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COMMERCIAL PAPER AND BANK DEPOSITS
AND COLLECTIONS*Ronald L. Hersbergen**

ITEMS IN THE BANK COLLECTION PROCESS

Under the Commercial Laws¹ a forgery² of a necessary indorsement³ on a check which has been deposited for collection typically gives rise to litigation between the various parties premised upon several possible theories of recovery. One such theory of recovery arises when the check is finally paid⁴ by the drawee-payor bank. In such a case, the drawee is liable⁵ to owner of the check.⁶ The depository bank⁷ is similarly liable to the true owner, but the latter cannot recover against both a depository bank and the drawee-payor bank.⁸ Should the drawee bank be liable under section 3-419(1),⁹ it will automatically have a right to recover from the depository bank under the implied warranties made by the depository bank

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1. LA. R.S. 10:1-101 through 5-117 (Supp. 1974). Section 1-101 provides that title 10 of the Revised Statutes shall be known as the "Commercial Laws." These provisions represent the enactment of articles 3, 4 and 5 of the Uniform Commercial Code (U.C.C.), with minor revisions where necessary to conform with the general scheme of Louisiana law. Hereinafter, any reference to the U.C.C., where different from Louisiana law, will be noted. Otherwise, any reference to "Commercial Laws" will be to title 10.

2. A forgery is simply an "unauthorized" signature. LA. R.S. 10:1-201 (Supp. 1974).

3. In this context an indorsement is "necessary" when its absence would prevent a proper "negotiation" of the instrument. *See id.* 10:1-201 (definition of "holder"), 3-202(1) (Supp. 1974). The legal consequences are generally the same whether the signature is forged or simply made without authority.

4. *See id.* 10:4-213 (Supp. 1974).

5. *Id.* 10:3-419(1) (Supp. 1974): "[W]hen a person pays an instrument on a forged indorsement, he is liable to the true owner." The language is adopted from U.C.C. section 3-419(1)(c), which states the principle of liability in terms of common law "conversion." *See* U.C.C. § 3-419, comments 1-3.

6. Presumably the party whose signature is forged is the true owner.

7. LA. R.S. 10:4-105(a) (Supp. 1974).

8. *See* *Cooper v. Union Bank*, 9 Cal. 3d 123, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).

9. LA. R.S. 10:3419(1) (Supp. 1974). Liability is not automatic, because the forgery, as an unauthorized signature, may not always be assertable by the true owner. *See* LA. R.S. 10:3-404, 3-405, 3-406 (Supp. 1974).

pursuant to section 4-207(1); the depositary bank has a like warranty action against its customer¹⁰—the depositor of the check—under section 4-207(2). The depositor and each prior transferor of the check have a similar warranty right against their respective transferors under section 3-417(2); ultimately, however, the party who dealt with the forger will most likely bear the loss.¹¹

Alternatively, the true owner may forego his right to sue either the drawee bank which paid the check or the depositary bank and proceed instead against the party with whom he dealt, upon the theory that the check was taken as conditional payment only, and that since the true owner has not received payment from the proceeds of the check, the underlying obligation remains outstanding and unpaid.¹² Such an action would typically involve the drawer and the payee, and because discharge by payment¹³ is the only logical defense to the payee's suit, the drawer can be compelled to pay the underlying obligation. The drawer is not prejudiced by the true owner's election of this second theory of recovery since he thereby has a right to have his account recredited by drawee upon a theory of breach of the checking account contract.¹⁴ Should the drawer be successful in his action,¹⁵ the drawee bank would once again be entitled to a recovery for breach of the depositary bank's section 4-207(1) warranty, and again, the loss typically would fall upon the party who, having dealt with the forger, has no effective warranty protection.

10. *Id.* 10:4-104(1)(e) (Supp. 1974).

11. *See Twellman v. Lindell Trust Co.*, 534 S.W.2d 83 (Mo. Ct. App. 1976); *Bank of the West v. Wes-Con Dev. Co.*, 15 Wash. App. 238, 548 P.2d 563 (Ct. App. 1976). The warranties of good title, like the other warranties under section 3-417(2), arise upon a transfer, not an indorsement, of the instrument. Therefore, the true owner who, in his action under section 3-419(1), might be precluded by section 3-406 from asserting that his name was forged, arguably does not face the preclusion problem when he is sued on a warranty theory, since sections 3-404 and 3-406 are addressed only to the unauthorized signature situation. *But see Allied Concord Fin. Corp. v. Bank of America Nat'l Trust & Sav. Ass'n*, 80 Cal. Rptr. 622 (Cal. App. 1969). Of course, general principles of equitable estoppel, which are brought into the Commercial Laws by section 1-103, could preclude the true owner from denying that he transferred (and therefore warranted) the instrument.

