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You Can't Have Your Cake and Eat It Too: Accord and Satisfaction Survives the Uniform Commercial Code

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YOU CAN'T HAVE YOUR CAKE AND EAT IT TOO: ACCORD AND SATISFACTION SURVIVES THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

Under the common law doctrine of accord and satisfaction, if a debtor offers its creditor a sum of money in full settlement of a disputed claim, and the creditor uses the offered sum,[1] the creditor is bound by the proposal.[2] The creditor is held to have accepted the settlement and the original claim is fully satisfied. Attempts by the creditor to protest the full-payment condition of the offer will be unsuccessful. The common law doctrine does not permit the creditor to take the benefit of the offer without also accepting its burdens.[3]

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1. The term "uses" is employed, rather than the word "negotiates" as defined in U.C.C. section 3-202, because courts have held that an accord and satisfaction may occur when the creditor has a check certified. *See, e.g.*, Lange-Finn Constr. Co. v. Albany Steel & Iron Co., 403 N.Y.S.2d 1012, 1014, 94 Misc. 2d 15, ____ (Sup. Ct. 1978). *Cf.* State Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 680, 610 P.2d 390, 395 (1980) (accord and satisfaction may occur when creditor retains check beyond a reasonable time).

2. The generally accepted ancestor case is Foakes v. Beer, 9 App. Cas. 605 (1882). In *Foakes* the court ruled payment of a lesser sum did not discharge a larger debt because consideration was lacking. *Id.* at 612 (citing Pinnel's Case, 77 Eng. Rep. 237, ____ (C.P. 1602) (something else had to be thrown into the bargain, a "horse, hawk or robe.")) *See also* 6 A. CORBIN, CORBIN ON CONTRACT § 1276 (1951); 15 W. JAEGER, WILLISTON ON CONTRACTS § 1838 (3d ed. 1972); Very v. Levy, 54 U.S. (13 How.) 345, 357 (1851). American cases are collected at 34 A.L.R. 1035, 75 A.L.R. 904, 84 A.L.R.2d 504.

3. 6 A. CORBIN, *supra* note 2, §§ 1277, 1279.

Some courts and writers have suggested that section 1-207 of the Uniform Commercial Code has changed the common law doctrine of accord and satisfaction.[4] Section 1-207 provides:

> A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient.[5]

Certain readers have construed this language to mean that a creditor who is offered an accord and satisfaction by means of a full-payment check may use the check "under protest" or "without prejudice" and not be bound by the settlement offered.[6] A New York annotation to section 1-207 supports this interpretation. The annotation specifically states that the Code provision overturns the established doctrine of accord and satisfaction if the creditor protests the full-payment condition before using or cashing the check.[7] Further support for this view appeared in the first edition of the White and Summers' text on the Uniform Commercial Code, which also construed section 1-207 to permit the creditor to avoid the condition to the offered payment.[8]

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4. *See, e.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 13-21 (1972).

5. U.C.C. § 1-207 (1978). All references to the Uniform Commercial Code are to the Official Text, 1978, unless otherwise indicated.

6. *E.g.*, Baillie Lumber Co., Inc. v. Kincaid Carolina Corp., 4 N.C. App. 342, ____, 167 S.E.2d 85, 93 (1969).

7. *See* N.Y. UNIFORM COMMERCIAL CODE LAW § 1-207 (McKinney 1964). The New York annotation reads:

> This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment, performance, etc., without losing his right to demand the remainder of the goods, to set-off a failure of quality, or to sue for the balance of the payment, so long as he explicitly reserves his rights.
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> . . . .
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> Case law involving the issues dealt with in this section deal [sic] with the problem in terms of the doctrine of consideration. Thus a distinction is drawn between liquidated and unliquidated claims. In Nassoiy v. Tomlinson, 148 N.Y. 326, 42 N.E. 715 (1896), the debtor paid no more than the exact amount he claimed was due. The court held that the conditional payment was payment of an unliquidated claim if any part was disputed, and that the acceptance of the payment discharged the entire debt. *Compare* Schuttinger v. Woodruff, 259 N.Y. 212, 181 N.E. 361 (1932), *and* Leidy v. Proctor, 226 App. Div. 322, 235 N.Y.S. 101 (1929). The Code rule would permit, in Code-covered transactions, the acceptance of a part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand the balance of the performance or payment.

Id.

