

**Accord and Satisfaction Under
Uniform Commercial Code Section 1-207:
*Scholl v. Tallman***

An accord and satisfaction is “a discharge by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant as full satisfaction of his claim.”¹ Although accord and satisfaction can take different forms, this Case Comment will focus on the results achieved when a debtor tenders a check in full settlement of an unliquidated debt. The general rule is applied when the amount or existence of a debt is in dispute and the debtor tenders a check in full satisfaction of his obligation. The cashing of the check by the creditor, with knowledge that the check was tendered in full settlement, extinguishes the debt. Thus, an unsuspecting creditor may find himself legally powerless to collect the full amount of a debt owing to him because he cashed a check from the debtor marked “payment in full.”

In *Scholl v. Tallman*,² the Supreme Court of South Dakota held that a creditor may avoid accord and satisfaction although he cashes a check tendered by a debtor in full satisfaction of an unliquidated debt.³ The creditor in *Scholl* cashed the debtor’s check after striking out the debtor’s notation on the back of the check that it was offered in full settlement of the debt.⁴ In addition, the creditor wrote on the back of the check that he did not accept it in full satisfaction, and he noted the amount that he believed was still owed by the debtor.⁵ The South Dakota court, taking a position that is a radical departure from the common-law doctrine,⁶ held that the creditor’s precautions in *Scholl* were sufficient to avoid accord and satisfaction and that he could sue for the amount he claimed to be due.⁷

The South Dakota court based its decision in part upon section 1-207 of the Uniform Commercial Code [hereinafter referred to as Code], which provides: “A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as ‘without prejudice,’ ‘under protest’ or the like are sufficient.”⁸ Since the Code has been

1. 6 A. CORBIN, CONTRACTS § 1276, at 115 (1962).

2. 247 N.W.2d 490 (S.D. 1976).

3. *Id.* at 492.

4. *Id.* at 491.

5. *Id.*

6. *But see* Siegele v. Des Moines Mut. Hail Ins. Ass’n, 28 S.D. 142, 132 N.W. 697 (1911).

7. 247 N.W.2d at 492-93.

8. U.C.C. § 1-207.

adopted in forty-nine states and since one of the underlying purposes is "to make uniform the law among the various jurisdictions,"⁹ the *Scholl* decision could have a broad impact upon the law throughout the country.

However, *Scholl* should not be followed in other jurisdictions for a variety of reasons. First, the South Dakota court based its decision in part upon weak case law interpreting a South Dakota pre-Code statute. Second, Code section 1-207 was not intended by the drafters of the Code to apply to accord and satisfaction. Third, the *Scholl* court made questionable use of prior case authority in applying Code section 1-207. Finally, the South Dakota court failed to recognize that accord and satisfaction is built upon the basic contract doctrine of mutual assent.

I. BASIC ACCORD AND SATISFACTION DOCTRINE

In order to discuss the accord and satisfaction framework in which *Scholl* was decided, a distinction must first be drawn between liquidated and unliquidated debts. A liquidated debt is either a fixed sum or one that can be calculated from figures at hand.¹⁰ *Pinnel's Case*,¹¹ decided by the Court of Common Pleas in 1602, stated in dictum that partial payment of a liquidated debt on the day the debt was due would not satisfy the debt.¹² This dictum was adopted over 280 years later by the House of Lords in *Foakes v. Beer*,¹³ and it has been the accepted doctrine since that time.¹⁴

The rule of *Foakes v. Beer*, however, has not been applied when a debt is unliquidated,¹⁵ that is, when either the debtor's liability or the amount due is in dispute; therefore, it is possible to achieve accord and satisfaction of an unliquidated debt by substituting partial payment for payment in full. First there must be a bona fide dispute over the debt.¹⁶ The debtor then offers to satisfy the debt by paying some amount in the disputed range. This is frequently accomplished by sending a check for less than the amount claimed, while indicating, usually by notation on the check, that it is to be accepted as payment in full. If the creditor cashes the check, an accord and satisfaction will be found in the vast majority of jurisdictions.¹⁷ The analysis is usually in terms of offer and acceptance:

9. U.C.C. § 1-102(2)(C).

10. *Charnley v. Sibley*, 73 F. 980, 982 (7th Cir. 1896).

11. 77 Eng. Rep. 237 (C.P. 1602).

12. *Id.* at 237.

13. 9 L.R. 605 (H.L. 1884).

14. 6 A. CORBIN, CONTRACTS § 1281, at 137 n.31 (1962).

15. *Baird v. United States*, 96 U.S. 430, 431 (1877).

16. *Fire Ins. Ass'n v. Wickham*, 141 U.S. 564, 577 (1891).

17. 6 A. CORBIN, CONTRACTS § 1279, at 127 n.17 (1962); 15 S. WILLISTON, CONTRACTS § 1854, at 543 n.7 (3d ed. 1972).

