

# U. C. C. 1-207

## § 1-207:2

## GENERAL PROVISIONS

### § 1-207:2. Local Statutory Citations and Variations.

UCC § 1-207 is cited locally as follows:

*Alabama:* Code of Ala Tit 7A § 1-207.

*Alaska:* AS § 45.05.032.

*Arizona:* ARS § 44-2214.

*Arkansas:* Ark Stats § 85-1-207.

*California:* UCCA § 1207.

*Colorado:* CRS 1973 § 4-1-207.

*Connecticut:* Gen Stats § 42a-1-207.

*Delaware:* 6 Del Code § 1-207.

*District of Columbia:* DC Code § 28:1-207.

*Florida:* Fla Stats § 671.1-207.

*Georgia:* Ga Code § 109A-1-207.

*Hawaii:* HRS § 490-1-207.

*Idaho:* Idaho Code § 28-1-207.

*Illinois:* Ill Rev Stats c 26 § 1-207.

*Indiana:* Ind Stats § 26-1-1-207.

*Iowa:* ICA § 554.1207.

*Kansas:* KSA § 84-1-207.

*Kentucky:* KRS § 355.1-207.

*Louisiana:* LSA-RS § 10:1-207.

*Maine:* 11 MRSA § 1-207.

*Maryland:* Md Code Art 95B, § 1-207.

*Massachusetts:* MGLA c 106 § 1-207.

*Michigan:* MCLA § 440.1207.

*Minnesota:* Minn Stats § 336.1-207.

*Mississippi:* Miss Code of 1972 § 75-1-207.

*Missouri:* VAMS § 400.1-207.

*Montana:* RCM § 87A-1-207.

*Nebraska:* Neb RS c 91 § 1-207.

*Nevada:* NRS § 104.1207.

*New Hampshire:* RSA § 382-A:1-207.

*New Jersey:* NJSA § 12A:1-207.

*New Mexico:* NM Stats § 50A-1-207.

*New York:* NY UCC § 1-207.

*North Carolina:* GS § 25-1-207.

*North Dakota:* ND Cent Code § 41-01-17.

*Ohio:* RC § 1301.13.

*Oklahoma:* 12A Okl St Ann § 1-207.

*Oregon:* ORS § 71.2070.

*Pennsylvania:* 13 Pa. C.S.A. 1207.

*Rhode Island:* RI GL § 6A-1-207.

*South Carolina:* SC Code § 36-1-207.

*South Dakota:* SDCL § 57A-1-207.

*Tennessee:* Tenn C § 47-1-207.

*Texas:* VTCA, Bus & C § 1.207.

*Utah:* Utah Code § 70A-1-207.

*Vermont:* 9A VSA § 1-207.

*Virginia:* Va Code 1950, § 8.1-207.

*Washington:* RCWA § 62A.1-207.

*West Virginia:* W Va Code § 46-1-207.

*Wisconsin:* Wis Stats § 401.207.

*Wyoming:* Wyo Stats § 34-1-207.

*Virgin Islands:* VIC T. 11A § 1-207.

Variations: Listed below are those jurisdictions which have enacted UCC § 1-207 in a form different than the Official Code together with a description of each local variation. None.

### § 1-207:3. Scope and suggestions.

Code § 1-207 expressly recognizes the right of a party to reserve his rights against the other contracting party so that he will not be held to have waived his right to any claim or remedy arising from the conduct or breach of such other party.<sup>1</sup> In the absence of such express reservation a party may waive his right to object or may give rise to an estoppel if he performs or accepts the performance of the other contracting party.

1. See § 1-207:4.

In *Blottner, Derrico, Weiss & Hoffman, P.C. v Fier* (1979) 101 Misc 2d 371, 420 NYS2d 999, 27 UCCRS 882, the court held that UCC § 1-207 was not applicable to a check received from a creditor because the transaction related to services and the Code does not apply to contracts for ser-

vices. But see *Ayer v Sky Club, Inc.* (1979, 1st Dept) 70 App Div 2d 863, 418 NYS2d 57, 27 UCCRS 881, app dismd 48 NY2d 705, 422 NYS2d 68, 397 NE2d 758, where the court stated that while the Code might not apply to the underlying transaction, the rule of the Code "should be applied".

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### § 1-207:4. Suff

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2. See §§ 3-408

3. UCC § 1-207

4. UCC § 1-207

5. UCC § 1-207

6. See § 1-207:1

In order to avoid questions of proof, it is desirable when possible to make a written reservation, or if that is not practical, to write a letter to the other party confirming the oral reservation which was made earlier.

