

Don't Cash That Check!

BY RANDALL J. GILLARY

I settled a lawsuit recently which involved a problem that I thought would be of interest to sales representatives.

My client was a golfing buddy of mine from The Detroit Golf Club. He sold automotive production parts. My friend had a long-term relationship with the owner of his principal based in another state. They had been close friends for more than 20 years. The owner decided that it was time to sell the company and to slow down and retire. The assets of the company were purchased by an investment firm located in the Northeast. My client was making a significant amount of money in sales commissions and the investment firm chose not to “assume” the non-written sales representation agreement that my client had with the prior owner. Effectively



the sales commissions which should have been paid to my client were going directly to the bottom line of the new owner.

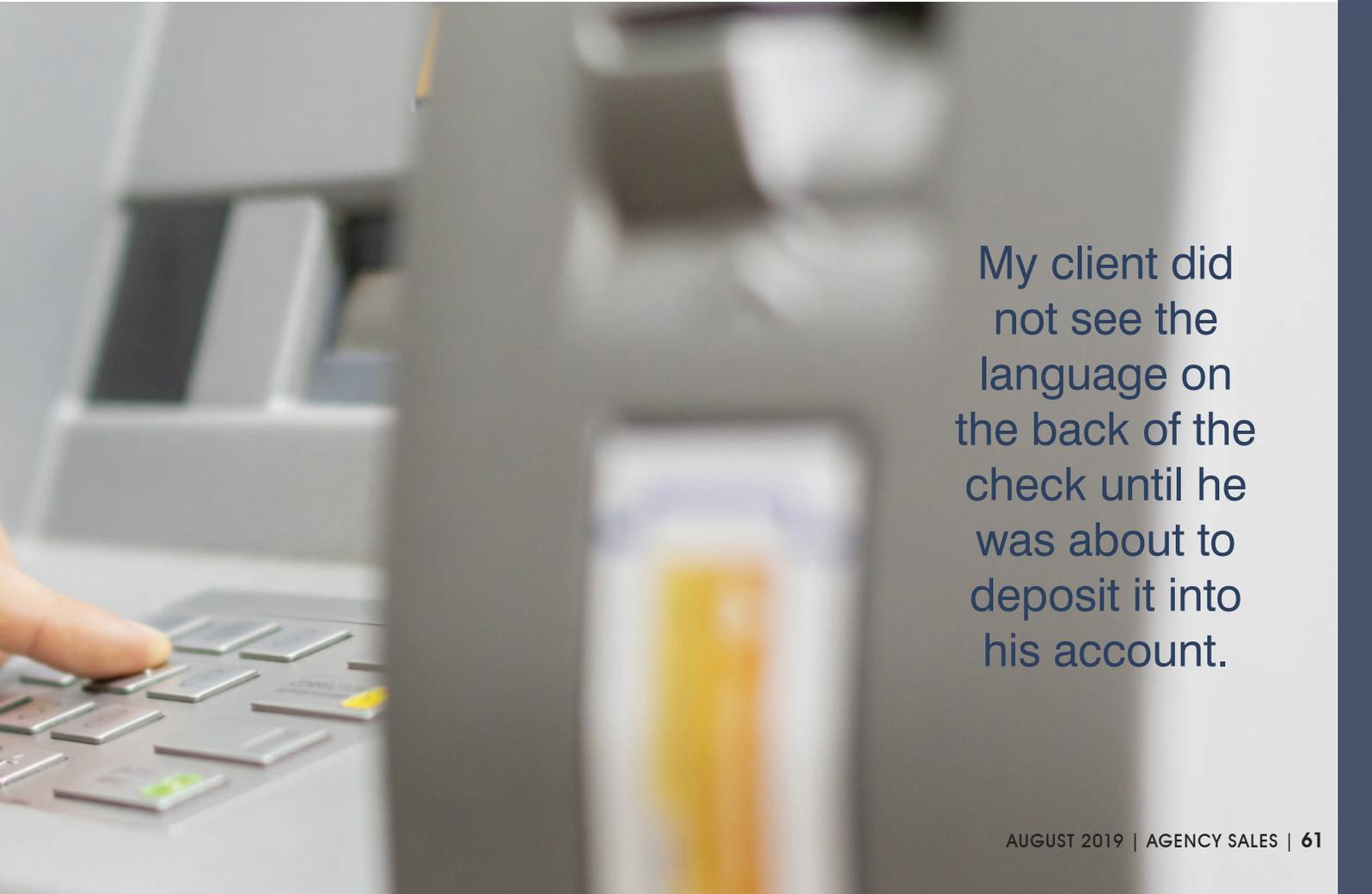
One of the key issues in the case was whether the new company was liable to my client to pay the sales commissions on the automotive business my client procured for the predecessor entity. I have addressed this issue in two articles I wrote for *Agency Sales* magazine. Please refer to June and July 2018 *Agency Sales* for the two-part article entitled “Asset Sales Protection for Sales Representatives.” Typically obtaining payment for post-termination sales commissions in an asset sale trans-

action can be extremely problematic. Fortunately in this case we had some unique factual circumstances which made it possible to pursue the post-termination commission claim with good results.

