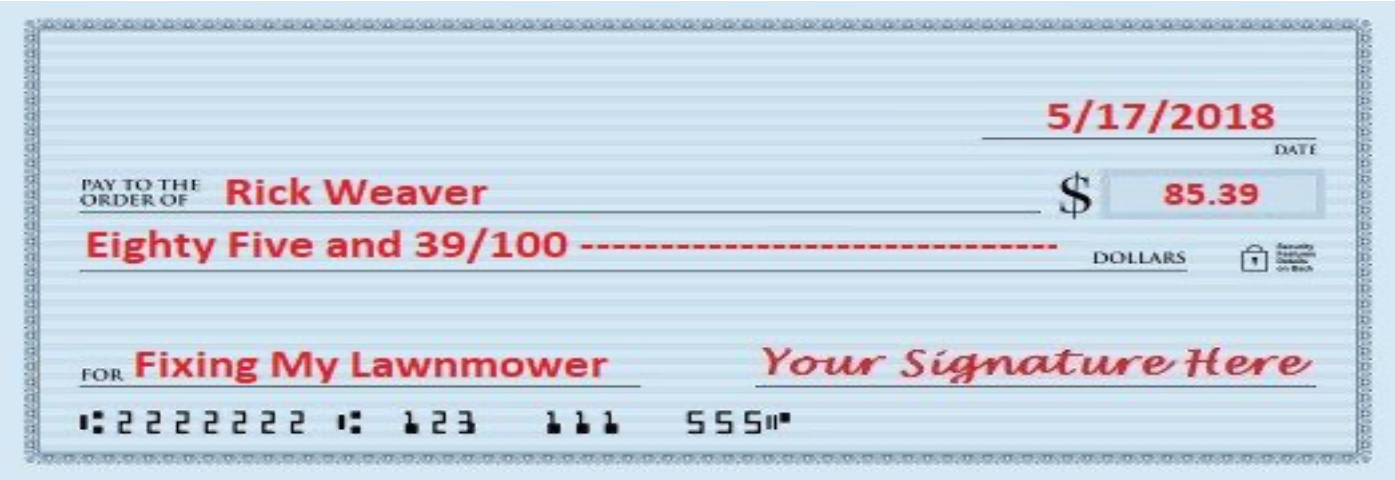
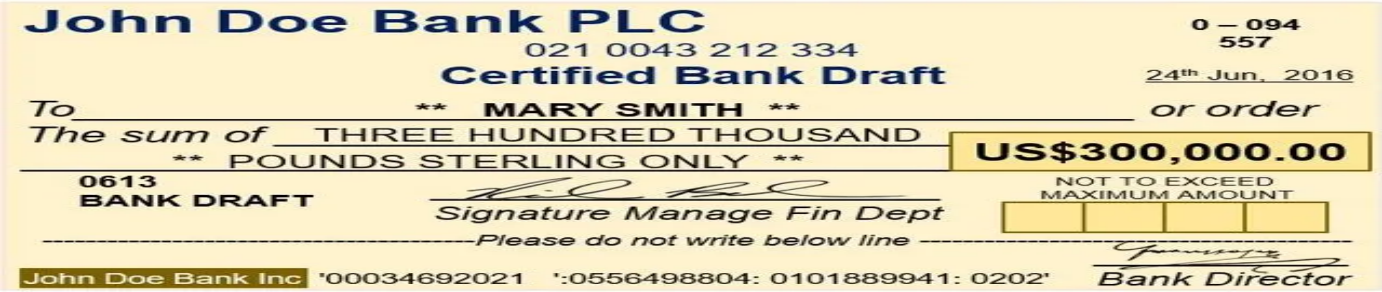
Syllabus Process For a Remittance Payment

What is Remittance?

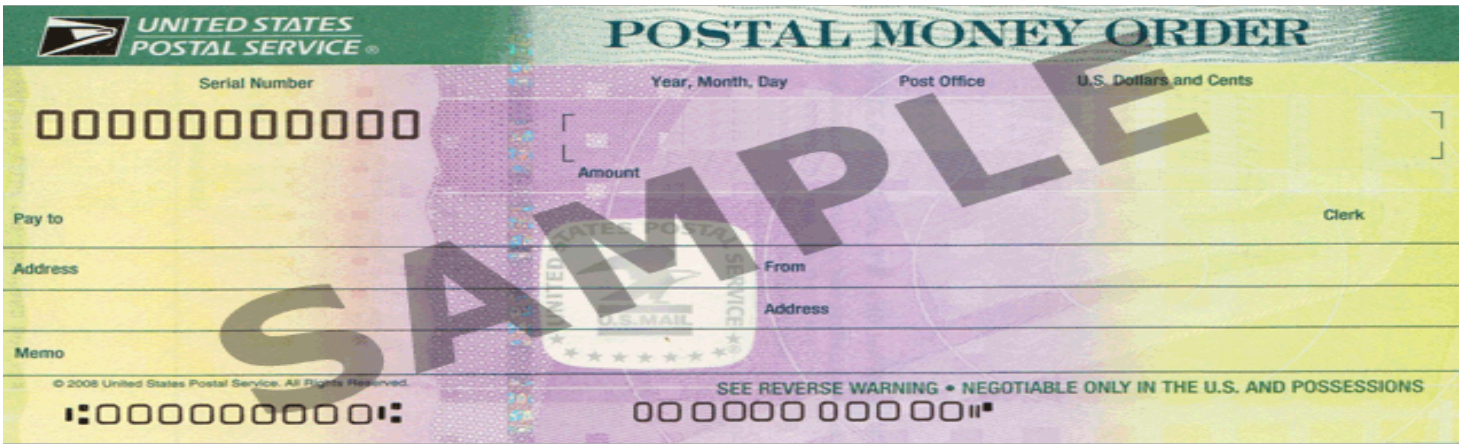
- Payment towards satisfaction of a debt, whether in cash or cash equivalents, such as checks, drafts, and other negotiable instruments.



Bank Draft



Drawn by a Bank on its Own Funds



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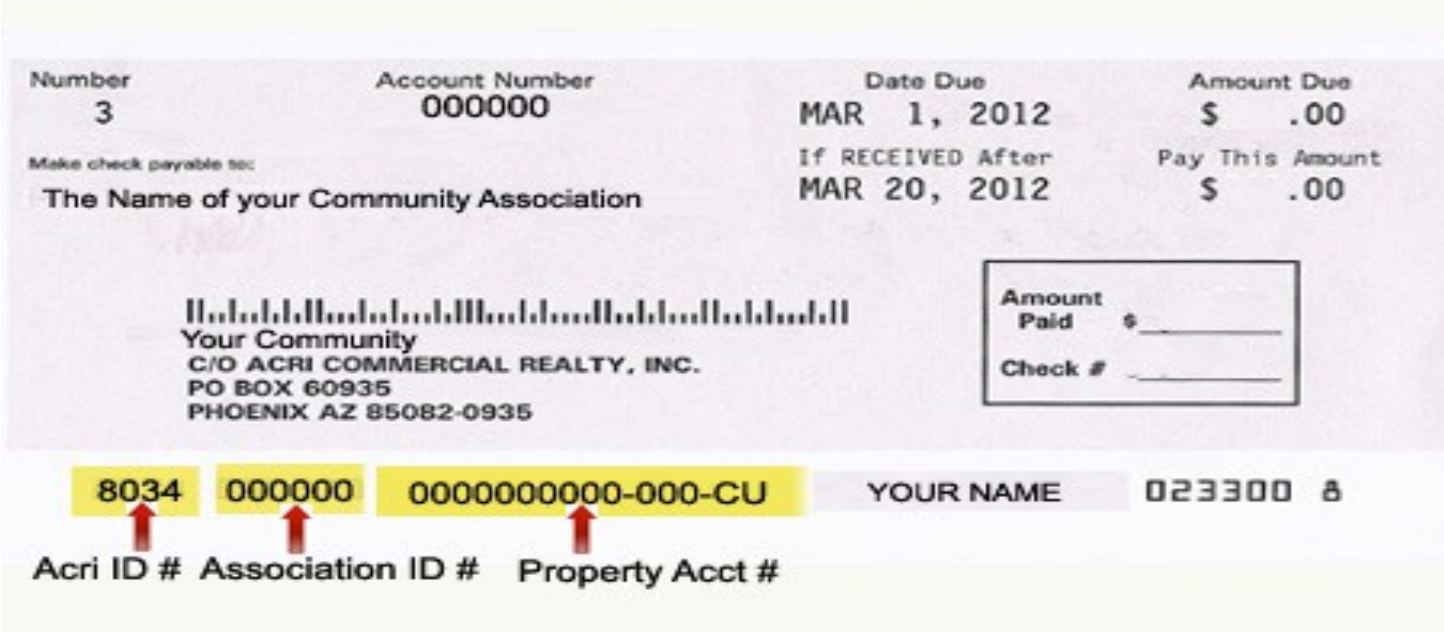
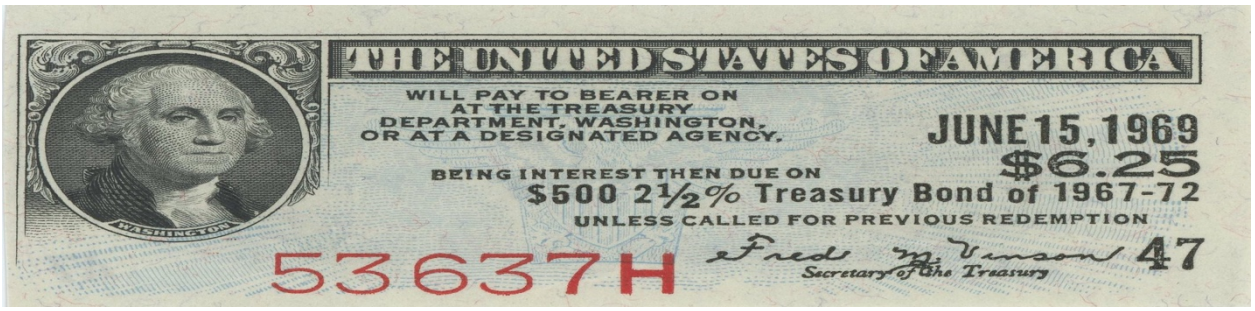


- Payment on an installment loan or open-end credit account, forwarded through the mail to a lock box, along with the remittance document, a machine readable billing document end coded with the customer's account number, and the amount due, plus any late charges, if the loan is delinquent.
- Proceeds from a check submitted to another bank for collection.

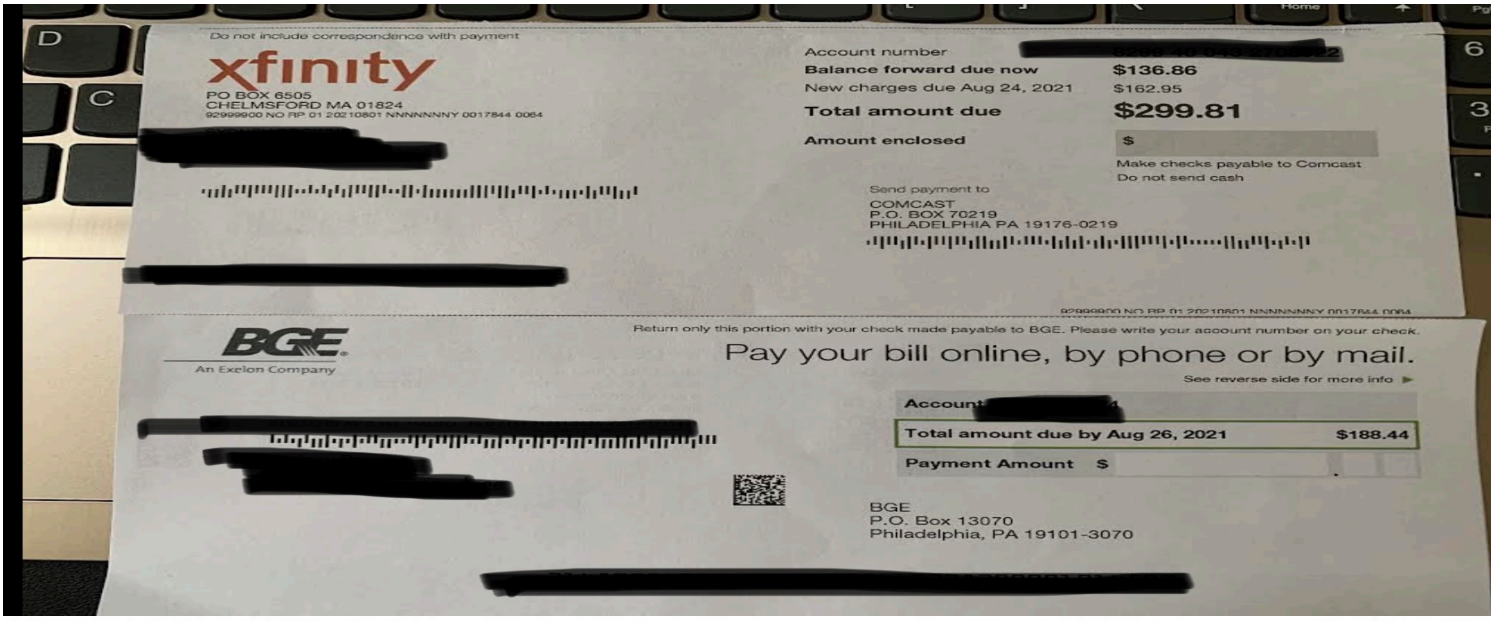
What is a Coupon?