When there is a series of performances by the other party each performance of which involves a breach, it is desirable that the party making the reservation of rights repeat such reservation for each performance rather than run the risk of being deemed to have waived his right by subsequently accepting a defective performance or himself performing without objection.

When a payment is made on a debt or obligation, is the payee bound by the terms on which the payment was tendered? Specifically, if a debtor tenders his creditor a check marked "In full payment" is it possible for the creditor to accept the check but thereafter assert the claim for any balance? There is some authority that the creditor may in such case cross out the notation, add "With reservation of rights" to his indorsement, and thereby reserve the right to proceed for any additional sum that the creditor believes to be due. By what is a sounder view, UCC § 1-207 does not authorize a creditor to accept a payment with a reservation that rejects the terms on which the payment was tendered. The subject is discussed in connection with commercial paper.<sup>2</sup>

#### § 1-207:4. Sufficiency of reservation.

Any expression indicating an intention to preserve rights is sufficient,<sup>3</sup> such as "without prejudice,"<sup>4</sup> "under protest,"<sup>5</sup> "under reservation,"<sup>6</sup> or "with reservation of all our rights."<sup>7</sup>

The Code states an "explicit" reservation must be made.<sup>8</sup> "Explicit" undoubtedly is used in place of "express" to indicate that the reservation must not only be "express" but it must also be "clear" that such a reservation was intended.

The term "explicit" as used in UCC § 1-207 means "that which is so clearly stated or distinctively set forth that there is no doubt as to its meaning."<sup>9</sup>

There is no explicit reservation of rights under UCC § 1-207 when the payee of a check given in full payment of a disputed claim merely

2. See §§ 3-408:1 et seq.

3. UCC § 1-207.

4. UCC § 1-207.

5. UCC § 1-207.

6. See § 1-207:1 pt 1.

7. See § 1-201:1 pt 1.

8. *Bivins v White Dairy* (1979, Ala App)

378 So 2d 1122, 28 UCCRS 316, cert den

(Ala) 378 So 2d 1125.

9. *Bivins v White Dairy*, supra.

prejudice a party by causing a loss of the right to object if the procedure is not employed.<sup>14</sup>

§ 1-207:7. Effect of reservation of rights.

The making of a valid reservation of rights preserves whatever rights the person then possesses and prevents the loss of such right by application of concepts of waiver or estoppel. For example, the right to cancel is not lost by the acceptance of performance when the aggrieved party has made a reservation of rights.<sup>15</sup>

The fact that the seller continues to deliver goods on demand is not a waiver of the seller's contention that the buyer is not entitled to the quantity of goods demanded when the seller made delivery with reservation of rights.<sup>16</sup>

§ 1-207:8. —Non-existing right.

By definition, a reservation of rights can only reserve a right that is existing. The making of a reservation of rights does not create a right when none existed before. Consequently a reservation of rights or performance under protest has no effect when the person making such reservation has no right to reserve. Thus when a city demanded that the seller deliver more goods than called for by the written contract, a delivery of such excess goods "under protest" did not entitle the seller to recover the reasonable value thereof because by law the city could not pay more than the written contract price.<sup>17</sup>

§ 1-207:9. Failure to make reservation.

When a waivable right or claim is involved, the failure to make a reservation thereof causes a loss of the right and bars its assertion at a later date.

When a distributorship contract is terminated by an agreement which does not reserve any outstanding claims of the parties, the agreement bars the subsequent assertion of any such claims.<sup>18</sup>

14. *Jon-T-Farms, Inc. v Goodpasture, Inc.* (1977, Tex Civ App 7th Dist) 554 SW2d 743, 21 UCCRS 1309, 1 ALR4th 512, writ ref n r e.

15. *Cities Service Helex, Inc. v United States* (1976) 211 Ct Cl 222, 543 F2d 1306, 20 UCCRS 923.

16. *Shea-Kaiser-Lockheed-Healy v Department of Water & Power* (1977, 2d Dist)

73 Cal App 3d 679, 140 Cal Rptr 884, 22 UCCRS 607.

17. *Shea-Kaiser-Lockheed-Healy v Department of Water & Power* (1977, 2d Dist) 70 Cal App 3d 1, 138 Cal Rptr 743, subsequent op on reh (2d Dist) 73 Cal App 3d 679, 140 Cal Rptr 884, 22 UCCRS 607.

18. *Transcentral Oil Corp. v California Oil Co.* (1970, CA7 Ill) 430 F2d 1127 (Code not cited).

§ 1-103:5. Undefined terms.

