POINT OF VIEW

BY DAVID G. ANDERSON

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New York's Law on Full Payment Checks: Has It Changed?

After completing your construction work, you receive substantial back charges – which you contest. Two months later, you receive a check for $40,000, with the words "payment in full" on the front. Your unpaid retainage is $100,000. You need the money. Should you cash the check?

For the past 30 years, the answer has been yes. You could cash this check "under protest" and then bring legal action to recover the unpaid $60,000. The words "under protest" (or similar language) printed above your endorsement preserved your rights to the unpaid balance.

Today, there is uncertainty. A recent article in the New York State Bar Association *Journal* (*Journal*) asserts that cashing a check "under protest" may no longer preserve one's rights to the unpaid balance.[1] Because, argues the *Journal* article, the December 17, 2014, revisions to New York's Uniform Commercial Code (Code) make it "likely" (except in a limited group of cases) that cashing the check will result in an accord and satisfaction of the dispute, even if the check is cashed "under protest."

Background

At common law, the effect of cashing a check marked "payment in full" was an accord and satisfaction in the amount of the check. The check was deemed, in effect, a settlement offer, and cashing the check deemed acceptance of that offer. In 1985, there was a nationwide debate as to whether the Code (specifically Article 1) had changed this common law rule. The N.Y. Court of Appeals, in *Horn Waterproofing Corp. v. Bushwick Iron & Steel*,[2] adopted the minority position and held that Article 1 of the Code permits one to cash a full payment check "under protest" without releasing the remaining debt.

The December 17, 2014 Code Revisions

The December 17, 2014 Code revisions, among other things, added § 102, which states that Article 1 "applies to a transaction to the extent that it is governed by another article of [the Code]."[3] Because service contracts (of which construction contracts are a subset) are not governed by another article of the Code, the *Journal* article reasons that Article 1 no longer applies to such contracts.[4] If Article 1 no longer applies, then its provisions, which allow one to cash a full payment check "under protest," no longer apply. Thus, if our construction contractor cashed the owner's $40,000 check "under protest," a court might ignore that language and find that the cashing of the check resulted in a settlement of the contractor's claim.

What Is the Law Today on Full Payment Checks?

Did those revisions reverse New York's long-standing law on payment in full checks? We won't know for certain until the courts address this issue. Although it is conceivable a court could interpret these Code revisions as reversing the law, it seems far more likely they will find no such thing, for the following reasons.

Code § 1-102 Does Not Change Existing New York Law

As noted, newly added Code § 1-102 states: "[Article 1] applies to a transaction *to the extent that it is governed by another article of this act*."[5] The *Journal* article reasons that because service contracts are not governed by another article of the Code, one cannot cash a full payment check "under protest."[6]

The article's conclusion – that the law on full payment checks has "likely" changed because of § 1-102 – is based on a misidentification of the transaction under review. The *Journal* article focuses on the "underlying" transaction (the service contract).[7] But the Court of Appeals, in *Horn Waterproofing Corp.*,[8] focused on the "settlement" transaction, deciding it was immaterial that the underlying transaction (the service contract) was not governed by the Code. In the Court's words:

> Regardless of whether the underlying transaction between the parties was a contract for the performance of services rather than for the sale of goods, defendant's tender of a check to plaintiff brought the attempted full payment or satisfaction of the underlying obligation within the scope of article 3, thereby rendering it a "Code-covered" transaction to which the provisions of [Article 1] are applicable.[9]

In short, under the Court's precedent, the test is whether the transaction – not the *underlying* transaction – is Code-covered. Thus the Court of Appeals interpreted Article 1 of the Code as allowing one to cash a check marked payment in full "under protest" and still recover the unpaid balance. And likewise, new § 1-102 looks only to the transaction itself. It states: "This article applies *to a transaction* to the extent that *it* is governed by

another article of this act."[10] The word "underlying" appears nowhere.

The Legislative History Does Not Evidence That New York Wanted to Change Its Law on Full Payment Checks

When the Legislature intends to reverse existing law, it almost always (1) identifies the change and (2) discusses why the change is needed and the factors it considered in making the change. This is particularly true when a change is commercially significant. The legislative history accompanying the December 17, 2014 Code revisions does not mention any change to the existing law on full payment checks.[11] The overriding need for commercial certainty and the absence of any notice to the business community substantially increase the likelihood of a court finding that the Legislature both intended to, and did, preserve New York's law on full payment checks.

