

1981

## UCC Section 1-207 and the Full Payment Check: The Struggle between the Code and the Common Law - Where Do the Debtor and Creditor Fit In?

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### Recommended Citation

Hendrick, Susan Harrison (1981) "UCC Section 1-207 and the Full Payment Check: The Struggle between the Code and the Common Law - Where Do the Debtor and Creditor Fit In?," *University of Dayton Law Review*. Vol. 7: No. 2, Article 6.

Available at: <https://ecommons.udayton.edu/udlr/vol7/iss2/6>

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# UCC SECTION 1-207 AND THE FULL PAYMENT CHECK: THE STRUGGLE BETWEEN THE CODE AND THE COMMON LAW—WHERE DO THE DEBTOR AND CREDITOR FIT IN?

## I. INTRODUCTION

A relatively overlooked section of the Uniform Commercial Code [hereinafter U.C.C. or Code], section 1-207,<sup>1</sup> which concerns performance or acceptance under reservation of rights, has recently come to the forefront and could have a profound effect on debtor-creditor relations.<sup>2</sup> The question which has arisen is whether U.C.C. section 1-207 should be applied to the full payment check, thus changing the common law doctrine of accord and satisfaction concerning the full payment check.

In the context of debtor-creditor relations, disputes often arise over an amount due. For example, A and B enter into an agreement whereby A agrees to furnish certain supplies and B agrees in return to pay \$200. During the course of the transaction, due to market conditions, some of the supplies have to be substituted. B claims that the substituted supplies are only worth \$100. A claims that the supplies are substantially the same, and that B still owes \$200. B, in an attempt to compromise, sends A a check for \$150 marked "payment in full." This triggers the dilemma.

Under the common law doctrine of accord and satisfaction, creditor A would have two choices.<sup>3</sup> He could accept B's check in full payment of the claim or he could return the check and sue for the full balance.<sup>4</sup> The creditor cannot retain the check and sue for the balance.<sup>5</sup> The burden is placed on the creditor to choose between these two alternatives. The debtor's position is clear. In sending a check marked "pay-

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1. U.C.C. § 1-207 states:

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

2. William Hawland, one of the most widely cited authors on the subject of § 1-207, has observed: "[i]f applied literally, this section could drastically alter the well-settled legal rights and duties of a debtor and creditor involved in one particular commercial transaction, namely, the accord and satisfaction by way of the 'conditional check'." Hawland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COMM. L.J. 329 (1969) [hereinafter cited as Hawland].

3. *Id.*

4. *Id.*

5. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 4-12, at 154 (1977) [hereinafter cited as CALAMARI & PERILLO].

ment in full," he has presented the creditor a "take it or leave it" offer.<sup>6</sup>

On the other hand, if U.C.C. section 1-207 is applied to the same set of facts, the burden shifts to the debtor. Under the Code, the creditor can retain the check "under protest" and with "full reservation of rights" and still sue for the balance.<sup>7</sup> Hence, the debtor can send a full payment check in an amount which he considers a fair compromise, \$150, hoping that the creditor will elect to accept the check in full settlement of the claim. Although the creditor upon receipt of an amount larger than the debtor admits is due might be less inclined to sue for the balance than if he received only what the debtor claimed was due, the debtor nevertheless risks the chance that the creditor will retain the larger amount and still sue for the balance. In other words, in sending \$150 the debtor takes the risk that the creditor will receive \$50 more than the debtor thinks he owes, and that the creditor will additionally sue for the remaining \$50 he originally claimed. The debtor's other choice is to send only the amount he admits is due, \$100, and wait for the creditor to sue for the balance. The potential for litigation is even greater in this instance because the debtor has made no attempt to compromise with the creditor; on the other hand, the debtor has not taken the risk of placing in the hands of the creditor any sums greater than the precise amount he admits is due. Consequently, because of these poor alternatives left open to the debtor when section 1-207 is applied to this type of situation, the informal compromise of accord and satisfaction is impaired.<sup>8</sup>

Perhaps of greater consequence to the debtor or the creditor is the question whether the Code will be applied to the situation. The uncertainty is harder to deal with than either of the two situations described above. This issue basically lay dormant until 1976,<sup>9</sup> and case law is still unsettled. Consequently, no clear majority or minority position has emerged. Nevertheless, because of the impact on the debtor-creditor relationship, the issue whether section 1-207 applies to the full payment check needs to be acknowledged and resolved.<sup>10</sup> Strong policy favoring

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6. *Id.*

7. *Id.* at 155.

8. Hawkland, *supra* note 2, at 330. "With the enactment of the Uniform Commercial Code, the validity of the common law doctrine of accord and satisfaction in the case under discussion [the full payment check] is seriously in doubt." *Id.*

9. Scholl v. Tallman, \_\_\_ S.D. \_\_\_, 247 N.W.2d 490 (1976). See Note, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check?*, 11 CREIGHTON L. REV. 515 (1977) (where the author discusses whether other jurisdictions should follow Scholl, the first case to hold that § 1-207 applied to the full payment check) [hereinafter cited as *Does Section 1-207 Apply*].