8. J. WHITE & R. SUMMERS, *supra* note 4, §§ 13-21. This position was reiterated by the authors in the second edition of their treatise. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 13-21 (2d ed. 1980).

Despite an early spate of decisions suggesting or holding that section 1-207 alters the common law, and the extremely divergent reasoning in many of the opinions, the common law doctrine now survives intact in all but a handful of states.[9] Most state courts that have considered the provision have concluded that it was not intended to and does not affect a settlement offered by means of a full-payment check.[10] This article will review the common law doctrine of accord and satisfaction, analyze the meaning and history of section 1-207 and its impact on the common law, and then examine the judicial treatment of the issue.[11]

II. THE COMMON LAW

The doctrine of accord and satisfaction has long occupied an honored niche in Anglo-American contract law.[12] Fundamental principles of contract law, familiar to every lawyer, are applied in the special setting of debtor-creditor disputes. An accord is an executory contract, an agreement between two or more capable parties supported by mutual assent and consideration.[13] Typically the creditor has a claim that the debtor disputes. The debtor's offer to pay a smaller sum now to settle the dispute and satisfy the claim is the accord. The satisfaction occurs when the executory accord is fully peformed. In the event of litigation, one of the parties asks the court to enforce the accord, contending it is an enforceable contract which has been or must be performed.[14]

An accord and satisfaction is usually designed to settle a pending dispute, frequently but not necessarily arising out of a pre-existing contract between the parties.[15] The accord, like any

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9. See *infra* notes 57-59 and accompanying text.

10. *See, e.g.*, Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, ____, 184 Cal. Rptr. 436, 437-38, 34 U.C.C. REP. SERV. 1, 6 (1982); Flambeau Prods. Corp. v. Honeywell Information Sys., Inc., 116 Wis. 2d 95, ____, 341 N.W.2d 655, 664, 37 U.C.C. REP. SERV. 1441, 1451 (1984).

11. This Article addresses the debtor-creditor relationship only. Banks that process the full-payment check have no obligation to verify that the creditor has in fact treated the underlying obligation as satisfied. U.C.C. § 4-203. This author is in full agreement with the proposition that the need for speed and efficiency in the bank collection system militates against imposing a duty on any bank in the collection chain to verify whether or not the creditor has accepted the debtor's offer. *See* City of Deerfield Beach v. Florida Nat'l Bank of Palm Beach County, 428 So. 2d 779, 780, 35 U.C.C. REP. SERV. 1218, 1220 (Fla. Dist. Ct. App. 1983).

12. *See* Very v. Levy, 54 U.S. (13 How.) 345 (1851).

13. RESTATEMENT (SECOND) CONTRACTS § 281 (1981).

14. 6 A. CORBIN, *supra* note 2, §§ 1271-75; 15 W. JAEGER, *supra* note 2, §§ 1851-64.

15. *See, e.g.*, Quaintance Assocs., Inc. v. PLM, Inc., 95 Ill. App. 3d 818, 821, 420 N.E.2d 567, 568 (1981) (dispute over terms of executive recruitment agreement); Loh v. Safeway Stores, Inc., 47 Md. App. 110, ____, 422 A.2d 16, 18 (1980) (customer broke tooth on frankfurter purchased from grocery, full-payment check tendered by manufacturer's insurer); Gallagher Lumber Co. v. Shapiro, 137 Vt. 139, ____, 400 A.2d 984, 985 (1979) (dispute over discounts on sales contract); Graffam v. Geronda, 304 A.2d 76, 77 (Me. 1973) (dispute whether fuel oil sold or consigned to debtor).

settlement or modification of contract rights, must be supported by consideration before it will be enforceable. Modification of the duties of one party to an agreement without modification of the rights or duties of the other side will run afoul of the pre-existing duty rule; the modification will be unenforceable for lack of consideration.[16] Normally, the consideration for a settlement agreement is found in the assent of each party to accept something less than it contends is its right or privilege.[17] Waiving the privilege to litigate questions of liability or to have a court liquidate an unliquidated claim is sufficient consideration for the settlement.[18] As long as there is a bona fide dispute, it is not even necessary to establish that there is reasonable doubt which party would succeed at a trial. Consideration will exist if the claim is actually doubtful or if the forbearing party *believes* the claim or defense is valid.[19] The bona fide dispute may go to responsibility or to the amount of the liability; as long as the claim is unliquidated as to either amount or liability, its settlement will not be open to challenge on the ground of lack of consideration.[20]

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16. *See* Hagerty Oil Co. v. Chester County Sec. Funds, Inc., 248 Pa. 456, ____, 375 A.2d 186, 187 (1977) (debtor admitted liability for full amount claimed; court ruled no accord and satisfaction occurred); Foakes v. Beer, 9 App. Cas. 605, 612 (1882). *But cf.*, U.C.C. § 1-107 (written waiver or renunciation of a claim arising out of an alleged breach permitted without consideration); U.C.C. § 2-209 (modification of sales agreement may be made without consideration).

