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What is a Joint Check Agreement?

The construction industry is famous for issuing joint checks and entering into joint check agreements, but these agreements can be entered into by anyone in any industry. The basic definition of a joint check agreement is a contractual agreement between multiple parties whereby one party agrees to *or is given permission to* make payment jointly to two or more parties.

Table of Contents

How Basic Joint Check Agreements Work

Joint check agreements are most common in the construction industry because so many tiers of parties participate in a project. This fits perfectly with the joint check concept.

A joint check agreement is commonly entered into between a general contractor, a subcontractor and a material supplier. The supplier, being hired by the subcontractor, wants to protect itself against non-payment. All three parties agree that any payments made by the general contractor for work involving the supplier's materials will be written jointly to the subcontractor and the material supplier.

The material supplier is protected against the risk of the subcontractor getting payment and not making a proportional payment to it. The general contractor is protected from the same risk, as such an instance would open him and the property owner to mechanics lien or bond claim exposure.

Here are two charts I've put together to explain how the payment process will work between these three hypothetical parties in a situation where there is a joint check agreement, and a situation where no agreement exists.

This chart to the left demonstrates how payment is processed on a standard construction project in absence of a joint check agreement.

When work is completed, the prime contractor will pay the subcontractor for the work. The subcontractor will turn around and pay the supplier for the building material supplies that were involved in the work.

Ideally, all parties get paid, but of course, there are inefficiencies and risks that interrupt the proper trickling down of construction payments.

The below chart shows the other scenario, such as when a prime contractor has a joint check agreement with the subcontractor and supplier. As you can see, the payment process is much more lateral.

Joint Check Agreements Exist By Contract And Not By Statute

Where does this "joint check" concept come from? Is there a federal or state statute to give contractors, owners and suppliers a guideline on how these agreements work? Is there some regulatory restrictions on what can be agreed upon within a joint check agreement?

Joint check agreements is not a creature of statute. In other words, there is no state or federal law that governs joint check agreements specifically or offers any guidelines.

To the contrary, joint check agreements are a creature of contract. In the United States, all parties have the general freedom to contract for whatever they want. The law only marginally restricts this freedom to prohibit folks from violating public policy (i.e. contracting into slavery, murder…or "no lien clauses").

What does this mean?

It means that there is no such thing as a "standard joint check agreement."

Accordingly, the parties to a joint check agreement can write the agreement any way they want. While this sounds nice and flexible, the result is that the industry is flooded with a ton of sample joint check agreements, and each of the samples would have sometimes significantly different effect.

Joint Check Agreements: Most Common Misunderstanding and How it Can Burn Your Company

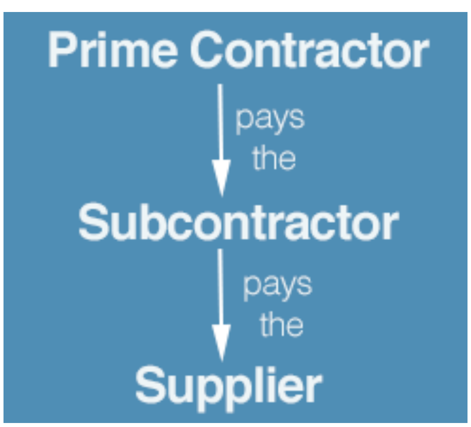
Here is a secret: If you have a joint check agreement, the paying party may not be obligated to issue a joint check. The joint check agreement you signed may instead just give them the *permission* to issue such a check. This is a very common issue and suppliers get burned on the misunderstanding every day.

Do The Terms Your Joint Check Agreement Place An Obligation Upon The Paying Party?

As explained in the "What Is A Joint Check Agreement" post, there is no such thing as a standard joint check agreement, and these agreements are subject to the contractual will of the parties. As a result, there are differences from agreement to agreement. One huge difference between agreements is that some obligate the paying party to issue a joint check, and others merely give permission to do so.

