Welcome to this podcast on Accord and Satisfaction brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is the concept of Accord and Satisfaction, with a focus on when an accord is formed and when performance under the accord results in a satisfaction.

The concept of modification was discussed in the podcast titled Modification and the Pre-existing Duty Rule. A modification occurs during the performance of a contract, when the contract is executory – that is, neither party has fully performed. With accord and satisfaction, one party has completed performance and the other party’s only obligation is to render its performance -- usually the payment of money. So the party who has performed is in the position of a creditor and the party who has not performed is in the position of a debtor. In that situation, one of the parties – usually the debtor – may offer to settle the debt by paying less than the amount owed.

An accord is the agreement to discharge a debt by the payment of less than the full amount. Since an accord is an agreement, it has to have all the elements of an enforceable agreement – mutual assent (usually offer and acceptance) and consideration as well as the absence of any defenses to contract formation. The performance of the accord is referred to as the satisfaction.

A recurring question involving accords is whether an agreement to accept payment of the lesser agreed amount, followed by payment of that lesser amount, discharges the debt. Again, there must be mutual assent to the accord. For example, we have agreed that I will dig a ditch for you for $100 and I finish completion of the ditch. You owe me $100. I am the creditor -- the one to whom $100 is owed and you are the debtor -- you owe me $100. What if you mail me a check for $75? I deposit it and then ask you for the other $25. You tell me that by accepting the $75, I have agreed to discharge the debt. Is it discharged? No. I had no idea that you were offering the $75 on those terms, so there is no accord. I reasonably thought you were just making a partial payment. So to satisfy the offer requirement to create an accord, you have to make clear that you are offering me the part payment in order to discharge the debt. You should make clear, either on the check or in an accompanying note, that if I accept the partial payment then the debt is discharged.

Suppose you do make a clear offer and I refuse to accept it on that basis. I write on the check something like, “Accepted without prejudice to my right to recover the full amount.” Is that effective? No. I can’t change the terms of an offer and then accept it. U.C.C. § 1-308 makes clear that acceptance of a performance with a reservation of rights does not apply to an accord and satisfaction. What if I put the check in a drawer for a while in order to think it over? That might be deemed an acceptance.

However, even if you clearly communicate an offer to me stating that the debt will be discharged on acceptance of the lesser amount, and I accept the offer, there still has to be consideration in order to form an enforceable accord. Here, the law generally stands by the pre-existing duty rule. In most jurisdictions, if you clearly say to me, “Will you accept $75 to discharge the $100 debt” and I say “yes,” and you pay me the $75, then I can go after you for the other $25 because there is no consideration for my agreement to give up $25. Remember that the rules for modification don't apply here because those applied to modifications during the course of performance and we are now talking about the time after one party has fully performed and we merely have a debt.

But we can use some of the same exceptions to get around the consideration problem that we used for a modification. You could give me something additional or different as consideration in order to make the

accord enforceable. So if you said to me, “Will you take $75 and a sandwich to discharge the debt?” and I agreed, then we would have an enforceable agreement because I have the freedom of contract to determine that I consider a sandwich worth $25. Or I could agree to take payment one day earlier than it is due – so long as it is something different.

If something additional or different is not given as consideration, the accord may still be enforceable if the obligation was not liquidated or is disputed. Liquidated means the amount of the debt was agreed to by the parties or fixed by a court. Disputed means there is a good faith defense to the payment of that obligation. Let’s go back to the example of my digging a ditch for you. Assume we did not agree on a price. When I completed the job, I asked for $100. You replied that you didn’t think it was worth that much and offered me $75 to discharge the debt. If I accept the offer, then we have an accord. There is consideration in liquidating the amount owed at $75. If I had sued you, I might have gotten more than $75 or less than $75.

