DOES U.C.C. SECTION 1-207 APPLY TO THE DOCTRINE OF ACCORD AND SATISFACTION BY CONDITIONAL CHECK?

Section 1-207 of the Uniform Commercial Code provides: "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."[1]

In *Scholl v. Tallman*[2] South Dakota became the first jurisdiction in which its highest court ruled on the applicability of this section[3] to the common commercial transaction known as "accord and satisfaction by conditional check." The South Dakota Supreme Court held that U.C.C. § 1-207 does apply to such a transaction. This interpretation alters the common law view that acceptance of a conditional check for payment of a disputed claim bars an action for recovery of the balance due.[4] Whether other jurisdictions should adopt the *Scholl* position and apply U.C.C. § 1-207 to the doctrine of accord and satisfaction by conditional check is the subject of this article.

THE MAJORITY AND MINORITY VIEWS ON ACCORD AND SATISFACTION BY CONDITIONAL CHECK

An "accord" is a superseding contractual agreement whereby one party agrees to accept a performance different than that already promised and in full satisfaction of the previously promised performance.[5] Thus accord and satisfaction results in the formation of a new contract. A "satisfaction" is the receipt of the performance promised under the accord.[6] Accord and

1. U.C.C. § 1-207 (all citations to the U.C.C. in this article will be to the 1972 official text unless otherwise indicated).

2. — S.D. —, 247 N.W.2d 490 (1976).

3. S.D. COMPILED LAWS ANN. § 57-1-23 (1967) is identical to U.C.C. § 1-207.

4. — S.D. at —, 247 N.W.2d at 492. Accord and satisfaction by way of conditional check is the situation in which a debtor, in a bona fide dispute over an unliquidated claim tenders to his creditor a check marked "in payment in full" or the like. In an attempt to reserve his right to payment of the balance of the disputed claim, he either erases the conditional words or inserts words of protest and then endorses and cashes the check. *See* text at note 5 *infra*.

5. RESTATEMENT OF CONTRACTS § 417, Comment a (1932). *See generally* 6 A. CORBIN, CONTRACTS §§ 1276-1292 (1962).

6. RESTATEMENT OF CONTRACTS § 417, Comment b (1932).

satisfaction results in the discharge of a previously existing contractual right or obligation and constitutes an affirmative defense in an action to enforce a previously existing claim.[7]

The enforceability of an accord is governed by standard principles of contract law.[8] Consideration, in the case of unliquidated, or disputed, claims,[9] is found in the mutual concessions of the parties and in the settlement of the dispute.[10] It is based on the theory that willingness to compromise is in itself valuable consideration.[11] Courts do not concern themselves with the adequacy of the consideration.[12]

The debtor's tender of an alternate performance must meet the requisites of any offer.[13] Further the offer's character must be such that the creditor understands that performance is tendered in full satisfaction of his claim.[14] However, no special language is required so long as the creditor understands the nature of the debtor's conditional tender.[15]

Acceptance revolves around the actions of the creditor

7. 6 A. CORBIN, *supra* note 5, § 1276, at 115.

8. *Id.* § 1277, at 117. The requisites of a valid contract include proper subject matter, mutual assent, and consideration. *See also* Eckert-Fair Constr. Co. v. Capitol Steel & Iron Co., 178 F.2d 338, 340 (5th Cir. 1949) *cert. denied*, 339 U.S. 928 (1950): "The minds of the parties must meet, the parties who act must be so authorized, or there must be an acceptance by way of ratification."

9. A claim is "unliquidated" or disputed when there is a bona fide contention that the debtor is not liable for the full amount. Corbin describes several types of unliquidated claims: (1) where the original claim had not been determined by agreement of the parties; (2) where an amount per unit of performance has been agreed by the parties, but the number of units to be performed has been undetermined; (3) amount to be paid has been agreed but the duty to pay is dependent on a questionable fact or event; (4) where the method of payment is unascertained; (5) where the debtor asserts a reduction in a previously decided amount because of defective performance by the creditor. 6 A. CORBIN, *supra* note 5, § 1290, at 166-72.

10. Grindstaff v. North Richland Hills Corp. No. 2, 343 S.W.2d 742, 744 (Tex. Civ. App. 1961).

11. Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 BUFFALO L.REV. 539, 541 (1968).

