THE TENDER TRAP: U.C.C. § 1-207 AND ITS APPLICABILITY TO AN ATTEMPTED ACCORD AND SATISFACTION BY TENDERING A CHECK IN A DISPUTE ARISING FROM A SALE OF GOODS

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The case of *Chancellor, Inc. v. Hamilton Appliance Co.*[1] was recently approved for publication[2] in New Jersey. Although this case is from a lower court of limited jurisdiction,[3] it is nevertheless an important one since it is the first to interpret the application of section 12A:1-207 of the New Jersey Statutes Annotated (1-207)[4] to the common law of accord and satisfaction in the State of New Jersey.

The relevant facts are simple. Hamilton Appliance Company (buyer), a retail store, owed Chancellor (seller), a wholesaler, $978.88 for four stereo sets.[5] After delivery to buyer, but before payment, the wholesale price was reduced by $41 per set. Buyer claimed that it was entitled to this reduced price and, additionally, claimed an $81 credit on merchandise which was allegedly improperly substituted by the seller.[6] The buyer sent a check along with a letter of transmittal

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[1] 175 N.J. Super. 345, 418 A.2d 1326 (Passaic County Ct. 1980).

[2] In the State of New Jersey not all written opinions are published. An opinion must be approved for publication by the Committee on Opinions. N.J. Ct. R. 1:36-2 provides for a Committee on Opinions "which shall review all formal written opinions, except those of the Supreme Court, to determine which shall be approved for publication in any series of reports, official or unofficial." *Id.* As a note of interest, the opinion was written by Judge Saunders of the Superior Court, temporarily assigned.

[3] Small Claims Division of the Passaic County District Court.

[4] N.J. STAT. ANN. § 12A:1-207 (West 1962). "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." *Id.* New Jersey follows the 1962 version of the Code; § 1-207 is the same in both the 1962 and 1972 versions.

[5] 175 N.J. Super. at 346, 418 A.2d at 1327.

[6] *Id.* at 346, 418 A.2d at 1327. The buyer had originally purchased twelve sets, eight of which turned out to be defective. The seller agreed to their return and credited buyer's account accordingly. The $978.88 figure is the balance due on the remaining four sets. *Id.*

to seller's attorney[7] for only $734.88. The buyer had written the notation "paid in full" on the front of the check. The seller deposited the check, endorsing it "without prejudice," and on the same day notified the buyer that he was "reserving his right to contend for the balance of the claim."[8]

Seller sued for the difference and buyer alleged as a defense that there had been an accord and satisfaction. Seller responded by relying on section 1-207, claiming that this section afforded him the opportunity to reserve his rights under this set of facts.[9]

On the basis of the foregoing facts the court decided that section 1-207 did not apply to the check cashing[10] situation and that the common law applied.[11] As the court read the New Jersey common law, the seller lost any right of reservation when he cashed buyer's check. The court therefore concluded that an accord and satisfaction had been created and judgment was rendered in favor of the buyer.[12]

This article will address three points: first, the common law of accord and satisfaction as applied to underlying contractual disputes; second, the specific New Jersey rule; and third, the interpretation of section 1-207 in the check cashing situation.

Common Law of Accord and Satisfaction

The doctrine of accord and satisfaction gives a judicial blessing to the settlement by parties of their own disputes. In order to understand the reasons for the judicial acceptance of such an arrangement, and the limits of the doctrine, we must first look at the history of its development.

Early at common law, before accord and satisfaction emerged, a debtor was not allowed to extinguish a debt by a tender of less than the full performance "required" by the underlying contractual obligation.[13] This was so even if the creditor had agreed to accept

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[7] *Id.* at 346-47, 418 A.2d at 1327. Although the facts of the case are not clear as to why the letter of transmittal was sent to the attorney for the seller, it is assumed that the dispute had escalated to the point where the buyer was dealing directly with the seller's attorney.

[8] *Id.* at 346, 418 A.2d at 1327.

[9] *Id.* at 348, 418 A.2d at 1328.

[10] The phrase "check cashing cases" refers to all those situations in which a court is attempting to determine whether an accord and satisfaction was created when one party has offered a check for less than the amount claimed by the creditor, with a view to settlement of a claim, and the creditor has in fact cashed the tendered check, but nevertheless seeks to obtain the full amount originally contested.

[11] *Id.* at 352, 418 A.2d at 1330.