17. Because the common law doctrine is a special application of basic contract law, no accord and satisfaction will occur if the creditor is not aware of the terms of the offer prior to using the full-payment check. 6 A. CORBIN, *supra* note 2, § 1277; 15 W. JAEGER, *supra* note 2, § 1856.

The assent element would present problems if an electronic fund transfer were used, rather than a check. The burden would be on the debtor to prove that, prior to receiving the fund transfer, the creditor knew it was remitted on the condition it be accepted in full satisfaction. The same problem would exist with any other mode of payment that did not take the form of a message delivered to the creditor prior to the credit of funds to the creditor's account. For a discussion of such payment systems and current attempts to draft a Uniform New Payments Code to regulate them, see Leary & Fry, *A "Systems" Approach to Payments Modes*, 16 U.C.C. L. J. 283 (1984).

With respect to electronic fund transfers, the problem is compounded by proposals that payment be final when notice of the fund transfer is received by the payee's depository institution from the transmitting institutions. *Id.* at 308 n.73. If the creditor has no opportunity to reject a transfer of credit prior to its receipt, it can hardly be said that receipt of the transferred credit is a manifestation of assent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 (2) (1981). On the other hand, the creditor's *use* of the funds could be construed as precisely such a manifestation of assent.

18. 6 A. CORBIN, *supra* note 2, §§ 1278-88; Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329, 330 (1969); Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48, 53 (1978).

19. RESTATEMENT (SECOND) OF CONTRACTS § 74 comment b, illustration 3 (1981). Illustration 3 to § 74 presents the situation in which *A*, knowing *B* is married, cohabits with him for several years. During that time *B* promises to marry her upon his divorce. *A* and *B* separate, and *A* surrenders any claims based on the promise to marry in return for *B*'s promise to pay her $1,000.00 per month for life. If it is found *A knew* there was no valid claim, the promise is unenforceable. The necessary implication is that the promise *is* enforceable if *A* in good faith believed her claim valid. *See also* Fiege v. Boehm, 210 Md. 352, 123 A.2d 316 (1956). In *Fiege*, the court enforced a man's promise to pay birth expenses for a child both parties believed could be his, given in return for the mother's promise not to file bastardy proceedings. *Id.* at ____, 123 A.2d at 319. As he later discovered, the child was not his. *Id.*

20. In Canada the majority view is that no consideration is required to support an accord and satisfaction. Many of the provincial legislatures have enacted statutes to this effect, and in some of the other provinces the courts have come to the same conclusion. Thus payment of a lesser sum in full satisfaction of a liquidated, undisputed, and due obligation satisfies the entire debt if accepted.

Frequently a debtor offers to settle a claim by sending the creditor a check for a smaller amount, accompanied by a letter stating the claim is disputed and the check is offered in full settlement of the account. Often the check bears some sort of legend to the effect that it represents full payment of the account.[21] Sometimes the legend on the check is the only indication that the debtor intended the payment to fully satisfy the account. If the creditor then uses the check, the account will be deemed satisfied. If the creditor nonetheless files suit to collect a balance claimed still to be due, proof of the offer to settle and its acceptance by the creditor (by using the check) will be a full defense for the debtor.[22]

The common law treatment of accord and satisfaction has long been accepted by nearly all American jurisdictions. A problem arises, however, when the creditor uses the check or payment while attempting to preserve the right to collect any balance. In some cases, after the creditor receives the check and any accompanying letters or vouchers, the creditor crosses out the language about full-payment and, perhaps, even writes something like "under protest" beneath the crossed-out words. The creditor then uses the check.[23]

The common law courts had little difficulty with this behavior. Because the payment was offered on the condition that the creditor accept the check as payment in full, the only way the creditor could use the payment was by accepting the condition. The creditor's choice was either to agree or to return the payment. "[I]t is the deed rather than the thought that counts. . . ."[24] Rejecting a bird in the hand may be the "exquisite torture" described by Professors White and Summers,[25] but lawyers and their clients face this dilemma daily. Deciding whether to take what is now available or

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Brenner, *Part Payment of a Debt by Accord and Satisfaction: The Canadian Experience,* 18 U.W. ONT. L. REV. 369, 386 (1980). *Cf.* U.C.C. § 3-802(3) (1977).