10. See Note, *Section 1-207 of the Uniform Commercial Code Not Intended to Apply to*  
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the preservation of accord and satisfaction with the full payment check,<sup>11</sup> along with the legislative history of section 1-207<sup>12</sup> and recent case law,<sup>13</sup> suggest that section 1-207 was not originally meant to be applied and should not be applied to the full payment check.

## II. THE GENERAL BACKGROUND OF THE COMMON LAW DOCTRINE OF ACCORD AND SATISFACTION AS IT RELATES TO THE FULL PAYMENT CHECK

An accord is an agreement in which a party agrees to accept some new, different performance in satisfaction of another party's existing obligation.<sup>14</sup> A satisfaction is the performance of the accord agreement.<sup>15</sup> A check which is clearly marked "offered in full settlement of disputed claim," a full payment check, constitutes an offer for an accord.<sup>16</sup> When the check is accepted and deposited the accord is accepted and the satisfaction takes place.<sup>17</sup>

Certain rules regarding the use of full payment checks have arisen because an accord is governed by ordinary contract principles.<sup>18</sup> Consequently, there must be mutual assent and consideration.<sup>19</sup> Mutual assent requires that the notation on a full payment check be clear so that the creditor receiving the check has the same understanding of the use to which the check is to be put as does the debtor who tenders it.<sup>20</sup> The consideration in an accord is the act of compromising by each party.<sup>21</sup> The debtor pays more than he admits is due while the creditor accepts less.<sup>22</sup> Consequently, the majority of jurisdictions<sup>23</sup> require that a debt be unliquidated<sup>24</sup> and disputed in good faith in order to find the requi-

*Doctrine of Accord and Satisfaction*, 15 LAND & WATER L. REV. 737, 742 (1980) [hereinafter cited as *1-207 Not Intended, Accord and Satisfaction*].

11. See note 97 and accompanying text *infra*.

12. See note 47 and accompanying text *infra*.

13. See note 83 and accompanying text *infra*.

14. Hawkland, *supra* note 2, at 329. See RESTATEMENT (SECOND) OF CONTRACTS § 351 (Tent. Draft No. 13, 1978).

15. Hawkland, *supra* note 2, at 329.

16. 1 AM. JUR. 2d *Accord and Satisfaction* § 14 (1962).

17. *Id.* at § 18.

18. Hawkland, *supra* note 2, at 329.

19. 1 AM. JUR. 2d *Accord and Satisfaction* §§ 11, 12 (1962).

20. *Id.* at § 15.

21. 17 AM. JUR. 2d *Contracts* § 121 (1964).

22. *But see* CALAMARI & PERILLO, *supra* note 5, § 4-12, at 155 (where debtor sends only the amount he admits that he owes, the majority still deem the debt to be unliquidated and find consideration).

23. See, e.g., *Longstreth v. Halter*, 122 Ark. 212, 183 S.W. 177 (1916); *Potter v. Pacific Coast Lumber Co. of Cal.*, 37 Cal. 2d 592, 234 P.2d 16 (1951); *Alcorn v. Arthur*, 230 Ky. 509, 20 S.W.2d 276 (1929); *Nordling v. Whelchel Mines Co.*, 90 Idaho 213, 409 P.2d 398 (1965); *Platt v. Penetryn Sys., Inc.*, 151 Ohio St. 451, 86 N.E.2d 600 (1949).

24. "A liquidated debt is either a fixed sum or one that can be calculated from figures at Published by eCommons, 1981

site consideration.<sup>25</sup> If a debt is liquidated or disputed in bad faith, for example, if there is no bona fide dispute, the debtor is merely paying something he already owed and is not giving anything up; hence, there is no new consideration for an accord.<sup>26</sup>

The most difficult question at common law is whether the requirement of mutual assent is met when a creditor accepts a full payment check with words of protest. Justice Cardozo succinctly answered this question in *Hudson v. Yonkers Fruit Co.*<sup>27</sup>: "Protest will . . . be unavailing if the money is retained. What is said is overridden by what is done, and assent is imputed as an inference of law."<sup>28</sup> Cardozo later noted in *Hudson* that the use of a full payment check in violation of its terms would constitute an act of conversion.<sup>29</sup>

A New Jersey court has aptly summarized the requirements for an accord and satisfaction at common law as follows:

When a claim is unliquidated and a check is tendered in full settlement, giving the creditor notice of this condition, the creditor's retention and use of the check constitutes an accord and satisfaction. . . . [T]he creditor is deemed to have accepted this condition by depositing the check for collection notwithstanding any obligation or alteration.<sup>30</sup>

### III. THE GENERAL BACKGROUND AND LEGISLATIVE HISTORY OF U.C.C. SECTION 1-207

An analysis of the language of section 1-207 and its legislative history aid in determining whether section 1-207 was intended to apply to the full payment check. U.C.C. section 1-207 provides that:

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by

hand." Note, *Accord and Satisfaction Under Uniform Commercial Code Section 1-207: Scholl v. Tallman*, 38 OHIO ST. L.J. 921, 922 (1977) [hereinafter cited as *Accord and Satisfaction under U.C.C.*]. A debt is unliquidated when the amount due can not be calculated or is in dispute. *Id.*

25. See Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 BUFF. L. REV. 539, 541 (1969). [hereinafter cited as *Conditional Tender*]. "A minority of jurisdictions . . . provide either by statute or decision that if there is a written receipt of agreement to accept partial payment even a liquidated debt will be discharged." *Id. Accord*, *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980).