[12] *Id.*

[13] *See, e.g.*, Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884), Pinnel's Case, 77 Eng. Rep. 237 (1602). This principle is also known as the pre-existing duty rule. *See* text accompanying note 33 *infra*.

the lesser performance.[14] Parties, however, were generally free to cancel their previous agreements and enter into a new agreement, called a novation.[15] A novation was to be analyzed as any other contract and, therefore, had to be supported by consideration.[16] This would not present a problem where there remained an executory element on both sides, since giving up the right to each other's executory performance would be consideration to support the cancellation of the original agreement and the new mutual promises would be the consideration for the new agreement. Such analysis would not work when one side of the agreement had been fully performed, since then there would be no consideration for the initial cancellation. In such a situation courts looked only to the obligations of the parties, determined by their initial agreement and not by the subsequent performance and acceptance of that performance. Hence, because courts faced with a settlement determined the scope of the original obligation first, any compromise was found to be without consideration.[17]

Faced with an increasing series of problems that did not seem properly resolved by the application of this approach, courts developed a distinction between cases where the performance obligations were unequivocal and those in which the parties had a dispute concerning their relative obligations.

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[14] The reason for this lies in the finding by the courts that the new agreement is not supported by consideration. *See* Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884).

[15] *See, e.g.*, San Gabriel Valley Ready Mix v. Casillas, 142 Cal. App. 2d 137, 298 P.2d 76 (Dist. Ct. App. 1956); Currie v. Trammel, 289 S.W. 736 (Tex. Civ. App. 1926). *See also* Cooke v. McAdoo, 85 N.J.L. 692, 90 A. 302 (E. & A. 1914).

[16] *See* Levine v. Blumenthal, 117 N.J.L. 23, 186 A. 457 (Sup. Ct. 1936), where it is stated "[i]t is elementary that the subsequent agreement, to impose the obligation of a contract, must rest upon a new and independent consideration." *Id.* at 26, 186 A. at 457. In that case a tenant requested a reduction in rent because its business had fallen to the point where the tenant was having a hard time meeting the existing rent. Payment of a lower amount was made until one month prior to the expiration of the lease. The landlord sued for the difference and the tenant claimed that it had entered into a new agreement for the lesser sum. *Id.* at 25, 186 A. at 458. The court held that there was no consideration found to uphold the alleged new agreement, the tenant was simply paying that which it was already bound to pay and no more. *Id.* at 29, 186 A. at 459. An exception to this rule could be found when the obligor does something through the new agreement which it was not already bound to perform. As stated in Pinnel's Case, 77 Eng. Rep. 237 (1602), "but the gift of a horse, hawk, or robe, etc. in satisfaction is good." *Id.* at 237. *See also* 6 A. CORBIN, CONTRACTS § 1284 (1962) [hereinafter cited as CORBIN].

[17] See Cooke v. McAdoo, 85 N.J.L. 692, 90 A. 302 (E. & A. 1914), for the difference between an accord and satisfaction and a novation:

> What has been said regarding the defense of accord and satisfaction is equally applicable to that of novation, which is a species of accord and satisfaction. The principal distinguishing feature between them is that a novation implies the extinguishment of an existing debt or obligation by the parties thereto, and its transition into a new existence between the same or different parties; whereas, an accord and satisfaction relates solely to the extinguishment of the debt or obligation.

Id. at 695, 90 A. at 303.

In the context of a dispute concerning the amount to be paid the problem can be analyzed as follows:

> X bills Y in the amount of $2000. Y replies that she does not believe the $2000 figure is accurate. Instead, she claims she owes only $1000. Y subsequently tenders X a check which has the notation "In full satisfaction of the underlying debt."

The check could be in one of four amounts:

1. $2000, the amount claimed by X.
2. Some figure between $1000 and $2000.
3. $1000, the minimum amount acknowledged by Y as owed to X.
4. Less than $1000.

Example one above does not present a problem since this is full payment of that which is claimed by the creditor. Debtor has fully performed under any interpretation.

In example two, the authorities are unanimous in holding that, as long as a bona fide[18] dispute exists and Y offers[19] X a check for a compromise amount in full satisfaction of the debt,[20] an accord and satisfaction will be created if the check is accepted by X.[21] Acceptance may be manifested by the simple act of cashing the tendered check.[22] X may not countermand the terms of the offer by crossing out its terms (the language "In full satisfaction of the underlying debt").[23] Endorsing the check with language such as "in partial payment" or "with all rights reserved" has no effect.[24]

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[18] Bona fide means good faith. The RESTATEMENT (SECOND) OF CONTRACTS has adopted the simple requirement of honesty; RESTATEMENT OF CONTRACTS had the additional requirement of reasonableness. In Decker v. Smith & Co., 88 N.J.L. 630, 96 A. 915 (E. & A. 1916), the court stated:

> While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be in *good faith*. Without an *honest* dispute, an agreement to take a lesser amount in payment of a liquidated claim is without consideration and void. An arbitrary refusal to pay, based on a mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirement of the rule.