21. A quick descriptive label for this transaction is a matter of some dispute. Professor Hawkland refers to the "conditional check." Hawkland, *supra* note 18, at 329. White and Summers agree with this terminology. J. WHITE & R. SUMMERS, *supra* note 4, at 453. Professor Rosenthal criticizes the phrase because § 3-104 requires that a check be an unconditional order to pay. Rosenthal, *supra* note 18, at 49 & n. 6. Rosenthal prefers the label "the full-payment check." *Id.* His approach has been followed in this Article without regard to whether the full-payment condition to the tender appears in a transmittal letter, on a voucher, or on the payment instrument.

22. *See, e.g.*, Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, ____, 184 Cal. Rptr. 436, 437, 34 U.C.C. REP. SERV. 1, 3 (1982) (legend typed on back of check stating: "This check represents payment in full for all obligations owed by [debtor]."); Vance v. Hammer, 105 Ariz. 317, ____, 464 P.2d 340, 342 (1970) ("paid in full for well drilling" written on back of check).

23. *E.g.* Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc., 63 Or. App. 364, ____, 664 P.2d 419, 420, 36 U.C.C. REP. SERV. 1100, 1101 (1983).

24. Braucher, *Interpretation and the Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 14 (1981); *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 50, 53 comment c, 81 illustration 6 (1981).

25. J. WHITE & R. SUMMERS, *supra* note 4, at 452. The authors state:

> Offering a check for less than the contract amount, but "in full settlement" inflicts an exquisite form of commercial torture on the payee. If the offer is reasonable it creates a

to wait and see whether one can get more in the long run is the choice a litigant makes every time a settlement is offered. Indeed, it is a choice inherent in every negotiation, whether it involves a purchase, an investment, or an international treaty.

III. THE IMPACT OF THE UNIFORM COMMERCIAL CODE

Since the adoption of the Uniform Commercial Code, the effectiveness of the full-payment check to override protests by the payee has come into doubt.[26] Some courts have interpreted section 1-207 of the Uniform Commercial Code to permit the creditor to receive the offered check as only part payment of the debt notwithstanding the debtor's restriction that acceptance of the check satisfies the debt. The Supreme Court of South Dakota and the New York Court of Appeals have ruled that a creditor may use a full-payment check "under protest" and still pursue payment of any balance claimed due.[27] The courts of California and other states disagree.[28] This controversy has cast a shadow of uncertainty over what has long been a valuable settlement mechanism.

This portion of the Article will explore the drafting history of the Code in order to examine any inferences that may be drawn from the history of section 1-207 and from other provisions that were contained in earlier drafts of the Code or that may now be

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marvelous anxiety in some recipients: "Shall I risk the loss of $9,000.00 for the additional $1,000.00 that the bloke really owes me?"

Id. This evocative language immediately conjures up images of the Chinese water torture.

26. *See* Hawkland, *supra* note 18, at 329-30.

27. *See* Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 41 U.C.C. REP. SERV. 1591 (N.Y. 1985); Scholl v. Tallman, 247 N.W.2d 490, 492, 20 U.C.C. REP. SERV. 833, 836 (S.D. 1976).

