

**SATISFACTION NOT GUARANTEED:
CALIFORNIA’S CONFLICTING LAW ON THE
USE OF ACCORD AND SATISFACTION
CHECKS**

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The law wisely favors settlements, and where there is a real and genuine contest between the parties, and a settlement is had without fraud or misrepresentation, for an amount determined upon as a compromise between the conflicting claims, such settlement should be upheld, although such amount is materially less than the amount claimed by the person to whom it is paid.¹

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1. Potter v. Pacific Coast Lumber Co., 37 Cal. 2d 592, 602-03, 234 P.2d

I. INTRODUCTION

The late Professor Grant Gilmore once described the first year of law school as akin to a “guided tour through hell.”² There are indeed many horrifying sights (or is it cites?) of uncertainty that the lawyer-to-be encounters in the first year curriculum, particularly in Contracts class.

One area that typically gives first year law students difficulty, and gives trouble to practicing lawyers as well, is the area involving settlement of claims, or accord and satisfaction. There are several difficult questions to analyze in the area. To what extent is consideration required to support a release of a claim? Is it necessary that there be a reasonable dispute over the amount owed in order for a release of a claim to be binding, or is it only necessary for the party seeking the release to be acting in good faith? May a recipient of an accord and satisfaction check (sometimes called a “payment in full” check) cross out the “payment in full” language, cash the check, and then sue for the balance of the claim?

The difficulty for students, and perhaps more so for practicing lawyers, is that there are many conflicting court decisions and statutes on these issues which make it hard, if not impossible, to analyze fact patterns and give certain answers and advice to clients. One must research the law of the relevant state and try to determine how that state’s courts or statutes deal with accord and satisfaction issues.

Analysis of these issues is particularly difficult in California because there are conflicting statutes on the issue of whether a recipient of an accord and satisfaction check can strike the payment in full language before negotiating the check and thus preserve the recipient’s claim against the drawer of the check. California Civil Code section 1526 permits the recipient of the check to strike the release language in most cases and cash the check, thus preserving the recipient’s claim. On the other hand, California Commercial Code sections 1207 and 3311 require the recipient of a payment in full check issued in good faith to make a choice: either negotiate the check and

16, 22 (1951).

2. GRANT GILMORE, *Introduction and Teaching Notes from Teacher’s Manual*, in *CONTRACTS* (Friedrich Kessler & Grant Gilmore eds., 2d ed. 1970), reprinted in PETER LINZER, *A CONTRACTS ANTHOLOGY* 39, 41 (2d ed. 1995).

release the claim or return the check to the person who issued the check and preserve the claim.

This Article critically examines the current state of the law of accord and satisfaction checks in California. Part II outlines the common law doctrine of accord and satisfaction. Part III discusses the legislative enactments in California dealing with accord and satisfaction checks—UCC sections 1-207 and 3-311 and Civil Code section 1526—and illustrates how these enactments have muddied up the relatively clear common law doctrine. This section presents the current conflict in California regarding accord and satisfaction checks. Part IV considers rules of statutory construction, reviews relevant case law, and addresses public policy arguments in determining which of the conflicting statutes—UCC sections 1-207 and 3-311 or Civil Code section 1526—should govern. Part V concludes that the Commercial Code statutes should govern; if anything, they may not go far enough in facilitating settlements. The recipient of a payment in full check offered in good faith settlement of a bona fide disputed or unliquidated claim should *not* be allowed to cross out the payment in full language, negotiate the check, and sue for the balance the recipient believes to be due. The bottom line, however, is that before lawyers can advise recipients of payment in full checks with certainty, either the legislature must act (preferably by repealing Civil Code section 1526) or the California Supreme Court must decide which of the inconsistent statutes govern.

II. THE COMMON LAW DOCTRINE OF ACCORD AND SATISFACTION

The common law³ defines an accord and satisfaction as a contract between a debtor and a creditor for the settlement of a disputed or unliquidated debt by some performance other than payment in full.⁴ Accord and satisfaction discharges the previously existing

3. The common law discussion deals with the law governing accord and satisfaction before adoption of California Civil Code section 1526 and Revised Uniform Commercial Code § 3-311 and assumes that pre-revision UCC § 1-207 did not apply. For a discussion of that issue, see *infra* notes 57-88 and accompanying text.

4. See Jay Winston, *The Evolution of Accord and Satisfaction: Common Law; U.C.C. Section 1-207; U.C.C. Section 3-311*, 28 NEW ENG. L. REV. 189, 191 (1993).

contractual right or obligation and serves as an affirmative defense in an action to enforce the previously existing contract claim.⁵

Because an accord serves as a substitute to the original contract between the parties,⁶ it must therefore satisfy the requirements of contract formation—offer, acceptance, and consideration⁷—before this partial payment serves to discharge the obligation.⁸

A payment in full⁹ check is the offer of an accord. California courts generally allow the offer to enter into an accord to be stated on the check itself or on some accompanying memorandum.¹⁰ The statement must be appropriately worded, such as “payment in full,” and conspicuously noted such that it is clear that this check is intended to resolve the dispute.¹¹ If the check contains this payment in full language, the creditor is said to be on notice of the accord

5. See Michaela White, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check?*, 11 CREIGHTON L. REV. 515, 515-16 (1977-78).

6. See RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

(1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.

(2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.

(3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach.

Id.

7. See Winston, *supra* note 4, at 191-92.

8. See Scott J. Burnham, *Accord and Satisfaction in California: A Trap for the Unwary*, 30 SANTA CLARA L. REV. 473, 474 (1990).

9. The payment in full check has also been referred to as a conditioned check, a conditional check, or a full payment check. See *Robinson v. Garcia*, 804 S.W.2d 238, 241 n.2 (Tex. App. 1991, writ denied).

10. See Burnham, *supra* note 8, at 476.

11. See Winston, *supra* note 4, at 192; see also *Potter v. Pacific Coast Lumber Co.*, 37 Cal. 2d 592, 597, 234 P.2d 16, 18 (1951) (debtor must make it clear that acceptance of what he tenders is subject to the condition that it shall be in full satisfaction).

whether or not the creditor had actual knowledge.¹² For example, in *Newsom v. Woollacott*,¹³ the plaintiff cashed a check for partial payment that was written by the defendant.¹⁴ On the check was the statement, ““In full for 9th and Grand Ave. fees.””¹⁵ The jury determined that the check did not constitute an accord and satisfaction and therefore the plaintiff received a judgment for the balance of his claim.¹⁶ However, the court of appeal reversed, holding that, unless the plaintiff controverted it, he was presumed to have knowledge of the writing.¹⁷ Thus, once plaintiff cashed the check, he was bound by the terms of the instrument, and as a result he effectively discharged the balance of the claim.¹⁸

Similarly, in *Potter v. Pacific Coast Lumber Co.*,¹⁹ the plaintiff sought to recover the balance due under contracts for the sale of three carloads of lumber.²⁰ The defendants pleaded an accord and satisfaction as an affirmative defense.²¹ A bona fide dispute²² arose as to the amount due under the contracts.²³ In an attempt to resolve the dispute, the defendants sent checks for partial payment to the plaintiff and attached vouchers to each check informing the plaintiff that the checks were intended as full settlement of the disputed claim.²⁴ The trial court found that the plaintiff’s acceptance of the check did not constitute an accord and satisfaction.²⁵ The California Supreme Court reversed.²⁶ It reasoned that the plaintiff’s acceptance and cashing of the checks pursuant to their conditional terms of “full settlement” constituted an accord and satisfaction as a matter of law.²⁷

12. See Burnham, *supra* note 8, at 476-77.

13. 5 Cal. App. 722, 91 P. 347 (1907).

14. See *id.* at 724, 91 P. at 347.

15. *Id.*

16. See *id.*

17. See *id.* at 725, 91 P. at 348.

18. See *id.* at 726, 91 P. at 348.

19. 37 Cal. 2d 592, 234 P.2d 16 (1951).

20. See *id.* at 594, 234 P.2d at 17.

21. See *id.*

22. See *infra* notes 37-54 and accompanying text.

23. See *Potter*, 37 Cal. 2d at 595-96, 234 P.2d at 17-18.

24. See *id.* at 596, 234 P.2d at 18.

25. See *id.* at 594, 234 P.2d at 17.

26. See *id.* at 603, 234 P.2d at 22.

27. See *id.*

Just as the accord constitutes the offer of a payment in full check, satisfaction occurs when the creditor accepts the accord.²⁸ The debtor must make it clear that the creditor's acceptance of the check is subject to the condition that it is in full satisfaction of the claim.²⁹ In order for the accord to discharge the original obligation, there must be an effective acceptance of the compromise offer.³⁰ "A subjective 'meeting of the minds' is not required, as the creditor's acceptance of the check may be evidenced 'actually or by implication.'"³¹ If the creditor accepts the check, the creditor is deemed to have accepted the offer by cashing a full payment check or otherwise exercising control over it.³² Just like any other offer, the offeree must either accept the terms of the offer or reject them.³³ A creditor who crosses out the conditional language on the check or holds the check for an unreasonable amount of time *may* be found to have accepted the settlement offer.³⁴

28. See Winston, *supra* note 4, at 192.

29. See *Teledyne Mid-America Corp. v. HOH Corp.*, 486 F.2d 987, 992 (9th Cir. 1973) (quoting *Potter*, 37 Cal. 2d at 597, 234 P.2d at 19).

This requirement is particularly stringent where past practices between the debtor and creditor have involved installment payments on the debt. In this situation the debtor bears the greater burden of demonstrating that the creditor received adequate notice that a given payment was tendered conditionally as final and not partial payment. Where this burden has not been met, the courts have refused to find an effective accord and satisfaction.

Id. at 992-93.

30. See *id.* at 993.

31. *Id.* (quoting *Besco Enterprises, Inc. v. Carole, Inc.*, 274 Cal. App. 2d 42, 45, 78 Cal. Rptr. 645, 646 (1969)).

32. See Winston, *supra* note 4, at 192; see also *Teledyne Mid-America*, 486 F.2d at 993 ("[I]t is almost universally held that '[t]he cashing of the check or its certification is sufficient an act of dominion to constitute such acceptance.'" (quoting *Besco Enterprises*, 274 Cal. App. 2d at 45, 78 Cal. Rptr. at 646) (second alteration in *Teledyne Mid-America*, 486 F.2d at 993)).

33. See Burnham, *supra* note 8, at 478.

34. See *id.*

In *Sheldon Builders, Inc. v. Trojan Towers*, the court held that a creditor who wishes to avoid the presumption that part payment has been accepted must return the check. On the other hand, in *Besco Enterprises, Inc. v. Carole, Inc.*, the court held that the parties had not en-

The extent to which consideration is required for a valid accord and satisfaction has been heavily litigated over the years. It has been argued that no consideration should be necessary to uphold an accord and satisfaction as compared to an executory contract because the person defending an accord and satisfaction is not trying to get a court to force someone to affirmatively perform; just as lack of consideration cannot be used to undo a completed gift, neither should it be available to undo an accord and satisfaction.³⁵ Nevertheless, the traditional rule is that some form of consideration is necessary to enforce a release of a claim: the proverbial “horse, hawk or robe.”³⁶ The truth of the matter is that unless some fraud or duress is involved, a creditor agreeing to an accord and satisfaction is agreeing to give up the balance of a claim in exchange for the forbearance on the part of the debtor from making the creditor go to court. This is valuable consideration indeed, considering the costs of pursuing matters in court.

Many courts will uphold an accord and satisfaction, and say that consideration exists, however, only if the debt is truly unliquidated³⁷

tered an accord when the creditor kept the check but gave written notice that “we cannot accept the check as presented.”

Id. (footnotes omitted); see also *Teledyne Mid-America*, 486 F.2d at 993-95. In *Teledyne Mid-America*, the Ninth Circuit affirmed the trial court’s holding that the acceptance of the check constituted an accord and satisfaction. The court held that the cashing of the check was not the event that triggered the accord. Rather, an accord was formed when the plaintiff failed to return the check despite fully understanding the terms of the debtor’s offer. See *id.* As discussed later, there has been a split of authority under pre-revision UCC Article 3 as to whether a recipient of a payment in full check could delete the payment in full language under the authority of pre-revision § 1-207. See *infra* notes 57-58 and accompanying text.