The Legislature Took Steps to Avoid Changing New York's Law on Full Payment Checks

The December 17, 2014 Code revisions were intended to modernize New York's law – make it consistent with the model code. The model code, however, takes the opposite position from New York on full payment checks. The model code clarifies that its acceptance "under protest" provisions do *not* apply to an accord and satisfaction (full payment checks).[12] Significantly, New York did not enact this clarifying language. Instead, the clarifying language was removed. The *Journal* article notes this removal but contends that in adopting § 1-102, the Legislature may inadvertently have changed the law on full payment checks.[13]

It is unlikely a court would agree. In interpreting statutes, courts seek to discern the Legislature's intent. Enactment of a law that deliberately omits certain language strongly evidences a legislative intent that the omitted language not be given effect. For this reason, it is not surprising that other legal commentators have concluded that the Legislature left New York's law on full payment checks unchanged when it did not adopt the model code's clarification.[14]

It thus appears highly unlikely that the courts will find that the December 17, 2014 Code revisions reversed (or had any effect on) the New York law on full payment checks.

But Another Factor Is at Play

A change in New York's law on full payment checks is probably overdue. As the *Journal* article points out, only in New York can one cash a check offered in full settlement of a dispute and still be able to sue for the unpaid balance.[15] In the other 49 states, the consequences of cashing a check marked "payment in full" even under protest is a settlement (accord and satisfaction) in the amount of the check. Why should one be able to accept a settlement offer (made by check) and then bring legal action to recover the remaining amount? In 1985, the N.Y. Court of Appeals adopted what was then the minority position on this issue, in large part because the Court believed that to be the "fairer" position.[16] Other states disagreed and today only New York clings to the minority view. Independent of which position is better, uniformity of the law is an important consideration. To this end, New York's Code states: "This act must be liberally construed and applied to promote its underlying purposes and policies which are . . . (3) to make uniform the law among the various jurisdictions."[17]

But even if a reversal in New York's existing law is long overdue, it should come from the Legislature and not the courts.

Conclusion

Returning to the issue of whether you should cash the check. You need the money, but if you cash the check under protest and bring legal action to recover the balance, the debtor will assert (among other defenses) that by cashing the check you settled the $100,000 dispute for $40,000. The debtor will contend that the law on payment in full checks changed on December 17, 2014, with enactment of the revised New York Code and cite the *Journal* article for support. We recommend that before cashing the check you obtain legal advice.

In the meantime, let's hope that New York quickly passes legislation ending the uncertainty, so the business community will once again know for certain the consequences of cashing a full payment check. ■

1. Sandra J. Mullings, *The Curious Case of the Full Payment Check*, N.Y. St. B.J. (May 2015), 44–48.
2. 66 N.Y.2d 321 (1985).
3. N.Y. Uniform Commercial Code § 102 (UCC).
4. Mullings, *supra* note 1, at 46–47.
5. UCC § 1-102 (emphasis added).
6. Mullings, *supra* note 1, at 47.
7. *Id*.
8. 66 N.Y.2d at 327–30.
9. *Id.* at 332.
10. UCC § 1-102.
11. A9933/S7816 signed by Governor Cuomo on Dec. 17, 2014.
12. Revised UCC §§ 1-207, 3-311 (1990).
13. Mullings, *supra*, note 1 at 47.
14. *See, e.g.*, Barbara M. Goodstein, *The New York UCC Comes of Age: Part II*, N.Y.L.J. Corp. Update, Vol. 253, No. 24 (Feb 5, 2015) ("In addition, the Act adopted only part of revised § 1-308 (performance or acceptance and reservation of rights) *so as to preserve existing New York law on accord and satisfaction* – permitting an express reservation of rights to avoid an accord and satisfaction otherwise effected by a payment . . . ") (emphasis added); G. Ray Warner, *New York Amends Its UCC, but Problems Remain*, Greenberg Traurig Alert, Feb 2015 ("New York also maintained its non-uniform language for section 1-308 'reservation of rights' provision, *thus continuing the existing law of accord and satisfaction*.") (emphasis added); Janet M. Nadile, *Modernization of New York's Uniform Commercial Code*, The American Law Inst., CLE Webinar (Feb. 11, 2015), slide 4 ("Revised 1-308 Performance under Reservation of Rights – NY omitted subsection (b) which in the official text provides that this section does not apply to accord and satisfaction. *This preserves NY's non-uniform approach to accord and satisfaction* as set forth in *Horn Waterproofing Corp. v. Bushwick Iron & Steel* . . .") (emphasis added); Matthew F. Furlong, et al., *2014 Changes to the New York Uniform Commercial Code*, Lawflash Morgan, Lewis & Bockius, LLP Jan. 6, 2015 ("Because the bill does not include adoption of the 1990 revisions to Articles 3 and 4, the bill omits the uniform language in § 1-308(b) that a reservation of rights does not apply to an accord and satisfaction.").
15. Mullings, *supra*, note 1 at 46.
16. *Horn Waterproofing*, 66 N.Y.2d at 326–27.
17. UCC § 1-103(a).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I'm a commercial litigator in New York. I recently was asked to mediate a commercial contract case, which is pending in the Commercial Division in the Supreme Court of New York, for one of my clients who is the defendant in the action. The morning right before commencement of the mediation, my client informed me that his business has been doing "lousy" and that even if the parties were to reach a settlement, he nevertheless intends to file for bankruptcy before the settlement payment becomes due. During that conversation, he emphasized that this information is confidential and cannot be disclosed to anyone. During the mediation, plaintiff's counsel communicated a final demand to my client, which my client indicated he was willing to accept. I did not disclose the information that my client shared with me either to the mediator or plaintiff's counsel.