28. *See, e.g.*, Air Van Lines, Inc. v. Buster, 673 P.2d 774, 779, 37 U.C.C. REP. SERV. 1454, 1456 (Alaska 1983); Pillow v. Thermogas Co. of Walnut Ridge, 644 S.W.2d 292, 294, 35 U.C.C. REP. SERV. 1404, 1405 (Ark. Ct. App. 1982); Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, ____, 184 Cal. Rptr. 436, 439, 34 U.C.C. REP. SERV. 1, 6 (1982); R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass'n, ____ Colo. App. ____, 680 P.2d 1342, 1344, 38 U.C.C. REP. SERV. 420, 422 (1984); American Food Purveyors, Inc. v. Lindsay Meats, Inc., 153 Ga. App. 383, ____, 265 S.E.2d 325, 326, 28 U.C.C. REP. SERV. 966, 967 (1980); Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 1012, 39 U.C.C. REP. SERV. 1186, 1191 (Me. 1984); Chancellor, Inc. v. Hamilton Appliance Co., 175 N.J. Super. 345, ____, 418 A.2d 1326, 1330, 30 U.C.C. REP. SERV. 12, 18 (1980); Brown v. Coastal Truckways, Inc, 44 N.C. App. 454, ____, 261 S.E.2d 266, 269, 28 U.C.C. REP. SERV. 3, 6 (1980); Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc., 63 Or. App. 364, ____, 664 P.2d 419, 421, 36 U.C.C. REP. SERV. 1100, 1104 (1983); KCF Constr., Inc. v. Amper, 36 U.C.C. REP. SERV. 369, 376 (Pa. Com. Pl. 1983); Hixson v. Cox, 633 S.W.2d 330, 332, 39 U.C.C. REP. SERV. 783, 785 (Tex. Civ. App. 1982); Gallagher Lumber Co. v. Shapiro, 137 Vt. 139, ____, 400 A.2d 984, 986 (1979); State Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 682, 610 P.2d 390, 396, 28 U.C.C. REP. SERV. 1284, 1292 (1980); Flambeau Prods. Corp. v. Honneywell Information Sys., 116 Wis. 2d 95, ____, 341 N.W.2d 655, 664, 37 U.C.C. REP. SERV. 1441, 1452 (1984); Jahn v. Burns, 593 P.2d 828, 830, 26 U.C.C. REP. SERV. 257, 258 (Wyo. 1979).

found in the statute.

The drafting history of the Uniform Commercial Code and of section 1-207 does not clearly indicate whether section 1-207 was designed to affect the common law of accord and satisfaction. The section has been included in the Code since the earliest drafts essentially without change, as has its comment.[29] When the Code was first offered for adoption by the states during the 1950s, the New York Law Revision Commission studied section 1-207, along with the rest of the Code.[30] The Report of the New York Law Revision Commission describes the section as affecting the law of waiver and estoppel when disputes arise during the performance of a contract. It does not mention accord and satisfaction.[31]

Similarly, the 1962 Recommendations of the Editorial Board for the Uniform Commercial Code, which were issued in response to the criticisms of the New York Law Revision Commission, suggest no change to section 1-207 or its comment and fail to refer to accord and satisfaction.[32] The section was included in the revised version of the Code offered to the states for enactment in 1962 and has been adopted by the states without change.[33]

The official comment to section 1-207 states that the section "provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute. . . ."[34] The comment does not refer to accord and satisfaction

29. *See* U.C.C. § 1-207 (1952); U.C.C. § 902(3) (Proposed Final Draft No. 2 1948); U.C.C. § 902(3) (Proposed Final Draft No. 1 1948); U.C.C. § 901(3) (Tent. Draft No. 4 1948); U.C.C. § 101(3) (Tent. Draft No. 3 1947); U.C.C. § 101(3) (Tent. Draft No. 2 1947).

30. N.Y. LAW REVISION COMM'N, REPORT FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE (1955).

31. *See id.* at 204-06. The report of the commission provides in part:

> (1) The buyer must pay at the contract rate for any goods accepted; (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

Id. The analysis states:

> The policy of 2-607(1) and (2) seems to be that actions speak louder than words, that the buyer becomes liable for the price (when due) on acceptance with knowledge, etc. It may be argued that section 2-607 as a specific provision will necessarily make an exception to section 1-207. But this rule does not or should not apply if section 1-207 expresses the more basic over-riding policy. Furthermore, may there not be *other* situations under contracts falling within the scope of Articles 3-9 where the policy of making a party *decide promptly where he stands* will be a more just one than the policy of permitting a *unilateral* reservation of all rights? If there are, then section 1-207 will work injustice in such cases unless they are specifically covered by a provision like that of section 2-607(2).

Id. at 206 (emphasis in original).

32. *See* Permanent Editorial Board for the Uniform Commerical Code, REPORT No. 1 (1962).

33. *See* U.C.C. § 1-207 (1962). *See also* State Correlation Tables, U.C.C. REP. SERV. (1979).