35. See 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1240 (1964 & Supp. 1999). At common law, eight jurisdictions, including California, did not appear to require an unliquidated or disputed debt in order for the doctrine of accord and satisfaction to apply. The other seven jurisdictions are Arkansas, Georgia, Maine, Mississippi, New Hampshire, North Dakota, and Virginia. See Winston, *supra* note 4, at 193 n.40; see, e.g., *Harris v. EMI Television Programs, Inc.*, 102 Cal. App. 3d 214, 219, 162 Cal. Rptr. 357, 360 (1980) (“[I]f the written instrument states an intention to discharge the debt, then the debt is discharged whether it is disputed or not and regardless of the amount paid in consideration of the release.” (citation omitted)).

36. Pinnel’s Case, 77 Eng. Rep. 237, 237 (C.P. 1600).

37. See 1 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON

or disputed.³⁸ This theory is based on the belief that the parties' "willingness to compromise is in itself valuable consideration."³⁹ At times it may be difficult to determine whether a debt is liquidated. The doctrine of account stated provides some guidance, stating that "a debt may also become liquidated when it goes unchallenged by the debtor for a period of time."⁴⁰ For example, assume that an attorney bills a client \$1000 for services performed at an hourly rate of \$100. The client disputes the amount of the bill and the attorney accepts \$800 in full satisfaction. The attorney has no claim for the balance because the obligation was unliquidated. However, "[i]f the bill had been resubmitted for several months and had gone unpaid, then

THE LAW OF CONTRACTS § 128 (3d ed. 1957) ("An unliquidated claim is one, the amount of which has not been fixed by agreement or cannot be exactly determined by the application of rules of arithmetic or of law.").

38. See White, *supra* note 5, at 516 n.9.

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

Id. (citing 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1290, at 166-72 (1962)). *But see* Winston, *supra* note 4, at 193 n.40 (eight states do not follow this rule). The Restatement (Second) of Contracts section 74 requires that for release of a claim or defense to be consideration, either the claim or defense must in fact be doubtful or the party asserting the claim and defense must believe that it is valid. See RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981).

39. White, *supra* note 5, at 516.

40. Burnham, *supra* note 8, at 475. The doctrine of account stated provides:

(1) An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.

(2) The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.

RESTATEMENT (SECOND) OF CONTRACTS § 282 (1981).

under the doctrine of account stated it would tend to become

liquidated at \$1000 and [the \$800 payment] would not discharge [the balance].”⁴¹

The honest dispute or unliquidated claim provides consideration because the creditor is foregoing the right to sue for the full balance in favor of settling the dispute out of court for a lesser amount.⁴² It does not matter whether or not there is a solid foundation for the dispute.⁴³ The test is whether the dispute is honest or if the party refusing to pay is acting in “bad faith.”⁴⁴

*Upper Avenue National Bank v. First Arlington National Bank*⁴⁵ illustrates the honest dispute requirement. The defendant, John Livaditis, owned real property on which a K-Mart building was being constructed.⁴⁶ The defendant entered into a service contract with the plaintiff, American Engineering, Inc., whereby the plaintiff was to perform heating and air-conditioning services for the K-Mart building.⁴⁷ The defendant ran into financial difficulties and induced the plaintiff to accept a note for \$13,515, the remaining amount due under the contract, plus ten percent interest.⁴⁸ Subsequently, the parties entered into a release agreement whereby the defendant paid the plaintiff \$8000 in satisfaction of the claim.⁴⁹ The plaintiff then repudiated the settlement by filing suit to recover the remaining \$5515 due under the contract.⁵⁰

The court stated that “[t]he well-established general rule is that an agreement to accept part payment of an amount *undisputably* [sic]

41. Burnham, *supra* note 8, at 476.

42. See Winston, *supra* note 4, at 193. If a debt is liquidated or undisputed, then a payment of a lesser amount is insufficient consideration to discharge a debt for more, unless something else (“a horse, or a canary, or a tomtit”) is thrown into the bargain. *Couldery v. Bartrum*, 19 Ch. D. 394, 399 (1881).

43. See *B. & W. Eng’g Co. v. Beam*, 23 Cal. App. 164, 171, 137 P. 624 (1913).

44. See *id.*

45. 400 N.E.2d 1105 (Ill. App. Ct. 1980).

46. See *id.* at 1106.

47. See *id.*

48. See *id.*

49. See *id.* at 1107.

50. See *id.*

due is not satisfaction of the whole debt and will not bar recovery of the balance unpaid.”⁵¹ The court explained that the rationale behind this rule is that when an honest dispute does not exist, there is no consideration supporting the agreement to discharge the entire debt by paying a lesser amount than the amount actually due.⁵² In other words, there must be an actual dispute between the parties in order to furnish the necessary consideration to discharge the obligation.⁵³ Because the court found that a good faith dispute did not exist as to the amount due, the defendant’s release was invalid and the plaintiff was allowed to recover the remaining balance.⁵⁴

In summary, while the requirement of consideration is somewhat nebulous, the common law rule regarding acceptance of accord and satisfaction checks is rather clear. The common law gives a creditor who receives a payment in full check two options: (1) reject the offer by returning or destroying the check, thereby preserving the right to sue for the balance the creditor believes due; or (2) cash the check and accept the accord, thus releasing the balance of the claim.⁵⁵ Under the common law, the creditor could not avoid an ac-

51. *Id.* (emphasis added).

52. *See id.*

53. *See id.* at 1108.

54. *See id.* at 1107-08. The court noted that if the case had been decided under the Uniform Commercial Code, § 1-107 would have obviated the consideration requirement since there was a written, signed release of the claim. *See id.* at 1107. The court probably viewed the underlying transaction between the parties as a service contract. There is no analysis as to whether the promissory note was negotiable; if it were, Article 3 of the UCC would apply and the case would have been decided differently.

55. *See* Winston, *supra* note 4, at 192; *see also* Susan Harrison Hendrick, *U.C.C. Section 1-207 and the Full Payment Check: The Struggle Between the Code and the Common Law—Where Do the Debtor and Creditor Fit In?*, 7 U. DAYTON L. REV. 421, 424 (1982) (quoting *Chancellor, Inc. v. Hamilton Appliance Co.*, 418 A.2d 1326, 1327 (N.J. Passaic County Ct. 1980)). A New Jersey court has summarized the common law requirements for accord and satisfaction as follows:

When a claim is unliquidated and a check is tendered in full settlement, giving the creditor notice of this condition, the creditor’s retention and use of the check constitutes an accord and satisfaction [T]he creditor is deemed to have accepted this condition by depositing the check for collection notwithstanding any obligation or alteration.

Chancellor, Inc., 418 A.2d at 1327.

cord and satisfaction by either reserving the creditor's rights on the check or by crossing out the full settlement language on the check.⁵⁶

III. LEGISLATIVE ENACTMENTS AFFECTING THE COMMON LAW DOCTRINE

While the common law approach to settlements of claims is uncertain as to exactly when accord and satisfaction checks will be binding on the recipient, the uncertainty is magnified in California because of competing inconsistent statutes: Civil Code section 1526 and revised Commercial Code sections 1207 and 3311. This section provides a general background of these statutes and illustrates their impact on the common law.

A. *The Uniform Commercial Code Pre-1990*

The Uniform Commercial Code contains several sections that deal with the topic of settlement of claims.⁵⁷ Under the pre-1990 version of the Code, one of the relevant sections was section 1-207. The original version of Uniform Commercial Code section 1-207 stated: "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."⁵⁸ Both courts and legal commentators struggled over whether section 1-207 applied to accord and satisfaction checks.⁵⁹ In other words, the question arose as to whether

56. See Winston, *supra* note 4, at 192.

57. Before the revisions to Articles 1, 3, and 4 in 1990, the relevant sections were 1-107, 1-207, 2-209, and 3-605. The Uniform Commercial Code was first adopted in California in 1963. See CAL. COM. CODE §§ 1101-9508 (West 1964 & Supp. 1990).

58. U.C.C. § 1-207 (1950 Official Text).

59. Although there was a split in authority as to whether § 1-207 applied to accord and satisfaction checks, most courts and legal commentators held that it did not apply. See, e.g., *Brown v. Coastal Truckways, Inc.*, 261 S.E.2d 266 (N.C. Ct. App. 1980); *State Dep't of Fisheries v. J-Z Sales Corp.*, 610 P.2d 390 (Wash. Ct. App. 1980); *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979); see also Wilfredo Caraballo, *The Tender Trap: UCC § 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, 453-58 (1981) (explaining

section 1-207 altered the common law doctrine of accord and satisfaction which states that acceptance of a conditional check for payment of a disputed claim bars an action for recovery on the balance due.⁶⁰

In *Scholl v. Tallman*,⁶¹ South Dakota became the first jurisdiction whose highest court addressed the issue of whether section 1-207 circumvents the common law doctrine of accord and satisfaction.⁶² In *Scholl*, Wesley Scholl, a carpenter, performed services for Clinton and Virginia Tallman.⁶³ A good faith dispute arose as to the amount the Tallmans owed Scholl.⁶⁴ They sent a check for \$500 to Scholl with the words, "Wesley Scholl Settlement in Full for all Labor and Materials to Date" typed on the back of the check.⁶⁵ Scholl scratched out that language and added the following language before cashing the check: "Restriction of payment in full refused."⁶⁶ Scholl then made a claim for the alleged balance due.⁶⁷ The South Dakota Supreme Court held that Scholl effectively reserved his rights under section 1-207.⁶⁸ Thus, the *Scholl* court held that section 1-207 does apply to accord and satisfaction checks and therefore nullified the common law doctrine of accord and satisfaction in that jurisdiction.

In *Cass Construction Co. v. Brennan*,⁶⁹ however, the Nebraska Supreme Court held that section 1-207 does not alter the common law doctrine of accord and satisfaction.⁷⁰ Cass Construction Com-

the different interpretations and applications of § 1-207); Albert J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48, 58-64 (1978) (discussing the legislative history of § 1-207). A significant jurisdiction holding that § 1-207 altered the law of accord and satisfaction is New York. See *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 488 N.E.2d 56, 61 (N.Y. 1985).

60. See *supra* Part II; see also White, *supra* note 5, at 515.

61. 247 N.W.2d 490 (S.D. 1976).

62. See White, *supra* note 5, at 515.

63. See *Scholl*, 247 N.W.2d at 490.

64. See *id.*

65. *Id.* at 491.

66. *Id.*

67. See *id.*

68. See *id.* at 492. The holding was made based on South Dakota Codified Law section 57-1-23, which is South Dakota's version of UCC § 1-207. See *id.*

69. 382 N.W.2d 313 (Neb. 1986).

70. See *id.* at 320.

pany (“Creditor”) entered into an oral agreement with Tim Brennan and Jim Asmussen (“Debtor”) whereby Creditor agreed to do some dirt moving work on Debtor’s property.⁷¹ A dispute arose as to the amount due.⁷² Debtor sent a check to Creditor for \$1408.25 which was accompanied by a letter, which expressed dissatisfaction with the Creditor’s work and also stated that the \$1408.25 was in “final settlement of the bill.”⁷³ Creditor accepted the \$1408.25 as partial payment on the debt but sent a letter to Debtor claiming that Debtor still owed \$16,716.75.⁷⁴ Creditor then deposited the check.⁷⁵ Creditor sued for the remaining balance after Debtor made no further payments.⁷⁶

Debtor invoked the doctrine of accord and satisfaction as an affirmative defense claiming that Creditor compromised any right it may have had to pursue the additional amount once it cashed the \$1408.25 check.⁷⁷ The Antelope County District Court concluded that since Creditor accepted the check, its acceptance was subject to the conditional language, and therefore the payment was in full satisfaction of the claim.⁷⁸ In addition, the district court held that section 1-207 did not alter or abolish the common law doctrine of accord and satisfaction.⁷⁹

The Nebraska Supreme Court agreed.⁸⁰ Creditor argued that section 1-207 alters the common law because it allows a creditor to cash conditional checks while retaining the right to sue for any unpaid balance.⁸¹ Creditor based its argument on the plain words of section 1-207 as well as on the policy of encouraging the free flow of commerce.⁸² The supreme court rejected Creditor’s arguments and

71. *See id.* at 315.