26. See CALAMARI & PERILLO, *supra* note 5, § 4-12, at 154.

27. 258 N.Y. 168, 179 N.E. 373 (1932).

28. *Id.* at 171, 179 N.E. at 374. *But see Does Section 1-207 Apply, supra* note 9, at 518 (noting a minority view where the creditor's acceptance must be made expressly and without protest.) See, e.g., *Siegele v. Des Moines Mut. Hail Ins. Ass'n*, 28 S.D. 142, 132 N.W. 697 (1911).

29. 258 N.Y. 172, 179 N.E. 375 (1932). Any use of a full payment check other than in full satisfaction of a claim would constitute a use of the check in violation of its terms.

30. *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 347, 418 A.2d 1326, 1327 (1980).

the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.<sup>31</sup>

This section first appeared in the Proposed Final Draft of 1950<sup>32</sup> and has remained unchanged through the current official version.<sup>33</sup>

Of particular interest is the co-existence of sections 1-207 and 3-802(3) in the 1950 and 1952 drafts.<sup>34</sup> In the 1952 Official Draft, section 3-802(3) provided:

Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances.<sup>35</sup>

This section codified the common law where there was a disputed and unliquidated debt by providing that the underlying obligation is discharged by obtaining payment of the check unless the payee establishes that the original obligor has taken unconscionable advantage of him; however, section 3-802(3) changed the common law with regard to undisputed and unliquidated debts in that it speaks only of a check in "full satisfaction of an obligation" without qualifying the term obligation or requiring that it be unliquidated or undisputed.<sup>36</sup> The 1956 Official Draft subsequently deleted section 3-802(3).<sup>37</sup>

Sections 1-207 and 3-802(3) coexisted in the two drafts without any cross reference.<sup>38</sup> The Official Comments to section 3-802(3) make it clear that it was meant to apply to accord and satisfaction.<sup>39</sup> It is doubtful that the authors of the Code intended that two section affect the same thing.<sup>40</sup> This in turn suggests that section 1-207 was not originally intended to apply to the full payment check at all.<sup>41</sup> In addition, the deletion of section 3-802(3) does not necessarily imply that section 1-207 now controls these types of transactions because the official com-

31. U.C.C. § 1-207.

32. *Id.* (1952 proposed final draft).

33. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48, 58 (1978) [hereinafter cited as Rosenthal]. Rosenthal, in what is probably the most frequently cited article on § 1-207, includes a comprehensive section dealing with the legislative history of § 1-207.

34. *Id.* at 60.

35. U.C.C. § 3-802(3) (1952 version).

36. Rosenthal, *supra* note 33, at 59 (Rosenthal's comments are based on a study by the New York State Law Revision Commission).

37. *Id.* at 60.

38. *Id.*

39. U.C.C. § 3-802, Official Comment 5 (1949 draft).

40. *Accord and Satisfaction under U.C.C.*, *supra* note 24, at 928.

41. Rosenthal, *supra* note 33, at 61.

ments to section 1-207 make no mention of such a change.<sup>42</sup> “The most plausible explanation is that the drafter of the Code decided to leave accord and satisfaction to the courts.”<sup>43</sup>

Another source of interpretation for section 1-207 is the Official Comments to the Code. Official Comment 1 to section 1-207 states:

This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment “without prejudice”, “under protest”, “with reservation of all our rights” and the like.<sup>44</sup>

Although the Official Comments usually point out any changes the section would make on the existing law, the comment to section 1-207 fails to note any such change.<sup>45</sup> Once again, this implies that section 1-207 was never intended to apply to the full payment check.<sup>46</sup> In a frequently cited article, Albert Rosenthal noted that “if so fundamental a change in the law of accord and satisfaction had been intended it seems likely that it would have been articulated—particularly during the critical years in the mid-fifties, when the fate of the Code probably hung in precarious balance. . . .”<sup>47</sup>

Although the above mentioned history strongly suggests that section 1-207 was not intended to apply to full payment checks, several state annotations suggest just the opposite.<sup>48</sup> The first of these interpre-

42. See note 44 and accompanying text *infra*. If § 1-207 was meant to fill the void when § 3-802(3) was deleted, this should have been mentioned in the Official Comments to § 1-207 in the year § 3-802(3) was deleted, 1957. *Accord and Satisfaction under U.C.C.*, *supra* note 24, at 928. However, “section 1-207 had the same comments in 1957 as in 1950 when the section was first introduced.” *Id.*

43. *Id.* at 928-29.

44. U.C.C. § 1-207, Official Comment 1.

45. Hawkland, *supra* note 2, at 331.

Since the Official Comments do, as a practice, point out any significant changes which a section makes in existing law, a strong argument can be made that the failure of the comment to 1-207 to mention such a sweeping change as would be caused by the application of the section to the present case indicates that no such result was intended.