[W]hen a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule, but one of two courses open to the creditor; either to decline the offer and return the check or accept it with the condition attached. The moment the creditor indorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition¹⁸

In most cases, this rule is not changed by the fact that the creditor scratches out the words "paid in full" or adds a statement indicating that the creditor accepts the money as partial payment only.¹⁹

II. THE DECISION

During 1971, the Scholl Construction Company performed work for Clinton and Virginia Tallman. The Tallmans made several payments in cash and by check during 1971 and 1972 toward satisfaction of their \$2,927.37 debt owed to Scholl. Since the Tallmans believed that several hundred dollars in cash payments had not been credited to their account, they sent a check on November 4, 1974, for \$500 marked "Wesley Scholl Settlement in Full for all Labor and Materials to Date."²⁰ Scholl then cashed the check after striking out the Tallmans' notation and writing "Restriction of payment in full refused. \$1,826.65 remains due and payable."²¹ The trial court held with the weight of authority that accord and satisfaction was a complete defense to Scholl's suit for the balance of the debt he claimed was due.²² The Supreme Court of South Dakota reversed the lower court's decision, but limited its decision to the facts presented by *Scholl*, in which the creditor conditioned his endorsement of the Tallmans' check with an explicit reservation of rights.²³ The decision was based on the construction of two South Dakota statutes.

The first statute, South Dakota Compiled Laws section 20-7-4, provides: "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation."²⁴ The *Scholl* court based its interpretation of this

18. *Qualseth v. Thompson*, 44 S.D. 190, 193, 183 N.W. 116, 116 (1921) (quoting 1 RULING CASE LAW *Accord and Satisfaction* § 32, at 196-197 (1914)). *Accord*, *Hutchinson v. Culbertson*, 161 Pa. Super. Ct. 519, 55 A.2d 567 (1947). See also 1 C.J.S. *Accord and Satisfaction* §§ 33-34 (1936).

19. See, e.g., *Boohaker v. Trott*, 274 Ala. 12, 145 So. 2d 179 (1962); *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373 (1932).

20. 247 N.W.2d at 491.

21. *Id.*

22. *Id.*

23. *Id.* at 492.

24. S.D. COMPILED LAWS ANN. § 20-7-4 (1967) (corresponds to S.D. REV. CODE § 787 (1919); S.D. CODE § 47.0235 (1939)).

statute upon the 1911 case of *Siegele v. Des Moines Mut. Hail Ins. Ass'n.*²⁵ In *Siegele* the South Dakota Supreme Court had held that section 20-7-4 allowed a creditor to cash a check tendered in full satisfaction of a debt without prejudicing his right to collect the balance of the debt.²⁶

The South Dakota Supreme Court explained that *Siegele* contained the rationale embodied in South Dakota's version of Code section 1-207²⁷ as well. In construing section 1-207, the South Dakota court relied on *Baillie Lumber Co. v. Kincaid Carolina Corp.*,²⁸ a North Carolina appellate court case, and *Hanna v. Perkins*,²⁹ a New York county court decision. In addition, the South Dakota court relied on text from a 1961 report of the Commission on Uniform State Laws³⁰ and on the comments of co-authors of a text on the Code.³¹ The *Scholl* court found these authorities persuasive for the proposition that Code section 1-207 authorizes a creditor to reserve his right to sue for the balance of an unliquidated debt he believes is due before cashing a check tendered in full satisfaction of that debt.³²

III. THE BASES OF THE DECISION

A. *South Dakota Compiled Laws, Section 20-7-4*

Aspects of the *Siegele* decision cast a shadow on its value as authority for the effect of a conditional endorsement under South Dakota Compiled Laws section 20-7-4.³³ First, *Siegele* arguably dealt with the attempted accord and satisfaction of a liquidated obligation, whereas *Scholl* involved an unliquidated debt. In *Siegele*, an insurance company sent a check to *Siegele* in the amount of \$400 after the company had settled with *Siegele*, according to his testimony, at \$925.³⁴ *Siegele* cashed the check for \$400 after reserving his right to the balance of the settlement amount.³⁵ At trial, the insurance company claimed that the settlement had been for \$400 and that since

25. 28 S.D. 142, 132 N.W. 697 (1911).

26. *Id.* at 144, 132 N.W. at 698.

27. S.D. COMPILED LAWS ANN. § 57-1-23 (1967).

28. 4 N.C. App. 342, 167 S.E.2d 85 (1969).

29. 2 U.C.C. Rep. Serv. 1044 (Westchester County Ct. N.Y. 1965).

30. COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT OF COMMISSION ON UNIFORM STATE LAWS TO LEGISLATURE OF NEW YORK STATE 19-20 (1961).

31. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 13-21, at 452-454 (1972).

32. 247 N.W.2d at 492.

33. At the time of the *Siegele* decision, the equivalent of SOUTH DAKOTA COMPILED LAWS § 20-7-4 was S.D. REV. CIV. CODE § 1880 (1903).

34. 28 S.D. at 143, 132 N.W. at 698.

