Tender of Payment Under U.C.C. Section 3-604: A Forgotten Defense?

A tender of payment may be defined as "an unconditional offer by a debtor or obligor to pay another, in current coin of the realm, a sum not less in amount than that due on a specified debt or obligation."[1] Tender of payment typically arises within the law of commercial paper when a party obligated on a negotiable instrument, at its maturity date, tenders the sum due to the holder. If tender is refused, and the holder subsequently brings suit to collect on the obligation, the party obligated may assert the prior tender as a defense to liability for interest, costs, and attorney's fees accruing on the instrument after the effective date of the tender. Article Three of the Uniform Commercial Code (Code) has codified a tender of payment rule for commercial paper in section 3-604:

> (1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.
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> (2) The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.
>
> (3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.[2]

Tender of payment under section 3-604 has been litigated only infrequently since the enactment of the Code.[3] Several reasons may be postulated for this lack of legal attention to tender. First, it may be that tender of payment infrequently arises in modern commercial transactions. As will be seen,[4] tender only becomes an issue when the holder delays collection of the instrument after it matures and the party obligated on the instrument desires to stop the running of interest and costs on the obligation. It is possible that modern holders promptly collect their debts and hence tender of payment does not arise as an issue. In the early days of the common law when the doctrine of tender of payment arose, great distances and gaps in communication could easily cause delay in the collection of negotiable instruments. The modern commercial world does not operate under similar disabilities.

Second, it is possible that parties obligated on negotiable instruments are unaware that tender of payment exists as a mechanism to stop interest and costs from running on an instrument after its maturity date. Tender

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1. Baucum v. Great Am. Ins. Co. of N.Y., 370 S.W.2d 863, 866 (Tex. 1963).

2. U.C.C. § 3-604.

3. The Uniform Commercial Code Reporting Service reports fewer than a dozen cases concerning § 3-604.

4. *See* notes 9-13 and accompanying text *infra*.

of payment in the negotiable instruments setting has been ignored in legal literature.[5] Section 3-604 has not been the subject of commentary since the enactment of the Code.

Third, because section 3-604 of the Code fails to define tender, the definition must be derived from the common law.[6] Parties obligated on negotiable instruments may be unwilling to follow the rituals associated with tender at common law, out of ignorance or desire to avoid the bother of making a tender.

The purpose of this Comment is to explore the law of tender of payment in the negotiable instruments setting through an examination of tender under the common law, the Negotiable Instruments Law, and section 3-604 of the Code, and to explain the lack of use of section 3-604. Exploration of the nature of tender of payment as it evolved from the common law to its present day form will reveal that many problems relating to tender of payment remain unresolved by the Code. This Comment will propose solutions to those problems.

I. TENDER OF PAYMENT UNDER PRE-CODE LAW

Tender of payment arises in a great variety of contractual settings. For example, a mortgagor may tender a payment due on a mortgage to the bank, an insured may tender a premium due on a policy to an insurance agent, or a consumer may tender money due on an automobile to a loan company.[7] In order to clarify how tender of payment works for commercial paper, it is helpful to illustrate how and why tender of payment may arise in this context.

A. *The Negotiable Instruments Setting*

Two hypothetical negotiable instruments reveal typical contexts in which tender of payment may become an issue.[8] In the first, *A*, in exchange for a $1000 loan from *B*, states:

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5. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 13-18, at 443 (1972) makes only a passing reference to tender of payment under § 3-604. For a general discussion of the law of tender, see Comment, *The Law of Tender in Texas*, 29 BAYLOR L. REV. 325 (1971).

6. U.C.C. § 1-103 reads:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

7. For a discussion of tender in a variety of contractual settings, see Comment, *supra* note 5, at 325.

8. These are not the only commercial paper contexts in which tender of payment may be an issue. Similar considerations prevail when a party acts as an acceptor of an instrument, that is, agrees to honor the instrument as presented. *See* U.C.C. § 3-410. This Comment will not examine the problems associated with a tender of a check in satisfaction of a debt. *See* Comment, *Accord and Satisfaction Under the U.C.C.* § 1-207, 38 OHIO ST. L.J. 921 (1977).

> I promise to pay *B* or order, the principal sum of $1000 plus 10 percent interest compounded annually, principal and interest due and payable one year from the date of this instrument.

The second instrument is a variation on the first and reads:

> I promise to pay *B* or order, the principal sum of $1000 plus 10 percent interest compounded annually, principal and interest due and payable at the First National Bank of New York, one year from the date of this instrument.

In both cases, *A* is the maker of the note, and *B* is the payee. As long as *B* retains a right of payment on the note, he is termed the holder. The difference between the two notes is that the second instrument is *domiciled*, that is, payable at a place specified in the instrument. Notes may be domiciled anywhere, but the most common domicile is a bank. The first note is payable on demand anywhere. In either case, *B* has the right to collect one thousand dollars plus ten percent interest one year from the date of the note.

The problem is that *B*, the holder, is not required to present the note for payment to *A*, the maker, on the date of the note's maturity. *A*'s obligation to pay the principal and interest continues whether *B* collects on the date provided for in the note or ten years later. Early English law established that makers of notes payable on demand had no right to presentment of the note for payment at its maturity.[9] This rule was in contrast to the law of checks, which required prompt presentment by the holder for payment.[10] The English courts, however, did adopt the check rule for instruments domiciled at a bank. Since notes domiciled at a bank were analogous to an order on the bank to pay the note, the English courts took the view that presentment should be necessary.[11] This distinction between domiciled and nondomiciled instruments did not survive in the United States. In the 1839 case of *Wallace v. McConnell*, the United States Supreme Court refused to require presentment for payment of domiciled paper:

> [W]hen the suit is against the maker of a promissory note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it.[12]

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9. *See* Rowe v. Young, 2 Brod & Bing 165 (C.P. 1820); Steffen, *Instruments "Payable at" a Bank*, 18 U. CHI. L. REV. 55, 60-65 (1950).

10. Failure to present a check promptly for payment absolved the drawer from liability for any loss occasioned by the delay. *See* Steffen, *supra* note 9, at 58.

11. *See* Sanderson v. Bowes, 14 East 500 (C.P. 1811); Steffen, *supra* note 9, at 61-62. The result is still good law in England. *See* 3 HALSBURY'S LAWS OF ENGLAND, *Business and Banking*, ¶ 58 (4th ed. 1973).

12. 38 U.S. (13 Pet.) 136, 149 (1839). *See* Steffen, *supra* note 9, at 65-68.