34. U.C.C § 1-207 official comment, ¶ 1.

or settlement offers. Instead, the comment refers to continuing performance "along the lines contemplated by the [original] contract"[35] and "a specific measure on which a party can rely as he makes or concurs in an *interim* adjustment in the course of performance."[36] Thus neither section 1-207 nor its comment clearly indicates that the section should be applied when a debtor offers a check as payment in full settlement of a disputed claim.[37]

Prior to 1956, the Uniform Commercial Code included section 3-802(3), which provided: "Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances."[38] Thus the language of the early section 3-802(3) embraced and validated all common law accords and satisfactions. Further, as will be developed below, the section eliminated the common law requirement that the pre-existing duty rule be satisfied. The purpose and scope of section 3-802(3) were clearly described in its comment, which stated:

> Checks are frequently given with a term providing that they are 'in full payment of all claims,' or similar language. The holder who obtains payment of such a check, takes its benefits subject to the drawer's stipulation that he releases the original obligation. Even where the obligation is for an undisputed and liquidated debt there is no unfairness in the tender of an accord and satisfaction; and in this respect subsection (3) changes the law in a number of states.
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> The exception stated as to unconscionable advantage taken by the obligor has been recognized in a considerable number of decisions. A genuine accord and satisfaction is to be found only where the parties are dealing at arm's length and on fair terms of bargaining equality, without unfair advantage taken by either party.[39]

The 1952 version of the Code, which contained the above, also

35. *Id.*
36. U.C.C. § 1-207 comment, ¶ 2 (emphasis added).
37. Hawkland, *supra* note 18, at 331.
38. U.C.C § 3-802(3) (1952).
39. *Id.* comment, ¶ 5.

included section 1-207 and its comment in a form identical to that present in today's uniform version.[40] As Professor Rosenthal has noted, the presence of both sections seems to indicate section 1-207 was not intended to affect accord and satisfaction.[41] Because section 3-802(3) so clearly dealt with the subject in the context of payment instruments, the inference to be drawn is that section 1-207 must have been drafted to address some other problem.[42]

Subsection (3) of section 3-802 was deleted from the 1957 Official Edition of the Code. In its 1954 report, the Editorial Board explained the deletion with the comment that subsection (3) had "evoked criticism on the ground that it would work hardship, and was open to abuse."[43] A close reading of the rejected section 3-802(3) shows that it went far beyond merely validating the existing law of accord and satisfaction. In line with the abrogation of the pre-existing duty rule found elsewhere in the Code, section 3-802(3) would have permitted the full-payment check to operate even when there was no dispute.[44] Thus section 3-802(3) would have operated far more broadly than the common law doctrine, which was exclusively a settlement mechanism.[45] It is impossible now to determine the nature of the criticism that prompted the drafters to delete section 3-802(3), but it seems highly probable that it was evoked, in major part, by the provision's validation of the use of the full-payment check outside the dispute settlement realm.

Notwithstanding the deletion of section 3-802(3), section 1-207 and its comment were carried through the various drafts of the Code, in language virtually identical to that found today.[46] This fact strengthens the inference that section 1-207 was not intended to influence the common law doctrine of accord and satisfaction.[47] The comment to section 1-207 was not changed when section 3-802(3) was dropped, although some change to refer to accord and satisfaction would have been logical if the drafters had understood the section to alter the common law.[48] The report of the exhaustive study of the Code conducted by the New York Law Revision

40. U.C.C. § 1-207 (1952).

41. Rosenthal, *supra* note 18, at 61.

42. Several commentators have suggested the purpose of § 1-207 is to permit the parties to proceed with performance of a contract after a dispute has arisen without fear of waiver or estoppel. *E.g.*, Hawkland, *supra* note 18, at 331; Rosenthal, *supra* note 18, at 63-64.

43. AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DECEMBER 1954 RECOMMENDATIONS OF THE EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE FOR AMENDMENTS TO THE TEXT THEREOF 25 (1955).

44. U.C.C. § 3-802(3) (1952).

45. 6 A. CORBIN, *supra* note 2, § 1278.

46. *See* U.C.C. § 1-207 (1962); *id* (1972); *id.* (1978).

47. Rosenthal, *supra* note 18, at 60-61.

48. *Id.*

Commission, which was being published at the same time that 3-802(3) was being dropped, does not refer to accord and satisfaction in its comments on section 1-207 and makes no cross-reference to section 3-802(3) in its discussion of section 1-207.[49] The failure of either the New York Law Revision Commission or the Editorial Board to make any cross-reference between sections 3-802(3) and 1-207 during this process, and the failure of the Editorial Board to revise section 1-207 or its comment to refer to accord and satisfaction strengthen the inference that no effect was intended.

