

Credit Line



A MEMBER NEWSLETTER

OCTOBER 2008

Less Than Good Checks

by Duane Burnett, Attorney, For-Shor Company

As the economy continues to struggle, a significant number of our customers are finding themselves in dire straits. This situation will often manifest in the issuance of checks that leave much to be desired.

Unfortunately, not everyone is financially responsible or viable, and there may even be those who are quite deliberate in their use of insufficient funds checks. Not every check problem is the same, but let's touch on a few.

THE UNSIGNED CHECK.

It infrequently happens that you receive a check that the customer has (hopefully) unintentionally left unsigned. Suspiciously minded credit professionals might wonder if this was an attempt to delay the payment while you contact them or return the check for signature. I recognize it for what it is, an oversight.

In order to help expedite things, and in order not to embarrass the customer, I simply write "OVER" on the signature line (Never sign the check for the customer!) and then on the back in the endorsement area print:

Lack of Signature Guaranteed
YOUR COMPANY NAME
By: Your Signature
Your Name Printed
Your Title

**Mechanic's
Lien
Seminar
Beginning &
Advanced**

**October 27
Red Lion Hotel
161 W 6th So.**

IN THIS *Issue*

PAGES ONE THROUGH FIVE

Returned Checks

PAGE SIX

Fall Outing at Old Mill Golf Course

PAGE SEVEN

October Calendar

Mechanic's Lien Seminar

PAGE EIGHT

ICEL October Luncheon

NACM BCS Board of Directors

Thus presented, your check will go through the channels and be processed appropriately with most financial institutions.

RETURNED CHECKS.

Other checks arrive nicely signed and are then returned by the bank "NFS" or "Insufficient Funds". If it is a known customer with a track record, I would always call them and receive instructions to re-deposit it. For counter sales and/or unknown customers, it is advisable to check with the bank directly. Nearly all have a number that can be called for 'merchant check verification'. Unfortunately some banks now require such inquiries on a toll number. If the check will clear now, trot over to the bank and put it in immediately. In all other circumstances, it is important to preserve your rights and start your time requirements running. By statute, if you wish to protect all your rights and to be entitled to statutory penalties, you must send a legally sufficient demand letter.

An issuer is "a person who makes, draws, signs, or issues a check whether as corporate agent or otherwise, for the purpose of: (i) obtaining from any person any money, merchandise, property, or other thing of value; or (ii) paying for any service, wages, salary, or rent." 7-15-1 (1) (b) U.C.A.

We, as credit managers for the 'holder' of the problem check, should be aware that the 'issuer' (as defined above) is liable to the holder of the check under three circumstances.

Continued on Pages 2-5

First, if the check is not honored upon presentment; and is marked “refer to maker”; or

Second, if the account upon which the check is made or drawn does not exist; has been closed; or does not have sufficient funds or sufficient credit for payment in full of the check; or

Third, the check is issued in partial or complete fulfillment of a valid and legally binding obligation; and the issuer stops payment on the check with the intent to fraudulently defeat a possessory lien or otherwise defraud the holder of the check.

In Utah, the issuer is liable for the check amount and a service charge of \$20.00. The holder may waive part or all of that service charge. If the holder redeposits the check and the check is honored, the issuer is not liable for the service charge. Otherwise you need to send a written notice to the issuer that complies with the Utah Code’s requirements (or requirements of the appropriate state).

If the issuer does not pay the amounts due (principal and service charge) within 15 days after the proper notice is mailed, the issuer is now liable for collection costs (not to exceed \$20.00) as well. The written notice is a pre-requisite to charging collection costs or filing an action in court based upon the DISHONORED INSTRUMENT chapter of the code.

That written instrument must advise the issuer that he will be liable for collection costs if payment has not been made within 15 days. The holder may thereafter commence civil action if payment is still not made within 30 days of the notice.