12. Barnett v. Rosen, 345 Mass. 244, —, 126 N.E. 386, 388 (1920); Grindstaff v. North Richland Hills Corp. No. 2, 343 S.W.2d 742, 744 (Tex. Civ. App. 1961).

13. 6 A. CORBIN, *supra* note 5, § 1277, at 117. Thus, an offer must manifest a present intention to be bound; it must be stated in such a way that the ordinary reasonable offeree would interpret it as an offer; and it must be sufficiently definite in its terms. J. MURRAY, CONTRACTS § 24, at 37-40 (2d ed. 1974).

14. *Id. See* Nelson v. Chicago Mill & Lumber Corp., 76 F.2d 17, 24 (8th Cir. 1935); Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, —, 234 P.2d 16, 19 (1951); Pitts v. National Independent Fisheries Co., 71 Colo. 316, —, 206 P.571, 571 (1922); Sawyer v. Somers Lumber Co., 86 Mont. 169, —, 282 P. 852, 854 (1929).

15. Siwooganock Guar. Sav. Bank v. Cushman, 109 Vt. 221 —, 195 A. 260, 270 (1937).

when the claim is unliquidated and disputed.[16] The majority of the courts have held that retention and use of the money or cashing of the check constitutes acceptance of the offer upon the condition it was tendered.[17] Under this view the creditor has the option of returning the check or accepting it upon the condition it was tendered.[18] Words of protest[19] or obliteration of the words purporting payment in full satisfaction[20] will not prevent an accord and satisfaction if the creditor receives payment on the check. Thus the creditor is estopped to deny mutual assent of the parties and the accord and satisfaction is complete when he receives payment on the check.[21] It is irrelevant that the creditor does not know the legal effect of his acceptance,[22] and his intent in accepting it is immaterial.[23]

16. 6 A. CORBIN, *supra* note 5, § 1279, at 127.

17. Autographic Register Co. v. Philip Hano Co., 198 F.2d 208, 213 (1st Cir. 1952) (applying New Jersey law); Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, —, 234 P.2d 16, 18 (1951); Alcorn v. Arthur, 230 Ky. 509, —, 20 S.W.2d 276, 277 (1929); Shaw v. United Motors Prod. Co., 239 Mich. 194, —, 214 N.W. 100, 101 (1927); Beck Elec. Constr. Co. v. National Contr. Co., 143 Minn. 190, —, 173 N.W. 413, 413 (1919); Schnell v. Perlmon, 238 N.Y. 362, —, 144 N.E. 641, 643 (1924); Platt v. Penetryn Sys., Inc., 151 Ohio St. 451, —, 86 N.E.2d 600, 602 (1949); Washington Natural Gas Co. v. Johnson, 123 Pa. 576, —, 16 A. 799, 802 (1889); Hotel Randolph Co. v. John C. Watrous Co., 144 Wash. 215, —, 257 P. 629, 630 (1927); Lange v. Darling & Co., 233 Wis. 520, —, 290 N.W. 188, 191 (1940).

18. Public Nat'l Life Ins. Co. v. Highsmith, 47 Ala. 488, 256 So.2d 912, 919 (1971); Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, —, 74 N.E. 143, 144 (1905); Growers Cattle Credit Corp. v. Swanson, 184 Neb. 612, 615-16, 169 N.W.2d 692, 695 (1969); C & R Constr. Co. v. Manchester, 89 N.H. 506, —, 1 A.2d 922, 923 (1938); Platt v. Penetryn Sys., Inc., 151 Ohio St. 451, —, 86 N.E.2d 600, 602 (1949); Giles v. Vockel, 311 Pa. 347, —, 166 A. 849, 850 (1933); Qualseth v. Thomas, 44 S.D. 190, —, 183 N.W. 116, 116 (1921).

19. Schwartzenberg v. Mayerson, 2 F.2d 327, 328 (6th Cir. 1924) (Ohio law); Market Produce Co. v. Holland, 183 Ark. 711, —, 38 S.W.2d 317, 318 (1931); Melick v. Nauman Vandervoort, Inc., 54 Mich. App. 171, —, 220 N.W.2d 748, 752 (1974); Henderson v. Eagle Express Co., 483 S.W.2d 767, 768 (Mo. App. 1972); Growers Cattle Credit Corp. v. Swanson, 184 Neb. 612, 616, 169 N.W.2d 692, 695 (1969); De Loache v. De Loache, 189 N.C. 394, —, 127 S.E. 419, 420 (1925); Carlton Credit Corp. v. Atlantic Ref. Co., 10 N.Y.2d 723, —, 219 N.Y.S.2d 269, —, 119 N.E.2d 837, 837 (1961); Seeds, Grain & Hay Co. v. Conger, 83 Ohio St. 169, —, 93 N.E. 892, 893 (1910); Root & Fehl v. Murray Tool Co., 26 S.W.2d 189, 191 (Tex. Comm. App. 1930).

