) on the back of the check were sufficient to preserve the recipient's rights.

Return to the Common Law Accord and Satisfaction

These rulings were widely challenged, though, and in all states except New York, were subsequently overturned on appeal. By and large, the appeals courts held that UCC §1-207 was not meant to supersede the common law accord and satisfaction. UCC §1-207 was subsequently renumbered to §1-308 and revised to make it clear that it did not apply to an accord and satisfaction.

Reservation of rights under the UCC is now limited to situations where a party agrees to accept the other party's performance, even though the performance is not in accordance with contractual requirements. As an example, a party might agree to accept delivery of defective items because they could not obtain replacement items in time. If the party made it clear that they were reserving their rights, they would probably be entitled to an adjustment in the contract price, unless the contract explicitly stated that acceptance waived all rights to an adjustment. The amount of the adjustment would be based on the party's "damages" – in other words, any costs the party had incurred because the items were defective.



Current Holdings on Accord and Satisfaction

Although there have not been any reported cases recently, New York courts apparently still allow the recipient of a full payment check to reserve its rights even though it has cashed the check. In addition, a few states allow a creditor to undo a satisfaction by returning whatever money was received within 90 days. Nevertheless, public policy supports certainty in business transactions; if a creditor cashes a check marked "payment in full," courts in most states will hold that the entire debt is discharged. One exception is if the debtor intentionally misrepresented its entitlement

to a reduction in the amount of its debt. Intentional misrepresentation is fraud; any time a party is induced to enter into a contract by fraud, the contract (in this case the accord) can be voided, even if it has already been satisfied. ■

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