Id. at 634, 96 A. at 917 (emphasis in original). *See also* CORBIN, *supra* note 16, § 1289.

[19] The traditional analysis of an accord and satisfaction in the check cashing situation has at its core the attempt by the debtor to settle the claim. This attempt, by way of tendering a check, is called an offer. As with all other offers there is the requirement that it be accepted. *See* CORBIN, *supra* note 16, § 1277.

[20] The debtor must make it clear that the offer is not subject to negotiation, i.e., it must be accepted on its terms. A.G. King Tree Surgeons v. George Deeb, 140 N.J. Super. 346, 348, 356 A.2d 87, 89 (Bergen County Ct. 1976).

[21] *See* CORBIN, *supra* note 16, § 1290, Illustrations 4 & 5.

[22] *See* Loizeaux Builders Supply Co. v. Ludwig, 144 N.J. Super. 556, 564, 366 A.2d 721, 726 (Law Div. 1976).

[23] *Id.*

[24] *Id.*

The basis for the conclusion in example two is the determination that an accord has been reached. The *Restatement (Second) of Contracts* defines an accord as a contract.[25] As such there must exist some consideration to make the agreement binding.[26] Consideration is usually found because, in the context of a good faith dispute, the parties are each willing to give up part of their respective claims to reach a compromise.[27]

The above analysis raises an important question concerning an attempt to satisfy the debt by tendering either the undisputed amount[28] of $1000 (example three) or less than that amount (example four). If an accord is a contract requiring consideration (and the "satisfaction" referred to in the phrase "accord and satisfaction" is merely the performance of the obligation of this new contract by the debtor) can tendering an amount admittedly due and owing (or less) qualify as consideration to support the new contract? The unanimity supporting the results in examples one and two does not extend to examples three and four. The reason for the split of authority is that it is not easy to find consideration to support the claimed settlement in the latter two examples[29] because the essence of consideration is giving something one was not previously obligated to give.

Consider example three where debtor tenders, as full payment, the $1000 she acknowledges to be due. Should cashing the check be treated as an accord despite creditor's attempt to countermand the "payment in full" language on the check? Corbin stated most forcefully his reason for finding an accord and satisfaction in such a situation:

> [T]he creditor is not merely making a promise to render some return performance. Instead, he is assenting to a discharge of the debtor. Instead of undertaking a new duty to the other party, he is extinguishing his own previous right against that party. The parties themselves do not regard the transaction as an executory contract but as a finished and executed transaction; and there is no good

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[25] "An accord is a contract by which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty . . . it is the essence of an accord that the original duty is not satisfied until the accord is performed. . . ." RESTATEMENT (SECOND) OF CONTRACTS § 35, Comment a, at 39 (Tent. Draft No. 13, 1978).

[26] RESTATEMENT (SECOND) OF CONTRACTS § 351, Comment d, at 42 (Tent. Draft No. 13, 1978).

[27] *See* CORBIN, *supra* note 16, § 1289.

[28] The term undisputed is used to describe that portion, or aspect, of the underlying contractual obligation which the parties both agree that the obligor is at least bound to tender. The obligor may also claim that it is the most she is bound to tender or do. *See generally* CORBIN, *supra* note 16, § 1290.

[29] *See* CORBIN, *supra* note 16, § 1289.

> reason why the court should not also so regard it. It is not ordinarily supposed that consideration is required for that which is executed.[30]

Some courts[31] have accepted Corbin's reasoning and still others have arrived at the same conclusion by reasoning that the offeree does not have the right to choose which part of an offer she will accept, and which she will reject.[32] The claimed policy determination is that the pre-existing duty rule,[33] which mandates a conclusion that the accord is not supported by consideration, creates a barrier to an expeditious resolution of a dispute which in turn leads to time-consuming and costly litigation.[34] As a means of tearing down this barrier Corbin would do away with the traditional concept of consideration, and replace it with an analysis which is concluded by deciding that "there is no reason for overlooking his express assent to the immediate extinction and discharge of the claim."[35] But is it in fact true that there is "no reason"? The only thing that the creditor has received from the debtor is being spared transactional costs to collect the undisputed amount. The only thing that the debtor has given up is a supposed right to force the creditor to expend transactional costs to collect that which is undisputably owed and perhaps collect even more. Should we ever allow such transactional cost elements alone, in the context of our unfortunately inefficient and expensive system of justice, to stand as consideration for an accord? It can be seriously maintained that to do so is unjust because it encourages people not to live up to their word.[36]

One body of authority rejects the view that an accord does not need to be supported by consideration.[37] Both the comment to section 351 of the *Restatement (Second) of Contracts* and the debate[38] concerning that section on the floor at the 1978 Annual Meeting of the American Law Institute[39] clearly established that when an accord

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[30] *Id.* § 1289, at 166.

