collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 14, ISSUE 2, JUNE 30, 1999

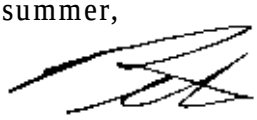
Dear Friends:

If your company, like so many, uses a "lock box" to receive payments from customers, you'll find our feature article loaded with valuable legal information on the newest twist to the age-old problem of "slamming." We'd like to thank attorney Joseph Marino for his contribution to our newsletter.

Also take a look at **www.szabo.com** the first chance you get. We've been busy "tweaking" our Szabo Website, and we think you'll find it even better looking and easier to navigate than before! The Website gives you a comprehensive look at Szabo as well as useful tools and information for today's media credit manager. We'll be adding more useful information down the road, so check us out often. And don't forget that you can e-mail us via the Website as well as place business utilizing the encrypted (secured) electronic claim form.

On our summer calendar of events is the NAB Radio Show, August 31st through September 3rd in Orlando, Florida. Hope to see many of y'all there!

Best wishes for a terrific summer,



Pete Szabo, President
Szabo Associates, Inc.

When Your Lockbox is Slammed ...
Protect Your Rights!

We wish to thank Joseph A. Marino, Counselor at Law, for contributing the following article. Mr. Marino has been an attorney at law since 1976 and a Szabo attorney for more than 10 years. He maintains a commercial litigation practice in Verona, New Jersey. Mr. Marino has been a Board Certified Creditors Rights Specialist by the American Board of Certification since 1994, an active member since 1978 of the Commmercial Law League of America, which he currently serves as the Chair of the Eastern Region and Chair of the Creditor Rights Section. He has been a contributing author and has served on numerous educational panels over the past 20 years. Mr. Marino was also admitted to practice law by the State of Florida in 1976 and the District of Columbia in 1977.

In simpler times, business relations were conducted mostly on a personal level, face to face. These days, personal business transactions are rapidly being replaced by high-speed electronic exchanges of information, names and faces have been reduced to a series of numbers and, for many companies, "lock box" procedures have replaced traditional avenues of payment.

Lock boxes are popular because they accelerate the collection of funds for a company to spend or invest. The process is a fairly simple one. A bank receives payment checks mailed to a post office box by a company's customers. The checks are immediately placed in the banking system for collection after photocopies are made for the company to post accounts receivable records. Because the bank picks up the checks several times a day and processes most of the checks at night, the checks enter the banking system faster than if the company received checks in its mailroom and then deposited them in the bank daily.

While financially advantageous, lock boxes have one fairly serious shortcoming: they are an easy target for "slamming," the age-old debtor's practice of sending a check for an amount less than the balance owed along with a conspicuous notation claiming the check constitutes "payment in full." If the check is deposited by the bank, the debtor contends that the deposit constitutes acceptance of his statement that the amount rendered is "payment in full." It is not surprising that most slamming complaints today involve lock boxes because of the impersonal nature of the procedures.

Courts grappling with slamming disputes must refer to the Common Law Doctrine of Accord and Satisfaction. Under that law, "accord" (an offer to settle a dispute) and "satisfaction" (acceptance) require a clear manifestation (a meeting of the minds) that both the debtor and creditor intended the compromised payment

—continued on page 2

Protect Your Rights! —

—continued from page 1

(short check) to be in full satisfaction of the entire indebtedness. Some courts have discharged entire obligations, holding that when a debtor with a disclosed dispute tenders a compromise check bearing a conspicuous notation "in full satisfaction" or "payment in full," the debtor has made an offer, and when the creditor negotiates the compromise check, the creditor has accepted the offer. Courts have been split on this issue, however, as well as on whether Section 1-207 of the Uniform Commercial Code (UCC) altered the original Common Law Doctrine of Accord and Satisfaction by allowing a creditor to simply cross out the debtor's conspicuous notation, replace the unsatisfactory language with the words "without prejudice" or "under protest," and cash the check without adversely affecting his right to seek the remaining balance.