My question to the Forum: Did I have an obligation to disclose my client's confidences under the circumstances? What should I have done? Is there anything I should do at this time?

Sincerely,

Concerned Counsel

Dear Concerned Counsel:

Your letter raises a very important and often difficult question. When and under what circumstances, if any, does a lawyer have an obligation to disclose confidential information learned from the client during the course of the lawyer's representation of the client?

It is a fundamental principle of ethics that a lawyer is generally prohibited, with some exceptions, from revealing a client's confidential information. *See* Rule 1.6 of the New York Rules of Professional Conduct (NYRPC). But, that is not the end of the road. The NYRPC also prohibit lawyers from making false statements to a third person, assisting a client in conduct that the lawyer knows is illegal or fraudulent, or from simply engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* NYRPC Rules 4.1(a), 1.2(d), and 8.4(c). Indeed, while the public interest is generally best served by strict compliance with the rule requiring lawyers to preserve the confidentiality of information relating to their representation of clients, the confidentiality rule is subject to limited exceptions that, *inter alia*, are intended to deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of the judicial process. *See* Rule 1.6 [Comment 6].

Does your predicament place you in one of the limited exceptions to the confidentiality rule? Based on what you have described, we believe it does even though the mediation is by its very nature a confidential process.

Let us take a look at which Rules of Professional Conduct are implicated in negotiations and specifically the mediation context. As an initial matter, we note that the negotiation process creates an inherent tension for lawyers since "[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." ABA Model Rules of Professional Conduct, Preamble (1995). Indeed, the mediation process often presents ethical dilemmas since the art of negotiation frequently involves some level of misrepresentations, "posturing" and "puffery," particularly concerning each side's minimum settlement points as well as the exaggeration or emphasis of the strengths of one's position, and the minimization or de-emphasis of the weaknesses of one's position. *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 439 (Apr. 12, 2006) (ABA, Formal Op.). Certain types of statements during negotiations, such as estimates of price or value placed on the subject of a transaction, or a party's intentions as to an acceptable settlement of a claim, are generally accepted conventions in negotiation and are ordinarily not deemed to be false statements of material fact, and therefore are not considered to run afoul of the ethical rules. *See* Rule 4.1 [Comment 2]. Additionally, it is recognized that the duty of zealous representation generally prohibits a lawyer in negotiations from voluntarily disclosing weaknesses in his or her client's case. *See* ABA, Formal Op. 375 (1993).

The flip side to those general principles is that the ethical rules governing lawyer truthfulness and the ethical prohibitions against lawyer misrepresentations apply in all environments, including the mediation context. *See* ABA, Formal Op. 439, at 8.

Specifically, Rule 4.1 of the NYRPC, Truthfulness in Statements to Others, has been found to govern a lawyer's conduct when negotiating either inside or outside of the mediation context. It provides "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Pursuant to this rule, a lawyer is required to be truthful when dealing with others on a client's behalf and is not permitted to make misrepresentations to another – mean-

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