The result was that makers had no presentment rights in the United States regardless of the type of promissory note.

The resulting disadvantage for the maker is that, if the holder delays collection of the note after it is due, interest continues to accrue on the note—in the sample notes, at the rate of 10 percent compounded annually. If the holder delays presentment for a substantial period of time, and if the note is for a substantial principal sum at a high rate of interest, the hardship placed on the maker may be very great. The maker's difficulties are further exacerbated when the original payee on the note is no longer the holder. If the note is negotiable,[13] *B* may have sold or given the note to *C* in satisfaction of a debt. *B*, by indorsing the note over to *C*, relinquishes his right to payment of *A*'s debt. It is now up to *C* to collect on *A*'s obligation. Especially with notes payable only after a period of years, the note may have changed hands many times. Thus, the maker may not even know the identity of the holder, although domiciling the note assures the maker that the holder, whoever he may be, must collect at a place known to the maker. The hardships placed on the makers of negotiable instruments spurred creation of a mechanism by which makers could stop the accrual of interest on the note caused by the holder's delay in presentment. The law of tender was the answer.

B. *Formal Requirements of a Tender of Payment at Common Law*

A tender of payment is essentially an offer by the maker of the note to pay his obligation to the holder when it becomes due. Yet a tender of payment is really more than an offer:

> A tender, while having many of the characteristics of any offer, is, in the contemplation of the law, more than an offer to perform the obligation required of the obligor under the terms of his contract. In other words, tender is a broader concept than offer, the former including the latter; every tender includes an offer, but every offer is not a tender.[14]

What, then, makes a tender of payment more than an offer to pay the sum due on the note? The common law worked out various requirements that must accompany the offer before it becomes a bona fide tender.

1. *The Elements of the Offer*

At common law, an offer could be a tender only if it was unconditional and manifested the readiness, willingness, and ability of the maker to pay the holder the sum due on the instrument.[15] A tender of payment, in other

13. Negotiability requires the existence of several formal elements set forth in U.C.C. §§ 3-104 to 114.

14. Comment, *supra* note 5, at 326.

15. *See, e.g.*, Bank of Lafayette v. Giles, 208 Ga. 674, 680, 69 S.E.2d 78, 82 (1952); Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329 (1921).

words, had to be more than a hollow offer by the maker to extinguish his obligation. The unconditional nature of the tender could be destroyed by tendering the sum subject to a counterclaim against the holder.[16] A maker could insist, however, that the holder perform a statutorily imposed duty without destroying the unconditional nature of the tender:

> Where it is the duty of the creditor, on tender of payment, to do a particular act, the offer to pay may be coupled with a demand upon the creditor to perform such act; e.g., in a case where, by statute, it is the duty of the creditor to give a release, on tender of payment a release may be demanded, for it is the performance of a duty imposed by law.[17]

The unconditional offer by the maker had to be for the sum owing at the time of the tender.[18] Older courts insisted that "tenders are always to be considered *stricti juris*; if a tender is not legal in every respect, even a court of equity will not support it, nor supply a defect."[19] Thus, if the maker failed to tender the exact sum due, the tender was defective. Modern courts, however, have relaxed this requirement somewhat to approve a tender of a reasonably approximate sum to the holder.[20]

It was clear at common law that the maker had to tender payment to the party to whom the sum was owing. If the original holder of the note had sold it or transferred it to another person, and the maker knew that the original holder no longer had any interest in the note, the tender had to be to the new holder.[21] In the absence of a right to prepayment, the maker could not tender payment before the note became due,[22] and if the tender occurred after the maturity date, the tender had to include interest on the note up to the date of tender.[23]

2. *Methods of Tendering Payment*

Makers of nondomiciled notes faced considerable difficulties in making a tender if the holder could not be easily located. The Supreme Court of Texas in *Baucum v. Great American Insurance Co. of New York* stated: "At common law where no place of payment is specified or fixed by law the rule is that the tenderer must seek the tenderee and make a

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16. Margolis v. Wittman, 169 N.Y.S. 573, 574 (App. Div. 1918); Brooklyn Bank v. DeGrauw, 23 Wend. 342 (N.Y. 1840).

17. Balme v. Wambaugh, 16 Minn. 106, 108 (1870). Upon payment the maker today has a right under U.C.C. § 3-505(1)(a) to a return of the note or a receipt of payment.

18. Comment, *supra* note 5, at 329.

19. King v. Finch, 60 Ind. 420, 422-23 (1878).

20. In Capital City Motors, Inc. v. Thomas W. Garland, Inc., 363 S.W.2d 575 (Mo. 1962), failure to tender four days' interest on $1000 did not destroy the tender. In Duke v. Pugh, 218 N.C. 580, 11 S.E.2d 868 (1940), a tender of $1.25 less than the amount owing did not destroy the tender. In Matzger v. Page, 62 Wash. 170, 113 P.254 (1911), failure to tender three days' interest on $40 did not destroy the tender.

21. Kentucky Virginia Stone Co. v. Fortner, 159 Va. 234, 165 S.E. 401 (1932).

22. Shipp v. Anderson, 173 S.W. 598 (Tex. Civ. App. 1915).

23. Duke v. Pugh, 218 N.C. 580, 11 S.E.2d 868 (1940).

tender to him if he can be found by the exercise of due diligence."[24] The question then became one of assessing the due diligence of the maker. One case did conclude, however, if the holder had left the state there was no duty on the part of the maker to follow the holder into another jurisdiction in order to tender payment.[25]

The ease of making a tender of payment was increased with respect to domiciled instruments through the doctrine of "constructive tender". The maker could effect a constructive tender by having an adequate sum on hand at the place of payment specified in the instrument. The United States Supreme Court in *Wallace v. McConnell* officially approved the doctrine of constructive tender when it wrote: "[S]hould [the maker] not find his note or bill at the bank, he can deposit his money to meet the note when presented, and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit."[26] The doctrine of constructive tender evolved as a way of relieving the maker from continual presence at the place designated in the note. It was clear, however, that regardless of whether the note was domiciled, the maker did not have to tender when it was certain that the holder would reject it. This rule was based on the equitable principle that the law will not require the doing of a useless thing.[27]

The State of Iowa has enacted legislation to aid makers of nondomiciled paper in tendering payment to an unknown or absent holder. The statute[28] allows the maker to leave funds on deposit with a court for the holder. By tendering the debt into court and giving notice, the maker can effect a valid tender when the holder is absent or unknown. This statute is unique in extending the possibility of a constructive tender to makers of nondomiciled instruments. Given the potential hardship to makers of nondomiciled paper when the holders are absent, this statute makes practical sense.