The debate was settled in 1990 when UCC Section 1-207 was amended to exclude its application to the issue of accord and satisfaction and UCC Section 3-311 ("Accord and Satisfaction by Use of Instrument") was instituted to expressly deal with the issue. Under this law, a debtor must prove that three situations occurred in order to discharge a claim by the creditor:

1. *The debtor tendered the compromise check in good faith as full satisfaction of the claim.* "Good faith" is defined by the UCC as "honesty in fact in the conduct or transaction concerned." The determination of good faith is a subjective test (what the person who performs believes), not an objective test (how others might judge). An implication of good faith is compromise, and any time a party reaches out to compromise, it is assumed that party is acting in good faith.
2. *The amount of the claim was unliquidated or uncertain or subject to a bona fide dispute.* The debtor must prove that the creditor had notice and/or knowledge of the dispute in a timely manner. This can be difficult since this aspect of a conflict is often reduced to a "he said, she said" situation.
3. *The creditor (claimant) deposited the compromise check.*

If these three situations are proven to have existed, the claim against the debtor will be discharged (deemed satisfied) if the debtor proves that the check or an accompanying written communication contained a conspicuous statement to the effect that the check was tendered as full satisfaction of the claim . . . *with two exceptions*.

If the creditor (claimant) is an organization, and it proves that, within a reasonable time before receiving the compromise check, it sent a conspicuous statement to the debtor that any communications from the debtor concerning disputed debts (including checks sent as full satisfaction of a debt) are to be sent to a designated person, office, or place, and the check or accompanying communication was not received by that person, office, or place, then the claim against the debtor will not be discharged. Additionally, the claim against the debtor will not be discharged if the creditor, whether or not an organization, proves that within 90 days after it deposited the compromise check through lock-box error, the creditor sent a check to the debtor as repayment for the amount accidently deposited. These two exceptions do not apply, however, and the claim against the debtor will be discharged if the debtor proves that, within a reasonable period of time before the compromise check was received and deposited, the creditor (or creditor's agent who had direct responsibility with respect to the disputed obligation) had notice and knew that the check was offered as a good faith payment in full satisfaction of the claim.

Let's look at three cases that illustrate how the law would apply. In all three cases, let's assume the following facts: 1. The creditor claims the debtor owes $10,000 and the creditor has made a demand for all of it. 2. The creditor uses a lock box, and the bank automatically stamps the check "for deposit only" and deposits them without the creditor's review. 3. One month after depositing a compromise check from the debtor, the creditor sends another demand to the debtor for the balance of the $10,000. The debtor responds that the matter has now been settled in full.

In all cases, in order for an "Accord and Satisfaction by Use of Instrument" to result, the debtor must prove (1) it sent the compromise check in good faith; (2) it had a bona fide dispute; and (3) the balance due was an unliquidated amount.

Case #1. *The debtor has no legitimate defense and has not raised a dispute to payment of the $10,000 debt. The debtor sends a compromise check for $3,000 bearing the conspicuous notation "payment in full."* In this case, it would be difficult for the debtor to prove that such a drastically reduced payment, in a situation in which no dispute existed, was made in good faith. The debtor should not prevail because the debtor did not act honestly.

Case #2. *The debtor has no legitimate defense and has not raised a dispute to payment of the $10,000 debt. The debtor*

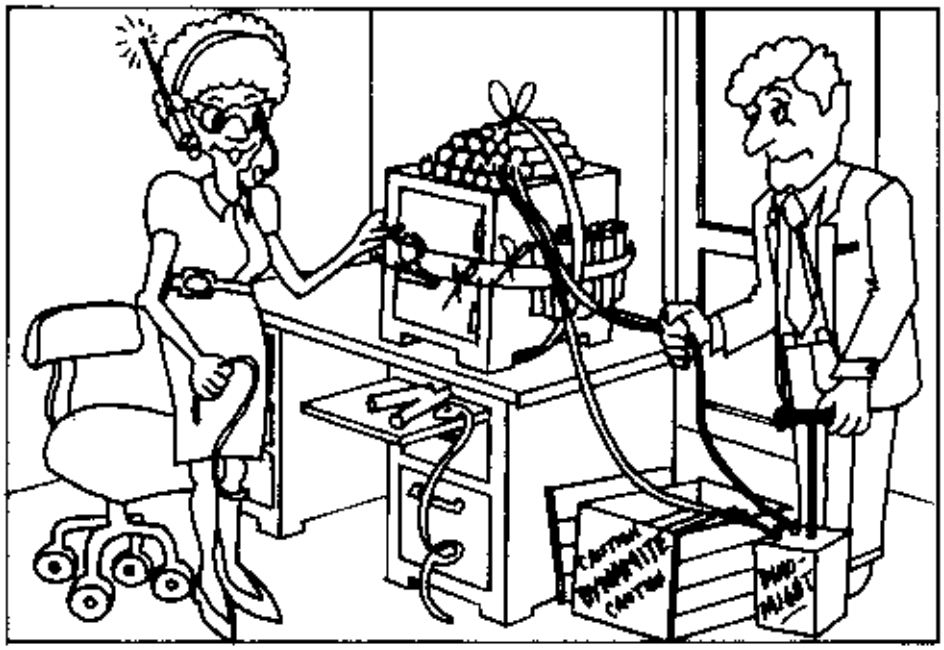
sends a compromise check for $7,500 bearing the conspicuous notation "payment in full." In this case, it it may be more difficult than in case #1 for the creditor to prove that such a modestly reduced payment was not made in good faith; however, this is another situation in which no dispute existed. Because there is no bona fide dispute, the debtor should not prevail.

