Florida Law Review

Volume 54 | Issue 3 Article 3

July 2002

Discharge of Contract—Performance and Tender: What Are the Operative Principles for a Global Community?

Sarah Howard Jenkins

DISCHARGE OF CONTRACT—PERFORMANCE AND TENDER: WHAT ARE THE OPERATIVE PRINCIPLES FOR A GLOBAL COMMUNITY?

*Sarah Howard Jenkins** **

I. INTRODUCTION

An expanding global economy and a budding global community are by-products of the technological revolution of the twentieth century. Increasingly, lawyers structuring the deal between two parties and, later, judges or arbitrators unraveling the complexities of the transaction are confronted with a plethora of rules that may govern the rights and

* Sarah Howard Jenkins, Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law; B.A., 1969, Hanover College; M.A., 1970, J.D. 1982, University of Kentucky. I would like to thank Professors Joseph M. Perillo, Distinguished Professor of Law, Fordham University, and Douglas J. Whaley, James W. Shocknessy Professor of Law, Ohio State University, for their comments on prior drafts of this Article and research assistants Candi Piggee Hoskins, J.D. 2001; Lea Ann Holder, J.D., 2001; and Melanie Yelder, J.D. 2002, University of Arkansas at Little Rock, William H. Bowen School of Law, for their diligent assistance.

obligations of the parties. Recent promulgations by the National Conference of Commissioners on Uniform State Laws, such as the Uniform Electronics Transactions Act, seek to facilitate both domestic and transnational contracting through the means of electronic communication without changing the fundamental principles of Contract Law.

Parties from states that are subject to the Convention on Contracts for the International Sale of Goods have the luxury of electing either to opt-out of the Convention and opt-in[1] to the Uniform Commercial Code (UCC) or to employ the UNIDROIT Principles of Contract Law to govern their cross-boarders goods transaction. What differences result, if any, based on such an election if a party asserts discharge of its obligation of performance as a defense to an alleged breach of contract action?

This Article, as part of the revision of *Corbin on Contracts*, addresses the basic principles of discharge of contract under domestic Contract Law as reflected in the Restatement (Second) of Contracts and the Uniform Commercial Code, limited to nonperformance, performance, and tender. As an added dimension, this Article compares the domestic standards for discharge—nonperformance, performance, and tender—with those under the Convention and the UNIDROIT Principles and notes, where relevant, the principles of the Uniform Computer Information Transactions Act.

II. DISCHARGE—THE GENERAL PRINCIPLE

While more narrowly defined under the Restatement (Second) of Contracts than the Uniform Commercial Code, a "[c]ontract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[2] In contrast, the Uniform Commercial Code broadens the meaning of "contract" beyond the agreement[3] of the parties to include the "total legal obligation"[4] that results from the impact of the UCC upon the agreement. This "total legal obligation" encompasses the bargain of the parties in fact as well as their course of dealings,[5] trade usage,[6] and course of performance.[7] In neither case does the term "contract" refer to the memorandum, the written document memorializing the promises to be

1. *See generally* Fred H. Miller, *Intrastate Choice of Applicable Law in the UCC*, 54 SMU L. REV. 525 (2001) (exploring the question of whether by agreement on choice of law the parties may opt-out or opt-in to the UCC in a wholly intrastate transaction).

2. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

3. U.C.C. § 1-201(3) (2000).

4. *Id.* § 1-201(11).

5. *Id.* § 1-205(1).

6. *Id.* § 1-205(2).

7. *Id.* § 2-208(1).

performed.[8] A document may be canceled, surrendered, or destroyed, but it is the obligation of the party that is discharged by such acts—not the written document.[9]

When it is asserted that a contract obligation is discharged, the meaning most commonly intended is that the legal duty of one of the parties has been annulled or extinguished,[10] one or more of the legal relations of the parties is deemed satisfied without any continuing legal obligation.[11] This is the meaning to be attributed to the term, discharge, when it is used in this Article. As a result of some post-formation event, a party who is under a legal duty by virtue of his assent may assert that the duty has been "discharged" or extinguished.[12] This response is distinguishable from a response that such a duty never existed, either because no contract was made or because the contract, although made, created no such duty.

The discharge of a duty to perform the balance of a contractual obligation does not, without more, discharge or extinguish all the legal relations of the contracting parties.[13] A party may be discharged from its

---

8. Dimario v. Coppola, 10 F. Supp. 2d 213, 219-20 (E.D.N.Y. 1998) (distinguishing a binding contract in the absence of a memorial); AROK Constr. Co. v. Indian Constr. Servs., 848 P.2d 870, 870, 876 (Ariz. Ct. App. 1993) (explaining that in the absence of a memorial, policy favors enforcement if the parties intended to be bound); RESTATEMENT (SECOND) CONTRACTS § 27 (1979).

9. Revised Article 3 of the Uniform Commercial Code continues the clarification adopted by former Article 3 that it is the obligation of the party and not the writing that is discharged. U.C.C. Revised §§ 3-601 to 3-604 (2001). "A negotiable instrument is in itself merely a piece of paper bearing a writing, and strictly speaking is incapable of being discharged. The parties are rather discharged from liability on their contracts on the instrument." U.C.C. § 3-601 cmt. 2 (1989).

10. Stanek v. White, 215 N.W. 784, 784 (Minn. 1927); Blackwood v. Brown, 29 Mich. 483, 483-84 (1874).

11. *Stanek*, 215 N.W. at 784 (maker of note was discharged from his obligation on the note in bankruptcy; but debt revived by a subsequent promise to pay).

12. *See* cases cited *supra* notes 10-11.

13. In *United States v. Samco Const. Co.*, 39 F. Supp. 2d 661 (E.D. Va. 1999), a subcontractor brought suit under the Miller Act against the general contractor and its surety for breach of subcontracts. *Id.* at 664. The court found that the subcontractor materially breached its subcontracts and held that a material breach discharges the aggrieved party's obligation to perform, here, to pay the remaining balance owed on the subcontract. *Id.* In *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405 (N.D. Iowa 1996), the employer sought a preliminary injunction to prohibit the employment of a former employee by a competitor and the disclosure of its trade secrets by the former employee to the competitor. *Id.* at 1410. The employee asserted as an affirmative defense the employer's breach of his employment contract by the employer's failure to honor vaction pay and moving expenses provisions of the agreement. *Id.* The court held that the employer's breach did not bear any relationship to the employee's common law fiduciary duty of an employee not to disclose confidential or secret information. *Id.* at 1431-32. The breach by the employer did not discharge the employee's common law fiduciary duty of nondisclosure. *Id.* In *RW Power Partners v. Va. Elec. & Power Co.*, 899 F. Supp. 1490 (E.D. Va. 1995), the court, in a declarative judgment action, used the terms "termination" and "cancellation" interchangeably as

executory contractual duties by an act of the other party or by an event and, yet, the discharged party continues to retain rights and privileges that accrued or became absolute under the agreement before the discharging event. These rights might include the privilege to prohibit disclosure of trade secrets,[14] the power to seek remedial relief for breach "of the whole

---

it interpreted a contract that gave purchaser the right to cancel the agreement if the seller of electrical output failed to perform any of its obligations. *See id.* at 1494-95. The court held that absent clear and explicit abrogation of the common law rule by the terms of the agreement and construing the agreement against the draftsperson, a material breach is required in order to give the nonbreaching party a right to cancel the contract. *Id.* at 1503. In *Lloyd v. Pendleton Land & Exploration, Inc.*, 22 F.3d 623 (5th Cir. 1994) (stating the Texas rule), geological consultants sued for breach of contract when an oil exploration company refused to compensate them as a result of an alleged breach of fiduciary duty. *Id.* at 624-25. Vacating the trial court's judgment on other grounds, the court of appeals upheld the trial court's determination that a breach of an independent obligation to refrain from unfair competition and improper use of proprietary information did not discharge company's obligation to pay compensation. *Id.* at 625-26. In *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976), suppliers of helium asserted the government's termination of contract violated the terms of the agreement and that the agreement remained in full force. *Id.* at 1309. After prevailing on an injunction prohibiting termination, the suppliers asserted the government's conduct before and including the attempted termination as material breaches of the contract entitling the suppliers to damages for the full term of the contract. *Id.* at 1311-12. The court held, consistent with the *Williston* view, that an election of remedies occurred by continuing performance; therefore, no cancellation occurred, and the contract continued. *Id.* at 1319. Also, considering the *Corbin* view of non-election of remedies, the suppliers' failure to explicitly reserve their rights limited their ability to recover under that theory. *Id.* at 1313-17. In *Entergy Servs., Inc. v. Union Pacific R.R.*, 35 F. Supp. 2d 746 (D. Neb. 1999), an electric utility sued a railroad for breach of a coal transportation agreement. *Id.* at 747. On a cross-motion for summary judgment, the court interpreted the agreement as providing for liquidated damages if the railroad failed to make up the tonnage deficit rather than alternative performances and that if the utility proved the railroad's failure to deliver agreed tonnage constituted a material breach, the utility would be discharged from performing its remaining duties under the contract. *Id.* at 755. In *Blue Ribbon Remodeling Co. v. Meistrich*, 97 Ohio Misc. 2d 8 (1999), a contract for the construction of concrete piers became void upon the contractor's failure to complete the work by the agreed date, absent delay resulting from availability of material, labor, weather conditions or other circumstances beyond the contractor's control. *Id.* at 10-14. The contractor sued in quantum meruit for reasonable value of services provided despite its failure to complete the work as agreed. *Id.* at 10. Recognizing Ohio's shift in a majority of recent appellate decisions and a change from the traditional view that quantum meruit was only available when substantial performance occurs, the court permitted recovery despite partial performance. *Id.* at 15-16. In *Fitz v. Coutinho*, 622 A.2d 1220 (N.H. 1993), a buyer under a contract to sever and remove timber failed to make weekly payments as required under the contract. *Id.* at 1222. The landowner asserted the delay in payments constituted a breach discharging its duty of performance. *Id.* Prior course of dealing between the parties established the owner's knowledge and expectation of likely delays until the mill returned a record of the scale of the timber. *Id.* at 1223. The court held that the breach was not a material one and the owner was not discharged. *Id.*

14. *See generally, e.g.*, *Uncle B's Bakery*, 920 F. Supp. at 1405.

contract or any unperformed balance,"[15] or the right to insist on arbitration of any pre-discharge dispute.[16]

It is possible for the entire complex group of legal relations to be discharged at once, when, for example, one party exercises a power to "terminate" the agreement as expressly reserved in the agreement or the parties mutually agree to rescind their contract.[17] In other cases, however, this total discharge from all legal relations seldom happens.[18] Consequently, it is usually necessary to consider separately each aspect of the contractual relationship to determine the relative rights and obligations of the parties.

In the case of a simple unilateral contract, such as a promissory note for money lent, only one party is under a duty. Here, a discharge of the debtor's duty to pay may be described as a discharge of the "contract" because no other legal relation remains to be satisfied. However, the party

15. U.C.C. § 2-106(4) (2001).

16. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 81(1), 98-9 U.S.T. 1980.

17. *See, e.g.*, Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (applying California law and holding that an agreement [of rescission], by its terms, abrogated all unperformed obligations except those that had accrued prior to the effective date); Metcalfe v. Comm'r, 43 T.C.M. (CCH) 1393 (1982) (distinguishing the legal effect between termination and rescission) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1228, 1236 (1964)).

18. U.C.C. § 2-720 (2001); Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103 (8th Cir. 1992). In *Simeone*, a buyer and a bank had entered into a contract for the purchase and sale of classic automobiles and parts, collateral held by the bank that was being foreclosed. The contract provided that the bank's immediate obligation to convey on a specified date was terminated if a court order was issued enjoining the sale on that date, or the defaulting debtor redeemed the automobile by tendering an amount greater than the purchase price. *Id.* at 104-05. Buyer asserted that the bank breached its obligation to sell when the bank entered an agreement to sell to a third party in exchange for the debtor's dismissing of its nuisance suit against the bank. *Id.* at 105. The court held that the discharge of the bank's obligation to convey on a specified date because of a Temporary Restratining Order did not terminate its duty to sell at some later reasonable time. *Id.* at 107. In *Consumers Power Co. v. Nuclear Fuel Servs., Inc.*, 509 F. Supp. 201 (W.D.N.Y. 1981), an electric utility sued a fuel services company for breach of contract to reprocess and supply nuclear fuels. *Id.* at 203. The fuel services company asserted frustration of purpose and commercial impracticability as defenses, and asserted its right to terminate the contract because of a "revocation" of its license. *Id.* at 207, 209. The court held that the factual issue of whether the service company's obligation to supply fuel was distinct from its alleged frustrated reprocessing obligation and precluded summary judgment. *Id.* at 211. In *Consumers Coop. Ass'n of Eau Claire v. Larson*, 1995 Wisc. App. Lexis 602, *1-2 (Ct. App. Wisc. May 16, 1995), a supplier agreed to supply liquid petroleum gas to mobile home parks owned by the buyer for eight years. *Id.* The agreement imposed an obligation on the buyer to "buy out" equipment installed by the supplier if the agreement was terminated before the end of the eight year term. *Id.* at *2. Before the end of the eight year term, natural gas service was available and selected by the residents. *Id.* The supplier sued asserting breach of the agreement and seeking specific performance of the buyout provision. *Id.* The court held the obligations of both parties were discharged and the agreement was terminated because of frustration of purpose, triggering the buyer's obligation under the buyout provision. *Id.* at *1.

so discharged is well advised to request the surrender of the instrument[19] or to have the instrument marked "PAID" to prevent the instrument from falling into the hands of a holder in due course who will take free of any discharged obligation of which it did not have notice at the time the instrument was taken.[20]

This Article makes a distinction between a future and conditional duty and a duty of immediate performance and also between a primary contractual duty, whether future or immediate, and a secondary duty to make reparation for breach of contract. Contract actions usually involve a claim for pecuniary compensation or other reparation for a breach. A sufficient complaint must allege, and the plaintiff must prove, both the making of a valid contract and its breach; the plaintiff must show that the defendant came under a contractual duty, that it became immediately performable by the fulfillment of all conditions precedent, and that the duty was not performed.[21] For a number of reasons, the defendant's primary contractual duty may have been discharged either before, at, or after the time when it became immediately performable. Because the plaintiff must ordinarily establish the fact of a breach of duty, it would seem proof must

---

19. U.C.C. Revised § 3-501(b)(2) (2001).

20. *Id.* § 3-601.

21. *See* Michelson v. Digital Fin. Servs., 167 F.3d 715, 729 (1st Cir. 1999) (applying Massachusetts law). In *Michelson*, an employee failed to satisfy his burden of proof on his entitlement to a compensation award after attaining the minimum sales volume in order to survive a motion for summary judgement on breach of contract claim. *Id.* The burden requires proof (1) that the parties reached a valid and binding agreement; (2) that employer breached the terms of the agreement; and (3) that employee suffered damages from the breach. *Id.* at 720; *see also* United States v. Verrusio, 803 F.2d 885, 891 (7th Cir. 1986) (citing and following 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1228, 1230 (1964)) (involving a narcotics defendant who argued on appeal that the government bore the burden of persuasion to establish defendant's breach of the plea agreement); Bank One v. Fed. Deposit Ins. Corp., 16 F. Supp. 2d 698, 707, 713 (N.D. Tex. 1998) (explaining that under Texas law, party asserting breach of contract has the burden of proof and must establish that a contract existed, the contract created duties, the defendant breached a material duty, and that damages were sustained); Sonfast Corp. v. York Int'l Corp., 875 F. Supp. 1088, 1094 (M.D. Pa. 1994) (holding that the plaintiff carries the burden of proving the breach; then the burden shifts to the defendant who asserted a modification of the agreement). In *Dep't of Transp. v. Scott*, 650 P.2d 158, 160 (Or. Ct. App. 1982), a general contractor asserted that its subcontactor breached their agreement, and the general contractor introduced evidence of the terms of the contract and the amount of payment made in performance of its duty under the contract. *Id.* However, the record did not reflect evidence that an additional contractual duty, making payments to subcontractor's employees, was performed. *Id.* The court stated the rule that a party to a contract who complains that the other party has breached the terms of a contract must prove performance of the contract on its own part. *Id.* The court affirmed the trial court's denial of motion for directed verdict and held that the general contractor failed to establish its performance, which, if found to be material by the jury, discharged the other party's duty to perform. *Id.* In *Nation Oil Co., v. R.C. Davoust Co.*, 201 N.E.2d 260, 266 (Ill. Ct. App. 1964), a buyer of interest in oil leases who counterclaimed for damages was denied recovery because of the buyer's failure to show performance of its own obligations under the contract. *Id.*

also be made to show that nothing occurred to discharge the other's duty either before or at the time for its immediate performance. However, this is not the case. The plaintiff does not have the burden of alleging and proving that a discharge did *not* occur.[22] If the defendant relies upon the existence of some discharging factor occurring either before or after the duty of immediate performance arose, then the burden of going forward, alleging and proving its occurrence, and the burden of proof, the risk of persuading the court of the discharge, are allocated to the defendant guilty of the breach.[23]

A. *"Discharge," "Termination," and "Cancellation"—Distinguishing the Concepts*

Often used interchangeably elsewhere, the terms "discharge," "termination," and "cancellation" refer to three distinct occurrences in contractual relationships under Article 2 of the Uniform Commercial Code.[24] When employed in this Article, two of these terms, "termination" and "cancellation," will denote the event and meaning reflected in the Uniform Commercial Code.[25] That is, termination "occurs when either party

22. *See, e.g.*, Labbe v. Premier Bank, 618 So. 2d 45, 46 (La. Ct. App. 1993) (finding defendant bank failed to carry its burden of proof on the extinguishing of its obligation as an affirmative defense to depositor's claim of conversion when bank transferred $2000 from depositor's account); Secrest v. Forest Furniture Co., 141 S.E.2d 292, 293, 294 (N.C. 1965) (holding that buyer failed to establish frustration of purpose as an excuse for its nonperformance of a contract to purchase plywood drawer bottoms when a fire destroyed the factory in which buyer intended to use the drawers); Charles A. Burton, Inc. v. Durkee, 123 N.E.2d 432, 438 (Ohio 1954); Rich v. McMullan, 506 S.W.2d 745, 748 (Tex. Civ. App. 1974) (holding that the property owners failed to establish defenses of impossibility of performance and fraud in an action for specific performance of contract to sell their homestead). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979).