72. *See id.* at 315-16.

73. *Id.* at 316.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 317.

81. *See id.*

82. *See id.*

held that “the language⁸³ of section 1-207 and its history,⁸⁴ purpose, and policy⁸⁵ do not alter the common law principles of accord and satisfaction.”⁸⁶

California authority sided with those courts holding that pre-revision section 1-207 did not alter the common law rules governing accord and satisfaction. In *Connecticut Printers, Inc. v. Gus Kroesen, Inc.*,⁸⁷ the court of appeal noted that section 1-207 was enacted to deal with reservation of rights for performance under one contract, while in an accord and satisfaction, a second contract is created through offer, acceptance, and consideration.⁸⁸ Thus in California, pre-revision section 1-207 did not permit a creditor to strike payment

83. Comments 1 and 2 of § 1-207 suggest that § 1-207 was not designed to alter the law of accord and satisfaction with regard to “payment in full” checks. Rather, the intent of § 1-207 was to allow contracting parties to proceed with performance without risking the possibility of waiving their rights. In other words, “the provision was designed to deal with problems of waiver, election of remedies, and estoppel rather than with attempted accord and satisfaction.” *Id.* at 318 (quoting Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 828 (1978)). Further, according to the language of § 1-207, it seems to be limited to those transactions in which the parties intend performance along the lines of the *original* contract. An accord and satisfaction, however, involves a new contract. *See Cass Constr. Co.*, 382 N.W.2d at 318.

84. The history of § 1-207 arguably indicates that it was not intended to apply to accord and satisfaction checks. Section 1-207 of the 1950 proposed final draft of the UCC coexisted with UCC § 3-802(3)(Official Draft 1952). Section 3-802(3) expanded the common law by permitting undisputed and liquidated claims to be subject to accord and satisfaction checks. Section 3-802(3) was deleted from the 1957 official draft due to concerns of abuse. Thus, accord and satisfaction continued to remain a common law doctrine. Commentators argued that § 1-207 does not deal with the issue of accord and satisfaction because § 3-802(3), which did address accord and satisfaction, made no reference to § 1-207. This suggests that the drafters did not intend to write overlapping sections regarding accord and satisfaction. Therefore § 3-802(3), which was subsequently deleted, was the section which dealt with the issue of accord and satisfaction, whereas § 1-207 did not. *See Cass Constr. Co.*, 382 N.W.2d at 319. For a detailed discussion of the legislative history behind § 1-207, see Rosenthal, *supra* note 59, at 58-65.

85. The purpose and policies behind §§ 1-207 and 3-311 will be examined *infra* Part IV.

86. *Cass Constr. Co.*, 382 N.W.2d at 317.

87. 134 Cal. App. 3d 54, 184 Cal. Rptr. 436 (1982).

88. *See id.* at 60, 184 Cal. Rptr. 2d at 439 (citing *State Dept. of Fisheries v. J-Z Sales Corp.*, 610 P.2d 390 (Wash. 1980)).

in full language and pursue the debtor for the balance of the claim.

B. The Civil Code

1. Section 1526

In 1987, the California legislature enacted Civil Code section 1526.⁸⁹ Section 1526 repudiates the common law of accord and satisfaction.⁹⁰ When the California legislature enacted section 1526, it essentially placed California in the camp of states permitting creditors to protest payment in full language.⁹¹ Section 1526 changes California common law by generally allowing a creditor to accept the debtor's check and sue for the balance if it strikes out the payment in full language or if the acceptance of the check was inadvertent or without notice of the notation.⁹²

89. See CAL. CIV. CODE § 1526 (West Supp. 1999). The statute became effective on January 1, 1988. See CAL. GOV'T CODE § 9600 (West 1980 & Supp. 1999).

90. See Burnham, *supra* note 8, at 485.

91. See *supra* notes 59-68 and accompanying text.

92. See CAL. CIV. CODE § 1526. Specifically, section 1526, entitled "Check or draft tendered in full discharge of claim; acceptance; protest; composition or extension agreement between debtor and creditors; release of claim," provides:

(a) Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft *does not* constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation.

(b) Notwithstanding subdivision (a), the acceptance of a check or draft constitutes an accord and satisfaction if a check or draft is tendered pursuant to a composition or extension agreement between a debtor and its creditors, and pursuant to that composition or extension agreement, all creditors of the same class are accorded similar treatment, and the creditor receives the check or draft with knowledge of the restriction. A creditor shall be conclusively presumed to have knowledge of the restriction if a creditor either: (1) Has, previous to the receipt of the check or draft, executed a written consent to the

2. Interpreting section 1526

Subsection (a) follows the common law doctrine of accord and satisfaction in that it restricts application of the statute to instances “[w]here a claim is disputed or unliquidated.”⁹³ In subsection (a), “claim” should arguably be construed broadly, describing a right to payment generally, whether or not reduced to judgment.⁹⁴ This interpretation would be in line with the common law where any dispute, such as a tort claim, a debt, or an implied contract fell within the boundaries of accord and satisfaction.⁹⁵

Subsection (a) also requires the check or draft to contain the language “‘payment in full’ or other words of similar meaning.”⁹⁶ It is unclear whether the legislature intended the statute to apply whenever a conditional check or draft is offered, or only when the payment in full language appears on the actual check or draft.⁹⁷ “A literal interpretation might hold that the statute does not apply in cases where an oral statement, separate communication, or accompanying letter, rather than the check itself communicates the offer to the creditor.”⁹⁸ Professor Burnham argues that it is nonsensical to apply section 1526 only when the payment in full language appears on the check, and refuse to apply section 1526 when the language appears

composition or extension agreement. (2) Has been given, not less than 15 days nor more than 90 days prior to the receipt of the check or draft, notice, in writing, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.

(c) Notwithstanding subdivision (a), the acceptance of a check or draft by a creditor constitutes an accord and satisfaction when the check or draft is issued pursuant to or in conjunction with a release of a claim.

(d) For the purposes of paragraph (2) of subdivision (b), mailing the notice by first class mail, postage prepaid, addressed to the address shown for the creditor on the debtor’s books or such other address as the creditor may designate in writing constitutes notice.

Id. (emphasis added).

93. CAL. CIV. CODE § 1526(a).

94. *See* Burnham, *supra* note 8, at 486.

95. *See id.*

96. CAL. CIV. CODE § 1526(a).

97. *See* Burnham, *supra* note 8, at 486-87.

98. *Id.* at 487.

on an accompanying document.⁹⁹ This argument is supported by California case law where courts have consistently allowed an offer to enter into an accord to be stated on the check itself or in a separate communication.¹⁰⁰

The final portion of subsection (a) marks the greatest deviation from the common law doctrine of accord and satisfaction. Under the common law, a creditor receiving a payment in full check had two options: (1) accept the accord according to its terms (thus dismissing the balance of the claim), or (2) reject the accord and preserve the right to sue for the balance.¹⁰¹ However, under subsection (a) of section 1526, the creditor may reject the offer to enter into an accord but still accept the conditional check and apply it towards the balance of the account.¹⁰² In other words, the creditor may “have its cake and eat it too.” Subsection (a) lists three ways in which the creditor may do this: (1) strike out or otherwise delete the payment in full language, (2) inadvertently accept the check, or (3) accept the check without knowledge of the payment in full language.¹⁰³

Subsection (b) carves out an exception to the requirements under subsection (a). Under subsection (b), the acceptance of a check or draft qualifies as an accord and satisfaction if the check is tendered pursuant to a composition or extension agreement and the following two conditions are met: (1) all creditors of the same class are treated similarly, and (2) the creditor receives the check with knowledge of the restriction.¹⁰⁴ Professor Burnham questions how this provision ties in with the rest of section 1526: “The provision seems out of place in the statute, however, for the statute is concerned with disputed or unliquidated debts, while a composition agreement gener-

99. *See id.* On the other hand, if section 1526 were applicable to only those instances in which the debtor wrote the payment in full language on the check, then the statute would serve the communication function by encouraging debtors to clearly communicate the offer to enter into the accord. *See id.*

100. *See, e.g.,* *Berger v. Lane*, 190 Cal. 443, 452, 213 P. 45, 49 (1923) (An offer to enter into an accord “sometimes is shown by the express words used in the body of the check *or by an accompanying receipt* stating that the amount sent is in full of all demands.”) (emphasis added).

101. *See supra* Part II.

102. *See* CAL. CIV. CODE § 1526(a).

103. *See id.*

104. *See id.* § 1526(b).

ally involves acknowledged obligations that the debtor is unable to pay.”¹⁰⁵

Subsection (b) contains an additional ambiguity. Professor Burnham points out that subsection (b) applies when the creditor receives the check with “knowledge of the *restriction*.”¹⁰⁶ However, in subsection (a), “knowledge of the *notation*” is the phrase that is used.¹⁰⁷ What was the legislature’s intent in using the term “restriction” in subsection (b) and then using the term “notation” in subsection (a)? It is likely that the legislature intended the phrases to mean the same thing—knowledge that the check is offered to discharge the obligation.¹⁰⁸ However, this again illustrates the sloppy and ambiguous drafting of section 1526. Professor Burnham points out yet another ambiguity arising from the phrase “knowledge of the restriction” in subsection (b).¹⁰⁹ Subsection (b) defines knowledge.¹¹⁰ This raises the question of whether this definition also applies to the word “knowledge” in subsection (a).¹¹¹

In *Armco Inc. v. Glenfed Financial Corp.*,¹¹² the court shed some light on this issue. The court was faced with determining whether defendant Glenfed clearly communicated to plaintiff Armco that the check was offered as an accord and satisfaction.¹¹³ The defendant sent the plaintiff a letter in which it calculated its obligation and enclosed a check for that amount.¹¹⁴ The plaintiff argued that an

105. Burnham, *supra* note 8, at 488-89.

106. *Id.* at 489 (quoting CAL. CIV. CODE § 1526(b)) (emphasis added by Professor Burnham).

107. *Id.* (quoting CAL. CIV. CODE § 1526(b)) (emphasis added by Professor Burnham).

108. *See id.*

109. *See id.*

110. *See* CAL. CIV. CODE § 1526(b).

111. *See id.* § 1526(a).

112. 720 F. Supp. 1129 (D.N.J. 1989).

113. *See id.* at 1154.

114. *See id.* The letter stated: “Pursuant to Section 2 of the Aircraft Agreement dated as of April 10, 1985, this is to advise you that we have received \$17,379,463.00 in Insurance Proceeds from National Union, calculated as follows” *Id.* “This is the amount agreed to with Scott Beeken in Dallas on July 29, 1985, when he was reviewing the Residual Value Policy offer. If you need any additional information, please call me or any of the people here who

accord and satisfaction cannot be reached unless the tendering party notifies the offeree in ““express terms”” or by an “explicit statement.”¹¹⁵

In resolving this issue, the court first looked to the common law. The plaintiff relied on *Potter v. Pacific Coast Lumber Co.*,¹¹⁶ where the California Supreme Court held that the debtor must expressly make clear that the check is intended as full satisfaction of the claim.¹¹⁷ The *Potter* court emphasized that the notice requirement is not met where the debtor simply includes with the check an account showing the balance equal to the amount of the check.¹¹⁸

The court then continued its examination of the notice requirement by looking at section 1526 by analogy.¹¹⁹ The court construed the statute by combining subsections (a) and (b).¹²⁰ Subsection (a) states:

Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words ‘payment in full’ or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if . . . the acceptance of the check or draft was . . . without *knowledge* of the notation.¹²¹

Subsection (b) states in part:

A creditor shall be conclusively presumed to have knowledge by the restriction if a creditor either: (1) Has, previous to the receipt of the check or draft, executed a written consent to the composition or extension agreement[, or] (2) [h]as been given, not less than 15 days nor more than 90

have been handling the matter.” *Id.* at 1154 n.48.