- Detachable certificates showing the dollar amount of interest payable on a bond holder at regular intervals, ordinarily semiannually. Coupons on a Bearer Bond are negotiable instruments and are processed just like checks. Bond interest on a book-entry security is credited to the owner's account.
- **Examples from the 1900s:**



Syllabus Process For a Remittance Payment

-**Examples from today:**



Instrument:

- Legally enforceable agreement between two or more parties, expressing a contractual right or a right to the payment of money. Practically all documents used in credit are instruments, e.g., checks, drafts, notes, bonds.

Remittance Advice:

Written confirmation of payment received, funds transferred, service performed, or payment made.

Examples in banking include a credit advice, a debit advice, a withdrawal or transfer and and account service charge

Pay to the Bearer:

- Check, draft, or other negotiable instrument transferable to the holder by delivery, without endorsement. A bearer bond, such as a bond with detachable coupons (See Above Examples), is not registered in the name of a particular owner and is payable to whomever receives it in good faith.

Pay to Order:

- Negotiable Instrument that is payable by endorsement and delivery. Pay to order instruments are usually written "Pay to the order of XYZ" or "Pay to XYZ or order." Ownership of a check, under the Uniform Commercial Code, can only be transferred only after the person accepting the check endorses it over to someone else.

General Remittance Processing Summary:

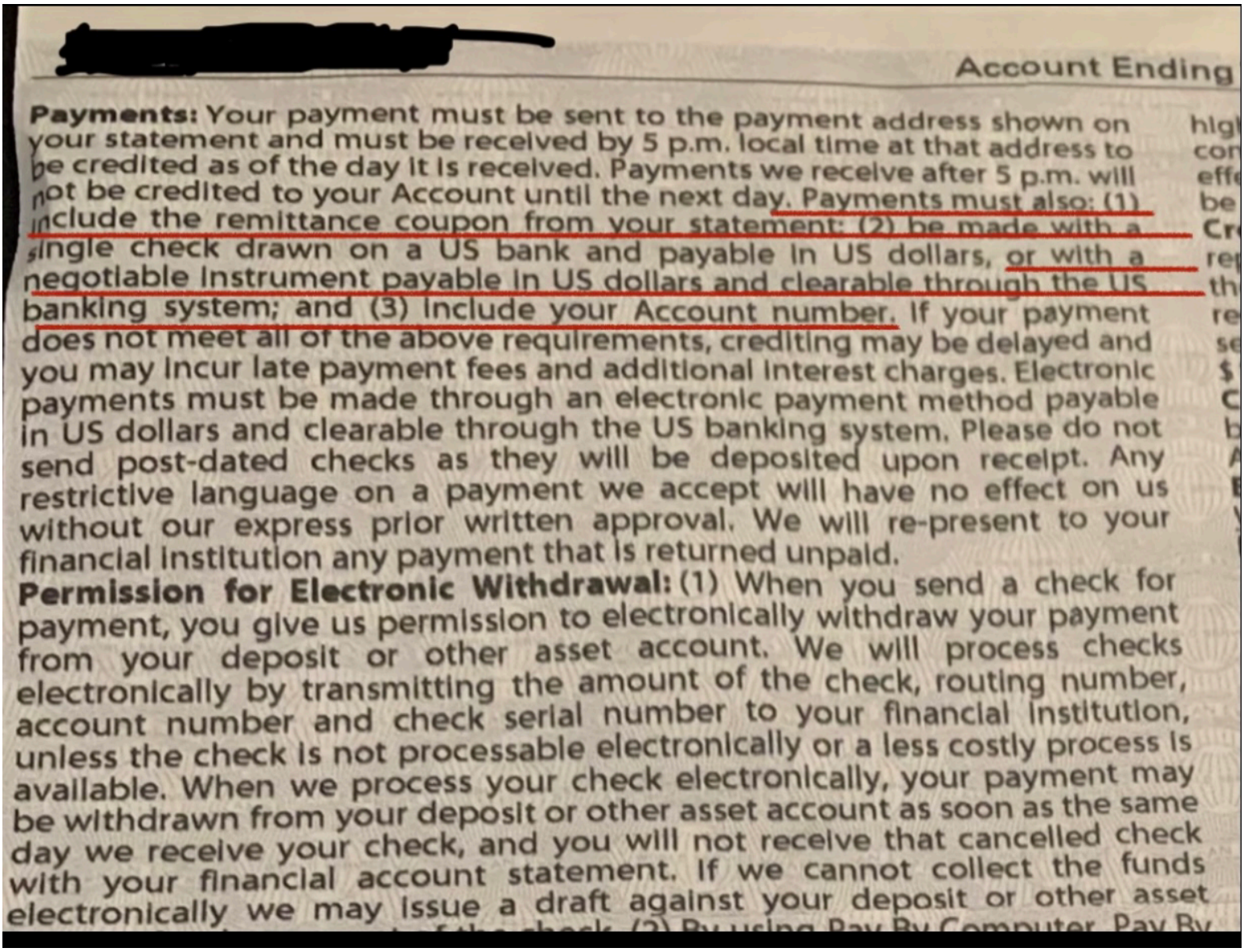
The **bills** an average living being would receive in a commercial capacity such as from utility companies, credit card companies, service providers, etc. would be considered a ***Bills of Exchange.*** Taking a look at *"Barron's Dictionary of Banking Terms 7th Edition" there are several definitions for* **bill** which are: Bill of Exchange (payment orders, sometimes drafts, negotiable and non negotiable instruments) Bill of Lading (receipts credits) , Treasury Bill (discounts, auctions), and Due Bill (outstanding securities between buying broker/selling broker).

All bills are different but more often than not are formatted in a very similar fashion. The new age technology allows for the use of **paperless** billing for "*Discounts*" and other small benefits. For the purpose of remittance processing, the paperless statement **must** be printed. For those who do **not** receive paperless statements and receive bills through the mail, they usually comes in as: The bill itself, a separate page of Instructions if not on the same or reverse page of the bill, and a return envelope.

IF THE REMITTANCE COMES WITH INSTRUCTIONS AND/OR A PARTICULAR ADDRESS WHERE PAYMENT MUST BE SENT FOLLOW THE INSTRUCTIONS TO THE POINT OTHERWISE PAYMENT MAY BE DISREGARDED.

Instructions Examples:

Syllabus Process For a Remittance Payment



[redacted] Account Ending

Payments: Your payment must be sent to the payment address shown on your statement and must be received by 5 p.m. local time at that address to be credited as of the day it is received. Payments we receive after 5 p.m. will not be credited to your Account until the next day. Payments must also: (1) include the remittance coupon from your statement; (2) be made with a single check drawn on a US bank and payable in US dollars, or with a negotiable instrument payable in US dollars and clearable through the US banking system; and (3) include your Account number. If your payment does not meet all of the above requirements, crediting may be delayed and you may incur late payment fees and additional interest charges. Electronic payments must be made through an electronic payment method payable in US dollars and clearable through the US banking system. Please do not send post-dated checks as they will be deposited upon receipt. Any restrictive language on a payment we accept will have no effect on us without our express prior written approval. We will re-present to your financial institution any payment that is returned unpaid.

Permission for Electronic Withdrawal: (1) When you send a check for payment, you give us permission to electronically withdraw your payment from your deposit or other asset account. We will process checks electronically by transmitting the amount of the check, routing number, account number and check serial number to your financial institution, unless the check is not processable electronically or a less costly process is available. When we process your check electronically, your payment may be withdrawn from your deposit or other asset account as soon as the same day we receive your check, and you will not receive that cancelled check with your financial account statement. If we cannot collect the funds electronically we may issue a draft against your deposit or other asset

Now what is underlined in red needs to be read very carefully. *Please see a banking dictionary*

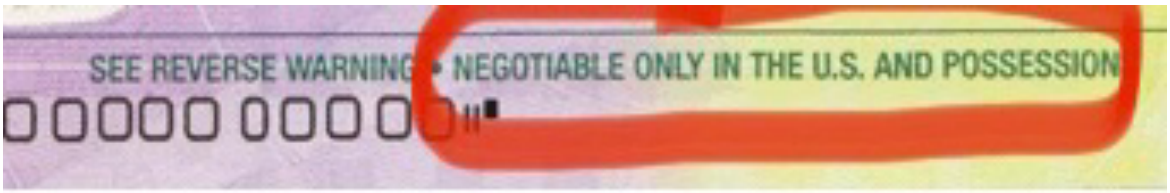
Remittance coupon has the word **coupon**: The term "credit card" means any card, plate, **coupon book** or other credit device existing for the purpose of obtaining money, property, labor, or **services** on credit.

https://www.fdic.gov/regulations/laws/rules/6500-200.html#fdic65001002.2
https://www.law.cornell.edu/uscode/text/15/1602#l

Syllabus Process For a Remittance Payment

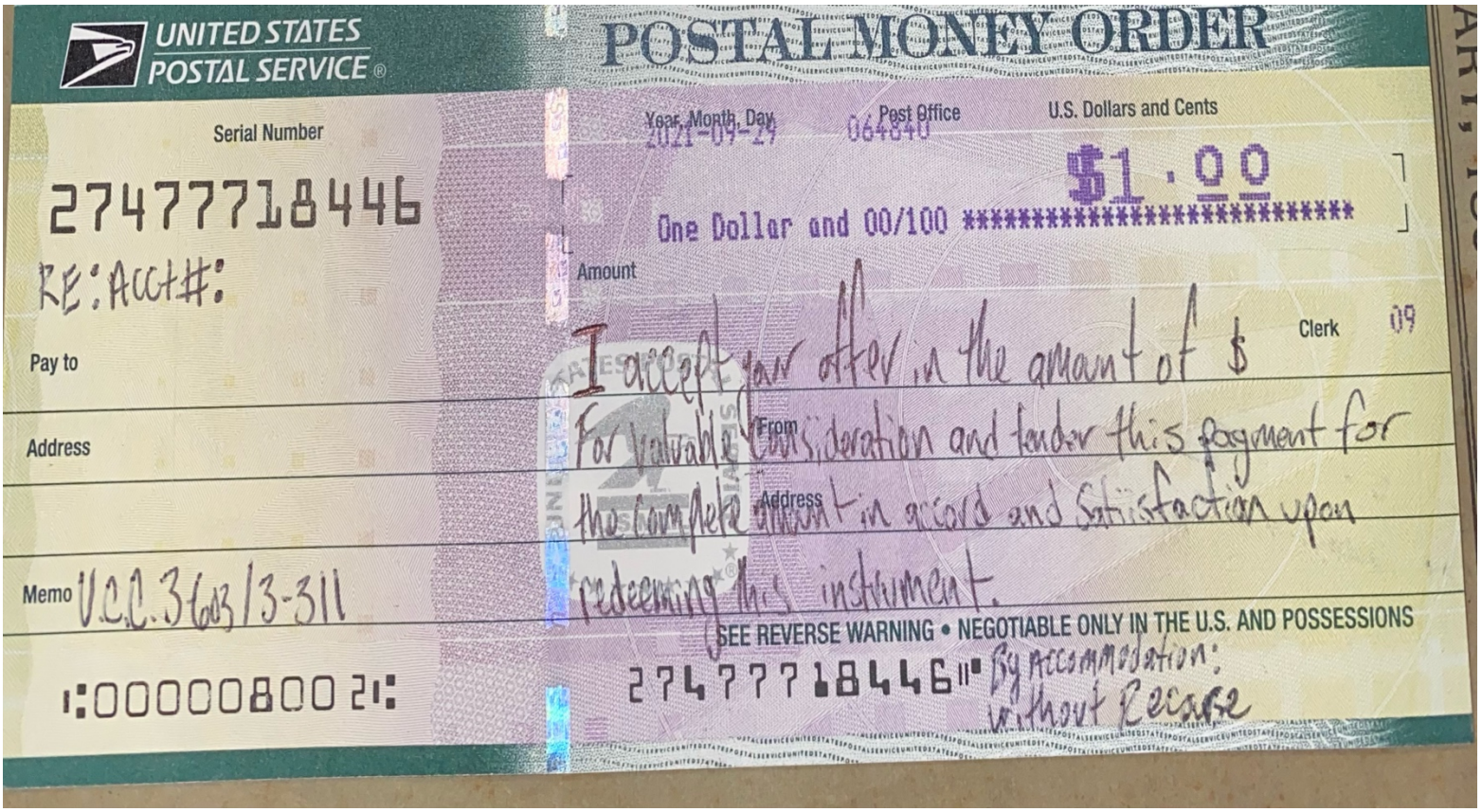
31 C.F.R. § 591.309- The terms property and property interest include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, **coupons**, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

This particular example gives two additional methods of payment. Check or negotiable instrument. Money Orders are a form of negotiable instrument.



Accord and Satisfaction by writing conspicuous statements such as:
-I accept your offer in the amount of $ _____ For valuable consideration and tender this payment for the complete amount in accord and Satisfaction upon redeeming this instrument, Account #:, By Accommodation: - without recourse.