20. Whitlock v. Veith, 83 So.2d 148, 150 (La. Ct. of App. 1955); Graffam v. Geronda, 304 A.2d 76, 80 (Me. 1973); Deuches v. Grand Rapids Brass Co., 240 Mich. 266, —, 215 N.W. 392, 394 (1927); Ball v. Thornton, 193 Minn. 469, —, 258 N.W. 831, 832 (1935); Kiser v. Wilberforce Univ., 35 N.E.2d 771, 773 (Ohio App. 1941); Wilmeth v. Lee, 316 P.2d 614, 615 (Okla. 1957); Hutchinson v. Culbertson, 161 Pa. Super. Ct. 519, —, 55 A.2d 567, 568 (1947).

21. Market Produce Co. v. Holland, 183 Ark. 711, —, 38 S.W.2d 317, 318 (1931); Qualseth v. Thompson, 44 S.D. 190, —, 183 N.W. 116, 116 (1921).

22. Miller v. Prince Street Elevator Co., 41 N.M. 330, —, 68 P.2d 663, 668 (1937); Schumacher v. Moffitt, 71 Ore. 79, —, 142 P. 353, 355 (1914).

23. Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, —, 234 P.2d 16, 19

Under the minority view this objective test of mutual assent has been rejected in favor of an approach in which the creditor's acceptance must be made expressly and without protest.[24] If he inserts words of protest, he has not accepted and no accord and satisfaction results.[25] The minority view readily concedes that retention of the check under these circumstances amounts to wrongful conversion of the debtor's money but apparently justifies this result by the availability of a tort action by the debtor against the creditor.[26]

The majority view rejects the creditor-as-tortfeasor theory and instead holds that the creditor's conduct in cashing the conditional check is operative as acceptance and therefore not wrongful.[27] This latter approach is seen as a "shortcut to complete justice" in that it protects the debtor against injury and prevents superfluous litigation.[28] In contrast, the minority position results in more circuitous litigation with the creditor getting judgment for the excess balance of his claim and the debtor then counterclaiming or suing in a separate action for the creditor's conversion of the check.[29]

ACCORD AND SATISFACTION UNDER U.C.C. § 1-207

Case law under U.C.C. § 1-207 is scant. Two courts, by way of dicta, have interpreted U.C.C. § 1-207 similarly to the court in

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(1951); Roberts v. Finger, 227 Miss. 671, —, 86 So.2d 463, 465 (1956); Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, —, 109 S.E.2d 171, 173 (1959).

24. *See, e.g.*, Siegele v. Des Moines Mut. Hail Ins. Ass'n, 28 S.D. 142, —, 132 N.W. 697, 698 (1911).

25. *Id.* at —, 132 N.W. at 698.

26. *Id.*

27. 6 A. CORBIN, *supra* note 5, § 1279, at 130.

28. *Id.*

29. *Id.* The American Law Institute has approved the majority view's streamlined approach to justice. RESTATEMENT OF CONTRACTS § 72(2) (1932) provides:

> Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.

See also RESTATEMENT OF CONTRACTS § 420, Comment a (1932) which states in part:

> The effect of the creditor's assent to receive what the debtor offers cannot be overcome by a statement, even though made contemporaneously with his acceptance, that he does not forego or entirely forego his pre-existing claim. The acceptance would be tortious unless the debtor's terms are assented to, and the creditor is not allowed to assert that he is a tortfeasor, when his acceptance can be given an effect involving no legal wrong.

Scholl.[30] All three courts favor the use of U.C.C. § 1-207 to reverse the common law doctrine of accord and satisfaction in situations of conditional checks.