The reference in UCC § 1-103 to "this Act" is a reference to the entire Code.<sup>20</sup>

Although the Code does not define negligence, the courts have interpreted it to mean the failure to exercise "reasonable" or "ordinary" care, which is that care which the ordinary prudent person would exercise under the circumstances.<sup>1</sup>

When the Code employs terms without defining them, the pre-Code definitions continue in force because not displaced.<sup>2</sup>

As the Code does not define "debtor," the meaning of that term is to be taken from the prior law.<sup>3</sup>

§ 1-103:6. Common law.

The Code is "complementary" to the common law which remains in force except where displaced by the Code.<sup>4</sup> "In attempting to codify a large body of law it is almost impossible to anticipate all the factual situations that may arise. And it is for this reason that courts have adopted the principle of statutory construction that a statute will not be construed so as to overrule a principle of established common law, unless it is made plain by the act that such a change in the established law is intended."<sup>5</sup>

A statute should be construed in harmony with the common law unless there is a clear legislative intent to abrogate the common law.<sup>6</sup> "Courts should be hesitant to improvise new remedies outside the already intricate scheme of Articles 3 and 4. However, this new cause of action would not interfere with that scheme but extend its principles to a situation not specifically foreseen by the drafters. The Code cannot be read to preclude a common law action."<sup>7</sup>

20. *Bowling Green, Inc. v State Street Bank & Trust Co.* (1969, DC Mass) 307 F Supp 648, *affd* (CA1 Mass) 425 F2d 81, 7 UCCRS 635.

1. *Fidelity & Casualty Co. v Constitution Nat. Bank* (1975) 167 Conn 478, 356 A2d 117.

2. *Weisbart & Co. v First Nat. Bank* (1978, CA5 Tex) 568 F2d 391, 23 UCCRS 797.

3. *Re Hammons* (1977, SD Miss) 438 F Supp 1143, 23 UCCRS 1077, *revid* on other grounds (CA5 Miss) 614 F2d 399, 6 BCD 187, 22 CBC 728, 28 UCCRS 857.

4. *North Carolina Nat. Bank v McCa-*

*ley & Co.* (1977) 34 NC App 689, 239 SE2d 583, 23 UCCRS 455.

5. *Starkey Constr., Inc. v Elcon, Inc.* (1970) 248 Ark 958, 978A, 457 SW2d 509, 7 UCCRS 923.

6. *United Bank v Mesa N. O. Nelson Co.* (1979) 121 Ariz 438, 590 P2d 1384, 25 UCCRS 1113.

7. *Girard Bank v Mt Holly State Bank* (1979, DC NJ) 474 F Supp 1225, 26 UCCRS 1210.

UCC § 3-406 does not give a depository bank a right of action against a drawer whose negligence contributed to the making of a forged indorsement, but such a right of action arises by common law

## § 1-103:7. Law merchant.

A number of gaps in the Code are to be filled by reference to the law merchant either on the premise that the law merchant was incorporated into and became part of the common law or else that the common law likewise makes no provision for the particular matter and therefore resort must be made both outside of the Code and outside of the common law, the inquiry being directed to law merchant.

To the extent that commercial paper is not regulated by the Code, the law merchant will be applied.<sup>8</sup>

The pre-Code law determines whether an irrevocable letter of credit may be orally extended.<sup>9</sup>

## § 1-103:8. What constitutes displacement.

UCC § 1-103 declares what bodies of law remain in force if not "displaced" by the Code. If the Code contains an express provision contrary to a prior rule of law, it is obvious that the prior rule has been displaced. A difficult question arises when the Code says nothing on the point in question.

Does the silence of the Code mean that the prior rule of law no longer exists because it has not been redeclared? Or does the silence of the Code mean that the way is open for the entry of the prior rule of law into the Code system?

The fact that the Code is silent on a particular point and omits any reference to it does not mean that it is displaced by the Code. The Official Code Comment supports the conclusion that silence does not constitute displacement and that an "explicit displacement is required. See § 1-103:1, pt 1."<sup>10</sup> The fact that the Code omits or fails to include a provision as to particular matter or states a rule flatly and omits an exception recognized under the prior law is a strong indication that no such exception exists under the Code. The silence of the Code, however,

which will be read into the Code. *Girard Bank v Mt Holly State Bank*, supra.

The Code does not regulate pledges and the gaps are filled out by the common law. *Wightman v American Nat. Bank* (1979, Wyo) 591 P2d 903, vacated on other grounds (Wyo) 610 P2d 1001, 29 UCCRS 251.

When a plaintiff relies on a theory of negligence, it is necessary for the plaintiff to establish a causal relationship between the negligence and the loss, as such requirement continues under the Code because not displaced. *Western Union Tel. Co. v Peoples Nat. Bank* (1979) 169 NJ Super 272, 404 A2d 1178, 26 UCCRS 1235.