35. *Id.*

the check was inscribed with the words, "This check accepted as payment in full for all claims to date,"³⁶ Siegele had extinguished his claim by cashing the check, whether the debt was \$400 or \$925.³⁷ In the lower court, there was a question of fraud on the part of the insurance company, and the jury found that the insurance company had indeed agreed to settle with Siegele for \$925.³⁸ Since *Siegele* was decided on the basis of the jury's finding that the obligation of the insurance company had been settled or liquidated at \$925, its value as authority on the law of accord and satisfaction is questionable. A party cannot simply refuse to pay a settled sum and thereby create an unliquidated debt.³⁹ "The test in such cases is, was the dispute honest or fraudulent? If honest, it affords the basis for an accord between the parties"⁴⁰ In *Scholl*, on the other hand, the parties had never agreed upon the amount of the debt. The debtors believed that some of their payments had not been properly credited to their account, and the creditor claimed that all of their payments had been accounted for.⁴¹ The result of *Siegele* would have been contrary to the rule of *Foakes v. Beer* if the court had allowed the insurance company's check for \$400 to satisfy its settled obligation to pay \$925. *Scholl*, on the other hand, presented the case of an unliquidated debt, to which the *Foakes* prohibition of accord and satisfaction is not applicable at common law.⁴² Therefore, if the court wished to interpret section 20-7-4 to prevent accord and satisfaction of an unliquidated debt, *Siegele* was improper authority upon which to base this interpretation.

Even assuming, *arguendo*, that the debt in *Siegele* was unliquidated, the *Scholl* court's use of *Siegele* was questionable. The *Siegele* construction of section 20-7-4 had arguably been overruled, or at least severely limited, by the South Dakota Supreme Court in a case not even mentioned in the *Scholl* opinion—*Adams v. Morehead*.⁴³ In *Adams*, the debtor sent a draft for \$100 "to close my account"⁴⁴ in settlement of an unliquidated debt. The creditor acknowledged the draft, but wrote to the debtor asking him to sign a note for the bal-

36. *Id.*

37. *Id.* at 143-44, 132 N.W. at 698.

38. *Id.* at 143, 132 N.W. at 698.

39. *De Mars v. Musser-Sauntry Land, Logging and Mfg. Co.*, 37 Minn. 418, 35 N.W. 1 (1887).

40. *Simons v. Supreme Council Am. Legion of Honor*, 178 N.Y. 263, 265, 70 N.E. 776, 776 (1904).

41. *Scholl v. Tallman*, 247 N.W.2d 490, 490-91 (S.D. 1976).

42. See note 15 *supra* and accompanying text.

43. 45 S.D. 216, 186 N.W. 830 (1922).

44. *Id.* at 217, 186 N.W. at 830.

ance. The lower court found the creditor's actions to be tantamount to a conditional endorsement of the draft and held that the creditor was not precluded from suing to collect the balance of the debt owed him.⁴⁵ The South Dakota Supreme Court reversed the lower court decision for the creditor,⁴⁶ bringing South Dakota in line with other authorities that state that a reservation of rights is futile when a creditor accepts partial payment of an unliquidated debt.⁴⁷ Thus, even if the debt in *Siegele* was unliquidated, it would seem that *Adams* overruled the holding in *Siegele* by implication since in *Adams* the creditor accepted a check tendered in settlement of an unliquidated debt after reserving his rights. Yet in *Scholl* the court stated that *Siegele* was never overruled.⁴⁸ Should the *Scholl* decision be followed, it should not be on the basis of the rationale contained in *Siegele*.

B. Code Section 1-207

The most significant weakness of *Scholl* arises not from the South Dakota court's construction of the state's pre-Code statute, but from its misuse of section 1-207 of the Code. When interpreting a section of the Code, the intention of the drafters, as determined from the history of the Code and the interpretation of the state adoption committees, is crucial. Often a court will have no other sources of authority upon which to rely. The history of the Code demonstrates that the drafters did not intend for Code section 1-207 to apply to accord and satisfaction and that the South Dakota legislature did not foresee such an application.

1. Legislative History

A 1948 law review article noted in relation to accord and satisfaction that:

A discerning solution has been advanced in the proposed draft of the Commercial Code, published April 15, 1948, by the National Conference of Commissioners on Uniform State Laws of the American Law Institute, § 902(3) of which reads, "Where an instrument by its terms provides that it is taken in full satisfaction of an obligation the payee by obtaining payment of the instrument or by negotiating it discharges the obligation unless he establishes that unconscionable advantage has been taken by the obligor."⁴⁹

45. *Id.*

46. *Id.* at 218, 186 N.W. at 830.

47. See note 19 *supra*.

48. 247 N.W.2d at 492.

49. Note, *Role of the Check in Accord and Satisfaction: Weapon of the Overreaching Debtor*, 97 U. PA. L. REV. 99, 109 (1948) (emphasis in original deleted).