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24. 370 S.W.2d 863, 867 (Tex. 1963).

25. Stansbury v. Embrey, 128 Tenn. 103, 109, 158 S.W. 991, 993 (1913).

26. 38 U.S. (13 Pet.) 136, 150 (1839). *Accord*, Forwood v. Magness, 143 Md. 1, 121 A. 855 (1923); Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329 (1921); Hennessey v. Woodling, 199 S.W. 564 (Mo. Ct. App. 1917).

27. *See, e.g.*, Bank of Lafayette v. Giles, 208 Ga. 674, 679, 69 S.E.2d 78, 82 (1952).

28. IOWA CODE ANN. § 538.5 (Supp. 1978) provides:

When an instrument for the payment of money is due and the holder is absent from the state or his identity or whereabouts are unknown and the instrument does not provide for a place of payment, the maker may tender payment at the last known residence or place of business of the last known holder, and if there be no person there authorized to receive payment and give proper credit therefor, the maker shall be deemed to have tendered payment and interest shall cease on the date of deposit if:

1. The maker deposits the amount due with the clerk of the district court in the county where the maker resided at the time of the making of the instrument, if he was then a resident of the state of Iowa, or if the maker was a nonresident of the state of Iowa at the time of making, with the clerk of the district court . . . and

2. . . . b. the maker within three days gives notice of such deposit by ordinary mail to the holder, if his identity and address are known.

3. *Keeping the Tender Good*

Regardless of the effectiveness of the maker's original tender of payment, an additional requirement generally existed at common law that the maker had to keep his tender "good" or "open." In *Fitzgerald v. Vaughn* the Georgia Supreme Court wrote:

> A tender, to prevent the running of interest, must be continuing . . . . The fact that a tender is made and refused is not sufficient to stop the running of interest. It must also appear that the tender has been kept good by the tenderer being at all times ready, willing, and able to pay the amount tendered . . . .[29]

The rationale for requiring the maker to keep his tender good was that after the date of the note's maturity the money legally belonged to the holder. Since the maker's obligation did not cease until the note was collected, the maker had to demonstrate the seriousness of his offer to pay by keeping the tender good.

Two exceptions to the necessity of keeping a tender good arose at common law. In a court of equity, it generally was not a fixed requirement that the tender be kept good,[30] unless the maker sought affirmative relief from the note.[31] The rationale stemmed from the equitable principle that a "party coming into equity for affirmative relief must himself do equity."[32]

The second exception to the necessity of keeping a tender good was that the discharge of a surety was not dependent on the continuing tender of the maker. The Supreme Court of Indiana in *Spurgeon v. Smitha* stated: "A creditor impliedly undertakes that the debt may be paid at maturity, and if he refuses to accept the money due, when tendered him, he breaks this implied undertaking, and loses his claim upon the sureties, for the act is injurious to them."[33]

How could the maker keep his tender good? By far the most common procedure was to allow the maker to deposit the money due on the note in court.[34] Many jurisdictions imposed such a *profert in curia* as an additional requirement for an effective tender. The Colorado Supreme Court, in *Westcott v. Patten*, stated: "In order, however, to render this plea [of tender] effective, when permissible, it would be necessary that it be accompanied by the tender and actual payment into court, subject to the plaintiff's disposal, of the money admitted to be due."[35] The equity courts

29. 189 Ga. 707, 710, 7 S.E.2d 78, 80-81 (1940).

30. *Annot.*, 12 A.L.R. 938 (1921); Thompson v. Crains, 294 Ill. 270, 281, 128 N.E. 508, 512 (1920).

31. *Annot.*, 12 A.L.R. 938, 945 (1921); Jefferson Title and Mortgage Corp. v. Dempsey, 266 N.Y. 190, 194 N.E. 403 (1935).

32. Tuthill v. Morris, 81 N.Y. 94, 100 (1880).

33. 114 Ind. 453, 455, 17 N.E. 105, 106 (1887).

34. Wallace v. McConnell, 38 U.S. (13 Pet.) 136, 140 (1839); Bank of Lafayette v. Giles, 208 Ga. 674, 69 S.E.2d 78 (1952); Balme v. Wambaugh, 16 Minn. 106 (1870); N.Y. CIV. PRAC. LAW § 3219 (McKinney 1970). *See* Note, *Tender, Payment of Into Court*, 7 MARQ. L. REV. 233 (1923).

35. 10 Colo. App. 544, 547, 51 P. 1021, 1022 (1898).

did not impose the requirement that the money actually be brought into court.[36]

Not all jurisdictions imposed upon the maker the duty of bringing the sum into court.[37] Tender could be kept good simply by keeping the money perpetually available for the holder, for example, by depositing the money in a bank account for the holder. Montana and North Dakota enacted virtually identical statutes expressly providing for this procedure: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."[38]

Irrespective of the method of keeping the tender good, the maker had to keep the funds in readiness to pay the holder. The maker could substitute other funds for those originally deposited,[39] as long as the amount on deposit did not drop below the amount owing to the holder.[40] Two advantages attended a deposit in bank over a deposit in court. First, a deposit in court was generally held to be an admission by the maker that the sum tendered was actually owing to the holder.[41] If the maker had an assertable defense against the holder, a deposit in court would be unwise. Second, if the maker wished to substitute money or its equivalent for the sum originally tendered, a deposit in bank would allow easier access to the money. A deposit in bank, however, raises an issue not directly faced by the courts: who is entitled to the interest earned on the deposit while a tender is being kept good? If the maker tendered his debt into an interest bearing account or a certificate of deposit, the deposit would be earning interest.

The holder could argue that he is entitled to the interest because he is the legal owner of the money in the account. The holder could have collected the funds at any time and then invested them to return interest. The maker, on the other hand, could argue that the holder should not be allowed to profit from his own delay in collecting on the obligation. Further, if the effective rate of interest earned by the account or certificate of deposit is equal to or greater than the interest rate on the note, a primary purpose of the tender is destroyed. If the note is payable at six percent

36. *See, e.g.*, Griffen v. Hart, 26 Wash. 2d 304, 173 P.2d 780 (1946); Thompson v. Crains, 294 Ill. 270, 128 N.E. 508 (1920).

37. N.H. REV. STAT. ANN. § 515.1 (1974) provides: "At any time before the return day of the writ, the defendant may tender to the attorney who brought the action the amount of the debt and costs and such tender shall be a bar to any further proceedings in this case."