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A payor bank cannot hold a collecting bank liable where the payor bank is guilty of contributory negligence which contributed to its own loss. *Fidelity & Deposit Co. v Bank of Bladenboro* (1978, ED NC) 472 F Supp 885, affd (CA4 NC) 596 F2d 632, 26 UCCRS 135.

8. *Mirabile v Udoh* (1977) 92 Misc 2d 168, 399 NYS2d 869, 23 UCCRS 101.

9. *W. Pat Crow Forgings, Inc. v Mornings Aero Industries, Inc.* (1978) 93 Misc 2d 65, 403 NYS2d 399, 23 UCCRS 1270.

10. *Demos v Lyons* (1977) 151 NJ Super 489, 376 A2d 1352, 22 UCCRS 754.

is not necessarily a displacement of the prior exception and the prior exception may be read into the Code when there is no logical reason for regarding the silence of the Code as an intentional abolition of the prior exception.<sup>11</sup>

§ 1-103:9. Ambiguous Code provision.

When a provision of the Code is not clear, the established pre-Code law should be followed. "A clear deviation from past law would not ordinarily be accomplished by Code ambiguities."<sup>12</sup>

§ 1-103:10. Prior contrary law.

The Code represents an entirely new approach in several areas of commercial law; especially as to secured transactions. Therefore the courts should not seek to preserve the old law which the Code has displaced by unambiguous provisions, but should interpret the Code as plenary and exclusive, except where the legislature has clearly indicated otherwise.<sup>13</sup>

Where the law prior to the adoption of the Code is contrary to the Code, that prior law must yield to the provisions of the Code.<sup>14</sup> Conse-

11. *Franklin Nat. Bank v Eurez Constr. Corp.* (1969) 60 Misc 2d 499, 301 NYS2d 845, 6 UCCRS 634.

12. *Cargill, Inc. v Stafford* (1977, CA10 Colo) 553 F2d 1222, 21 UCCRS 707.

13. *Lincoln Bank & Trust Co. v Queenan* (1961, Ky) 344 SW2d 383, 1 UCCRS 609, noted in 78 Banking LJ 701, 3 Boston College Industrial & Commercial Law Rev 43-45, 47 Iowa L Rev 496, 60 Mich L Rev 242.

14. *Moore v Burt Chevrolet, Inc.* (1977) 39 Colo App 11, 563 P2d 369, 21 UCCRS 1223; *Cargill, Inc. v Stafford* (1977, CA10 Colo) 553 F2d 1222, 21 UCCRS 707; *Oak Park Currency Exchange, Inc. v Maropoulos* (1977) 48 Ill App 3d 437, 6 Ill Dec 525, 363 NE2d 54, 21 UCCRS 1380; *First National Bank v Smoker* (1972) 153 Ind App 71, 286 NE2d 203, 11 UCCRS 10, reh den 153 Ind App 89, 287 NE2d 788, 11 UCCRS 289; *Corbin Deposit Bank v King* (1964, Ky) 384 SW2d 302, 2 UCCRS 441; *Holdridge v Heyer-Schulte Corp.* (1977, ND NY) 440 F Supp 1088, 22 UCCRS 978; *Hardex-Staubenville Corp. v Western Pennsylvania Nat. Bank* (1971) 446 Pa 446, 285 A2d 874, 10 UCCRS 448; *Elanco Products Co. v Akin-Tunnell* (1971, Tex

Civ App 7th Dist) 474 SW2d 789, 10 UCCRS 30, writ ref n r e, later app (Tex Civ App 7th Dist) 516 SW2d 726, 15 UCCRS 777, writ ref n r e; *Burlington Nat. Bank v Strauss* (1971) 50 Wis 2d 270, 184 NW2d 122, 8 UCCRS 944.

When the express terms of the Code are inconsistent with pre-Code case law, the pre-Code law is necessarily displaced and is not effective. *Merwin v Ziebarth* (1977, ND) 252 NW2d 193, 22 UCCRS 582.

Decisions under the law merchant which are inconsistent with the Code are no longer authority. *St. James Bank & Trust Co. v Board of Comrs.* (1978, La App) 354 So 2d 233.

A pre-Code decision holding that reasonable notification by a franchisor was not required when terminating the franchise is superseded by the Code which requires reasonable notification. *Leibel v Raynor Mfg. Co.* (1978, Ky App) 571 SW2d 640, 24 UCCRS 40.

A pre-Code decision protecting a retailer from warranty liability is not to be followed under the Code because such liability is in fact placed by the Code upon a