*Id.*

46. *Id.* Hawkland offers a possible interpretation of Official Comment 1:

This language might suggest that the section is not designed to alter the law of accord and satisfaction but to permit parties to go ahead with the performance of a contract without the fear of waiver. An accord and satisfaction . . . involves a *new* contract, not the “contemplated” performance of the original contract.

*Id.* (emphasis original).

47. Rosenthal, *supra* note 33, at 61.

48. The Delaware comment to § 1-207 states:

“In particular it [§ 1-207] makes possible avoidance of the sometimes harsh effect of cases holding that a debt is discharged in its entirety by acceptance of part payment which the debtor tenders as full payment of an unliquidated claim.” DEL. CODE ANN. tit. 6, § 1-207 (1975).

The Florida Code Comment notes:

tations appeared when the New York Commission on Uniform State Laws sent its report, including annotations of each section, recommending that New York enact the Code.<sup>49</sup> The portion dealing with section 1-207 stated that “[t]he Code rule would permit, in code-covered transactions, the acceptance of a part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the performance as payment.”<sup>50</sup> The current New York annotation is substantively the same.<sup>51</sup> Despite the clarity in these state annotations, it must be emphasized that these annotations only appear in the following five states: Delaware, Florida, Minnesota, New Hampshire, and New York.<sup>52</sup>

#### IV. CASE LAW

##### A. Cases Applying Section 1-207 to the Full Payment Check

The first case directly dealing with the effect of section 1-207 on the full payment check was decided in 1976 in *Scholl v. Tallman*.<sup>53</sup> In *Scholl*, the Supreme Court of South Dakota held that the conditional endorsement of a check constitutes an explicit reservation of rights and is not acceptance in writing as required for an accord and satisfaction

“This section [§ 1-207] offers a device of considerable practical value, in permitting a party to accept whatever he can get in payment, performance etc. without having to gamble with his legal rights to demand the balance of the payment.” FLA. STAT. ANN. § 671.1-207 (West 1966).

The Minnesota comment specifies that “this section [§1-207] does *not preclude* an accord and satisfaction or a waiver if one party offers to give or receive performance only on his terms and the other party assents and goes ahead *without explicit protest or reservation of rights*.” MINN. STAT. ANN. § 336.1-207 (West 1966) (emphasis original).

The New Hampshire comment to § 1-207 explains:

As to the common law, the section would, in code-covered situations, permit acceptance of a part performance or payment tendered in full settlement without the acceptor gambling with his legal right to demand the remainder of the performance or payment, a course impossible now save where the part tendered is either liquidated or undisputed.

N.H. REV. STAT. ANN. § 382-A:1207 (1961).

For the New York comment see note 51 *infra*.

49. Rosenthal, *supra* note 33, at 61-62 provides the historical background regarding the report of the New York Commission on Uniform State Laws and § 1-207.

50. *Id.* (Rosenthal quotes from the *Rep. of the Comm'n on Uniform State Laws to Legislature of State of N.Y.* 19-20 (1961)).

51. The current New York annotation reads as follows:

This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment, performance, etc., without losing his rights to demand the remainder of the goods, to set-off a failure of quality, or to sue for the balance of the payment, so long as he explicitly reserves his rights.

N.Y. U.C.C. LAW § 1-207 (McKinney 1964).

52. See note 48 *supra*.

53. — S.D. —, 247 N.W.2d 490 (1976). Two earlier cases said that § 1-207 applied to the full payment check. *Hanna v. Perkins*, 2 U.C.C. Rep. 1044 (Westchester [N.Y.] County Ct. 1965) (dictum). *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969) (alternative holding).



under the South Dakota statute.<sup>54</sup> In rendering its decision, the court relied on dicta in two earlier cases,<sup>55</sup> the Commission on Uniform State Laws,<sup>56</sup> and professors White and Summers.<sup>57</sup> Without explicitly mentioning the effect this decision would have on the debtor, the court discarded the defendant's argument that the application of section 1-207 to the full payment check would seriously debilitate the use of accord and satisfaction.<sup>58</sup> "This doctrine has long been an effective method of avoiding litigation; it will still serve that function whenever rights are not explicitly reserved."<sup>59</sup> It is doubtful, however, that a conscientious creditor would ever accept a full payment check without routinely reserving his rights.

The longest line of authority applying section 1-207 to the full payment check is in New York. The first New York case to apply section 1-207, *Lange-Finn Construction Co. v. Albany Steel & Iron Supply Co.*,<sup>60</sup> primarily relied on the New York Annotations in holding that the Code changed the common law.<sup>61</sup> Although the underlying policy is not discussed, the court recognized the plight of the creditor when faced with the decision whether to retain money in hand or return it in the hope of a greater amount.<sup>62</sup> The New York cases following *Lange-Finn* have consistently adhered to its holding.<sup>63</sup>

54. \_\_\_\_ S.D. \_\_\_\_, 247 N.W.2d 490, 492 (1976). *Scholl* involved a dispute over an amount due for construction work done for the defendants. The plaintiff cashed a full payment check received from the defendant after noting "restriction of payment in full refused." *Id.* at \_\_\_\_, 247 N.W.2d at 491. The plaintiff then commenced suit for the balance.