23. *See* Eastern Air Lines, Inc. v. McDonnell Douglas, 532 F.2d 957, 968 (5th Cir. 1976) (applying California law and holding that an agreement of rescission, by its terms, abrogated all unperformed obligations except those that had accrued prior to the effective termination date); Blue Line Coal Co. v. Equibank, 769 F. Supp. 891, 897 n.7 (E.D. Pa. 1991) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1228 (1964)); West Haven v. Liberty Mut. Ins. Co., 639 F. Supp. 1012 (D. Conn. 1986) (finding the insurer bore the burden of proof that it was released from its contractual duty to defend insured because the insured chose its own counsel and because it failed to ask for a defense) (citing 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1228 (1952)).

24. *See, e.g.*, Societe Nationale Algerienne Pour La Recherche v. Distrigas Corp., 80 B.R. 606, 608 (Bankr. D. Mass. 1987) (determining whether rejection of an executory contract under the Bankruptcy Code is a "termination" or "breach" of the contract with varying results on the obligations of the parties) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1229-1230 (1964)).

25. "'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives." U.C.C. § 2-106(3) (2001); *see also* UCITA § 102(a)(63) (1999).

pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach"[26] and cancellation "occurs when either party puts an end to the contract for breach by the other."[27] Although the term "discharge" is not a defined term in the Uniform Commercial Code, the comment to Section 2-720 suggests that "discharge" involves a loss or impairment of unaccrued rights,[28] a meaning consistent with that in the Restatement (Second) of Contracts. A "[d]ischarge of a duty extinguishes the obligor's duty and terminates the obligee's correlative right and any claim based on that right."[29] Generally, the word "discharge" refers to the legal duty of only one of the parties, for which no legal obligation of performance remains and the correlative right is negated.

When a defendant is sued for an alleged nonperformance, the defendant may defend by asserting that the alleged duty has been "discharged" by a failure of consideration, by a condition subsequent, by the plaintiff's own breach, or by some other operative event.[30] This assertion does not mean

---

"'Cancellation' occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance." U.C.C. § 2-106(4) (2001); *see also* UCITA § 102(a)(8) (1999); Int'l Therapeutics, Inc., v. McGraw-Edison Co., 721 F.2d 488, 492 (5th Cir. 1983) (stating that termination and cancellation are two separate and discrete methods for ending a contract; the former requires notice, the latter does not).

26. U.C.C. § 2-106(3) (2001); *see, e.g.*, Eck & Assocs., Inc. v. Alusuisse Flexible Packaging, Inc., 700 N.E.2d 1163, 1169-70 (Ind. Ct. App. 1998) (finding employment contract of indefinite duration reserved a right in both parties to terminate for just cause).

27. U.C.C. § 2-106(4) (2001); *see also* Metro. Prop. & Liab. Ins. Co. v. Commonwealth, 509 A.2d 1346, 1348 (Pa. Commw. Ct. 1986), *aff'd. by*, 535 A.2d 588 (Pa. 1987) (holding that cancellation is a form of prospective relief); Jazlowiecki v. Nicoletti, 387 A.2d 1081, 1082 (Conn. Super. Ct. 1977) (stating that "cancel" means to declare an instrument void or do away with an existing agreement).

28. U.C.C. § 2-720 cmt. (2001).

29. RESTATEMENT (SECOND) OF CONTRACTS (1979) (Introductory Note to Chapter 12); *see, e.g.*, Freidoco, Ltd. v. Farmers Bank, 529 F. Supp. 822, 824 (D. Del. 1981) (involving a bankruptcy trustee who commenced action seeking a discharge of debtor's contract because of commercial impracticability); *see also* McLain Plumbing & Elec. Serv., Inc. v. United States, 30 Fed. Cl. 70, 78 (1993) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1228 (1964) (defining discharge)).

30. *See* Mobil Exploration & Producing N. Am., Inc. v. Graham Royalty Ltd., 910 F.2d 504 (8th Cir. 1990). In *Mobil*, the non-selling joint owner of an interest in a well brought a suit in equity against a selling joint owner seeking specific performance and damages resulting from the selling joint owner's breach of the joint operating agreement. *Id.* The alleged breach was the failure to provide notice of its desire to sell under terms of the joint operating agreement that granted non-selling joint owner a preferential right to purchase the interest. *Id.* at 505. The selling owner's successor was unsuccessful in asserting laches and estoppel as defenses to the action. *Id.* In *Consumers Power Co. v. Nuclear Fuel Serv., Inc.*, 509 F. Supp. 201 (W.D.N.Y. 1981), an electric utility sued a fuel services company for breach of contract to reprocess and supply nuclear fuels. *Id.* at 204. The fuel services company asserted as defenses and sought summary judgment for discharge of its obligation on the bases of frustration of purpose, commercial impracticability,

that the contractual duty of the plaintiff has also been discharged. The defendant may insist that the plaintiff is still bound to proceed with performance, may ask for specific enforcement, or may counterclaim for damages for either a partial or a total breach.[31]

When, by the express terms of the parties' agreement,[32] a party reserves a power to "terminate" the agreement or the agreement "terminates" upon the happening of an event,[33] it is more likely intended that the exercise of the power will affect the rights and duties of both parties and that further performance according to the contract will be no longer required of either of them. The inference of such an intention should never be drawn from the mere use of the words themselves.[34] A court interpreting the parties' agreement should never assume that contracting parties knew and distinguished accurately between the terms "terminate" and "cancel" or that they used the terms with the intent to express the statutory meanings used in the Uniform Commercial Code.[35] As in all other cases, determining the parties' intent from the words used must be reached through the process of interpretation, using all the aids thereto that may exist in the particular case.[36] The words must be interpreted and given legal effect in light of all

---

and exercise of its right to terminate the contract because of a "revocation" of its license. *Id.* at 204-05, 209.

31. *See Mobil*, 910 F.2d at 504; Utah Int'l, Inc. v. Colorado-Ute Elec. Ass'n, 425 F. Supp. 1093 (D. Colo. 1976); TXO Prod. Corp. v. Page Farms, Inc., 698 S.W.2d 791 (Ark. 1985). In *TXO*, a lessor sued lessee for failure to make timely payments under an oil and gas lease. *Id.* at 792. To justify its failure to pay, lessee asserted breach by lessor in failing to provide notice of a change in ownership of the leased property. *Id.* at 793. The court affirmed the trial court's determination that lessor's breach was a minor one; lessee was not discharged from its duty to pay. *Id.* In *Inter-Power of New York, Inc. v. Niagara Mohawk Power Corp.*, 686 N.Y.S. 911 (Sup. Ct. 1999), the defendant requested notice of performance of the plaintiff's sale of power. *Id.* at 912. Defendant deemed the plaintiff's response insufficient and responded that the agreement was void by its terms. *Id.* at 932-33. Plaintiff responded that the defendant's position was an anticipatory repudiation of the agreement and sued. *Id.* at 933. Defendant presented evidence that the plaintiff elected to waive the breach and was not ready, willing, and able to perform and therefore was in breach of the agreement. *Id.*

32. "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." U.C.C. § 1-201(3) (2000).

33. *See, e.g.*, Bank One v. Fed. Deposit Ins. Corp., 16 F. Supp. 2d 698, 703 (N.D. Tex. 1998) (declaring that the sale and leaseback of agreement for equipment automatically terminated upon an event of insolvency).

34. *See* Mark V, Inc. v. Mellekas, 845 P.2d 1232, 1236-37 (N.M. 1993) (holding that the phrase "all obligations are hereby canceled" is ambiguous, requiring interpretation) (following 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1229 (1964)).

35. *See, e.g.*, Sonfast Corp. v. York Int'l Corp., 875 F. Supp. 1088, 1096-97 (M.D. Pa. 1994) (holding that a paragraph entitled "CANCELLATION" in a requirements contract gave the buyer a right to terminate the agreement).

36. *See, e.g.*, Seko Air Freight, Inc. v. Transworld Sys., Inc., 22 F.3d 773 (7th Cir. 1994)

the surrounding circumstances, those extrinsic to the memorandum as well as those that are to be found within its four corners.[37]

The exercise of a power to "cancel" the contract, because of a breach or other nonperformance by the other party, does not discharge a right to the agreed price of a performance already rendered by the party exercising the power or his right to damages for a breach that previously has been committed.[38] This same principle is applicable upon "termination" of the contract, when the power exercised was one reserved in the express terms of the agreement and was not dependent on a breach by the other party.[39]

For example, a football player's contract with an investment advisor terminated when the player ceased playing football; however, the player's right to arbitrate claims for damages resulting from a breach occurring before the date of termination remained effective.[40] Contracts of agency or

---

(citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1229 (1964 & 1992 Supp.)). In *Seko Air Freight*, the court determined whether $50,000 fee was refundable upon termination of the agreement by considering the difficulty of determining damages, the risks undertaken by the defendant, and the plaintiff's rights under the agreement. *Id.* at 775. In *Great W. Sugar Co. v. White Stokes Co.*, 736 F.2d 428 (7th Cir. 1984), the seller sent a letter to the buyer after the purported formation of an oral contract to purchase beet sugar. *Id.* at 429. The letter requested the buyer's signature and contained statements that could be construed as either requiring the signature as a condition precedent to the formation of an agreement or, as the seller asserted, making the failure to sign the letter a breach of the agreement empowering the seller to cancel the agreement with a right to damages. *Id.* Deposition testimony by the seller's officers failed to substantiate the seller's belief that it had a right to cancel. *Id.* at 430 n.4. The court held that signing and returning the letter was either a condition precedent to contract formation or gave the buyer a right to terminate the oral agreement without liability. *Id.* at 432-33.

37. RESTATEMENT (SECOND) OF CONTRACTS §§ 214, 216 (1979).

38. U.C.C. § 2-720 (2001).

39. Philadelphia, Wilmington, & Baltimore R.R. v. Howard, 54 U.S. (13 How.) 307 (1851); Lennon v. United States Theatre Corp., 920 F.2d 996 (D.C. Cir. 1990) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1229 (1964)); Hayes v. Nashville, 80 F. 641 (6th Cir. 1897); Cherry Valley Iron Works v. Florence Iron River Co., 64 F. 569 (6th Cir. 1894); United States v. Cont'l Cas. Co., 210 F. Supp. 433 (S.D.N.Y. 1962); U.S. v. Haynes School Dist. No. 8, 102 F. Supp. 843 (E.D. Ark. 1951); Am. Transformer Co. v. U.S., 63 F. Supp. 194 (Cl. Ct. 1945); Singer Mfg. Co. v. Brewer, 93 S.W. 755 (Ark. 1906); Factory Realty Corp. v. Corbin-Holmes Shoe Co., 44 N.E.2d 671 (Mass. 1942); Hamilton v. Park & McKay Co., 70 N.W. 436 (Mich. 1897); New York v. N.Y. Refrig. Const. Co., 40 N.E. 771 (N.Y. Ct. App. 1895); S. Inv. Co. v. Postal Telegraph-Cable Co., 72 S.E. 361 (N.C. 1911); Sondles v. Johnson, 131 A. 275 (Pa. 1925). In *B.L. Metcalf Gen. Contractory, Inc. v. Earl Erne, Inc.*, 28 Cal. Rptr. 382 (Cal. Ct. App. 1963), a subcontract provided that in case of breach by the subcontractor, the principal contractor should be entitled "to terminate the contract and complete the work himself." *Id.* at 384. The court held that a notice of termination as so provided was not operative as a "rescission." *Id.* at 387. A provision for arbitration remained in effect, with power in the arbitrator to award damages for the breach. *Id.*

40. *See generally* Blatt v. Farley, 276 Cal. Rptr. 612 (Cal. Ct. App. 1990) (involving an arbitration that arose upon termination of the contract). *See also* Societe Nationale Algerienne Pour La Recherche v. Distrigas Corp., 80 B.R. 606, 609 (Bankr. D. Mass. 1987) (holding that an

other employment may provide that one or both of the parties will have the power to terminate the agency or employment at any time or on specified conditions.[41] When the required notice is given, neither party is under a duty of further performance; the contract is "terminated."[42] Yet the rights of the parties with respect to performances rendered or a breach committed before the notice became operative depends upon the provisions of the "terminated" contract.[43]

1. UNIDROIT Principles of International Commercial Contracts

Unlike the UCC, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) avoid the often confusing distinction between termination and cancellation by employing the term "termination" for the right both to bring an end to the parties' agreement for non-performance or breach[44] and to end the agreement by mutual assent.[45] Pursuant to the UNIDROIT Principles, non-performance is *any* failure by a party to perform its obligation under the contract.[46] Non-performance includes defective performance, late performance, early performance,[47] a complete failure to perform,[48] non-excused non-performance, and excused non-performance such as non-performance resulting from *force majeure* — the occurrence of an unexpected external event.[49] A party that has not

arbitration clause remained effective after rejection of the executory contract in bankruptcy and granting relief from the automatic stay for international arbitration of issues of liability and damages).

41. RESTATEMENT (SECOND) OF AGENCY §§ 107, 126 (1958).

42. *See* Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos., 714 N.E.2d 898, 901 (Ohio 1999); *see also* Buska v. Cent. Life Assurance Co., 145 N.W.2d 721, 724 (Wis. 1966).

43. *See* Dolan v. Cont'l Airlines, 563 N.W.2d 23 (Mich. 1997) (discussing employee's rights after employment contract was terminated); *see also Blatt*, 276 Cal. Rptr. at 627.

44. UNIDROIT Principles of International Commercial Contracts § 3, art. 7.3.1 cmt. 1 (1994) [hereinafter UNIDROIT Principles].

45. UNIDROIT Principles, art. 3.2 (1994). Neither consideration nor *cause* is needed for the agreement to terminate to be enforceable. *Id.* art. 3.2 cmts. 1-2. Although no consideration is required to modify an agreement under UCC § 2-209 (1), consideration is required for an enforceable agreement of rescission, the mutual abandonment of the existing contract, under Article 2. *See, e.g.*, Vulcan Materials v. Volpe Constr., 622 F.2d 880 (1980). Consistent with the Restatement (Second) of Contracts, the UNIDROIT Principles authorize "avoidance" of a contractual relationship by one of the parties for some infirmity in the bargaining process such as mistake, fraud, unjustified or unlawful threat, or gross disparity (unconscionability). UNIDROIT Principles, arts. 3.8, 3.9, 3.10 (1994).

46. UNIDROIT Principles, art. 7.1.1.

47. *Id.* art. 6.1.5. If obligee has no legitimate interest in refusing the earlier performance or if obligee accepts the earlier performance without reservation, then the earlier performance is not treated as non-performance. *Id.* cmt. 2.

48. *Id.* art. 7.1.1 cmt. 1.