In *Hanna v. Perkins*[31] the defendant debtor, after receiving a bill from the plaintiff for labor and materials, deducted a sum of money for damages alleged to have been caused by the plaintiff's faulty workmanship. The debtor sent a check to the creditor for the difference with the endorsement, "In full for labor and materials to date."[32] After the creditor had deposited the check under protest,[33] he brought suit for the amount claimed as damages. The debtor moved for summary judgment based on his defense of accord and satisfaction.[34]

The New York county court held that the dispute was not bona fide[35] nor the claim unliquidated[36] and therefore, the mutual concessions of the parties did not operate as consideration.[37] Since the existence of other modes of consideration raised a triable issue of fact, the court denied the debtor's motion stating:

> If it were not that this court finds that triable issues of fact are present, this court would deny the motion by holding this particular section of the Code [U.C.C. § 1-207] would seem to favor plaintiff's overriding endorsement of 'Deposited under protest' as a reservation of his right to collect payment of balance.[38]

Thus the court suggested that even if it had found as a matter of law that there was a bona fide dispute over an unliquidated claim, it would have extended relief to the creditor because he had effectively reserved his right to sue for the balance under U.C.C. § 1-207. Implicit in this suggestion is that

30. Hanna v. Perkins, 2 U.C.C. Rep. 1044 (Cty. Ct. N.Y. 1965); Baillie Lumber Co., Inc. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

31. 2 U.C.C. Rep. 1044 (Cty. Ct. N.Y. 1965).

32. *Id.*

33. *Id.* The plaintiff wrote "Deposited under protest" on the back of the check. *Id.*

34. *Id.*

35. *Id.* at 1045. The court, without discussion, concluded that the claim was not bona fide.

36. *Compare* Corbin's fifth example of an unliquidated claim, *supra* note 9, *with* the court's conclusion that the parties' claim was liquidated: "In the instant case, defendant does not dispute plaintiff's claim, but urges ambiguously that plaintiff was negligent and damages to an extent (not genuinely shown) personal property of the defendant." 2 U.C.C. Rep. at 1045.

37. *Id.*

38. *Id.* at 1046.

New York would abandon the majority position on accord and satisfaction by conditional check.[39]

In *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*,[40] the intermediate appellate court of North Carolina also felt that section 1-207 applied to accord and satisfaction by conditional tender. In *Baillie* the defendant debtor owed the plaintiff a liquidated and undisputed amount for lumber. The debtor offered to pay thirty-five per cent of the debt in settlement of the whole and the plaintiff agreed on the condition that payment reach him by a specified date. The parties communicated no further and the specified payment date passed. Several months later the creditor received a check for 17.5 per cent of the account balance marked "first installment of agreed settlement."[41] Several months thereafter the plaintiff received a second check for the same amount marked "Final Installment of Agreed Settlement."[42] The plaintiff deposited the checks with the words "with reservation of all our rights" written on the back of both checks and filed suit to collect the balance of his account.[43] The court found that since the debt was liquidated and undisputed, no common law accord and satisfaction resulted due to a failure of consideration.[44] However, the debtor argued that under a North Carolina statute the creditor's deposit of the check resulted in a discharge of the balance of the claim.[45] The court rejected this contention holding that the inscriptions written on the checks by both parties did not constitute an agreement within the meaning of the statute.[46] It then stated: "We hold that Baillie, by its endorsement with explicit reservations, did not accept the second check in full payment but in the manner provided in G.S. § 25-1-207 reserved its rights to collect on the remainder of its unpaid bill."[47]

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39. New York has adhered to the view that acceptance of a conditional check for payment of a disputed claim bars an action for recovery of the balance due. *See* Carlton Credit Corp. v. Atlantic Ref. Co., 208 N.Y.S.2d 622, 12 A.D.2d 613, *aff'd*, 10 N.Y.2d 723, 219 N.Y.S.2d 269, 176 N.E.2d 837 (1961).

40. 4 N.C. App. 342, 167 S.E.2d 85 (1969).

41. *Id.* at —, 167 S.E.2d at 87.

42. *Id.* at —, 167 S.E.2d at 87-88.

43. *Id.* at —, 167 S.E.2d at 88.

44. *Id.* at —, 167 S.E.2d at 92.

45. *Id.* at —, 167 S.E.2d at 90. N.C. GEN. STAT. § 1-540 (1969) provides: "In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same."

46. 4 N.C. App. at —, 167 S.E.2d at 91. The court found that the parties had each made an offer which the other rejected.