Paying Parties Typically Do Not Want To Incur A Joint Check Obligation

Joint check agreements primarily benefit the lowest tiered party (like a building material supplier). The party making the initial payment – usually the general contractor or property owner – do receive a slight benefit from these agreements, but the benefit pales in comparison to the benefit afforded the party getting the payment.

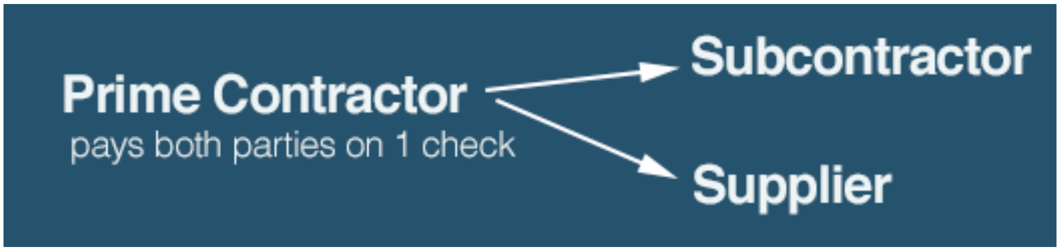


Accordingly, the motivation to the general contractor or developer in signing a joint check is usually pretty low. It is for this reason that these parties typically do not want to incur an additional obligation through a joint check agreement.

If they sign an agreement with a lower tiered sub or supplier and obligate themselves to issue a joint check for any work involving that lower tier, that creates a pretty inconvenient obligation. There are a few reasons why a paying party would want to avoid such an obligation:

- Keeping track of which lower tiered parties have joint check agreements and which don't is difficult, and prone to mistake;
- Having to dissect each payment into its component parts to make sure each lower tier gets paid in the correct proportion is an added and unnecessary administrative task;

- Any mistake mades leaves the paying party subject to an obligation it normally would not have.



Paying Parties Do Like The Power Of Permission To Issue A Joint Check

While paying parties want to avoid incurring a new obligation with a lower tiered subcontractor or supplier, they do like the power that comes with permission to issue a joint check.

Absent a joint check agreement, a general contractor or developer cannot usually issue a check to a lower tier. Instead, they must follow the standard payment pattern (paying their contractor and trusting the contractor will pay people down the line). Entering into a joint check agreement whereby their customer gives permission to pay lower tiers on a joint check gives the general paying party some additional power to control the payment flow.

While they may not need to do this often, if circumstances warrant it is a good risk control tool.

Look To The Terms Of Your Specific Joint Check Agreement To See If It Is Obligatory or Permissive

What dictates whether the paying party *must* or merely *may* issue joint checks? The joint check agreement, of course.

Since there are no "standard" joint check agreements, you'll need to review the language within the specific joint check agreement at play to see which rules apply to your situation. Yes, we know how boring and complex that is.

Here is an example of language that is obligatory, meaning it will obligate the paying party to issue a joint check. If the joint check is not issued and you have language like this in your contract, you'll likely be able to file a lawsuit directly against the paying party.

> *"In consideration of the benefit to the Paying Party by Lower Tier Party's supplying materials to the project, the subcontractor and the Paying Party hereby agree and guarantee that Lower Tier Party's invoices will be paid by joint checks to be sent directly to Lower Tier Party."*

Contrary to this, here is an example of language that is permissive, meaning that it will not obligate the paying party to issue the joint check, but will merely allow the paying party to issue the joint check:

> *"In consideration of the materials supplied and/or labor furnished by the Lower Tier Party to the Subcontractor for work performed at the project, the Subcontractor authorizes the Paying Party to make all payments, with respect to the materials supplied and/or labor furnished by the Lower Tier Party, in the form of a check jointly payable to both the Subcontractor and the Lower Tier Party."*

Can you see the difference?

Why Not Understanding The Terms Can Be Dangerous To Your Company

This part of the post should be obvious.

If you think your joint check agreement obligates the paying party to pay you, when in actuality it only gives the paying party permission, you may have a very difficult time getting paid if the paying party winds up not issuing a joint check.

From the paying party's perspective on the other hand, misunderstanding that permission is required only when an actual obligation exists can create a similar bad situation.