115. *Id.* at 1154-55.

116. 37 Cal. 2d 592, 234 P.2d 16 (1951).

117. *See Armco*, 720 F. Supp. at 1155 (citing *Potter*, 37 Cal. 2d at 597, 234 P.2d at 19).

118. *See Potter*, 37 Cal. 2d at 607-08, 234 P.2d at 25 (citing *Work v. Associated Almond Growers*, 102 Cal. App. 232, 236, 282 P. 965 (1929)).

119. *See Armco*, 720 F. Supp. at 1155. The *Armco* court considered California Civil Code section 1526 only by analogy because section 1526 was not in existence at the time the aircraft agreement was signed. *See id.*

120. *See id.*

121. *Id.* (quoting CAL. CIV. CODE § 1526 (emphasis added)).

days prior to receipt of the check or draft, notice, in writing, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.¹²²

Thus, the court focused on the term “knowledge” in subsection (a) and the language of the statute which stated that a creditor shall be conclusively presumed to have knowledge of the accord if the creditor falls within either section 1526(b)(1) or (b)(2).¹²³ Because the defendant failed to provide adequate notice to the plaintiff under both the common law and section 1526 by analogy, the defendant’s motion for summary judgment based on the doctrine of accord and satisfaction was denied.¹²⁴

Subsection (c) of section 1526 states that the acceptance of a check or draft by a creditor constitutes an accord and satisfaction when the check or draft is issued with a release of a claim.¹²⁵ Thus, subsection (c) provides an exception to subsection (a). Subsection (a) applies to *claims* that are disputed or unliquidated and provides ways to render the accord ineffective.¹²⁶ Subsection (c), however, allows checks issued with a release of a *claim* to constitute an effective accord and satisfaction.¹²⁷ Arguably subsection (c) completely vitiates subsection (a).¹²⁸ In other words, if the word ‘claim’ has the same meaning in subsection (a) and subsection (c), then subsection (c) would totally trump subsection (a).

In *Red Alarm, Inc. v. Waycrosse, Inc.*,¹²⁹ the Ninth Circuit addressed the issue of how to reconcile section 1526(c) with section 1526(a).¹³⁰ The dispute arose from the following facts. In 1988, Red Alarm and Silent Knight negotiated an agreement in which Red Alarm agreed to purchase security alarm equipment from Silent Knight.¹³¹ In 1990, Red Alarm grew dissatisfied with some of the

122. *Id.* (quoting CAL. CIV. CODE § 1526).

123. *See id.*

124. *See id.*

125. *See* CAL. CIV. CODE § 1526(c).

126. *See id.* § 1526(a).

127. *See id.*

128. *See* Burnham, *supra* note 8, at 492-93.

129. 47 F.3d 999 (9th Cir. 1995).

130. *See id.* at 1002-04.

131. *See id.* at 1001.

equipment it was receiving from Silent Knight.¹³² Subsequently, Red Alarm sent a letter and check to Silent Knight's "lock box."¹³³ The letter attempted to waive certain warranty claims and create additional contractual terms between the parties.¹³⁴ The letter further stated that acceptance of the check constituted Silent Knight's agreement to all the terms outlined in the letter.¹³⁵ The following notation appeared on the back of the check: "We agree to Red Alarm, Inc.'s proposed settlement offer dated February 21, 1992."¹³⁶ Because the check and letter "[w]ere sent to the lock box, the check was automatically deposited and the letter was forwarded to Silent Knight's offices."¹³⁷

Upon receipt of the letter, Silent Knight "promptly notified Red Alarm that it rejected the terms of the letter and that it was retaining the check as payment for a past due invoice."¹³⁸ Red Alarm claimed that Silent Knight was now bound by the terms of the settlement letter because it had cashed and retained the check.¹³⁹ When Red Alarm informed Silent Knight that it refused to abide by the original terms of the contract, Silent Knight terminated the contract.¹⁴⁰ Red Alarm filed suit alleging that the settlement letter and accompanying check constituted an accord and satisfaction.¹⁴¹

The Ninth Circuit determined that a bona fide dispute existed.¹⁴² However, the court found that under section 1526(a), the acceptance of the check did not constitute an accord and satisfaction because Silent Knight accepted the check "inadvertent[ly]" and "without knowledge of the notation."¹⁴³ Red Alarm argued that although the

132. *See id.*

133. *See id.* "The 'lock box' is an automatic check depository wherein checks sent to Silent Knight by its customers are automatically deposited into its account by its bank." *Id.* at 1001 n.2.

134. *See id.* at 1001.

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.* at 1002.

142. *See id.*

143. *Id.* at 1003.

act of cashing the check likely did not constitute acceptance of the accord, Silent Knight accepted the accord when it retained the check after becoming aware of the letter's terms.¹⁴⁴ The court refuted this argument by stating "[C]ivil Code section 1526(a) . . . changes California common law and allows a creditor to accept the debtor's check if it strikes out the 'payment in full' language or if the acceptance of the check was inadvertent or without notice of the notation, both of which it was."¹⁴⁵

Red Alarm then argued for an accord and satisfaction under section 1526(c).¹⁴⁶ Red Alarm argued that because its letter offered to waive its warranty claims, it constituted a "[r]elease of a claim' within the meaning of section 1526(c)."¹⁴⁷ Therefore, Red Alarm argued that Silent Knight's acceptance of the check effectuated an accord and satisfaction.¹⁴⁸

The court acknowledged that a literal reading of section 1526(c) seemed to support Red Alarm's argument.¹⁴⁹ The court, however, emphasized that section 1526(c) must not be read as expansively as the language suggests.¹⁵⁰ Every proposed accord and satisfaction essentially involves a release of the compromised claim.¹⁵¹ "If section 1526(c) is interpreted that broadly, then it will completely vitiate section 1526(a)."¹⁵² The court concluded that section 1526(c) must be read while keeping the entire statute in mind.¹⁵³ The court limited the applicability of section 1526(c) to those situations in which the parties negotiate a formal release of the claim and should therefore be able to rely on the acceptance of the check as an effectuation of the release.¹⁵⁴

In summary, while section 1526 is somewhat ambiguous, it appears that any debtor who attempts to use a payment in full check, in

144. *See id.*

145. *Id.*

146. *See id.* at 1003-04.

147. *Id.* at 1003.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *Id.*

153. *See id.*

154. *See id.* at 1003-04.

other than a formal release or composition situation, does so at the debtor's peril. As Professor Burnham points out, section 1526 is a "trap for the unwary."¹⁵⁵ A debtor may unwittingly try to use a payment in full check to informally resolve a claim only to find that the creditor has crossed out the restrictive language. The debtor may then be hauled into court to defend the balance of the claim.

C. Revised Uniform Commercial Code Sections 1-207 and 3-311

As indicated above, there was a significant split in authority as to whether pre-revision section 1-207 applied to accord and satisfaction checks.¹⁵⁶ As part of the overall revision of Articles 3 and 4 of the Uniform Commercial Code, the drafters tried to resolve this split of authority with revised sections 1-207 and 3-311.

1. Revised section 1-207

In 1990, the drafters of the Uniform Commercial Code revised Articles 3 and 4 together with conforming amendments to Article 1.¹⁵⁷ In 1992, the California legislature adopted these revisions in Commercial Code Divisions 1, 3, and 4. The revised divisions of the California Commercial Code took effect January 1, 1993.¹⁵⁸

Revised section 1-207(2) explicitly states that section 1-207(1) does not apply to an accord and satisfaction.¹⁵⁹ Official comment 3 states that section 1-207 was revised in response to the split in judicial authority regarding the application of section 1-207 to an accord and satisfaction.¹⁶⁰ In addition, official comment 3 also states that revised section 3-311 now governs those transactions in which an accord and satisfaction is attempted through the use of a check.¹⁶¹

Thus, in California, section 3311 is now the relevant Commercial Code section when dealing with an accord and satisfaction

155. Burnham, *supra* note 8, at 493.

156. *See supra* notes 59-88 and accompanying text.

157. *See* U.C.C. arts. 1, 3, 4 (1990 Official Text).

158. *See* CAL. COM. CODE § 16,101 (West 1990 & Supp. 1999).

159. *See* U.C.C. § 1-207 (1990 Official Text). Subsection (2) did not exist in former § 1-207. *See id.*

160. *See id.* § 1-207 cmt. 3.

161. *See id.*

check.¹⁶² The Commercial Code section is the same as Uniform Commercial Code section 3-311.

2. Revised UCC section 3-311

Revised Uniform Commercial Code section 3-311 states that a conspicuously designated payment in full check is effective to discharge a claim if (1) it is tendered in good faith, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the recipient obtains payment of the check.¹⁶³ The statute also contains

162. Note that as discussed *infra* Part V, although it is clear that section 3311 is the relevant Commercial Code statute on the issue of accord and satisfaction, it is still not clear as to which statute, Commercial Code section 3311 or Civil Code section 1526, governs the law of accord and satisfaction in California or whether both statutes are somehow applicable.

163. See CAL. COM. CODE § 3311(a). Specifically, section 3311, titled “Disputed obligation; Good faith tender of instrument” provides:

(a) If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument, the following subdivisions apply.

(b) Unless subdivision (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subdivision (d), a claim is not discharged under subdivision (b) if either of the following applies:

(1) the claimant, if an organization, proves that (A) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (B) the instrument or accompanying communication was not received by that designated person, office or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted

some exceptions which protect recipients of such checks from inadvertently negotiating them and thus mistakenly releasing a claim.¹⁶⁴

a. interpreting 3-311

Official comments 1 and 2 explain that the drafters' intent behind section 3-311 was essentially to codify the common law doctrine of accord and satisfaction while adding some minor changes to reflect modern business conditions.¹⁶⁵ The common law provides that the recipient of the payment in full check has the choice of either (1) accepting the check and thus releasing the claim, or (2) refusing the check and preserving the claim.¹⁶⁶ Under this rule, the recipient of the check does not have the option of protesting the payment in full language while taking the check.¹⁶⁷ Official comment 3 states that section 3-311 is premised on the belief that the common law rule produces a fair result, and payment in full checks encourage informal dispute resolution.¹⁶⁸

Sections 3-311(a) and (b) codify the common law doctrine of accord and satisfaction. Section 3-311(b), like the common law, requires the debtor to prove that the instrument¹⁶⁹ contained a "conspicuous statement"¹⁷⁰ making it clear that the check was tendered as full satisfaction of the claim.¹⁷¹ Section 3-311(a) codifies the other three requirements for an accord and satisfaction under the common

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant . . . knew that the instrument was tendered in full satisfaction of the claim.

Id. § 3311.

164. *See id.* § 3311(c).

165. *See* U.C.C. § 3-311 cmts. 1 & 2.

166. *See supra* Part II.

167. *See supra* Part II.

168. *See* U.C.C. § 3-311 cmt. 3.

169. It is not limited to just the instrument itself. The conspicuous statement can be on an accompanying document, but it must still be in writing. *See* CAL. COM. CODE § 3311(b).

