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THE "IN FULL PAYMENT" CHECK

The effect, if any, of Louisiana Revised Statutes 10:1-207[1] on the frequently encountered marginal notation "in full payment" has occupied this space on other occasions.[2] Under section 1-207 a debtor can issue a check in payment of goods or services, but reserve his right to subsequently dispute that the obligation was even owed, or was due, in the amount demanded. Such a device has commercial utility of some importance.[3] While Louisiana Revised Statutes 10:3-112(1)(f) recognizes that drawers may use the "in full payment" notation to attempt to gain a compromise of the amount demanded,[4] the Uniform Commercial Code (UCC) does not give clear guidance as to the intended result when the payee creditor (who receives the tender of an "in full payment" check drawn in an amount less than that he belives due) reacts to it by indorsing and/or depositing the check[5] with his section 1-207 "reservation of rights" explicitly noted thereon. Nationally, the cases are more-or-less evenly split on the power of the creditor to overcome the

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1. Section 1-207 states: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." La. Commercial Laws: La. R.S. 10:1-207 (1983) [hereinafter cited as La. Com. Laws].

2. See Hersbergen, The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Commercial Paper and Bank Deposits and Collections, 38 La. L. Rev. 384, 392-94 (1978); Hersbergen, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Commercial Paper and Bank Deposits and Collections, 40 La. L. Rev. 606, 611-15 (1980) [hereinafter cited as Hersbergen, 1978-1979 Term].

3. See Continental Information Sys. Corp. v. Mutual Life Ins. Co., 77 A.D.2d 316, 432 N.Y.S.2d 952 (1980). Appearing in Chapter 1 of Title 10, § 1-207 applies to the entirety of that title.

4. See La. Com. Laws § 3-112(1)(f); see also Polin v. American Petrofina Co., 589 P.2d 240 (Okla. Ct. App. 1978). Use of the "in full payment" notation in an obligation in which the amount owed is not in dispute seems to raise the issue of remission rather than the compromise issue. Compare La. Civ. Code arts. 3071 & 3073 with La. Civ. Code arts. 2199 & 2201.

5. The debtor typically will place, either on the front or the backside of the check, a notation that the check is tendered "in full payment" and that "by indorsement hereof, the Payee releases and discharges the drawer from any sums claimed to be owed by Drawer to Payee."

"in full payment" condition by use of the section 1-207 reservation of rights.[6]

In 1978, the Fourth Circuit Court of Appeal of Louisiana decided that the creditor-payee could not unilaterally cross out the debtor-drawer's "endorsement by payee discharges the drawer" notation on the back of the check, as payee's act of endorsement (or negotiation) constituted an acceptance of the drawer's offer of compromise.[7] Although the reservation of rights issue was before the fourth circuit in that case,[8] section 1-207 was not discussed by the court and apparently played no part in the outcome. The fourth circuit obtained a similar result in 1982,

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6. The following cases support the view that § 1-207's reservation of rights can overcome the "in full payment" notation: Slavenburg Corp. v. Kenli Corp., 36 U.C.C. Rep. 8 (E.D. Pa. 1983); Miller v. Jung, 361 So. 2d 788 (Fla. Dist. Ct. App. 1978); Kroulee Corp. v. Klein & Co., 103 Misc. 2d 441, 426 N.Y.S.2d 206 (1980); Ayer v. Sky Club, Inc., 70 A.D.2d 863, 418 N.Y.S.2d 57 (1979); Lange-Finn Contr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 2d 15, 403 N.Y.S.2d 1012 (1978); Braun v. C.E.P.C. Distribs., Inc., 77 A.D.2d 358, 433 N.Y.S.2d 447 (1980); Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Kilander v. Blickle Co., 280 Or. 425, 571 P.2d 503 (1977); Scholl v. Tallman, 247 N.W.2d 490 (S.D. 1976).

By contrast, an equally impressive number of cases refuse to permit § 1-207 to block the compromise resulting from the deposited or certified "in full payment" check: Eder v. Yvette B. Gervey Interiors, Inc., 407 So. 2d 312 (Fla. Dist. Ct. App. 1981); Yelen v. Cindy's, Inc., 386 So. 2d 1234 (Fla. Dist. Ct. App. 1980); American Food Purveyors, Inc. v. Lindsay Meats, Inc., 153 Ga. App. 383, 265 S.E.2d 325 (1980); Eppling v. Jon-T Chemicals, Inc., 363 So. 2d 1263 (La. App. 4th Cir. 1978); Loh v. Safeway Stores, Inc., 47 Md. App. 110, 422 A.2d 16 (1980); Chancellor, Inc. v. Hamilton Appliance Co., 175 N.J. Super. 345, 418 A.2d 1326 (1980); A.G. King Tree Surgeons v. Deeb, 14 N.J. Super. 346, 356 A.2d 87 (1976); Blottner, Derrico, Weiss & Hoffman v. Fier, 101 Misc. 2d 371, 420 N.Y.S.2d 999 (1979); Jahn v. Burns, 593 P.2d 828 (Wyo. 1979).