38. MONT. REV. CODES ANN. § 58-423 (1969); N.D. CENT. CODE § 9-12-24 (1975).

39. PA. STAT. ANN. tit. 12 § 1073 (Purdon 1953) states: "Provided that the said defendant or defendants shall be required to keep up said tender at every trial of the action aforesaid, and may pay the money into court, on leave obtained, but shall not be required to preserve, or pay in, the identical money originally tendered."

40. Crain v. McGoon, 86 Ill. 431 (1877).

41. Stallmaker v. Great Am. Ins. Co. of N.Y., 364 S.W.2d 620 (Mo. Ct. App. 1963).

interest, and the maker tenders the principal and interest into an account bearing six percent or more interest, to allow the holder to take the interest would be equivalent to allowing interest to accrue on the note after the date of the tender.

In *McCrea v. Martien*[42] the holder delayed presentment for six years, and the maker used the money due on the note in his business. In awarding costs and interest to the holder the Ohio Supreme Court stated:

> The money due on the notes belonged in equity, to the plaintiff; and though the defendant might hold it for his own indemnity, he so held it as the trustee of the plaintiff. Instead of holding it without use, he put it into his own business, and used it as his own, as if it were borrowed money; and, failing to account for the profits, should, upon equitable principles, be held liable for the use of the money.[43]

Under such a "trustee theory," the interest earned by a deposit in bank would logically go to the holder. The result, however, renders the maker a caretaker of the holder's money. Arguably, giving the interest to the maker will promote prompt collection of negotiable instruments, since holders will have greater incentive to collect their money if it is their responsibility to invest it.

4. *The Effect of a Valid Tender of Payment*

If the maker managed to meet the several common-law requirements of a tender of payment, the holder was put on notice of the maker's readiness and willingness to discharge his debt. The result of an effective tender was the suspension of further liability for interest and costs accruing on the note after the effective date of the tender.[44] Tender thus removed the possibility of further damage caused by the holder's failure to make a timely presentment of the instrument for payment, but it did not excuse the maker from liability for the original principal and interest on the instrument.[45]

Another consequence of a valid tender by the maker was the discharge of parties who had backed up the maker's obligation to pay, by signing the instrument as sureties.[46] If the holder refused to accept the maker's tender, all sureties would be discharged from further obligation. This rule was a corollary of the rule that a tender need not be kept good to discharge sureties.

A final consequence of tender of payment at common law related to

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42. 32 Ohio St. 38 (1876).

43. *Id.* at 42-43.

44. *See, e.g.*, Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329 (1921); Rush v. Wagner, 184 App. Div. 502, 171 N.Y.S. 817 (1918); Westcott v. Patton, 51 P. 1021, 10 Colo. App. 544 (1898).

45. Alder v. Interstate Trust and Banking Co., 166 Miss. 215, 230, 146 So. 107, 111 (1933).

46. *See, e.g.*, Spurgeon v. Smitha, 144 Ind. 453, 17 N.E. 105 (1887); Joslyn v. Eastman, 46 Ver. 256 (1873). *Contra*, Clark v. Sickler, 64 N.Y. 231 (1876).

constructive tender of notes domiciled at a bank. The question arose whether a valid constructive tender would excuse the maker from liability for the principal and interest on the instrument in the event of a bank failure. The issue came down to who should bear the risk of loss occasioned by the holder's failure to present the note before the bank failed. The argument for holders was that since *Wallace v. McConnell* requires no presentment for payment, the maker assumes all risk of loss as part of his obligation to pay the debt.[47] The argument for makers, on the other hand, was that the loss could have been prevented by the diligence of the holder, and thus it was unfair to place the risk of loss on the maker.[48] Makers, in essence, were arguing that bank-domiciled paper should, as in England, be treated like a check, in which case, the holder is responsible for loss caused by delay in presentment. Common law favored the holder in the event of bank failure; most courts followed the *Wallace* view of bank-domiciled instruments.[49] The debate, however, resurfaced under the Negotiable Instruments Law and continued through the enactment of the Code.

C. *Tender of Payment Under the Negotiable Instruments Law*

The Negotiable Instruments Law (NIL), a uniform act widely adopted prior to the Code, was the predecessor of Article Three. Several NIL provisions directly affected the law of tender.

1. *Presentment Rights Under the NIL*

Section 70 of the NIL codified virtually word for word the rule of *Wallace v. McConnell* denying presentment rights to makers of negotiable instruments. NIL section 70 reads:

> Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.[50]

Section 70 taken alone would appear to codify the common-law rule of presentment[51] and provide for the possibility of constructive tender of

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47. Wood Co. v. Merchants' Savings, Loan & Trust Co., 41 Ill. 267, 270-71 (1866).

48. Steffen, *supra* note 9, at 67.

49. 18 MINN. L. REV. 734, 735 (1933). *See, e.g.*, State Nat'l Bank of St. Louis v. Hyatt, 75 Ark. 170, 86 S.W. 1002 (1905).

50. J. BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 70, at 983 (7th ed. 1948).

51. *See, e.g.*, Armour Fertilizer Works v. Tuttle, 126 Me. 423, 139 A. 225 (1927); Farmers' Nat'l Bank v. Venner, 192 Mass. 531, 78 N.E. 540 (1906); Florence Oil & Refining Co. v. First Nat'l Bank of Canon City, 38 Colo. 119, 88 P. 182 (1906).

domiciled instruments. Confusion, however, was created by NIL section 87, which stated that when an instrument "is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."[52] Section 87 in essence required presentment for bank-domiciled paper, which would be treated as a check. The risk of loss on checks was set forth in NIL section 186: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."[53] Section 87, read in conjunction with section 186, would apparently overrule the rule of *Wallace v. McConnell* set forth in section 70 for bank-domiciled instruments, and adopt the English check view of this type of negotiable instrument. The issue thus became which NIL section would control: section 70, which apparently adopted the *Wallace* rule uniformly, or section 87, which apparently established a different rule for bank-domiciled paper.