With a minor addition, this section appeared in the 1949 draft of the Uniform Commercial Code [hereinafter referred to as 1949 Code Draft] as section 3-802(3).⁵⁰ The title of the section was "Effect of Instrument on Obligation for Which it is Given." Official Comment five to the section specifically noted that the section would apply to checks tendered in full payment of all claims. The comment further noted that the most sweeping change that section 3-802(3) would make in the common law was that an accord and satisfaction could be consummated even when a debt was undisputed and liquidated, a considerable change in the law for many states.⁵¹ This change is demonstrated by the decisions noted in the Pennsylvania Annotations to the Proposed Uniform Commercial Code, which indicate that the pre-Code decisions in that state were in accord with section 3-802(3) when the obligation was disputed, but contrary when the obligation was undisputed.⁵² In the 1950 Uniform Commercial Code Proposed Final Draft [hereinafter referred to as 1950 Final Code Draft], section 3-802(3) of the 1949 Code Draft appeared under the same title but as section 3-702(3) with modifications in the text.⁵³ The comments were similar to those in the 1949 Code Draft.

Section 1-207 first appeared in the 1950 Final Code Draft,⁵⁴ containing text, comments, and cross references identical to those included in the current Code.⁵⁵ The common situations in which section 1-207 was meant to apply were outlined in the first comment to that section and were explained by one author as follows:

Obviously, the section should apply to the situations in which a buyer makes an instalment payment under a contract which he thinks the seller has breached, or the buyer accepts a delivery that he feels does not conform to the contract, or the seller goes ahead with his performance in spite of an anticipatory repudiation by the buyer.⁵⁶

50. U.C.C. § 3-802(3) (1949 draft) provided:

Where an instrument by its terms provides that it is taken in full satisfaction of an obligation the payee by obtaining payment of the instrument or by negotiating it discharges the obligation unless he establishes that unconscionable advantage has been taken by the obligor, or unless the drawer initiates the collection of the instrument on behalf of the payee.

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

52. SUBCOMMITTEE ON THE PROPOSED UNIFORM COMMERCIAL CODE OF THE JOINT STATE GOVERNMENT COMMISSION OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 94 (1952).

53. U.C.C. § 3-702(3) (1950 proposed final draft) provided:

Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee satisfies the underlying obligation by negotiating the instrument or obtaining its payment unless he establishes that the original obligor has taken unconscionable advantage in the circumstances or unless it is the drawer who has initiated collection on behalf of the payee.

54. U.C.C. § 1-207 (1950 proposed final draft).

55. See U.C.C. § 1-207.

56. Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by*

The drafters of the Code probably did not intend to write two sections affecting accord and satisfaction doctrine, and it is clear from the comments that section 3-802(3) was meant to apply to accord and satisfaction. The Official Comments usually point out significant changes in existing case law.⁵⁷ Because the Official Comments to section 1-207 fail to mention any significant change that section 1-207 might make in the established accord and satisfaction doctrine, the drafters of the Code likely did not initially intend for section 1-207 to apply to accord and satisfaction.

In the Uniform Commercial Code Official Draft of 1952 [hereinafter referred to as 1952 Official Code Draft], the number of section 3-702 was changed back to 3-802;⁵⁸ however, in a supplement to the 1952 Official Code Draft, the Enlarged Editorial Board recommended the deletion of subsection (3) of section 3-802 because the "provision evoked criticism on the ground that it would work hardship, and was open to abuse."⁵⁹ That was the beginning of the end for section 3-802(3); the same comment appeared in the 1954 amendments to the Code⁶⁰ and the 1956 recommendations of the Editorial Board.⁶¹ Finally, in the official 1957 text, all traces of section 3-802(3) were removed.⁶²

Section 1-207, on the other hand, has remained intact and appears in the most recent version of the Code. Since it is probable that the drafters of the Code did not intend for section 1-207 to apply to accord and satisfaction cases in 1950 and 1952 when section 1-207 appeared in the same drafts as section 3-802(3) (designated section 3-702(3) in the 1950 version of the Code), one would assume that if the drafters had intended section 1-207 to fill the void left by elimination of section 3-802(3), they would have mentioned this in the comments to section 1-207 in the 1957 Code. However, as noted earlier, section 1-207 had the same comments in 1957 as in 1950 when the section was first introduced. The most plausible explanation is that

Conditional Check, 74 COM. L.J. 329, 331 (1969). This author was suggesting that section 1-207 might apply to accord and satisfaction in the manner that it was applied by the *Scholl* court.

57. *Id.* at 331.

58. U.C.C. § 3-802 (1952 official draft). Section 3-802(3) provided, "Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances."

59. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, SUPPLEMENT NO. 1 TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE 25 (1955).

60. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE AMENDMENTS 1954, at 25 (1954).

61. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 132 (1956).

62. U.C.C. § 3-802 (1957 official text).

the drafters of the Code decided to leave accord and satisfaction to the courts. The Enlarged Editorial Board may have believed that section 3-802(3) would make the doctrine of accord and satisfaction too rigid. The "abuse" envisioned by the board⁶³ may have been that debtors would begin to mark all checks "paid in full," causing unsuspecting creditors to lose their rights to collect even liquidated debts, in direct opposition to *Foakes v. Beer*.