[31] *E.g.*, United States *ex rel* Glickfeld v. Krendal, 136 F. Supp. 276 (D.N.J. 1955).

[32] *E.g.*, Nassoiy v. Tomlinson, 148 N.Y. 326, 42 N.E. 715 (1896).

[33] *See* text accompanying note 13 *supra*.

[34] One of the main attractions of the doctrine of accord and satisfaction in check cashing situations is that the parties have set up their own quick, extra-judicial, means of clearing up and terminating a dispute.

[35] CORBIN, *supra* note 16, § 1289, at 166.

[36] Leff, *Ignorance, Injury and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 2-18 (1970), *reprinted in* R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 191-99 (1979).

[37] *See* RESTATEMENT (SECOND) OF CONTRACTS § 351, Comment d, at 42 (Tent. Draft No. 13, 1978).

[38] 55 ALI PROCEEDINGS 194-99 (1978).

[39] This is the body that publishes the various Restatements of the law.

was defined as a contract in that section the requirement of consideration was implied. This article will not choose between these two solutions to the problem of tender of the undisputed amount but sets them out to lay the groundwork for an examination of the New Jersey law.[40]

What about those circumstances where the tender is less than the undisputed amount? This places the "transactional-cost-as-consideration" problem in stark relief. Such a situation has been termed a "hold-up."[41] Courts could take this position and be done with the problem. Another tack would be to take the position of Professor Albert Rosenthal that the tender and acceptance of even less than the undisputed amount creates an accord and satisfaction.[42]

It is extremely difficult to understand Professor Rosenthal's result. Accord and satisfaction would be an indefensible doctrine if it were applied to a situation where there is not a good faith dispute. If the dispute must be founded in good faith, similar principles should require that the tender in satisfaction of the dispute also be made in good faith. It is hard to see how tendering less than one admits he owes can ever be found to be in good faith.

THE NEW JERSEY RULE

The facts of *Chancellor* clearly establish that the buyer tendered a check for the undisputed amount and no more.[43] The court decided that the rule in New Jersey had "been that when a check is tendered as payment for an unliquidated claim on the condition that

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[40] For a more detailed discussion of this controversy, see CORBIN, *supra* note 16, § 1289; 1 S. WILLISTON, CONTRACTS §§ 128-30 (3d ed. 1957); Rosenthal, *Discord and Dissatisfaction: Section 1-207 of The Uniform Commercial Code*, 78 COLUM. L. REV. 48, 51-55 (1978).

[41] This phrase is borrowed from Professor Michael Risinger who used that term when speaking, at the annual meeting of the American Law Institute, on section 351 of the *Restatement (Second) of Contracts*. *See* 55 ALI PROCEEDINGS 195 (1978). It refers to the fact that the person tendering a check for less than admittedly due is doing nothing more than threatening the creditor with transactional (court) costs if the creditor wishes to obtain more than the amount tendered.

[42] *See* Rosenthal, *supra* note 40, at 51-59. *See also* RESTATEMENT OF CONTRACTS § 420, Comment a, Illustration 2 (1932):

> A owes B an unliquidated claim for the fair value of work performed. B asserts that the value of the work is $150. A denies this but admits that the value is not less than $125. A sends B $100 with a note stating that if not accepted as full payment it must be returned. B keeps the money, but immediately asserts that it is accepted only as partial payment. A's debt is discharged. His admission of the value of the claim does not liquidate it even partially.

Id.

[43] 175 N.J. Super. at 346-47, 418 A.2d at 1327.

it be accepted in full payment, the creditor is deemed to have accepted this condition by depositing the check for collection" in spite of the fact that the creditor alters or adds conditions to the check.[44]

Three of the five cases[45] cited by the *Chancellor* court merely lay down the general conditions for the creation of an accord and satisfaction. These three uphold the basic proposition that when a valid dispute exists and an offer to settle is made by the tender of a check indicated to be in full satisfaction of the debt, no words of objection can overcome the fact that the check is cashed.[46] Not one of these three cases involved a tender of money for the minimum that was acknowledged as due and owing. In those cases the amount tendered was that which the tendering party believed was a reasonable compromise. Only *United States ex rel Glickfeld v. Krendel*[47] and *Loizeaux Builders Supply Co. v. Donald B. Ludwig Co.*[48] dealt with the circumstances in which the tender was not a compromise amount.