The dispute over presentment rights and risk of loss caused by delay in presentment took on importance as banks failed during the Depression. Holders were anxious to uphold the common-law *Wallace* rule, now lodged in section 70, and place the risk of loss for bank failure on makers. Section 70, taken alone would mandate that the maker, if he had sufficient funds on hand at the maturity date of the instrument, and the bank failed, be excused only from liability for interest and costs accruing on the instrument after the date of tender. This reading of the NIL found great favor in the southern and western states, which ignored section 87 and continued the common-law tradition of placing the risk of loss on the maker.[54] A minority of states, led by New York, favored the check theory of section 87 and felt that it was unfair to place the risk of loss on the maker.[55] Nevertheless, the majority rule judicially resolved the statutory conflict in favor of section 70,[56] and continued to place the risk of loss on the maker.

2. *Secondary Liability and Tender of Payment*

A second provision relating to tender of payment was NIL section 120: "A person secondarily liable on the instrument is discharged . . . (4) By a valid tender of payment made by a prior party. . . ."[57] Secondary liability was defined in NIL section 192: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is

52. J. BRANNAN, *supra* note 50, § 87, at 1022.

53. *Id.* § 186, at 1291.

54. *See, e.g.*, Federal Intermediate Credit Bank v. Epstin, 151 S.C. 67, 148 S.E. 713 (1929); Binghampton Pharmacy v. First Nat'l Bank, 131 Tenn. 711, 176 S.W. 1038 (1915).

55. *See, e.g.*, Baldwin's Bank of Penn Yan v. Smith, 215 N.Y. 76, 109 N.E. 138 (1915).

56. Steffen, *supra* note 9, at 69.

57. J. BRANNAN, *supra* note 50, § 120, at 1140.

absolutely required to pay the same. All other parties are 'secondarily' liable."[58] Section 120(4) applied essentially to indorsers and to sureties who signed the instrument as indorsers. Sureties who signed the instrument as co-makers were primarily liable on the instrument and therefore outside the coverage of section 120(4).[59]

Section 120(4) operated in the following manner. If the maker effected a valid tender of payment, all secondarily liable parties were discharged by the tender.[60] If one of the parties secondarily liable on the instrument tendered payment, all secondary parties signing the instrument after that tendering party were excused from further obligation. The rationale in both cases was that the holder could have accepted the tender by the tendering party at any time, and thus relieved the secondarily liable parties from further obligation.

3. *Issues Left Unresolved by the NIL*

Although it codified the common-law principles of constructive tender and discharge of secondarily liable parties, the NIL was silent regarding many issues relating to the law of tender. The NIL failed to indicate which common-law elements of tender would or should be recognized under the NIL. The NIL did not define tender, nor did it indicate whether and how the tender was to be kept good. The NIL nowhere indicated what the effect of a tender would be. These issues were still alive when Article Three of the Code was drafted.

II. TENDER OF PAYMENT UNDER SECTION 3-604

The drafters of Article Three of the Code included a tender of payment rule for commercial paper from the outset.[61] Section 3-604 became the final codification of the rule,[62] which remained virtually unchanged through the various drafts of Article Three.

A. *The Scope of Section 3-604*

1. *The Effect of Tender of Payment*

The Code improved on the NIL by codifying in section 3-604(1) the

58. *Id.* § 192, at 1341.

59. *See, e.g.*, Roberson Ruffen Co. v. Spain, 173 N.C. 23, 91 S.E. 361 (1917).

60. The issue whether a note payable at a bank constituted an authorization to pay the note at maturity also affected the liability of secondary parties. In Appleman v. Pepis, 117 Okla. 199, 246 P. 225 (1926) an indorser was not discharged by the mere presence of funds at the bank where the note was domiciled. Where specific direction to pay the note was given by the maker in Mohan v. Woburn Nat'l Bank, 313 Mass. 306, 47 N.E.2d 289 (1943), the indorser was discharged. *Contra*, Corley v. French, 154 Tenn. 672, 294 S.W. 513 (1927).

61. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Commercial Code, Proposed First Draft, Article 3, § 805 (April 15, 1948).

62. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Official Draft 1952.

common-law rule relating to the actual effect of a tender of payment. Section 3-604(1) reads:

> Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs, and attorney's fees.[63]

The Official Comments to section 3-604 indicate that subsection (1) is new and is meant to state the generally accepted view of the effect of a valid tender of payment.[64] One important addition to the common law, however, is the specific inclusion of attorney's fees as one of the costs suspended by a valid tender. Section 3-604(1) goes beyond the NIL to codify the consequences of tender.

2. *Secondary Liability and Tender of Payment*

The common-law rules relating to discharge of secondarily liable parties by a valid tender of payment, codified in NIL section 120(4), were carried over into Code section 3-604(2), which reads:

> The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.[65]

The secondary liability language of the NIL has been dropped in favor of the Code concept of a "right of recourse." The Official Comments to section 3-604 indicate that subsection (2) rewords NIL section 120(4) to indicate that the party discharged by the valid tender is one with a right of recourse against the party making the tender, whether the latter is a prior party or a subsequent one who has been accommodated.[66]

Section 3-604(2) applies, like NIL section 120(4), to indorsers and sureties. Indorsers under the Code agree to pay the instrument under the conditions set forth in section 3-414(1).[67] Parties are presumed to be liable to one another in the order in which they sign the instrument.[68] Sureties under the Code are termed "accommodation parties." An accommodation party is, according to section 3-415(1), "[o]ne who signs the instrument in any capacity for the purpose of lending his name to another party to it."[69] Accommodation parties come in three forms: accommoda-

63. U.C.C. § 3-604(1).

64. U.C.C. § 3-604. Official Comment 1.

65. U.C.C. § 3-604(2).

66. U.C.C. § 3-604. Official Comment 2.

67. U.C.C. § 3-414(1) states:
Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

68. This rule is made explicit with regard to indorsers by U.C.C. § 3-414(2) which states: "Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument."

69. U.C.C. § 3-415(1).

tion makers, that is, sureties who agree to honor the maker's contract as set forth in section 3-413(1),[70] accommodation indorsers, or sureties who agree to act as indorsers as set forth in section 3-414(1),[71] and guarantors, that is, those parties agreeing to honor the contract set forth in section 3-416.[72]

Section 3-604(2) operates in much the same fashion as NIL section 120(4). The indorsers and sureties would have a right of recourse against the maker, who agreed to pay the instrument in the first place. If the maker tenders payment and it is refused by the holder, the indorsers and sureties would be discharged from further liability. The rationale remains the same as it was at common law: refusal of the tender impairs the rights of the indorsers and sureties who would have been excused had the tender been accepted.