If a holder of a check violates this chapter of the code by filing a civil action before 31 days from the day on which the required notice is mailed, an issuer may not be held liable for an amount in excess of the check amount.

A notice that complies with statute will contain all of the time frames and clearly state the penalties for not making timely payment on the dishonored instrument.

The state of Utah requires that it be substantially in the format on opposite page.. 

The code further provides that if the issuer has not paid the holder the amounts owed within 30 calendar days from the day on which the required notice is mailed, the holder may offer to not file civil action if the issuer pays the holder: (i) the check amount and service charge; (ii) the collection costs; (iii) an amount that is equal to the greater of \$50 or triple the check amount and does not exceed the check amount plus \$250; and (iv) if the holder retains an attorney to recover on the dishonored check, reasonable attorney’s fees not to exceed \$50.

This letter can be sent regular mail, but you should log those mailings in case you are required to provide later proof of that mailing. Some firms have one designated person who officially ‘mails’ all such notices and can then be called on to provide an affidavit or testimony that this requirement was met. Written notice may be given by United States mail that is first class and postage prepaid. However, written notice is conclusively presumed to have been given when the notice is properly deposited in the United States mail; postage prepaid; certified or registered mail; return receipt requested; and addressed to the signer at the signer’s address as it appears on the check or last-known address. 7-15-2 (1) U.C.A. Previously, registered mail was mandatory. This was later relaxed to include certified mail. Now regular mail and forethought are all that is needed.

The form sets forth the time frames involved and also the penalties. Note the Court costs and attorney fee provisions. As a credit manager it is sometimes helpful to be aware of and even to be able to pass on to the maker of the check when asked, the amount of those fees. You may also state those fees on your notice letter.

Under the most recent Utah law, the filing of a complaint fee is \$50.00 for less than \$2,000.00; \$95.00 for \$2,000.00 or more and less than \$10,000.00; and \$155.00 for a complaint of more than \$10,000.00.

Bad Check Letter That Must Be Sent To The Issuer

XYZ Company
Credit Department
somewhere West otherplace South
Salt Lake City, Utah 84115
(801) 444-4444

September 15th 2008

BAD CHECK WRITER
A NICE STREET
SMALL TOWN, UTAH 84444

Dear Mr. Writer:

YOU ARE HEREBY NOTIFIED that the check described below issued by you has been returned to us unpaid.

Check Date: *****

Check Number: *****

Originating Institution: ***** Bank

Amount: \$*,**.*

Reason for Dishonor: REFER TO MAKER (or as stated on the check)

In accordance with Section 7-15-1, Utah code Annotated, you are liable for this check, together with a service charge of \$20.00, which must be paid to the undersigned.

If you do not pay the check amount and the \$20 service charge within 15 calendar days from the day on which this notice was mailed, you are required to pay within 30 calendar days from the day on which this notice is mailed:

- (1) the check amount;
- (2) the \$20 service charge; and
- (3) collection costs not to exceed \$20

If you do not pay the check amount, the \$20 service charge, and the collection costs within 30 calendar days from the day on which this notice is mailed, in accordance with Section 7-15-1, Utah Code Annotated, an appropriate civil legal action may be filed against you for:

- (1) the check amount;
- (2) interest;
- (3) court costs;
- (4) attorney's fees;
- (5) actual costs of collection as provided by law; and
- (6) damages in an amount equal to the greater of \$100 or triple the check amount, except that damages recovered under this subsection (6) may not exceed the check amount by more than \$500.

In addition, the criminal code provides in Section 76-6-505, Utah Code Annotated, that any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm partnership, or corporation any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent knowing it will not be paid by the drawee and payment is refused is guilty of issuing a bad check. The civil action referred to in this notice does not preclude the right to prosecute under the criminal code of the State of Utah.