170. *Id.* § 3311 cmt. 4. A statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it." U.C.C. § 1-201(10) *quoted in* CAL. COM. CODE § 3311 cmt. 4. If the claimant can reasonably be expected to examine the check, almost any language on the check should be noticed and therefore will be considered conspicuous. *See id.*

171. *See* U.C.C. § 3-311(b).

law: (1) the debtor must act in good faith¹⁷² while tendering the check in full satisfaction of the claim; (2) the amount of the claim must be unliquidated or subject to a bona fide dispute; and (3) the creditor must obtain payment of the check.¹⁷³

While subsections (a) and (b) of section 3-311 codify the elements of the common law doctrine of accord and satisfaction, subsection (c) provides limitations on the applicability of an accord and satisfaction check.¹⁷⁴ Subsection (c)(1) deals with an accord and satisfaction check when the creditor is an organization.¹⁷⁵ This subsection states that a payment in full check does not discharge a claim if the creditor proves that: (1) it is an organization,¹⁷⁶ (2) the organization has communicated to the other party that an offer of full payment is to be sent to a particular person, office, or place, and (3) the check was not received by the designated person, office, or place.¹⁷⁷ It is designed to protect the creditor against inadvertent accord and satisfactions.¹⁷⁸ Comment 5 states that this section is aimed specifically at protecting organizations, because when the creditor is an organization, there is a greater likelihood that the check may be deposited without notice to those in the organization who are concerned with the disputed claim.¹⁷⁹

For example, business organizations such as department stores

172. Section 1-201(19) of the UCC defines good faith as honesty in fact. This section, however, does not apply to Article 3 of the UCC. A good faith dispute is defined differently for the purposes of Articles 3 and 4. Section 3-103(a)(4) defines good faith as not only honesty in fact, but also requires the observance of reasonable commercial standards of fair dealing. *See id.* § 3-311 cmt. 4 (citing U.C.C. § 3-103(a)(4) (1990)). Thus, good faith under Article 3 has both a subjective and an objective component. An example given in the official commentary on bad faith is when a debtor routinely writes "payment in full" as the debtor's regular business practice, preventing an accord and satisfaction on the ground that such checks are not tendered in good faith. *See id.*

173. *See id.* § 3-311(a).

174. *See id.* § 3-311(c).

175. *See id.* § 3-311(c)(1).

176. Organization includes a corporation, government, government subdivision or agency, business trust, estate, trust, partnership, association, two or more persons having a joint or common venture, or any other legal or commercial entity. *See id.* § 1-201(28) quoted in *Winston*, *supra* note 4, at 219 n.289.

177. *See CAL. COM. CODE* § 3311(c)(1).

178. *See id.* § 3311 cmt. 5.

179. *See id.*

and public utilities generally have claims against a large number of customers.¹⁸⁰ Customers normally send their checks to a central location where the organization's clerks process the checks and simply record that payment has been made.¹⁸¹ An inadvertent accord and satisfaction can occur when a clerk who is trained to simply process the check and note the account number fails to notice the payment in full language on a check.¹⁸² Subsection (c)(1) allows an organization to protect itself from this problem by advising customers that communications regarding disputed debts must be sent to a particular person, office, or place.¹⁸³ If the organization complies with the requirements of section 3-311(c)(1), the check is treated as a partial payment of the debt, and not as an offer to settle.¹⁸⁴ Thus, "this section prevents a clever or careless debtor, aware of these modern business practices, from 'pulling a fast one' by slipping a full settlement check through the system to pay less than the full amount on an allegedly questionably disputed claim."¹⁸⁵

Section 3-311(c)(2) is also designed to prevent inadvertent accord and satisfaction.¹⁸⁶ If the creditor discovers that it has received a payment in full check, it can prevent an accord and satisfaction if the creditor tenders repayment of the check to the debtor within ninety days after the debtor tendered the check.¹⁸⁷ In other words, subsection (c)(2) provides a ninety-day window to rectify an inadvertent acceptance of a payment in full check. Section 3-311(c)(2) can be used by any creditor, whether or not an organization.¹⁸⁸

Subsections (c)(1) and (c)(2), however, are subject to section 3-311(d).¹⁸⁹ Subsection (d) states that if the debtor proves that the

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.* § 3-311(c)(1).

184. *See Winston, supra* note 4, at 219; *see also* CAL. COM. CODE § 3311 cmt. 5 (illustrating the application of subsection (c)(1) as a limitation on subsection (b) in cases in which claimant is an organization).

185. *Winston, supra* note 4, at 220.

186. *See* U.C.C. § 3-311 cmt. 6.

187. *See id.*

188. A creditor who is an organization can only use § 3-311(c)(2) as an alternative to § 3-311(c)(1). It cannot use both. *See id.* § 3-311 cmt. 6.

189. *See id.* § 3-311(d).

creditor knew¹⁹⁰ the check was tendered as a payment in full check, then the claim is discharged even if (1) the check was not sent to the person, office, or place required by a notice from the creditor in compliance with subsection (c)(1); or (2) the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2).¹⁹¹

In summary, UCC section 3-311 essentially codifies the common law doctrine of accord and satisfaction. Under section 3-311, a creditor, upon receiving a payment in full check, has the option of either: (1) accepting the check and thus releasing the balance of the claim, or (2) returning the check and preserving the right to seek the full amount. Section 3-311(c) addresses the issue of inadvertent accord and satisfaction in the commercial context and implements safeguards to protect the creditor.

b. criticisms of 3-311

The revision to section 1-207 and the creation of section 3-311 have facilitated the settlement of claims via accord and satisfaction checks, but there is an argument that the revisions do not go far enough. The requirement of a bona fide or unliquidated claim goes beyond other Uniform Commercial Code sections dealing with settlement of claims, and the provisions dealing with inadvertent acceptance of payment in full checks arguably provide greater protections to creditors than necessary.

As noted above, there are several sections in the Uniform Commercial Code that deal with settlements. Section 1-107 permits the discharge of any claim or right arising out of a breach by a written

190. A claimant knows that a check was tendered in full satisfaction of a claim when the creditor "has actual knowledge" of the fact. U.C.C. § 1-201(25). If the claimant is an organization, it has knowledge that a check was tendered in full satisfaction of the claim when that fact is

brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines.

U.C.C. § 1-201(27).

191. See CAL. COM. CODE § 3311(d).

release signed by the aggrieved party. Sections 2-209 and 2A-208, dealing with sales and leases of goods respectively, permit a modification of a contract without consideration. Section 3-604 permits a party entitled to enforce a negotiable instrument to discharge the obligation of a party to pay the instrument, also without consideration.¹⁹²

The only requirement for discharge under these other UCC sections is the overarching requirement of good faith found in various sections of the UCC.¹⁹³ There is no express requirement that the settled claim be in honest dispute or that the claim be unliquidated.¹⁹⁴

It may be that in most cases, if there is no dispute, the debtor will also be acting in bad faith in attempting to obtain a release via a payment in full check. But in some cases, because of financial hardship on the part of the debtor, and the creditor's desire to receive something, there might be a legitimate commercial reason for the parties to settle even if the amount owed is not in dispute. A verbal modification of a sale of goods contract to reduce the price for a financially distressed buyer might be enforceable under section 2-209, while the buyer's attempt to settle via a payment in full check would not be enforceable under section 3-311. The requirement of a bona fide dispute or unliquidated claim also requires litigation over the merits of the dispute. It is not clear why the standards for settlement under section 3-311 are higher than the standards under other UCC provisions.

As noted above, section 3-311 has safeguards to protect against "clever debtors" who attempt to slip payment in full checks past unsuspecting creditors. Section 3-311(c)(1) permits creditors to require such checks to be sent to a specified office. Commentators have criticized this section because it reduces the rights of debtors to informally settle disputes with organizations.¹⁹⁵ It has been argued that

192. The discharge can occur through voluntary destruction of the instrument, striking a signature, or otherwise by agreement not to sue. *See* U.C.C. § 3-604(a).

193. *See* U.C.C. §§ 1-203, 2-103(1)(b), 3-103(a)(3) (1999 Official Text).

194. Official comment 2 to § 2-209 speaks of the need for a "legitimate commercial reason" for a modification to be enforceable. *See* U.C.C. § 2-209 cmt. 2.

195. *See* Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Com-*

the problem targeted by section 3-311(c)(1) is not supported by empirical data and therefore it may be unnecessary.¹⁹⁶

Finally, assuming there is a genuine problem of full payment checks being sent to centralized payment centers, the language of section 3-311(c)(1) is currently broader than necessary to accomplish its goal.¹⁹⁷

The rationale of preventing unintended accord and satisfaction when payments are made to a central payment office applies only to large entities with a centralized payment department. Yet subsection 3-311(c)(1) allows any size organization, including those that do not use a central payment office, to impose a requirement that full payment checks be sent to a designated person or office.¹⁹⁸

It is also possible that many debtors will not pay very careful attention to or remember the "conspicuous statement"¹⁹⁹ sent by a creditor requiring accord and satisfaction checks to be sent to a specified office.

It may be that section 3-311(c)(2) provides sufficient safeguards to creditors and that subsection (c)(1) should be repealed. At some point, even a creditor with completely automated check processing will learn that the debtor is refusing further payment on the basis of a check tendered in accord and satisfaction. If that point comes within ninety days after payment of the check, subsection (c)(2) permits the creditor to tender repayment of the check and to assert the claim in full.²⁰⁰ Ninety days should be sufficient time for even the most monolithic creditor to discover a payment in full check which was erroneously accepted. However, if a compelling case can be made

mercial Code: A Consumer Perspective, 42 ALA. L. REV. 679, 691 (1991).

196. *See id.* Ms. Hillebrand suggests that prior to limiting the applicability of accord and satisfaction by adopting section 3-311(c)(1), state legislators should demand proof that full payment checks sent to centralized payment centers are a genuine problem. Assuming it is a genuine problem, legislators should then demand proof that creditors cannot solve this problem by simply instituting better check handling procedures. Ms. Hillebrand asserts that this is a better alternative than reducing consumer rights to use accord and satisfaction. *See id.*

197. *See id.*

198. *Id.* at 692 (footnote omitted).

199. *See* U.C.C. § 3-311(b).

200. *See* U.C.C. § 3-311(c)(2) (1995).

that it is not enough time, perhaps the time could be extended.

IV. WHICH STATUTE (SHOULD) GOVERN?

Unfortunately, when the California legislature made revised sections 1-207 and 3-311 of the UCC part of the California Commercial Code, the legislature did nothing about Civil Code section 1526. When the California legislature added the transition provisions via the passage of SB 1405 in 1994, again they left Civil Code section 1526 standing.²⁰¹ An earlier version of SB 1405 contained an express repeal of section 1526, but it was removed from the bill after it encountered opposition from the original sponsor of section 1526, Senator Quentin Kopp (I-San Francisco).²⁰² Currently, Civil Code section 1526 unhappily coexists with Commercial Code sections 1207 and 3311 in the California Codes.

The issue thus becomes, which statute—section 3311 or section 1526—should govern the treatment of accord and satisfaction checks in California? This section analyzes the rules of statutory construction, examines public policy arguments, and reviews California case law in concluding that Commercial Code section 3311 should govern; therefore, Civil Code section 1526 should be repealed.

A. Rules of Statutory Construction

One can attempt to deal with the question of which statute(s) should govern by using fundamental rules of statutory interpretation. One such rule is that where two statutes address the same subject matter, the more recent enactment prevails over an inconsistent prior enactment.²⁰³ The most recent enactment is considered the latest expression of legislative will.²⁰⁴ The California legislature enacted

201. See CAL. COM. CODE §§ 16101-16104 (West Supp. 1999).

202. Professor Hull worked with the California State Bar Uniform Commercial Code Committee and with the California Commission on Uniform State Laws in drafting the transition provisions, and this is his recollection of the events.

203. See *Stafford v. Los Angeles County Employees' Retirement Bd.*, 42 Cal. 2d 795, 798, 270 P.2d 12, 14 (1954); *Directors Guild of America v. Harmony Pictures, Inc.*, 32 F. Supp. 2d 1184, 1192 (C.D. Cal. 1998).

204. See *Stafford*, 42 Cal. 2d at 798, 270 P.2d at 14.

Civil Code section 1526 in 1987,²⁰⁵ and enacted Revised Commercial Code sections 1207 and 3311 in 1992.²⁰⁶ Therefore, the later Commercial Code enactment should trump the earlier inconsistent statute, Civil Code section 1526.²⁰⁷

On the other hand, other fundamental rules of statutory construction arguably suggest that Commercial Code section 3311 does not trump Civil Code section 1526. One rule states that statutes should be construed in a manner to make them apply together in harmony, if that is possible.²⁰⁸ Thus, if there is any way in which Civil Code section 1526 can be reconciled with Commercial Code section 3311, then they should coexist as opposed to one statute trumping the other.²⁰⁹

Another rule states that statutes that more specifically address the issue should prevail over more general statutes.²¹⁰ One could argue that Commercial Code sections 3311 and 1207 do not expressly state the effect of deleting the payment in full language noted on the check itself. Commercial Code section 3311 is silent on the issue, and section 1207 simply states that it does not apply to accord and satisfactions. Thus, the intent of the drafters must be divined from the official comments, which are not binding on the courts, but merely persuasive.