Waiving Mechanics Lien Rights in a Joint Check Agreement

When you sign a joint check agreement you are signing a contract, and therefore, you want to be very careful. You want to understand what the document says and make certain that it properly reflects the agreement you're entering into.

It is common to see "lien waiver" or "no lien" language within joint check agreements. Sometimes these clauses are valid and binding, and can really negatively impact your collection remedies.

No Lien Clauses Are Invalid In Many States – Even When Part of A Joint Check Agreement

We've written about "No Lien Clauses" in the past on the Construction Payment Blog. This term – no lien clauses – is a term we've fabricated to describe those clauses within a construction contract that require a party to waive their lien rights.

This is not the same as a lien waiver. A lien waiver is signed after you complete some work and is usually given in exchange for a payment or promise for payment. "No lien clauses," on the other hand, are within the initial contract or subcontract, and it waives your rights to lien before you begin furnishing labor or materials.

In most states such clauses are invalid as a matter of law. This is considered an exception to the “Freedom to Contract” general rule, as such clauses are deemed against public policy.

While joint check agreements frequently contain no lien clauses, the fact that it is contained within a joint check agreement instead of a standard contract will not change the result. The agreement will still be null and void in those states where such clauses are legally invalid.

When You Sign The Joint Check Agreement Can Make A Difference To Your Lien Rights

Caution: When you execute the joint check agreement can make a huge difference to the validity of such a “no lien clause.”

If you execute your joint check agreement at the beginning of a construction project and at the time of contracting, the “no lien clause” within the agreement will likely be treated exactly the same as if it were contained within the contract.

However, if you execute the joint check agreement after you perform the work or furnish the materials, the no lien clause will likely be valid, even in those states restricting the clauses. The reason is simple: it will be considered a lien waiver.

While you did not receive payment, the courts would likely see you exchanging your lien rights in consideration for a joint check agreement.

Joint Check Agreements:
A Great Tool for Credit Managers

Earlier this month I wrote an article about credit managers, outlining what I think are the 3 Primary Traits of a Great Credit Manager. The first trait was that great credit managers "understand all of the hard work comes before credit is actually issued," mentioning the *proactive* step of requiring Joint Check Agreements when confronted with a risky account.

This post examines why Joint Check Agreements are a great tool for credit managers in the construction industry, and explores the two circumstances when they may be used.

Why You Should Have A Joint Check Agreement Ready To Go At Anytime

Every account and construction project is unique and presents a unique credit challenge. Credit departments must be prepared for each of these circumstances. Sometimes, that means getting a personal guarantee or a promissory note signed. Sometimes, a joint check agreement fits the bill.

A joint check agreement is an agreement entered into by at least three parties. The paying party agrees to issue payments jointly to two parties: usually the paying party's customer and that party's customer. A common example is when a general contractor agrees to issue payments jointly to a subcontractor and the subcontractor's supplier.

If your company is confronted with a non-payment situation that may be solved by acquiring a promise to pay from a more solvent and reliable contractor, having joint check agreements and joint check language ready to fire off is important.

Proactive Joint Check Agreements Are Signed Before Furnishing And Before Incurring Debt

Joint check agreements are just that: agreements. They can be entered into by any party at anytime, and they can include terms requiring pretty much anything (almost anything).

If your credit department really wants to furnish to a project but you can't clear the customer with enough credit, a proactive joint check agreement at the start of the project may fit the bill. The general contractor can agree with you and your potential customer to issue all payments to you through a joint check.

Presuming the joint check agreement language is written favorably, this instrument may be the security your company needs to proceed with the project.

Reactive Joint Check Agreements Are Signed After Debt Incurred

Another circumstance that may warrant a joint check agreement is when an account starts to go sour. Instead of putting the brakes on the account and discontinuing furnishing to the project, it may be possible to get a joint check agreement with the paying party.

As anyone in the construction industry knows, sometimes payments get delayed up the contracting chain. While your customer is not paying your account and the credit risk climbs, it doesn't necessarily mean the customer is misappropriating funds or trying to avoid the debt. It may simply boil down to your customer not yet getting paid.