12. *See, e.g., Seliga v. American Mut. Liab. Ins. Co.*, 174 So. 2d 878 (La. App. 4th Cir. 1965); *Pirkle & Williams v. Shreveport Jitney Jungle, Inc.*, 140 So. 837 (La. App. 2d Cir. 1932).

13. LA. R.S. 10:3-601(1)(a) (Supp. 1974).

14. *Id.* 10:4-401(1) (Supp. 1974). The "properly payable" status of checks is discussed in Hersbergen, *The Bank-Customer Relationship Under the Louisiana Commercial Laws*, 36 LA. L. REV. 29 (1975).

15. Drawer's action can be precluded under LA. R.S. 10:4-406 (Supp. 1974).

If it should happen that the true owner's notification of loss or the demand for payment of the underlying obligation reaches the drawer at a time when he can still order the drawee to stop payment¹⁶ on the check, the check will be returned as an unpaid item to the depository bank. In that event, the drawer's account will not be affected, and the drawee bank, not having paid the item, will not be subject to a suit by the true owner under section 3-419(1). Upon receipt of the returned check, the depository bank will then have either the right of a "holder" to sue the drawer or prior indorsers,¹⁷ or the right to sue the depositor (its customer) under the section 4-207(2) engagement of the latter.¹⁸ The depositor has a similar right against unqualified indorsers prior to him, pursuant to section 3-414(1), and once again the loss is shifted back up the chain of indorsers¹⁹ until it reaches the party who dealt with the forger.

The above described scheme of distributing the inevitable losses due to forgery is new to Louisiana law.²⁰ Many of the same liability issues arise in situations which involve neither a forged indorsement nor an ill-intentioned party. Such was the case in *Davis v. Miller Builders & Developers, Inc.*²¹ The plaintiff, an attorney, had disbursed the proceeds of a house sale by issuing checks to various payees. One such check was made payable to Miller Builders, and another was made payable to Louisiana Bank & Trust Company ("LB&T"). By oversight, plaintiff's

16. *See id.* 10:4-403. *Cf. id.* 10:4-407.

17. Given that the item bears a forged indorsement (or, more precisely, that it lacks a necessary indorsement) the depository bank cannot technically be a "holder." See note 3, *supra*. By utilizing LA. R.S. 10:3-406, however, the bank may be able to preclude the true owner from asserting the inoperativeness of his signature, thereby permitting the bank's allegation that it is in fact the holder to go unchallenged. Where the depository bank sues the drawer, the bank's lack of holder status usually can be raised—the drawer having done nothing that would preclude him from doing so—and the bank's lack of holder status becomes, in effect, a defense to payment by drawer. *See* U.C.C. §§ 3-413(2), 3-603(1).

18. Under section 4-207(2) the depositor-customer not only warrants title and other matters to the depository bank, he also *engages* that upon dishonor and notice of dishonor he will "take up" the item. *Cf.* LA. R.S. 30:3-414 (Supp. 1974).

19. Under LA. R.S. 10:3-414, any of the indorsers in the chain could, of course, have limited his undertaking to mere transfer of title by a *qualified* indorsement, such as "without recourse," but an unqualified indorser's engagement under section 3-414 runs to "the holder or to any subsequent indorser who takes it [the instrument] up."

20. *Compare* Smith v. Louisiana Bank & Trust Co., 272 So. 2d 678 (La. 1973); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Commercial Paper*, 34 LA. L. REV. 293 (1974).