Case #3. *The debtor has raised in a timely manner a legitimate dispute to payment of a claim of $10,000 debt. The debtor honestly believes it owes $5,000 and sends a compromise check for $5,000 bearing the conspicuous notation "payment in full."* In this case, the debtor has raised a legitimate defense to pay an unliquidated amount where there was a bona fide dispute. The debtor's compromise check was sent in good faith, and the debtor subjectively believes that the balance owed is unliquidated as an adjustment has not been reached. The debtor should prevail unless the creditor proves that, within a reasonable time before the debtor tendered the compromise check, the creditor sent a conspicuous statement to the debtor that any communications concerning a disputed invoice or account, including any compromised payment tendered as full satisfaction of the debt, are to be sent to a designated person, office, or place, and the compromise check or accompanying communication was not received by that designated person, office, or place. If the creditor's conspicuous statement is boldly printed on all of its credit applications, confirmations of sales, purchase orders, invoices, and statements of accounts, then the requirements of this section of the law would be satisfied. In such a case, the creditor need prove only that the debtor's compromise check was not received by the proper person, office, or place. Or, if the creditor proves that it tendered repayment of the $5,000 to the debtor within 90 days after accidently depositing the check, the claim against the debtor will not be discharged. The only way for the debtor to overcome these last two obstacles would be to prove that the creditor (or its agent) had actual notice within a reasonable period of time before the check was received and deposited that it was offered as a good faith payment in full satisfaction of the claim.

Clearly, for companies facing the problem of lock box slamming, the best protection as afforded by the law is to institute as general policy a specific and designated procedure for communications and/or compromise payments from the debtor on disputed accounts to be received by a particular person, place or office, and to provide written notice to the debtor that this procedure must be followed. Such written notice must be received by the debtor in order to afford protection to the creditor.

The best way for a creditor to maximize protection is to clearly set forth a conspicuous statement of the designated procedure on all invoices, statements of account, credit applications, contracts, brochures, sales promotions, confirmations of sales and purchase orders. An example is the following: "Any communications written or oral regarding any dispute and/or payments relative to any Invoice or Account which is the subject of any dispute must be sent to "John Smith, Controller located at 123 Main St., N.Y., N.Y." and not to the regular payment address of P.O. Box . . . "

Such a policy makes it clear to the debtor that unprincipled attempts to slam a lock box will not be rewarded, and while there are minor variations in the law among the 50 states, this approach has proven to be meritorious in courts across the country. ♦



"WELL BOSS, THE GOOD NEWS IS I'VE GOTTEN "LOCK BOX" PROCEDURES IN PLACE LIKE YOU ASKED. THE BAD NEWS IS I CAN'T REMEMBER THE COMBINATION!"

The Szabo Difference:
Staying Ahead of the Game

New technology and new credit management techniques are not only changing your business—they're changing laws and regulations. Local, state and national lawmakers are scrambling to keep up.

There's no place where business life is changing faster than in the media industry. Every day, we use new media that our parents never dreamed of. The questions you need to answer are these: (1) are you making the best use of new technology and techniques, and (2) are you taking steps to see that they contain no loopholes that might weaken your credit management?

When business moves this quickly, no one has all the answers. But at Szabo, we have a lot of the answers you need and we know where to look to find others.

Because we specialize in media, and because we do business throughout the United States and the world, we see the latest trends wherever they take place. We can share these trends with all our clients.

We maintain an up-to-date legal resource library that contains recent laws and regulations as well as the latest court opinions regarding new forms of credit management. The information in our library is available to all our clients through our representatives.

Our in-house paralegals stay even closer to the latest laws and legal opinions; they're often aware of developments even before they are published.

Finally, Szabo clients can benefit from a network of attorneys that we've built up over years of experience and collaboration. We believe this network offers an unsurpassed working knowledge of credit-related law. These attorneys, located throughout the United States and in many other countries, work with us regularly and give priority treatment to Szabo clients.

The bottom line is, any time you take advantage of a new technique or technology in credit management, it pays to learn everything you can about the potential consequences. No other collection service offers you more help in this area than Szabo. It's good to know you never have to go it alone. ♦

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