

## **REVISITING THE DEFENSIVE DOCTRINE OF ACCORD AND SATISFACTION IN THE CONTEXT OF RESTRICTIVE ENDORSEMENTS**

Generally, a contract is given the effect intended by the contracting parties. However, in some situations that intention may be altered by the subsequent course and conduct of one or more of the parties to the contract.

One such instance involves what is referred to as an accord and satisfaction. An accord and satisfaction exists “when parties agree to discharge an existing obligation in a manner other than in accordance with the terms of their original contract.” *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Properties, L.C.*, 323 S.W.3d 322, 335 (Tex. App.–Beaumont 2010) (citations omitted). An accord and satisfaction creates a new contract between the parties, “either express or implied, where parties agree that the existing obligation is released by means of a lesser payment, which is tendered and accepted.” *Id.* To claim this defense, there must be an agreement between the parties that “the lesser amount paid was in full satisfaction of the entire claim.” *Id.*

To establish the defense of accord and satisfaction, there must be (1) evidence of a dispute between the parties about what is expected and (2) evidence establishing that the parties specifically and intentionally agreed to discharge the existing obligation by means of a lesser payment tendered and accepted. *See Smith v. Cmty. Nat. Bank*, 344 S.W.3d 561, 574 (Tex. App.–Eastland 2011); *see also Case Funding Network, L.P. v. Anglo-Dutch Petroleum Int'l, Inc.*, 264 S.W.3d 38, 50 (Tex. App.–Houston [1st Dist.], 2007) (noting the accord and satisfaction doctrine requires that there be a legitimate dispute between the parties).

Furthermore, there must be clear communication to the creditor that the tender “is made on the condition that acceptance will constitute satisfaction of the underlying obligation.” *See Smith*, 344 S.W.3d at 574 (noting there was no evidence creditor and debtor agreed to discharge debtors obligation). Thus, the condition accompanying a tender of payment on a debt “must be so clear, full, and explicit that it is not susceptible of any other interpretation.” *Id.* Whether a tender of payment is deemed conditional is generally a question of fact. *See Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 618 (Tex. App.–Dallas 2010).

Further, with respect to a payment made by check, the mere acceptance of a check bearing a restrictive endorsement – e.g., “Payment in Full” or “In Full Release” - without more, will not ordinarily constitute accord and satisfaction. *See Cleveland Reg'l Med. Ctr.*, 323 S.W.3d at 335. There must be mutual assent between the parties that the conditional tender will form a new agreement and satisfy the original obligation. *Id.*; *see also Collins v. Moroch*, 339 S.W.3d 159, 164-65 (Tex. App.–Dallas 2011) (rejecting accord and satisfaction defense because parties did not agree the existing balance would be released by a lesser payment tendered and accepted); *Williams v. Colthurst*, 253 S.W.3d 353, 359 (Tex. App.–Eastland 2008) (noting an accord and satisfaction agreement only occurs when the parties mutually assent to it).

When a check listing certain conditions is tendered to a creditor, a new contract may be created between the parties when the check is cashed or deposited. *See Khoury v. Bekins Moving & Storage Co.*, No. 05-98-00619, 2000 WL 1073607, at \*2 (Tex. App.–Dallas July 24, 2000); *see also Case Funding Network, L.P.*, 264 S.W.3d at 49-51 (Tex. App.–Houston [1st Dist.], 2007) (noting that the letters accompanying the checks stated that if creditors deposited the check, it

would release debtors from liability and that an accord and satisfaction would occur). Thus, when the conditional tender is cashed or deposited, the affirmative defense of accord and satisfaction may arise. If, however, the creditor does not accept the conditions accompanying the tender, the creditor still has the option to repudiate the transaction. The only sure fire way of avoiding accord and satisfaction is for the creditor to repudiate the transaction by returning the instrument. Simply striking out the debtor's conditions on the check or inserting a provision on the check that it is accepted as a partial payment may not be sufficient to avoid the defense. *See Khoury*, 2000 WL 1073607, at \*2; *see also Metromarketing Servs., Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 197 (Tex. App.–Houston [1st Dist.], 2000) (“To repudiate a transaction that purports to fully satisfy a claim, a creditor must return the tendered draft.”); *Indiana Lumbermen's Mut. Ins. Co. v. State*, 1 S.W.3d 264, 267 (Tex. App.–Fort Worth 1999) (explaining that to avoid an accord and satisfaction the state was required to return the checks without cashing them).

Recently, a Texas court held that the accord and satisfaction doctrine may still apply even in the absence of a conditional notation on the check itself. For example, in *Custom Transit, L.P. v. Flatrolled Steel, Inc.*, 375 S.W.3d 337, 347-48 (Tex. App. 2012), *reh'g overruled* (Aug. 29, 2012), *review denied* (Nov. 22, 2013), the creditor accepted and cashed a check for less than the totals specified in the creditors invoices. *Id.* at 347. The check did not contain a notation stating that the check fully satisfied the specified debt. *Id.* There was evidence, however, that the creditor and debtor had entered into an oral agreement, whereby, the creditor would accept lesser payments as full satisfaction of the amounts owed to the creditor. *Id.* 347-48. The court explained that while generally tender without more did not establish accord and satisfaction; “more” existed in this case even in the absence of a notation on the checks themselves. *Id.* The court held there was enough evidence on the record demonstrating that the parties orally agreed to the discharge of the debtors existing obligations. *Id.* at 348.

In summary, mere acceptance of a check for a lesser amount or with notations that it is being tendered for a lesser amount in full satisfaction of the debt may (or may not) under the specific factual circumstances constitute, when accepted, an accord and satisfaction. Care should be taken that the intentions of the parties with respect to the transaction are understood. Anything other than what was intended should be addressed immediately for what it is, i.e., an unintended alternation of the material terms negotiated between the parties. Be careful out there.