21. 340 So. 2d 409 (La. App. 2d Cir. 1976).

employee listed both checks on a deposit slip, and deposited them for collection in an account in Miller's name in Commercial National Bank ("Commercial"), writing on the back of each check "for deposit to account of [Miller]." Commercial, failing to observe that the LB&T check was not properly indorsed,²² credited both checks to Miller's account, affixed to both its "all prior endorsements guaranteed" stamp, and forwarded the checks for payment to the drawee bank, Pioneer Bank & Trust Co. ("Pioneer"), which bank honored both checks and debited plaintiff's account. The mistake was discovered when LB&T foreclosed a mortgage which should have been paid off by plaintiff's check to LB&T. Miller was unable to make restitution of the proceeds of the LB&T check, and litigation followed.

The Second Circuit, applying pre-Commercial Law principles, held (1) that plaintiff was entitled to judgment against Pioneer, since the latter paid an item that was not properly payable, due to the lack of the payee's indorsement;²³ (2) that Commercial was liable to Pioneer on its guaranty of all prior indorsements;²⁴ (3) with respect to Commercial's negligence action against plaintiff, the court found no liability, in that Commercial itself should have sought clarification of the obvious inconsistency between the check and the deposit slip. Judgment was also granted Commercial against its depositor, Miller. Under the Commercial Laws, the court's ruling with respect to the plaintiff-drawer versus the drawee bank would without doubt be the same.²⁵ The liabilities between drawee-payor bank and the depository-collecting bank, and between the latter bank and drawer, would probably be the same under the Commercial Laws as well though the methodology is different.

Under the Commercial Laws, the warranty of section 4-207(1)(a) replaces and renders unnecessary the "PEG" stamp.²⁶ Therefore, if the

22. The check made payable to Miller was not indorsed by Miller, but this matter was not at issue since it ultimately was paid to Miller as intended. *Cf.* LA. R.S. 10:4-205(1) (Supp. 1974).

23. The drawer's order to drawee was to pay Louisiana Bank and Trust or *its* order. Without LB&T's indorsement, Pioneer accomplished neither result. The ruling would be the same under LA. R.S. 10:4-401 (Supp. 1974) and U.C.C. section 4-406 imposes no duty whatsoever on a drawer to discover a missing indorsement.

24. Under the applicable local clearinghouse agreement, Commercial's "PEG" stamp guaranteed prior indorsements even though the first indorsement was missing. LA. R.S. 10:4-207(1) (Supp. 1974) accomplishes this result anyway. See note 26, *infra*.

25. See LA. R.S. 10:4-401(1) (Supp. 1974).

26. See *id.* 10:4-207(3) (Supp. 1974), and U.C.C. comment 2 thereto. The warranties of section 4-207(1) apply to a missing, as well as a forged, indorsement.

same case were to arise today, the liability of Commercial to Pioneer would be a matter of breach of the section 4-207(1)(a) warranty by Commercial that it either had a good title to the item, or was authorized to obtain payment on behalf of one who did have good title.²⁷ Seemingly the warranty would be breached, in that Commercial could not itself have had title without LB&T's indorsement (or a right to supply it, had LB&T been a "customer" of Commercial),²⁸ and Commercial arguably was not authorized to obtain payment by one who had title.²⁹ But liability is not automatic; in addition to the question whether Commercial did in fact represent a party who had title, there is the requirement of section 4-207(4) that the claim for breach of warranty be made within a reasonable time after the claimant learns of the breach. Because the erroneously credited account is continuously being depleted, and the account holder in question is sometimes unable to respond financially in such cases, dilatory action by the warrantee under subsection (4) can result in a discharge of the warrantor to a large portion of the warranty claim.

Despite the presence of new potential pitfalls, the payor bank/collecting bank litigation would most likely be decided the same today as it was in *Davis*. Perhaps the collecting bank-drawer aspect of that case would also have the same result today. In effect, the Second Circuit found that both the drawer and the collecting bank were negligent,³⁰ and the "tie" went to the drawer.³¹ But the pre-Commercial Laws legal principles did

See Feldman Const. Co. v. Union Bank, 28 Cal. App. 3d 731, 104 Cal. Rptr. 912 (Ct. App. 1972).

27. *See* American Nat'l Bank v. Foodbasket, 493 P.2d 403 (Wyo. 1972) ("title" equated with marketability).

28. *See* LA. R.S. 10:4-104(1)(e) (Supp. 1974).