Example:



Syllabus Process For a Remittance Payment

- Offer accepted for value received $_________, for accord and satisfaction of the obligation due pay to the order/pay to the bearer:, For special deposit for special purposes such as bailment or general deposit. Account #:, By Accommodation: -without recourse, to dishonor return within (x) days.

Example:

TOWN OF WESTPORT EMS
FEDERAL TAX ID:066002128
269 MAIN STREET
CROMWELL, CT 06416
(800)258-3902

November 9, 2020

[redacted]

ACCOUNT INFORMATION

Patient Name	[redacted]
Patient Number	
Date of Call	03/14/2020
Call Number	[redacted]
From Location	534 POST RD EAST
To Location	NORWALK HOSPITAL
Insurance	CIGNA HEALTHCAR
Policy #	[redacted]

BALANCE DUE **$1368.58**

This account is **PAST DUE!** This is the second invoice for service provided to you. Please send your payment immediately or call our office at 1-800-258-3902. You may also visit our website at www.ambulancebill.com to provide your insurance information or to pay credit card. Thank you!

DESCRIPTION OF CHARGES	HCPC	QUANTITY	UNIT PRICE	AMOUNT
ALS-1 EMERGENCY	A0427	1.0	$1,258.00	$1,258.00
MILEAGE	A0425	6.0	$18.43	$110.58
			TOTAL CHARGES	$1,368.58

DESCRIPTION OF PAYMENT	RECEIPT	PAYMENT DATE	AMOUNT
INSURANCE EFT PAYMENTS - CIGNA HMO		10/08/2020	$0.00
		TOTAL CREDITS	$0.00
		PLEASE PAY THIS AMOUNT =>	$1368.58

Offer accepted for value recieved $1368.58. For accord and satisfaction of the obligation due. Pay to the order: TOWN OF WESTPORT EMS For special deposit for special purposes such as bailment or general deposit Account #: By Accommodation: without recourse To dishonor return within days

ATTENTION INSURANCE COMPANY CLAIMS PROCESSORS:

NOTICE: THIS BILL IS SUBJECT TO MANDATORY ASSIGNMENT

PURSUANT TO CT GENERAL STATUTES SEC 38A-525

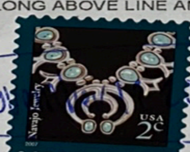
IF YOU PROVIDE A CHECK AS PAYMENT, YOU AUTHORIZE US EITHER TO USE THE INFORMATION FROM YOUR CHECK TO MAKE A ONE-TIME ELECTRONIC FUND TRANSFER FROM YOUR ACCOUNT OR TO PROCESS THE PAYMENT AS A CHECK TRANSACTION. WHEN WE USE INFORMATION FROM YOUR CHECK TO MAKE AN ELECTRONIC FUND TRANSFER, FUNDS MAY BE WITHDRAWN FROM YOUR ACCOUNT AS SOON AS THE SAME DAY YOU MAKE YOUR PAYMENT, AND YOU WILL NOT RECEIVE YOUR CHECK

190CDQMCT11CT2

^DETACH ALONG ABOVE LINE AND RETURN STUB WITH YOUR PAYMENT^

$ Two Cents Consideration

TOWN OF WESTPORT EMS
269 MAIN STREET
CROMWELL, CT 06416
ADDRESS SERVICE REQUESTED



Nov ... 2020

Pay Online ➤ www.ambulancebill.com
Company Code: TW7

PATIENT NAME			BALANCE
[redacted]			$1368.58
CALL NUMBER	DATE OF CALL	STATEMENT DATE	AMOUNT ENCLOSED
[redacted]	03/14/2020	11/09/2020	$

November 9, 2020

One Thousand Three Hundred Sixty-Eight 58/100 dollars

[redacted]

0026 041048

Make Checks Payable to:

TOWN OF WESTPORT EMS
269 MAIN STREET
CROMWELL, CT 06416

U.C.C. 3-603 / U.C.C. 3311

By Accommodation: without Recourse

character of the instruments employed. As long ago as 1873, this Court said: "The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself." *United States* v. *Isham*, 17 Wall. 496, 504.

Remittance coupons/Payment coupons: Are credit cards for the purpose of the obligation.

Using a credit card works as such: The company sends a credit slip to its own bank. The company bank pays a third party, records the transaction, and sends credit slip to a clearing system. The clearing system routes the credit slip to the issuing bank. The issuing bank pays the third party's bank and collects from the consumer

For references on the stamp duty consideration please look in the google drive for the file titled **Stamp Duty.**

Let's look at another example of instructions for remittance processing:

To contact us regarding your account:

Call Customer Service:

In U.S.	1-800-945-2028
Spanish	1-888-795-0574
Pay by phone	1-800-436-7958
International	1-480-350-7099

We accept operator relay calls

Send Inquiries to:
P.O. Box 15298
Wilmington, DE 19850-

Information About Your Account

Making Your Payments: The amount of your payment should be at least your minimum payment due, payable in U.S. dollars and drawn on or payable through a U.S. financial institution or the U.S. branch of a foreign financial institution. You can pay down balances faster by paying more than the minimum payment or the total unpaid balance on your account.

You may make payments electronically through our website or by one of our customer service phone numbers above. In using any of these channels, you are authorizing us to withdraw funds as a one-time electronic funds transfer from your bank account. In our automated phone system, this authorization is provided via entry of a personal identification number. You may revoke this authorization by cancelling your payment through our website or customer service telephone numbers prior to the payment processing. If we receive your completed payment request through one of these channels by 11:59 p.m. Eastern Time, we will credit your payment as of that day. If we receive your request after 11:59 p.m. Eastern Time, we will credit your payment as of the next calendar day. If you specify a future date in your request we will credit your payment as of that day.

If you pay by regular U.S. mail to the Payments address shown on this statement, write your account number on your check or money order and include the payment coupon in the envelope. Do not send more than one payment or coupon per envelope. Do not staple, clip or tape the documents. Do not include correspondence. Do not send cash. If we receive your properly prepared payment on any day by 5 p.m. local time at our Payments address on this statement, we will credit to your account that day. If your payment is received after 5 p.m. local time at our Payments address on this statement, we will credit it to your account as of the next calendar day.

For all other payments or for any payment type above for which you do not follow our payment instructions, crediting of your payments may be delayed for up to 5 days.

Account Information Reported To Credit Bureau: We may report information about your Account to credit bureaus. Late payments, missed payments or other defaults on your Account may be reflected in your credit report. If you think we have reported inaccurate information to a credit bureau, please write to us at Chase Card Services P.O. Box 15369, Wilmington, DE 19850-5369.

To Service And Manage Any Of Your Account(s): By providing my mobile phone number, I am giving permission to be contacted at that number about all of my accounts by JPMorgan Chase and companies working on its behalf. My consent allows the use of text messages, artificial or prerecorded voice messages and automatic dialing technology for informational and account servicing, but not for sales or telemarketing. Message and data rates may apply.

Authorization To Convert Your Check To An Electronic Transfer Debit: When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check. Your bank account may be debited as soon as the same day we receive your payment. You will not receive your check back from your institution.

Conditional Payments: Any payment check or other form of payment that you send

Syllabus Process For a Remittance Payment

Mail Payments to:
P.O. Box 1423
Charlotte, NC 28201-1423

Visit Our Website:
www.chase.com/cardhelp

5298

us for less than the full balance due that is marked "paid in full" or contains a similar notation, or that you otherwise tender in full satisfaction of a disputed amount, must be sent to Card Services, P.O. Box 15049, Wilmington, DE 19850-5049. We reserve all our rights regarding these payments (e.g., if it is determined there is no valid dispute or if any such check is received at any other address, we may accept the check and you will still owe any remaining balance). We may refuse to accept any such payment by returning it to you, not cashing it or destroying it. All other payments that you make should be sent to the regular Payment address shown on this statement.

Syllabus Process For a Remittance Payment

Conditional payments for less than the full balance marked paid in full or contains similar notation *see above examples with money order and bill* falls under accord and satisfaction.

BELOW IS SUPPORTING CASE LAW WHICH CAN BE USED IN AN AFFIDAVIT FOR A SUIT FOR FAILURE TO COMPLY WITH THE LAW.

No. C2-99-269
Supreme Court of Minnesota

Webb Business Promotions, Inc. v. American Electronics & Entertainment Corp.

617 N.W.2d 67 (Minn. 2000)
Decided Sep 14, 2000

No. C2-99-269.

68 Filed: September 14, 2000. *68

69 Appeal from the Office of Appellate Courts. *69

Heard, considered, and decided by the court en banc.

OPINION

LANCASTER, Justice.

This is an action for breach of contract between appellant, American Electronics Entertainment Corp. (AEE) and respondent, Webb Business Promotions, Inc. (Webb). Webb sued AEE for breach of contract. AEE asserted the affirmative defense of accord and satisfaction under Minn. Stat. § 336.3-311 (1998).[1] Following a court trial, the district court found that there was no accord and satisfaction, concluding that there was an absence of good faith in the tender and no mutual agreement. The court of appeals affirmed, holding that mutual agreement is not required for an accord and satisfaction. We reverse the court of appeals and remand the matter to the district court.

[1] Minnesota Statutes § 336.3-311 provides in relevant part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

We are presented in this case with two questions: First, did the district court err in imputing AEE's bad faith in the underlying sales contract to AEE's offer of an accord and satisfaction? Second, did the court of appeals err in holding that because mutual agreement is not explicitly enumerated in Minn. Stat. § 336.3-311, such agreement is not necessary to create an enforceable accord and satisfaction?

On May 16, 1995, AEE entered into a contract with Target Corporation (Target). The agreement called for Target to purchase 300,000 units of

three-pack MGM blank videotapes from AEE, and AEE was to provide 300,000 units of promotional merchandise (calendars, pencils and the like) as a "free gift with purchase" with each pack of videotapes. Subsequently, on May 24, 1995, AEE executed a written contract with Webb in which Webb agreed to provide the 300,000 units of promotional merchandise to AEE at a contract price of $684,000. In order to fulfill its part of the agreement between Webb and AEE, Webb borrowed approximately $400,000 from First National Bank of Farmington, which in turn acquired a right of assignment of all funds due to Webb from AEE. The contract between AEE and Webb provided that AEE would be responsible for any and all defects with respect to the MGM blank videotapes, that Webb would be expected to absorb $30,000 in advertising, packing, and shipping costs, and that delivery of the promotional merchandise was due on or before July 15, 1995.

On May 24, 1995, AEE sent Webb purchase order #604 for the 300,000 units of promotional merchandise. Purchase order #604 specifically stated that it was "conti[n]gent upon Target['s] purchase order" with AEE. Target's agreement with AEE permitted Target to cancel its purchase order if the product was not up to Target's quality standards or at Target's sole convenience any time prior to shipping. AEE never informed Webb of the conditions under which Target could cancel its purchase order with AEE.

On May 4, 1995, more than two weeks before
71 Webb entered into its contract with *71 AEE, Target requested that AEE submit a sample of the MGM videotapes for quality testing. AEE complied with the request. On May 31, 1995, approximately two weeks after Target issued its purchase order to AEE, the quality testing service recommended that Target "stay away" from the MGM brand of videocassette "until they improve their quality." Target immediately notified AEE that the tapes failed the quality test. On June 9, 1995, AEE requested and Target agreed to re-test the videotapes at AEE's expense. On June 23, 1995, the quality tester sent Target a second report, stating that the tapes were "satisfactory," but still had problems with consistency.

A few days prior to the July 15, 1995, delivery date for the promotional merchandise to AEE from Webb, Target notified AEE that it was canceling the transaction. In response, AEE sent a representative to Target in an attempt to renegotiate the deal with Target. AEE never notified Webb of the failed quality tests. AEE was successful in renegotiating the deal but was only able to persuade Target to purchase 85,000 units of the videotape and promotional merchandise combination, instead of the 300,000 units originally agreed to. At trial, a Target representative testified that the primary reason for the reduction in the order was the poor test results of the MGM videotapes, but Target also considered the recent reduction in industry sales of blank videotapes.

On July 20, 1995, six days after the 300,000 units of promotional merchandise had arrived at the packaging location, AEE sent a letter notifying Webb that based on Target's cancellation and renegotiation of its purchase order, AEE was canceling its order with Webb and would thereafter place orders with Webb on a weekly basis. Alan Webb,[2] not knowing the terms of the arrangement between AEE and Target, requested that AEE cancel the order entirely and sue Target for breach. Alan Webb then contacted First National Bank of Farmington to let it know the status of the deal with AEE. The bank directed him to follow through with the replacement order.

[2] Alan Webb is the president and sole shareholder of Webb Business Promotions.

Webb ultimately agreed to deliver 85,000 units to AEE based on Target's order to AEE, although AEE never issued an additional purchase order to Webb. Upon delivery, Webb submitted invoice #11374 to AEE for approximately $190,000 for payment by August 24, 1995. On September 20,

1995, because Webb had not yet received payment for invoice #11374, Alan Webb placed a phone call to AEE's vice president, Linda Tsai. Alan Webb requested immediate payment of the invoice. In response, Tsai asserted that the invoice was incorrect and that AEE would deduct various costs from the payment, which would result in a payment of approximately $150,000 for the 85,000 units of promotional merchandise.