In some instances, however, a party other than the maker may attempt to make a valid tender. This situation often arises when more than one indorser or surety has signed the instrument. If one of several indorsers or sureties sees that the maker is not going to make a tender, the indorser or surety may tender payment to the holder to prevent further accrual of costs and interests.[73] If so, what is the effect of the tender on the other indorsers or sureties? Since parties are presumed to be liable in the order in which they sign, any party signing the instrument subsequent to the tendering party would have a right of recourse against that party. The right of recourse covered by section 3-604(2) is one against the party making the tender. An indorser or surety earlier in the chain of signatures would have no such right of recourse. The same rule would obtain with a series of accommodation makers, as long as they do not sign the instrument as co-makers.

3. *Constructive Tender*

Section 3-604(3) retains the concept of constructive tender codified in NIL section 70, but rewords the final clause of the first sentence of section 70 to include situations in which the instrument is domiciled in more than one place:

> Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.[74]

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70. U.C.C. § 3-413(1) states: "The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments."

71. U.C.C. § 3-414(1). *See* note 67 *supra*.

72. U.C.C. § 3-416.

73. *See* Taines v. Capital City First Nat'l Bank, 344 So. 2d 273 (Fla. App. 1977).

74. U.C.C. § 3-604(3).

In case of multiple domicile, the maker must demonstrate his willingness, readiness, and ability to pay at each locale before a constructive tender accrues. Ability to pay at one domicile is insufficient to create a valid constructive tender.

The common-law and NIL debate over the effect of a constructive tender on bank-domiciled instruments was resurrected by the drafters of Article Three. The first solution to the dispute was to create section 3-121, "Instruments Payable at a Bank," and to provide the states with alternative ways to view bank-domiciled paper. Section 3-121, Alternative A embodies the English check view of bank-domiciled paper:

> A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.[75]

The Official Comment to section 3-121 indicates that this alternative is designed to codify the existing practice in New York and surrounding states, which disagreed with the majority rule rejecting NIL section 87 in favor of NIL section 70.[76] Alternative A discards *Wallace v. McConnell* and substitutes the English check view for bank-domiciled instruments. The Official Comment indicates that in states adopting Alternative A, "[t]he bank is not only authorized but ordered to make payment out of the account of the maker or acceptor when the instrument falls due, and it is expected to do so without consulting him."[77]

Alternative A to section 3-121 ties in to section 3-604(3) in the sense that the maker, in states adopting this alternative, can effect an automatic constructive tender simply by having on hand at the bank funds sufficient to pay the obligation. The maker need not designate which funds should be paid out on the instrument, because the bank has the inherent authority to pay the instrument out of *any* funds the maker has on hand. Since the bank is authorized to pay on presentment, the mere presence of sufficient funds at the bank indicates the maker's readiness, willingness, and ability to pay the instrument. A survey of the states reveals that only twenty-one jurisdictions have adopted Alternative A.[78]

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75. U.C.C. § 3-121 Alternative A.

76. U.C.C. § 3-121. Official Comment.

77. *Id.*

78. ALASKA STAT. § 45.05.286 (1962); CONN. GEN. STAT. § 42a-3-121 (1975); DEL. CODE tit. 6, § 3-121 (1967); D.C. CODE § 28: 3-121 (1973); HAW. REV. STAT. § 490: 3-121 (1975); KY. REV. STAT. § 355.3-121 (1970); ME. REV. STAT. tit. 11, § 3-121 (1964); MASS. GEN. LAWS ANN. ch. 106, § 3-121 (West 1976); MO. REV. STAT. § 400.3-121 (1969); NEV. REV. STAT. § 104.3 121 (1973); N.H. REV. STAT. § 382-A: 3-121 (1961); N.J. REV. STAT. § 12A: 3-121 (1961); N.Y. U.C.C. § 3-121 (McKinney 1964); N.D. CENT. CODE § 41-03-21 (1960); OHIO REV. CODE ANN. § 1303.20 (Page 1962); PA. STAT. ANN. tit. 12A § 3-121 (Purdon 1970); R.I. GEN. LAWS § 6A-3-121 (1970); TEX. BUS. & COM. CODE ANN. tit. § 3-121 (Vernon 1968); VT. STAT. ANN. tit. 9A, § 3-121 (1966); V.I. CODE ANN. tit. 11A, § 3-121 (1965); WYO. STAT. § 34-21-321 (1977).

Alternative B to section 3-121 expresses the practice of the southern and western states, which refused to view bank-domiciled paper as an automatic order to pay the instrument. Alternative B retains the majority rule under the NIL:

> A note or acceptance which states that it is payable at a bank is not itself an order or authorization to the bank to pay it.[79]

The Official Comment to section 3-121 states that in jurisdictions adopting Alternative B

> [t]he note or acceptance payable at a bank is treated as merely designating a place of payment, as if the instrument were payable at the office of an attorney. The bank's only function is to notify the maker or acceptor that the instrument has been presented and to ask for his instructions; and in the absence of specific instructions it is not regarded as required or even authorized to pay.[80]

In states adopting Alternative B, for the maker to have funds at the bank on the date of maturity would not constitute an automatic constructive tender to the holder under section 3-604(3) since the bank requires the authorization of the maker to pay the instrument. In Alternative B states, the maker must instruct the payor bank to pay the instrument before his readiness, willingness, and ability would be demonstrated. At this writing, thirty-one jurisdictions follow Alternative B.[81]

The nonuniformity of approach to bank-domiciled paper perpetuates the controversy over risk of loss in the event of bank failure. The Code addresses the problem of bank failure in two sections. Section 3-501(1)(c) states:

> [I]n the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in Section 3-502(1)(b).[82]

Section 3-502(1)(b) provides:

> Any drawer or the acceptor of a draft payable at a bank or the maker of a note

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79. U.C.C. § 3-121 Alternative B.