29. Lacking a delivery to it, Louisiana Bank and Trust would not have had title, and logically, the drawer himself cannot be said to have had title; the latter point is not without some confusion, however. *Compare* Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358 (1962) and *Jett v. Lewis State Bank*, 277 So. 2d 37 (Fla. Dist. Ct. App. 1973), with *Prudential Ins. Co. of America v. Marine Nat'l Exch. Bank*, 315 F. Supp. 520 (E.D. Wis. 1970) and *International Indus., Inc. v. Island State Bank*, 348 F. Supp. 886 (S.D. Tex. 1971). The indicated cases do not directly involve the drawer's title to a non-delivered instrument as a warranty issue; rather, the issue in those cases was whether the drawer could be called a "true owner" for purposes of an action under U.C.C. section 3-419(1).

30. 340 So. 2d at 413. The burden is upon the depository bank to make sure that indorsements are valid. *See* Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 303 F. Supp. 401 (M.D. Fla. 1969), *aff'd*, 431 F.2d 341 (5th Cir. 1970); *Birmingham Trust Nat'l Bank v. Central Bank & Trust Co.*, 49 Ala. App. 630, 275 So. 2d 148 (Ala. Civ. App.), *writ denied*, 275 So. 2d 153 (Ala. 1973).

31. *Cf.* LA. R.S. 10:3-406, 4-406(2)-(3) (Supp. 1974).

not recognize the warranties now implied by section 4-207(2). Though the drawer in *Davis* did not transfer title to the LB&T check to Commercial, it did "transfer" for collection purposes,³² and it would follow that the drawer made the same warranty to Commercial that Commercial as a collecting bank made to Pioneer³³—if the drawer was a "customer" who received a settlement. Drawer arguably was a customer, but it is equally arguable that he received no "settlement or other consideration" within the meaning of subsection (2). Accordingly, the drawer in *Davis* would have made no warranty under section 4-207(2).³⁴

A final theory exists by virtue of the enactment of the Commercial Laws under which a court could hold favorably for a collecting bank against a drawer. The theory arose in *Cooper v. Union Bank*,³⁵ a decision of the California Supreme Court in which the identical U.C.C. section 3-404 was held to include equitable estoppel, invocable against a payee to avoid an *unconscionable* result.³⁶ Because the California court could just

32. 340 So. 2d at 413.

33. The warranty is one of good title in either instance; Commercial's warranty arises under section 4-207(1), while drawer's warranty—if any—arises under section 4-207(2).

34. Miller certainly was a "customer" within the meaning of LA. R.S. 10:4-104(1)(3), in that he had an account with Commercial, but section 4-104 is prefaced by an "unless the context otherwise requires" clause. Within the context of section 4-207(2) the term probably refers more precisely to a person "for whom the bank has agreed to collect items," i.e., the depositor. Miller was not the depositor—the drawer was, and the drawer received no "consideration." If plaintiff was acting for Miller in a representative capacity, then Miller made a warranty under section 4-207(2), but if plaintiff had no authority to act for Miller, he must be said to have acted for himself personally, and perhaps would have made a warranty not as a "customer" of Commercial but as a person for whom the bank agreed to collect the item.

A very reliable, but not failsafe, method of determining the warranty liability of a depositor is to determine whether he would have been liable on his signature had the item been returned to the depository bank as a dishonored item. Had that occurred in *Davis*, and had the Commercial Laws applied, *Davis* probably would not have been liable as a drawer in an action by Commercial, since Commercial's failure to observe reasonable commercial standards (i.e., overlooking the discrepancy between the deposit slip and the check) makes unavailable to it the means of precluding *Davis* from raising the one fatal flaw in Commercial's suit: without Louisiana Bank and Trust's indorsement, Commercial cannot be the "holder," and that being so, it is questionable whether a non-holder can maintain an action on the instrument. It is highly questionable whether the drawer's engagement runs to a non-holder, the payment to whom would not discharge the drawer. See U.C.C. §§ 3-406, 3-413(2), 3-603; cf. *id.* § 3-301.

35. 9 Cal. 3d 371, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).