In these circumstances, credit managers can get a joint check agreement signed obligating the paying party to issue all payments to you jointly with the customer. This allows you to solve the risk problem without having to stop working the account.

Joint Check Agreements Must be Signed by Everyone

Who must sign a joint check agreement, and why would that even matter? Getting ink from the appropriate parties is a critical step in executing a valid joint check agreement. Joint check agreements are commonly misunderstood leaving parties with an empty promise from the developer or general contractor. While the language of the agreement makes a difference in this area, its quite common for the enforceability of a joint check agreement to boil down to this simple question: who signed it?

Joint Check Agreements Are Exception To General Contract Rules - Obligating A Third Party To A Debt

Joint check agreements create an exception to a party's typical contractual responsibilities.

Normal circumstances see only two contracting parties: the obligee and the obligor. In the construction context, the obligor is the party charged with furnishing labor or materials to a project, and the obligee is the party who will receive the benefit of that furnishing. For example, a general contractor will contract with a subcontractor for performance of some scope of work. The subcontractor is charged with performing according to the contract and is the obligor. The general contractor will receive the benefit of that work and is considered the obligee.

All contract talk aside, the important take-away from this example is that there are only two parties to a typical agreement. There is the obligor and the obligee. One party is required to perform the work and the other party will receive and pay for it.

Third parties (such as the property owner, the construction manager, the lender, the sub-subcontractor, and so on) are not parties to the agreement. They cannot demand that the obligor perform anything, and in turn, the obligor is only able to go after the obligee for payment. In fact, the restriction upon an obligor (like a subcontractor) to only seek payment from the party it directly contracts with is one of the primary justifications for filing a mechanics lien, as the mechanics lien provides authority to proceed against other parties up the contracting chain for payment (see 17 Ways A Mechanics Lien Works To Get You Paid).

Entering into a joint check agreement carves out an exception to the general rules of contracting. Although the contracting agreement is between only two parties, a third party jumps in and promises to guarantee payment to the performing party by agreeing to write all checks to both parties of the original contract. Realize that this requires three parties to agree:

(1) The third party who will write the joint checks must agree to take on the additional obligation;

(2) The obligee to the original contract must agree to allow the third party to write these joint checks and pay the obligor directly; and

(3) The obligor must agree to accept payment from the joint checks.

What's that mean?

All Three Parties To A Joint Check Agreement Must Sign The Agreement

All of this confusing contract law babble means just one thing: get everyone to sign the joint check agreement.

If every one of the three parties to a joint check agreement doesn't sign the agreement it could come under attack. The only party who could possibly be forgiven for not signing the agreement is the lowest tier who is receiving the benefit of the agreement (i.e. the original contract's obligor), and that's because many state's case law suggests that the party receiving the benefit of an obligation need not sign the agreement to claim the benefit. Nevertheless, why roll the dice on this? If you're benefiting from a joint check agreement you might as well sign it, too.

Joint Check Agreement Fraud: Understand and Prevent It

Joint check agreements are popular in the construction industry. In fact, they are so commonly used they are often referred to as a "construction instrument," insinuating that they are exclusively used in that industry. Also common, unfortunately, is joint check agreement fraud. This post explains where joint check agreement fraud occurs and helps you understand and prevent it.

Forged Signatures on Joint Check Agreements

Subcontractors are under pressure to get materials to perform their scope of work on time and within budget. If a material supplier refuses to extend enough credit to get the job done, it could lead the subcontractor into a desperate situation. The solution to their problem may be a joint check agreement. But what if the general contractor refuses to agree?

Subcontractors and others with credit problems have been known to forge a general contractor's or developer's signature on a joint check agreement. You should understand that this occurs in the industry, and it is a good practice to send an email or make a phone call to the general contractor or developer to confirm that they did indeed sign the joint check agreement and understand their obligations.

Forged Endorsements on Joint Checks

Forging signatures on joint check agreements is less common than this more troubling joint check fraudulent act: forging a check endorsement.