49. *Id.*

received performance may be entitled to terminate the contract if the non-performance is fundamental.[50]

Consistent with domestic law, termination under the UNIDROIT Principles extinguishes the future obligations of both parties to the agreement without affecting the terms that relate to the settlement of disputes or terms such as choice of law or forum selection clauses, which by their nature are not affected by termination.[51] Termination does not deprive the aggrieved party of any right to claim damages for non-performance.[52] Moreover, either party may claim restitution for goods or services supplied under the agreement before the agreement was terminated.[53] Assume A and B enter an agreement for computer hardware, software licenses, and services including training and software upgrading.[54] The agreement includes a forum selection clause designating A's country as the forum of choice and a non-disclosure provision for confidential information provided for the development of the software. After B takes delivery and commences using the programs, B discovers the software is defective and insufficient for its needs. Pursuant to Article 7.3.1, B

---

50. *Id.* art. 7.3.1. A fundamental nonperformance may be analogized to a material breach. Article 7.3.1 states:

> (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.
> (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether
> (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
> (b) strict compliance with the obligation which has not been performed is of essence under the contract;
> (c) the non-performance is intentional or reckless;
> (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
> (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.
> (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

Id.

51. *Id.* art. 7.3.5.
52. *Id.* art. 7.3.5(2).
53. *Id.* art. 7.3.6(1).
54. This hypothetical context is based on the illustrations to UNIDROIT Principles art. 7.3.5, cmt 3, ill. 2; art. 7.3.6, cmt 3, ill. 2.

"terminates" the agreement. B may still claim damages.[55] A may not disclose any confidential information it received to assist in its development of the software[56] and the forum selection clause remains effective.[57] Should A make a claim for restitution of the hardware, the licenses,[58] and any manuals or books, A must return any payments made by B as a condition to its claim for the goods supplied. However, because the training was of no value to B, A cannot seek a money allowance for the training provided.[59]

2. Convention on Contracts for the International Sale of Goods (CISG)

Under the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), either party may declare the contract avoided, if prior to the date of performance a fundamental breach[60] by the other is apparent.[61] Article 49 empowers the buyer to avoid an agreement after a fundamental breach,[62] upon non-delivery after the lapse of an

---

55. *Id.* arts. 7.3.5(2), 7.4.1; UCITA § 802(e) (1999) (amended 2001).

56. UNIDROIT Principles, art. 7.3.5(3); *see also* UCITA §§ 802(2)(B), 616(b)(2) (1999) (amended 2001).

57. UNIDROIT Principles, art. 7.3.5(3) cmt. 3 (providing an example in illustration 2); UCITA §§ 802(2)(B), 616(b)(5) (1999) (amended 2001).

58. *See* UCITA § 815(a)(1).

59. UNIDROIT Principles, art. 7.3.6(1) cmt. 2 (providing an example in the illustration).

60. For a discussion of fundamental breach under CISG, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 328 (1999). *See also* Andrew Babiak, *Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT'L & COMP. L.J. 113 (1992).

61. CISG, art. 72(1). For a discussion of avoidance, see Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, Warsaw 1999, *at* http://cisgw3.law.pace.edu/cisg/biblio/kazimierska.html. *See also* UCITA § 601(b)(2) (stating that an aggrieved party may cancel only upon a material breach).

62. *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995). Rotorex, a New York corporation, was to sell over 10,000 compressors to Delchi, an Italian buyer, for use in its air conditioners. *Id.* at 1026. Prior to executing the contract, Rotorex sent a sample compressor and written performance specifications. *Id.* The compressors were to be sent in three installments which were to be completed by May 15, 1988. *Id.* The first shipment was sent and paid for with a letter of credit and while the second shipment was en route, Delchi discovered that the first lot of compressors did not meet specifications. *Id.* at 1027. After several attempts to cure the defects Delchi requested new compressors be supplied. *Id.* Rotorex refused. *Id.* Delchi cancelled the contract and was able to obtain compressors from Sanyo, but not before it suffered a loss in sales. *Id.* The District court held that the Convention governed and that under art. 49 the buyer may declare the contract void if the breach was "fundamental." *Id.*

> A breach . . . is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

extended delivery period granted, after or a declaration that delivery will not occur within the period fixed under Article 47.[63] Seller's comparable right is delineated in Article 64.[64] Once the right of avoidance is exercised, both parties are discharged from their obligations under the agreement. However, the agreement is neither "void" nor nullified; any damages due may be recovered and any provision of the agreement governing settlement of rights upon avoidance remains effective.[65] This right of avoidance exists in installment contracts as well.[66] In contrast, "avoidance" under the UNIDROIT Principles refers to the right to avoid (set aside) or disaffirm a contract that was a byproduct of mistake, fraud, a threat, or gross disparity. The appropriate terminology under the UNIDROIT Principles for bringing an end to an agreement after conduct constituting a fundamental breach is "termination."[67] The effect of "avoidance" under the CISG parallels the effect of cancellation under the UCC. In our jurisprudence, the term "avoidance" is used in contexts consistent with the term's usage under the UNIDROIT Principles, when a party is empowered to disaffirm an agreement because of some infirmity in the bargaining process that negates the validity of mutual assent.

B. *Discharge of Duty by Performance*

Full performance consistent with the terms of the agreement discharges a legal duty.[68] This is true of both the primary contractual duty and the

---

Id. at 1028 (quoting CISG art. 25). Because any reasonable person could see that shipping non-conforming goods to a buyer would result in a buyer not getting what he expected, the breach was fundamental. *See id.; see also* Med. Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.I., 1999 WL 311945, *1 (E.D. La.). This case involved a dispute between a Louisiana corporation and an Italian corporation that manufactures radiology equipment. *Id.* The parties entered into an agreement granting the seller an exclusive right to sell Giotto Mammography units to the buyer. *Id.* The FDA seized the equipment for non-compliance with administrative procedures, and a dispute arose between the parties as to who bore the responsibility of bringing the equipment into compliance with governmental safety regulations. *Id.* Buyer demanded mediation. *Id.* After mediation failed, the parties entered into arbitration. *Id.* Buyer was awarded damages. *Id.* Buyer sought confirmation of the award. *Id.*

63. CISG, art. 47.

64. *Id.* art. 64.

65. *Id.* art. 81(1); *see also* Kazimierska, *supra* note 61.

66. CISG, art. 73.

67. UNIDROIT Principles, art. 7.3.1.

68. Allman v. Allman, 2000 WL 1728339, *4 (Tenn. Ct. App. 2000) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1230 (1964)) (holding husband's obligation to pay balance of former wife's car loan was discharged by the wife's insurance company when the car was totally destroyed by wife); Rodgers v. Erickson Air-Crane Co., 2000 WL 1211157, *7 (Del. Super. Ct. 2000) (citing 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1230 (1952)) (rejecting seller's argument that its relationship with the buyer was governed by a writing submitted and signed after full performance by both parties because both duties were discharged).

secondary duty to compensate or to make restitution after a breach of the contract. Full and exact performance means not only performance of the character, quality, and amount as required but also performance within the agreed time. Whether the performance rendered is in accord with that required by the contract is to be determined by interpretation of the terms and by evidence of competent witnesses. In some cases, interpretation may be difficult, or the evidence may be conflicting.[69]

Correlatively, substantial performance is not full performance and does not discharge a legal duty.[70] A defect, no matter how slight, prevents the discharge of the duty.[71] However, under the principle of *de minimis non curat lex*,[72] courts occasionally find that something less than full performance satisfies the primary contractual duty and permit a discharge despite trifling defects.[73] Applying the principle of *de minimis non çurat lex* while attempting to adhere to the rule of full performance, a court may find that the contract permitted such deviations or that the "variance was within the range allowed by the specifications."[74]

Substantial performance gives the performing party a claim for the contract price and the other party a claim only for damages.[75] Insubstantial performance, performance resulting in a material breach of the agreement, may result in a claim for restitution by the breaching party but not one for damages.[76]

1. Performance of the Secondary Duty

Consider that a buyer and a seller agree that the seller will deliver 1000 pounds of frozen chicken breast in July. The buyer agrees to pay $.50 per pound. Thereafter, the seller repudiates, refusing to deliver. The seller's primary duty to deliver the goods has been breached. Upon breach of the contract, the law gives the injured party, the buyer, a right or claim for damages and imposes upon the breaching party, the seller, a duty to pay damages.[77] This duty to pay damages is distinguishable from the primary

---

69. *See* Sands Motel v. Hargrave, 358 S.W.2d 670 (Tex. Civ. App. 1962) (finding a plumbing contractor's duty to perform installation of hot and cold water lines in a workmanlike manner was limited or restricted by the plans agreed to by the parties; plumber's obligation of performance was discharged by performance consistent with the plans in workmanlike manner).

70. RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. a, cmt. d (1979).

71. *Id.* § 237 cmt. d.

72. "The law does not concern itself with trifles." BLACKS LAW DICTIONARY 443 (7th ed. 1999).

73. E. ALLAN FARNSWORTH, CONTRACTS § 8.8 (3d ed. 1999).

74. *Id.* (citing Intermeat v. Am. Poultry, 575 F.2d 1017 (2d Cir. 1978); Van Clief v. Van Vechten, 29 N.E. 1017 (N.Y. 1892)).

75. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d (1979).

76. *Id.*

77. 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 995 (1964).

duty of performance, delivering the chicken breast, which the breaching party failed to render as required by the agreement.[78] The secondary duty, the obligation to compensate the buyer for the breach,[79] must now be performed.

The performance required by the secondary duty to compensate for a breach of contract is usually the payment of a definite sum of money in settlement of a claim that previously may have been unliquidated.[80] As long as the claim is unliquidated, determining the performance required by this duty must be resolved. Unless the agreement provides an alternative dispute resolution mechanism, the amount of damages to be paid must be resolved through litigation.[81] Once the required performance is determined, the claim is liquidated and the secondary duty of performance—paying the sum that is now liquidated—will only be discharged by paying the amount required, the exact performance imposed in the judgment entered.[82]

Assume, however, that the buyer breached the agreement after the seller delivered and the buyer accepted the goods. Seller then brings an action for the price.[83] Success here by the seller imposes on the buyer the obligation to specifically perform the promise to pay a liquidated sum, the agreed cost of the seller's performance.[84] Under UCC § 2-709, the seller is demanding that the buyer pay the agreed price and any incidental damages that might have been incurred as a result of the buyer's breach.[85] The price of the goods is a liquidated sum, $500, a sum fixed by the agreement. Here, the primary duty, performance consistent with the terms of the contract, is the major element of the buyer's secondary obligation to compensate the seller for breach, which now includes the liquidated sum of the price and incidental costs incurred by seller. With the addition of incidental damages, if any, the buyer's secondary duty is established.[86]

---

78. *Id.* at §§ 995, 1001; 11 SAMUEL WILLISTON, WILLISTON ON CONTRACTS §§ 1338-1339A (3d ed. 1936); RESTATEMENT (FIRST) OF CONTRACTS § 277 (1932).

79. 5 CORBIN *supra* note 77, § 995.

80. *Id.*

81. 5A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1230 (1964).

82. A judgment entered in a breach of contract action has been called "higher evidence of that contract, because it [the contract] now has the sanction of the judicial determination of its validity and amount by a court of law." Blount v. Windley, 95 U.S. 173, 176 (1877). Upon entry of a judgment the "original contract or cause of action becomes merged, and the judgment constitutes a new and liquidated debt. This debt and liability for interest . . . are obligations binding upon the debtor till the judgment is reversed or satisfied." Butler v. Rockwell, 29 P. 458, 461 (Colo. 1892).

83. U.C.C. § 2-709 (2001).

84. *Id.*

85. *See, e.g.*, Bulk Oil v. Sun Oil Trading Co., 697 F.2d 481 (2d Cir. 1983) (holding that interest is an incidental expense).

86. U.C.C. § 2-710.

As the hypothetical situation illustrates, a primary contractual duty to render a promised performance may continue even after a breach by the promisor. The obligation to pay a liquidated money debt[87] and an order of specific performance[88] are examples of the continuation of the primary contractual duty.

Generally, if the primary contractual duty of performance is the payment of money, this duty can be rendered by the debtor after the due date as well as at the agreed time.[89] Payment of the amount of the debt discharges the debt[90] when made even if made after the due date. The duty to compensate for the breach is an additional secondary duty.[91] A late payment of the liquidated sum does not discharge the secondary duty to compensate for the delay in making the payment.[92] Additionally, payment is a performance that does not require cooperation by the creditor or someone representing him to discharge the obligation, but receipt of the payment by the creditor or his representative does.[93] This is true whether payment is made on the exact day of maturity or thereafter.[94] But the creditor's cooperative action is no more than the actual receipt of the money.[95]

A secondary duty to pay unliquidated damages for breach is not discharged by making the payment that is received by the creditor. The creditor must assent to receiving the payment as a liquidation and discharge of the secondary duty as well. Only upon assent to the offer that the payment discharge both duties does the receipt of the payment discharge both duties.[96] There is no "satisfaction" in the absence of an "accord."[97]

2. Pleading and Proof of the Cause of Action for Breach

In an action for damages or other types of reparation for a breach of contract, the plaintiff must allege and prove the making of the contract and

---

87. The common law action of debt gave specific enforcement of the duty to pay with damages awarded for the delay in the payment. BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING § 52 (3d ed. 1923). Action of debt employed "where the consideration has been executed and where there is an absolute duty to pay in money the value of the performance rendered, there debt on simple contract or indebitatus assumpsit is a proper remedy." *Id.*

88. CORBIN, *supra* note 77, § 990.

89. U.C.C. Revised § 3-603(c) (2001).

90. *Id.* § 3-603; RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. c (1979).

91. *See* U.C.C. § 3-603.

92. *See id.*

93. *Id.*

94. *See id.*

95. *See id.*

96. *See* David McDavid Nissan, Inc. v. Subaru of Am., Inc., 10 S.W.3d 56, 71 (Tex. Ct. App. 1999); Stevens v. State Farm Fire & Cas. Co., 929 S.W.2d 665, 673 (Tex. Ct. App. 1996); Simburg, Ketter, Sheppard & Prudy, LLP v. Olshan, 988 P.2d 467, 472 (Wash. Ct. App. 1999).

97. *David McDavid Nissan*, 10 S.W.3d at 71.

the fact of the breach. In the case of a unilateral money debt, payment is an affirmative defense.[98] The burden of proof or, in the terms of the Uniform Commercial Code, the burden of establishing[99] the fact of breach is allocated to the plaintiff, who has alleged that full and exact performance of the legal duty owed was not in fact performed.[100] If a plaintiff seeks damages for a breach he must allege and prove the action or inaction by the defendant that constitutes a breach of their agreement.[101] In defending an action for breach of contract, a defendant may assert that a discharge subsequent to the breach occurred.[102] A discharge that takes place subsequent to breach must be alleged and proved by the defendant.[103] Payment or any other performance that is accepted, subsequent to breach, as satisfaction must be shown by the defendant.[104] Although accord and satisfaction must be pled and is distinguishable from payment or

---

98. *See* Geo. Byers Sons, Inc. v. Norman Smith, 1999 Ohio App. LEXIS 3648, *10 (1999) (finding defendant's failure to plea payment resulted in a waiver of the affirmative defense; consequently, trial court properly denied defendant the opportunity to rebut or refute plaintiff's evidence of nonpayment and properly limited the scope of defendant's cross-examination); Blackwell v. Int'l Union, 487 N.E.2d 334, 337 (Ohio Ct. App. 1984) (holding that the union failed to plead or prove the affirmative defense of partial payment); Wagner v. Savage, 244 P.2d 161, 166 (Or. 1952) (declaring that payment is a defense which must be plead and proved; the defendant has the burden of proof); Baehr v. Buell, 113 N.W. 433, 434 (Wis. 1907). *But see* Pollak v. Winter, 51 So. 998, 999 (Ala. 1910) (stating that the plaintiff in a suit on an open account must show the rendering of service, the value of the service and that payment was not made when due). If the defendant relies on payment to an agent, he must prove the authority of the agent to receive it for the principal. Bacot v. S. C. Loan & Trust Co., 127 S.E. 562, 569 (S.C. 1925).

99. U.C.C. § 1-201(8) (2000).

100. *See* NICOR Exploration Co. v. Fed. Energy Regulatory Comm'n, 50 F.3d 1341, 1349 (5th Cir. 1995) (citing 5A CORBIN, *supra* note 81, § 1230); Nankin v. Beverly Enterprises-Wisconsin, 774 F. Supp. 540, 543 (E.D. Wis. 1991) (citing 5A CORBIN, *supra* note 81, § 1230); Ticknor v. Micro Ink Sys. Corp., 1994 WL 879505, *3 (Mass. Super. 1994) (citing 5A CORBIN, *supra* note 81, § 1230).