The background of section 3-112(1)(f) is further evidence that the drafters of the Code intended that section 3-802 and not section 1-207 would apply to accord and satisfaction. Section 3-112(1)(f) of the current Code states that the negotiability of a draft is not impaired if the draft contains a statement that it is offered in full satisfaction of an obligation of the drawer.⁶⁴ The 1949 Code Draft first contained section 3-112(1)(f) with substantially the same language.⁶⁵ Official Comment four to section 3-112 of the 1949 Code Draft read: "Paragraph (f) is new. The effect of a clause of acknowledgment of satisfaction upon negotiability has been uncertain under the original section. *Its effect upon satisfaction of the obligation is covered in Section 3-802(3).*"⁶⁶ The 1950 Final Code Draft⁶⁷ and the 1952 Official Code Draft⁶⁸ contained the same section and comment. In the 1957 Code, however, the reference to section 3-802(3) in Comment four to section 3-112 was deleted,⁶⁹ since section 3-802(3) itself was deleted from the 1957 version of the Code.⁷⁰ Comment four to section 3-112 has remained the same since 1957.

If section 1-207 was meant to apply to accord and satisfaction concurrently with section 3-802(3) in 1950 and 1952 when section 3-802(3) was part of the Code, the section should have been mentioned in Comment four to section 3-112 along with section 3-802(3). If section 1-207 was meant to fill the void left by the elimination of section 3-802(3) in 1957, mention of section 1-207 should have been added to Comment four. The drafters' treatment of Comment four to section 3-112 is a clear indication that section 1-207 was never intended to apply to accord and satisfaction, either concurrently with or in place of section 3-802(3).

63. See notes 59-61 *supra* and accompanying text.

64. U.C.C. § 3-112(1)(f) provides: "(1) The negotiability of an instrument is not affected by . . . (f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer"

65. U.C.C. § 3-112(1)(f) (1949 draft).

66. U.C.C. § 3-112, Official Comment 4 (1949 draft) (emphasis added).

67. U.C.C. § 3-112, Official Comment 4 (1950 proposed final draft).

68. U.C.C. § 3-112, Official Comment 4 (1952 official draft).

69. U.C.C. § 3-112 Official Comment 4 (1957 official text) stated: "Paragraph (f) is new. The effect of a clause of acknowledgment of satisfaction upon negotiability has been uncertain under the original section."

70. See U.C.C. § 3-802 (1957 official text).

2. State Adoption Committees

Although no case law mentioned Code section 1-207 with respect to accord and satisfaction until *Hanna v. Perkins*⁷¹ in 1965, many state adoption committees recognized that a literal reading of section 1-207 could affect accord and satisfaction. The *Scholl* opinion mentioned the text of the New York annotations to section 1-207: "The Code rule would permit, in Code-covered transactions, the acceptance of a part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the performance or payment."⁷² The Massachusetts⁷³ and New Hampshire⁷⁴ versions of Code section 1-207 are accompanied by similar annotations. The authors of a Minnesota study believed that section 1-207 could allow a creditor to accept partial payment of a disputed debt and to avoid accord and satisfaction in one limited case: when the debtor paid only the portion of the debt that he admitted to be owing, and the creditor reserved his right to collect the disputed balance.⁷⁵ This situation would arise if a creditor claimed \$500, but the debtor claimed that he owed \$400, and he sent a check for \$400 marked "paid in full" instead of, perhaps, a check for \$450. According to the Minnesota study, if the creditor explicitly reserved his rights there would be no accord and satisfaction. The New York, Massachusetts, and New Hampshire annotations, and the Minnesota study show that the language of section 1-207 has been construed to alter the common-law rights of the parties to an accord and satisfaction.

South Dakota does not have a report by a special Code adoption committee. No reference is made under South Dakota Compiled Laws Annotated section 57-1-23 to the doctrine of accord and satisfaction. Whether or not the South Dakota legislature anticipated the *Scholl* interpretation of Code section 1-207 is not clear. If the South Dakota legislature did not foresee the *Scholl* interpretation of Code section 1-207 it is not alone; many other states' annotations to Code section 1-207 refer only to continuing performance after a breach of contract.⁷⁶

71. 2 U.C.C. Rep. Serv. 1044 (Westchester County Ct. N.Y. 1965).

72. 247 N.W.2d at 492. See COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT OF COMMISSION ON UNIFORM STATE LAWS TO LEGISLATURE OF NEW YORK STATE 19-20 (1961).

73. ANNOTATED LAWS OF MASSACHUSETTS, SPECIAL SUPPLEMENT CONTAINING THE MASSACHUSETTS UNIFORM COMMERCIAL CODE 41-43 (1958).

74. BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE, 1959 NEW HAMPSHIRE ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 14 (1959).

75. S. KINYON & R. McCLURE, A STUDY OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MINNESOTA LAW 40-41 (1964).

76. See, e.g., SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, PART I, THE UNIFORM COMMERCIAL CODE 34 (1960) (California);

A Florida study specifically states that section 1-207 makes no change in the current law.⁷⁷

Although the states' adoption committees were split on their interpretations of section 1-207, the legislative history of the Code demonstrates that the drafters did not intend section 1-207 to apply to accord and satisfaction. However, rather than basing its decision upon the interpretation of section 1-207 given by the drafters of the Code, the South Dakota Supreme Court chose to rely upon the interpretation of the section given by two lower courts in other states.