80. U.C.C. § 3-121. Official Comment.

81. ALA. CODE § 7-3-121 (1975); ARIZ. REV. STAT. § 44-2521 (1967); ARK. STAT. ANN. § 85-3-121 (1961); CAL. COM. CODE § 3121 (1964); COLO. REV. STAT. § 4-3-121 (1973); FLA. STAT. § 673.3-121 (1973); GA. CODE § 109A-3-121 (1975); IDAHO CODE § 28-3-121 (1967); ILL. REV. STAT. ch. 26, § 3-121 (1973); IND. CODE ANN. § 26-1-3-121 (Burns 1974); IOWA CODE § 554.3-121 (1971); KAN. STAT. § 84-3-121 (Supp. 1975); LA. CIV. CODE § 10:3-121 (1975); MD. COM. CODE ANN. art. 95B, § 3-121 (1964); MICH. COMP. LAWS § 440.3 121 (1970); MINN. STAT. § 336.3-121 (1966); MISS. CODE ANN. § 75-3-121 (1973); MONT. REV. CODES ANN. § 87A-3-121 (1964); NEB. REV. STAT. § 90-3-121 (1971); N.M. STAT. ANN. § 50A-3-121 (1962); N.C. GEN. STAT. § 25-3-121 (1965); OKLA. STAT. tit. 12A, § 3-121 (1963); OR. REV. STAT. § 73-1210 (1977); S.C. CODE § 36-3-121 (1976); S.D. COMPILED LAWS ANN. § 57-10-37 (1969); TENN. CODE ANN. § 47-3-121 (1964); UTAH CODE ANN. § 70A-3-121 (1968); VA. CODE § 8.3-121 (1965); WASH. REV. CODE § 62A.3-121 (1974); W.VA. CODE § 46-3-121 (1966); WIS. STAT. § 403.121 (1964).

82. U.C.C. § 3-501(1)(c).

> payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.[83]

Reading these two sections together leaves the distinct impression that bank-domiciled paper will invariably be treated as a check for purposes of a bank failure. The Official Comments to section 3-501 clearly indicate that the purpose of the presentment requirement for bank-domiciled paper is to reverse the common-law rule placing on the maker the risk of loss due to bank failure.[84] But, given the alternative views of bank-domiciled instruments in section 3-121, would this be true? In states adopting section 3-121 Alternative A, there would appear to be no difficulty since the check view is expressly adopted. In those states, if the maker had on deposit funds sufficient to pay the instrument, there would be an automatic constructive tender under section 3-604(3) and thus the maker would clearly have funds maintained to "cover" his liability on the instrument within the meaning of section 3-502(1)(b).

In states adopting section 3-121 Alternative B a different result would obtain. The Official Comments to section 3-502 indicate that this section only deprives the holder of funds in "any case where bank failure or other insolvency of the drawee or payor has prevented him from receiving the benefit of funds which would have paid the instrument if it had been presented."[85] Thus, in states adopting section 3-121 Alternative B, liability for bank failure would be placed on the maker until he authorized the bank to pay the instrument upon presentment; in other words, until he effected a valid constructive tender under section 3-604. The drafters may have thought that the inclusion of presentment rights in section 3-501(1)(c) reversed the common-law rule in all cases by substituting the check theory for bank-domiciled instruments. Nevertheless, there is still the possibility of a nonuniform result in states not adopting the check theory when the maker fails to make a constructive tender. The Code drafters may have deliberately disregarded this problem. The Official Comment to section 3-121 indicates that the drafters were not concerned with the lack of uniformity because promissory notes do not cross state lines as frequently as do checks, and in any event, even in states adopting Alternative B, the general banking practice is to notify the maker at the date of the note's maturity and request instructions.[86] If the maker gives such an authorization, a constructive tender would occur; and results under sections 3-501 and 3-502 would then be uniform.

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83. U.C.C. § 3-502(1)(b).
84. U.C.C. § 3-501. Official Comment 4.
85. U.C.C. § 3-502. Official Comment 2.
86. U.C.C. § 3-121. Official Comment.

B. *Issues Left Unanswered by Section 3-604*

Although section 3-604 codifies some of the common-law principles of tender of payment, the Code, like the NIL, remains silent regarding the actual constitutive elements of tender. The Code never defines a tender, nor does it indicate which of the common-law elements of tender should be recognized in modern commercial transactions. To the extent that the Code is silent, one must presume that the common law remains intact by virtue of section 1-103.[87]

Few courts have attempted to interpret section 3-604 against the backdrop of common-law principles of tender of payment. A California Court of Appeals indicated in *Still v. Plaza Marina Commercial Corp.* the continuing vitality of the common-law rule that a tender cannot be conditional.[88] The court rejected the maker's assertion of a valid tender because the maker attempted to assert a counterclaim against the holder, thereby rendering the tender conditional. The Wisconsin Supreme Court in *Kohlenberg v. American Plumbing Supply Co.* recently reiterated the common-law rule that in the absence of an express right to prepayment, a tender before the maturity date of the instrument is defective.[89] The same court joined the view expressed in *Security National Bank of L.I. v. Schwartz*[90] that a partial tender could not relieve the maker from liability for interests and costs. An Indiana court of appeals in *Stockwell v. Bloomfield State Bank* reaffirmed one common-law approach to keeping the tender good by holding that the maker must tender the sum due into court.[91]

Because the rules of tender were not completely uniform at common law, the foregoing cases may represent only the common-law heritage of the particular state. Further, the cases fail to analyze whether it is actually desirable to perpetuate the common-law elements of tender in the modern commercial world. Since two of the express goals of the Code are to modernize the law governing commercial transactions[92] and to make uniform the law among the various jurisdictions,[93] it is appropriate to ask what elements of tender should be recognized for purposes of Article Three transactions.

C. *Reforming the Law of Tender*

The common law placed a disproportionately heavy burden on the maker of the negotiable instrument to conform to various rules governing

87. *See* text accompanying note 6 *supra.*

88. 21 Cal. App. 3d 378, 98 Cal. Rptr. 414 (1971).

89. 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

90. 2 U.C.C. Rep. Serv. 411 (1965). *Accord,* Kohlenberg v. American Plumbing Supply Co., 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

91. 367 N.E.2d 42, 46 (Ind. Ct. App. 1977).

92. U.C.C. § 1-102(2)(a).

93. U.C.C. § 1-102(2)(c).

an effective tender. The maker was placed in a difficult position by the lack of presentment rights, and by the requirement that the tender must be continually kept good. The maker was forced to prove constantly to a dilatory holder that the offer to extinguish the debt was serious. The holder could delay presentment for long periods of time during which the tender had to be kept good. The holder in *McCrea v. Martien*[94] delayed presentment for six years during which time the maker had to be ready, willing, and able to pay. The result of such cases is that the maker becomes virtually a caretaker of the holder's money. In the context of modern commercial transactions, many of the rigid formalities surrounding tender of payment seem both unnecessary and unfair. The law of tender needs to be revised to place a greater responsibility on the holder of the instrument to collect his obligation, thereby relieving the diligent and honest maker of some of the ancient formalities attending a tender of payment.