On September 20, 1995, AEE sent a letter to Webb explicitly referencing purchase order #604, referring to terms of the original May 24, 1995, agreement, and informing Webb that AEE intended to deduct certain amounts for re-packaging and shipping from the total amount owed to Webb based upon the May 24 agreement. The letter also stated that AEE intended to pay Webb on September 21, 1995, and that "[b]y accepting and cashing the check, Webb is assumed to agree that this is the final settlement and AEE will owe nothing to Webb." On September 21, 1995, AEE submitted a check as payment to Webb in the amount of $150,677. The check was accompanied by a letter stating in part, "[p]er our phone conversation * * * I am sending you the check as your favor [sic] * * *. Please be awared [sic] that this is a final check, **AEE will have no obligation to Webb as long as the check is cashed by Webb**." After discussions regarding Alan Webb's concerns about accepting the check, First National Bank told him to accept the check.
72 Alan *72 Webb therefore accepted and deposited the check and gave the funds to the bank. In November 1995, AEE sent a check for approximately $3,000 to Webb as a refund for unspent funds that it had withheld for shipping and packing costs.

Webb brought suit for breach of contract against AEE seeking recovery of money due to him under the May 24, 1995, agreement as originally stated in purchase order #604. AEE asserted the affirmative defense of accord and satisfaction. At trial Webb asserted that the check for $150, 677 was accepted to resolve the dispute surrounding the second agreement for delivery of the 85,000 units, and was *not* intended to resolve the claims relating to AEE's breach of the first agreement for 300,000 units referenced by purchase order #604. Further, Webb asserted that the check offering the accord and satisfaction was tendered in bad faith because AEE had purposely withheld information from Webb with respect to the testing of the videotapes and because AEE misinformed Webb about the terms of the contract between AEE and Target. AEE responded that the check and the accompanying communications clearly referenced purchase order #604 and the May 24 agreement, and stated that the payment was intended to resolve all claims that Webb had against AEE. AEE argued that the original purchase order was expressly contingent on Target's order to AEE and it was therefore entitled to reduce the amount of the order based on Target's change in its order to AEE.

The district court found that AEE breached its contract with Webb by anticipatory repudiation, that Webb did not know that Target's order with AEE was cancelable at any time, and that AEE's agent withheld the truth from Webb regarding the poor quality of the videotapes. The district court went on to find that if Webb had known of the quality failure of the videotapes when it first occurred, it could have ceased delivery as early as May 31, 1995. The district court concluded that AEE acted in bad faith by wrongfully concealing material facts from Webb by failing to reveal: Target's request to test the tapes in early May 1995; the terms of sale and conditions of the contract between AEE and Target; the true reason why Target cancelled its purchase order on July 14, 1995; and the results of the quality assurance tests. The court also found that AEE acted in bad faith by affirmatively representing to Webb that the tape quality had never been questioned by Target. Finally, the court concluded that the parties did not mutually agree that Webb was accepting the payment in full satisfaction of all outstanding

claims. The district court therefore held that Webb's acceptance of AEE's check for $150,677 did not constitute an accord and satisfaction.

The court of appeals held that the district court did not err in concluding that there was no accord and satisfaction because AEE tendered its check with the knowledge that there were "outstanding obligations in dispute," and therefore the accord and satisfaction check was not tendered in good faith. *Webb Bus. Promotions, Inc. v. American Elecs. Entertainment Corp.*, No. C2-99-269, 1999 WL 810452, at *7 (Minn. App. Oct. 12, 1999). The court of appeals also held that mutual agreement is not required for an accord and satisfaction. *See id.*

I.

An accord is a contract in which a debtor offers a sum of money, or some other stated performance, in exchange for which a creditor promises to accept the performance in lieu of the original debt. *See Don Kral Inc. v. Lindstrom*, 286 Minn. 37, 39, 173 N.W.2d 921, 923 (1970). *See generally* Restatement (Second) of Contracts § 281 (1981); 6 Arthur L. Corbin, *Corbin on Contracts* § 1276 (West 1962). The satisfaction is the performance of the accord, generally the acceptance of money, which operates to discharge the debtor's duty as agreed to in the accord. *See Don Kral Inc.*, 286
73 Minn. at 39, *73 173 N.W.2d at 923. *See generally* Restatement (Second) of Contracts § 281; 6 Corbin, *supra*, § 1276. The purpose of accord and satisfaction is to allow parties to resolve disputes without judicial intervention by discharging all rights and duties under a contract in exchange for a stated performance, usually a payment of a sum of money. *See* U.C.C. § 3-311 cmt. 3 (1990), *reprinted in* Minn. Stat. Ann. § 336.3-311 (West. Supp. 2000) ("Section 3-311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged."). *See generally Weed v. Commissioner of Revenue*, 550 N.W.2d 285, 288 (Minn. 1996); *Roaderick v. Lull Eng'g Co.*, 296 Minn. 385, 389, 208 N.W.2d 761, 764 (1973).

An enforceable accord and satisfaction arises when a party against whom a claim of breach of contract is asserted proves that (1) the party, in good faith, tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument.[3] *See* Minn. Stat. § 336.3-311(a)-(b).[4]

[3] Subsections (c) and (d) of the statute except certain situations from a binding accord and satisfaction, but those situations are not alleged to apply here. *See* Minn. Stat. § 336.3-311(c)-(d) (1998).

[4] In 1990 the common law doctrines of accord and satisfaction were codified into section 3-311 of the U.C.C. which, in turn, was adopted by the legislature in 1992. *Cf.* U.C.C. § 3-311 cmt. 3, *reprinted in* Minn. Stat. Ann. § 336.3-311 (noting section 3-311 follows the common law rule with minor variations to reflect modern business conditions); Act of Apr. 24, 1992, ch. 565, § 39, 1992 Minn. Laws 1816, 1842, *codified at* Minn. Stat. § 336.3-311 (1998); 6 Corbin, *supra*, § 1279 (outlining common law requirements for accord and satisfaction).

AEE claims the district court erred in finding that it did not offer the accord in good faith. The district court found that AEE acted in bad faith through several concealments and misrepresentations regarding the quality testing, AEE's contract with Target, and the reasons for cancellation. The district court found that AEE breached its contract with Webb, the breach was in

bad faith, and therefore the tender of the check to Webb by AEE in offering the accord and satisfaction was in bad faith.

Whether there has been an accord and satisfaction is a question of fact. *See Bloomer v. Bloomer*, 289 Minn. 481, 484, 185 N.W.2d 520, 522 (1971). The findings of the trial court, as the trier of fact, will not be reversed on appeal unless they are "manifestly and palpably" contrary to the evidence. *Butch Levy Plumbing and Heating, Inc. v. Sallblad*, 267 Minn. 283, 293, 126 N.W.2d 380, 387 (1964). However, "[f]indings of fact which are controlled or influenced by error of law are not final on appeal and will be set aside." *In re Holden's Trust*, 207 Minn. 211, 227, 291 N.W. 104, 112 (1940).

Good faith is demonstrated when the party tendering the instrument offers a check with the intent to honestly enter into an accord and satisfaction while observing reasonable commercial standards of fair dealing. *See* Minn. Stat. § 336.3-103(a)(4) (1998). The focus of the good faith inquiry is on the offer of the accord, and not on the actions of the parties in performing the underlying contract. *See* Minn. Stat. § 336.3-311(a)(i); *cf.* U.C.C. § 3-311 cmt. 4 (1990), *reprinted in* Minn. Stat. Ann. § 336.3-311.[5] *74

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[5] All of the examples of bad faith tender in the comments to section 3-311 of the U.C.C. relate solely to the offer of the accord, not to any conduct relating to the underlying contract. The examples are as follows:

For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender. Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

U.C.C. § 3-311 cmt. 4, *reprinted in* Minn. Stat. Ann. § 336.3-311.

Bad faith is not necessarily established by a failure to disclose facts about the underlying dispute that would have led to rejection of the offer of an accord. By accepting a certain sum of money to discharge a debt, the creditor waives a cause of

action relating to the original debt. *See Roaderick*, 296 Minn. at 389, 208 N.W.2d at 764; *Weed*, 550 N.W.2d at 288; *see also Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 463, 124 N.W.2d 328, 338 (1963) ("In order for an accord and satisfaction to exist, there must be an honest dispute between the parties, [and] a tender with the explicit understanding of both parties that it was in full payment of *all* demands * * *." (emphasis added)). Therefore, part of the consideration for the accord is the creditor's waiver of claims that may entitle it to more than what the debtor is offering in the accord. Once the creditor accepts the accord and performs the satisfaction, the validity of the accord and satisfaction may not be challenged unless the party challenging the accord can demonstrate that the elements of the accord and satisfaction have not been satisfied. *See Don Kral Inc.*, 286 Minn. at 39-40, 173 N.W.2d at 923 (stating that where an accord constitutes a binding contract, the original liability is discharged, but where the accord is not fully performed, the original liability remains).

In support of their arguments regarding good faith both parties rely on *McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 1307 (7th Cir. 1996). In Illinois, as in Minnesota, a party must prove that he or she acted in good faith in tendering an instrument in full satisfaction of a claim. *See* 810 Ill. Comp. Stat. Ann. 5/3-311 (West 1992). In *McMahon Food Corp.*, McMahon and Burger Dairy had an ongoing business relationship. *See* 103 F.3d at 1310. The debtor (McMahon), in tendering the instrument for the offer of the accord, purposely misled the creditor about the amount in dispute. *See id.* at 1310-12. In attempting to resolve a dispute regarding multiple transactions, McMahon purposely led Burger Dairy to believe that previous disputes had already been resolved, when in fact they had not. *See id.* at 1311. As a result, the accord and satisfaction that was offered misrepresented the actual amount in dispute. The bad faith was directly related to the tender of the accord, and not purely related to McMahon's actions with respect to the underlying contracts, and the district court found accord and satisfaction to be unenforceable. *See id.* at 1313, 1317.

The court in *McMahon* affirmed the district court's finding that McMahon had acted in bad faith and taken advantage of Burger Dairy by misinforming it about the total amount in dispute "` *at the time payment was tendered*.'" *Id.* at 1313 (citation omitted). McMahon therefore failed to meet section 3-311(a)'s good faith requirement. *See id.* In contrast, the district court here relied exclusively on AEE's misrepresentations and concealment of facts related to the underlying sales contract. The district court made no findings relating specifically to AEE's tender of the instrument offering the accord. *75 Moreover, neither Webb nor the district court established a connection between AEE's conduct as it related to the underlying sales contract and its offer of the accord. We conclude, therefore, that the district court erred as a matter of law in finding AEE's tender of its check to Webb under Minn. Stat. § 336.3-311 was in bad faith. *See generally Shema v. Thorpe Bros.*, 240 Minn. 459, 62 N.W.2d 86 (1953). It may be possible that fraud or misrepresentation relating to an underlying contract is so pervasive that the fraud infects the good faith offer of an accord. However, where the district court fails to draw any connection between fraud in the underlying contract and the tender of the accord, such as in this case, those circumstances are not present. Because the district court's finding of bad faith was controlled by an error of law, we set the finding aside. *See In re Holden's Trust*, 207 Minn. at 227, 291 N.W. at 112.

The court of appeals reasoned that because AEE offered the accord with the knowledge that there were outstanding obligations in dispute, good faith was lacking. Section 336.3-311(a)(ii) *requires* that there be a bona fide dispute as to the amount of the claim or that the claim was unliquidated for an accord and satisfaction to be valid. The purpose of

entering into an accord and satisfaction is to settle these disputed claims. Therefore, the existence of a dispute regarding the amount of the underlying claim cannot constitute bad faith for purposes of an accord and satisfaction.

We reverse the decision of the court of appeals and hold that the district court erred as a matter of law in finding that AEE's offer of the accord to Webb was in bad faith based on the conduct relating to the underlying sales contract. Because the district court did not focus on the formation of the accord and satisfaction in determining good faith, we remand to the district court for that determination.

II.

We turn now to the second issue: Did the court of appeals err in holding that because mutual agreement is not explicitly enumerated in Minn. Stat. § 336.3-311, such agreement is not necessary to create an enforceable accord and satisfaction?

Under common law, accord and satisfaction may not be found where mutual agreement is lacking. *See Butch Levy Plumbing and Heating, Inc.*, 267 Minn. at 290-91, 126 N.W.2d at 385-86; 6 Corbin, *supra*, § 1277. For an accord and satisfaction to be enforceable, the payment must be offered in full satisfaction of the debt, and the payment must be accepted as the same. *See Butch Levy Plumbing and Heating, Inc.*, 267 Minn. at 290-91, 126 N.W.2d at 385-86; *Youngstown Mines Corp.*, 266 Minn. at 463-64, 124 N.W.2d at 338-39.

As noted above, Minn. Stat. § 336.3-311 was intended to codify the common law elements of accord and satisfaction. *See* U.C.C. § 3-311 cmt. 3, *reprinted in* Minn. Stat. Ann. § 336.3-311; *supra* note 4. The common law elements include the basic contractual requirement of mutual agreement and therefore the court of appeals erred in holding that mutual agreement was not necessary for an accord and satisfaction under Minn. Stat. § 336.3-311.

AEE argues that even if we conclude that mutual agreement is a separate element of an accord and satisfaction under the U.C.C., it is demonstrated here by the conduct of the parties. The district court made no specific factual findings with respect to the formation of the accord and satisfaction. The court simply concluded that the parties did not agree that Webb was accepting payment in full satisfaction.