101. Lent v. New York & Mass. Ry., 29 N.E. 988, 990 (N.Y. 1892) (holding that the plaintiff must aver breach by non-payment); Sec. Fin. Co. v. Linker, 176 A. 76, 77 (Pa. Super. Ct. 1935) (finding that in a suit against a guarantor, the plaintiff must allege and prove nonpayment by the principal debtor; in the absence of such proof, the defendant is entitled to a directed verdict in his favor).

102. *See Sec. Fin. Co.*, 176 A. at 78.

103. *See id.*

104. In *Benson v. Lamb*, 101 N.E.2d 235 (Ohio Ct. App. 1951), the plaintiff commenced an action against the administrator of decedent's estate alleging work for the decedent, the nature of the work, and the reasonable value of the services provided. *Id.* at 236. The administrator answered specifically denying the statement of account and alleged that plaintiff had received payment. *Id.* Plaintiff did not reply. *Id.* On the date set for trial, the administrator filed a motion for judgment on the pleadings. *Id.* at 236-37. The trial court sustained the motion and entered judgment in favor of the administrator. *Id.* at 237. The judgment was affirmed on appeal. *Id.* at 238.

performance of the obligation owed, a defendant's plea of "payment" as a defense has been held sufficient where the proof established the liquidation of a sum owed and the cancellation of mutual debts resulting in payment.[105] Such a settlement, however, is not exact "performance." Rather, the settlement is a discharge by accord and satisfaction or new agreement, and the burden of establishing the discharge is on the defendant.[106]

C. *Application of Payments When More than One Debt Exists*

An obligor who owes two or more duties to the same obligee has the power to direct application of any payment tendered, unless the obligor holds the money as a trustee or under a duty to apply it in a particular fashion and the obligee knows or has reason to know of the duty.[107] Absent

---

105. A plea of "payment" of a note is supported by proof that the plaintiff had owed an unliquidated amount for services rendered by the defendant, that by agreement they had liquidated this as the amount still due on the note, and that the two amounts were then set off against each other and discharged. Marr v. Heggie, 58 N.E.2d 1, 4 (Mass. 1944).

106. *Id.*

107. RESTATEMENT (SECOND) OF CONTRACTS § 258 (1979).

> (1) Except as stated in Subsection (2), as between two or more contractual duties owed by an obligor to the same obligee, a performance is applied according to a direction made by the obligor to the obligee at or before the time of performance.
> (2) If the obligor is under a duty to a third person to devote a performance to the discharge of a particular duty that the obligor owes to the obligee and the obligee knows or has reason to know this, the obligor's performance is applied to that duty.

Id. Although noting that questions relating to performances other than the payment of money are rare under this section, the scope of the Restatement provision is not limited to the payment of money. RESTATEMENT (SECOND) OF CONTRACTS, Application of Performance, Introductory Note, at 297.

It has been held that mere knowledge by the creditor of the source from which the debtor derived the funds received but without direction as to the application of the funds will not deprive the creditor of power to apply the funds to any of the claims against the debtor. F.H. McGraw & Co. v. Milcor Steel Co., 149 F.2d 301, 302 (2d Cir. 1945). This Article takes the position that knowledge of, or reason to know from the circumstances the source of the funds limits the creditor's ability to allocate the performance to debts other than those associated with that source. *See* Lyman Lumber, Inc. v. Thompson, 405 N.W.2d 708, 709-10 (Wis. Ct. App. 1987); Carroll v. Beck, 151 F.2d 964 (6th Cir. 1945) (requiring the creditor to apply the payment in accordance with the interests of the general contractor from whom the debtor derived the money). *See generally* Moser Paper Co. v. N. Shore Publ'g Co., 266 N.W.2d 411, 415 (Wis. 1978) (discussing the "identical property" exception reflected in Restatement (Second) of Contracts § 258 (2)). Such a rule prevents collusion between the obligor and obligee and avoids the potential double recovery from one who has performed its obligation in good faith. Note, *Recent Decisions*, 32 VA. L. REV. 162, 167-68 (1945) (criticizing *F.H. McGraw & Co.*, 149 F.2d 301).

In *F.H. McGraw & Co.*, a general contractor brought an interpleader action against its subcontractor and the subcontractor's suppliers. *F.H. McGraw & Co.*, 149 F.2d at 302. These a duty owed to a third person or obligee's knowledge or reason to know of the source of the performance, an obligor may tender a payment on its own terms and the obligee must receive it on those terms or not at all. If the obligor owes more than one debt to the obligee, matured or unmatured, then directions given at or before the time of payment but not later than the obligee's application or a change in the circumstances, such as a subsequent dispute or controversy between the parties, must be followed by the obligee.[108] The obligor may instruct that the payment be applied to any one of the debts, to none of them, or to more than one of them in any specified proportion. To attain his desired goal, the obligor must manifest his

---

defendants brought a third party claim against the general contractor's surety. *Id.* at 303. The surety asserted improper allocation of payments as a defense. *Id.* With the consent of the subcontractor and knowledge of the source of the funds received, the suppliers reallocated all payments previously received from the subcontractor on the job subject to the surety's bond to a subsequent job that had not been performed and was unmatured at the time of the previous payments. *Id.* at 303-05. Troublesome here is the court's upholding of a reallocation and revival of a debt previously discharged at a time subsequent to the payment by the obligor. Restatement (Second) of Contracts § 258 cmt. b, provides that the direction given by the obligor at the time of performance controls rather than some prior direction. Thus, the direction given at the time of performance rather than a subsequent direction should have priority, especially if the interests of third parties are affected. *See id.*

In contrast to *F.H. McGraw & Co.*, the Alaska Supreme Court in *State* ex rel. *Palmer Supply Co. v. Walsh & Co.*, 575 P.2d 1213 (Alaska 1978), held that the creditor's method of allocation was ineffective despite its agreement with the obligor. In an action under Alaska's Little Miller Act, the supplier and subcontractor agreed to apply the funds received from the general contractor to other debts owed. *Id.* at 1217. The supplier knew the source of the funds; the check received from the general contractor indicated the job for which payment was being made. *Id.* The obligee's knowledge of the obligor's duty to a third person to devote a performance to discharge a particular obligation limited the obligee's right to apply the payment contrary to that duty despite an agreement with the debtor. *Id.* at 1218. Here the duty under the Little Miller Act and the common law duty of performance owed a surety in the former case provided the bases for disregarding the agreement between the debtor and the obligee. *Id.; see also* Bounds v. Nuttle, 30 A.2d 263 (Md. 1943) (holding that absent an agreement between contractor and materialmen to apply funds received from owner to other debts of the contractor so as to extract a double payment from owner through the imposition of mechanics' liens, contractor may direct the application of payments received from owner as desired); C.D. Johnson Lumber Corp. v. Leonard, 236 P.2d 926, 933 (Or. 1951) (finding application by the creditor to general open account is final if the debtor acquiesces therein); Gourley v. Iverson Tool Co., 186 S.W.2d 726 (Tex. Civ. App. 1945); Utah State Bldg. Comm. v. Great Am. Indem. Co., 140 P.2d 763 (Utah 1943) (recognizing a split of authority on the question of the ability of the materialmen to apply the funds received when it knows of the source but the funds are given without designation).

108. *See* Gayer v. Gayer, 952 P.2d 1030 (Or. 1998) (reversing trial court ruling that father's direction on application was effective from the date he increased his monthly support payments rather than the date of the letter from father's new wife with a statement of intention) (citing 5A CORBIN, *supra* note 81, § 1231).

intention[109] to the obligee through his written or spoken words or through the circumstances including the payment itself.[110]

In the absence of direction, the obligee may apply the payment, within certain limitations, to his own advantage if the obligee manifests its intentions—gives notification—to the obligor within a reasonable time after the application.[111] The obligee may apply the payment to any matured lawful obligation.[112] Unless the obligee has reason to know that the obligor

---

109. In *Shahmoon Indus., Inc. v. Peerless Ins. Co.*, 226 N.Y.S.2d 997 (N.Y. Sup. Ct. 1962), it was a disputed question of fact whether a debtor on two separate accounts directed the application of his payments to one account or the other. *Id.* This determination depended on the amount of the liability of the defendant as a surety on one of the accounts. *Id.*

In *Williams v. Milliger*, 352 S.W.2d 794 (Tex. Ct. App. 1962), the defendant owed plaintiff $1,288.60 for services; in a bankruptcy proceeding the plaintiff received $257.72. *Id.* at 794. The balance of $1,030.88 was barred. *Id.* at 795. Thereafter, the plaintiff rendered additional services valued at $563. *Id.* The plaintiff received a payment of $485, the trial court found that this was paid and received on account of the barred debt. *Id.* The plaintiff was held to be entitled to the full $563. *Id.* at 796.

In *Schreiber v. Armstrong*, 374 P.2d 297 (N.M. 1962), the plaintiff and defendant were the sole shareholders in a corporation to which the defendant owed $1000. *Id.* at 298. In order to raise more capital, the plaintiff and defendent mutually agreed that each would buy ten more shares, for which each would pay $1000. *Id.* The defendant handed $1000 to the plaintiff, directing him to pay it to the corporation for the additional ten shares. *Id.* Instead, the plaintiff caused the corporation to credit the defendant's account in payment of his debt. *Id.* This action by the plaintiff was a breach of contract for which the defendant had a claim for damages. *Id.* Whether the defendant owed two obligations to the corporation, or no obligation, the defendant had power to direct the use of his money to the purchase of stock. *Id.* at 300-01.

110. RESTATEMENT (SECOND) OF CONTRACTS § 258, cmt. b & ill. 6 (1979); *see also* Del. Dredging Co. v. Tucker Stevedoring Co., 25 F.2d 44, 45-46 (3d. Cir. 1928); Jacobson v. United Nat'l Bank, 5 B.R. 274, 278 (Bankr. D. S.D. 1980); Pearce v. Walker, 15 So. 568, 568 (Ala. 1894); Merker v. Lake Region Packing Ass'n, 174 So. 229, 230 (Fla. 1937); Henry v. Halifax Hosp. Dist., 368 So.2d 432, 432 (Fla. Dist. Ct. App. 1979); Carozza v. Brannan, 46 A.2d 198, 199-200 (Md. 1946); Standard Salt & Cement Co. v. Commercial Cas. Ins. Co., 213 N.W. 543, 544 (Minn. 1927); Cent. Nat'l Bank v. Paton, 439 N.Y.S.2d 619, 621 (N.Y. 1981); Gayer v. Gayer, 952 P.2d 1030, 1030-34 (Or. 1998); F.M. Slagle & Co. v. Bushnell, 16 N.W.2d 914, 919-21 (S.D. 1945).

111. RESTATEMENT (SECOND) OF CONTRACTS § 259(1) (1979); *see also* Jalasko Assos., Inc. v. Newbery Energy Corp., 663 P.2d 946, 949 (Alaska 1983); Gen. Elec. Co. v. Anchor Cas. Co., 87 N.W.2d 639, 644 (Minn. 1958); Hannan Motor Co. v. Darr, 56 So. 2d 64, 68 (Miss. 1952). *But see* Weston Group, Inc. v. A.B. Hirschfeld Press, Inc., 845 P.2d 1162, 1167 (Colo. 1993) (citing 5A CORBIN, *supra* note 81, §§ 1230, 1231, for the general principle of the creditor's right to apply payments in the absence of direction but without requiring notification); Lee v. Yano, 997 P.2d 68, 77 (Haw. Ct. App. 2000) (no notification duty imposed under Hawaii precedent) (distinguishing 5A CORBIN, *supra* note 81, § 1231); Mich. Elec. Supply Co. v. Vandenburg Elec. Co., 72 N.W.2d 216, 218 (Mich. 1915) (holding the creditor's application by an entry on the creditor's books of account, to unsecured rather than to a secured debt, without regard to the order of their creation, and without notice to the debtor was effective against the debtor's surety).

112. *See* RESTATEMENT (FIRST) OF CONTRACTS § 387(b) (1932); *see also* Preston County Coke Co. v. Preston County Light & Power Co., 119 S.E.2d 420 (W. Va. 1961). In the case of an

is under a duty to apply the tendered money in a particular way,[113] the obligee may apply the payment to any debt in any proportion, to an unsecured rather than a secured debt,[114] even to one barred by the Statute of Limitations or unenforceable because of the Statute of Frauds. However, the obligee may not apply the payment to a debt if such an application would result in a forfeiture of another obligation, if the debt is disputed, or if the debt is unenforceable on grounds of public policy.[115]

Furthermore, the obligee's application of the payment to an obligation that is barred by the statute of limitation does not operate, without additional facts or circumstances, as a promise by the obligor to pay the otherwise barred debt.[116] The obligor's failure to give directions permits the

---

open running account, payments by the debtor with no direction as to their application and applied by the creditor in reduction of the general account prevented the statute of limitations from barring any part of the account. *Id.* at 423.

Also, in *J. & G. Constr. Co. v. Freeport Coal Co.*, 129 S.E.2d 834 (W. Va. 1963), debtor sent checks as "payment on account," at that time owing a "judgment debt" and owing on an open account. The court held that the creditor was justified in applying payment on the open account instead of on the one better secured. *Id.* at 846.

In *Atlantic & Gulf Prop., Inc. v. Palmer*, 109 So. 2d 768 (Fla. Dist. Ct. App. 1959), the court upheld a mortgagee's application of the insurance proceeds to unmatured installments due at the end of the mortgage term rather than to earlier installments because the mortgagor had not objected. *Id.* at 771.

In *Gen. Elec. Co. v. Anchor Cas. Co.*, 87 N.W.2d 639 (Minn. 1958), a supplier sued on a contractor's performance bond for the price of materials used by the contractor. *Id.* at 641. The plaintiff supplied such materials to the contractor for other jobs not included within the defendant's bond, maintaining only a general running account. *Id.* Certain payments were made by the contractor between June 19 and December 16, 1953, without direction as to specific application; these payments were credited on the general account. *Id.* On January 19, 1954, before any controversy had arisen, the plaintiff notified the contractor, making specific application of payments on special accounts not covered by defendant's bond. *Id.* at 641-42. The court held that this notice of application was within a "reasonable time" and effective as against the defendant surety. *Id.* at 646. The plaintiff's act of crediting payments on the general running account of the debtor "cannot be considered an application of such payment to any specific item;" it did not prevent a specific application later. *Id.* at 644.

113. RESTATEMENT (SECOND) OF CONTRACTS §§ 258(2) & 259 cmt. c (1979). In *Koehring Co. v. United States*, 303 F.2d 468 (10th Cir. 1962), Hoover sued Koehring (under the Miller Act) for the use of equipment by the latter's subcontractor, Central. *Id.* at 469. Central also owed Hoover for use of equipment on other contracts. *Id.* In order to pay Hoover, Central obtained from Proctor (corporate predecessor of defendant Koehring, and prime contractor) a check for $3000 on the subcontract, payable to Central and Hoover jointly. *Id.* This was applied by Hoover in payment of a debt due by Central for equipment used on jobs other than Proctor's, without knowledge or reason to know that it was Central's duty to Proctor to apply this money in payment for equipment on the Proctor contract. *Id.* The court held that the creditor Hoover was justified in its application of the payment and could still recover from defendant for equipment used on the Proctor contract. *Id.*

114. *See, e.g.*, People v. Vandenburg Elec. Co., 72 N.W.2d 216, 219 (Mich. 1955).

115. RESTATEMENT (SECOND) OF CONTRACTS § 259 (1979).

116. *Id.* § 259 illus. 1.

obligee to infer that the obligor is waiving the statutory defenses to the lawful obligation[117] and provides a "self help" means of minimizing the unjust enrichment of the obligor. The UNIDROIT Principles likewise permit the obligee to exercise discretion in applying the payment received as long as the obligation is due and undisputed.[118]

If neither party exercises the prerogative of designating the payment to be discharged, both the Restatement (Second) of Contracts and the UNIDROIT Principles provide rules of application or imputation to be followed with some distinctions.[119] If both parties fail to exercise the power of application as between two or more matured debts, the Restatement states a priority rule that authorizes application consistent with the obligee's right to apply payments to implement its best interest but with regard, first, for the interests of third persons, then the obligee's or creditor's interest, and finally, the obligor's. Thus, if the obligor owes a duty to a third person to pay a particular debt owed to the obligee, such as the duty owed to a secondary obligor or surety on an indebtedness,[120] the court must direct that the payment be applied to this obligation in preference to a debt that is unsecured or one for which interest has accrued and is overdue.[121] In contrast, the UNIDROIT Principles rank the obligor's interest in the matured obligations or the first to mature as first priority; second, those obligations for which obligee has the least security; third, the most burdensome for the obligor; and finally, the obligation incurred first.[122] With appropriate adaptations, this rule of priority is applicable for non-monetary obligations under the UNIDROIT Principles as well.[123]

---

117. *See id.* cmt. c.