The issue has generated a substantial amount of commentary. See, e.g., Caraballo, 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, 11 Seton Hall L. Rev. 445 (1981); Del Duca, Handling "Full Payment" Checks, 13 U.C.C. L.J. 195 (1981); Hawkland, The Effect of UCC § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check, 74 Com. L.J. 329 (1969); Rosenthal, Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code, 78 Colum. L. Rev. 48 (1978); Comment, Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code, 18 Buffalo L. Rev. 539 (1969); 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).

7. Eppling v. Jon-T Chemicals, Inc., 363 So. 2d 1263 (La. App. 4th Cir. 1978). The case is discussed in Hersbergen, 1978-1979 Term, supra note 2, at 611-15.

8. When the payee in *Eppling* had crossed-out the drawer's "in full payment" notation, he had added the words "The endorsement of this check by Payee does not constitute a release of any claims that Payee has against the Maker [*sic*] hereof." Those words appear to meet the § 1-207 requirement as to "explicit reservation of rights" that such words as "'without prejudice', 'under protest' or the like are sufficient." La. Com. Laws § 1-207. Cf. Bivins v. White Dairy, 378 So. 2d 1122 (Ala. App. 1979) (noting that payee's act of scratching out the drawer's notation and substituting the words "without recourse" did not constitute an "explicit reservation of rights" under § 1-207).

and once again the section 1-207 issue was present but not discussed.[9] In 1983, the Louisiana Supreme Court decided in *RTL Corp. v. Manufacturer's Enterprises*[10] that a compromise had not germinated, although a creditor had substituted the words "partial payment" for the debtor-drawer's "payment in full" notation on a tendered check and then had deposited the check. Arguably, the section 1-207 issue was involved,[11] but it was not discussed by the court.

Recently the first circuit court of appeal has adopted the view of the fourth circuit that the payee-creditor may not, by unilateral action, alter or modify the effect of the debtor's "in full payment" notation suggesting, as did the fourth circuit in 1978,[12] that the creditor in Louisiana may not override that notation via section 1-207. *Harrington v. Aetna Life & Casualty Co.*,[13] the first circuit's decision in question, also suffers from the shortcoming of prior cases in failing to discuss the effect, if any, of section 1-207. The *Harrington* decision expressly rests on the fourth circuit's 1975 decision in *Charles X. Miller, Inc. v. Oak Builders, Inc.*[14] and on the decision of the Louisiana Supreme Court in the 1930 case of *Berger v. Quintero*.[15] Because the facts of both *Oak Builders* and *Quintero* arose prior to January 1, 1975, section 1-207 had no application thereto. Even if cases such as *Oak Builders* and *Quintero* can be said to form part of what Louisiana Revised Statutes 10:1-103

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9. Ingraham Concrete Structures, Inc. v. Champion Shipyards, Inc., 423 So. 2d 752 (La. App. 4th Cir. 1982). The drawer's check was free of notations, but the letter accompanying it advised the payee that the check was what the drawer felt "is sufficient to cover anything you may have done on behalf of Champion Shipyards, Inc. as per your invoice nN0117, your job number 34." Id. at 753. The response of the payee was to obtain certification of the check and subsequently endorse and negotiate it with the words "all rights reserved, law suit pending." As in *Eppling*, the drawer's offer of compromise was held to have been accepted, the reservation of rights notwithstanding. Given that the certification preceded the reservation of rights, the offer of compromise was accepted before the reservation of rights. The opinion indicates, however, that the result would have been the same in the absence of the certification.

10. 429 So. 2d 855 (La. 1983).

11. It is debatable whether the notation "partial payment," substituted for "payment in full," would constitute an "explicit reservation of rights" under La. Com. Laws § 1-207. See supra notes 1 & 8.

12. See supra note 7.

13. 441 So. 2d 1255 (La. App. 1st Cir. 1983).

14. 306 So. 2d 449 (La. App. 4th Cir. 1975).

15. 170 La. 37, 127 So. 356 (1930). The *Harrington* opinion cited the following quotation from *Quintero*:

> If plaintiff was not satisfied with the ["in full"]settlement tendered, he should not have retained the check, and caused it to be certified by the bank upon which it was drawn, but should have returned it, in the absence of a waiver of the condition attached to the remittance. By retaining the check, and causing it to be certified, he is now precluded from rejecting it, and suing defendant upon the entire claim.