Sincerely,

Name of Holder: XYZ

Address: somewhere West otherplace South, Salt Lake City, Utah 84115

Telephone: (801) 444-4444

Attorney fees (Rule 73, Utah Rules of Civil Procedure, effective November 1, 2003) are as follows:

<u>FEES</u>	<u>Debt Of</u>
\$250.00	0.00 to 1500.00
\$325.00	1500.01 to 2000.00
\$400.00	2000.01 to 2500.00
\$475.00	2500.01 to 3000.00
\$550.00	3000.01 to 3500.00
\$625.00	3500.01 to 4000.00
\$700.00	4000.01 to 4500.00
\$775.00	4500.01 to 5000.00

It is not unknown for the sheer size of the potential liability to induce positive action on the part of the insufficient check writer. Keep your certified or registered return receipt or your mailing log and letter copy for your legal counsel if the matter is forced to further extremes.

Hopefully your checks will all clear after that first telephone contact. If not, I sincerely hope you avail yourself of the legal remedies available and make sure you follow statutory procedures so that you do not accidentally violate federal or state law as you attempt to 'collect' that bad check.

And as a note of caution, remember in reporting these check incidents, that there may be many reasons why a check was not viable. Discussion about a deadbeat, lowlife or other derogatory commentary may result in you being the ultimate pocketbook that suffers following that action for slander by the unfortunate individual who will then be able to make good all his checks at your expense. Professionals act and talk in a professional manner. The law is on your side if you use it and stay within it.

Remember that you are a member of a professional organization. Utilize it as a resource. NACM Collection Department is available to assist you in pursuing your problem credit accounts, including insufficient funds instruments.

You should further provide your fellow group members with notification of parties whose checks have proven less than golden. This is most easily accomplished through the Industry Group Alert Program.

CAVEAT: Until a civil action is filed, fees in excess of the amount authorized by Title 7, Chapter 15, Dishonored Instruments, may not be charged; therefore, because excessive fees charged by an agency were neither expressly authorized by individuals who wrote bad checks nor permitted by this Chapter 15, they violated the federal Fair Debt Collection Practices Act. Ditty v. Check Rite, Ltd., Inc., 973 F. Supp. 1320 (D. Utah 1997) Cited in Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998)

PAID IN FULL CHECK (THAT ISN'T)

What if I receive a perfectly good check with the restriction **PAID IN FULL**?

1. Accord & Satisfaction

- a. An accord is an agreement
- b. A satisfaction is the execution of the performance

An accord and satisfaction is a method of discharging a claim whereby the parties agree to accept something in settlement of the claim and perform the obligation.

A valid accord and satisfaction completely discharges the obligor's existing duties and constitutes a defense to any attempt to enforce claims other than such duties.

Can a person in Utah deposit a check "paid in full"; write under protest or cross out the words "paid in full" and thereafter bring an action for the unpaid balance? **NO**

Marton Remodeling vs. Mark Jensen, 706 P.2d 607 (UT 1985) stated "The fact that the creditor scratches out the words 'in full payment', or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge."

2. Elements of accord and satisfaction

- a. bona fide dispute over an unliquidated amount
- b. payment tendered in full settlement of the entire dispute
- c. an acceptance of the payment.

If the credit department happens to cash a check marked “paid in full” and you are not aware of it at the time, under the Uniform Commercial Code, you have 90 days to pay the money back and thereby negate the transaction; otherwise the general law applies.

Check Truncation Act

On October 28th 2004 CHECK 21 or the Check Clearing for the 21st Century Act was implemented. The stated goal of this legislation is to increase efficiency of the nation’s payment system by removing certain legal impediments to check truncation so that banks would be able to easily present and return checks electronically. (In the context of Check 21, check truncation means removing the original check from the check clearing process, ideally at the point of deposit.)

Check 21 authorizes the use of a new negotiable instrument called a substitute check. It provides the legal framework for the creation of substitute checks that are the legal equivalent of the original check and are enforceable to the same extent as the original check without prior agreements to that effect --- even in the collection process.