118. UNIDROIT Principles, art. 6.1.12(2).

119. *Id.* art. 6.1.12.

> (3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:
> (a) an obligation which is due or which is the first to fall due;
> (b) the obligation for which the obligee has least security;
> (c) the obligation which is the most burdensome for the obligor;
> (d) the obligation which has arisen first.
>
> If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

Id.

120. Restatement (Third) of the Law of Suretyship and Guaranty § 21 (1996) provides that a principal obligor with notice of a secondary obligation owes a duty to the secondary obligor to perform the underlying obligation owed to the obligee. *Id.*

121. RESTATEMENT (SECOND) OF CONTRACTS § 260(2)(a) cmt. b, illus. 1 (1979).

122. UNIDROIT Principles, art. 6.1.12(3).

123. *Id.* art. 6.1.13.

The decision in *Fowler v. Courtemanche*[124] illustrates these principles. The debtor executed a note and chattel mortgage for the purchase price of logging equipment.[125] The debt was payable in monthly installments of $5700 due on the 25th of the month.[126] As authorized by the debtor, the creditor sold a trailer that had been given by the debtor as additional collateral to secure repayment of the debt and received the proceeds.[127] The debtor did not direct the application of the proceeds received from the sale.[128] The creditor applied the proceeds to an open account allegedly owed to a related corporate entity.[129] Thereafter, the creditor declared the debtor in default, seized, and sold other property subject to the mortgage.[130] This seizure was held to be tortious because a proper application of the proceeds would have avoided the default on the obligation.[131] Even though the money received from the sale was more than the balance that was due and delinquent, the proceeds should have been applied in payment of that balance and not to a debt for which debtor had no personal duty. The excess proceeds should have been held for part payment of the next maturing installment.[132] The default and an unjust forfeiture would have been avoided.[133]

Without debtor-directed allocation and inappropriate creditor application, the task of determining the appropriate application of proceeds fell to the court in *Fowler*. With its stated goal of accomplishing the ends of justice,[134] the court considered three principles: 1) the identical property rule,[135] which requires that proceeds derived from mortgaged property must be applied to the mortgage debt,[136] 2) proceeds from mortgaged property must be used to pay the debt currently due,[137] and 3) the court's duty to consider the equities existing both at the time the payments were made and those subsequently occurring.[138]

---

124. 274 P.2d 258 (Or. 1954).
125. *Id.* at 261-62.
126. *Id.* at 262.
127. *Id.* at 262-63.
128. *Id.* at 264.
129. *Id.* at 263.
130. *See id.* at 262.
131. *Id.* at 264-71.
132. *See id.* at 275.
133. RESTATEMENT (SECOND) OF CONTRACTS § 259 cmt. c (1979) (discussing the limitations on a creditor's power of application).
134. *Fowler*, 274 P.2d at 271.
135. RESTATEMENT (SECOND) OF CONTRACTS § 258 cmt. c (1979).
136. *Fowler*, 274 P.2d at 274.
137. *Id.*
138. *See id.* at 272-73.

D. *Tender of Performance*

Where the agreement between the parties calls for performances to be exchanged concurrently, each party is entitled to refuse to proceed until it is assured that the other will perform at the same time.[139] Each party is entitled to the occurrence of the condition that must precede its performance—the performance of the other.[140] When each party's performance is a concurrent condition for the other's performance, a party may tender its performance and satisfy the occurrence of the condition of the other party's duty, without the risks that full performance carries.[141] If the other party does not tender its performance, a breach occurs.[142] If the failure to perform or to offer to perform is a material failure, the tendering party's obligation of performance is discharged.[143] Furthermore, a failure by both parties to tender during the time for performance results in a discharge of the duties of both parties, without a right to recover damages from the other. In this situation, neither party's failure is a breach of the agreement.[144]

---

139. RESTATEMENT (SECOND) OF CONTRACTS § 238 cmt. a (1979); *see also* Bavarian Pastry Shop, Inc. v. Bavarian Bakeries, Inc., No. 05-94-01002-CV, 1995 WL 702571, *3 (Tex. App. Nov. 22, 1995).

140. *See* RESTATEMENT (SECOND) OF CONTRACTS § 238 cmt. a (1979).

141. *See, e.g.*, S. Nat'l Bank v. Crateo, 458 F.2d 688, 695 (5th Cir. 1972); Stoner v. Humphrey, No. CA 93-939, 1994 WL 505232, *3 (Ark. Ct. App. Sept. 14, 1994); *Bavarian Pastry Shop*, No. 05-94-01002-CV 1995 WL 702571, at *3.

142. *See* RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. a (1979).

143. *Id.*

144. Aviation Dev. Co. v. C & S Acquisition Corp., No. 97 Civ. 9302 AJP, 1999 WL 46630 (S.D.N.Y. Feb. 2, 1999). In *Aviation Development*, the buyer and the seller executed a letter of intent for the purchase and sale of four passenger aircraft. *Id.* at *1. The seller agreed to provide optional financing if the buyer was unable to obtain financing. *Id.* at *2. In exercising its right to optional financing, the buyer made a request for seller financing, placed the required $1.6 million in the account of its broker, and notified the seller. *Id.* at *4. When the seller failed to ground the planes for the buyer's inspection, the buyer sued. *Id.* at *6. Applying New York law to the transaction, the court found the agreement ambiguous, applied Article 2 of the UCC, and held that the payment of the deposit and the obligation to provide optional financing were concurrent conditions. *Id.* at *12. The court further held that neither party performed its concurrent obligation and neither was entitled to damages. *Id.* at *12. In *Pittman v. Canham*, 3 Cal. Rptr. 2d 340 (Cal. Ct. App. 1992), a purchaser brought an action for breach of a contract to sell a fifty-six-acre tract of land. *Id.* at 341. Both the contract and the escrow instructions provided that time was of the essence. *Id.* The escrow instruction further provided for a December 24th closing. *Id.* The seller delivered her deed in advance of the closing date to the escrow agent but it was returned by the escrow agent for notarization. *Id.* The seller did not tender the notarized deed; the purchaser did not tender his promised deposit, promissory note, or deed of trust. *Id.* Three months after the closing date, the seller sold the land to another. *Id.* In affirming the trial court, the appellate court held that a failure by both parties to perform concurrent conditions during the time for performance resulted in a discharge of both parties' duty to perform *Id.* (citing 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 663 (1960)). In distinguishing conditions precedent and

What constitutes "tender" of performance?

By definition, tender requires the holding out of that which is to be delivered or performed before the condition is satisfied.[145] Authorities agree, however, that an offer of performance accompanied with manifested present ability to perform or "due tender" is sufficient.[146] Both the Restatement (Second) of Contracts and the UCC permit due tender, an offer coupled with the present ability to perform, to satisfy the requirement of tender.[147] A sufficient tender includes: 1) an expression of readiness and willingness to perform, 2) a present willingness to do so, and 3) notice to the other party of such readiness.[148]

---

concurrent conditions, the court clarified that conditions precedent must be performed before the duty of the other arises but with concurrent conditions, tender of performance is sufficient. *Id.* at 342. In *Young v. Brookshire Village Props.*, 655 N.E.2d 1329 (1995), a purchaser sued a vendor for breach of contract. *Id.* at 1331. Without evidence that the purchaser tendered or attempted to tender the purchase money to the vendor within the period specified, the purchaser was barred from recovery for breach of contract. *Id.*

145. E. ALLAN FARNSWORTH, CONTRACTS § 8.10 (3d ed. 1999) (explaining the meaning of tender).

146. *See* RESTATEMENT (SECOND) OF CONTRACTS § 238 cmts. a & b (1979); U.C.C. § 2-503, cmt. 1 (2001); *see generally* Stoner v. Humphrey, No. CA 93-93a, 1994 WL 505232 (Ark. Ct. App. Sept. 14, 1994) (citing Loveless v. Diehl, 364 S.W.2d 317 (1963)) (distinguishing situations when only one of the parties has a duty of performance such as a case involving "an open account or promissory note, an actual offer of the money owed is essential to a valid tender;" and when both parties are under a duty of performance, only an ability to perform and an "indication" of that ability to the other party is necessary).

147. RESTATEMENT (SECOND) OF CONTRACTS § 238 cmt. b.; U.C.C. § 2-503, cmt. 1.

148. Bavarian Pastry Shop, Inc. v. Bavarian Bakeries, Inc., No. 05-94-01002-CV 1995 WL 702571, *2 (Tex. Ct. App. Nov. 22, 1995); *see also* S. Nat'l Bank v. Crateo, 458 F.2d 688, 695 (5th Cir. 1972). Applying the Texas rule of mutual conditions precedent to the interim financier's telephonic and telegraphic messages for the permanent financier who failed to appear earlier that day at the scheduled closing in Austin, the *Crateo* Court upheld the district court's determination that the interim financier's conduct satisfied its obligation of tender under the terms of the agreement that imposed concurrent conditions precedent upon the parties. *Id.* Although the dissent agreed that the interim financier's messages evidenced its willingness to make the tender and a demand for performance of the other, the dissent questioned whether sufficient proof was introduced to establish the financier's *ability* to make the actual tender before the end of day to the permanent financier in California. *Id.* at 698-00 (Rives, J. dissenting). In *Brooks v. Scoville*, 17 P.2d 218 (Utah 1932), a stock purchaser alleged an agreement by the seller to repurchase the stock within one year from the date of purchase, his demand of defendant on several occasions to repurchase the stock, his readiness and willingness to tender the stock, and the seller's failure to perform. *Id.* at 219. The seller filed a general demurrer. *Id.* The purchaser had failed to assert an offer or tender of the stock to the seller. *Id.* The trial court's judgment was based on findings that the purchaser had communicated his readiness and willingness to tender. *Id.* In upholding the judgment, the court concluded that defective allegations of matters of fact regarding an offer to perform rather than an absence of facts could be cured by the evidence. *Id.* at 222. The evidence also supported a conclusion that an actual tender of the stock would have been vain and useless. *Id.*

In Article 2 of the UCC, tender means "due tender," which is "an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows [itself] ready to proceed."[149] The law is clear that when concurrent conditions are present, a tender by one is conditional on the reciprocal tender by the other party, and that an offer or proffer of performance is sufficient to put the other in breach of the concurrent condition. This principle protects against the loss of the cost of performance or the cost of tendering full performance and minimizes the risk of full performance without receiving the promised return performance. Without such a rule, the performing party, after its performance, has at best only a right to recover for the breach having parted with its performance or the cost of tendering its performance.

Unlike the tender of performance in the context of concurrent conditions, when the performance called for by the agreement is the payment of money or the delivery of a thing by one of the parties, tender, absent a contrary statutory rule,[150] requires production of the payment or the thing required for contract performance.[151]

E. *Legal Effect of Tender*

Because tender of performance or an offer to perform is not the equivalent of actual performance, tender standing alone will not operate to discharge a duty of performance.[152] If the promised performance does not require cooperation on the part of the promisee or promisee's representative, a tender or an offer by the promisor to perform would ordinarily have no effect on the right to a discharge.[153] The promisor has a duty to render the performance—not merely to tender it.[154] If the promisor desires a discharge, the promisor must perform to completion the promised performance unless the other party repudiates or otherwise breaches the

---

149. U.C.C. § 2-503 cmt. 1. Tender also refers "to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation." *Id.*; *see also* UCITA § 601(c)(1) (adopting "due tender" as the standard for tender of performance).

150. *See, e.g.*, IDAHO CODE § 9-1501 (Michie 2000) ("An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property."); UTAH CODE ANN. § 78-27-1 (1996) ("An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.").

151. *See supra* note 146.

152. Spooner v. Polk County, 528 P.2d 597, 600 (Or. Ct. App. 1974) (quoting 5A CORBIN, *supra* note 81, § 1233).

153. *Id.* (quoting 5A CORBIN, *supra* note 81, § 1233).

154. *Id.* (quoting 5A CORBIN, *supra* note 81, § 1233).

contract.[155] Thus, if A contracts to build a building on A's own land or to set sail in A's own ship for South America, an offer to build or to set sail would have no effect as a discharge of A's duty of performance.[156] Only a subsequent repudiation or other breach by the promisee would discharge A's duty of performance.[157]

If, however, the performance promised is one that requires the cooperation of the promisee or promisee's representative, a tender or an offer of performance by the promisor at the proper time and place will make it incumbent on the promisee to render the necessary cooperation.[158] Whether the promisee has himself promised to cooperate or not, the promisor's duty of performance is conditional upon receiving the requisite cooperation.[159] In such a case, the promisor's duty to perform may be discharged by the other's failure to cooperate.[160] It is not the promisor's offer of performance, however, that discharges him; rather, it is the refusal of the other to provide the necessary cooperation that discharges the tendering party.[161] In the previous example, assume A agreed to build a house on B's land and A arrived at the location on the appointed day for commencing the performance with the necessary tools, equipment, and personnel only to be denied access to the land by B. Here, A tenders the beginning of performance with the willingness and ability to perform but does not receive the necessary cooperation. B's failure to cooperate results in a breach of B's duty to cooperate and a discharge of A's duty to perform.

In the context of the rendition of services or a sale of goods, upon tender, the seller's duty of performance is discharged. Under the terms of a shipment contract, upon yielding possession to the carrier, the making of a contract for carriage, and the giving of notice to the buyer,[162] the seller has no remaining obligation of performance unless the goods are defective or the contract of carriage is unreasonable.[163] If the quality of the seller's performance gives rise to a right of rejection by the buyer or an action for breach of warranty, the seller's performance is not consistent with the terms

155. *Id.* (quoting 5A CORBIN, *supra* note 81, § 1233).

156. *See id.* (discussing 5A CORBIN, *supra* note 81, § 1233) (holding that an offer to perform a reasonably disputed duty did not discharge the duty).

157. *See generally* Acme Inv., Inc. v. Southwest Tracor, Inc., 105 F.3d 412 (8th Cir. 1997) (holding that seller's repudiation discharged buyer's duty to perform).

158. Multach v. Adams, 418 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1982) (citing 5A CORBIN, *supra* note 81, § 1233).

159. *Id.*

160. *Id.* at 1255-56 (distinguishing the effect of an obligee's failure to cooperate by refusing to accept the tender between a unilateral obligation to pay a debt and other performances).

161. *See id.*

162. U.C.C. § 2-504 (2001).

163. *Id.*

of the agreement and a discharge does not result. If, however, the seller has completely performed consistently with the terms of the agreement, upon tender, the seller's duty of performance is discharged.[164] When the agreement of the parties imposes on the seller the obligation to deliver the goods at a specified destination, the seller's obligation of performance requires the tender of documents, if required by the agreement, to enable buyer to take possession and the tender of the goods at the destination.[165] Upon tender of the goods at the destination, absent a breach of warranty by the seller, the seller's obligation of performance is discharged.[166] In this case, it is not buyer's refusal to perform that results in a discharge but the seller's full performance.[167] This full performance, rather than the shifting of the risk of loss, justifies discharge.[168] For example, suppose a buyer and a seller contract for the purchase and sale of goods in possession of a bailee and the goods are to be delivered without being moved. The seller gives notice to the bailee of buyer's interest in the goods with direction that bailee acknowledge to the buyer the buyer's right to possession. Upon notice to the buyer, the seller has not only tendered the goods[169] but also has completely performed.