In *Glickfeld,* a federal district court attempted to construe New Jersey law in a situation where no actual New Jersey authority existed. It adopted the majority rule as enunciated by Corbin, which, as noted above[49] holds that cashing a check for the minimum undisputed amount creates an accord and satisfaction.[50] *Loizeaux* was the only case before *Chancellor* where a New Jersey court had ruled on a similar set of facts. The *Loizeaux* court took notice of both *Glickfeld* and Corbin's analysis:

> The above is clearly the majority view and supported by the greater weight of authority. On principle, however, it appears that where, as here, the debtor has merely paid the amount of the claim, acknowledged by it to be due, and no more, it is difficult to justify a rule that places a creditor in the dubious position of surrendering part of that which he claims to be due in return for an amount which neither party claims to be in dispute. See also, 6

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[44] *Id.* at 347, 418 A.2d at 1327.

[45] United States *ex rel* Glickfeld v. Krendel, 136 F. Supp. 276 (D.N.J. 1955); Decker v. Smith & Co., 88 N.J.L. 630, 96 A. 915 (E. & A. 1916); Rose v. American Paper Co., 83 N.J.L. 707, 85 A. 354 (E. & A. 1912); Loizeaux Builders Supply Co. v. Ludwig, 144 N.J. Super. 556, 366 A.2d 721 (Law Div. 1976); A.G. King Tree Surgeons v. Deeb, 140 N.J. Super. 346, 356 A.2d 87 (Bergen County Ct. 1976).

[46] Decker v. Smith & Co., 88 N.J.L. 630, 633, 96 A. 915, 916-17 (E. & A. 1916); Rose v. American Paper Co., 83 N.J.L. 707, 709, 85 A. 354, 355 (E. & A. 1912); A.G. King Tree Surgeons v. Deeb, 140 N.J. Super. 346, 348-49, 356 A.2d 87, 88 (Bergen County Ct. 1976).

[47] 136 F. Supp. 276 (D.N.J. 1955).

[48] 144 N.J. Super. 556, 366 A.2d 721 (Law Div. 1976).

[49] *See* notes 30-35 *supra* and accompanying text.

[50] 136 F. Supp. at 280-81.

> *Corbin, Contracts* (1950), § 1289. While this court acknowledges that it is bound by the above-cited authority, it finds that a crucial element of accord and satisfaction is not present in this case . . . for it is fundamental that where there is no bona fide dispute between the parties, there can be no accord and satisfaction without the added element of new consideration.[51]

The decision of this court is ambiguous. Does it hold that there was no bona fide dispute because the debtor acknowledged a minimum amount due and owing and therefore there was no consideration to support an accord on the basis of a mere tender of that amount? If so, *Loizeaux* was like example three above and *Chancellor*. Or, did it hold that there was no bona fide dispute because the debtor knew that the true obligation was to be for an amount which was to be more than that acknowledged and tendered? If so, *Loizeaux* is a case like example four. Although there is a lack of clarity as to whether the court was simply trying to get out from under the *Glickfeld* decision,[52] it is clear that the court did find that consideration is required to support an accord and that such a conclusion was inconsistent with *Glickfeld* unless consideration is defined in a very strange way.

The court in *Chancellor* found that a genuine dispute arose between the parties,[53] but it does not tell us how it arrived at this conclusion. The court came to its decision consistent with *Glickfeld*, but did it address the issues raised by *Loizeaux*? It is argued here that the answer is no. A proper reading of *Loizeaux* would result in a finding that an accord and satisfaction was not created in the *Chancellor* case. Utilizing the common law analysis, then, the seller, not the buyer, should have prevailed.

If I were simply interested in criticizing the court in its interpretation of the existing law and its resulting decision, I would stop here. Like the court, however, I too wish to address an important issue which was raised at the trial.

Section 1-207 of the Uniform Commercial Code

Section 1-207 states:

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

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[51] 144 N.J. Super. 564-65, 366 A.2d at 726.

[52] The *Loizeaux* court states that it is bound by the authorities. Why? It is not true that a New Jersey court is bound by the determination of a federal trial court (*Glickfeld*) in the absence of New Jersey authority.

[53] 175 N.J. Super. at 347, 418 A.2d at 1327.