C. *Post-Code Cases*

The two cases relied upon by the *Scholl* court in its interpretation of Code section 1-207 stand in direct contrast to the settled case law⁷⁸ and possibly the language of section 1-207 itself.⁷⁹ *Baillie Lumber Co. v. Kincaid Carolina Corp.*⁸⁰ was a North Carolina Court of Appeals case that was not appealed. The creditor, Baillie Lumber, agreed to accept a portion of a debt owed by Kincaid Carolina in full satisfaction if paid by a certain date. Kincaid Carolina tendered two checks in payment after the stipulated date. Baillie Lumber believed that the agreement for part payment was no longer in effect, since Kincaid Carolina was late in paying, and cashed the checks after noting that it reserved the right to collect the balance of Kincaid Carolina's debt.⁸¹ The court found that the debt was liquidated, and therefore there could be no accord and satisfaction.⁸²

The court stated that Baillie Lumber had reserved its rights as provided by North Carolina's version of Code section 1-207.⁸³ However, the opinion does not resolve whether the court believed that the reservation of rights under Code section 1-207 would avoid accord and satisfaction of liquidated debts, unliquidated debts, or both. Since the North Carolina court had found that the debt in *Baillie* was liquidated, it is probable that the court was writing in relation to liquidated debts. It is not clear that the court would have applied Code section 1-207 to the accord and satisfaction of an unliquidated debt. Thus,

KANSAS LEGISLATIVE COUNCIL, UNIFORM COMMERCIAL CODE: KANSAS ANNOTATIONS 18-19 (1964); LEGISLATIVE RESEARCH COMMISSION, COMMONWEALTH OF KENTUCKY, RESEARCH PUBLICATION No. 49, UNIFORM COMMERCIAL CODE, ANALYSIS OF EFFECTS ON EXISTING KENTUCKY LAW 17-18 (1957).

77. FLORIDA BAR CONTINUING LEGAL EDUCATION, FLORIDA STUDY AND COMMENTS ON THE UNIFORM COMMERCIAL CODE 5 (1966).

78. See notes 17 and 19 *supra*.

79. See section IV. *infra*.

80. 4 N.C. App. 342, 167 S.E.2d 85 (1969).

81. *Id.* at 347-348, 167 S.E.2d at 89.

82. *Id.* at 351, 167 S.E.2d at 91.

83. *Id.* at 353, 167 S.E.2d at 93. North Carolina's version of U.C.C. § 1-207 is N.C. GEN. STAT. § 25-1-207 (1965).

the case is very weak authority for the position taken by the *Scholl* court that Code section 1-207 authorizes a creditor to avoid accord and satisfaction of an unliquidated debt simply by cashing a check upon which he has made a conditional endorsement.

*Hanna v. Perkins*⁸⁴ contains the strongest language supporting the result reached in *Scholl*. The court in *Hanna* first came to a conclusion similar to that reached by the *Baillie* court: there was a liquidated obligation and therefore no basis for an accord and satisfaction.⁸⁵ But, in dictum, the *Hanna* court stated:

If it were not that this court finds that triable issues of fact are present, this court would deny the motion by holding this particular section of the code [section 1-207] would seem to favor plaintiff's overriding indorsement of "Deposited under protest" as a reservation of his right to collect payment of balance.⁸⁶

The main triable issue of fact in *Hanna* was whether the debt was liquidated. The court resolved that the debt was liquidated; therefore, the quotation above could be paraphrased to read that if the debt were unliquidated the creditor could reserve his rights under section 1-207. Thus, the *Hanna* court specifically indicated that section 1-207 would apply to accord and satisfaction of *unliquidated* debts. However, the court's reference to Code section 1-207 was dictum only, making the case of questionable value to the *Scholl* court in reaching its similar conclusion. Furthermore, *Hanna* was a New York case. The annotations to New York's version of Code section 1-207 specifically refer to accord and satisfaction as an area of the law possibly affected by the section.⁸⁷

The *Scholl* opinion contains no mention of a Ninth Circuit Court of Appeals case decided in 1973 that discussed Code section 1-207 in relation to accord and satisfaction, *Teledyne Mid-America Corp. v. HOH Corp.*⁸⁸ In *Teledyne*, Teledyne Mid-America Corporation sued HOH Corporation and the husband and wife owners C. W. and Jane Shafer. After affirming the trial court's dismissal of the claim against Mr. and Mrs. Shafer,⁸⁹ the court considered Teledyne's claim against HOH, which HOH argued was extinguished by an accord and satisfaction.⁹⁰

The dispute between HOH and Teledyne was the result of two claims. The first claim was asserted by Teledyne against HOH for

84. 2 U.C.C. Rep. Serv. 1044 (Westchester County Ct. N.Y. 1965).

85. *Id.* at 1045.