The South Dakota statute outlining an accord and satisfaction is S.D. LAWS ANN. § 20-7-4 (1980). The South Dakota counterpart to § 1-207 is S.D. LAWS § 57A-1-207 (1980).

55. See note 53 *supra*.

56. See note 49 and accompanying text *supra*.

57. White and Summers believe that § 1-207 changes an accord and satisfaction when a payee accepts with protest. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 13-21, at 547 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS]. White and Summers view this issue entirely from the creditor's viewpoint. *Id.* at 544-45. In concluding that § 1-207 changes the common law, they rely on the report of the New York Commission on Uniform State Laws, see note 50 and accompanying text *supra*, and the earliest cases dealing with § 1-207, namely *Baillie*, *Hanna*, and *Scholl*, see note 53 and accompanying text *supra*.

58. \_\_\_\_ S.D. \_\_\_\_, \_\_\_\_, 247 N.W.2d 290, 292-93 (1976).

59. *Id.*

60. 94 Misc.2d 15, 403 N.Y.S.2d 1012 (1978).

61. *Id.* at 18, 403 N.Y.S.2d at 1014. See note 51 *supra* for the text of the New York Annotation.

62. The court's concern for the creditor is apparent in the language of an additional portion of the New York Annotations quoted by the court: "The Code rule would permit, in Code-covered transactions, the acceptance of a part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the performance or payment." 94 Misc.2d 15, 18, 403 N.Y.S.2d 1012, 1014 (emphasis added).

63. *Accord*, *Braun v. C.E.P.C. Distributions, Inc.*, 77 A.D.2d 358, 433 N.Y.S.2d 447 (1980); *Kroulee Corp. v. A. Klein & Co. Inc.*, 103 Misc.2d 441, 426 N.Y.S.2d 206 (1980); *Ayer v. Sky*

The holdings of the New York and South Dakota courts have been followed in only a limited number of cases.<sup>64</sup> A Florida case, *Miller v. Jung*,<sup>65</sup> is of some interest because it articulates the policy and purpose in applying the Code to change the common law. The Code's approach in section 1-207 "frees up or minimizes impediments to the flow of commercial paper while reserving the rights of the immediate parties."<sup>66</sup> Thus, it is the creditor who primarily benefits from this arrangement.

Only three jurisdictions hold that section 1-207 changes the common law doctrine of accord and satisfaction.<sup>67</sup> The rationale of this position, while centering on state annotations to the Code and White and Summers, reflects the desire to permit creditors to accept whatever payments they can receive from a debtor without forfeiting their rights to collect and sue for any outstanding disputed amounts.

### *B. Cases Adhering to the Common Law Doctrine of Accord and Satisfaction*

Cases which apply the common law and explicitly reject the appli-

Club, Inc., 70 A.D.2d 863, 418 N.Y.S.2d 57 (1979).

64. *Accord*, Simpson v. Norwesco, Inc., 442 F. Supp. 1102 (S.D.S.D. 1977); Bivins v. White Dairy, \_\_\_ Ala. App. \_\_\_, 378 So. 2d 1122 (Ala. Civ. App. 1979); Miller v. Jung, 361 So. 2d 788 (Fla. Dist. Ct. App. 1978).

65. 361 So. 2d 788 (Fla. Dist. Ct. App. 1978). *Contra* Eder v. Yvette B. Gervey Interiors, Inc., 407 So. 2d 312 (Fla. Dist. Ct. App. 1981). *Eder*, a December 1981 case in the Fourth District Court of Appeal of Florida, creates a sharp conflict with its sister, the second district, in *Miller v. Jung*. The fourth district held that § 1-207 should not be used to defeat an accord and satisfaction. 407 So. 2d at 314. It is particularly interesting that in making its decision, the fourth district acknowledged and rejected the Florida Code Comment, *supra* note 48. Because the court in *Eder* expressly certified a conflict with *Miller*, this conflict will undoubtedly be placed in the lap of the Florida Supreme Court to resolve.

66. 361 So. 2d at 789.

67. Alabama, New York, and South Dakota, *see* notes 54, 60, 63 and 64 *supra*. The Second District Court of Appeals of Florida has also held that § 1-207 applies to the full payment check; however, Florida's Fourth District has expressly held the opposite. *See* note 65 *supra*. *But see* Del Duca, *Handling "Full Payment" Checks*, 13 U.C.C. L.J. 195 (1981). Del Duca contends that the majority view is "that Section 1-207 applies to 'full payment' check transactions." *Id.* at 197. Del Duca bases his conclusion on decisions from South Dakota, New York, Florida, North Carolina and Oregon as well as the explanatory comments or annotations to the Code in Delaware, Florida, New Hampshire, New York, and Minnesota. *Id.* It should be noted that the Oregon decision hinted that the U.C.C. might change the common law, but it did not base its decision on the Code. Kilander v. Blickle Co., 280 Or. 425, 429, 571 P.2d 503, 505 (1977). The case was remanded because of a factual issue. *Id.* In addition, Del Duca relies on *Baillie Lumber Co. v. Kincaid Carolina Corp.* as authority for North Carolina. 4 N.C. App. 342, 167 S.E.2d 85 (1969). As noted earlier, note 36 *supra*, this reading of *Baillie* is based on dicta or an alternative holding. Additionally, Del Duca fails to recognize two recent North Carolina cases which distinguish *Baillie* and hold that § 1-207 "does not apply to a check tendered in full payment of a disputed claim." Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, 458, 261 S.E.2d 266, 269 (1980). *Accord* Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