Other provisions of the Code seem inconsistent with an intent to displace accord and satisfaction. Section 1-103, of course, provides that except as displaced by the particular provisions of the Code, the principles of law and equity shall supplement its provisions.[50] In instances where the drafters desired to alter or reverse a common law rule, care was taken to indicate that intent in the comments to the particular section.[51] The drafters quite clearly stated that section 3-802(3) was designed to expand the availability of the full-payment check to satisfy obligations.[52] The language of section 1-207 and its comment have only an oblique relationship, if any, to the full-payment check. The lack of any reference in the comments of section 1-207 to accord and satisfaction has been interpreted as a further indication that the section was not designed to affect the common law rule.[53]

Other provisions of the Code abolish the pre-existing duty rule and permit the modification of contractual obligations without the existence of consideration.[54] Section 3-802(3) was consistent with this rejection of the need for consideration to validate contractual modifications and settlements. The Code embodies a policy that the common law prerequisite of new consideration should not hinder parties who wish to voluntarily modify their existing contractual obligations. The effect of the original section 3-802(3) was identical.

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49. N.Y. LAW REVISION COMM'N, *supra* note 30, at 330-32.

50. U.C.C. § 1-103.

51. *See* U.C.C. § 2-205, comment 1; *id.* § 2-209, comment 1.

52. U.C.C. § 3-802(3), comment (1952).

53. McDonnel, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 PA. L. REV. 795, 827 (1978).

54. *See* U.C.C. §§ 1-107; 2-209(1); 3-605; 5-105. Section 2-209(1) specifically states that "[a]n agreement modifying a contract within this Article needs no consideration to be binding." *Id.* § 2-209(1). Section 1-107 provides that "[a]ny claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." *Id.* § 1-107. Section 3-605 provides: "The holder of an instrument may even without consideration discharge any party (a) in any manner apparent on the face of the instrument or the indorsement . . .; or (2) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged." *Id.* § 3-605. In article 5, governing letters of credit, § 5-105 provides that "[n]o consideration is necessary to establish a credit or to enlarge or otherwise modify its terms." *Id.* § 5-105.

When the drafters focused their attention on accord and satisfaction, they apparently regarded it as another form of settlement or modification and chose not only to preserve it, but to expand its availability through the explicit language of section 3-802(3). A construction of section 1-207 that impairs the availability of accord and satisfaction therefore would have directly conflicted with the evident purposes of section 3-802(3). Had complete rejection of accord and satisfaction been intended when section 3-802(3) was deleted, it seems very strange that no change was made in section 1-207 or its comments. Rather, the inference is strong that throughout the drafts section 1-207 was intended only to permit parties to continue performing agreements notwithstanding disputes over the performance that was due.

IV. POST-CODE JUDICIAL TREATMENT OF ACCORD AND SATISFACTION

A. AN OVERVIEW

Judicial consideration of whether section 1-207 alters the common law effect of accepting a full-payment check has been slow and sparse. The courts are now divided, with South Dakota[55] and New York[56] adhering to the position that the creditor's protest can prevent an accord and satisfaction. A decision from Alabama suggests that section 1-207 alters the rule.[57] There is an unresolved division among the Florida courts of appeal between the New York position and the view that section 1-207 does not affect the common law.[58] Decisions in fifteen other states take the latter view.[59]

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55. *See* Scholl v. Tallman, 247 N.W.2d 490, 492, 20 U.C.C. REP. SERV. 833, 836 (S.D. 1976). *See also infra* notes 76-82 and accompanying text.

56. See *infra* notes 83-136 and accompanying text.

57. Bivins v. White Dairy, 378 So. 2d 1122, 1124, 28 U.C.C. REP. SERV. 316, 318 (Ala. Civ. App. 1979).

58. *Compare* Eder v. Yvette B. Gervey Interiors, Inc., 407 So. 2d 312, 314, 33 U.C.C. REP. SERV. 146, 149 (Fla. Dist. Ct. App. 1981) (§ 1-207 does not alter common law) *with* Miller v. Jung, 361 So. 2d 788, 789, 24 U.C.C. REP. SERV. 1085, 1086 (Fla. Dist. Ct. App. 1978) (§ 1-207 does alter common law).