Conversely, when the seller tenders the goods to the buyer conditioned on the buyer's payment for the goods, it is the buyer's refusal to perform that results in a discharge.[170] In this case, the seller has not unconditionally yielded possession to the buyer's control and disposition. Similarly, the seller's tender to the buyer of a non-negotiable document of title or written direction to the bailee who has possession of the goods is a conditional tender not entitling seller to a discharge until the non-negotiable bill of lading or written instruction is honored by the bailee.[171] The buyer's control and rights in the goods vis-à-vis the seller remains an issue given the nature of the document used to give direction to the bailee. Full performance does not occur until the bailee has honored the non-negotiable document of title or acknowledgment.[172] The bailee has an obligation to comply with any instructions received from the seller, consignor, until the buyer, consignee,

---

164. *Id.* § 2-503 cmts. 1-4, § 2-504.
165. *Id.* § 2-503.
166. *Id.*
167. *Id.*
168. *Id.*
169. *See id.* § 2-503(4).
170. *See id.*
171. *See id.*; *see generally* Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc., 774 F.2d 214 (7th Cir. 1985).
172. *See* Whately v. Tetrault, 5 U.C.C. Rep. Serv. 838, 29 Mass. App. Dec. 112 (1964) (finding that the seller's notice to the bailee that the goods had been sold coupled with the bailee's arranging delivery of the goods to the buyer meant that the subsequent loss of the goods was buyer's responsibility).

has presented the non-negotiable document of title.[173] The seller's control suggests that something less than full performance has occurred.[174]

An offer to perform or a tender of performance made conditional upon some return performance by the other party that the other is then under no duty to render is not an effective and operative tender either as a discharge or as a condition precedent to the other's obligation of performance.[175] When a bilateral contract requires the parties to render performances concurrently, each party's duty being conditional on such concurrent performance by the other, a tender by either one may properly be made conditional on the required performance of the other.[176]

The question of the effect of a tender of performance arises most frequently in the case of a unilateral money debt or payment of a negotiable instrument. Unless otherwise provided by statute,[177] tender of payment does not operate as a discharge of the debt, even though the exact amount due is tendered at the very time and place specified in the original contract.[178]

---

173. U.C.C. §§ 7-303, 2-705 (2001).

174. *Id.* § 2-503(4) (1998) ("[A] refusal by the bailee to honor the document or to obey the direction defeats the tender.").

175. *See* Hepburn & Dundas v. Auld, 5 U.S. (1 Cranch) 321 (1803) (discussing the situation when an obligor tendered a delivery of documents on condition of first receiving a written release of the claim against him); Kelley v. Leucadia Fin. Corp., 846 P.2d 1238, 1243 (Utah 1993) (citing 5A CORBIN, *supra* note 81, § 1233).

176. *See* U.C.C. § 2-507 (2001); *see also Kelley*, 846 P.2d at 1243 (following 5A CORBIN, *supra* note 81, § 1233) (holding that tender by the buyer of the purchase price with a demand for a title free from boundary defects was a request consistent with the seller's obligation under the terms of the agreement).

177. Some statutes provide for the extinguishment of the debtor's obligation after an offer of payment and compliance with the terms of the statute, such as the immediate deposit of the funds in the name of the creditor with a reputable bank and notice to the creditor or a deposit to the order of the court. *See, e.g.*, CAL. CIV. CODE § 1500 (West 2002) ("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 . . . and notice . . . to the creditor."); LA. CIV. CODE ANN. art. 1869 (2001) ("An obligation to deliver a thing or money is extinguished where without justification an obligee fails to accept the performance tendered by the obligor . . . followed by deposit to the order of the court . . . if declared valid by the court."); S.D. CODIFIED LAWS § 54-2-4 (1999) ("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."); N.Y. Real Prop. Acts. § 1921(3); *see also* Walker v. Houston, 12 P.2d 952, 953 (Cal. 1932).

178. *See* Norwood Lumber Co. v. McKean, 153 F.2d 753, 754 (3d Cir. 1946); Mitchell v. Roberts, 17 F. 776, 779 (E.D. Ark. 1883); Walker v. Houston, 12 P.2d 952, 953 (Cal. 1932); Saunders v. Denison, 20 Conn. 521, 525 (Conn. 1850); McFarland v. Christoff, 92 N.E.2d 555, 557 (Ind. Ct. App. 1950); Kellos v. Parker-Sharpe, Inc., 263 S.E.2d 138, 139 (Ga. 1980); Town v. Trow, 41 Mass. 168, 169 (Mass. 1833); Cowles v. Marble, 37 Mich. 158, 160 (Mich. 1877); Mahoney v. Lester, 168 P.2d 339, 345 (Mont. 1946); Bank v. Davidson, 70 N.C. 118, 121 (N.C. 1874); Radin v. Harper, 82 N.Y.S.2d 121, 122 (N.Y. Sup. Ct. 1946); Liberty Nat. Bank of Weatherford v. Semkoff, 84 P.2d 438, 440 (Okla. 1938); Guar. Bank v. Thompson, 632 S.W.2d

Furthermore, the creditor's refusal to accept the money so tendered does not operate as a discharge of the debt. Such a refusal by the creditor is a prevention of performance by the debtor; but it does little or no harm to the debtor. The latter is not being deprived of any return performance to which he has a right, and under ordinary circumstances the creditor's refusal to accept the risks of ownership and possession of the money is of no serious disadvantage to the debtor. When the creditor's refusal to accept these risks is a serious matter to the debtor and there is a subsequent loss to the debtor because of these risks, the debtor should be discharged to the extent of the loss suffered.

The refusal by the creditor of a proper tender of the money due him is operative to prevent the debtor from being guilty of a breach of duty, although it is not a discharge of the debtor's duty.[179] It is the creditor's fault that the creditor is deprived of the use of the money. Consequently, the creditor has no right to interest beyond the due date[180] or to other damages. Interest as damages for breach is not collectible, for the debtor has not breached.[181] Any promise of interest that the debtor may have made in the contract of loan is discharged because the debtor is no longer in a position to make use of the principal tendered for the obligation. Having withdrawn the money from the business, the debtor is justified in keeping it segregated and unproductive in order to make payment of the debt.

Because the creditor's own actions caused the failure of payment by the debtor and thus increased the burden and risk on the surety or secondary obligor, the creditor cannot require a surety or secondary obligor to pay the debt.[182] And it is equally unjust for the creditor to enforce mortgages and

---

338, 340 (Tex. 1982); James Talcott, Inc. v. Cohen, 275 N.W. 906, 908 (Wis. 1937).

In *Flower's Case*, Noy 67 (about 1600), a debtor brought the money in a bag and cast it on a table before his creditor and in the creditor's possession. It was held that this was payment and that the debtor could wage his law when sued. This was a discharge even though the creditor at once made a gift of the money back to the debtor. It would have been otherwise if the money had been merely tendered.

See also Perkins v. Pub. Serv. Co., 45 A.2d 210 (N.H. 1945) (presenting an interesting theory similar to *Flowers*); Hobbs v. Yonkers, 5 N.E. 778, (N.Y. Ct. App. 1886). In *Hobbs*, a public official made an unenforceable promise to accept a reduction of the fees allowed by statute. *Id.* at 779. The statutory fees were received by him in full, the duty owed to him being thus discharged. *Id.* He thereafter paid into the treasury the excess over the agreed amount. *Id.* This was an executed and irrevocable gift. *Id.* at 781.

179. *See* C.G. Caster Co. v. Regan, 410 N.E.2d 422, 426 (Ill. Ct. App. 1980) (quoting 5A CORBIN, *supra* note 81, § 1233).

180. U.C.C. Revised § 3-603(b) (2001).

181. *See* Norwood Lumber Corp. v. McKean, 153 F.2d 753 (3d Cir. 1946); Forwood v. Magness, 121 A. 855 (Md. Ct. App. 1923); Nat'l Bank of Rochester v. Erion-Haines Realty Co., 209 N.Y.S. 522 (N.Y. Sup. Ct. 1925); Owens v. N. State Life Ins. Co., 92 S.E. 168 (N.C. 1917); *see also* pre-revised U.C.C. § 3-604 (1989).

182. U.C.C. Revised § 3-603(b) (2001).

other liens on property of the debtor, when the latter made a proper tender and remains ready to pay the amount for which the liens were created.[183]

F. *Tender of Money for Discharge of Obligation*

Tender of payment may serve as a condition precedent to another's duty[184] or satisfy the tendering party's obligation of performance resulting in a discharge of the duty to pay.[185] Tendering money to satisfy one's duty of performance discharges the duty if several requirements are met.[186]

(1) The money must be of the kind required by the contract.[187] Under the UCC, "[m]oney means a medium of exchange authorized or adopted by a domestic or foreign government . . . and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations."[188] Unless the agreement otherwise requires or the creditor demands legal tender or refuses to accept any form of payment other than legal tender,[189] payment or an offer to pay in a manner consistent with the ordinary course of business, including payment by check, is a proper tender.[190] Use of a personal check rather than a bank obligation such as a cashier's check, teller's check or certified check, conditionally satisfies the tendering party's duty of performance,[191]

183. *See* Mitchell v. Roberts, 17 F. 776 (E.D. Ark. 1883); Walker v. Houston, 12 P.2d 952 (Cal. 1932); Latta v. Tutton, 54 P. 844 (Cal. 1898); Hill v. Carter, 59 N.W. 413 (Mich. 1894); Mendell v. Howard, 208 S.W. 497 (Mo. Ct. App. 1918); Frost v. Yonkers Sav. Bank, 70 N.Y. 553 (N.Y. Ct. App. 1877) (stating that tender by a junior mortgagee for the purpose of acquiring the senior security does not discharge it).

184. *See supra* note 141 and accompanying text.

185. *See In re* Gen. Plastics Corp., 158 B.R. 258, 285 (Bankr. S.D. Fla. 1993).

186. *See, e.g.*, Mondello v. Hanover Trust Co., 148 N.E. 136, (Mass. 1925); Barrell v. Britton, 148 N.E. 134, 252 (Mass. 1925); Waldron v. Murphy, 40 Mich. 668 (Mich. 1879); Noyes v. Wyckoff, 21 N.E. 158 (N.Y. 1889); Knight v. Abbott, 30 Vt. 577 (Vt. 1858).

187. Simmons v. Swan, 11 F.2d 267 (1st Cir. 1926) (holding a check insufficient if objected to); Servel v. Jamieson, 255 F. 892 (9th Cir. 1919).

188. U.C.C. § 1-201(24) (2000). The U.C.C. rejects the view "that money is limited to legal tender." *Id.* cmt. 24. "Money [is that] circulating medium . . . part of the official currency of [the authorizing] government." *Id.*

189. Payment by check through the mail consistent with business custom, properly mailed in due time although not received prevents summary cancellation of the contract. Vonk v. Dunn, 775 P.2d 1088, 1092 (Ariz. 1989) (citing 5A CORBIN, *supra* note 81, § 1235). A tender of payment by a personal check is not a good tender if there are not sufficient funds in the bank on which it is drawn, if the creditor has objected to payment by check, or if the tender is conditional upon something to which the debtor is not entitled. Sieverts v. White, 273 P.2d 974, 975 (Utah 1954).

190. RESTATEMENT (SECOND) OF CONTRACTS § 249 cmt. a (1979); U.C.C. § 2-511 (2001); UNIDROIT Principles, art. 6.1.7(1) (1995).

191. U.C.C. § 2-511(3) (2001); UNIDROIT Principles, art. 6.1.7(2) (1995).

suspending it until the personal check is honored. Upon honor by the drawee bank, the duty of performance is discharged.[192]

If, however, a bank obligation, a cashier's check, teller's check, or certified check, is tendered and taken, the tendering party's duty of performance is discharged.[193] Discharge of the tendering party on the duty of performance, the underlying obligation, to the extent that payment has been made, does not affect the liability the tendering party may have because of its indorsement of the bank obligation.[194] Liability may only be based on either the indorser's engagement on the instrument or for breach of transfer warranties.[195]

A contract obligation to pay "money" requires payment in an authorized or adopted medium of exchange by a domestic or foreign government and, thereby, constitutes "legal tender."[196] In a cross borders transaction, if the agreement does not express the monetary obligation in a particular currency, "payment must be made in the currency of the place where payment is to be made."[197] Where the terms of the agreement express a specific currency, the UNIDROIT Principles authorize payment in the currency of the place for payment unless the agreement expressly limits payment to the specified currency or the currency of the place of payment is "freely convertible."[198]

---

192. U.C.C. Revised §§ 2-511(3), 3-310(b)(1) (2001); *see also* Gaunt v. Ala. Bound Oil & Gas Co., 281 F. 653 (8th Cir. 1922); Sudduth v. Storm King Coal Co., 268 F. 433 (6th Cir. 1920); Servel v. Jamieson, 255 F. 892 (9th Cir. 1919); Stevens v. Hines, 218 P. 57 (Cal. Ct. App. 1923); Hohener v. Gauss, 34 Cal. Rptr. 656 (Cal. Ct. App. 1963) (holding tender by check by an optionee was sufficient, even though in excess of bank balance, if drawee bank had agreed to honor an overdraft and the optionor had not objected to the form of payment); Kitchell v. Schneider, 103 N.E. 647 (Ind. 1913); Schmith v. Union Mut. Cas. Co., 247 N.W. 655 (Iowa 1933); Steckel v. Selix, 197 N.W. 918 (Iowa 1924); Neal v. Finley, 124 S.W. 348 (Ky. 1910); O'Toole & Nedeau Co. v. Boelkins, 235 N.W. 820 (Mich. 1931); Murphy v. Frank P. Miller Corp., 200 N.W. 974 (Mich. 1924); New York Util. Co. v. Williamsburg Steam Laundry Co., 175 N.Y.S. 60 (N.Y. Sup. Ct. 1919); Ugland v. Farmers' & Merch. State Bank, 137 N.W. 572 (N.D. 1912); Schaeffer v. Coldren, 85 A. 98 (Pa. 1912); Pershing v. Feinberg, 52 A. 22 (Pa. 1902); Bickel v. Sheppard, 127 S.E. 41 (W. Va. 1925) (objecting to a tender on the sole ground that it is not sufficient in amount is a waiver of objections as to the form in which it is made, such as one made by a check and conditional on a receipt); Thompson v. Crains, 128 N.E. 508 (Ill. 1920); Gardner v. Spurlock, 339 P.2d 65 (Kan. 1959) (tender by cashier's check, not objected to); Perkins v. Pub. Serv. Co., 45 A.2d 210 (N.H. 1946).

193. U.C.C. Revised § 3-310(a) (2001).

194. *Id.*

195. *Id.* §§ 3-310(a), 3-416.

196. *Id.* § 1-201(24); *see also* Margulus v. Mathes, 90 N.E.2d 254, 256 (Ill. Ct. App. 1950) (finding that seller was within its right to object to the tender of certified checks when the agreement stipulated cash even though seller had other motives for wanting to cancel the contract).

197. UNIDROIT Principles, art. 6.1.10 (1994).

198. *Id.*, art. 6.1.9

Despite the inclusion of an express currency for payment of the monetary obligation in a cross border transaction, if it is impossible for payment to be made in the agreed currency, the obligee may require payment in the currency of the place of payment[199] or the obligor may provide payment by a means or in a manner that is commercially a substantial equivalent to that agreed upon.[200] The sufficiency of the "money" tendered should be determined by the terms of the agreement and the relevant business custom.

(2) The money must be produced under such circumstances that the tendering party's control over the money is relinquished so that the creditor can take possession of it without unreasonable exertion,[201] unless by words

---

> (1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place of payment unless
> (a) the currency is not freely convertible; or
> (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.
> (2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).
> (3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.
> (4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

Id.

199. *Id.*, art. 6.1.9(2) (1994).

200. *See, e.g.*, U.C.C. § 2-614 (2001)

> (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory.

Id.

201. *See* Kerr v. U.S., 108 F.2d 585, 586 (D.C. Cir. 1939) (finding tender effective upon actual receipt of letter containing premium by the addressee); Texas Employers Ins. Ass'n v. Underwriting Members of Lloyds, 836 F. Supp. 398, 409-10 (S.D. Tex. 1993) (holding that tender required actual payment in settlement or payment into court by primary insurer of its policy limits to trigger the obligation of the excess carrier to defend the insured or entitle primary insurer to indemnification of litigation costs); Arguelles v. Kaplan, 736 S.W.2d 782, 784 (Tex. Ct. App. 1987) (declaring that delivery of deed to title company with instructions to surrender to obligee after original note was marked paid in full was not a relinquishing of control unless consistent with the parties' agreement).

or other conduct the creditor makes it evident that the money will not be received even if it is produced.[202] In the latter event, the money need not be physically produced; but the debtor must have it available.[203]

(3) The money tendered must be either the exact amount due including interest or a larger amount without requiring the making of change.[204]

When authorized by statute, a written offer to pay a sum of money or to deliver property, if rejected, negates the need to produce the money or property but it must be coupled with a present ability to perform. *See* CAL. CIV. PROC. CODE § 2074 (2001); GUAM CODE ANN § 8201 (2001); IDAHO CODE § 9-1501 (Michie 2001); IOWA CODE § 538.6 (2002); MONT. CODE ANN. § 28-1-1202 (2001) (stating a written offer to pay a particular sum of money if not accepted is equivalent to the actual production and tender of the money); OR. REV. STAT. § 81.010 (1999); UTAH CODE ANN. § 78-27-1 (2001).