cation of section 1-207 have only recently been decided.<sup>68</sup> The majority of cases dealing with accord and satisfaction have not dealt with section 1-207 at all<sup>69</sup> or have postponed decision on the issue because of limited precedent and disagreement among legal scholars.<sup>70</sup> Among the cases which have in fact ruled on this issue and hold in favor of the common law, the line of reasoning has been based on three factors: (1) the language of section 1-207; (2) the legislative history; and (3) policy.

An interpretation of section 1-207 based on the plain meaning of the language of the statute has been held to render section 1-207 inapplicable to the full payment check.<sup>71</sup> The Wyoming Supreme Court in *Jahn v. Burns*<sup>72</sup> identified the pertinent portion of the statute as follows: "[a] party who with explicit reservation of rights . . . assents to performance *in a manner . . . offered* by the other party does not thereby prejudice the rights reserved."<sup>73</sup> Based on the plain meaning rule, the court found that "[t]he manner offered here is part payment *conditioned on it being in full settlement*. In an attempt to reserve rights, plaintiff did not 'assent to performance *in the manner offered*.'"<sup>74</sup> Thus, the court held that section 1-207 was not meant to apply to the full payment check.<sup>75</sup>

68. See, e.g., *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980); *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980); *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980); *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 261 S.E.2d 266 (1980); *Gallagher Lumber Co. v. Shapiro*, 137 Vt. 139, 400 A.2d 984 (1979); *State Dep't of Fisheries v. J-Z Sales Corp.*, 25 Wash. App. 671, 610 P.2d 390 (1980); *Van Sistine v. Tollard*, 95 Wis.2d 678, 291 N.W.2d 636 (1980); *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979).

69. This can be inferred from the fact that only four jurisdictions have held that the Code applies to the full payment check, see note 67 *supra*, and only seven jurisdictions have explicitly held that it does not, see note 68 *supra*. The remaining jurisdictions have continued to apply the common law without reference to the Code. See Rosenthal, *supra* note 33, at 67-68.

70. See *Fritz v. Marantette*, 404 Mich. 329, 273 N.W.2d 425 (1978). The court in *Fritz* withheld "adopting a particular judicial interpretation of § 1-207 at this time" and decided the case on common law principles. *Id.* at 338, 273 N.W.2d at 429. See also *Kilander v. Blickle Co.*, 280 Or. 425, 571 P.2d 503 (1977) (Discussion of the issue whether § 1-207 applied to the full payment check, but no decision rendered).

71. See, e.g., *Jahn v. Burns*, 593 P.2d 828, 830 (Wyo. 1979); *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 458, 261 S.E.2d 266, 269 (1980).

72. 593 P.2d 828, 830 (Wyo. 1979).

73. *Id.* (emphasis original).

74. *Id.* (emphasis original). *Contra*, *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980). The Georgia appellate court rejects the reasoning of *Jahn*, asserting that "assent to performance" is not to be equated with "acceptance of the condition." The court in *American Food Purveyors* goes on to uphold the common law rule, but does so only on the basis of *stare decisis*, stating that "the continued adherence to the traditional rule concerning the full-payment check is questionable as a matter of legal theory." *Id.* at 386, 265 S.E.2d at 327.

The legislative history of section 1-207 has also been held to render section 1-207 inapplicable to the full payment check.<sup>76</sup> The courts have looked to the Official Comments of the Code and the observations and interpretations of the Comments made by William Hawkland in an often cited article.<sup>77</sup> In addition, Rosenthal and his discussion dealing with section 3-802(3) have been cited.<sup>78</sup> In *Chancellor, Inc. v. Hamilton Appliance Co.*,<sup>79</sup> the New Jersey District Court additionally reviewed the legislative history in New Jersey. The New Jersey Study Comment, unlike the New York annotation, did not mention the rule on accord and satisfaction.<sup>80</sup> The court concluded that "[i]t would appear that the Legislature adopted § 1-207 presupposing that it reflected existing law."<sup>81</sup>

The policy rejecting the application of section 1-207 to the full payment check recognizes that a debtor's attempt to make a good faith offer to compromise would be futile under the Code. As the court in *Chancellor* noted:

[i]f the court were to conclude that a creditor could reserve his rights on a 'full payment check,' a convenient and informal device for the resolution of disagreements in the business community would be seriously impeded. The court is hesitant to impair such a valuable, informal settlement tool where there is no indication that the legislature intended that result.<sup>82</sup>

Although only a limited number of jurisdictions have explicitly upheld the common law, they represent the most recent trend.<sup>83</sup> While the rationale of these cases rests on the language or the legislative history of section 1-207, this trend favoring the common law most proba-

76. See, e.g., *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980) (where the court looks at the comment to § 1-207 and its legislative history and finds no intent "to redefine the law of accord and satisfaction and to restrict the use of the 'full payment check'"). *Id.* at 349, 418 A.2d at 1329.