47. *Id.* at —, 167 S.E.2d at 93. One commentator has stated that the clear

In *Scholl v. Tallman*,[48] Clinton and Virginia Tallman disputed the amount owed Wesley Scholl, a carpenter who performed work for them during 1971. As of February 18, 1971, Scholl's books showed that the Tallmans owed $2,927.37. The Tallmans paid on their account throughout 1971-72, but two years later Scholl's books showed that they owed $2,077.37. The Tallmans disputed this figure contending that several payments had not been credited to their account.[49] They sent a check for $500 to Scholl with the words "Wesley Scholl Settlement in Full for all Labor and Materials to Date" typed on the back of the check.[50] They made no further payments. After he had scratched out the conditional words on the back of the check, Scholl cashed the check and wrote "Restriction of payment in full refused. $1,826.65 remains due and payable."[51] He then commenced an action to collect the alleged balance due. The trial court held that the defendants' affirmative defense of accord and satisfaction barred the plaintiff's recovery of the balance of his claim and the plaintiff appealed.[52]

On appeal, the supreme court stated "[t]he only issue before this court is whether there has been an accord and satisfaction of the disputed claim."[53] They noted the contractual requisites of offer and consideration were met[54] but that the creditor's acceptance failed to meet statutory requirements.[55] In holding there was no acceptance, the court relied on *Siegele v. Des*

implication of this case is that even had the checks met the statutory requirements for acceptance, receiving payment on the checks would nevertheless be denied the effect of a discharge if the payee endorsed them with a reservation of rights in accordance with U.C.C. § 1-207. Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L. J. 329, 331 (1969).

48. — S.D. —, 247 N.W.2d 490 (1976).

49. *Id.*

50. *Id.* at —, 247 N.W.2d at 491.

51. *Id.*

52. *Id.*

53. *Id.*

54. "Offer and consideration are not disputed here; the controversy involves acceptance." *Id.*

55. S.D. COMPILED LAWS ANN. § 20-7-4 (1967) provides: "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation." *See* note 45 *supra* for the text of the North Carolina statute relied on in *Baillie*. Corbin points out that these statutes were passed in response to the rule of Foakes v. Beer, 9 App. Cas. 605 (1884) in which the House of Lords held that acceptance of the principal of a liquidated debt does not discharge a claim for interest due thereon even though the creditor had expressly agreed that it should be operative as a total discharge. Thus, these

Moines Mutual Hail Insurance Association,[56] in which South Dakota adopted the minority view of accord and satisfaction by conditional check. In *Siegele* the court held that the creditor, by cashing the conditional check and reserving his rights in a manner similar to Scholl, had not "accepted in writing" in satisfaction of the claim.[57] The *Scholl* court cited the following language in *Siegele* with approval: "His cashing of such check, without accepting same in full of his debt, may have been wrongful conversion of the check, but it certainly was not an acceptance of $400 in satisfaction of the claim."[58]

The court in *Scholl* found that the rationale of the *Siegele* decision was embodied in U.C.C. § 1-207,[59] holding that the plaintiff effectively reserved his rights under U.C.C. § 1-207 and had not accepted in writing as required by section 20-7-4 of the South Dakota Statutes.[60]

DOES U.C.C. § 1-207 APPLY TO ACCORD AND SATISFACTION BY CONDITIONAL CHECK?

Whether U.C.C. § 1-207 was intended to apply to accord and satisfaction in situations of conditional tender is unclear. Legislative history indicates that the drafters of the Code were aware that section 1-207 might effect drastic changes in the law of accord and satisfaction by conditional check. In the 1955 Report of the New York State Law Revision Commission,[61] the Commission discussed the effect of a reservation of rights under U.C.C. § 1-207 as it relates to the legal consequences of a buyer accepting goods with the knowledge that they are nonconforming. The Commission noted that an acceptance under these circumstances precludes the buyer from not only reject-

statutes were meant to apply to part payment of an overdue *liquidated* debt. 6 A. CORBIN, *supra* note 5, § 1281, at 136-38. The *Baillie* court applied this statute to a liquidated debt. However, the *Scholl* court applied the South Dakota statute to an unliquidated claim. Thus, it is questionable whether this statute was even applicable in the *Scholl* case, where an unliquidated claim was involved.