> 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.[54]

The literature on this section of the Code is in disagreement concerning the applicability of section 1-207 to the check cashing scenario.[55] The cases are also inharmonious.[56]

The most forceful position taken is that of Professor Rosenthal.[57] Professor Rosenthal argues that the lack of clear intent on the part of the drafters of the Code and the enacting legislatures,[58] the scope of Article I of the Code,[59] the policy behind the rules on accord and satisfaction,[60] and the comments to the section[61] all require a finding that section 1-207 does not alter the common law of accord and satisfaction. Professor Rosenthal has had a great deal of success in winning over converts. While a number of courts have held that section 1-207 has changed the common law on accord and satisfaction (the so-called New York rule),[62] most have not.[63] Of those who have not, many have cited Professor Rosenthal as a persuasive authority for their decision.[64] While I have some strong disagreements concerning Professor Rosenthal's policy statements,[65] I nevertheless agree with his result,[66] though I arrive there by a different path.

A central point in the previous debate on this issue has focused on the tendering of the check as an "offer"[67] to settle. The focus

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[54] N.J. STAT. ANN. § 12A:1-207 (West 1962).

[55] J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, §§ 13-21 (2d ed. 1980) and J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 155-56 (2d ed. 1977) maintain that § 1-207 alters the common law rule on accord and satisfaction. Rosenthal, *supra* note 40, disagrees. Professor William Hawkland takes the position that care should be taken in analyzing this section. Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329 (1969).

[56] *Compare* Scholl v. Tallman, 247 N.W.2d 490 (S.D. 1976) *with* Jahn v. Burns, 593 P.2d 828 (Wyo. 1979).

[57] *See* Rosenthal, *supra* note 40.

[58] Rosenthal, *supra* note 40, at 58-63.

[59] Rosenthal, *supra* note 40, at 68-71.

[60] Rosenthal, *supra* note 40, at 55-58.

[61] Rosenthal, *supra* note 40, at 64.

[62] *See, e.g.*, Large-Finn Constr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 15, 403 N.Y.S.2d 1012 (Sup. Ct. 1978); Scholl v. Tallman, 247 N.W.2d 490 (S.D. 1976).

[63] *See, e.g.*, Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, 261 S.E.2d 266 (1980); State of Washington, Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 610 P.2d 390 (1980); Jahn v. Burns, 593 P.2d 828 (Wyo. 1979).

[64] *See, e.g.*, Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, 261 S.E.2d 266 (1980).

[65] *See* text following note 42 *supra*.

[66] In this regard, I also agree with the result in *Chancellor*. *See* text following note 80 *infra*.

[67] *See* Rosenthal, *supra* note 40, at 72; Comment, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check*, 11 CREIGHTON L. REV. 515 (1977).

should instead be on a carefully chosen term in section 1-207, "explicit,"[68] and its significance in the reservation of rights analysis.

The term "explicit" is not defined in the Uniform Commercial Code. The drafters of the Code suggest that the proper interpretation of any undefined term or terminology "be limited to its reason."[69] Comment 1 of U.C.C. section 1-102 states the drafters' position as follows:

> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[70]

To my mind, the term "explicit" implies the requirement that for the reservation of rights to be effective the offeree must notify the offeror that his term "in full satisfaction of the debt," written on the check, is not accepted. Furthermore, notification must be done in such a way as to allow the offeror an opportunity to either acquiesce in the "explicit" reservation of rights by the offeree or withdraw or stop payment on the check.

Thus, I see the term "explicit" as necessarily implying notice, and while the term "explicit" is not defined in the Code, the term "notice" is. "Notice" is defined in section 1-201(26)[71] as "taking such steps as may be reasonably required to inform." Notice must be to some end or purpose. In check cashing situations, the purpose of the requirement of explicitness must be to allow the offeror to take reasonable steps to either acquiesce in, or preclude, the cashing of the check by the offeree. Unless interpreted to imply such notice, the term "explicit" would be an unnecessary addition to section 1-207. Otherwise, the party reserving rights could simply cash the check while simultaneously drafting a separate letter which contains the "explicit" reservation language, and then either pocket the letter or put it in her desk for safekeeping.

This interpretation of section 1-207 leads to the result most consistent with the resolution by the Code in dealing with analogous

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[68] I would like to thank my colleague, Professor Neil B. Cohen for suggesting that perhaps analysis of § 1-207 had been misguided by searching for an interpretation in the legislative history rather than focusing on the term "explicit."

[69] U.C.C. § 1-102, Comment 1.

[70] *Id.*

[71] N.J. STAT. ANN. § 12A:1-201 (26) (West 1962).

problems of contract formation in other sections of the Code. Specifically, this interpretation renders section 1-207 as the functional correlative of the contract formation rules of section 2-207.