77. *Id.* at 350-51, 418 A.2d at 1329. See notes 45 and 46 and accompanying text *supra*.

78. 175 N.J. Super. at 351-52, 418 A.2d at 1329-30. See notes 34-41 and accompanying text *supra*.

79. 175 N.J. Super. 345, 418 A.2d 1326 (1980).

80. New Jersey Study Comment, N.J. STAT. ANN. § 12A:1-207 (West 1962).

81. 175 N.J. Super. at 350, 418 A.2d at 1329.

82. *Id.* at 352, 418 A.2d at 1330.

83. Comparing the dates of the decisions in notes 53, 60, 63 and 64 *supra*, with note 68 *supra* indicates the first of these decisions, which appeared in the late 1970's, favored applying the Code, while the majority of the decisions appearing in 1980 (note 68 *supra*) upheld the common law. See Note, *Commercial Transactions - Michigan Rejects UCC and Adopts Minority Common Law Standard for Conditional Check Accord and Satisfaction*, 26 WAYNE L. REV. 1067 (1980) [hereinafter cited as *Michigan Rejects U.C.C.*] (which also notes that "[t]he recent trend . . . has indicated the reluctance of courts to apply 1-207 to conditional check accord and satis-

bly results from the desire to preserve the use of the full payment check as a device to achieve an accord and satisfaction.

## V. POLICY IMPLICATIONS IN APPLYING SECTION 1-207 TO THE FULL PAYMENT CHECK

### A. *Impact on the Creditor*

Under the traditional doctrine of accord and satisfaction, the creditor faced with a full payment check must either accept the check in full settlement of the claim or return it.<sup>84</sup> However, as Rosenthal admits, "not all debtors are under dogs."<sup>85</sup> It is possible that a powerful debtor, for example, an insurance company, could force a weaker creditor to accept a lesser sum because he needed the funds immediately and could not afford to wait and sue for the entire amount due.<sup>86</sup> White and Summers characterize the use of the full payment check as "an exquisite form of commercial torture on the payee."<sup>87</sup> Hawkland suggests that "[i]f this viewpoint is accepted, section 1-207 of the U.C.C. might be justified as an effort to balance the scales."<sup>88</sup>

If section 1-207 is applied to the full payment check, the creditor no longer has the problem of election. He can simply accept the check with explicit reservation of his rights<sup>89</sup> and still retain the right to sue for any outstanding balance.

At this point it is interesting to note the observations made by another author about the inherent protections the common law doctrine of accord and satisfaction affords a creditor from an overreaching debtor.<sup>90</sup> The author initially notes that accord and satisfaction only applies in limited circumstances, namely, when the disputed debt is unliquidated.<sup>91</sup> She then points out that "the dispute must be made in good faith."<sup>92</sup> In addition, the creditor must have reasonable notice

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84. See note 5 *supra*.

85. Rosenthal, *supra* note 33, at 55.

86. *Id.*

87. WHITE & SUMMERS, *supra* note 57, § 13-21, at 544. Rosenthal answers the charge of White and Summers. "Assuming, however, parties of equal bargaining power negotiating in good faith at arm's length, it is not clear why this torture is any more exquisite than that induced by any settlement offer proposing more than the offeree is sure he would receive but less than he thinks he deserves." Rosenthal, *supra* note 33, at 56.

88. Hawkland, *supra* note 2, at 332.

89. The Code states that in order for a payee to explicitly reserve his right "[s]uch words; as 'without prejudice', 'under protest' or the like are sufficient." U.C.C. § 1-207.

90. *Does Section 1-207 Apply*, *supra* note 9, at 525. The author stresses the policy considerations underlying the doctrine of accord and satisfaction, as well as the inherent protection it contains for creditors against overreaching debtors. *Id.* at 527.

91. *Id.* at 525.

that the check is intended to be in full satisfaction of the debt.<sup>93</sup> Finally, an accord can be set aside on the grounds of fraud or mistake.<sup>94</sup> These protections would permit a creditor to retain a full payment check without affecting an accord if, for example, the check was tendered in bad faith on an undisputed amount, or where the creditor was unaware that the check was tendered in full settlement. Notwithstanding these protections, the creditor who needs immediate cash and cannot afford the time to wait and sue is left unaided by the common law.