56. 28 S.D. 142, 132 N.W. 697 (1911).

57. *Id.* The statutory requirements are set out in note 66 *supra*.

58. Scholl v. Tallman, — S.D. —, 247 N.W.2d 490, 491 (1976) (citing Siegele v. Des Moines Mut. Hail Ins. Ass'n, 28 S.D. 142, 143, 132 N.W. 697, 698 (1911)).

59. — S.D. at —, 247 N.W.2d at 492. U.C.C. § 1-207 is identical to S.D. COMPILED LAWS ANN. § 57-1-23 (1967).

60. — S.D. at —, 247 N.W.2d at 492. *See* note 55 *supra* for text of the statute. Thus the *Scholl* court's holding was a dual one. Reference to U.C.C. § 1-207 was unnecessary since the court could have disposed of the case on the same grounds as the court in *Siegele*, that is, that the creditor's acceptance did not meet the requirements of S.D. COMPILED LAWS ANN. § 20-7-4.

61. 1 NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 330 (1955).

ing the goods, but also from revoking his acceptance of them under U.C.C. § 2-607.[62] However, if U.C.C. § 1-207 were applicable to this situation, the buyer could reserve these rights.[63] The Commission stated:

> It may be argued that Section 2-607 as a specific provision will necessarily make an exception to Section 1-207 . . . . Furthermore, may there not be other situations . . . where the policy of making a party *decide promptly* where he stands will be a more just one than the policy of permitting a *unilateral* reservation of all rights? If there are, then Section 1-207 will work injustice in such cases unless they are specifically covered by a provision like that of Section 2-607(2).[64]

This language suggests that the Commission thought that U.C.C. § 1-207 should not apply to accord and satisfaction by conditional check. However, it has been argued that although the Commission felt that section 1-207 should not apply to accord and satisfaction by conditional tender, that section was left intact despite the fact that many changes were made in the Official Draft of the U.C.C. as a result of the Commission's recommendations. Therefore, it is arguable that the drafters of the Code intended U.C.C. § 1-207 to alter the majority view of accord and satisfaction by conditional tender.[65]

Even stronger support for this interpretation is found in the 1961 Report of the Commission on Uniform State Laws which states: "The Code rule would permit, in Code-covered transactions, the acceptance of a part . . . payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the payment."[66]

This statement clearly deals with an offered compromise of an *unliquidated* claim because at common law there was never a risk of losing the right to sue for the balance of a liquidated claim.[67]

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62. *Id.* at 331. U.C.C. § 2-607(2) provides:
Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

63. Hawkland, *supra* note 47, at 332.

64. LAW REVISION COMM'N REPORT, *supra* note 61, at 332.

65. Hawkland, *supra* note 47, at 332.

66. *Id.* (quoting 1961 REPORT OF THE COMM'N ON UNIFORM STATE LAWS 19-20).

67. *See* 6 A. CORBIN, *supra* note 5, § 1281, at 136-39. Unless statutorily abridged, such bargains failed for want of consideration. *See* notes 45 and 55 *supra* for examples of these statutes.

The Official Comment to U.C.C. § 1-207 suggests that the section was not intended to apply to accord and satisfaction by conditional check.[68] First, while the Official Comments generally do point out any significant changes which a section makes in existing law,[69] the comment to U.C.C. § 1-207 fails to mention any alteration of the common law made by the section. Therefore, one might argue that the alteration of debtor-creditor rights was not intended. Secondly, the section's announced purpose appears to be confined to those transactions in which the parties intend performance along the lines of the original contract.[70] Thus, it is arguable that section 1-207 has no application to an accord which involves a conscious rejection of performance along the lines of the contract and results in a new superseding contractual agreement.[71]

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68. U.C.C. § 1-207, Comment 1 provides: "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,' 'under reserve', 'with reservation of all our rights', and the like."

69. For example, U.C.C. § 2-205 Official Comment 1 notes that the section alters the former rule which required that "firm offers" be sustained by consideration to be binding. U.C.C. § 2-207 Official Comment 1 announces the purpose of altering the common law "mirror image rule" whereby terms in an "acceptance" which varied from those in the offer made the purported acceptance a counteroffer. U.C.C. § 2-209 Official Comment 1 notes that the section seeks to allow for reasonable modification of sales contracts without regard to technicalities that formerly accompanied modifications such as consideration and the Statute of Frauds. Although the comments are not legally binding they have been highly persuasive in the determination of the applicability of the Code. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, —, 396 P.2d 186, 188 (1964).