The agreement necessary to form a contract need not be express, but may be implied from circumstances that clearly and unequivocally indicate the intention of the parties to enter into a contract. *See Shema*, 240 Minn. at 465, 62 N.W.2d at 90. *76 Minnesota Statutes § 336.3-311(a) and (b) require a conspicuous statement that the tender of payment is offered as full satisfaction of the claim. By obtaining payment under that conspicuous statement, the creditor has communicated his agreement to the transaction. Performance of the statutory requirements therefore demonstrates a mutual agreement to effectuate a contract in which the creditor accepts payment from the debtor that serves to discharge claims against the debtor.

We hold that once the elements of section 336.3-311(a) and (b) are met, mutual agreement of the parties to enter into an accord and satisfaction is presumed as a matter of law. The presumption may be rebutted where the party challenging the accord and satisfaction can demonstrate, for example, some ambiguity in the language of the instrument or the accompanying communication such that a reasonable person would not have understood that payment was meant to discharge the obligation. *See, e.g., Imperial Elevator Co. v. Hartford Accident Indem. Co.*, 163 Minn. 481, 487-88, 204 N.W. 531, 533-34 (1925).

Because the district court did not make findings regarding the formation of the accord and satisfaction, or determine whether ambiguity exists with respect to the offer of an accord that would defeat a finding of mutual agreement on the

accord and satisfaction, we remand this case to the district court for findings as to whether any ambiguity existed sufficient to rebut the presumption of mutual agreement.

We hold that the district court erred in imputing bad faith to an accord and satisfaction from conduct relating only to the underlying contract. We also hold that mutual agreement is required for an enforceable accord and satisfaction.

Reversed and remanded.

No. 17-3786
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Knight v. Midland Credit Mgmt. Inc.

Decided Nov 8, 2018

No. 17-3786

11-08-2018

RENEISHA KNIGHT, on behalf of herself and all other similarly situated consumers, Appellant v. MIDLAND CREDIT MANAGEMENT INC.

RENDELL, Circuit Judge

NOT PRECEDENTIAL

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(District Court No.: 2-17-cv-03118)
District Judge: Honorable Mark A. Kearney
Submitted under Third Circuit LAR 34.1(a)
on September 14, 2018 Before: JORDAN,
2 VANASKIE and RENDELL, Circuit Judges *2
OPINION* **RENDELL**, Circuit Judge:

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Reneisha Knight appeals from the District Court's dismissal of her Second Amended Complaint for failure to state a claim under the Fair Debt Collection Practices Act ("FDCPA"). Knight's FDCPA claim arises from the receipt of a debt collection letter from Midland Credit Management, Inc. ("Midland"), which Knight claims is false, deceptive, and misleading. Upon Midland's motion to dismiss, the District Court concluded that the letter could not constitute a violation of the FDCPA and granted dismissal. For the reasons that follow, we will reverse the District Court's order granting Midland's motion to dismiss and will remand with instructions to deny the motion.

I. BACKGROUND

A. Factual Background

Knight had $944.08 of personal credit card debt that was originally owed to Capital One Bank, N.A. and later purchased by Midland Funding, LLC.[1] **A. 32.** Midland sent Knight a letter (the "Letter") in an attempt to collect on this debt. **A. 32.** The Letter's top half includes, among other things, the name of the "Original Creditor," the "Original Account" number, and the name of the
3 debt's "Current Owner." A. 32. A few *3 lines below this, the Letter states, "We can't change the past, but we can help with your future." *Id.*

[1] Midland Funding LLC, the current owner of Knight's debt, is a separate corporate entity from Midland Credit Management, Inc., the entity which attempted to collect on Knight's debt and which is the appellee in this case. **A. 32.**

The section of the Letter immediately following this statement is divided into two columns. **A. 32.** The right-hand column is titled "KNOW YOUR OPTIONS" and provides three loan repayment options. *Id.* Option 1 offers "40% OFF" if payment is made by a specified date, Option 2 provides for "20% OFF" if the debt is paid over the course of six months, and Option 3 offers "Monthly Payments As Low As: $50 per month." *Id.*

The lower section's left-hand column states that "Midland Credit Management believes that everyone deserves a second chance" and invites Knight "to accept one of these discounts." *Id.* Several lines later, the Letter then explains, "After receiving your final payment, we will consider the account paid*." *Id.* This references a note at the bottom of the Letter, which provides, "*If you pay your full balance, we will report your account as **Paid in Full.** If you pay less than your full balance, we will report your account as **Paid in Full for less than the full balance**." *Id.* (emphasis in original).

B. Procedural History

Knight filed a complaint in the District Court alleging that the Letter violates Section 1692e of the FDCPA, 15 U.S.C. § 1692 *et. seq.*, because it is false, deceptive, and misleading. **A. 21.** Knight later filed a First Amended Complaint, which Midland moved to dismiss for failure to state a claim. **A. 3.** The District Court granted Midland's motion, dismissing the complaint without prejudice and allowing Knight to file a Second *4 Amended Complaint. **A. 3.** Knight did so, and Midland responded by filing a second motion to dismiss for failure to state a claim. **A. 4.**

On November 8, 2017, the District Court granted Midland's motion without prejudice, concluding that Knight's "stated challenge of the debt collection language is, as a matter of law, not confusing or misleading to the least sophisticated debtor." A. 16. The District Court gave Knight until November 22, 2017 to amend her complaint. **A. 4.** Knight did not file a Third Amended Complaint, and on November 27, 2017, the District Court entered an order closing the case. **A. 4.** Knight filed a notice of appeal on December 20, 2017. **A. 4.**

II. DISCUSSION [2]

[2] The District Court had jurisdiction under 28 U.S.C. § 1331. As discussed below, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise *de novo* review over a district court's grant of a Rule 12(b)(6) motion to dismiss. *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 (3d Cir. 2000). We "must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). We accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 931 (3d Cir. 2010).

On appeal, Knight argues that the District Court erred in granting Midland's motion to dismiss for failure to state a claim. In response, Midland argues, first, that we lack jurisdiction over this appeal under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure and, second, that the District Court did not err in granting the motion to dismiss. For the following reasons, we disagree with both of Midland's arguments and find that we have jurisdiction and that the District Court erred in dismissing Knight's complaint. *5

A. Jurisdiction

Midland argues that we lack jurisdiction because Knight's appeal is untimely under Rule 4 of the Federal Rules of Appellate Procedure. **Appellee's Br. at 1.** Pursuant to 28 U.S.C. § 1291, we have jurisdiction over appeals of district courts' final decisions. Rule 4 requires that a notice of appeal be filed "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4. According to Midland, the District Court's November 8, 2017 Order was "*a dismissal* of the case" and, therefore, the final order upon which this appeal is based. Appellee's Br. at 1 (emphasis in original). Because Knight did not file her notice of appeal within 30 days of this order, Midland argues that her appeal is untimely. **Appellee's Br. at 2.**

Midland's argument is without merit. "Generally, an order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action." *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976). However, where the plaintiff fails to amend the complaint, the order of dismissal becomes final and appealable *once the amendment period passes* because the plaintiff has chosen to stand on the complaint. *See Batoff v. State Farms Ins. Co.*, 977 F.2d 848, 851 n.5 (3d Cir. 1992); *Welch v. Folsom*, 925 F.2d 666, 668 (3d Cir. 1991). Because Knight did not amend her complaint a third time, the November 8, 2017 Order dismissing her complaint was not "final" until November 22, 2017, when the District Court ended the opportunity to amend by closing the case. Because Knight filed her notice of appeal within 30 days of November 22, 2017, her appeal is timely. *6

6

B. Motion to Dismiss

Knight argues the District Court erred in finding that, as a matter of law, the Letter was not deceptive or misleading in violation of the FDCPA. **Appellant's Br. at 11.** Section 1692e of the FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation in connection with the collection of any debt," including "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. § 1692e(10).

Courts analyze FDCPA claims under the "least sophisticated debtor" standard. *Jensen v. Pressler & Pressler*, 791 F.3d 413, 418 (3d Cir. 2015). This standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor." *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 149 (3d Cir. 2013). It protects "the gullible as well as the shrewd." *Id.* Nevertheless, the least sophisticated debtor is held to "a quotient of reasonableness, a basic level of understanding, and a willingness to read with care." *Id.* Accordingly, a debt collector cannot be held liable for a plaintiff's "bizarre or idiosyncratic interpretations." *Id.*

A "specific plaintiff need not prove that *she* was actually confused or misled." *Jensen*, 791 F.3d at 419 (emphasis in original). Instead, the focus is on whether the objective least sophisticated debtor would be deceived or misled by a debt collector's statement in a communication. *Id.* at 419-20. "[A] collection letter is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Caprio*, 709 F.3d at 149 (internal quotations and citations omitted). Furthermore, for a debt collector's statement to be actionable, it must be material. *7 *Jensen*, 791 F.3d at 421. A statement is material if it has "the potential to affect the decision-making process of the least sophisticated debtor." *Id.* This, though, "is not a particularly high bar." *Id.*

7

On appeal, Knight argues that the Letter could be found to be false, deceptive, and misleading in four ways. We consider each separately below.

1. Promise of Financial Benefit

First, Knight claims that the Letter implies false and deceptive promises of future financial benefit to the consumer. **A. 26.** Knight's allegation refers to the Letter's statement, "We can't change the past, but we can help with your future." A. 26. Knight's complaint alleges that there are two interpretations of this statement: (1) reporting the payment to the credit reporting agencies will improve the debtor's credit score or credit worthiness; or (2) reporting payment to the original creditor will help the debtor in future lending decisions.[3] **A. 26.** Knight contends that the first interpretation is false, as paying off a delinquent debt would actually harm the debtor's credit score. **A. 26-27.**

[3] On appeal, Knight also provides two additional interpretations that were offered by Midland and the District Court in the proceedings below. **Appellant's Br. at 13-14.** However, we must only consider the

interpretations alleged in Knight's complaint. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

It is not "bizarre or idiosyncratic" for the least sophisticated debtor to read the language Knight identifies to mean that payment would not hurt a debtor's credit score and might even actually improve it. We recognize that this might not be the most appropriate reading of the Letter, but it is not
8 our responsibility to determine whether one *8 interpretation is more appropriate than another. *Caprio*, 709 F.3d at 151. Instead, analyzing the Letter as we must under the least sophisticated debtor standard, which protects "naïve and even gullible individuals," *id.*, we cannot conclude at this stage that the least sophisticated debtor could not have been misled by this language. Moreover, a debtor who falsely believes that making payment on her debt would not hurt her credit score and might improve it could be induced to make the payment. Therefore, this language could be found to be material.

2. To Whom Payments Will Be Reported

Second, Knight claims that the Letter could be found to be false, deceptive, and misleading in its use of the term "report." **A. 22-23.** Knight argues that "report" could be reasonably interpreted by the least sophisticated debtor to mean Midland would report the payment to the credit reporting agencies, the original creditor, or both. **A. 22-23.**

Knight's interpretation of the Letter's use of the term "report" is not "bizarre or idiosyncratic." Without any other defining or clarifying language as to whom Midland will report a debtor's payment, the least sophisticated debtor could reasonably believe that Midland would report the payment to the debtor's original creditor, the credit reporting agencies, or both. This claim is bolstered by the Letter's prominent provision of the name of Knight's original creditor. Because the least sophisticated debtor could come to multiple conclusions as to whom the payment is reported that are neither bizarre nor idiosyncratic, the Letter could be found to be misleading. Furthermore, because the entity to whom payment is reported can impact a debtor's decision to pay, this
9 language could be found to be material. *9

3. When Payments Will Be Reported as "Paid in Full" versus "Paid in Full for less than the full balance"

Third, Knight argues that the Letter is ambiguous as to when a debtor's payment would be reported as "Paid in Full" or "Paid in Full for less than the full balance." A. 23. (emphasis omitted). This argument arises largely from Knight's assertion that "Option 3" of the Letter, which offers monthly payments as low as $50 a month, is ambiguous. **A. 23-25.** Although Option 3 in isolation appears to provide for payment of the full account balance, the Letter's invitation to "accept one of these *discounts*" suggests that it is instead a settlement option. A. 32 (emphasis added). Given this ambiguity, Knight argues that the Letter could be interpreted by the least sophisticated debtor in several ways: (1) "Paid in Full" applies to Option 1 and "Paid in Full for less than the full balance" applies if Option 2 or 3 is selected;[4] (2) "Paid in Full" applies only if the debtor immediately pays the listed "current balance" and choosing any of the three listed options results in a report of "Paid in Full for less than the full balance;" (3) "Paid in Full" applies to Option 1 or Option 2 and "Paid in Full for less than the full balance" applies to Option 3; (4) "Paid in Full for less than the full balance" applies to Option 1 or Option 2 and "Paid in Full" applies to Option 3; or (5) any partial payment results in the account being reported as "Paid in Full for less than the full balance." **A. 23-25.**
10 *10

[4] Knight's complaint alleges two additional variations of this first interpretation: "Paid in Full" applies to Option 1 and choosing Option 2 or 3 would result in a reporting that the debt is "Paid in Full for less than the full balance" *until* either (1) final

payment *of the respective discount plan* is made or (2) the *full account balance* is completely paid off. **A. 23-24.** --------

We agree that the Letter could be misleading as to when a debtor's account will be reported as "Paid in Full" or "Paid in Full for less than the full balance." The least sophisticated debtor is expected to read a communication in its entirety. *Caprio*, 709 F.3d at 149. Given that the Letter encourages the debtor to accept "one of these discounts" and fails to unequivocally state that Option 3 is not a discount but an option to pay the full account balance, the least sophisticated debtor reading the entire Letter could reasonably understand Option 3 to be a settlement option. Accordingly, the Letter may mislead the least sophisticated debtor with respect to whether "Paid in Full" instead of "Paid in Full for less than the full balance" will be reported. This ambiguity could be said to be material because it may affect whether a debtor makes a payment and which option he or she chooses.