Subcontractors in need of cash may get their hands on a joint check and forge the other party's signature on it to deposit it on their own. They may have good intentions to pay you, but may come up short because of cash flow issues.

If this happens, you should contact the maker of the check (the general contractor / developer) and have them file a fraud report with their bank.

If this is done soon enough, it's possible that the bank will be capable of reversing the deposit. You may also have a civil action against the company forging your signature for fraud.

Joint Check Agreements:
3 Fatal Mistakes You Can Make

Getting a joint check agreement is a plus for any credit department, and I highly recommend utilizing the joint check remedy when it's available. Don't make the mistake, however, of thinking that joint check agreements are a one-size-fits-all type of document. To the contrary, there are lots of traps and mistakes to be made. This post discusses 3 fatal mistakes you can make when executing, enforcing or working with a joint check agreement.

Mistake: Overlooking Importance of Language In The Joint Check Agreement

It's interesting how overlooked *language* is in joint check agreements. People in the construction industry go around talking about joint check agreements like there is a standard agreement or standard form out there that everyone follows. To the contrary, almost every joint check agreement is unique.

And all those words in the joint check agreement mean something. If you're not careful, it could really put you in a bind. Are you, for example, accidentally waiving your mechanics lien rights? Are you *requiring* the general contractor to issue a joint check or merely giving him permission to do so?

A fatal mistake made by companies is simply not reading a joint check agreement before signing.

Mistake: Accepting Joint Check Agreements or Joint Checks Without The Word "AND" In It

What is the difference between "ABC Construction and ABC Supply" and "ABC Construction / ABC Supply?" A lot!

If the first - ABC Construction and ABC Supply - is on the face of the check instrument, the instrument will not be accepted unless it is endorsed by both parties. If the second is on the face of the instrument, on the other hand, there are some banks who will accept this for deposit with either company endorsing the check.

You'll want to make sure the joint check agreement makes it explicitly clear that checks must be written out to include the word "AND." It is surprising how many joint check agreements use shorthand and require only a "/" in the check. That little conjunction makes a big difference.

Mistake: Trusting That The Other Parties Will Meet Their Obligations Or Understand Their Obligations

Some companies, general contractors and developers sign joint check agreements like they're going out of style. It's a pain free way to get material suppliers on board with the project and to get the project moving along. You may be surprised (or not) to learn that these signing parties rarely keep track of their obligations in any meaningful way.

Sure, there are software products out there that will help companies keep track of where they do and do not have joint check obligations, but it's more likely that they are a disorganized mess and flying on the seat of their pants with respect to these agreements. Who wants to buy software to help manage this junk?

The result is that checks get accidentally written in violation of the joint check agreement. So, you may be wondering, where is the "mistake?" The mistake is in going forward on a joint check agreement without ever speaking with or emailing the party who will be cutting the check.

Get in touch with them at the start of the agreement and confirm the obligation. Not only will you avoid a fraud / forgery situation, but you'll also make sure your account gets some attention to decrease the chance they forget about you.

Oh, and don't get me started about folks that simply don't understand what a joint check agreement is but sign it anyway. By calling or emailing these folks, you will at least educate them about their obligations before an untimely breach.

If you get the language in your Joint Check Agreement correct you'll at least have a civil remedy in the event of a default. The point of getting a joint check agreement, however, is to avoid civil lawsuit remedies, and that's why this type of mistake is so troublesome.

Joint Check Agreements vs. Mechanic Liens: Comparing Tools

We've discussed some of the positives and perils of joint check agreements. Since this is also a form of payment security (and sometimes a very good form), you may be a little confused about the differences between the two devices and whether one is better than the other. This post will compare the joint check agreement with the mechanics lien remedy.

Mechanics Lien Claims Are Secured By The Property and Joint Checks Are Only Secured By The Parties

When you file a mechanics lien claim you are actually staking a claim in the project jobsite itself. If you remain unpaid on the project and foreclose upon your mechanics lien claim, the property may be sold at auction to satisfy your debt. Although there are some differences between a lien claim and a mortgage, there are also a lot of similarities, and so in a lot of ways your mechanics lien claim acts like a mortgage or privilege against the property.