Section 2-207 states:

> *Additional Terms in Acceptance or Confirmation*
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.[72]

The "mirror image" rule of common law has clearly been abrogated[73] insofar as it does not reflect the realities of commerce.[74] The courts are called upon by section 2-207(1) to look at the writings of the parties and first determine if the writings create a contract. If no contract is formed by the writings, yet the parties perform, the courts

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[72] N.J. STAT. ANN. § 12A:2-207 (West 1962).

[73] *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1165-66 (6th Cir. 1972). At common law the acceptance must be the "mirror image" of the offer. Any deviation in the acceptance from the terms of the offer creates a counter-offer. *Id.*

[74] *See* U.C.C. § 2-207, Comment 2:

> 2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms. (Comment 2 was amended in 1966.)

Id.

must use the supplemental provisions of the Code to determine the obligations of the parties.[75] If the writings do evidence that a contract has been formed, then the Code creates a singular manner of juxtaposing the terms on which they disagree. The additional term contained in the acceptance (at common law the counter-offer) is to be construed as a proposal for addition to the contract, which requires an affirmative assent by the original offeror.[76] If both parties are merchants,[77] then the additional term is made part of the contract unless:

> (1) the offer expressly limits acceptance to the terms of the offer;
> (2) they materially alter it; or
> (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.[78]

Analyzing the check tender situation by analogy to the rules of section 2-207, a statement which purports to reserve rights can be construed as a counter-offer which requires an affirmative response in order to make it part of the contract. This construction of the contract interpretation rules of section 2-207 can be applied to section 1-207 in the following manner.

The writings of the parties evidence an intent to contract in the sense that the offeror is offering to pay part of the claim that is demanded. She does so only on the condition that the payment be accepted on the terms offered (full satisfaction of the debt). The offeree has assented to payment, but has included a counter-offer (partial satisfaction only). The question that is raised concerns the terms of their contract: full payment versus partial payment. In this context it is submitted that the cashing of the check should be analogized to "a definite and seasonable expression of acceptance" under a section 2-207(1) analysis.[79] The construction rules in section 2-207

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[75] N.J. STAT. ANN. § 12A:2-207(3) (West 1962).

[76] N.J. STAT. ANN. § 12A:2-207(2) (West 1962).

[77] N.J. STAT. ANN. § 12A:2-104 (West 1962):

> (3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. L.1961, c.120, § 2-104.

Id.

[78] N.J. STAT. ANN. § 12A:2-207(2) (West 1962).

[79] The assumption in the text is that the acceptance of cashing the check and reserving rights is an acceptance *not* "expressly made conditional on assent to the additional or different terms." N.J. STAT. ANN. § 12A:2-207(1) (West 1962). If one concludes that the reservation language is in fact conditional then one must conclude that no agreement has been reached. This does not impede the analysis; it leads to the following possibilities:

would then lead to the following conclusions. If one of the parties is a nonmerchant the counter-offer must be specifically assented to. If both parties are merchants then the counter-offer becomes a term of the contract unless it materially alters the offer. Partial satisfaction certainly materially alters the offer of full satisfaction, and is otherwise inconsistent with an offer which is certainly conditioned. The offeror would never be held to have accepted the purported reservation which accompanies the cashing of the check unless she does so expressly or by implication. Therefore, since a reservation of rights without notice is an ineffective proposal to the contract, cashing the check has the same effect as in an accord and satisfaction—it completes the contract.

Anyone having read this far might conclude that I believe that the *Chancellor* court correctly determined the impact of section 1-207 on the common law but decided the case incorrectly because it misinterpreted New Jersey law on accord and satisfaction.[80] Ironically, however, I think the *Chancellor* court reached the right result. There is a Code solution to this case which pre-empts the common law and which the *Chancellor* court never considered.

The transaction in *Chancellor* involved a sale of goods;[81] thus it was governed[82] by Article 2 of the Code.[83] In *Chancellor*, the buyer had an agreement to purchase stereo sets at a fixed price but was nevertheless claiming entitlement to a subsequent price reduction.[84]

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1) If there is no cashing of the check, then obviously there is no problem.

2) If the check is cashed we would analogize to subsection 3 of § 2-207 and find that the conduct of the parties does create an agreement, the terms of which are to be determined by looking at the relevant supplementary sections of the Code. In this case we would find that, pursuant to the § 2-209 analysis at notes 85-92 *infra* and accompanying text, there is a valid offer of modification of the agreement. Subsequently, as stated in Comment 6 of § 2-207, we may also use § 2-207(2) as a supplement and the analysis at notes 72-79 *supra* and accompanying & following text. This analysis would lead us to the same conclusion as that found in the text.