Civil Code section 1526, however, is more specific in its application than Commercial Code sections 1207 and 3311. Section 1526(a) specifically addresses the issue of deleting the payment in full language noted on the check.²¹¹ Section 1526(a) states that when a check tendered by the debtor contains the language “payment in

205. See *supra* Part III.A.1.

206. See *supra* Parts III.C.2, III.C.3.

207. See Steven O. Weise, *Payment-in-Full Checks*, 18 CAL. BUS. L. REP. 218, 219-20 (1997) (discussing *In re Van Buren Plaza, LLC*, 200 B.R. 384 (Bankr. C.D. Cal. 1996)).

208. See *Stafford*, 42 Cal. 2d at 799, 270 P.2d at 14.

209. See *infra* Part IV.C.2 (discussing *Directors Guild of America*, 32 F. Supp. 2d at 1190-92, where the U.S. District Court for the Central District of California addressed the issue of whether sections 1526 and 3311 can be reconciled).

210. See *Stafford*, 42 Cal. 2d at 798, 270 P.2d at 14.

211. See CAL. CIV. CODE § 1526(a) (West Supp. 1999); see also *supra* Part III.B.

full” on it, acceptance of the check by the creditor does not constitute an accord and satisfaction if any of the following occur: (1) the creditor deletes the payment in full language; (2) the creditor inadvertently accepts the check; or (3) the creditor does not realize that the check contains the payment in full language.²¹² Therefore, an argument can be made that Civil Code section 1526 should govern because it expressly discusses the effect of deleting the payment in full language on a check, whereas Commercial Code sections 1207 and 3311 are silent on this issue. A court, however, in deciding how to apply Commercial Code section 3311, should consider the intent underlying the statute. The official comments make clear that the drafters’ intent in enacting section 3311 was to overrule Civil Code section 1526, even if section 1526 is not specifically mentioned by name and number.²¹³

As illustrated above, rules of statutory construction do not render a clear answer as to which statute should govern. As Professor Karl Llewellyn stated: “Statutory interpretation still speaks a diplomatic tongue,” and this is evidenced by the fact that “there are two opposing canons [of construction] on almost every point.”²¹⁴ Thus,

212. See CAL. CIV. CODE § 1526(a). Of course, in order for section 1526 to apply, the claim must be disputed or unliquidated. See *id.*

213. See CAL. COM. CODE § 3311 (West Supp. 1999). Official comment 2 discusses the common law rule of accord and satisfaction. Under the common law, the debtor can propose a settlement of the disputed debt by clearly noting payment-in-full type language on the check. The creditor can refuse the check or can accept it subject to the condition stated by the debtor, but the seller cannot accept the check and refuse to be bound by the condition. If the creditor accepts the conditional check, then the claim is relinquished regardless of whether the creditor deleted the payment in full language. See *id.* cmt. 2. Official comment 3 states that section 3311 follows this common law rule. See *id.* cmt. 3; see also *supra* Part II. Civil Code section 1526 is in clear conflict with the common law rule because the section *does* allow the creditor to delete the payment in full language, cash the check, and preserve the claim. See CAL. CIV. CODE § 1526. Thus, because the drafters of Commercial Code section 3311 chose to follow the common law, which directly conflicts with Civil Code section 1526, their intent must have been to overrule Civil Code section 1526.

214. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Following are two of the examples given by Professor Llewellyn: “A statute cannot go beyond its text” vs. “To effect its purpose a

to shed some more light on the issue of which statute should govern, it is arguably more meaningful to consider the different public policy arguments supporting Civil Code section 1526 and Commercial Code section 3311.

statute may be implemented beyond its text”; “Where design has been distinctly stated no place is left for construction” vs. “[c]ourts have the power to inquire into real—as distinct from ostensible—purpose.” *Id.* at 401-02.

B. Public Policy

1. Public policy arguments for section 1526

Civil Code section 1526 was enacted to protect creditors' rights.²¹⁵ Specifically, it was enacted to protect creditors from debtors who issue payment in full checks in bad faith.²¹⁶ Creditors were frustrated with the choice²¹⁷ of either taking the check for some of the amount due, and possibly waiving the balance of their claim, or not taking the check and having to go through the expense and hassle of litigation.²¹⁸ Certainly one can understand the frustration of a creditor who receives a check from a deadbeat debtor containing the accord and satisfaction language, especially when the debtor does not have a legitimate defense to the creditor's full claim. Some legal commentators have characterized the use of the payment in full check as "an exquisite form of commercial torture on the payee."²¹⁹ For example, if the payment in full offer is reasonable, it creates an uncomfortable dilemma for the creditor: "Shall I risk the loss of the \$9000 ["payment in full" check] for an additional \$1000 that the bloke really owes me?"²²⁰ Civil Code section 1526 addresses these "inequities" that a payment in full check places on a creditor by al-

215. See *Burke Co. v. Hilton Dev. Co.*, 802 F. Supp. 434, 439 (N.D. Fla. 1992).

216. See *Burnham*, *supra* note 8, at 495 n.89.

217. This choice which left the creditors frustrated existed in the common law doctrine of accord and satisfaction and was subsequently codified and continues to exist today under section 3311 of the Commercial Code. See *supra* Parts II, III.C.2.a.

218. See *Burnham*, *supra* note 8, at 481.

219. JAMES WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-21, at 544 (2d ed. 1980). *But see* *Hendrick*, *supra* note 55, at 432 n.87 (quoting *Rosenthal*, *supra* note 59, at 56). *Rosenthal* answers the charge of *White and Summers*. "Assuming, however, parties of equal bargaining power negotiating in good faith at arm's length, it is not clear why this torture is any more exquisite than that induced by any settlement offer proposing more than the offeree is sure he would receive but less than he thinks he deserves." *Id.*

220. *Winston*, *supra* note 4, at 210 (citing *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 488 N.E.2d 56, 59 (N.Y. 1985) (quoting *WHITE & SUMMERS*, *supra* note 219, § 13-21, at 544-45)).

lowing the creditor to delete the accord and satisfaction language and sue for the balance of the claim, without worrying about whether there was a good faith dispute.²²¹

While at first blush Civil Code section 1526 appears to give creditors valuable rights, in the long run those rights are likely to become illusory. If debtors become aware of the creditor's right to strike the payment in full language, they will not tender payment in full checks. In fact, they may not tender any checks at all. If a well-advised debtor wants to make a partial payment without fear of the creditor suing for the balance, the debtor will be advised to require a formal release of claim to be issued by the creditor at the same time that the check is issued.²²² If the creditor is unwilling to provide such a formal release, the debtor may be better off waiting for the creditor to sue and obtain a judgment. For creditors, the expense of negotiating formal releases and pursuing litigation is likely to exceed any benefits they may obtain from striking payment in full language and suing for the balance of a claim, which they may not be able to recover in any event.

2. Public policy arguments for section 3311²²³

Unlike Civil Code section 1526, Commercial Code section 3311 does not allow a creditor to "have its cake and eat it too." Section 3311 essentially codifies the common law doctrine of accord and satisfaction by giving a creditor who receives a payment in full check the choice of either: (1) cashing the check and thus relinquishing the balance of the claim; or (2) returning the check to the debtor and preserving the claim.²²⁴ It does not allow a creditor to cash a payment in full check and come after the debtor for the balance of the claim.

221. *See supra* Parts III.A, III.B.1.

222. For other suggestions on how to comply with Civil Code section 1526, see Burnham, *supra* note 8, at 494-95. *See also* Weise, *supra* note 207, at 219 (suggesting that Civil Code section 1526 does not apply to offers of accord and satisfaction not "notated" on the check itself).

223. Because Commercial Code section 3311 essentially codifies the common law doctrine of accord and satisfaction, many of the public policy arguments supporting the common law also apply to section 3311. Thus, arguments that have previously been used to support the common law will be used in this Article to support section 3311.

224. *See supra* Part III.B.2.

The rationale underlying Commercial Code section 3311 is more sound than the rationale underlying Civil Code section 1526. The law favors settlements, and Commercial Code section 3311 furthers this goal.²²⁵ Section 3311 facilitates informal, efficient, and inexpensive dispute resolution,²²⁶ at a time where “[t]he costs and delays associated with litigation are mounting in geometric progression.”²²⁷ These high litigation costs and lengthy delays adversely effect both large business entities as well as the average American. For example, as of 1990, American corporations were spending in excess of \$20 billion annually defending lawsuits.²²⁸ In the Judicial Improvements Act of 1990, Chairman Joseph R. Biden addressed the impact of high cost and delays on the American middle class. Chairman Biden stated, “[f]or the middle class of this country . . . the courthouse door is rapidly being slammed shut. Access to the courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford.”²²⁹

While section 3311 does not “re-open the courthouse doors” which Chairman Biden asserts are being slammed shut, it does, however, open a different door for parties to enter, in order to solve a bona fide dispute. Under section 3311, a debtor and creditor can easily resolve a disputed claim through the simple act of drawing and negotiating a check containing payment in full language. As Chancellor William D. Hawkland states:

[T]here is much to be said for rules of law that facilitate the private resolution of disputes. Whatever other merits or demerits are assigned to the conditioned check, no one can deny that its use has produced the settlement of many cases to the great advantage of the commercial world and the

225. See Winston, *supra* note 4, at 206.

226. See Burke, 802 F. Supp. at 439; see also Hendrick, *supra* note 55, at 433 (“[T]he use of the full payment check under the common law favors the private resolution of disputes, ultimately benefiting the public at large.”).

227. S. REP. NO. 101-416, at 15 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6809 (quoting Carl Liggio, general counsel for Ernst & Young).

228. See *id.* at 7.

229. *Id.* at 6.

public at large.²³⁰

The application of Commercial Code section 3311 renders a fair result. It is a convenient and valuable method of dispute resolution. Equity dictates that a creditor who cashes a payment in full check should be bound by the terms of the offer.²³¹ The debtor's intent is known, and thus allowing the creditor to cash the check and sue for the balance—as Civil Code section 1526 allows—seems unfair.²³² Section 1526 allows a creditor to ignore the plain intent of the debtor and sue for the remainder due under the original debt.²³³ It runs afoul of the well-accepted rule that the offeror (the debtor) is the master of the offer.

While the common law doctrine of accord and satisfaction codified in Commercial Code section 3311 results in reduced litigation and efficient dispute resolution, some have argued that it gives debtors an unfair advantage over creditors.²³⁴ Although at first glance this may appear true, Commercial Code section 3311 does sufficiently protect creditors from overreaching debtors. In order for section 3311 to apply, the debtor must act in good faith when tendering the payment in full check to the creditor, and the amount of the claim in question must either be unliquidated or subject to a bona fide dispute.²³⁵ Thus, if a good faith dispute does not exist as to the amount due, then the creditor's cashing of a payment in full check for less than the total amount due will not relinquish the creditor's claim.²³⁶

230. William D. Hawkland, *The Effect of U.C.C. Section 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329, 332 (1969).

231. *See Burke*, 802 F. Supp. at 439.

232. *See id.* In other words, "[i]t is unfair to the party who writes the check thinking that he will be spending his money only if the whole dispute will be over, to allow the other party, knowing of that reasonable expectation, to weasel around the deal by putting his own markings on the other person's checks." *Id.* (quoting 6 ARTHUR L. CORBIN, CONTRACTS § 1279 (2d. ed. 1962 & Supp. 1999)).

233. *See Burke*, 802 F. Supp. at 439.

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

235. *See supra* Part III.C.2.

236. *See supra* Part III.C.2.a; *see also* White, *supra* note 5, at 525.

[An] example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on

In addition, the burden is on the debtor to prove that the check or an accompanying document contains a “conspicuous statement”²³⁷ indicating that the instrument was tendered as full satisfaction of the claim.²³⁸ This requirement prevents a debtor from sneaking the payment in full language past the creditor.