36. The court relied on the fact that section 23 of the Negotiable Instrument

as readily have applied an estoppel-to-avoid-unconscionability theory under U.C.C. section 1-103,³⁷ a Louisiana court could rule similarly against the drawer in a non-forgery case such as *Davis*. While Louisiana expressly recognizes "equitable estoppel,"³⁸ and implicitly recognizes unconscionability as a grounds for avoidance of an obligation,³⁹ so that these theories can be applied through section 1-103, the *Cooper* case is readily distinguishable.⁴⁰

THE BANK-CUSTOMER RELATIONSHIP

Because the banking world is increasingly one of sophisticated machine technology, the Fourth Circuit's decision in *Hibernia National Bank in New Orleans v. Lee*⁴¹ is almost reassuring in that its facts disclose a banking error of the human variety. The decision itself, however, is unfortunate. A review of the facts of the *Lee* decision readily discloses that undue criticism of the majority opinion would be unfair; rather, the opinion simply missed the opportunity to eliminate, by a policy ruling, a bank-customer problem of possibly frequent occurrence. Plaintiff had a car loan at Hibernia on which monthly installment payments were owed. She opened a checking account with the bank, signing a signature card containing a provision which empowered Hibernia to *charge* against her

Law had been similarly construed. *See id.* at 383-84 & n.17, 507 P.2d at 618-19 & n.17, 107 Cal. Rptr. at 10-11 & n.17.

37. LA. R.S. 10:1-103 (Supp. 1974) states the same principle as U.C.C. section 1-103, omitting common law terms found in the U.C.C. section.

38. *See, e.g.*, *American Bank & Trust Co. v. Trinity Universal Ins. Co.*, 251 La. 445, 205 So. 2d 35 (1967); *Babin v. Montegut Ins. Agency, Inc.*, 271 So. 2d 642 (La. App. 1st Cir. 1972); *Calhoun v. Huffman*, 217 So. 2d 733 (La. App. 3d Cir.), *writ refused*, 253 La. 878, 220 So. 2d 460 (La. 1969).

39. *See, e.g.*, *Smith v. Everett*, 291 So. 2d 835 (La. App. 4th Cir. 1974), *writ denied*, 294 So. 2d 827 (La. 1974); *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529 (La. App. 4th Cir. 1969); *Broussard v. Fidelity Standard Life Ins. Co.*, 146 So. 2d 292 (La. App. 3d Cir. 1962); *Housecraft Div. of Southern Siding Co. v. Tatum*, 130 So. 2d 524 (La. App. 4th Cir. 1961). *Cf. Marcello v. Bussiere*, 284 So. 2d 892 (La. 1973); *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973) (regarding disclaimer of warranty).

40. *Cooper* involved a series of forgeries of the same payee's name by payee's own employee. Payee's suit against various collecting banks was precluded by rather strong evidence of negligence, including the hiring of a known, and not-necessarily reformed gambler, whose activities went unsupervised. A significant difference exists between the handling of a forged indorsement and that of a missing indorsement. In the former case, the collecting bank may or may not itself be negligent; but handling a check which has no indorsement at all casts the bank into an almost indefensible position.

41. 344 So. 2d 16 (La. App. 4th Cir. 1977).

account "any liabilities whatsoever" that she might owe the bank.⁴² By plaintiff's version of the relevant events, on January 2, 1976, she presented to Hibernia's drive-up window teller two checks totaling \$310.74, and a deposit slip for \$175, receiving about \$40 in cash, making a loan payment and depositing the remainder. The teller's version of the transaction was that plaintiff deposited \$175, and received \$135.74 in cash—making no loan payment. The key to the controversy is that one of these two checks was made payable to the order of Hibernia Bank in the amount of \$110.27, with the annotation "For #11-016596." The sum of \$110.27 just happened to be the exact amount of her loan installment. Since she did not notice the reference to the loan note number,⁴³ and since plaintiff presented no loan payment coupon therewith, defendant's teller treated the check as an item for cash, stamping it "cashed." The tape from her machine substantiated the teller's version of the transaction.