This has a lot of implications, some of which are discussed in our popular post: 17 Ways A Mechanics Lien Works To Get You Paid. The main implication being that a lot of parties are affected and concerned about a mechanics lien including the property owner and lender. The secondary implication is that collecting on your debt has a backup plan. If the parties don't pay, you can always get paid through the equity on the property.

Joint check agreements are completely different from this. When you have a joint check agreement in hand you typically will not have security vested in any property or item. Instead, you'll have a promise to pay from additional parties. While you previously relied solely on your customer to pay the debt, with a joint check agreement you'll additionally be able to recover against the other parties to the agreement (subject, of course, to some technicalities or limitations).

A joint check agreement is a great tool for companies and credit managers. Understand, however, that it's only an enforceable contract and it is not a security instrument like a mechanics lien claim.

Mechanics Lien Rights Are Created By Statute and Joint Check Rights Are Created By Agreement

Another key difference between mechanics lien rights and joint check agreements is their roots. A mechanics lien right is a creature of statute and a joint check agreement is a create of contract. What in the world does this mean and why does that make a difference?

Mechanics Liens Are Rooted In Statutory Law

More than 200 years ago, Thomas Jefferson brought the country's (and the world's) first mechanics lien bill before the Maryland legislature. In it, he created a statutory framework whereby those furnishing labor or materials to a construction project could enforce a lien right against a property if unpaid.

This right to make a claim against the property arose as a result of the party furnishing labor or materials to the project. It did not require the agreement of the property owner, the general contractor or any other party. In fact, it would soon become impossible in most states to agree around the laws, or in other words, to agree that the law would not apply and that a party cannot have lien rights.

Whenever a right is created by statute like this it is looked upon differently by courts. If you read mechanics lien case law you'll probably see a phrase like this: "Since mechanics lien laws are in derogation of common law they are strictly construed."

In fact, when a right like the mechanics lien rights exists, courts will look at the law strictly. This is not to say that liberal interpretation cannot exist , because it can and should to ensure that the laws achieve their purpose. But it is exactly this friction between the strict and liberal interpretation requirements that has caused much unrest in courts around the country when interpreting these laws.

Joint Check Agreements Are Rooted In Contract Law

Unlike mechanics lien rights, the rights that arise out of a joint check agreement are related to contract law. There is no "statutory" right to joint check agreements, nor are there any joint check agreement laws in the country that regulate these agreements. Instead, they are exactly as described: agreements.

Parties can get together on a construction project (or within any industry) and agree to pretty much anything they want. The only limitation to the "freedom to contact" is that contractual agreements cannot violate public policy. So, for example, it is illegal to contract for prostitution, gambling, etc. Nevertheless, if an agreement does not violate these legal boundaries, the terms of the party will govern that relationship.

If you are engaged in a dispute about mechanics lien laws the courts are going to look to case law and the statutory text to determine the question. If engaged in a dispute about a joint check agreement, on the other hand, the courts are going to look to the terms of the agreement to determine the question. This can be a big difference.

Joint Check Agreements and Bankruptcies

Bankruptcy is a significant credit and collections challenge in the construction industry. We all fear it. A customer filing for bankruptcy protection translates into attorney fees, payment delay and non-collectable debts. How do credit departments prepare for and respond to these bankruptcy situations?

Here, we examine how joint check agreement obligations and benefits stand up in a bankruptcy filing. You'll likely be surprised with how vulnerable your joint check agreement is in a bankruptcy event. In researching this post, I owe a debt to Edward Peterson of Stitcher, Riedel, Blain & Postler, P.A.

Bankruptcy: What You Must Fear

Let's start by looking at bankruptcy filings generally and what credit departments should fear - aside from getting stiffed on payment - when a party to a construction project seeks bankruptcy protection. Mostly, they should fear Bankruptcy Code Section 547: Preferences.