202. Greenwood v. Watson, 171 F. 619 (3d Cir. 1909); Odum v. Rutledge & J.R. Co., 10 So. 222, (Ala. 1891); Rudulph v. Wagner, 36 Ala. 698 (Ala. 1860); Kreiss Potassium Phosphate Co. v. Knight, 124 So. 751 (Fla. 1930); Mondello v. Hanover Trust Co., 148 N.E. 136 (Mass. 1925); Baird v. Union Mut. Life Ins. Co., 173 N.W. 686 (Neb. 1920); Lewis v. Mott, 36 N.Y. 394 (N.Y. 1867); Murray v. Bryan, 188 N.Y.S. 254 (N.Y. Sup. Ct. 1921); Bane v. Atl. Coast Line R.R., 88 S.E. 477 (N.C. 1916); Stern v. Maxwell, 44 S.W.2d 482 (Tex. App. 1932); Poff v. Miller, 235 S.W. 570 (Tex. Comm'n App. 1921, Judgm't adopted); Shank v. Groff, 32 S.E. 248 (W. Va. 1898).

The actual tender of money may be excused for other reasons. In a sale of land, payment and conveyance are frequently concurrent conditions; if the vendor is not able to deliver the necessary deed, the purchaser need not make an actual tender. The purchaser's ability to pay is a condition of his right of action. Barrett v. McAllister, 33 W. Va. 738 (1890). One party's repudiation or inability to perform the agreed equivalent will excuse actual tender.

In *Brooks v. Scoville*, 17 P.2d 218 (Utah 1932), a stock purchaser alleged: an agreement by the seller to repurchase stock within one year from the date of purchase, his demand of defendant on several occasions to repurchase the stock, his readiness and willingness to tender the stock, and the seller's failure to perform. *Id.* at 219. The seller filed a general demurrer. The purchaser had failed to assert an offer or tender of the stock to seller. The trial court's judgment was based on findings that the purchaser had communicated his readiness and willingness to tender. *Id.* In upholding the judgment, the court concluded that defective allegations of matters of fact regarding an offer to perform rather than an absence of facts could be cured by the evidence. *Id.* at 222. The evidence also supported a conclusion that an actual tender of the stock would have been in vain and useless. *Id.*

In *Record Machine & Tool Co. v. Pageman Holding Corp.*, 266 P.2d 1 (Cal. 1954), a purchaser deposited the money in a bank in escrow for delivery on conveyance, but the vendor refused performance. *Id.* at 2. No actual tender of the price was necessary in order to get specific enforcement. *Id.* at 5.

203. In *Hall v. Norwalk F. Ins. Co.*, 17 A. 356 (Conn. 1889), it was said that, if the creditor refuses to accept the money even if it shall be produced, the debtor need not produce it and need not even have it in his possession. *Id.* at 360. This is no doubt correct; but it can hardly be said that there has been a tender by the debtor. The principal operative fact is the creditor's refusal to permit performance by the debtor.

In *Bembridge v. Miller*, 385 P.2d 172 (Or. 1963), a statute provided that an offer of payment might operate as a tender; but the court held that such an offer did not have the effect of terminating a duty to pay interest if it appeared that the debtor did not have the ability to make the payment that he purported to "offer." *Id.* at 179.

204. Guy F. Atkinson Co. v. Comm'r, 814 F.2d 1388, 1393 (9th Cir. 1987); Pac. Mail S.S.

(4) Tender must be at the time and place required by the contract.[205] It must be made to the creditor in person, or to the creditor's authorized representative.[206] A tender of payment in advance of the due date and the creditor's refusal to receive it at that time does not affect the debtor's duty to make payment as agreed.[207] Debtor must make a new tender on the date of maturity or be in default. Likewise a tender of money made after the debtor has already committed a default was not, at common law, a proper tender, because the amount then due is no longer a liquidated, definite sum.[208] After default there is a right to damages as well as a right to the principal sum. In most cases, however, these damages are the interest value

---

Co. v. W. Pac. R.R., 251 F. 218, 222 (9th Cir. 1918); Ebersole v. Addington, 46 So. 849, 849 (Ala. 1908); Shafer v. Willis, 56 P. 635, 636 (Cal. 1899); Wiggins v. Sheppard, 90 S.E. 56, 56 (Ga. 1916) (must include interest due); Smith v. Pilcher, 60 S.E. 1000 (Ga. 1908); Cheney v. Roodhouse, 25 N.E. 1019, 1022 (Ill. 1890); W. K. Neckwear Co. v. Rabinowitz, 133 So. 450, 450-51 (La. Ct. App. 1931) (must include interest); Am. Sur. Co. v. Venner, 67 N.E. 331, 332 (Mass. 1903); Platsis v. Diafokeris, 511 A.2d 535 (Md. Ct. Spec. App. 1986) (citing 5A CORBIN, *supra* note 81, § 1235); Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co., 76 A. 879, 880 (Me. 1909) (too small by nine cents); Audit Servs., Inc. v. Frontier-West, Inc., 827 P.2d 1242 (Mont. 1992) (holding that tender of part performance did not extinguish obligation when the subcontractor tendered $1730.45 of $2,476.87, a contractual obligation for fringe benefit contributions, liquidated damages, and audit fees); Graham v. Linden, 50 N.Y. 547, 550 (1872); New York Util. Co. v. Williamsburg Steam Laundry Co., 175 N.Y.S. 60 (N.Y. App. Div. 1919); Krauss v. Potts, 156 P. 1162 (Okla. 1916) (declaring that tender of part does not stop interest, at least unless the amount due is within the exclusive knowledge of the creditor); Barreda v. Merchants' Nat'l Bank, 206 S.W. 726, 727 (Tex. Civ. App. 1918); Matzger v. Page, 113 P. 254, 255 (Wash. 1911) (disregarding failure to include three days' interest on $40); Dixon v. Clark, 5 C.B. 365 (1847) (holding that in an action of debt for $26, a plea of tender of $5 as part of the debt on the due date was demurrable; tender must be of the whole sum due at the time and place and must be kept good); Blow v. Russell, 1 C. & P. 365 (1824); Robinson v. Cook, 6 Taunt. 336 (1815).

205. Rottman v. Hevener, 202 P. 334, 335-36 (Cal. 1921); Isbell v. Walton Trust Co., 163 P. 716 (Okla. 1917); Stansbury v. Embrey, 158 S.W. 991, 992-93 (Tenn. 1913) (tender to bank if debt is payable there).

206. *Cheney*, 25 N.E. at 1022; Grand Lodge of Bhd. of R.R. Trainmen v. Clark, 127 N.E. 280, 282 (Ind. 1920); Moffat v. Parsons, 5 Taunt. 307 (1914) (holding that tender at proper place to a clerk in charge was good in spite of contrary directions to the clerk); Cranley v. Hillary, 2 M. & S. 120 (1813). If no place of payment is fixed by agreement, and the creditor is within the state, the debtor must seek out the creditor in order to tender payment to him. *See* Berley & Kyzer v. Columbia, Newberry & Laurens R.R., 64 S.E. 397, 398 (S.C. 1909); Jones v. Main Island Creek Coal Co., 99 S.E. 462 (W. Va. 1919).

207. Bowen v. Julius, 40 N.E. 700, 700 (Ind. 1894); Doering v. Schneider, 128 N.E. 936, 937 (Ind. Ct. App. 1920); Trahant v. Perry, 149 N.E. 149, 150 (Mass. 1925); Barrell v. Britton, 148 N.E. 134, 135 (Mass. 1925); Shipp v. Anderson, 173 S.W. 598, 600 (Tex. Civ. App. 1915); Peryer v. Pennock, 115 A. 105, 105 (Vt. 1921). A postdated check, sent by mail in advance, may operate as a valid tender, if supported by former usage and not objected to by the creditor. Stevens v. Hines, 218 P. 57, 59-60 (Cal. Ct. App. 1923).

208. S. Ry. v. Harris, 80 So. 101 (Ala. 1918). Tender is not possible in case of a wholly unliquidated claim for a trespass or other wrong. *See* Johnson v. Williams, 132 So. 170, 171 (Ala. 1931); Ganus & Co. v. Tew, 50 So. 1000, 1001 (Ala. 1909).

of the use of the money at the agreed rate or at market rates, the amount of which can easily be calculated. This has led to the passing of statutes providing that a tender of payment after default shall be fully operative if the amount tendered is large enough to include the principal of the debt, accrued interest, and any further amount to which the creditor may afterwards be found by a court to have been entitled. Refusal of such a tender may therefore have all the effects that a tender on the due date would have had. It may be, indeed, that such would now be held to be the case even in the absence of a statute.[209]

(5) The tender must be kept good.[210] If the creditor repents of its refusal to receive the tendered payment and takes such action that it can no longer be reasonably regarded as preventing payment by the debtor, the debtor must make actual delivery of the money within a reasonable time of the creditor's demand for it. Tender is "kept good" when the money is kept in debtor's possession or on deposit at a bank or other place for safekeeping or by payment into a court.[211] If after the creditor's initial refusal and subsequent demand the debtor fails to make delivery of the money, then the debtor's initial tender is defeated.[212] If the creditor brings an action at law

---

209. *See* Mitchell v. Roberts, 17 F. 776, 779 (E.D. Ark. 1883); Rudulph v. Wagner, 36 Ala. 698, 701 (Ala. 1860); Latta v. Tutton, 54 P. 844 (Cal. 1898); Loughborough v. McNevin, 14 P. 369 (Cal. 1887); Boise Lumber Co. v. Indep. Sch. Dist. of Boise, 214 P. 143, 144 (Idaho 1923); Palatine Ins. Co. v. O'Brien, 68 A. 484, 486 (Md. 1908); Cass v. Higenbotam, 3 N.E. 189 (N.Y. 1885); Walsh v. Colvin, 101 P. 1085, 1087 (Wash. 1909) ($800 tendered, the amount in dispute not possibly in excess of $775).

210. *See* Bissell v. Heyward, 96 U.S. 580 (1877). Interest is not stopped by a tender if the debtor thereafter fights the claim on the merits. *See* Sanitary Farm Dairies v. Gammel, 195 F.2d 106 (8th Cir. 1952); Derby v. Bell, 117 So. 8 (Ala. 1928) (stating that interest is not stopped by a tender, even though creditor continues to refuse to receive it); Saunders v. McDonough, 97 So. 622 (Ala. 1923); Rowell v. Ross, 87 A. 355 (Conn. 1913); Fortson v. Strickland, 99 S.E. 147 (Ga. App. 1919) (holding that the amount tendered must be continuously available); *Clark*, 127 N.E. 280; West v. Farmers' Mut. Ins. Co., 90 N.W. 523 (Iowa 1902); Silver v. Moore, 84 A. 1072 (Me. 1912); Nat'l Mach. & Tool Co. v. Standard Shoe Mach. Co., 63 N.E. 900 (Mass. 1902); Norris v. Ryno, 135 N.W. 463 (Mich. 1912); Browning, King & Co. v. Chamberlain, 104 N.E. 627 (N.Y. 1914); Werner v. Tuch, 27 N.E. 845 (N.Y. 1891); Halpin v. Phenix Ins. Co., 23 N.E. 482 (1890); Becker v. Boon, 61 N.Y. 317 (1874); Wood v. Rabe, 96 N.Y. 414 (1884); De Bruhl v. Hood, 72 S.E. 83 (N.C. 1911); Anderson v. Griffith, 93 P. 934 (Or. 1908); Manning v. Brandon Corp., 161 S.E. 405 (S.C. 1932); Barron v. Thompson, 97 S.E. 840 (S.C. 1919); Union Mach. & Sup. Co. v. Thompson, 182 P. 573 (Wash. 1919); Vergonis v. Vaseleou, 178 P. 463 (Wash. 1919); Hart v. Kanawha Oil Co., 90 S.E. 604 (W. Va. 1916); Shank v. Groff, 32 S.E. 248 (W. Va. 1898); Gyles v. Hall, 2 P.Wms. 378 (1726).

211. *See, e.g.*, Empire Fluorspar Co. v. Knight, 65 N.E.2d 37 (Ill. App. Ct. 1946); Chicago v. Chicago City Ry., 245 Ill. App. 473, 482-83 (1927); Rice v. Kahn, 35 N.W. 465 (Wisc. 1887).

212. *See* Frank v. Pickens, 69 Ala. 369, 370-73 (1881) (finding that tender of payment to mortgagee of personal property before the suit did not discharge the mortgage when the mortgagor deposited with the clerk a sum less than the sum tendered and due; adding to the sum after the presentation of evidence permitted the mortgagee to speculate and defer payment).

on the account, even though he demands more than the amount tendered, the tender is not regarded as being "kept good" unless the debtor actually pays the amount into court for the creditor's use.[213] When the suit is in equity, however, or in any modern court that has equity powers and a flexible procedure, the actual payment into court may not be required; such a court can do full justice by making its decree conditional and can thus give the creditor complete security.[214] Unless the debtor complies with the conditions prescribed, the advantages of a tender will be denied him.

A payment of the money into court, in accordance with a previously made tender consistent with the contract terms, operates as actual performance of duty and as a discharge.[215] The only judgment to which the creditor is then entitled is a judgment that the amount held by the officer of the court shall be delivered to him.[216] No judgment whatsoever will be

---

213. Woods v. Dixon, 240 P.2d 520, 522 (Or. 1952) (stating that in an action for recovery of money, tender must be made good by paying money into court). There are some statutory provisions making it unnecessary to pay the money into court. Walker v. Houston, 12 P.2d 952 (Cal. 1932).

Also, if the tender is properly made on condition that pledged securities be surrendered, and this condition is not performed by the creditor, payment into court is not required. Johnson v. Indep. Sch. Dist. of Va., 249 N.W. 177 (Minn. 1933); Cass v. Higenbotam, 3 N.E. 189 (N.Y. 1885).

214. Cheney v. Bilby, 74 F. 52 (8th Cir. 1896); Regan v. Berent, 64 N.E.2d 483 (Ill. 1946); Thompson v. Crains, 128 N.E. 508 (Ill. 1920); Kelly, Shuttleworth & McManus v. Cent. Nat'l Bank & Trust Co., 248 N.W. 9 (Iowa 1933); Perkins v. Pub. Serv. Co., 45 A.2d 210 (N.H. 1946); Murray v. O'Brien, 105 P. 840 (Wash. 1909); Mankel v. Belscamper, 54 N.W. 500 (Wisc. 1893).

215. *In re* Gen. Plastics Corp., 158 B.R. 258, 285 (S.D. Fla. 1993) (citing 5A CORBIN, *supra* note 81, § 1235 (1964)) (holding that a factor discharged itself of liability for its possession of receivables due the assignor by filing an interpleader action); *see also supra* note 202.

216. Money paid into court may be ordered repaid to the debtor if the creditor has become unable to return securities to which the debtor is entitled. *See* Levin v. Goodman, 153 A. 476 (N.J. 1931). For the effect of payment into the court, see *Brofer Coal & Mining Co. v. Kearns*, 4 F.2d 353 (7th Cir. 1925). Four months before his bankruptcy, the debtor unconditionally tendered an amount admitted to be due on a claim for unliquidated damages in an action in the municipal court of Chicago. *Id.* at 354. In that action, a judgment was rendered for a larger sum than that tendered. *Id.* Petitioner sought to recover the funds for the benefit of the estate in bankruptcy. *Id.* The Seventh Circuit affirmed the lower court's ruling that the effect of a tender to the court was controlled by state law. *Id.* at 354-55. Under Illinois law, a tender for unliquidated damages becomes a fund in *custodia legis*, "custody of the law is the custody of the plaintiff," and operates as a final and irrevocable transfer to the plaintiff. *Id.* at 354.

In *Phipps v. Watson*, 147 So. 234 (Fla. 1933), an executor of a landowner's estate commenced an action for determination of which party litigant bore the loss of funds represented by a cashier's check paid into the registry of the court when the bank became insolvent during the pendency of the action. *Id.* at 235. The Florida Supreme Court held that an unconditional tender into the registry of the court becomes a fund in *custodia legis* subject to the order of the court or the pleasure of the depositee. *Id.* The entire amount paid belongs to the depositee even though a verdict for a lesser sum is awarded. Even assuming the depositor retained some control or reservation, upon final adjudication, the court treated the cashier's check as cash and adjudicated entered against the debtor on which any writ of execution could be issued. Instead, the debtor will be given judgment for its costs against the creditor. To have this effect, the tender must be a proper one. If it is not, the creditor will be entitled to recover not only the balance proved but also interest and costs.