By definition a substitute check is defined as a paper reproduction of the original check that:

- Contains an image of the front and back of the original check;
- Bears a MICR line containing all information required under generally applicable industry standards for substitute checks (MICR: magnetic-ink character recognition);
- Conforms to generally applicable industry standards for substitute checks (such as paper stock, dimension, MICR line indicators, and other features or requirements);
- Is suitable for automated processing in the same manner as the original check.

A substitute check is the legal equivalent of the original check if it (1) accurately represents all the information on the front and back of the original check at the time the original was truncated and (2) bears a legend that states “This is a legal copy of your check. You can use it the same way you would use the original check.”

What happens to the original check? Typically, original checks are destroyed once the check is digitized. There are no requirements governing the retention of original checks. Substitute checks are legal substitutes for proof of payment.

A returned substitute check will have the same identifying legends (NSF, etc.) as traditionally have appeared on your original check and should be treated for all purposes (redeposit, statutory bad check notices, collection, etc.) as if you held the original.

Payment made to Replace Dishonored Check is an Avoidable Preference, Even If Creditor Released Lien In Exchange For Initial Check

In re JWJ Contracting Co., Inc., 371 F.3D 1079 (9th Cir. 2004)

Debtor Contractor gave Creditor Subcontractor a check in payment of construction work performed by Creditor. In exchange for the check, Creditor issued an unconditional release of Creditor’s lien against a payment and performance bond that the Debtor had provided. The check bounced, and the Debtor replaced the dishonored check with a cashier’s check. Approximately 2 months later, the Debtor filed a bankruptcy petition. The Trustee sought to avoid the cashier’s check transfer as a preference pursuant to §547. The Creditor attempted to defend against the preference claim on the grounds that its lien release provided a contemporaneous exchange for new value pursuant to §547(c)(i). The Ninth Circuit held that the transfer was avoidable because Creditor unconditionally released its lien in exchange for the dishonored check, and therefore gave no new value (i.e., did not release its lien) in consideration for the cashier’s check. The Ninth Circuit noted that the Creditor **should have issued a lien release conditioned upon actual payment.**

NACM Fall Outing 2008 Old Mill Golf Course



Todd Hammond won the Men's Closest to the Pin. Forest Products team Justin Sant, Ryan Oliver, Todd Hammond and Michelle Hyland



Susan Archibeque, CCE, was the ladies Closest to the Pin with team Phil and Georgette Bevan



1st Place Team (members all from Idaho) from left to right: Scott Warner, Rick Lawson, Brian Davis, and Jerry Rudd



Jane Rose from Hajoca, was the Ladies Longest Drive Champion awarded by Allen Vickers, A & K Railroad, and Chairman of the Board

Special Thanks

Bingo Prize Donations

Easton Technical Products
Geneva Rock Products
Hajoca Corporation
Plastic Specialties
Sierra Forest Products
Young Electric Sign Company



2nd Place Team left to right: Dave Keyt (Idaho), Chad Wheeler, Tyler Steenblik, CCE; and Doug Caudell



Kim Pool and Georgette Bevan
Guitar Heros

Good Job!



YOUR ENTERTAINMENT COMMITTEE:
Grant Weller, Board Rep., CMC Conesco; Brenda Martinez, CBA, LaPoint Automotive; Ruth Brown, CBA, Turf Equipment; Falelua Kaihau, Kenworth Sales; Kelly Paisey, Plastic Specialties; Georgette Bevan, CCE, NACM; Mary Jane McIntosh, CBA, Henderson Wheel
Could not attend: Wendy Bradley

Kevin Luing, Reliance Steel, (4th on the right) won the Men's Longest Drive. His team: Scott and Lauri Lee and Rick Francom