The danger here is explained nicely in a March 2010 American Bar Association Business Law article titled "Preference: When Can A Trustee Claw Back Payments To Creditors?"

The Bankruptcy Code permits the trustee or debtor-in-possession to "avoid" certain preferential transfers that a debtor made to creditors in the 90-day period prior to the filing of a bankruptcy petition. Preferential transfers should not be confused with fraudulent conveyances. Though they are often lumped together, they are distinct concepts. A preferential transfer focuses on whether a creditor has received a payment that results in that creditor getting better treatment than other creditors in light of the bankruptcy.

When a party files bankrupt, a trustee is appointed to oversee the disbursement of assets held by the business. It is the trustee's job to make sure that all creditors are treated fairly and equally. So, if Creditor A is owed $100,000 and Creditor B is owed $50,000, all other things being equal those two creditors should be paid the same *percentage* of their debt. If the percentage paid is 10%, Creditor A will get $10,000 and Creditor B will get $5,000.

The "Preferences" statute in the Bankruptcy Code allows the trustee to turn back the clock for 90 days *before* the bankruptcy was filed and to take payments made during that period into account when coming up with who should receive what in the bankruptcy distribution. If you get paid too close to a bankruptcy filing, you may be required to pay the customer back!

Are Payments Made Under Joint Check Agreements Subject To A Bankruptcy Preference?

What if you have a joint check agreement signed requiring more than one party to pay your debt? In other words, what if the bankrupt party and a non-bankrupt party have signed a joint check agreement promising to pay your debt? Can you disregard the bankruptcy filing and just go after the non-bankrupt party? Can you rely on this to prevent a §547 Preference claw back?

Well, as these things go, it depends.

First, it depends on the terms of the joint check agreement itself. If a third-party non-bankrupt owner or contractor is required under the agreement to make payments through a joint check, most bankruptcy districts will determine that the bankrupt party does not have a requisite "interest" in the funds, and therefore, they will not be subject to the preference.

On the other hand, in those circumstances where the non-bankrupt party simply *may* issue a joint check and need not issue the joint check (which happens), many bankruptcy districts may consider these payments subject to the §547 preference. Here is how Mr. Peterson explains the situation in his above-linked article:

The bankruptcy trustee may argue that, because the Contractor was a joint payee on the joint check, the Contractor had the requisite “interest” in the check proceeds and the payment to the Supplier was a preference...Under certain circumstances, the trustees or debtors have been successful in recovering payments made to Suppliers pursuant to joint checks, especially where courts determine that the Owner or Contractor did not have an independent obligation to pay the Supplier...

Second, it depends on where you are. Even though bankruptcy law is federal law and theoretically the *same* in every state, that does not prevent the various court districts from interpreting the law differently. As such, how this particular issue gets handled will depend heavily on where the bankruptcy filing is being litigated.

Can You Recover Unpaid Amounts Under A Joint Check Agreement When Your Joint Payee Is Bankrupt?

The other issue to consider when holding onto a joint check agreement where your joint payee is in bankruptcy is what rights you have for unpaid amounts post-bankruptcy.

The bankruptcy trustee will eye all payments still due hoping to get them added to the bankruptcy estate. To do so, the trustee will be faced with the same situation as above, namely the question of whether the bankrupt party has an "interest" in the joint check payment. If the bankrupt party has the requisite interest it will get added to the estate. If not, it'll flow directly to the non-bankrupt party.

Again this issue will likely boil down to whether the paying party has the actual obligation to pay the non-bankrupt party. If the joint check agreement merely authorizes the owner (or GC) to make payment by joint check, the trustee will be successful at re-routing the payments to the estate. If the joint check agreement mandates payment by joint check, the non-bankrupt party will likely be successful at getting the payment directly and avoiding the bankruptcy interests therein.

Conclusions & Joint Check Agreement Best Practices

So, if you're a credit manager how do you ensure your joint check agreements avoid these bankruptcy perils and really protect your company in the event of a bankruptcy? While you'll never be able to avoid the situation and risk entirely, here are some best practices:

1) Make Your Company A Party To The Joint Check Agreement: Make sure you are announced in the agreement as a party to the agreement, and make sure that you are a signatory on the agreement. Your company should be a party to the agreement, and thus, you should have defined rights therein.

