

RESTRICTED ENDORSEMENTS & SAFE HARBOR

Any text affixed on a check or text contained in some form of document that refers to an accompanying check is considered a “restrictive endorsement.” All states have adopted the recent revision of the Uniform Commercial Code, Article 3, Section 311 (UCC3-311), which is commonly referred to as “Safe Harbor.” The Safe Harbor principal is applicable to payments received in a system that is serviced by a third party (such as a bank lock box or a post office box). Typically, this is the creditor’s banking institution whose lock box is serviced by banking personnel lacking the knowledge and expertise to make an informed decision relative to restricted endorsements.

The Safe Harbor provision of UCC 3-311 specifies within 90 days of depositing restricted payment from a buyer, the seller can send one of their checks back to the buyer in the same amount of the restricted check and preserve the creditor/seller’s legal remedies. The “reimbursement” check should be sent back via some mode requiring proof of attempted delivery. The buyer/debtor need not cash the “reimbursement check;” as the creditor/seller’s right to proceed with litigation is preserved by the act of sending back the amount originally submitted under endorsement text or provisions.

If credit grantor is made aware of a dispute prior to any type of final payment being made, UCC Section 3-311 states that a creditor’s claim for an overdue balance is not discharged if within a reasonable time before tender the creditor stipulates that a restricted instrument (restricted check) must be sent to a designated person, office or place. If those instructions are not followed, then creditor remedies are available.

UCC Section 1-207, which has not been repealed, allows for both performance and acceptance under “Reservation of Rights.” Thus, once who explicitly reserves his rights does not prejudice those rights “so stated as reserved.” Some court jurisdictions have indicated that this section of the code is not applicable to restricted instruments, whereas other courts have ruled that Section 1-207 can be applied to the sale of goods. Recent trends have been for courts to apply UCC Section 3-311 as opposed to Section 1-207. Should a creditor decided to gamble with Section 1-207, then the endorsement text on the check should read, “This check is accepted without prejudice and with full preservation of all rights pursuant to Section 1-207 of the UCC” or “under protest.”

It is our recommendation that given a choice, a creditor’s actions should conform to UCC Article 3, Section 311, which follows the “Safe Harbor” principle. In our opinion wording like “under protest” or the other wording as referenced above combined with Article 1-207, should only be used when the amount in dispute does not make it economically feasible to pursue litigation. Williams & Williams, Inc. would have no problem in this instance pursuing a debtor for the disputed portion, provided that a creditor realizes that once the 90-day Safe Harbor provision has elapsed the matter could not be pursued through the courts because judicial thinking now subscribes to the prevailing winds of UCC 3, Section 311 (“SAFE HARBOR”). The changes in Article 3-311 were designed to eliminate pre-existing ambiguity concerning the handling of instruments with or accompanied by restrictive endorsements.