When no payment⁴⁴ on the loan was disclosed by Hibernia's records as of February 5, 1976, the bank filed suit on the note and seized plaintiff's car. On February 27, 1976 the bank "froze" plaintiff's checking account balance of \$686.08, pursuant to the signature card agreement, causing subsequent dishonoring of plaintiff's checks. The majority opinion affirmed the lower courts dismissal of plaintiff's claim for wrongful dishonor.⁴⁵

Purely from the standpoint of wrongful dishonor, the *Lee* case presents two issues: 1) did plaintiff in fact make a payment on her loan (if so, the dishonors were wrongful); 2) was Hibernia entitled to "freeze" plaintiff's checking account, even if plaintiff made no payment on her loan? The lower court, and the Fourth Circuit, resolved the payment dispute against the plaintiff—a conclusion which finds some support in the

42. In Louisiana a bank has no right, independent of an express agreement to that effect, to apply deposited funds to the debts of the depositor. *See, e.g.*, *S.E.C. v. Affiliated Inv. Corp.*, 298 F. Supp. 178 (W.D. La. 1968), *aff'd*, 409 F.2d 570 (5th Cir. 1969); *Thomas v. Marine Bank & Trust Co.*, 156 La. 941, 101 So. 315 (1924); *Murdock & Williams v. Citizens' Bank*, 23 La. Ann. 113 (1871).

43. The check also referenced "Consumer Credit."

44. On January 2, 1976, plaintiff owed payments for the months of November, December, and January. Plaintiff drew a check to Hibernia on January 30, 1976 for \$220.54, to cover two months' payments.

45. In addition to a claim for wrongful dishonor, plaintiff alleged that defendant failed to afford her procedural due process under the fourteenth amendment. The Fourth Circuit found no "state action" in the bank's exercise of its contractual right of setoff. *Cf. Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974).

evidence.⁴⁶ Still, if it be assumed that plaintiff's attempted payment was ineffective, the key issue—raised by Judge Redmann in his dissenting opinion—must be faced: Did Hibernia, which unquestionably could have *charged* the delinquent note payment against plaintiff's checking account at any time during November, December, January and February,⁴⁷ have any right to prevent by a "freeze" on February 27th the honoring of checks drawn on that account? The answer must be "no!" The right to "charge" against the account any liabilities owed the bank does not include the right to direct that no further items be honored against the account.⁴⁸ In fact, the bank's freeze was no doubt just what Judge Redmann called it—an invalid and unlawful pledge. The resulting dishonors of plaintiff's checks were therefore wrongful under section 4-402.

MARGINAL NOTATIONS

The Commercial Laws contain no express treatment of the problem of marginal notations placed on the face of a negotiable instrument.⁴⁹ The marginal notation will be given effect,⁵⁰ if placed on the instrument at the

46. The bank's machine-generated record of the transaction was no doubt persuasive on the issue, but the bank's internal labelling of the transaction (as one of "cash") should not be given undue weight, for it is as self-serving as the plaintiff's testimony. If, for example, defendant's teller erroneously treated the \$110.27 check as a *deposit* to plaintiff's checking account, crediting same accordingly, could the court have said that the note payment was not made? The unequivocal order of the plaintiff, as embodied in the check, and directed specifically to Hibernia, was "pay to the order of Hibernia Bank," that is, "pay yourself, for #11-016596." Payment to any other person would violate that order, and be a wrongful payment.

In his dissent, Judge Redmann does point out that the failure to resolve this factual issue against the payee (Hibernia) on policy grounds tends to create the opportunity for mischief, or at least the opportunity for consumer grief through honest mistake, by payee creditors who might contend that the check made payable to them was actually "cashed," even though the amount of the check was exactly that owed them by the drawer.

47. It is inferable that plaintiff's account was minimal until the February 27th "freeze" action. By that time, suit had been filed and the note accelerated. By "charging" the account, the note may have been made "current," a result the bank perhaps did not desire at that time.

48. As a matter of the contract between plaintiff and Hibernia, plaintiff's checks had to be honored so long as they were "properly payable," unless the bank had by exercise of its right of charge (*e.g.*, LA. R.S. 10:4-401, 4-303 (Supp. 1974)), made the account insufficient.

49. Should the notation constitute a condition to the undertaking of the obligor, the instrument may be rendered non-negotiable. *See* Southern Baptist Hosp. v. Williams, 89 So. 2d 769 (La. App. Orl. Cir. 1956).