(6) For a tender of money in payment of a debt to be proper, it must be unconditional.[217] There is an exception to this in the case of a negotiable instrument. A tender of payment is not rendered ineffective by the fact that the tender is expressly made conditional upon the production and surrender of the instrument.[218] In the case of a bilateral contract, the duty to pay may be conditional upon the concurrent rendition of the agreed exchange, in

---

its disposition to the decedent. *Id.* Upon adjudication, the fund became in *custodia legis* subject only to the pleasure of the depositee or the order, protection, and control of the court. *Id.*

In *Mann v. Sprout*, 185 N.Y. 109, 77 N.E. 1018, 1019 (N.Y. 1906), in an appeal from the lower court's order permitting the defendant to amend its answer to add a counterclaim for damages and granting the release of funds tendered unconditionally to the court for the plaintiff, the Court of Appeals reviewed the effect of tender in *custodia legis* under the applicable state statute. *Id.* When a debt is due, a tender of the entire amount without conditions and payment into the court pursuant to its order is an absolute transfer even if not accepted by the plaintiff. *Id.* Only in an independent action for relief from mutual mistake or unilateral mistake resulting from fraud. *Id.* Acceptance by the court has the same effect as acceptance by the plaintiff. Other statutes "expressly discharge the . . . [depositor] from all further liability to the extent of the money [deposited]." *Id.*

217. Queensboro Nat'l Bank v. Kelly, 48 F.2d 574 (2d Cir. 1931); Segno v. Segno, 167 P. 285 (Cal. 1917); Edwards-Warren Tire Co. v. Coble, 115 S.E.2d 852 (Ga. Ct. App. 1960) (rejecting tender because it was conditioned on a release in full of all claims); Sansone v. Crocker, 170 N.W. 796 (Iowa 1919); Leonard v. Woodruff, 243 N.W. 252 (Mich. 1932); Saussenthaler v. Fed. Union Sur. Co., 193 S.W. 286 (Mo. Ct. App. 1917); Levin v. Goodman, 153 A. 476 (N.J. Ct. App. 1931); Margolis v. Wittman, 169 N.Y.S. 573 (N.Y. Sup. Ct. 1918); Albermarle Fertilizer Co. v. Brock, 121 S.E. 353 (N.C. 1924); Stephens v. Reik, 247 S.W. 627 (Tex. App. 1923); Rutherford v. McGee, 241 S.W. 629 (Tex. App. 1922); Ken. Va. Stone Co. v. Fortner, 165 S.E. 401 (Va. 1932).

In *Swanson v. Baldwin*, 93 N.W.2d 740 (Iowa 1958), the defendant made a tender in court of a balance due from him "to be held until disposition of this suit." *Id.* at 742. This was a "conditional" tender that did not make the money available to the creditor. *Id.* Therefore, it did not stop the running of interest, even though the amount stated in the tender was as much as was later found to be due at that time. *See id.*

In *Walla Walla Port Dist. v. Palmberg*, 280 F.2d 237 (9th Cir. 1960), the employing defendant tendered to its contractor the final installment admittedly due under the contract, at the same time presenting with it a voucher to be signed, containing the words "Final payment on construction work at Attalia." *Id.* at 239. The contractor refused to sign because he had a claim for extra work not covered by the contract and he justly feared that acceptance of the payment on those terms might be held to operate as an accord and satisfaction of his claim. *Id.* The court held that the tender so made was not operative to stop the running of interest on the amount due. *Id.* at 249.

218. U.C.C. Revised § 3-501(b)(2) (2001); Storey v. Krewson, 55 Ind. 397 (Ind. 1876); Heywood v. Hartshorn, 55 N.H. 476 (N.H. 1875); Bailey v. County of Buchanan, 22 N.E. 155 (N.Y. 1889); Hansard v. Robinson, 7 B. & C. 90 (1827). *Contra* Holton v. Brown, 18 Vt. 224 (Vt. 1846).

which case the defendant can be put in default by a tender that is conditional upon such concurrent performance,[219] or upon the concurrent surrender of securities held by the creditor, in which case the tender is not ineffective by being made conditional on such surrender;[220] or the tender is conditional upon the performance of conditions precedent to the tendering party's obligation of performance under the terms of the contract.[221] Authorities are split on whether a tender is impaired by the contemporaneous demand for a receipt in the absence of a statute authorizing such a demand.[222] Of course, the tender is not good if it is conditional on a receipt in full or upon an acknowledgment of full satisfaction,[223] and the same has been held if tender is conditional upon the execution of a release of mortgage security[224] or obligations imposed upon the tendering by a third party representing the tendering party's interests.[225]

---

219. *See* Brinton v. Haight, 870 P.2d 677 (Idaho 1994) (recognizing that tender of payment conditioned upon contemporaneous release of the security for the debt is an effective tender of a concurrent obligation). To stop the running of interest, an effective tender must be made and kept good. *Id.* at 684. A tender is kept good by manifesting the ability and readiness to pay if the tender is later accepted. *Id.* Such manifestation is satisfied by keeping the tendered money on deposit in a bank, paying it into court or by making the tender in writing. *Id.* The debtor's tender of a cashier's check with a demand for immediate delivery of the deed of reconveyance and a refusal to pay trustee's reconveyance fee was held an effective tender under an Idaho statute that imposed an obligation on a trustee to reconvey the estate of real property upon satisfaction of the secured debt. *Id.* at 683. The statute did not require tender of expenses or fees as a condition. *Id.; see also Storey*, 55 Ind. at 397.

220. Berry v. Bank of Bakersfield, 170 P. 415 (Cal. 1918); Wadleigh v. Phelps, 87 P. 93 (Cal. 1906); Loughborough v. McNevin, 14 P. 369 (Cal. 1887); Halpin v. Phenix Ins. Co., 23 N.E. 482 (N.Y. 1890) (finding tender conditioned on satisfaction of mortgage security effective); Cass v. Higenbotam, 3 N.E. 189 (N.Y. 1885). In *Winthrop Sav. Bank v. Jackson*, 67 Me. 570 (1878), a bond deposited as security had been stolen by bank robbers, the court held that a tender of the amount of the note conditional on return of the bond was not a defense. *Id.*

221. Jacoby v. Rosebrock, 70 N.E.2d 766, 796 (1947); Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 391 (1988).

222. *See* Sanford v. Bulkley, 30 Conn. 344 (1862) (holding that conditional-tender expressed to be in full though less than sum demanded by respondent); *Storey*, 55 Ind. at 397. *Contra* Walsh v. Walsh, 108 P.2d 765 (Cal. 1940) (holding that the tender of a sufficient sum entitles debtor to a receipt in full and debtor may as a condition tender demand for a receipt in full); Lovett v. E. Oil Co., 70 S.E. 707 (W. Va. 1911). For a statute authorizing the demand for a receipt, see U.C.C. Revised § 3-501(2)(iii) (2001) (stating that upon demand, the person making presentment must sign a receipt on the instrument for any payment made).

223. Pleasant v. Ariz. Storage & Dist. Co., 267 P. 794 (Ariz. 1928); Sanford v. Bulkley, 30 Conn. 344 (1862).

224. *Storey*, 55 Ind. 397; *see also* Masson v. Ind. Ltg. & F. Co., 101 N.E. 753 (1913).

225. *See* PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah 1997) (citing 5A CORBIN, *supra* note 81, § 1235 (1964)) (declaring that the bank's issuance of a cashier's check to title company on behalf of buyer subject to conditions to be satisfied by the buyer was neither a timely tender nor the actual production of the money; under a statute that provides for waiver of tender if the recipient of tender failed to object, no objection to a tender was necessary upon the tender of a

A tender by the debtor of the amount due that is subsequently determined to be correct is not made ineffective by the fact that the amount tendered is less than the amount claimed as long as the tender is not made in such manner that acceptance of the money by the creditor prejudices any claim by the creditor to a larger amount, either as a discharge or as an admission.[226]

(7) Failure to comply with the formal requirements of tender will not defeat the effectiveness of the tender if compliance is prevented or waived by creditor's repudiation of the agreement; if tender would be unavailing or futile given the creditor's conduct; or if the creditor expressed objections to the tender on other grounds, or failed to object to the absence of one or more of the formalities of tender, or objects without specifying the reason.[227] This "excuse" of formalities applies equally to the form of the

---

check that is not payable when presented).

226. *See, e.g.*, Warner Bros. Co. v. Freud, 63 P. 1017 (Cal. 1901) (holding that receipt acknowledging amount of payment received without referencing the action or judgment issued by the court did not compromise or settle or satisfy the judgment issued and did not bar an appeal by the tendering party); Joseph Magnin Co. v. Schmidt, 89 Cal. App. 3d Supp. 7 (Cal. App. Dep't Super. Ct. 1978) (construing statute that permits debtor to tender a sum less than the amount demanded and upon refusal to deposit the lesser sum with the court with the reasonable expectation of proving creditor right to recover only the lesser sum is deemed the prevailing party, entitled to attorneys fees and costs without liability for interest from the date of tender); Staff Indus., Inc. v. Hallmark Contracting, Inc., 846 S.W.2d 542 (Tex. Ct. App. 1993) (stating that tender of a lesser amount than that demanded conditioned on settlement or abandoning an appeal is insufficient to toll the running of interest or bar recovery of attorneys fees); Tomahawk Vill. Apartments v. Farren, 571 N.E.2d 1286, 1294 (Ind. Ct. App. 1991) (holding that tender of a check for $1000 to show good faith intent to pay expenses upon documentation limited to that effect). *But see* Bayliss v. Lake Holiday Estates, 1984 WL 276257 (Va. Ct. App. Apr. 18, 1984). Defendant tendered in-kind properties, unimproved lots and accounts, prompting claimant to object that the values were less than that required. *Id.* at *1. Given the difficulty of valuation of the tendered properties, the modest percentage of the shortage, and the claimant's conduct, the chancellor held the tender was effective to the extent of the value tendered, interest imposed from the date of tender on the shortage only. *Id.*

227. *See, e.g.*, Perkins v. Pub. Serv. Co. of N.H., 45 A.2d 210, 216 (N.H. 1945) (declaring, in an action in equity, that objecting to the amount of tender and not the manner of tender constituted a waiver of all formalities of tender other than the amount); Wyckoff v. County of Monmouth, 21 A.2d 791 (N.J. 1941) (dismissing an action for damages for termination of employment against the county when the county offered without tendering the actual money and without paying the proposed compensation into the court an amount in excess of that due). Employees who objected to the amount but did not object to the form of tender were held to have waived informality of tender. *Perkins*, 45 A.2d at 272; *see also* Nicklas v. Crowell, 238 P.2d 347 (Okla. 1951) (finding in an action to establish a resulting trust, a mother who had the money, offered to pay $1000 for conveyance of title without displaying the money, but the daughter and her husband refused to sign deed and thereby waived tender); Bayless v. Strahan, 182 S.W.2d 262 (Tex. Ct. App. 1944); Rawcliffe v. Aguayo, 438 N.Y.S.2d 697 (N.Y. Sup. Ct. 1981); Jenkins v. Equip. Ctr., Inc., 869 P.2d 1000 (Utah Ct. App. 1994) (holding, in an action for conversion, the obligor's failure to tender amount due for repair of tractor was excused as useless when obligee

payment that is tendered, the obligation that tender be kept good,[228] and the actual production of the money.[229] For such a result to be reached, it must appear that the debtor would in fact have complied with all requisites but for the waiver or prevention of the creditor.[230] The fact that the creditor claims too much is not itself a waiver or prevention.

The formalities of tender are generally relaxed in an action in equity to prevent injustice if the tendering party made a conscientious effort to comply honestly with the contract or if an unsettled account existed between the parties, and the tendering party expressed a willingness and ability to pay what may be due upon an accounting.[231] In a jurisdiction

---

demanded in its invoice and through its counsel the balance due on the open account in addition to the amount due for repairs); Sellwood v. Equitable Life Ins. Co., 42 N.W.2d 346, 353 (Minn. 1950) (finding that in an action for recovery on an insurance policy, objection to the amount of tender rather than the medium waived the necessity to tender money rather than a check); Lowry v. Northwestern Sav. & Loan Ass'n, 542 S.W.2d 546 (Mo. Ct. App. 1976); Ricke v. Ricke, 405 N.E.2d 351 (Ill. App. Ct. 1980).

228. *See* Hirsh v. Ogden Furn. & Carpet Co., 160 P. 283, 286 (Utah 1916); Perkins v. Pub. Serv. Co., 45 A.2d 210 (N.H. 1945).

229. *See* Steckel v. Selix, 197 N.W. 918, 921 (Iowa 1924); Henderson v. Foster, 124 S.E. 463, 469 (Va. 1924).

In *Mayron's Bake Shops, Inc. v. Arrow Stores, Inc.*, 176 A.2d 574 (Conn. 1961), a lease provided for payment of rent on the first of the month, with a 10-day grace period. *Id.* at 575. The tenant appeared on August 12 and offered to give his check in payment. *Id.* The landlord refused to receive payment on account of the delay. *Id.* Three days later he served a notice to quit. *Id.* The court held that the delay alone did not terminate the lease, and that the landlord had not exercised his "option" to terminate until after payment had been offered and refused by him. *Id.* at 577. His refusal made it unnecessary for the tenant to make actual tender in cash. *Id.*

230. *See, e.g.*, Chesterton State Bank v. Coffey, 454 N.E.2d 1233 (Ind. Ct. App. 1983) (citing 5A CORBIN, *supra* note 81, § 1235) (estopping the bank from attacking any defect in the tender when the bank prevented tender by requiring tender to a specific loan officer contrary to the terms of the agreement and without objecting to the conditions imposed upon indorsement of the tendered check).

231. *See* Arnold v. Leahy Home Bldg. Co., 420 N.E.2d 699, 704 (Ill. App. Ct. 1981), *superceded on other grounds by*, Chand v. Schlimme, 563 N.E.2d 441 (Ill. 1990). In *Arnold*, the plaintiffs' submission of its own closing statement with notice that it would govern the closing rather than builder's statement was held to be an unconditional tender in an action in equity for specific performance of a contract to convey land and home. *Id.* at 707. "In an equity action the technical rules of tender are relaxed to prevent injustice" if the tendering party made a conscientious effort to comply honestly with the contract. *Id.* at 704. If unsettled account exists between the parties, a willingness and ability to pay what may be due upon an accounting is sufficient. *Id.*

See also F.H.T., Inc. v. Bailey, 320 N.W.2d 772 (Neb. 1982). In an action in equity seeking specific performance of a stock buy-out resolution of closely held corporation. *Id.* at 774. The estate alleged that the resolution was invalid, had been abandoned, and there was improper tender. *Id.* In defense, the purchaser asserted its willingness and ability to perform its obligation "as established by [the required audit]." *Id.* at 775. Failure to tender a specific amount did not defeat a proper tender because the technical rules governing tender in actions at law were not binding on a court of equity. *Id.*

where equity and law are merged, the equitable considerations should have no affect on an action at law. The nature of the action or the relief sought should govern the determination of whether the technical rules of tender are applicable.

III. CONCLUSION

While technology greatly facilitates communication and revolutionizes the manner of contract formation, the principles of discharge of contract through performance, nonperformance, or tender have undergone minimal modification and remain a stabilizing force in a substantive genre undergoing dynamic change. Perhaps the reason for such stability in this area of discharge is that the fundamental goal of the contractual relation at its inception—obtaining the desired performance, the goods or services sought—the underlying motivation of the parties has and will not change. Impairing that goal, then, justifies the abrogation of remaining obligations.

Comparison of the primary principles of contract law on discharge, performance, nonperformance, and tender, reveals little variation in substance that can be justified, in part, from the symbiotic evolution of domestic and cross border contract law; and, in part, by the views and perceptions of one of the chief catalysts in this symbiotic evolutionary process, Arthur L. Corbin (1874-1967). Corbin's laborious work, despite impaired visual and auditory ability until his death, molded and sharpened the insight of today's visionaries and architects of contract law.

The revision of a revisionist is not a task lightly assumed. Maintaining the integrity of this initial work while modifying its content to reflect the substantial impact of the Uniform Commercial Code on existing and evolving law, including relevant international law initiatives that will impact future domestic authority, and updating language and case authority to preserve this work's position as the leading resource and authority on domestic contract law have been the primary goals. This is a modern restating of the thoughts and perceptions of the man and scholar who, in his own words "proceeded to prepare a 'one-man revision' of the entire Restatement [First of the Law of Contracts]."[232]

232. Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher Annotated*, 50 WASH. & LEE L. REV. 755 n.3 (1993).