4. "Paid in Full" versus "Paid in Full for less than the full balance"

Lastly, Knight claims that the Letter's use of the phrase "Paid in Full for less than the full balance" is itself misleading to the least sophisticated debtor. **A. 26.** Knight alleges that the least sophisticated debtor does not understand the full meaning of this reporting status and is unsure how an entity would treat a debt that has been reported as "Paid in Full for less than the full balance." **A. 26.**

We agree that the phrase "Paid in Full for less than the full balance" could be found to be misleading. Both of the reporting statuses provided by the Letter—"Paid in Full" and "Paid in Full for less than the full balance"—use the phrase "Paid in Full" with the same capitalization, and the latter status has no other capitalized words. Because any payment is reported with the language "Paid in Full," the ramifications of each status are *11 unclear. Without any other clarifying language, the least sophisticated debtor may read the two statuses together and believe that they have the same reporting consequences and that one is no better or worse than the other, which is inaccurate. Furthermore, this language could be found to be material because the least sophisticated debtor may be induced to make a specific type of payment based on this information.

III. CONCLUSION

For the foregoing reasons, we conclude that Midland's Letter could be found to be deceptive and misleading. Given its ambiguous and contradictory language, the Letter could be found to cause the least sophisticated debtor to interpret it in ways that are neither bizarre nor idiosyncratic. Therefore, we will reverse the District Court's dismissal and remand for further proceedings consistent with this opinion.

No. 389, September Term, 2000
Court of Special Appeals of Maryland

Wickman v. Kane

136 Md. App. 554 (Md. Ct. Spec. App. 2001) · 766 A.2d 241
Decided Feb 5, 2001

No. 389, September Term, 2000.

Filed: February 5, 2001.

The Circuit Court, Montgomery County, Vincent Ferretti, Jr., J.

555 Reversed. *555

Douglas Clark Hollmann, Annapolis, for appellant.

Robert Phillip Thompson (Thompson Sugar, P.A., on the brief), Baltimore, for appellee.

Argued before HOLLANDER, EYLER, DEBORAH S. SMITH, MARVIN H. (Ret'd, Specially Assigned), JJ.

556 *556

Opinion by EYLER, Judge, Retired, Specially Assigned.

Miles X. Wickman, appellant, challenges an order of the Circuit Court for Montgomery County granting summary judgment in favor of Michael A. Kane, appellee, in Wickman's suit on a promissory note. Wickman presents the following question for review, which we have rephrased:

> Did the circuit court err in ruling that his acceptance of a partial payment of the total amount due on the promissory note constituted an accord and satisfaction?

For the following reasons, we shall reverse the judgment of the circuit court.

FACTS AND PROCEEDINGS

On June 2, 1989, Michael A. Kane and Randy C. Stewart, as makers, executed a promissory note for $225,000, with interest at 11%, amortized over a thirty year period, and payable to Miles X. Wickman. The note called for monthly payments of $2,143, with the balance due on June 2, 1994. The note further contained an acceleration clause providing that, in the event of a default on any of the obligation, in whole or in part, the balance would become due and payable at the option of the holder. It also gave the makers the right to prepay the unpaid balance, in whole or in part,
557 without penalty. *557

After the balance on the note became due, Kane and Stewart continued to make monthly payments on it. On November 12, 1995, Kane wrote a check for $111,456.54, payable to Wickman. That amount equaled one-half of the outstanding balance on the note, plus interest. On the memorandum line of his check, Kane wrote: "payment in full of loan." Kane mailed the check to Wickman on November 14, 1995. He enclosed a cover letter in which he said:

> As you know, in June 1989, you loaned to Randy and I, on a several basis (meaning we each were responsible for one half of the loan) the amount of $225,000. The note was due in June of 1994 and was not formally extended although payments were continued at the same interest rate of 11%.

> Please find enclosed payment for my one half of the above note together with interest through the above date. The remaining principle [sic] balance of my share is $108,186. The interest is $3270.54 for a total of $111,456.54.
>
> Since Randy is still paying you on a monthly basis, it is impossible for you to return the note marked canceled. Accordingly, would you please sign the bottom of this letter and return it to me so that I may fulfill the terms of the refinance of my portion of the note. The purpose is to acknowledge that I no longer owe you any money and that the above referenced note is paid in full.
>
> Please call with questions.

The following statement, with a signature line for Wickman, appeared at the bottom of Kane's letter:

> The undersigned hereby acknowledges receipt of $111,456.54 which represents complete and full payment of all principal and interest of Michael A. Kane's share of the note between Miles X. Wickman (as lender) and Michael A. Kane and Randy C. Stewart (as makers) originally dated June 2, 1989.

Wickman did not negotiate the check or sign the statement at the bottom of Kane's letter. On December 27, 1995, Kane and Wickman had a telephone conversation, which Kane memorialized
558 *558 as follows in a letter to Wickman, dated January 10, 1996:

> In connection with our telephone conversation of December 27, 1995, I once again wish to set forth my position as clearly as possible to avoid any further misunderstanding.
>
> The note Randy and I signed (dated June 2, 1989) which became due on June 2, 1994, was signed on a "several" basis, meaning that Randy owed half and I owed half. It was always paid out of accounts owned one half by Randy and one half by me. It was never my intention that I would be responsible for Randy's half or that Randy would be responsible for my half.
>
> The documents that Randy and I signed in connection with our decision to part company reflect this intent and indicate that I was to pay my half of the note to you and that Randy was to make arrangements with you to pay his one half of the note. I have requested that Randy finalize this aspect of our agreement with you on more than one occasion.
>
> It is my understanding that unless a note states that an obligation is "joint and several", then it is presumed to be "several". The note I signed does not indicate that the liability is joint and several.
>
> I have tendered payment of my one half share of the note together with interest with my letter to you of November 14, 1995. It is my understanding that you have yet to deposit the check. I wish to be certain you understand that any interest on my one half share ceased when I tendered payment to you and that I no longer owe you any money.

Thereafter, Wickman negotiated the November 12, 1995 check. Before doing so, however, he changed the memorandum on it to read "payment in full of ½ loan," instead of "payment in full of loan."

Stewart continued to make monthly payments on the note through July 1998. He then ceased making payments and filed for bankruptcy in

federal court. Wickman filed a claim in that
559 proceeding. *559

Wickman brought an action on the note against Kane, in the Circuit Court for Anne Arundel County. He alleged that he had made demand upon Kane for payment under the note, but that Kane had refused. He further alleged that the note was in default and that as of August 1, 1998, the principal balance owed on it was $105,044.47, plus interest of 11% per annum. The case was transferred to the Circuit Court for Montgomery County. Kane filed an answer denying the indebtedness and raising, *inter alia*, the defense of accord and satisfaction.

Kane filed a motion for summary judgment, attaching an affidavit attesting to the facts recited above. Wickman filed an opposition and a cross-motion for summary judgment. He furnished an affidavit attesting that the note had been intended to be joint and several; that all of the payments on the note until November, 1995 had been paid by means of checks by both makers; that Kane's November 14, 1995 letter had been accompanied by releases that he had refused to sign; that he had told Kane that he would not accept his check as full payment of the obligation due under the note; and that he had amended the memorandum line of Kane's November 12, 1995 check to read "`payment in full of ½ of loan' to indicate [his] refusal to accept [Kane's] offer that the payment would satisfy his obligation under the Note."

The circuit court held a hearing on the motions for summary judgment. It granted summary judgment in favor of Kane, ruling that there was no genuine dispute of material fact and that, as a matter of law, the action on the note was barred by the doctrine of accord and satisfaction. Three days later, the court docketed a written summary judgment order. Wickman filed a motion for reconsideration within ten days. After that motion was denied, he noted a timely appeal.

STANDARD OF REVIEW

A circuit court may grant summary judgment when the movant demonstrates that there is no genuine dispute of material fact and that he is entitled to judgment as a matter of law. Md. Rule 2-501(e) (2000); *King v. Board of Educ.*, 354 Md.
560 369, *560 376, 731 A.2d 460 (1999). In deciding whether to grant a motion for summary judgment, the circuit court determines issues of law only. In reviewing the circuit court's grant of summary judgment, we have the same information from the record and decide the same issues of law as the circuit court decided. *Heat Power Corp. v. Air Prods. Chems., Inc.*, 320 Md. 584, 591-92, 578 A.2d 1202 (1990). We determine whether the circuit court was legally correct in granting summary judgment. *Id.* In essence, we review the trial court's legal conclusions *de novo*. *Matthews v. Howell*, 359 Md. 152, 162, 753 A.2d 69 (2000).

DISCUSSION

The parties agree that there was no genuine dispute of material fact. Wickman contends that the circuit court erred in ruling, on the undisputed facts, that his action against Kane on the note was barred by the defense of accord and satisfaction. Specifically, he argues that under Md. Code (1997 Repl. Vol.), § 3-116(a) of the Commercial Law Article ("CL"), the note as executed created a joint and several liability of Kane and Stewart, as the makers; therefore, there was no bona fide dispute as to whether Kane's obligation under the note was for the full amount of the note or one-half of the amount of the note. Because there was no such dispute, Kane's November 12, 1995 payment merely was a partial payment of a liquidated and undisputed debt that was due, which is not an accord and satisfaction, as a matter of law. Put otherwise, there was no consideration to support an accord and satisfaction, because Kane simply paid an existing debt.

Kane responds that the undisputed facts established that there was a bona fide dispute over the amount of his liability under the note, and, therefore, his forbearance on his defense to Wickman's claim against him for the full value of

the note was sufficient consideration to support an accord and satisfaction. He further asserts that the undisputed facts established that Wickman accepted his $111,456.54 payment in compromise
561 of that dispute. *561

An accord and satisfaction is a completed compromise of a disputed claim. In *Kimmel v. SAFECO Ins. Co.*, 116 Md. App. 346, 696 A.2d 482 (1997), we explained the doctrine as follows:

> [W]hen a claim is disputed, acceptance of payment, coupled with knowledge that payment is intended fully to satisfy a disputed claim, constitutes an accord and satisfaction that bars any further recovery.

116 Md. App. at 357, 696 A.2d 482. In *Jacobs v. Atlantco Ltd. Partnership*, 36 Md. App. 335, 373 A.2d 1255 (1977), we adopted the definition of accord and satisfaction found in 1 C.J.S., Accord and Satisfaction, § 1 (1936 Supp. 1976)[1]:

> Accord and satisfaction is a method of discharging a contract or cause of action, whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the "accord" being the agreement, and the "satisfaction" its execution or performance.

36 Md. App. at 340-41, 373 A.2d 1255. *See also Automobile Trade Ass'n v. Harold Folk Enter.*, 301 Md. 642, 665, 484 A.2d 612 (1984).

Accord and satisfaction is an affirmative defense. To prevail, the defendant must prove: 1) that a dispute arose between the parties about the existence or extent of liability; 2) that, after the dispute arose, the parties entered into an agreement to compromise and settle the dispute by the payment by one party of a sum greater than that which he admits he owes and the acceptance by the other party of a sum less than that which he claims is due; and 3) that the parties performed that agreement. *Air Power, Inc. v. Omega Equip. Corp.*, 54 Md. App. 534, 538-39, 459 A.2d 1120 (1983).

The compromise of a dispute between parties will serve as consideration for an accord and satisfaction when the dispute is bona fide: that is,
562 the dispute is asserted in good *562 faith and the subject matter is reasonably doubtful. *Snyder v. Cearfoss*, 187 Md. 635, 643, 51 A.2d 264 (1947); *Air Power, Inc.*, 54 Md. App. at 539, 459 A.2d 1120. These conditions must exist because forbearance on a claim or defense relative to a dispute that is not made in good faith and is not reasonably doubtful is of no value.

> [F]orbearance, to be adequate consideration, must be forbearance of a claim which is asserted in good faith. This does not mean that the one asserting the claim must believe that a suit on it can be won. It does mean, however, that the claim is not made for purposes of vexation or "in order to realize on its nuisance value." 1 Corbin, *Contracts*, § 140 (1963 Supp. 1971). To that requirement of "good faith," the Court of Appeals, in *Snyder v. Cearfoss*, 187 Md. 635, 643 [51 A.2d 264] (1947), has imposed the additional requirement that the claim be "reasonably doubtful," i.e., not "so lacking in foundation as to make its assertion incompatible with honesty and a reasonable degree of intelligence."

Air Power, Inc., 54 Md. App. at 539, 459 A.2d 1120.[2]

[1] This definition currently appears at 1 C.J.S., Accord and Satisfaction, § 2 (1985).

[2] Section 74 of the Restatement (second) of Contracts (1981) states, in pertinent part: "Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, *or* (b) the forbearing or surrendering party

believes that the claim or defense may be fairly determined to be valid." (Emphasis added.) By contrast, in Maryland both good faith and reasonable doubt are required. *See Snyder v. Cearfoss*, 187 Md. 635, 643, 51 A.2d 264 (1947).

