

# Contracts BULLETIN

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## Bulletin #83, Before You Cash That Check . . . (February 1, 2005)

In the construction business, it seems a relief to get *any* payment, even a partial payment. For subcontractors, the risk of nonpayment seems even greater than the risk for general contractors. Subcontractors are often concerned about whether the general contractor will get paid and whether the general contractor will, in turn, pay the subcontractor. But don't be too quick to cash that check when it finally arrives or you may find yourself without a remedy to recover *all* amounts to which you are entitled.

Imagine that you have been hired by a general contractor to install an HVAC system. In response to the invoice, the general contractor refuses to pay you for the full amount of the contract, claiming your work was deficient. The general contractor provides you with a check for a portion of the invoiced amount that says "paid in full," "final payment," or contains similar language. Happy to receive any payment, you ignore or miss the notation and cash the check. You assume you can cash the check and sue the general contractor for the balance due. Unfortunately, in such circumstances, you may have unwittingly extinguished any right you once had to pursue a claim against the general contractor for the remainder of the money. This situation is legally referred to as "an accord and satisfaction" and is the law in virtually every jurisdiction in the United States.

*(It is important to keep in mind that this Contracts Bulletin is only a general overview of the law in this area. Because laws in individual states may vary and the facts and circumstances of each case will determine whether an accord and satisfaction exists, it is recommended that you seek competent legal advice before making the decision about how to proceed when you are faced with the situation outlined in this article.)*

### What is an "Accord and Satisfaction?"

An accord and satisfaction is essentially a settlement of a disputed claim. By including language, such as "paid in full" or "final payment" on a check or in an accompanying letter, the general contractor is making an offer to settle a dispute for a specific amount of money. By cashing the check, the subcontractor is accepting the offer. The accord and satisfaction creates a new agreement between the parties and makes the original agreement unenforceable.

The doctrine of accord and satisfaction has been formalized by a statute that is known as the Uniform Commercial Code (UCC). (The Uniform Commercial Code is a standard set of laws that were drafted by a national committee to govern commercial transactions and have been adopted in most states.) Generally, to demonstrate there is an accord and satisfaction under the UCC, the general contractor must prove the following:

1. There is a “bona fide” dispute between the general contractor and the subcontractor. This means there must be a genuine dispute between the parties regarding how much money is still owed. As a general rule, if the parties do not dispute how much money remains due under the contract, there can be no accord and satisfaction.
2. The general contractor tenders a check as a good faith offer to pay the claim in full. In other words, the general contractor’s offer must be made in good faith and must be made with the intent of fully satisfying the dispute between the parties. (Again, the “dispute” could relate to the quality of your work.)
3. The check or accompanying written communication indicates the dispute is “paid in full” or other equivalent language. The UCC requires that such a statement be “conspicuous” although the statutes often do not contain specific requirements regarding lettering size or color.
4. The subcontractor cashes the check.

A general contractor can successfully prevent a subcontractor from receiving any additional money if the general contractor can prove each of the four factors listed above.

Once again, it is important to remember that laws may vary from jurisdiction to jurisdiction and it is recommended that you seek legal counsel. What this means is in some jurisdictions you may be able to cash the check. So, if you see “paid in full” on the back of a check for less than the full amount – call your lawyer. You might be able to cash the check without waiving your claim.

### **What is a Subcontractor to Do?**

So what’s a subcontractor to do? A subcontractor is faced with a dilemma when it receives a check for partial payment purporting to be final payment on the project. The subcontractor can either accept the partial payment, thereby, waiving its right to the remainder but being assured of receiving some money, or the subcontractor can refuse the check in the hope of eventually recovering the full amount. The subcontractor’s dilemma is increased by the fact that, if the subcontractor does not accept the amount tendered, it will likely be forced to sue the general contractor to recover the full amount due and will likely incur significant costs to do so.

### **Gelles Case**

Courts have consistently found that subcontractors, who cash such a check or hold the check for an unreasonably long period of time, have accepted the check in settlement of the dispute and have entered into an accord and satisfaction with the general contractor.

In 2002, a court in Virginia confirmed this general rule. Gelles agreed to provide brick laying work for JSI’s construction project. Gelles & Sons General Contracting Inc. v. Jeffrey Stack, Inc., et. al., Record No. 12319 (Va. 2002). Gelles and JSI disputed the final amount due for the project. JSI claimed it was entitled to adjustments for work and materials it provided to properly complete the work. Gelles and JSI exchanged correspondence regarding amounts that each believed was still owed. Ultimately, JSI sent Gelles a letter, which included the following statement in the final paragraph:

*JSI Paving and Construction stands by its final amounts as stated on the latest correspondence dated December 8, 2000. Enclosed, please find a check in the amount of \$13,580.00 representing final payment on the contract.*

Gelles cashed the check and filed a lawsuit against JSI. JSI claimed that there was an accord and satisfaction and that Gelles’ lawsuit should be dismissed. Gelles claimed that the statement in the letter was not conspicuous or clear.