Code

Industry Credit Groups
Other events

October, 2008

Looking Ahead

Oct 15-17 Western Region Credit Conference Las Vegas, NV
 Oct 27 Mechanic Lien Seminar, Red Lion Hotel
 Nov 4 NACM Credit Boot Camp, Red Lion Hotel
 Nov 5 Credit Evolution, Red Lion Hotel

Sat./Sun.	Monday	Tuesday	Wednesday	Thursday	Friday
			1	2 Hardware & Lumber	3 Steel & Welders
4/5	6	7	8 SLC Contractors National Dist. Credit Professionals	9 ICEL LUNCHEON RED LION HOTEL 11:45 A.M.	10 Concrete, Paving, Excavating & Waterworks
11/12	13	14 Food & Restaurant	15 Advertisers, Media Ut. County Contr.	16 Industrial Supply Electrical Floor Covering Waste Haulers	17 Diesel Engines Ogden Contractors
18/19	20 Masonry Landscaping	21 Printing Ind. of Utah Heating & Plumbing Automotive & Truck Suppliers Roofers & Siding	Western Region Credit Conference		24
25/26	27 MECHANIC'S LIEN SEMINAR RED LION HOTEL	28 Equipment Dealers	29	30	31

Mechanic's Lien Seminar

Salt Lake City, Monday, October 27, 2008

Red Lion Hotel, 151 West 600 South, Salt Lake City, UT

Speaker: Dana Farmer, Attorney, Liencounsel

Cost: Members \$75 per session, additional person same company \$55
 Basic & Beyond the Basics combination \$120
 Non-Members \$85/session
 (OPTIONAL LUNCH BUFFET: \$25)

Contact Georgette Bevan
 to sign up or for more information
 801-433-6116 or
 GBevan@nacmint.com

Mechanic's Lien Basics, 9–12 noon

- What is a lien
- When to file a lien
- How do you protect lien rights
- What do I do after I file a lien
- Training (SCR)
 State Construction Registry
 Searching & Filing Notices

Beyond the Basics, 1–4 p.m.

- Legislative update
- Lien laws in Idaho, Wyoming & Nevada
- New rules from Court of Appeals for joint checks
- Analyzing the validity of Notices of Commencement and Notices of Completion

ICEL October Luncheon, Thursday, October 9, 11:45 a.m.

Red Lion Hotel, 151 West 600 South, SLC, UT

Collection Seminar by Dean Wangsgard, CCE, President, NACM BCS

This is a seminar for all credit managers who want to improve their collections skills. Dean is a gifted speaker with years of credit experience. His topics will include:

- Why credit management
- The credit & collection process
- The internal process
- Collection calls
- Handling excuses
- Negotiating for the best possible position

This would be a great opportunity to ask a non-member to come as your guest.

ICEL will pay for both of your lunches and your guest will see the benefits of ICEL. Just let Georgette know before the meeting.

*For more ICEL information, contact
Georgette Bevan, CCE, at 801-433-6116*

NACM BCS Board of Directors, 2008-2009

BOARD OF DIRECTOR OFFICERS:

Allen Vickers Chairman A & K Railroad	Grant Weller Vice Chairman CMC Construction Services	Sandra Brown Treasurer Schmidt Sign Service
---	--	---

NACM OFFICERS:

Dean Wangsgard, CCE President NACM BCS	Scott W. Lee, JD, CCE Vice President & Secretary NACM BCS
--	---

BOARD OF DIRECTORS:

Bonnie Snider, CCE Alder Sales Corp	Susan Lujan, CCE Kenworth Sales Co.	Dana Farmer, JD LienCounsel	Cyndie Keetch, CBA Mountain Contrs Supply Grp
Doug Darrington, CCE Altaview Concrete, Inc.	Barbara Mackay Intermountain Concrete Specialties	Penny Williams Midwest Floor Coverings	Janae Jeffs, CCE Muir Roberts Enterprises Inc.



P.O. Box 460
Midvale, UT 84047-0460
(801) 487-8781
(800) 977-6226
www.nacmint.com