[80] *See* text accompanying notes 10-12 *supra* & text following note 52 *supra*.

[81] N.J. STAT. ANN. § 12A:2-105 (West 1962) defined "goods" broadly: "(1) 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." *Id.*

[82] *But cf.* Sherrock v. Commercial Credit Corp., 290 A.2d 648, 650-51 (Del. 1972) (Article 1 rather than Article 2 definition of "good faith" applies to secured transaction problem even though underlying transaction was sale of goods).

[83] N.J. STAT. ANN. § 12A:2-102 (West 1962) states:

> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

Id.

[84] Chancellor, 175 N.J. Super. at 346, 418 A.2d at 1327. *See* notes 5-8 *supra* and accompanying text.

This type of conduct is treated by the Code as an attempt to modify the original agreement, and is therefore governed by section 2-209.[85] Any attempt to modify an agreement by tendering less than the full value required pursuant to that agreement in the hope of satisfying the contractual obligation is permitted by the Code if the modification is agreed upon by both parties. Section 2-209 states that an agreement modifying a contract within this Article needs no consideration to be binding.[86] The reason for this departure from the common law pre-existing duty rule is clearly laid out in Comment 1 of section 2-209: "This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."[87] Therefore, in light of section 2-209(1), two questions must be answered in order to determine whether the parties in *Chancellor* successfully modified their agreement. First, was the attempted modification made in good faith? Second, did the seller agree to accept the substituted performance?

Pursuant to section 1-203, there is a requirement of good faith applicable to "every contract or duty within this Act."[88] Accordingly, Comment 2 to section 2-209 states that any "modifications . . . must meet the test of good faith imposed by the Act."[89] In *Chancellor*, however, there is no discussion by the court whether the buyer was making a "good faith" claim to the reduction in price. The court simply stated, without any corroborating analysis, that there was a "bona fide" dispute.[90] Let us assume that what the *Chancellor* court did was conclude that the buyer in good faith believed that he had a right to the reduction he claimed. Tender of the undisputed amount in such a situation can be taken as an offer in good faith, satisfying the requirement imposed by the Code. Even though such tender cannot count as consideration, consideration is not necessary to create a binding modification under section 2-209. Hence, we are, by this analysis, one step into an enforceable modification under the Code. What is the effect of cashing the check and altering the terms?

In reply to the offer to modify, the seller has indicated his disagreement with the "full satisfaction" term. As stated previously, section 2-209 validates only modifications which are agreed to by the

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[85] N.J. STAT. ANN. § 12A:2-209 (West 1962).
[86] N.J. STAT. ANN. § 12A:2-209(1) (West 1962).
[87] U.C.C. § 2-209, Comment 1.
[88] N.J. STAT. ANN. § 12A:1-203 (West 1962).
[89] U.C.C. § 2-204, Comment 2.
[90] 175 N.J. Super. at 347, 418 A.2d at 1327. *See also* note 18 *supra*.

parties. The inclusion of the reservation language requires analyzing it with a view to making a determination as to whether the seller has agreed to the modification. This, in turn, leads us to section 1-207, since that section specifically refers to the problem of reservation of rights. This section determines the efficacy of the purported reservation. If the reservation is effective the construction rules of contract formation contained in section 2-207 would require a conclusion that we do not have a modification.[91] If, however, the reservation is ineffective, the effect of section 1-207 is to preclude the reservation language from consideration, since an ineffective reservation is meaningless. The *effectiveness* of the reservation, as I have previously indicated,[92] is determined by whether or not it is "explicit." The seller in *Chancellor* did not meet the explicitness requirement and, therefore, his reservation language will not be given effect. He will, accordingly, be deemed to have accepted the offer of modification. Once the reservation language is determined to be ineffective we are left with a simple act of acceptance for section 2-209 purposes—cashing the check.

Thus, in effect, the seller will be estopped from asserting that cashing the check was not an act of acceptance. This estoppel, as indicated above, is created by section 1-207 by denying the seller the right to assert the validity of a "secret" reservation of rights.

Conclusion

The question whether the Uniform Commercial Code alters the common law rule of accord and satisfaction in check tendering cases is not adequately addressed if one examines only section 1-207 and fails to recognize that the *type* of transaction may itself give rise to the proper resolution. In a sale of goods transaction we must look to Article 2 for the substantive rule of law and then apply section 1-207 to interpret attempted reservations of rights in contract modification problems controlled by Article 2.

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[91] *See* notes 72-79 *supra* and accompanying text.

[92] *See* notes 68-71 *supra* and accompanying text.