Id. at 39, 127 So. at 357.

refers to as "the other laws of Louisiana,"[16] that section itself admonishes that such "other laws" apply "unless displaced by the particular provisions" of Title 10. One such particular provision that arguably displaces whatever other laws of Louisiana there are which predate January 1, 1975 is section 1-207. It is doubtful that the final chapter and verse has been written on this issue.[17]

NEGOTIABLE INSTRUMENTS

The Rights of a Holder in Due Course

In the course of rendering an opinion in a particular case, a court occasionally leaves an indelible, but erroneous or misleading interpretation of the law. Such unfortunate slips of the judicial quill should be discouraged. The opinion in *American Bank & Trust Co. v. Sunbelt Environmental Systems*[18] contains an example of an erroneous interpretation in dicta. The bank was the holder of Sunbelt's promissory note and sought the protection of Louisiana Revised Statutes 10:3-305(2) to avoid Sunbelt's asserted defense of failure or want of consideration.[19]

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16. A point not necessarily conceded here.

17. The case of Fritz v. Marantette, 404 Mich. 329, 273 N.W.2d 425 (1978) expressly declined to rule on the interpretation of § 1-207, citing the lack of agreement among the commentators and the then-limited precedent but offered an interesting argument that the legislative history of the UCC does not support the view that § 1-207 applies to the "in full payment" check. As the court observed, § 3-802 of the 1952 Official Draft of the UCC had a subsection (3) which read:

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

Because neither § 1-207 nor § 3-802 of the 1952 Official Draft made a cross-reference to the other, the Michigan court took that as suggestive of a lack of intent that § 1-207 should apply to the "in full payment" check. Both Rosenthal and Hawkland, make the same point by observing that § 1-207, if applicable to the "in full payment" check, would make a fundamental change in the common law of accord and satisfaction—without the slightest hint in the comments to § 1-207 that such was intended. Rosenthal, supra note 6 at 61; Hawkland, supra note 6 at 329.

Moreover, § 1-102 states as among the underlying purposes and policies of the UCC the simplification, clarification, and modernization of commercial law, as well as the uniformity of that law, which are all to be kept in mind by a court when construing and applying the UCC. In the light of § 1-102 it would seem that the application of § 1-207 to the "in full payment" check would not promote the stated objectives. Both arguments of statutory construction seem compelling, despite the failure of Louisiana to adopt § 3-802 and even though the UCC did not retain subsection (3) of § 3-802 in later official drafts.

18. 451 So. 2d 1111 (La. App. 1st Cir. 1984).

19. Section 3-305(2) permits the holder in due course to take a negotiable instrument "free from . . . all defenses of any party to the instrument with whom the holder has

The court ultimately held on rehearing that the bank, which had dealt with Sunbelt, was not a holder in due course and thus was not entitled to the protection of § 3-305,[20] but stated along the way that:

> [W]hile possibly other defenses may be asserted against a holder in due course by a party with whom the holder in due course has dealt (by negative inference from LSA-R.S. 10:3-305(2)), failure or want of consideration is *never* a defense as against a holder in due course.[21]

In point of fact, the defense of failure or want of consideration (and any other defense) is assertable under § 3-305 against a holder in due course by a party with whom the holder in due course has dealt.[22]

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not dealt," with the exception that certain defenses such as minority, incapacity, duress, discharge in bankruptcy, and certain varieties of fraud are assertable against a holder in due course.

20. The possessor of a negotiable instrument can qualify for the protection of § 3-305 by meeting the requirements of §§ 3-302 and 3-202. La. Com. Laws §§ 3-302, 3-202. See also La. Com. Laws §3-201(1).

21. 451 So. 2d 1111, 1119 (La. App. 1st Cir. 1984) (emphasis added).

22. In re Elkins Energy Corp., 21 B.R. 481 (W.D. Va. 1982); Wilmington Trust Co. v. Delaware Auto Sales, 271 A.2d 41 (Del. 1970); Standard Fin. Co. v. Ellis, 3 Hawaii App. 614, 657 P.2d 1056 (1983); Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968); Bucci v. Paulick, 227 Pa. Super. 492, 419 A.2d 1255 (1980). See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 14-9 (2d ed. 1980). In support of the position asserted, the first circuit in the *Sunbelt* case cites La. Com. Laws § 3-306(c) and *Courtesy Fin. Servs. v. Hughes*, 424 So. 2d 1172 (La. App. 1st Cir. 1982). The *Courtesy Financial* case in no way supports the notion that failure or want of consideration cannot be asserted against a holder in due course by one with whom the holder in due course has dealt. Section 3-306, in reciting the mirror image of § 3-305, does separately list—as among the infirmities and equities subject to which the holder having not the rights of a holder in due course takes the instrument—the defenses of "want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose" and "all defenses of any party which would be available in an action on a simple contract." The fact that nondelivery and failure of consideration are obviously examples of "defenses . . . available in an action on a simple contract" is perhaps the source of the first circuit's confusion. Cf. La. Civ. Code art. 2046 (dissolution of the contract). However, § 3-306 has nothing to do with the rights of a holder in due course, even when the holder in due course has "dealt" with the defendant. Furthermore, § 3-305—which has everything to do with the rights of a holder in due course—clearly states "all defenses," in which case the negative implication of the "has not dealt" language would mean any and all defenses (however categorized in § 3-306) could be asserted by one with whom the holder in due course has dealt.