86. *Id.* at 1046.

87. See note 72 *supra* and accompanying text.

88. 486 F.2d 987 (9th Cir. 1973).

89. *Id.* at 991.

90. *Id.* at 992.

trade debts incurred by its predecessor, Shafer Company, Inc.⁹¹ Second, HOH claimed that Teledyne owed HOH \$40,860 from a distribution profit protection fund for HOH's uncollectible accounts. In paying the amount owed by Shafer Company to Teledyne, HOH offset its claim on the distribution profit protection fund against the larger amount that HOH owed Teledyne as Shafer Company's guarantor. HOH's check contained on its reverse side: "In full payment of all HOH trade obligations."⁹² Teledyne argued that the cashing of HOH's check by Teledyne's accounting department was not an effective acceptance for purposes of accomplishing an accord and satisfaction.⁹³ However, when Teledyne officials were subsequently notified of the compromise tender, they informed HOH that the check was accepted as partial payment only.⁹⁴ The court held that the action of the officials indicated that they had accepted the check, but attempted to reserve Teledyne's right to sue for the balance.⁹⁵ Therefore, the case presented a classic accord and satisfaction situation in which the creditor cashed the check and attempted to reserve his right to sue for the balance. In accordance with the prevailing common law, the district court decision for HOH was affirmed.⁹⁶

The facts of *Teledyne* presented the typical application of accord and satisfaction doctrine, just as did the facts of *Scholl*. There was an unliquidated debt, a conditional tender of a check in the disputed range, and an acceptance and explicit reservation of rights by the creditor. The Ninth Circuit stated in a footnote: "Neither party has considered the applicability of the Uniform Commercial Code to this transaction. On the facts, there is strong reason to doubt that section 1-207 is pertinent. Under the circumstances we do not find it appropriate to discuss it."⁹⁷

It is unclear whether the court failed to discuss Code section 1-207 because it found that the section was inapplicable or because the issue had not been raised by either party. The court's reference to section 1-207 was admittedly dictum. The decision, however, is at least as persuasive as the two lower court decisions relied upon in *Scholl*. The statement by the Ninth Circuit should have been followed by the South Dakota court in *Scholl*, not only because it is in accordance with the intention of the drafters of the Code,⁹⁸ but as a matter of basic

91. *Id.* at 991.

92. *Id.*

93. *Id.* at 992.

94. *Id.* at 991-92.

95. *Id.* at 994.

96. *Id.* at 995.

97. *Id.* at 993 n.6.

98. See section III.B.1. *supra*.

contract law principles. The *Scholl* analysis does not retain the requirement of mutual assent necessary for an accord and satisfaction.

IV. THE REQUIREMENT OF MUTUAL ASSENT

The most critical problem with the result of the *Scholl* decision is the lack of mutual assent between the parties. Suppose that *C* performs work for *D* under a contract that mentions levels of quality without specifying any objective means of measuring quality. The contract price is \$5,000 but *D* believes that because of poor workmanship, only \$4,000 should be paid; *C* of course disagrees. *D* tenders a check for \$4,500 marked "paid in full." At this point, *C* has been given an offer to settle that he can accept or reject. When *C* cashes the check, there is objective mutual assent to an accord and satisfaction. The fact that *C* does not know the legal consequences of his act is not controlling,⁹⁹ *C* understood that *D* offered to settle the dispute with a check tendered in full payment. In this case, *D* has not unilaterally determined *C*'s rights. However, allowing *C* to reserve his rights by stipulating a condition on the back of *D*'s check before cashing it leaves *D* no opportunity to accept or reject *C*'s "counteroffer." *D* might have preferred either to settle or to litigate the entire matter. If *C* is allowed to reserve his rights, *D* can litigate only the remaining amount due.

Professor Williston believed that when a creditor cashes a check tendered in full settlement of a disputed debt with the sole intention of reducing the debtor's account, "[i]t is impossible to find the ordinary elements of a bargain in such a case. There is not only no mutual assent mentally, but there is no expression of mutual assent."¹⁰⁰ In an accord and satisfaction both parties have made decisions to substitute a new performance for the old contract. If the creditor is allowed simply to reserve his rights and cash the check, he is unilaterally determining his own rights and those of the debtor.¹⁰¹ One of the earliest accord and satisfaction cases asserted: "And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it."¹⁰²

Code section 1-207 can be interpreted to maintain the requirement of mutual assent. By inserting the words "creditor" and "debtor" into section 1-207, it can be demonstrated that section 1-207 does not alter the common-law doctrine. "A [creditor] who with explicit reservation

99. RESTATEMENT OF CONTRACTS § 20, Comment a (1932).

100. 15 S. WILLISTON, CONTRACTS § 1855, at 552 (3d ed. 1972).

101. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON UNIFORM STATE LAWS, REPORT ON THE UNIFORM COMMERCIAL CODE 22 (1962).