### B. Impact on the Debtor

Under section 1-207 the debtor will no longer be able to tender a full payment check on a "take it or leave it basis."<sup>95</sup> The debtor will always be faced with the risk that the creditor will accept the check under reservation of rights. It would certainly be unrealistic to expect a creditor to return a check under the Code. Consequently, the use of the full payment check would be seriously impaired.<sup>96</sup>

If the full payment check becomes ineffective, an informal, easy, inexpensive, and convenient method of compromise would be lost.<sup>97</sup> This can only lead to more litigation, increasing the burden on the courts.<sup>98</sup> On the other hand, the use of the full payment check under the common law favors the private resolution of disputes, ultimately benefiting the public at large.<sup>99</sup>

The impact of section 1-207 on the underlying relationship between the debtor and the creditor should not be overlooked.<sup>100</sup> Although under the Code, the creditor no longer must choose between two not ideal but not unreasonable choices, the burden shifts to the debtor who really has no plausible choice at all. Realistically, a debtor who in good faith disputes an unliquidated debt must resort to litiga-

93. *Id.*

94. *Id.* at 526.

95. See note 7 and accompanying text *supra*. See *Conditional Tender*, *supra* note 25, at 543 ("UCC 1-207 seems to provide the creditor with the means to reap the benefits of the tender while permitting him to ignore the condition upon which the check is submitted."). *Id.*

96. See note 8 *supra*.

97. Rosenthal, *supra* note 33, at 57.

98. *Conditional Tender*, *supra* note 25, at 549. In a Note discussing the conditional (or full payment) check under the Code, the author points out that if the informal method of settlement through an accord and satisfaction disappears, such controversies will have to be brought to the courts for settlement. *Id.* at 549-50.

99. Hawkland, *supra* note 2, at 332.

[T]here is much to be said for rules of law that facilitate the private resolution of disputes. Whatever other merits or demerits are assigned to the conditioned check, no one can deny that its use has produced the settlement of many cases to the great advantage of the commercial world and the public at large.

*Id.*

tion himself, or pay only the amount he feels is due and wait to be sued. The tendering of some greater amount in a genuine offer of compromise would be futile. Thus, under the Code, the debtor must bear all the risks with few options.

### C. General Policies of the Code

In light of the impact section 1-207 would have on the common law if applied to the full payment check, it is useful to look at it in terms of the general policies of the Code. Section 1-102(2) states:

- (2) Underlying purposes and policies of this Act are
- (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
  - (c) to make uniform the law among the various jurisdictions.<sup>101</sup>

As noted by another author, the application of section 1-207 to the full payment check, changing the common law doctrine of accord and satisfaction,<sup>102</sup> does not further these policies.<sup>103</sup> Far from simplifying or clarifying the law, this use of section 1-207 only adds complexity.<sup>104</sup> Certainly, the custom and usage of the full payment check is being changed.<sup>105</sup> Finally, the once virtually universal doctrine of accord and satisfaction with the full payment check is upset and eliminated.<sup>106</sup>

## VI. CONCLUSION

The full payment check is a useful, convenient device whereby a debtor can tender a good faith offer of compromise without fear that

101. U.C.C. § 1-102(2).

102. U.C.C. § 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, . . . shall supplement its provisions."

In *State Dep't of Fisheries v. J-Z Sales Corp.*, 25 Wash. App. 671, 610 P.2d 390 (1980), the Washington appellate court said that § 1-103 requires "that the principles of law and equity are not to be displaced by particular provisions of the Code unless done so explicitly by the Code." *Id.* at \_\_\_\_, 610 P.2d at 395. Consequently, in deciding whether § 1-207 should apply to the full payment check, the court held: "The statute does not explicitly supersede the law pertaining to accord and satisfaction, and it should not be inferred as doing so." *Id.* at \_\_\_\_, 610 P.2d at 396. Therefore, § 1-207 was deemed inapplicable to the situation.

103. *1-207 Not Intended, Accord and Satisfaction*, *supra* note 10, at 747. In a note discussing *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979) (a case holding that § 1-207 does not apply to the full payment check), the author states, in support of the decision reached by the Wyoming Supreme Court, this interpretation of § 1-207 "fosters the growth of the policies in section 1-102 of the Code by keeping the doctrine of accord and satisfaction as it now stands, intact." *Id.* at 748. Rosenthal, also points to the clash between § 1-207 and the basic purposes in § 1-102. Rosenthal, *supra* note 33, at 64.

104. *1-207 Not Intended, Accord and Satisfaction*, *supra* note 10, at 747.

105. *Id.*

his offer will be rejected while his check is retained.

Based on practical policy reasons, section 1-207 should not be applied to the full payment check changing the common law doctrine of accord and satisfaction. If the condition on a full payment check can simply be negated with words of protest, this method of compromise will become a thing of the past. In this sense, the Code discourages private resolution of disputes.

The ultimate effectiveness of the Code as applied here is questionable. If the goal is to allow the creditor to collect all that he can without jeopardizing his right to sue for more, one must wonder how many debtors in the future will be willing to send a check at all in amounts above that admittedly due. Under the Code no conscientious creditor would ever accept a check without routinely placing words of protest on it. Certainly, no conscientious debtor in the same situation would risk sending a check in compromise of a disputed claim for more than the precise amount he conceded was due; this is because the creditor could reject the debtor's offer of compromise and yet still retain the amount which is greater than what the debtor admits is due. In the long run, the Code will probably achieve no more than has been accomplished under the common law, with two exceptions. One, it would shift the burdens and risks of the transaction from the creditor to the debtor. Two, it would lead to increased litigation.

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