2) Obligate The Owner or Contractor To Pay You: A lot of joint check agreements merely give the owner or general contractor permission to issue joint checks. You want your joint check agreements to obligate the owner or general contractor to issue joint checks to you.

3) Make The Joint Check Agreement Restrictive On Your Joint Payee: Make the joint check agreement clearly demonstrate that it benefits *you* and not your joint payee. Include language that the joint payee must endorse the check to your favor, that it cannot revoke the agreement and that it merely serves to hold the payment in trust to get the payment to you.

4) Do Not Allow Any Portion To Go To The Joint Payee: Make sure your joint checks are written separately from any other checks due to the joint payee. You want the entire joint check amount to be payable to you. If the joint payee is owed other money on the project you want that to get paid to the joint payee in a separate instrument.

How to Enforce a Joint Check Agreement

Getting a joint check agreement is great for your company. Nevertheless, joint check agreements are sometimes violated, like anything else.

Why You May Need To Enforce A Joint Check Agreement

Let's start with some reasons why you may put into a position where a joint check agreement may need to be enforced. Here are some common scenarios:

JOINT PAYEE REFUSES TO SIGN THE CHECK

Joint checks are just that: a check instrument written to your company and somebody else. When everything is going smoothly on a project there usually aren't any problems. These checks come in, they're signed by the parties, and deposited by one party according to an agreement. For a variety of reasons, however, a project may reach a point when the parties stop cooperating with one another or when one party feels entitled to remedies or payments that are in dispute. This situations are challenging when joint checks are in play, since one party will likely refuse to sign.

OWNER OR CONTRACTOR DOESN'T INCLUDE YOU ON THE CHECK

Another situation may arise when the paying party issues the check without your company on it in violation of a joint check agreement. This can happen accidentally or intentionally. Nevertheless, it is a violation of the joint check agreement, and if the parties do not cooperate to correct the issue, the paying party may be reluctant to issue another check to you and pay for the work or materials twice.

How To Enforce Your Joint Check Agreement

Writing a how-to on enforcing a joint check agreement is a tricky subject since these agreements are a creature of contract and vary greatly from one agreement to the next. Accordingly, what may be appropriate for one agreement may not be appropriate for another. It's advisable, therefore, that you consult with a construction attorney as your first step here.

STEP 1: REVIEW YOUR JOINT CHECK AGREEMENT AND FOLLOW PROCEDURES

The first thing you'll want to do is review your joint check agreement's terms. Make sure that a violation actually occurred (duh!), but then also review the terms to see if there are defined procedures on enforcing your agreements.

Sometimes a contract will have very strict enforcement terms requiring formal notices, mediation, arbitration, cure periods or enforcement delay. Making a misstep with these procedures will not only cost you precious time and money, but it may cost you your entire claim. It is no unheard of for entire valid claims to get dismissed because parties did not follow their notice or enforcement procedures.

STEP 2: CONSIDER YOUR BIG PICTURE ARGUMENT

Enforcing a joint check agreement may be the whole dispute. A lot of the time, however, it is only a tiny part of the arguments between the parties. It is because of a bunch of other arguments that the joint check issue even arises.

It is possible to go after the parties with a narrow focus on the joint check agreement's obligations. Unfortunately, however, every other argument under the sun is likely to get roped in (workmanship disputes, delay, damages, contract violations, etc.). When looking to enforce your joint check agreement don't be naive about these other disputes. Keep them all in mind and come up with your big picture legal plan.

Joint Check Agreement Form

This post pulls together everything we've discussed to create an agreement form that is free to view, download and use. Of course, everything we do here at *zlien* and on the Construction Payment Blog is subject to our Terms of Use.

Download *zlien*'s Joint Check Agreement Form free. We wrote this to benefit the company furnishing and expecting payment through a joint check agreement.