Finally, subsection (c) of Commercial Code section 3311 provides two additional safeguards to creditors. First, subsection (c)(1) applies to organizations and states that an accord and satisfaction does not result if the organization informed the debtor that communications concerning disputed debts should be sent to a specific person, office, or place, and the debtor sent this communication elsewhere.²³⁹ Second, subsection (c)(2) applies to any creditor, whether or not an organization, and provides a ninety-day grace period after the debtor tenders the check for the creditor to return the check to the debtor and preserve the claim.²⁴⁰ Thus, if the creditor accepted the check inadvertently, section 3311 gives the creditor ninety days to realize this mistake and return the check to the debtor and preserve the claim.

One other reason for courts to follow Commercial Code section 3311 as opposed to Civil Code section 1526 is that almost all jurisdictions have adopted revised Uniform Commercial Code Articles 3 and 4, including section 3-311.²⁴¹ By adopting the Uniform Commercial Code, California has signed off on the two principle policies underlying the Code, namely to provide uniform and certain law for commercial transactions throughout the United States.²⁴² Given a

their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor.

CAL. COM. CODE § 3311 cmt. 4 (West Supp. 1999).

237. “Conspicuous” statement is defined in Commercial Code section 1201(10). A statement is conspicuous if “it is so written that a reasonable person against whom it is to operate ought to have noticed it.” CAL. COM. CODE § 1201(10) (West 1964 & Supp. 1999).

238. See *supra* Part III.C.2.a.

239. See *supra* notes 174-85 and accompanying text.

240. See *supra* notes 186-88 and accompanying text.

241. As of this writing, only New York, Rhode Island, and South Carolina have not adopted Revised Articles 3 and 4. See U.C.C. Reporting Service, State U.C.C. Variation Table xix (March 1999).

242. See U.C.C. § 1-102 (1999); see also Bruce W. Frier, *Symposium: One*

choice of following a non-uniform commercial statute or a uniform one, California courts should follow the uniform statute.

In summary, Commercial Code section 3311 facilitates informal, quick, and inexpensive dispute resolution while providing the necessary safeguards to ensure that creditors are protected from overreaching debtors. As noted earlier, section 3311 might be amended to further facilitate claim resolution,²⁴³ but in its current form it is superior to the approach taken by Civil Code section 1526.

C. California Case Law

Since Revised Commercial Code sections 1207 and 3311 were enacted in 1992, we are aware of only two²⁴⁴ reported cases in which a court has had to choose which statute(s)—Commercial Code section 3311 or Civil Code section 1526—to apply to a payment in full check. Both cases are from lower federal courts—one a bankruptcy court decision—and as such are of only persuasive authority in California. One court applies section 1526 while the other applies section 3311. Thus, because binding case law does not exist on this issue, it is still unclear as to which of these conflicting statutes governs the use of accord and satisfaction checks in California.

1. *In re Van Buren Plaza*²⁴⁵

a. facts

On June 26, 1992, Van Buren Plaza, LLC, (“Debtor”) entered into a contract for services with Ironstone Group, Inc. (“Creditor”).²⁴⁶ The contract stipulated that Creditor was to perform services related to reducing the amount of Debtor’s property tax liabil-

Hundred Years of Uniform State Laws—Interpreting Codes, 89 MICH. L. REV. 2201 (1991) (comparing policies of the UCC against European uniform codes).

243. See *supra* notes 191-197 and accompanying text.

244. One other case, in addition to these two, involves a check issued after the effective date of California Commercial Code section 3311. The case cites Civil Code section 1526 but simply states that the check did not contain payment in full language and therefore did not represent an offer of accord and satisfaction. See *Thompson v. Thompson*, 41 Cal. App. 4th 1049, 1059-60, 48 Cal. Rptr. 2d 882, 888 (1996).

245. 200 B.R. 384 (Bankr. C.D. Cal. 1996).

246. See *id.* at 385.

ity.²⁴⁷ A dispute arose as to whether Debtor owed Creditor for services rendered for both the 1991 and 1992 tax years, or just for 1991.²⁴⁸ On June 20, 1994, Debtor tendered a check to Creditor for the exact amount due for only the 1991 tax year.²⁴⁹ On the back of the check, Debtor printed "Payment in full for all services to date."²⁵⁰ Before depositing the check, Creditor sent a letter to Debtor protesting the accord and satisfaction language and reserving its right to pursue the balance that it believed to be due.²⁵¹ After the Debtor ultimately filed for bankruptcy, Creditor filed a timely proof of claim for the balance of its claim.²⁵²

b. discussion

In *Van Buren Plaza*, the United States Bankruptcy Court, Central District of California, stated that the central issue in the case was to determine the applicable law in California regarding accord and satisfaction checks.²⁵³ In order to resolve this issue, the court had to first address the following two sub-issues: (1) Did this case present a bona fide dispute over an unliquidated claim?²⁵⁴ and (2) Assuming a bona fide dispute existed, did Creditor properly object to the payment in full language in reserving its rights?²⁵⁵

After giving a history of the law of accord and satisfaction in California up to the enactment of Civil Code section 1526, the court held that there was a bona fide dispute between Debtor and Creditor.²⁵⁶ The issue then turned to whether Creditor properly objected to

247. *See id.*

248. *See id.*

249. *See id.*

250. *Id.*

251. *See id.* at 386.

252. *See id.*

253. *See id.*

254. The court stated that an unliquidated claim or bona fide dispute between the parties must exist before an accord and satisfaction can be established. *See id.* at 387. This requirement existed under the common law and continues to exist today under both Commercial Code section 3311 and Civil Code section 1526. *See supra* Parts II-III.

255. *See Van Buren Plaza*, 200 B.R. at 386.

256. The court stated that in order to determine whether a bona fide dispute exists, the test is whether the dispute is honest as opposed to fraudulent. *See id.* at 387; *see also supra* notes 37-54 and accompanying text. The court de-

the payment in full language in reserving its rights.²⁵⁷ In addressing this issue, the court relied solely on Civil Code section 1526.²⁵⁸ The court pointed out that the language in section 1526(a) is somewhat ambiguous regarding whether the creditor must physically strike the payment in full notation before negotiating the check in order to reserve the creditor's rights.²⁵⁹ Specifically, the court was concerned with the language in section 1526(a) which allows a creditor to communicate its intent not to enter into an accord and satisfaction "[b]y striking out or *otherwise deleting*" the payment in full notation.²⁶⁰ The court held that the statutory language, "otherwise deleting," permits the creditor to send a letter to the debtor protesting the accord and satisfaction, thus reserving the creditor's rights.²⁶¹

Because Creditor in this case sent a letter to Debtor protesting the payment in full language, the court held that Creditor clearly communicated its intent not to enter into an accord and satisfaction in accordance with Civil Code section 1526.²⁶² As a result, the court determined that an accord and satisfaction was not reached and therefore Creditor was allowed to assert its claim in bankruptcy.²⁶³

The *Van Buren Plaza* court chose to follow Civil Code section 1526 without even mentioning Commercial Code sections 3311 and 1207. Since the check was issued in 1994, the provisions of revised Commercial Code Divisions 1 and 3—specifically, sections 1207

terminated that a bona fide dispute existed between the parties based on a letter where Debtor described a conversation between Debtor and Creditor. The letter verified that Debtor signed the contract with the understanding that the contract only pertained to the 1991 tax year. The letter convinced the court that the Debtor had an honest belief that it did not owe money for the 1992 tax assessment. *See Van Buren Plaza*, 200 B.R. at 387.

257. *See id.*

258. *See id.*

259. *See id.*

260. *Id.* (emphasis added) (quoting CAL. CIV. CODE § 1526(a) (West Supp. 1999)).

261. *See id.* In other words, when construing section 1526(a), courts should not limit it to a literal interpretation. "A literal interpretation might hold that the statute does not apply in cases where an oral statement, separate communication, or accompanying letter, rather than the check itself, communicates that the creditor wishes to reject the debtor's offer to settle the claim." *Id.*

262. *See id.*

263. *See id.* at 387-88.

and 3311—applied to the *Van Buren Plaza* transaction.²⁶⁴ At a minimum, the court should have addressed the application of sections 1207 and 3311 to the payment in full check. Perhaps the lawyers did not call these statutes to the court’s attention, or for some reason the court erroneously thought that Civil Code section 1526 more clearly addressed the situation. If Commercial Code section 3311 had been applied in *Van Buren Plaza*, as it should have been, Creditor would not have been allowed to assert its claim in bankruptcy.²⁶⁵

2. *Directors Guild of America v. Harmony Pictures, Inc.*²⁶⁶

a. *facts*

Directors Guild of America—Producer Pension Plan and the Directors Guild of America—Producer Health Plan (“DGA”) hired an accounting firm to audit the books and records of Harmony Pictures, Inc. and Melody Film, Inc. (“HPMF”) to determine whether it paid the proper amount in contributions to DGA’s pension and health plans.²⁶⁷ Based on the accounting firm’s findings, on July 23, 1997, DGA sent a letter to HPMF claiming that HPMF failed to pay or underpaid contributions to its pension and health plans for the audit period of June 1, 1990, through May 31, 1994.²⁶⁸

On August 26, 1997, HPMF sent a letter to DGA in an effort to resolve the dispute as to the amount due.²⁶⁹ The letter stated that

264. The California legislature adopted revised UCC §§ 3-311 and 1-207 in 1992. The revised divisions of the California Commercial Code were effective January 1, 1993. *See supra* notes 157-66 and accompanying text.

265. Section 3311 gives the creditor the choice of either (1) accepting the payment in full check and thus releasing the claim, or (2) refusing the check and preserving the claim. *See supra* Part III.C.2.a, III.C.2.b. Under section 3311, because the Creditor in this case accepted the check, an accord and satisfaction would have been reached and the Creditor would therefore have been precluded from asserting its claim in bankruptcy.

266. 32 F. Supp. 2d 1184 (C.D. Cal. 1998).

267. *See id.* at 1186.

268. *See id.* Specifically, the accounting firm determined that HPMF owed DGA \$67,111.64 in further contributions, \$34,037.70 in interest and \$8442.90 in audit fees, for a total of \$109,592.24. *See id.* at 1186-87.

269. *See id.* at 1186.

HPMF was enclosing a check for \$67,111.64²⁷⁰ as “[f]ull and final payment and settlement . . . for the audit period June 1, 1990[,] through May 31, 1994.”²⁷¹ On the back of the check, “HPMF placed the following notation: ‘Full and final settlement for the audit period 6/1/90 to 5/31/94.’”²⁷²

On August 27, 1997, DGA sent a letter in response to HPMF’s letter.²⁷³ DGA acknowledged receipt of the check, but stated that the check did not represent full and final settlement.²⁷⁴ However, DGA did state that HPMF’s letter would be presented to the Legal and Delinquency Committee at their next meeting for final resolution of this issue.²⁷⁵ DGA informed HPMF that it would be “[n]otified of [the Committee’s] decision in writing immediately thereafter.”²⁷⁶ DGA then struck out the payment in full language on the check and deposited it into its account.²⁷⁷

On September 15, 1997, almost three weeks after DGA’s August 27, 1997, letter to HPMF, DGA informed HPMF in writing that the Committee had rejected HPMF’s settlement offer.²⁷⁸ “By the time HPMF received the letter, it was too late to stop payment on the [c]heck.”²⁷⁹ HPMF, relying on Commercial Code section 3311, argued that DGA’s acceptance of the check constituted an accord and satisfaction.²⁸⁰ DGA, however, relied on Civil Code section 1526 and argued that by striking out the payment in full language on the check, it had preserved the right to litigate the balance of its claim.²⁸¹

270. This figure constituted the entire amount of the alleged unpaid contributions but did not include interest and audit fees which DGA had requested. *See id.* at 1186-87.

271. *Id.* at 1186.

272. *Id.* at 1187.