Alternatively let’s assume the amount is liquidated. I agreed to dig the ditch for you for $100. After I finished, you said, “I don't think you did a reasonable job digging that ditch so there was breach of contract.” As long as you made the claim in good faith, you have a defense to payment, which makes the debt disputed. So you may say, “I have a claim against you for not digging the ditch properly, but I will give up that claim if you take $75 in payment.” Now we have an offer to enter into an accord and if the offer is accepted, then we have an accord. There is consideration because we have resolved the dispute. Again, if I had sued you, I might have gotten more than $75 or less than $75.

So if we have satisfied the requirements of offer, acceptance, and consideration, then we have an accord. The accord hovers until the terms of the accord are performed, at which point we have satisfaction and the debt is discharged. What if the accord is not performed? Then the creditor can sue on either the underlying contract or on the accord. Take the example where the contract was to dig the ditch for $100, and you disputed owing me that much, and we agreed that your payment of $75 would discharge the debt. You did not pay me the $75. I can sue either on the underlying contract for $100 or on the accord for $75. You may wonder why I would sue for $75 when I can sue for $100? The answer is that the $100 debt was disputed. When I sue you for $100, you can raise the dispute and I might end up getting less, even less than $75. But the $75 amount is liquidated and undisputed – you have no defense to owing me that amount.

Let’s bring up one more concept – substituted contract. This occurs when all the elements are the same except the creditor agrees to discharge the debt in return for the debtor’s *promise* to pay the lesser amount, rather than when the debtor actually pays it. In that event, the debt is discharged as soon as the agreement is made, whether the debtor performs or not. Because a creditor would be foolish to accept a promise to pay a lesser amount to discharge the debt, any ambiguity is resolved in favor of the transaction being an accord rather than a substituted contract.

Some jurisdictions have mechanisms for allowing liquidated and undisputed debts to be paid by less than the full amount. So if you say to me “I owe you $100, I admit I owe you $100, I have absolutely no defense, but will you accept $75 to discharge it?” then if there is a mechanism in the jurisdiction for resolving that debt by the payment of less, and that mechanism is followed, then the debt would be discharged. But remember that in the absence of such a mechanism, consideration is required to discharge a debt by the payment of a lesser amount.

An interesting example of accord and satisfaction is the case of *Arrol v. Con Edison*, 322 N.Y.S.2d 420 (1971). Arrol was a customer of Con Ed who thought his electricity bill was too high. He wrote Con Ed a letter explaining that he disputed the amount of the bill and enclosed a check for less than the amount he had been billed, informing Con Ed that their acceptance of that amount would discharge the debt. Con Ed cashed his check and demanded payment of the balance. Arrol sued. The court held that Arrol had clearly communicated his offer and Con Ed accepted it. There was consideration because Arrol had raised a dispute in good faith, even if the bill was accurate. Therefore, the debt was discharged by the partial payment. Con Ed complained that it received thousands of payments every day and could not possibly read all the correspondence before processing them, but the court said too bad, the same rules apply to you as to everyone else.

Interestingly, there is now a law that assists Con Ed in this situation. U.C.C. § 3-311, Accord and Satisfaction by Use of Instrument, it pretty much tracks the common law rules for accord and satisfaction. But it also provides that an organization can inform its customers that a disputed claim has to be sent to a designated office, and if it is not, then the claim is not discharged. To deal with customers like Arrol, a company like Con Ed should include in its billing statement a designated office that customers should send their disputed claims to. Alternatively, the statute provides that if it doesn’t have such a mechanism, then the recipient of a check sent pursuant to an accord has 90 days to return the amount of the check to the person who sent it. If they do, then the claim is not discharged.

Let’s briefly review this podcast. You should be able to determine when parties have entered into an effective accord. You should determine whether there has been an offer, an acceptance, and consideration. If there is an effective accord, and if there is satisfaction when the debtor performs according to the terms of the accord, then the debt is discharged. If the debtor does not perform according to the terms of the accord, then the creditor can sue on either the accord or on the underlying obligation.

I hope you’ve enjoyed this podcast on Accord and Satisfaction.

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