102. Pinnel's Case, 77 Eng. Rep. 237, 238 (C.P. 1602).

of rights performs or promises performance or assents to performance in a manner demanded or offered by the [debtor] does not thereby prejudice the rights reserved" The key phrase is "in a manner demanded or offered by the [debtor]." In order for the creditor to cash the debtor's check for payment on account only, that act by the creditor would have to be the performance demanded or offered by the debtor. This is not the case when the debtor has tendered a check in full satisfaction of his debt. The debtor is offering a substituted performance to extinguish the debt, whereas the creditor is simply reducing the debt and reserving his right to the balance.

This Case Comment does not suggest that the established accord and satisfaction doctrine for unliquidated debts is the only solution or even the best solution. Accord and satisfaction can be a harsh doctrine, especially when large sums of money are in dispute. It may force a creditor to accept needed partial payments rather than to reserve the right to obtain the benefit of his bargain with the debtor. For example, a contractor with bills to pay is hard pressed not to accept \$800,000 tendered in payment of a debt that the contractor believes should be \$1,000,000, and yet the \$200,000 balance is probably the difference between a profitable and an unprofitable venture. Nevertheless, so long as there is no unfairness, the law favors settlements between parties.¹⁰³ Section 1-207, according to the drafters of the Code and one interpretation of the language, should not change the common law when a check is tendered in full settlement of an unliquidated debt.

V. RECOMMENDATIONS

Should other courts decide to follow the *Scholl* decision, debtors may still offer a check in full settlement of an unliquidated debt. The Code allows parties to vary its provisions unless otherwise provided.¹⁰⁴ Since section 1-207 does not prohibit the alteration of its provisions by agreement, a variation by the parties would be proper. At least two writers have suggested that a condition be written on the back of a debtor's check tendered in full settlement to avoid the result reached in *Scholl*.¹⁰⁵ The purpose of this inscription would be to fully inform the creditor of the debtor's intentions and further, to provide a court

103. *Hager v. Thomson*, 66 U.S. (1 Black) 80 (1861); *Simons v. Supreme Council Am. Legion of Honor*, 178 N.Y. 263, 70 N.E. 776 (1904).

104. U.C.C. § 1-102(3) provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

105. *Hawkland*, *supra* note 56, at 342; Comment, *Accord and Satisfaction: Conditional Tender By Check Under the Uniform Commercial Code*, 18 BUFFALO L. REV. 539, 544 (1969).

that might feel compelled to follow *Scholl* with a basis for distinguishing the case.¹⁰⁶ The debtor's inscription might provide:

This check is offered solely for the purpose of fully settling (debtor's) debt to (creditor) arising out of (specify obligation). (Creditor) may accept the offer to settle by cashing this check or reject the offer to settle by destroying or returning the check. Should (creditor) cash this check, (creditor) is agreeing to waive the provisions of Uniform Commercial Code § 1-207 as those provisions apply to this debt.

The statement above or one similar should demonstrate to a court that the creditor is fully aware of the consequences of cashing the check and that the debtor has not taken unfair advantage of the creditor. Until the courts are settled on the applicability of section 1-207 to accord and satisfaction, debtors might be well advised to include such a statement on all checks tendered in full settlement of an unliquidated debt.

VI. CONCLUSION

The method suggested above for altering the provisions of section 1-207 illustrates the unreasonable position adopted by the *Scholl* court. If *Scholl* is followed and debtors begin to write long narratives on the backs of their checks, creditors will undoubtedly develop equally long endorsement notations to neutralize the debtors' inscriptions. The result would be very similar to the "battle of the forms" that developed during pre-Code days to protect buyers and sellers in the offer and acceptance stage of contracting.¹⁰⁷ The *Scholl* interpretation does not further the underlying purposes and policies of the Code, as stated in section 1-102(2)(a), "to simplify, clarify and modernize the law governing commercial transactions."¹⁰⁸ The *Scholl* analysis could cause the consummation of an accord and satisfaction through the tender of a check in full payment of an unliquidated debt to become unduly complicated.

Scholl gives section 1-207 one possible reading based upon two lower state court opinions,¹⁰⁹ a comment of the Commission on Uniform State Laws,¹¹⁰ and a text based on the same two cases and on the same comment.¹¹¹ In contrast, the legislative history indicates that the drafters did not intend for Code section 1-207 to apply to ac-

106. See Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 BUFFALO L. REV. 539, 544 (1969).

107. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 36 (1970).

108. U.C.C. § 1-102(2)(a).

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

110. See note 72 *supra* and accompanying text.

111. See note 31 *supra*.

cord and satisfaction, and most state adoption committees did not indicate that section 1-207 would change existing case law. The requirement of mutual assent to an accord and satisfaction is not met by the *Scholl* interpretation of section 1-207. Furthermore, the language of section 1-207 does not authorize ignoring the common law requirement of mutual assent. As a matter of contract principles and analysis of the Code, "there is strong reason to doubt that section 1-207 is pertinent"¹¹² to accord and satisfaction doctrine.

R. Steven Kestner

112. *Teledyne Mid-America Corp. v. HOH Corp.*, 486 F.2d 987, 993 n.6 (9th Cir. 1973).