The court agreed with JSI. The court considered whether a reasonable person would have understood that the check was being tendered as full satisfaction of Gelles' claim against JSI. The court found that "a reasonable person could not have considered the language of the December 8 and 13 letters 'was anything other than' an expression of JSI's intent that the check and letter proffered on December 13 was, 'in effect, a drop-dead letter that says, 'This is it. This is what we're going to pay you.'" Because Gelles cashed the check, the court found there was an accord and satisfaction and dismissed Gelles' lawsuit.

### OMNI Case

Courts have further found that a subcontractor cannot avoid relinquishment of its claims by altering or crossing out the language on the check or by voicing an objection to the language prior to cashing the check.

In 2000, OMNI Alarm Systems attempted such a modification on a check tendered by MCI Electric Company. Omni Alarm Systems, Inc. v. MCI Electric Company, Inc., 2002 WL 31431429 (Va. Cir. Ct. 2002). MCI and OMNI were parties to an agreement pursuant to which OMNI agreed to install camera and security devices. The agreement between OMNI and MCI omitted many material provisions, which ultimately led to a dispute between them regarding amounts due under the agreement. OMNI provided MCI with an invoice for approximately \$40,000. In response, MCI sent OMNI a check for approximately \$17,500. The check contained the notation, "in full," on the face of the check. OMNI crossed out the notation and beside it wrote "amount in dispute" before cashing the check. OMNI then sued MCI for the remaining invoiced amounts due. MCI argued that because OMNI cashed its check, there was an accord and satisfaction and OMNI could not recover any additional money. The court agreed with MCI and ruled that by cashing the check, OMNI was precluded from pursuing its claims any further. The court noted:

*The result is the same if the seller adds a notation to the check indicating that the check is accepted under protest or in only partial satisfaction of the claim. . . the seller can't accept the check and refuse to be bound by the condition.*

The court found that OMNI knew MCI was offering the amount as a final settlement of the claim and could not avoid such a result simply by altering the language on the check.

### Precision Drywall Case

Precision Drywall took a different approach in an attempt to preserve its right to recover full payment. Precision Drywall & Painting, Inc. v. Woodrow Wilson Construction Co., Inc., 843 So.2d 1286 (La. Ct. App. 2003). Pursuant to its contract with Woodrow Wilson, Precision provided drywall and painting for Woodrow's construction project. Woodrow claimed that it experienced numerous problems with Precision's work and assessed backcharges against Precision. Woodrow provided Precision with an itemized list of backcharges and a final payment. The back of the check was inscribed with the following: "Acceptance of this check represents full and final payment for all materials and labor provided for the Dupre Library project, in Lafayette, Louisiana." Precision's attorney sent Woodrow a letter indicating Precision was rejecting the final payment and offering to settle with Woodrow. Woodrow did not accept the settlement offer and Precision, thereafter, cashed the check and filed a lawsuit against Woodrow for the remainder of the money.

Precision claimed that it did not consent to the new contract, i.e., the accord and satisfaction, which is evidenced by the fact that Precision sent a letter to Woodrow rejecting the check as final payment. However, all that is needed to show consent is knowledge that the check is tendered as final payment and acceptance of the check. Here, although Precision sent a letter indicating that it rejected the check, it ultimately accepted the check by cashing it. The court found that Precision could not both object to the check as final payment and cash the money. Precision was barred from pursuing the remaining amounts due under the contract.

## Options

So you may be wondering what your options are when you receive a check for partial payment. Unfortunately, in this situation, you are not left with many choices. You can accept the check and forego any opportunity to collect any remaining amounts due under the contract. (Some jurisdictions allow you to return the money within 90 days if you change your mind after you cash the check.) If you want to preserve your right to collect all the money you are due, you can return the check to the general contractor and negotiate a different settlement or bring a lawsuit for the full contract price. No matter what decision you ultimately arrive at, don't take too long getting there. In some jurisdictions, you will be deemed to have accepted the offer if you hold the check for an unreasonably long period of time.

## Conclusion

The *Contracts Bulletins'* mantra – carefully read contracts applies equally in this situation. If you receive partial payment on a project, carefully look at the check and the accompanying communication to determine whether it is offered as final payment on the project. If so, you must take appropriate steps (including contacting your lawyer) to preserve your rights and avoid unwittingly foregoing your claim.

*SMACNA wants the Contracts Bulletins to serve our members. Your feedback or topic suggestions are welcomed by contacting Steve Yoch (e-mail: [syoch@felhaber.com](mailto:syoch@felhaber.com); telephone 651 312 6040) or Tom Soles, SMACNA's Executive Director – Market Sectors, (e-mail: [tsoles@smacna.org](mailto:tsoles@smacna.org); telephone: 703 803 2988).*

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Sheet Metal and Air Conditioning Contractors' National Association  
4201 Lafayette Center Drive Chantilly, Virginia 20151-1209  
Tel (703) 803-2980 Fax (703) 803-3732 [info@smacna.org](mailto:info@smacna.org)



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