CL § 3-311 also is pertinent, and is consistent with the Maryland common law of accord and satisfaction. It addresses accord and satisfaction by use of an instrument. It states, in pertinent part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) *the amount of the claim was unliquidated or subject to a bona fide dispute*, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> 563 *563
>
> (b) . . . the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(Emphasis added.)[3]

[3] In his brief, Kane argues at length that, under CL § 3-311(b), Wickman effected an accord and satisfaction by negotiating his check, because the check as presented to Wickman bore the "conspicuous statement" that it was tendered in full satisfaction of Wickman's claim. The language of CL § 3-311(a) makes plain, however, that subsection (b) of the statute is not triggered unless and until the amount of the claim is unliquidated (which is not the case here) *or is subject to a bona fide dispute*.

The corollary to the rule that, when a claim is liquidated, an accord and satisfaction only can be found when there was a bona fide dispute between the parties about the existence or extent of liability, is that partial payment of an undisputed claim or a debt that is liquidated and presently due cannot support an accord and satisfaction. This is so because past consideration will not support a new agreement. *Reece v. Reece*, 239 Md. 649, 659, 212 A.2d 468 (1965). Accordingly, payment of a claim or debt that one already is obligated to pay, when the claim or debt is due and owing, ascertainable in amount, and not controverted, will not serve as consideration for an accord. *Eastover Co. v. All Metal Fabricator, Inc.*, 221 Md. 428, 433, 158 A.2d 89 (1960); *Air Power, Inc.*, 54 Md. App. at 538, 459 A.2d 1120. In that circumstance, there must be some collateral consideration beyond the past consideration to constitute an accord. *Scheffenacker v. Hoopes*, 113 Md. 111, 115, 77 A. 130 (1910); *Prudential Ins. Co. v. Cartingham*, 103 Md. 319, 321-22, 63 A. 359 (1906); *Commercial Farmer's Nat'l Bank v. McCormick*, 97 Md. 703, 707-08, 55 A. 439 (1903); *Barry Properties, Inc. v. Blanton McCleary*, 71 Md. App. 280, 286, 525 A.2d 248 (1987).

In the case *sub judice*, the parties agree that Wickman's claim on the note was liquidated, i.e., it could be determined with exactness from the
564 parties' agreement, calculated using *564 rules of arithmetic, or determined by law. *See Black's Law Dictionary* 642 (abridged 6th ed. 1991); *see also Eastover Co.*, 221 Md. at 433, 158 A.2d 89 (defining "unliquidated claim"). Moreover, when Kane tendered his payment, in November 1995, the note not only was due, but was overdue.[4] The parties disagree, however, about whether there was a bona fide dispute concerning the extent of Kane's liability on the note. Wickman maintains that there was no such dispute and, therefore, Kane's November 1995 check merely was a partial payment of past consideration, insufficient to support an accord. Kane maintains that there was

such a dispute and, therefore, his forbearance to defend the claim was new consideration adequate to support an accord, and Wickman accepted his payment as a compromise of the dispute. *See Scheffenacker*, 113 Md. at 115, 77 A. 130; *see also Eastover Co.*, 221 Md. at 433, 158 A.2d 89 (stating that an agreement to accept less than is due would be *nudum pactum*).

[4] The trial court stated that Wickman was getting his money "faster than he needs to get it" and that this was consideration for accepting the accord and satisfaction. Under CL § 3-304, the note was overdue on the day after its due date, June 2, 1994. Wickman was not, therefore, getting his money faster than he was entitled to get it.

Wickman acknowledges that Kane believed in good faith that his liability on the note was several. Thus, whether Kane had a good faith belief in the merits of his defense is not an issue. *See Gruss v. Gruss*, 123 Md. App. 311, 321, 718 A.2d 622 (1998) (stating that subjective good faith is a factual determination). Rather, this case turns on whether the dispute between the parties was "reasonably doubtful." *Snyder*, 187 Md. at 643, 51 A.2d 264; 3 Richard A. Lord, *Williston on Contracts*, § 7:45, at 702 (4th ed. 1992). A claim or defense can be "reasonably doubtful" because of uncertainty about the facts *or* the law. *See Snyder*, 187 Md. at 643, 51 A.2d 264 ("forbearance is insufficient consideration if the claim [or defense] forborne is so lacking in foundation as to make its assertion incompatible with honesty and a reasonable degree of intelligence") (quoting 1 *Williston on Contracts*, Rev. Ed., § 135); Restatement (Second) of
565 Contracts § 74 (1981); 3 *565 *Lord*, *supra*, at 704-06; *see also Pennsylvania State Univ. v. University*
566 *Orthopedics*, 706 A.2d 863, 873 (Pa.Super. Ct. 1998) (stating that the surrender of a claim involving uncertain facts is sufficient consideration to support a contract); *Washington v. Brown*, 92 Wash.App. 586, 965 P.2d 1102, 1107 (1998) (stating that if the claim is doubtful because of uncertainty as to the law, and it is asserted in good faith, forbearance to assert the claim constitutes sufficient consideration for a contract); *Michaelian v. State Comp. Ins. Fund*, 50 Cal.App.4th 1093, 58 Cal.Rptr.2d 133, 145 (1996) (stating that forbearance on a claim is not sufficient consideration when the claim is wholly invalid or worthless).

The alleged dispute in this case was not factual in nature. That is, the parties were not in disagreement about any of the events surrounding the execution of the note. What allegedly was in dispute was the legal significance of the note: did it have the legal effect of making each maker liable for the full amount of the debt or for one-half the amount of the debt? A claim or defense is reasonably doubtful as to the law if it does not appear obviously unfounded in law to a person with an elementary knowledge of the legal principles involved. 3 Lord, *supra*, at 705-06. We review *de novo*, for its legal correctness, the circuit court's implicit determination that Wickman's claim that the note was signed on a joint and several basis and, therefore, that Kane was liable for the entire balance, was "reasonably doubtful."

CL § 3-116(a) governs joint and several liability on an instrument, including a promissory note. It states:

> Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.[5]

*566

[5] When the promissory note in this case was signed, on June 2, 1989, the provision now found at CL § 3-116(a) was found in Md. Code (1975) § 3-118(e) of the Commercial Law Article. Subsection (e) provided: "Unless the instrument otherwise specifies

> two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as `I promise to pay.'"

In their briefs, the parties refer to CL § 3-116. CL § 3-118(c) does not differ substantively from CL § 3-116(a).

This statute and its application to the note in this case are straightforward. The note unambiguously identifies Kane and Stewart as "the Makers" and does not contain any language to the effect that their liability is anything other than joint and several. One with an understanding of only the fundamentals of the law could apply CL § 3-116 to the language of the note and determine that Kane and Stewart, as makers, were jointly and severally liable for the debt. Conversely, one could not apply the plain language of CL § 3-116(a) to the note and conclude, as Kane did, that Kane's legal liability on the note was limited to one-half the debt.

It would be apparent, even to a person with little or no legal knowledge, that, in light of CL § 3-116, Wickman's claim on the note was not reasonably doubtful. For us to hold otherwise would call into question the long-standing principle that "parties to a contract are presumed to contract mindful of the existing law and that all applicable or relevant laws must be read into the agreement . . . ." *Wright v. Commercial and Sav. Bank,* 297 Md. 148, 153, 464 A.2d 1080 (1983); *Heyda v. Heyda*, 94 Md. App. 91, 98, 615 A.2d 1218 (1992). That principle is itself one of commonsense; even a person with little legal knowledge would be loathe to think that a contract is not subject to existing laws unless they are expressly incorporated. In short, CL § 3-116(a) applies automatically and clearly to the note and establishes that Kane and Stewart were jointly and severally liable.

Kane argues that *Scheffenacker v. Hoopes*, *supra*, 113 Md. 111, 77 A. 130 and *Jacobs v. Atlantco Ltd. Prtnrshp.*, *supra*, 36 Md. App. 335, 373 A.2d 1255, nonetheless support his assertion that there was a bona fide dispute in this case. We do not 567 find those cases analogous. *567

In *Scheffenacker v. Hoopes*, a cattleman contracted with a printer for the printing of 1,000 catalogs to be used to advertise the sale of his cattle at a country fair. The cattleman was dissatisfied with the catalogs and, at his request, the printer made some changes and printed 300 more catalogs. The printer then gave the cattleman a bill for the printing job. The cattleman sent the printer a check for one-half of the full amount and enclosed a letter indicating that the check was intended as full settlement of the bill. The letter stated that the printer's failure to properly produce the catalogs, "caused [the cattleman] great damage and injury" and that the cattleman was considering bringing a claim in recoupment, but hoped to settle the matter without a dispute by agreeing to pay one-half the bill. 113 Md. at 113, 77 A. 130. The Court of Appeals held that there was sufficient consideration to support an accord and satisfaction because the cattleman gave up his claim in a bona fide dispute.

The dispute in *Scheffenacker*, unlike the dispute in the case *sub judice*, was reasonably doubtful on the facts. The dispute involved factual questions and credibility determinations that could not be resolved by a straightforward application of the law. In the case at bar, the parties agree on the facts. The question here, unlike in *Scheffenacker*, is not whether the claim was reasonably doubtful on the facts, but whether it was reasonably doubtful on the law.

In *Jacobs v. Atlantco Ltd. Partnership*, the parties entered into a contract for the sale of real estate. The contract contained clauses providing, *inter alia*, that it would be "considered null and void" if the buyer failed to settle by the appointed date, that title was to be good and merchantable, and that time was of the essence. 36 Md. App. at 336, 373 A.2d 1255. The purchaser refused to proceed to settlement on the appointed date because the

title attorney opined that there was a cloud on the seller's title in the form of a decree recognizing the right of a third party to occupy the property under a leasehold. The seller's attorney maintained that this "was not a cloud on [the] title. . . . [as the third party] had left the area — 'absconded', [sic] they
568 called it — months before. . . ." *568 *Id.* at 337-38, 373 A.2d 1255. After the parties located the third party and obtained a release from him, settlement was rescheduled. At the rescheduled settlement, the seller refused to go forward, alleging that the contract had been breached when settlement did not take place on the originally scheduled date, and that one of the seller's general partners was not legally obligated to sign the settlement documents. The seller demanded an additional $50,000 to proceed. After a series of telephone communications, the buyer agreed to pay $25,000 to the seller, in the form of a one-year note secured by a mortgage on the property. Settlement went forward. Four months later, the buyer sued the seller to set aside the note, alleging that it was not supported by consideration. The case was tried by the court, which found in favor of the seller. The court concluded that the note was a binding accord and satisfaction, with the consideration for the note being the compromise of bona fide disputes between the parties. This Court affirmed the judgment.

Jacobs also is distinguishable from the present case. The central question in *Jacobs* was whether the disputes raised by the seller that resulted in the compromise payment of $25,000 were made in good faith: that is, were they "taken in the honest belief that [they] were an arguable position, and in good faith, or whether [they] were a pretext, not honestly believed, but raised for the purpose of exerting economic duress." 36 Md. App. at 340. We concluded that the trial court's factual finding that each of the parties' "views on the state of the title had some substance, and neither was frivolous," was not clearly erroneous. *Id.* at 347, 373 A.2d 1255. In the case *sub judice*, by contrast, Kane's good faith belief in his defense to the note was not at issue. Rather, the reasonableness of the dispute on the law was at issue. Our focus in not on the honesty with which Kane took the legal position that he was responsible for only one-half of the debt (which, if disputed, would be a factual question), but on the objective rationality of that legal position.

Wickman's claim that Kane's liability on the note was joint and several, and that Kane therefore
569 owed the full balance on *569 it, was not reasonably doubtful on the law. Kane articulated the legal basis for his position concisely in his letter, stating, "It is my understanding that unless a note states that an obligation is `joint and several,' then it is presumed to be `several.'" This legal basis directly contradicts the clearly stated controlling law and was not "'compatible with . . . a reasonable degree of intelligence.'" *Jacobs v. Atlantco Ltd. Prtnrshp*, *supra*, 36 Md. App. at 343, 373 A.2d 1255 (quoting 1 *Williston on Contracts*, Rev. Ed., Sec. 135). Kane's payment of $111,456.54 on the note was a partial payment of his already existing liability, not a payment in compromise of a bona fide dispute. Accordingly, the circuit court was legally incorrect in ruling that Wickman's claim against Kane on the note was barred by the doctrine of accord and satisfaction.

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY APPELLEE.

570 *570

Court of Appeals of the State of New York

California Packing Corp. v. Kelly S. D. Co.

228 N.Y. 49 (N.Y. 1920) · 126 N.E. 269
Decided Jan 27, 1920

Argued January 6, 1920

50 Decided January 27, 1920 *50

51 *Lyle Evans Mahan* for appellant. *51 *H.H.*
52 *Nordlinger* for respondent. *52

POUND, J.

This is an appeal, on certified questions, from an order of the Appellate Division, reversing an order made by the Special Term denying a motion made under section 682, Code of Civil Procedure, by a third party to vacate an attachment. The Appellate Division vacated the attachment. The material question is whether an allegation in the complaint that a draft, not alleged to be negotiable, was drawn upon defendant by plaintiff, and "for a valuable consideration" duly accepted by defendant, sufficiently states a cause of action for breach of contract under section 636, Code of Civil Procedure.