70. Thus, Comment 1 states that the section "provides machinery for the continuation of performance along the lines contemplated by the contract" and comment 2 provides that the section "merely provides a specific measure on which a party can rely as he makes or concurs in any interim adjustment in the course of performance." *See also* Comment, *supra* note 11, at 545.

71. *See* text at note 5 *supra*. A case illustrative of this possible intendment of § 1-207 is Northern Helex Co. v. United States, 10 U.C.C. Rep. 353 (Ct. Cl. 1972), in which the plaintiff sued for breach of contract arising out of a sale of surplus helium to the Department of the Interior. After several years, the government defaulted by failing to pay for shipments for one year. However, Northern Helex continued to deliver the helium since it did not own helium storage facilities and the production of helium was an inevitable by-product of its liquified petroleum gas and petro-chemical operations. The plaintiff notified the United States that its failure to make payments was considered a material breach of contract which was not being waived. The plaintiff filed suit for damages.

In its petition, plaintiff alleged that although its contractual obligation to perform had been discharged by material breaches of contract, it would continue to tender helium to the government in mitigation of damages and in the interest of conservation.

The issues before the court were whether the defendant's breach was a material one, and second, whether the plaintiff had waived the breach by

Although it has been argued that the common law doctrine of accord and satisfaction gives debtors an unfair advantage over creditors,[72] the doctrine does contain sufficient protections for creditors from overreaching debtors. First, accord and satisfaction by conditional check applies only when the debt under dispute is unliquidated and therefore it is only in a limited context that the doctrine applies at all.

Secondly, the dispute must be made in good faith. Thus if a debtor's refusal to pay his creditor's claim is arbitrary and known by him to have no basis, his refusal to pay does not render the claim unliquidated.[73] In such a case, the debtor's payment of less than the amount claimed does not operate as an accord and satisfaction, even though it is so tendered and received.[74]

Another protection for the creditor is that the debtor's offer to compromise the disputed and unliquidated claim must be preceded by a dispute or discussion with the creditor. The purpose of this requirement is to give reasonable notice to the creditor that the check is being tendered as full satisfaction. The debtor's endorsement on the check to this effect is merely an evidential fact to be weighed along with other facts in determining whether the offer was sufficiently unambiguous.[75]

Yet another safeguard for the creditor concerns the sending of a misstated bill. If a claim is not in dispute and the creditor mistakenly sends a bill showing less than the amount actually

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continuing to perform. The court first held that the government's failure to pay for the helium for an extended period of time constituted a material breach. Secondly, the court held that the plaintiff had not waived its right to claim a material breach of contract by continuing to perform since its continued performance under U.C.C. § 2-704 was commercially reasonable and because it had effectively reserved its right to relief under the machinery provided in U.C.C. § 1-207. In so holding, the court said: "We are convinced of the fairness of following the modern UCC rule in this case because of the harshness of a contrary result on our special facts, where cessation of production was commercially impossible and avoidance of waste most desirable." *Id.* at 363.

The court then discussed the defendant's contention that the plaintiff's cashing of the check on January 14, 1971, waived the cause of action. Because this check was neither conditionally tendered nor rights attempted to be reserved by any words of protest, the court held that these transactions did not constitute an accord and satisfaction.

72. *See, e.g.*, Note, *Role of the Check in Accord and Satisfaction: Weapon of the Overreaching Debtor*, 97 U. PA. L. REV. 99 (1949).

73. 6 A. CORBIN, *supra* note 5, § 1287, at 159. For examples of unliquidated claims *see* note 9 *supra*.

74. Occidental Life Ins. Co. v. Eiler, 125 F.2d 229, 235 (8th Cir. 1942). The social policy behind such a ruling is that the debtor should not be rewarded for his conduct by allowing full satisfaction. CORBIN, *supra* note 5, § 1287, at 159.