1. *The Unconditional Nature of the Tender*

The common-law notion that a tender is more than an offer to pay the debt is essentially sound. A tender should be more than a hollow offer by the maker to pay his obligation. The requirement that a tender reveal the readiness, willingness, and ability of the maker to pay the obligation ensures that the maker is putting forth a good faith effort to extinguish the debt. The requirement, however, that the offer be completely unconditional is unfair when the maker has a bona fide counterclaim or defense to assert against the holder. The modern rules of pleading and the desirability of adjudicating all disputes arising out of the same transaction in one lawsuit, militate against the principle that the assertion of a counterclaim or defense destroys the effectiveness of the tender. A maker may be ready, willing, and able to pay the holder a sum due on an instrument, and yet have a bona fide dispute with regard to the sum actually owing. Under the common-law rule, the maker was forced to elect either to tender, thereby judicially admitting the sum due, or to assert his counterclaim and thus lose the benefits of the tender.

The Code itself may provide a way for the maker to assert a conditional tender without destroying its effectiveness. Code section 1-207 provides:

> A party who with explicit reservation of rights performs or promises 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.[95]

Although section 1-207 was not written with the tender problem in mind, a maker could theoretically invoke its provisions to alter the unconditional

94. 32 Ohio St. 38 (1876). *See* text accompanying notes 42-43 *supra*.

95. U.C.C. § 1-207.

nature of his obligation to the holder. If the maker felt that a defense or counterclaim existed against the holder, because the holder was not entitled to the sum owing, he could tender "under protest" or "without prejudice," thereby preserving his rights against the holder. Successful implementation of section 1-207 in the tender context would alter the common-law rule, but would allow the adjudication of bona fide claims by makers without destroying the benefits of tender.

A simpler way of avoiding the problems associated with the unconditional nature of tender is to redefine the meaning of tender in terms of the Code concept of "good faith."[96] A party may tender in good faith while still possessing a bona fide claim against the holder. For Article Three purposes, tender of payment should be defined as follows: A good faith offer by the maker or acceptor that manifests a readiness, willingness, and ability to pay the holder the sum owing on the instrument.

2. *Methods of Tendering Payment*

A maker should be required to demonstrate his willingness to pay by attempting initially to locate the holder to tender payment when the instrument is not domiciled. But it is not commercially fair to require the maker to seek out the holder over long periods of time or in other jurisdictions in order to make a tender. This problem has been greatly alleviated for domiciled instruments through the concept of constructive tender. Nevertheless the problem persists for demand instruments, especially if the holder is absent from the jurisdiction or is unknown to the maker. For nondomiciled instruments, the approach taken by Iowa[97] makes eminent sense. The maker should be required to tender at the last known place of business or residence of the holder. If the holder is absent, the maker should be permitted to deposit the funds in court and through notice to the holder make known that the money is available to satisfy the debt.

With respect to bank-domiciled paper, the controversy over the "check theory" has not been solved. Professor Steffen pointed out during the drafting of Article Three that the alternatives presented by section 3-121 merely perpetuated the common-law controversy over bank-domiciled paper.[98] Despite the Code drafters' protestations to the contrary, promissory notes do cross state lines, and the nonuniformity of approach created by section 3-121 creates the possibility of anomalous decisions regarding bank-domiciled paper.[99] The possibility of nonuniformity in

96. U.C.C. § 1-201(19) defines good faith as "honesty in fact in the conduct or transaction concerned."

97. *See* note 28 and accompanying text *supra.*

98. Steffen, *supra* note 9, at 56.

99. *Id.* at 57 n.11.

result in bank failure cases may be minimal given the practice in Alternative B states of requesting instructions from the maker at the note's maturity, and the rarity of bank failures today. Because section 3-501(1)(c) clearly indicates a preference for the check view, states should be encouraged to promote uniformity by adopting Alternative A to section 3-121.

3. *Keeping the Tender Good*

Should the maker be required to keep the tender good under the Code? In order to simplify and unify the requirements of tender, the old distinction between law and equity should be abolished. The maker should be required to keep his tender good for a commercially reasonable time as a demonstration of his intent to extinguish the obligation.

The maker should be required to keep his tender good for a period of thirty days following the initial tender. If the holder fails to present the note for payment during this period, the maker should be subsequently excused from all interest, costs, and attorney's fees accruing on the instrument, under the principles codified in section 3-604(1). The maker, of course, would still be liable for the initial obligation. The thirty-day rule would relieve the maker from looking after the holder's funds and encourage prompt collection of debts. With bank-domiciled paper, the thirty-day rule should supplement the provisions of section 3-501 and 3-502 by shifting the risk of loss absolutely onto the holder after the thirty-day period. If a holder wishes to avoid problems caused by his own delay in presentment such a rule will encourage him to relieve the maker of his obligation by prompt presentment.

How should the maker be required to keep the tender good during the thirty-day period? Both common-law methods of keeping a tender good are commercially feasible. For bank-domiciled paper the issue is moot since a constructive tender will continue as long as there are funds at the bank to pay the obligation. With instruments domiciled at a place other than a bank, with instruments payable on demand, and when the holder is unknown to the maker, deposits in court make more sense. The maker should be allowed to deposit the funds with the clerk of courts in the county of last known residence or business of the holder. Whether the funds are deposited in bank or in court, actual notice should be given to the last known holder. Codification of the thirty-day rule would itself provide notice to any holder that he must collect within thirty days, but the giving of actual notice by the maker would ensure that the holder realizes that a tender is being asserted.

At the end of the thirty-day period, the maker should be allowed to use the funds without destroying the effectiveness of the tender. Allowing the maker to use the funds without the penalty of destroying an effective tender releases funds that would otherwise be arbitrarily tied up in keeping

the tender good. Such a rule would promote the free flow of funds and encourage prompt collection of debts.

CONCLUSION

A tender of payment is a desirable option for any maker or acceptor of a negotiable instrument who fears delay by the holder in presentment of the instrument for payment. Yet section 3-604 seldom appears as a defense in modern commercial paper litigation. The reason for the lack of interest in tender of payment as an issue may not be attributable to any one source, but review of the history of the doctrine reveals a complicated and perhaps inconvenient defense for makers of negotiable instruments. The rules associated with tender of payment arose in a commercial world vastly different from today's society. Many of the rigid formalities of tender seem out of place in the modern commercial setting where simplicity and efficiency are relied upon to facilitate commercial transactions. The law of tender should be unified and clarified to enable makers of negotiable instruments to counteract effectively the potential damage caused by delay in presentment of instruments for payment. This Comment has proposed reforms for the law of tender in the hope that section 3-604 may become a more useful tool in the commercial world.

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