

The Executory Accord

by Gianfranco A. Pietrafesa

Lawyers are familiar with the principle of accord and satisfaction. When is an accord satisfied? What happens when an accord has not been satisfied? When a party breaches an accord, what are the non-breaching party's rights?

Assume two parties enter into an agreement where party A sells widgets to party B in exchange for party B's promise to make 12 equal installment payments to party A. Party B eventually stops making payments due to alleged cash flow problems. The parties thereafter further negotiate the matter, and party A reluctantly agrees to accept installment payments in reduced amounts from party B. What type of contract results from this arrangement? From party A's perspective, it is merely an accord.

AN ACCORD

"An accord is a contract unto which an obligee [party A] promises to accept a stated performance in satisfaction of the obligor's [party B's] existing duty."¹ In other words, "[a]n accord is an agreement whereby one party agrees to make some performance in exchange for extinguishment of a debt or other obligation".²

AN ACCORD IS EXECUTORY UNTIL THERE IS COMPLETE PERFORMANCE

Party A agrees to accept only *complete* performance under the accord in satisfaction of party B's existing obligations under their original agreement. Therefore, the accord remains executory until party B *completely* performs under the accord. Party A must ensure that the language of the accord states there will be no satisfaction of the

accord until there is complete performance by party B. Upon a breach of the accord by party B, party A can seek enforcement of the executory accord *or* the original agreement.

"Performance of the accord discharges the original duty."³ However, "[u]ntil performance of the accord, the original duty is suspended."⁴ "It is the essence of an accord that the original duty is not satisfied until the accord is per-

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formed, a result that is sometime suggested by use of the term 'executory accord.'⁵

It is noted that:

[T]he failure to make a payment or otherwise perform an act required by a new agreement entered into in satisfaction of a debt or claim leaves such an agreement a mere executory accord, without satisfaction, and as such, it constitutes no bar to the enforcement of the original claim or debt.⁶

Likewise:

[I]t is a general rule that where execution or performance of the accord is necessary to constitute satisfaction and achieve the legal results of satisfaction, nothing short of actual, full, complete, and exact performance or execution of the agreement of accord in its entirety will suffice;...An accord is executory so long as something remains to be done in the future. It is sufficiently executed only when all is

done which the party agreed to accept in satisfaction of the preexisting obligation.⁷

Therefore, only full and complete performance of an accord discharges or satisfies a party's obligation under the original agreement. Until such performance is made, the accord remains executory, and a party's obligation under the original agreement is suspended.

A PARTY MAY ENFORCE THE EXECUTORY ACCORD OR THE ORIGINAL AGREEMENT

A party's failure to fully and completely perform under the executory accord constitutes a material breach of the accord, entitling party A to enforce either party B's obligations under the original agreement or party B's obligations under the accord.

The Restatement of Contracts, Second, provides:

Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor [party B] as discharges the new duty of the obligee [party A] to accept the performance and satisfaction. If there is such a breach, *the obligee [party A] may enforce either the original duty or any duty under the accord.*⁸

Likewise:

...If the debtor breaks a contract

which is an accord to be satisfied by a future stated performance, the creditor has alternative rights; he can enforce either the original duty or the accord. When there has been a failure to perform the act required by the new agreement, that agreement is no bar to an action on the original debt or claim.⁹

CONCLUSION

A lawyer must be cognizant that an accord remains executory until the accord is completely performed. That is, there is no accord *and satisfaction* until there is complete performance of the accord. Upon a breach of the executory accord, the non-breaching party may seek enforcement of the accord *or* the original agreement, which may result in a judgment of a greater amount. ■

ENDNOTES

1. Restatement of Contracts, Second, §281(1).
2. *Nevels C.M., Inc. v. Nissho Iwai American Corp.*, 726 F. Supp. 525, 536 (D.N.J. 1989) (citation omitted).
3. Restatement of Contracts, Second, §281(1).
4. Restatement of Contracts, Second, §281(2).
5. Restatement of Contracts, Second, §281, comment (a).
6. 1 Am.Jur. 2d §47 at p.344. As stated in *Accord id.* §52 at p.349 ("[w]here the accord is not fully performed the original claim is not satisfied ...").
7. 1 C.J.S. §37 at pp. 541-42.
8. Restatement of Contracts, Second, § 281(2) (emphasis added).
9. 1 Am.Jur.2d §47 at p.344 (emphasis added).

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March Luncheon Focuses on Insurance Provisions

Jonathan J. Cohen, president of Elias B. Cohen & Associates, an insurance brokerage and consulting firm in Roseland, will join with attorney Ira Meislik on March 27, 2008, for the next Business Law Section Brown Bag Luncheon, titled "What Business Lawyers Should Know About Insurance Provisions but Were Afraid to Ask." They will lead participants at locations throughout New Jersey through an analysis of commonly used, but often confusing, inconsistent, and sometimes just plain wrong insurance provisions found in business contracts of all types. Along the way, they will explain the basic types of casualty, property and liability coverage, what it means to be an additional insured, the meaning of primary and non-contributory coverage, the value (illusory and real) of a certificate of insurance, self-insurance, and the way in which deductibles and self-retention programs work. Cohen has been providing insurance advice to businesses and their attorneys for over 40 years, and is a frequent and lively speaker on a wide range of insurance topics.

The program will take place from 12:30 to 2 p.m. on Thursday, March 27, 2008, with participants at eight locations throughout New Jersey. Time will be allotted for the answering of participants' questions of general interest.

The program is open to members of the Business Law Section of the New Jersey State Bar Association. ■

New Committees Launched

We are pleased to announce that the Business Law Section is launching two new committees. Section members interested in getting involved in one or both of the following committees are asked to contact David J. Papi-er at Sonnenschein Nath & Rosenthal LLP (Venture Capital Committee) or Richard J. Pinto at Stevens & Lee (Life Science Committee).

VENTURE CAPITAL AND EMERGING GROWTH TECHNOLOGY COMPANY COMMITTEE

The committee provides a forum and resource to members of the New Jersey State Bar Association engaged in representing technology entrepreneurs, emerging growth technology companies and venture capital firms. The committee examines and monitors trends, current issues and other concerns affecting venture-backed companies. The convergence of corporate and intellectual property-related issues as they impact emerging growth companies is a focus of this committee.

LIFE SCIENCES PRACTICE COMMITTEE

The committee provides a forum and resource to members of the New Jersey State Bar Association engaged in representing biotechnology, genomics, pharmaceutical, medical device, healthcare science, diagnostic and other life science companies. The committee examines and monitors trends, current issues and other concerns of specific interest to the industry, with special focus on matters associated with intellectual property, licensing, product development, marketing and distribution, advertising, product liability, commercial transactions, FDA and international regulation, and securities law disclosure requirements applicable to the foregoing. ■