This article is written about another issue which arose in my friend’s case. This issue involved the legal principle referred to as “accord and satisfaction.” An accord and satisfaction occurs when two parties make a new agreement (the “accord”) and then performance is completed under the new agreement (the “satisfaction”). The particular kind of accord and satisfaction in this case involved the cashing of a check with the re-

strictive language on the back of the check indicating that the check was issued in full and final payment of all amounts due. My client did not see the language on the back of the check until he was about to deposit it into his account. He then basically said to himself, “That is not the deal.” He crossed off the language and deposited the check. To top it off, the check was issued after we filed a lawsuit for post-termination sales commissions and the principal was represented by an attorney from one of the large law firms in the Detroit area. I do not know for sure but my guess is that the check was prepared under instructions from the attorney. The

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check was sent directly to my client even though the principal and its attorney knew that I was representing him because we had already served the Summons and Complaint. Our sales commission claim was in the amount of several hundreds of thousands of dollars. The check was less than \$8,000.

The Problem

Under the Uniform Commercial Code, which is the law in virtually every state in the United States, the cashing of a check issued with language on the check that it is issued in full and final payment of all money due can result in an accord and satisfaction. In order for there to be an accord and satisfaction the payor must prove three elements:

1. The tender was in good faith and in full satisfaction of the claim.
2. The claim must be liquidated or subject to a bona fide dispute.
3. The person receiving the check must have obtained payment.

An accord and satisfaction can be avoided if the payment is returned within 90 days as long as the above three elements have not been met. The attorney for the principal filed a Motion for Summary Judgment claiming that by cashing the check, the sales representative settled his case for less than \$8,000. The Motion for Summary Judgment also included a claim that the asset sale cut off my client's post-termination sales

commission claim. We opposed the motion on all counts and made the following arguments regarding the Accord and Satisfaction issue:

- The check was to cover a liquidated amount that both parties agreed was due for monthly retainer payments and no part of it was to pay sales commissions.
- The language on the check did not indicate that it also covered all future commission claims.
- The good faith element could not be met because the principal bypassed me as the attorney for the sales representative to try to trick the sales representative for settling his case for essentially a nominal amount.
- We tendered re-payment of the check within 90 days.

The Judge denied the Motion for Summary Judgment on the accord and satisfaction issue ruling that there were genuine issues of material fact including but not limited to whether the defendant acted in good faith. The Judge clearly did not like the fact that the defendant bypassed me as the attorney for the sales representative by sending the check directly to the client when they knew he was represented by an attorney. The Judge also denied the Motion on the successor liability issue / asset sale issue based on the unique facts in the case. We were later able to obtain a favorable settlement during a mediation shortly before trial.

The point of this is that the is-

sue on the accord and satisfaction could have easily gone the other way if it would have occurred before the lawsuit was filed. This is an issue that all sales representatives should be aware of.

The Solution

In the event that your principal ever issues you a check with any type of restrictive language on it indicating that by cashing the check you are agreeing to any restrictive terms, **DO NOT CASH THE CHECK!** The first thing that you should do is to copy the check on both sides and to send both the front and back of the check to your lawyer. When this comes up in any of my cases, I immediately contact the attorney for the principal and ask the attorney if we can cash the check “without prejudice to the claims and defenses of both parties.” If they agree we can do that then my client will cash the check and give the principal credit against the commission claim. If they do not agree then we send the check back. The principal’s attorney knows that if he or she refuses to allow my client to cash the check that he or she is effectively admitting that they will only pay the commissions which are currently due if my cli-

ent agrees to drop his claim for additional commissions. That can be considered as bad faith under many applicable sales commission acts. I have never had an attorney refuse to agree to allow my client to deposit the check without prejudice.

The Moral

The moral of this story is that you should never cash a check with any restrictive language on it. What you should do is to send the check to your attorney so that he can contact the attorney for the other side to make sure that you can cash the check without prejudice. *You should presume that if you cash the check, you are accepting the conditions included on the check!* We were able to get around the restrictive language on the check in this instance but more often than not the sales representative will lose on this issue.



Randy J. Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers’ representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 38 years. He is also the author of the definitive book for manufacturers’ representatives entitled *Protecting Your Commissions—A Sales Representatives’ Guide*. The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.

One Last Point

The above example involved a situation where there was a pending lawsuit. You should keep in mind that the principles in this article apply equally to situations where no lawsuit has been filed. I have seen principals try this when they have unilaterally reduced the commission rate and the check states that by cashing the check you are agreeing to the reduced rate. Again, do not cash that check unless you are willing to be stuck with the reduced rate. As always, be sure to have a relationship with an attorney who understands your business so that you can contact him or her when these types of situations arise to obtain guidance as to how you should proceed.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.

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