

THE CHECK IS IN THE MAIL

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A recent Texas Court of Appeals case (*Kirby v. Probus Prop.*, 200 S.W. 3d 258 [Tex. App.—Dallas 2006, pet. denied]) restates the basic rules relating to payment by check. **Although the context of the *Probus* case is landlord/tenant, the rules which the case sets out are applicable to timeliness of payments in other contexts, such as loans.**

In *Probus*, the tenant had an option to purchase the property, but in order to retain that option over a number of years, the tenant had to make a \$10,000 payment on or before January 1 of each year. On January 1, 2003, the tenant wrote a personal check for \$10,000 payable to the landlord. There was no dispute that the check was actually written and delivered to the landlord, who took the check to his bank and deposited it. However, several days later, the check was returned to the landlord for insufficient funds.

In the meantime, the tenant realized his error. He testified that he maintained several accounts and carried several checkbooks, but wrote the check on the wrong account. At some point after January 1, the tenant wrote a new \$10,000 check on an account that had sufficient funds in it and delivered the check to the landlord. The landlord refused the tender and stated that the option had terminated through nonpayment. The tenant sued to enforce the option.

The Court of Appeals details the basic law relating to the acceptance of checks in commercial transactions. The Court of Appeals noted that the option agreement did not provide for payment of the option by check. The landlord's acceptance of a check would, therefore, be a conditional payment which would not be made "absolute" until the check cleared the tenant's bank. Therefore, payment by a personal check on January 1 was a "conditional" payment which, had all worked out as planned, would have become an "absolute" payment. However, when the check was returned NSF, it was as if the payment had never been made.

Acceptance by the landlord of a check "temporarily suspends" an obligation pending presentment of the check. Therefore, from the landlord's perspective, if the check clears, it is as if the obligation was discharged on the date the check was presented.

The Court of Appeals ruled that the tenant had not timely paid the option fee because his "conditional" presentment of a \$10,000 check never became "absolute." The tenant was several days late and \$10,000 short in the payment of his option fee. The Court saw no reason to enforce the option agreement.

The *Probus* case tells us some important things about our commercial dealings with customers. **The first thing the case tells us is that loan documents should provide for payment in “U. S. dollars.”** As a custom or course of dealing, we will often agree to accept personal, uncertified checks in payment of an obligation. However, this course of dealing does not alter the contract language. **The second thing the case tells us is the importance of our actions once a check is dishonored.** The landlord clearly had a choice of either terminating the option for non-payment (which he did) or allowing some period of grace for the check to be replaced. The landlord’s actions in this case, in clearly communicating that the payment was untimely, influenced the Court of Appeals.

The bottom line is that unless the loan agreement provides otherwise, payment of an obligation by check is a customer's privilege and not a right. Once the check is honored, the customer’s obligation is discharged. Once the check is dishonored, then it is as if the obligation had never been met.

Postscript: These rules as to timeliness of payments were affirmed yet again in the very recent case of (*E.P. Towne Center Partners, L.P., v. Chopsticks, Inc.*, ---S.W.3d --- 2007 WL 2405212 [Tex. App. — El Paso]), reported less than a month ago.

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