273. *See id.*

274. DGA claimed that interest of \$34,037.70 and audit fees of \$8442.90 for a total of \$42,480.60 remained outstanding. *See id.*

275. *See id.*

276. *Id.*

277. *See id.*

278. *See id.*

279. *Id.*

280. *See id.*

281. *See id.*

b. discussion

The United States District Court for the Central District of California was thus presented with the same issue that the *Van Buren Plaza* court addressed.²⁸² Specifically, the issue was which provision—Civil Code section 1526 or Commercial Code section 3311—should govern the treatment of accord and satisfaction checks in California?²⁸³ In its well-reasoned opinion, the court broke down its analysis into three parts: (1) Which statute(s) apply to the facts of this case? (2) If both statutes apply, can they be reconciled? and (3) If they cannot be reconciled, which provision should control?²⁸⁴

DGA conceded that HPMF met its burden of establishing that Commercial Code section 3311 applied.²⁸⁵ However, DGA argued that Civil Code section 1526(a) also applied and should govern the dispute.²⁸⁶ HPMF countered by stating that even if section 3311 did not trump section 1526, section 1526(a) could not be applied because section 1526(c)—which confirms “an accord and satisfaction where the check was issued ‘in conjunction with a release of a claim’”—was the relevant subdivision that governed this transaction.²⁸⁷

The court relied on *Red Alarm, Inc. v. Waycrosse, Inc.*,²⁸⁸ to determine whether section 1526(c) applied to this case.²⁸⁹ In *Red Alarm*, the Ninth Circuit limited the scope of section 1526(c) in order

282. See *supra* Part IV.C.1. However, unlike the *Van Buren Plaza* court which only considered section 1526, and ignored the application of section 3311, the *Directors Guild* court analyzed both section 3311 and section 1526, thus rendering a more complete opinion than the court in the *Van Buren Plaza* case.

283. See *Directors Guild*, 32 F. Supp. 2d at 1189.

284. See *id.* at 1188-92.

285. See *id.* at 1189. Both parties agreed that section 3311 subsections (c) and (d) were not applicable to the facts of this case. See *id.* For a review of subsections (c) and (d) see *supra* notes 173-91 and accompanying text.

286. See *Directors Guild*, 32 F. Supp. 2d at 1189.

287. *Id.* HPMF argued that the letter that DGA sent along with the payment in full check constituted a “release” within the meaning of the statute and therefore an accord and satisfaction was reached under section 1526(c). See *id.* Of course, DGA maintained that the letter did not constitute a “release” and therefore section 1526(c) did not apply. See *id.*

288. 47 F.3d 999 (9th Cir. 1995). See also *supra* notes 129-55 and accompanying text for a discussion of the *Red Alarm* case.

289. See *Directors Guild*, 32 F. Supp. 2d at 1189.

to protect section 1526(a) from being completely trumped.²⁹⁰ The court reasoned that “[e]very proposed accord and satisfaction can be construed to involve a release of the compromised claims. If section 1526(c) is interpreted that broadly, then it will completely vitiate section 1526(a).”²⁹¹

The *Directors Guild of America* court, in analogizing the *Red Alarm* facts with the facts of its case, agreed with the Ninth Circuit opinion that section 1526(c) should be limited in scope.²⁹² The court reasoned that the language in HPMF’s letter offering settlement was simply just a more elaborate version of what was typed on the back of the payment in full check.²⁹³ The court stated that HPMF’s argument that the letter constituted a release must fail because otherwise any “debtor could preclude the application of section 1526(a)” simply by enclosing a letter with the check “stating that the check constituted ‘payment in full.’”²⁹⁴ In other words, a broad construction of section 1526(c) “would eliminate a creditor’s ability to preserve its rights under section 1526(a) by crossing out the notation on the check.”²⁹⁵ Thus, in narrowly construing section 1526(c), the court stated that the “reference to ‘release’ must therefore contemplate a mutual understanding (not necessarily in writing) that was reached *before* the debtor issued the check containing the notation.”²⁹⁶ The court concluded that because DGA and HPMF did not reach a mutual understanding before the issuance of the check, the letter HPMF enclosed with the check did not constitute a “release” under section 1526(c),²⁹⁷ and therefore section 1526(c) did not apply to this transaction.²⁹⁸ Therefore, DGA was correct in asserting that while Commercial Code section 3311 applied to the facts of this case, section 1526(a) also applied.²⁹⁹

290. *See Red Alarm*, 47 F.3d at 1003.

291. *Directors Guild*, 32 F. Supp. 2d at 1189 (quoting *Red Alarm*, 47 F.3d at 1003).

292. *See id.*

293. *See id.*

294. *Id.*

295. *Id.*

296. *Id.* (emphasis added).

297. *See id.* at 1190.

298. *See id.* at 1192.

299. *See id.*

Because the court concluded that both Civil Code section 1526(a) and Commercial Code section 3311 applied to the facts of the case, the court shifted its analysis to determine whether these statutes could be reconciled.³⁰⁰ The court emphasized that the “goal of statutory construction is to . . . effectuate the intent of the [l]egislature.”³⁰¹ Whenever reasonably possible, the statutes should be reconciled.³⁰² If, however, the two statutes cannot be reconciled, then effect is given to the more recently enacted law.³⁰³ The court first considered the history of section 1526 and section 3311 and concluded that the legislative history did not establish the legislature’s intent with regard to section 3311 vis-à-vis section 1526.³⁰⁴

The court then considered alternative constructions of the statutes in order to avoid direct conflict.³⁰⁵ HPMF wanted section 3311 to apply so that an effective accord and satisfaction would be reached, and DGA would therefore be precluded from seeking the balance of its alleged claim.³⁰⁶ In an attempt to reconcile section 3311 with section 1526, HPMF argued that section 3311 more specifically applied to the facts of this case.³⁰⁷ Section 1526(a) only discusses notations on checks and drafts, but does not address those instances, such as this case, where the debtor sends a letter accompanying the check.³⁰⁸ Section 3311, however, refers to “an instrument or an accompanying written communication” such as HPMF’s August 26, 1997, letter, and therefore should apply to this case.³⁰⁹ The court quickly rejected this argument, pointing out that “nothing in Civil Code section 1526 precludes its application where” the check is

300. *See id.*

301. *Id.*

302. *See id.*

303. *See id.*

304. *See id.* at 1190-91. The court determined that when section 3311 was enacted in 1992, “nowhere in the [l]egislative history of this 1992 revision did any legislator or other person expressly mention Civil Code section 1526.” *Id.* at 1190.

305. *See id.* at 1191.

306. *See id.*

307. *See id.*

308. *See id.*

309. *Id.* (second emphasis added).

accompanied by a letter.³¹⁰ Thus, HPMF's attempt to reconcile the statutes failed.

DGA also proposed an alternative construction of the statutes in an attempt to reconcile them. DGA wanted section 1526(a) to apply because section 1526(a) allows the creditor to cross out the payment in full language, cash the check, and sue for the balance of the alleged claim.³¹¹ DGA argued that section 1526 and section 3311 should be construed together to provide three different protections to creditors who have received payment in full checks.³¹² First, Commercial Code section 3311(c) protects a creditor by allowing the creditor a ninety-day window to return to the debtor a payment in full check that the creditor inadvertently deposited.³¹³ Second, Commercial Code section 3311(c) also protects a creditor by allowing the "creditor to require that communications regarding disputed debts be sent to a particular person or place," and if the debtor does not comply with this requirement, "then the claim is not discharged even if the creditor cashes the check."³¹⁴ Third, Civil Code section 1526 protects a creditor by allowing a creditor to protest the payment in full language and avoid an accord and satisfaction.³¹⁵

The court did not find DGA's argument persuasive.³¹⁶ The court reasoned that adopting DGA's construction would undermine the purpose behind section 3311 of "benefiting debtors and promoting settlements."³¹⁷ If Civil Code section 1526 was construed with Commercial Code section 3311 as just another exception, the effect would be that the "exception would swallow the rule."³¹⁸ Creditors

310. *Id.* The court reasoned that HPMF's proposed construction of section 1526 "would essentially add the phrase 'unless the check is accompanied by written correspondence' to section 1526." *Id.* The court held that this construction would be "contrary to Code of Civil Procedure section 1858" which states "that when construing a statute, a court should not 'insert what has been omitted.'" *Id.* (relying on *Western/California v. Dry Creek Joint*, 50 Cal. App. 4th 1461, 1488, 58 Cal. Rptr. 2d 220, 236 (1996)).

311. *See id.*

312. *See id.*

313. *See id.*

314. *Id.*

315. *See id.*

316. *See id.*

317. *Id.*

318. *Id.* In other words:

would always “take the money and run’ (to the nearest bank) . . . [and] Commercial Code section 3311 would then have no meaningful function in California.”³¹⁹ Thus, DGA’s alternative construction of the statutes was also rejected.

The court held that Civil Code section 1526(a) could not be reconciled with Commercial Code section 3311(a) and 3311(b).³²⁰ Thus, in deciding which statute should govern the dispute, the court gave effect to section 3311 because it was enacted after section 1526.³²¹ Because the court followed section 3311, HPMF’s motion for partial summary judgment was granted and DGA’s motion for partial summary judgment was denied.³²² DGA’s striking of the payment in full language on the settlement check constituted an accord and satisfaction and DGA was therefore precluded from seeking the alleged balance of the claim.³²³

V. CONCLUSION

When a creditor receives a payment in full check, the creditor should be bound either to reject the check, or by accepting it, accede to the debtor’s terms. A creditor should not be allowed to “accept the benefit, and reject the condition.”³²⁴ This rule existed under the common law and is supported today by Commercial Code sections 1207 and 3311. However, in California, because Civil Code section 1526 continues to co-exist with the Commercial Code statutes, creditors can rely on section 1526 and argue that it allows them to “have their cake and eat it too.” In other words, it allows the creditor to accept the benefit while rejecting the condition. Until Civil Code sec-

What incentive would a creditor, even one who actually knew about Commercial Code Section 3311, ever have to accept less than full payment of his claim and forego the rest, if instead he could preserve the right to threaten suit or even sue for the remainder, merely by crossing out the notation?

Id.

319. *Id.*

320. *See id.* at 1192.

321. *See id.*

322. *See id.*

323. *See id.*

324. *Potter v. Pacific Coast Lumber Co.*, 37 Cal. 2d 592, 599, 234 P.2d 16, 20 (1951).

tion 1526 is repealed, our advice to debtors is that they cannot be certain that the issuance of a payment in full check to a creditor—and the creditor's subsequent acceptance of that check—will render an effective accord and satisfaction, thus relinquishing the balance of the claim. Therefore, in order for a debtor to protect itself, the debtor should demand a formal release of the claim from the creditor in exchange for the debtor's partial payment.

With regard to creditors, if a court is willing to accept the argument that Civil Code section 1526 trumps the Commercial Code statutes, then a creditor can reserve its rights to the balance of the claim by simply deleting the payment in full language. However, the authority for that proposition is slim—a bankruptcy court decision³²⁵—and, in our opinion, wrong. In addition, a recent district court opinion,³²⁶ while only persuasive authority, considered both Civil Code section 1526 and Commercial Code section 3311 to resolve the facts of its case, and chose to follow section 3311.³²⁷ Therefore, if a creditor is really concerned about reserving its rights to pursue the balance of the claim, it should return the check to the debtor and sue for the total amount believed to be due.

The bottom line is that the California legislature needs to deal with this inconsistency in the statutes. The legislature should place California in the mainstream of jurisdictions by repealing Civil Code section 1526 and leaving Commercial Code section 3311 standing alone. If anything, Commercial Code section 3311 does not go far enough in facilitating settlements; it should be amended to require only good faith on the part of the party seeking settlement and should not provide the creditor with the option of pursuing the balance of a claim allegedly due simply because the payment in full check was sent to the wrong office.

325. See *In re Van Buren Plaza*, 200 B.R. 384 (Bankr. C.D. Cal. 1996); see also *supra* Part IV.B.1.

326. See *Directors Guild*, 32 F. Supp. 2d at 1192; see also *supra* Part IV.B.2.

327. See *Directors Guild*, 32 F. Supp. 2d at 1192.