75. *Id.* § 1277, at 123.

due, the payment of that amount does not operate as full satisfaction even though the debtor endorses the check "for balance to date."[76]

Finally, just as in the case of other contracts, an accord can be set aside or reformed and enforced, on the ground of fraud, accident, or mistake.[77] In the case of the compromise of unliquidated claims, there must be a mistake as to matters that were not in issue and were not compromised for the settlement to be voidable on the ground of mistake.[78]

Even critics of accord and satisfaction by conditional check acknowledge the doctrine's usefulness in most commercial transactions.[79] It is only in those cases where the debtor occupies a superior bargaining position that he may avail himself of an opportunity to coerce the creditor into an unfair settlement.[80] However, these situations may be approached by requiring the payee-creditor to establish that "unconscionable advantage" has been taken by the payor-debtor.[81] This is preferable to the response of jurisdictions like South Dakota which early rejected the majority view of accord and satisfaction by conditional check.[82]

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76. Whitt v. Leath, 213 Ala. 309, —, 104 So. 796, 797 (1925).

77. 6 A. CORBIN, *supra* note 5, § 1292 at 178-80.

78. For example, in Grand Trunk W. R. Co. v. Lahiff, 218 Wis. 457, 261 N.W. 11 (1935) a claim for damages was compromised and settled for the drowning of A. Later, it appeared that A was not in fact drowned, the identity of a body having been mistaken. There had been no dispute as to this fact, and the compromise had been on the basic assumption that A was drowned. Restitution of the amount paid was enforced.

79. Note, *Role of the Check in Accord and Satisfaction: Weapon of the Overreaching Debtor*, 97 U. Pa. L. Rev. 99, 102 (1949): "Uniform application of the doctrine of accord and satisfaction is most desirable in that businessmen be encouraged to settle their differences with a minimum of interference and a maximum of finality."

80. *Id.* at 104-09. Examples of a superior bargaining position are obvious when the debtor is an insurance company, a landlord, or employer of the creditor.

81. *Id.* at 109-10. Thus, the author of the note suggests that this situation would be "properly remedied by a frank acknowledgment of the nullifying effect of economic coercion . . . ." Interestingly, the proposed draft of the Uniform Commercial Code, published April 15, 1948, by the National Conference of Commissioners on Uniform State Laws of the American Law Institute suggested this solution in § 902(3): "Where an instrument by its terms provides that it is taken in full satisfaction of an obligation the payee by obtaining payment of the instrument or by negotiating it discharges the obligation unless he establishes that unconscionable advantage has been taken by the obligor."

82. Siegele v. Des Moines Mut. Hail Ins. Ass'n, 28 S.D. 142, —, 132 N.W. 697, 697 (1911).

South Dakota appears to have adopted its minority stance in response to a factual situation in which a debtor, an insured under a hail insurance policy, occupied an inferior bargaining position in relation to the creditor, the insur-

CONCLUSION

Although the few cases which have construed section 1-207 in relation to accord and satisfaction by conditional tender have found that section applicable, those cases are not entirely persuasive. In both *Hanna v. Perkins*[83] and *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*,[84] the courts' discussion of section 1-207 was contained in dicta. Furthermore, both discussions were by lower state courts. In *Scholl v. Tallman*,[85] the South Dakota Supreme Court's holding was weakened by the fact that it was reaffirming a long-held, and questionable, minority position. Since an analysis of U.C.C. § 1-207 does not reveal an explicit intent to alter the doctrine, jurisdictions adhering to the majority view should examine the policy considerations underlying the doctrine as well as the benefits afforded the public by the private solution of disputes before extinguishing accord and satisfaction by conditional check through the mere device of protesting the condition. Besides containing inherent protections for creditors against overreaching debtors, the common law doctrine of accord and satisfaction promotes judicial economy by providing an efficient method of settling commercial disputes without resort to extensive litigation.

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ance company. The defendant company claimed the loss was adjusted at $400 and the plaintiff assured claimed it was adjusted at $925. The company sent a conditional check for $400 which the assured cashed and indorsed with a reservation of rights to the balance of the claim. Although the court refused to address issues of fraud raised by the assured, it seems likely that the presence of these facts in a case of first instance influenced South Dakota's initial adoption of its minority view on accord and satisfaction by conditional check.

83. Hanna v. Perkins, 2 U.C.C. Rep. 1044 (Cty. Ct. N.Y. 1965).

84. Baillie Lumber Co., Inc. v. Kincaid Carolina Corp., 4 N.C.App. 342, 167 S.E.2d 85 (1969).

85. Scholl v. Tallman, — S.D. —, 247 N.W.2d 490 (1976).