The Appellate Division in the first department has repeatedly held that an allegation in a pleading that a contract was made "for a valuable consideration" is a mere conclusion of law and that the particular consideration must be pleaded. (*Fulton* v. *Varney,* 117 App. Div. 572, 575; *Neukirch* v. *McHugh,* 165 App. Div. 406, 409.) The Appellate Division in the third department, on the contrary, has held (*St. Lawrence Co. Nat. Bank of Canton* v. *Watkins,* 153 App. Div. 551, 553) that a more particular allegation of consideration is unnecessary to make a good pleading.

We are of the opinion that the allegation is sufficient, as "a plain and concise statement" of the ultimate, principal and issuable fact of consideration, to permit the proof of the facts showing the actual consideration. (*Sultan of Turkey* v. *Tiryakian,* 213 N.Y. 429.) The Code of Civil Procedure (§ 519) provides that "the allegations of a pleading must be liberally construed, with a view to substantial justice between the parties." In an action on a non-negotiable note it has been held that the words "for
53 value received" make a good averment. *53 (*Prindle* v. *Caruthers,* 15 N.Y. 425.) That was the common-law form, and at common law facts were pleaded according to their legal effect. These words have a tested efficiency under the Code. The pleader may depend more safely upon a form stabilized by authority than upon his own ingenuity in stating the particular facts in such case. "A very broad and general allegation of consideration" is sufficient. (*National Citizens' Bank of N.Y.* v. *Toplitz,* 178 N.Y. 464, 468.) In pleading on negotiable instruments, by copy, it is unnecessary to allege a consideration, for "every negotiable instrument is deemed *prima facie* to have been issued for *a valuable consideration."* (Negotiable Instruments Law [Cons. Laws, ch. 38], § 50.) Words which are the equivalent of the presumption should, in actions on non-negotiable instruments, such as drafts, be sufficient. "For a valuable consideration" in legal significance, means "for an equivalent or compensation having value" or "for value received."

The complaint and affidavit gave jurisdiction to the justice who granted the warrant. They show the existence, *first,* of a cause of action on contract

upon which an attachment could be founded, and *secondly,* of liquidated damages.

Even in an action for unliquidated damages where evidentiary facts must be stated with some degree of particularity to show a liability of the defendant for the amount stated, in order that the court may say, *prima facie,* that more than nominal damages have been sustained, complaints and affidavits, general in their terms and open to criticism on the ground that facts are loosely stated, have been upheld on applications to vacate, made, not by the defendants, but by other attaching creditors, where it could be fairly said that the allegations of fact were not "vague and inconclusive." The only question is whether the affidavits conferred jurisdiction to grant the warrant. (*Steuben Co. Bank* v. *54 *Alberger,* 78 N.Y. 252, 258; *Haebler* v. *Bernharth,* 115 N.Y. 459, 464, 465.) Meticulous particularity in pleading the facts which must be shown by way of evidence to establish a cause of action is neither necessary nor proper. It bewilders the real issue and furnishes no safeguard against imposition or oppression.

The order of the Appellate Division should reversed, with costs in this court and in the Appellate Division, the order of the Special Term affirmed, and the questions certified answered as follows: The first and third questions in the affirmative; the second question as follows: The allegation is one of fact and does not state a conclusion of law.

HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

CFPB Consumer Laws and Regulations ECOA

Equal Credit Opportunity Act (ECOA)

The Equal Credit Opportunity Act (ECOA), which is implemented by Regulation B, applies to all creditors. When originally enacted, ECOA gave the Federal Reserve Board responsibility for prescribing the implementing regulation. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) transferred this authority to the Consumer Financial Protection Bureau (CFPB or Bureau). The Dodd-Frank Act granted rule-making authority under ECOA to the CFPB and, with respect to entities within its jurisdiction, granted authority to the CFPB to supervise for and enforce compliance with ECOA and its implementing regulations.[1] In December 2011, the CFPB restated the Federal Reserve's implementing regulation at 12 CFR Part 1002 (76 Fed. Reg. 79442)(December 21, 2011). In January 2013, the CFPB amended Regulation B to reflect the Dodd-Frank Act amendements requiring creditors to provide applicants with free copies of all appraisals and other written valuations developed in connection with all credit applications to be secured by a first lien on a dwelling. This amendment to Regulation B also requires creditors to notify applicants in writing that copies of all appraisals will be provided to them promptly.

The statute provides that its purpose is to require financial institutions and other firms engaged in the extension of credit to "make credit equally available to all creditworthy customers without regard to sex or marital status." Moreover, the statute makes it unlawful for "any creditor to discriminate against any applicant with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act." The ECOA has two principal theories of liability: disparate treatment and disparate impact. Disparate treatment occurs when a creditor treats an applicant differently based on a prohibited basis such as race or national origin.[2] Disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member of a protected class unless it meets a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact.[3]

In keeping with the broad reach of the statute's prohibition, the regulation covers creditor activities before, during, and after the extension of credit. A synopsis of some of the more important points of Regulation B follows, and an examination program is provided for a more thorough review.

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[1] Sec.1071 of the Dodd-Frank Act added a new Sec. 704B to ECOA to require the collection of small business loan data. The amendment will be reflected in this document at a later date once it becomes effective.

[2] 12 CFR Part 1002 Supp. I Sec. 1002.4(a)-1; 12 CFR Part 1002 Supp. I Sec. 1002.4(a)-1. "Disparate treatment" may be "overt" (when the creditor openly discriminates on a prohibited basis) or it may be found through comparing the treatment of applicants who receive different treatment for no discernable reason other than a prohibited basis. In the latter case, it is not necessary that the creditor acts with any specific intent to discriminate.

[3] 12 CFR Part 1002 Supp. I Sec. 1002.6(a)-2.

For fair lending scoping and examination procedures, the CFPB is temporarily adopting the FFIEC Interagency Fair Lending Examination Procedures that are referenced in the examination program. However, in applying those procedures the CFPB takes into account that the Fair Housing Act (FHAct), 42 U.S.C. 3601 *et seq*., unlike ECOA, is not a "Federal consumer financial law" as defined by the Dodd-Frank Act for which the CFPB has supervisory authority.[4]

Applicability – 12 CFR 1002.2(e), 1002.2(f), 1002.2(j), 1002.2(l), 1002.2(m), and 1002.2(q)

Regulation B applies to all persons who, in the ordinary course of business, regularly participate in the credit decision, including setting the terms of the credit. The term "creditor" includes a creditor's assignee, transferee, or subrogee who so participates. For purposes of discrimination or discouragement, 12 CFR 1002.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made.

Regulation B's prohibitions apply to every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to: information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures). The regulation defines "applicant" as any person who requests or who has received an extension of credit from a creditor and includes any person who is or may become contractually liable regarding an extension of credit. Under Regulation B, an "application" means an oral or written request for an extension of credit made in accordance with procedures used by a creditor for the type of credit requested. "Extension of credit" means "the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit [,] the refinancing or other renewal of credit...or the continuance of existing credit without any special effort to collect at or after maturity)." Because the ECOA and Regulation B prohibit discrimination in any aspect of a credit transaction, a creditor violates the statute and regulation when discriminating against borrowers on a prohibited basis in approving or denying loan modifications. Moreover, as the definition of credit includes the right granted by a creditor to an applicant to defer payment of a debt, a loan modification is itself an extension of credit and subject to ECOA and Regulation B. Examples of loan modifications that are extensions of credit include, but are not limited to, the right to defer payment of a debt by capitalizing accrued

[4] In addition to potential ECOA violations, an examiner may identify potential violations of the FHAct through the course of an examination. The FHAct prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability). The CFPB cooperates with the U.S. Department of Housing and Urban Development (HUD) to further the purposes of the FHAct. If a potential FHAct violation is identified, the examiner must consult with Headquarters to determine whether a referral to HUD or the U.S. Department of Justice and, if applicable, the creditor's prudential regulator is appropriate.

interest and certain escrow advances, reducing the interest rate, extending the loan term, and/or providing for principal forbearance.[5]

Prohibited Practices – 12 CFR 1002.4

Regulation B contains two basic and comprehensive prohibitions against discriminatory lending practices:

- A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.
- A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage, on a prohibited basis, a reasonable person from making or pursuing an application.

Note that the regulation is concerned not only with the treatment of persons who have initiated the application process, but also with lender behavior before the application is even taken. Lending officers and employees must be careful to take no action that would, on a prohibited basis, discourage a reasonable person from applying for a loan. For example, a creditor may not advertise its credit services and practices in ways that would tend to encourage some types of borrowers and discourage others on a prohibited basis. In addition, a creditor may not use prescreening tactics likely to discourage potential applicants on a prohibited basis. Instructions to loan officers or brokers to use scripts, rate quotes, or other means to discourage applicants from applying for credit on a prohibited basis are also prohibited.

The prohibition against discouraging applicants applies to in-person oral and telephone inquiries as well as to written applications. Lending officers must refrain from requesting prohibited information in conversations with applicants during the pre-interview phase (that is, before the application is taken) as well as when taking the written application.

To prevent discrimination in the credit-granting process, the regulation imposes a delicate balance between the creditor's need to know as much as possible about a prospective borrower with the borrower's right not to disclose information irrelevant to the credit transaction as well as relevant information that is likely to be used in connection with discrimination on a prohibited basis. To this end, the regulation addresses taking, evaluating, and acting on applications as well as furnishing and maintaining credit information.

Electronic Disclosures – 12 CFR 1002.4(d)

Disclosures required to be given in writing may be provided to the applicant in electronic form, generally subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

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[5] *See* Federal Reserve Board Consumer Affairs Letter 09-13 (December 4, 2009) (http://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm).

CFPB Consumer Laws and Regulations ECOA

Rules for Taking Applications – 12 CFR 1002.5

Regulation B permits creditors to ask for any information in connection with a credit transaction, so long as they avoid certain clearly defined areas set forth in 12 CFR 1002.5, which include both the specific prohibited bases of discrimination and certain types of information that often relates to discrimination on a prohibited basis.

Applicant Characteristics

Creditors may not request or collect information about an applicant's race, color, religion, national origin, or sex. Exceptions to this rule generally involve situations in which the information is necessary to test for compliance with fair lending rules or is required by a state or federal regulatory agency or other government entity for a particular purpose, such as to determine eligibility for a particular program. For example, a creditor may request prohibited information:

- In connection with a self-test being conducted by the creditor (provided that the self-test meets certain requirements) (12 CFR 1002.15);
- For monitoring purposes in relation to credit secured by real estate (12 CFR 1002.13; the Home Mortgage Disclosure Act, 12 U.S.C. 2801 ("HMDA"); Home Affordable Modification Program ("HAMP")); or
- To determine an applicant's eligibility for special-purpose credit programs (12 CFR 1002.8(b), (c) and (d)).

Information about a Spouse or Former Spouse – 12 CFR 1002.5(c)

A creditor may not request information about an applicant's spouse or former spouse except under the following circumstances:

- The non-applicant spouse will be a permitted user of or joint obligor on the account. (NOTE: The term "permitted user" applies only to open-end accounts.)
- The non-applicant spouse will be contractually liable on the account.
- The applicant is relying on the spouse's income, at least in part, as a source of repayment.
- The applicant resides in a community property state, or the property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a state.
- The applicant is relying on alimony, child support, or separate maintenance income as a basis for obtaining the credit.

demonstrable relationship to creditworthiness.[7] Additionally, in any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant to favor the applicant in extending credit.

Rules for Extensions of Credit – 12 CFR 1002.7

Section 1002.7 of Regulation B provides a set of rules proscribing certain discriminatory practices regarding the creation and continuation of credit accounts.

Signature Requirements

The primary purpose of the signature requirements is to permit creditworthy individuals (particularly women) to obtain credit on their own. Two general rules apply:

- A creditor may not require a signature other than the applicant's or joint applicant's if under the creditor's standards of creditworthiness the applicant qualifies for the amount and terms of the credit requested.
- A creditor has more latitude in seeking signatures on instruments necessary to reach property used as security, or in support of the customer's creditworthiness, than it has in obtaining the signatures of persons other than the applicant on documents that establish the contractual obligation to repay.

When assessing the level of a creditor's compliance with the signature requirements, examiners should consult with the Examiner-in-Charge if any questions arise.

Special-Purpose Credit Programs – 12 CFR 1002.8

The ECOA and Regulation B allow creditors to establish special-purpose credit programs for applicants who meet certain eligibility requirements. Generally, these programs target an economically disadvantaged class of individuals and are authorized by federal or state law. Some are offered by not-for-profit organizations that meet certain IRS guidelines, and some by for-profit organizations that meet specific tests outlined in 12 CFR 1002.8.

Examiners are encouraged, if an issue arises regarding such a program, to consult with Headquarters.

Notifications – 12 CFR 1002.9

A creditor must notify an applicant of action taken on the applicant's request for credit, whether favorable or adverse, within 30 days after receiving a completed application. Notice of approval may be expressly stated or implied (for example, the creditor may give the applicant the credit card, money, property, or services for which the applicant applied).

Notification of adverse action taken on an existing account must also be made within 30 days.

[7] Judgmental systems may consider the amount and probable continuance of income. A planned reduction in income due to retirement may, for example, be considered.