50. *See, e.g.*, Greiner v. Rogers, 450 S.W.2d 665 (Tex. Ct. App. 1969); Fleming v. Becker, 14 Ariz. App. 347, 483 P.2d 579 (1971). Such decisions exemplify the

time of execution and with the intention that it become a part of the instrument. A common use of the marginal notation is to effect a compromise⁵¹ of a claim by noting on a check, "In full and complete satisfaction and release of all claims against drawer," or comparable language. But, as discovered by the defendant in *Terra Trucks, Inc. v. Weber*,⁵² the marginally noted check must be taken by the creditor-payee as full payment of the disputed sum; if not, there is no compromise. The defendant in *Weber* lost the compromise issue principally because her marginal notation was not sufficiently descriptive.⁵³

The issue raised in *Weber*, which is actually related to the broader legal issue of when a check is taken in payment,⁵⁴ rather than as a conditional offer of payment, is an important one. With the proper language, a marginal notation can be an effective means of bringing the compromise defense into the lawsuit.⁵⁵ The marginal notation should be accompanied by a letter to the creditor-payee spelling out in unambiguous terms the effect of taking the check intended by the drawer to be a tender in compromise of the obligation.⁵⁶

For the creditor-payee, receipt of a check properly noted by the drawer as a tender in compromise of the disputed claim must be handled carefully. Refusing the check, or refusing to cash it, is a safe but unpalatable alternative, and striking out the marginal notation will not avail the creditor.⁵⁷ Section 1-207 of the Commercial Laws may give the creditor-payee a way to avoid the compromise issue: this section seems to permit

operation of LA. R.S. 10:1-103 (Supp. 1974): "[U]nless displaced by the particular provision of this title, the other laws of Louisiana shall apply."

51. LA. CIV. CODE arts. 3071-3083.

52. 346 So. 2d 275 (La. App. 4th Cir. 1977).

53. Defendant had contracted for landfill services to be performed by plaintiff, and was either unhappy with that performance, or with the agreed price of \$2,200. Defendant delivered a check to plaintiff for \$1,600 bearing the notation "Fill Pasadena Lots" on the lower left face of the check. Plaintiff accepted the check.

54. See, e.g., *Seliga v. American Mut. Liab. Ins. Co.*, 174 So. 2d 878 (La. App. 4th Cir. 1965); *Pirkle & Williams, Inc. v. Shreveport Jitney Jungle, Inc.*, 140 So. 837 (La. App. 2d Cir. 1932).

55. See *A. Ray Curtis Co. v. Barnes*, (Utah, 1976) 554 P.2d 212 (Utah 1977) (drawer placed on the check the notation "endorsement of this check constitutes payment in full," a tactic which resulted in a common law *accord and satisfaction* upon indorsement).

56. See LA. R.S. 10:3-119(1) (Supp. 1974): "As between the obligor and his immediate obligee . . . the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction . . ."

57. *A.G. King Tree Surgeons v. Deeb*, 19 U.C.C. Rep. 167 (N.J. Dist. Ct. 1976).

the payee to indorse the marginally noted compromise check "without prejudice" or "under protest."⁵⁸ Two U.C.C. decisions have permitted creditor-payees to avoid the consequences of the drawer's "in full payment" notations by reservation of right words in the payee's indorsement.⁵⁹ If the decisions are correct in their underlying premise that U.C.C. section 1-207 effects a change in common law theory of accord and satisfaction,⁶⁰ it would seem arguable that section 1-207 provides the Louisiana creditor with a very nice way of avoiding the compromise issue otherwise created by the check marginally noted "in full payment" or the like.

58. LA. R.S. 10:1-207 (Supp. 1974) provides that:

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. Such words as "without prejudice," "under protest" or the like are sufficient.

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

60. For a discussion of the legislative history of U.C.C. section 1-207, U.C.C. comments thereto, and analysis of the effect of the section on the "accord and satisfaction issue," see *Hawkland, The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COMM. L.J. 329 (1969). Professor Hawkland presents plausible arguments on both sides of the issue. Because Louisiana's enactment of title 10 was not a complete revision of the commercial transactions field, as was true in the common law states, it can be argued that LA. R.S. 10:1-207 (Supp. 1974) applies only to reservation of rights on *negotiable* instruments, which a check marginally noted "in full payment" might not be. LA. R.S. 10:3-104(1)(b) (Supp. 1974). Buttressing this argument is the fact that Louisiana did not enact U.C.C. section 3-802 pertaining to the effect of a check on the underlying obligation (though Louisiana jurisprudence is not contrary thereto), and the fact that section 1-207 contains no comment by the Law Institute, something one would perhaps expect if Civil Code article 3071 was to be affected.