59. The following states have held that § 1-207 does not affect the common law: Alaska (Air Van Lines, Inc. v. Buster, 673 P.2d 774, 779, 37 U.C.C. REP. SERV. 1454, 1457 (Alaska 1983)); Arkansas (Pillow v. Thermogas Co. of Walnut Ridge, 644 S.W.2d 292, 294, 35 U.C.C. REP. SERV. 1404, 1405-06 (Ark. Ct. App. 1982)); California (Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, 61, 184 Cal. Rptr. 436, 439, 34 U.C.C. REP. SERV. 1, 5-6 (1982)); Colorado (R.A. Reither Constr. Co., Inc. v. Wheatland Rural Elec. Ass'n, 680 P.2d 1342, 1344, 38 U.C.C. REP. SERV. 420, 422 (Colo. 1984)); Georgia (American Food Purveyors, Inc. v. Lindsay Meats, Inc., 153 Ga. App. 383, ____, 265 S.E.2d 325, 327, 28 U.C.C. REP. SERV. 966, 969 (1980)); Maine (Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 1011, 39 U.C.C. REP. SERV. 1186, 1190 (Me. 1984)); New Jersey (Chancellor, Inc. v. Hamilton Appliance Co., 175 N.J. Super. 345, ____, 418 A.2d 1326, 1330, 30 U.C.C. REP. SERV. 12, 16 (N.J. Dt. Ct. 1980)); North Carolina (Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, ____, 261 S.E.2d 266, 269, 28 U.C.C. REP. SERV. 3, 6-7 (1980)); Oregon (Les Schwab Tire Centers of Oregon, Inc. v.

Michigan courts note the dispute but have refused to rule on it.[60] A number of other state courts have issued opinions dealing with protests to full-payment checks without mentioning section 1-207, despite the fact the Code was in effect in the respective states prior to the issuance of the opinions.[61]

The courts have employed two distinct analyses to determine whether the Uniform Commerical Code governs the full-payment check.[62] The lower courts of New York focused on the transaction that led to the dispute which the offeror seeks to resolve. Their reasoning was that when the Code governs the underlying transaction, section 1-207 must therefore also apply.[63] These courts then stressed the language of section 1-207, regarding words of protest, and the New York Annotation[64] and, without further analysis of the section, concluded that the provision permits the

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Ivory Ranch, Inc., 63 Or. App. 364, ____, 664 P.2d 419, 423, 36 U.C.C. REP. SERV. 1100, 1106-07 (1983)); Pennsylvania (KCF Constr., Inc. v. Amper, 36 U.C.C. REP. SERV. 369, 376 (Pa. Com. Pl. 1983)); Texas (Hixson v. Cox, 633 S.W.2d 330, 331, 39 U.C.C. REP. SERV. 783, 784-85 (Tex. Civ. App. 1982)); Vermont (Gallagher Lumber Co. v. Shapiro, 137 Vt. 139, ____, 400 A.2d 984, 986 (1979)); Washington (State Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 682, 610 P.2d 390, 395-96, 28 U.C.C. REP. SERV. 1284, 1291-92 (1980)); Wisconsin (Flambeau Prods. Corp. v. Honeywell Information Sys., 116 Wis. 2d 95, ____, 341 N.W.2d 655, 663-64, 37 U.C.C. REP. SERV. 1441, 1451-52 (1984)); Wyoming (Jahn v. Burns, 593 P.2d 828, 829, 26 U.C.C. REP. SERV. 257, 258 (Wyo. 1979)).

60. *See* Fritz v. Marantette, 404 Mich. 329, 337-38, 273 N.W.2d 425, 428-29, 25 U.C.C. REP. SERV. 625, 629-30 (1978).

61. See *infra* notes 201-03 and accompanying text.

62. Most of the courts that have considered the effect of § 1-207 upon the common law have rejected the New York interpretation of § 1-207 and ruled that the provision does not alter the common law of accord and satisfaction. Many of these courts have not analyzed whether or not the Uniform Commercial Code is applicable, apparently reasoning that the issue is irrelevant when the doctrine of accord and satisfaction will apply regardless of the coverage of the Code. *See, e.g.*, Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, ____, 184 Cal. Rptr. 436, 438-39, 34 U.C.C. REP. SERV. 1, 3-6 (1982).

63. *Compare* Continental Information Sys. Corp. v. Mutual Life Ins. Co., 77 A.D. 2d 316, ____, 432 N.Y.S.2d 952, 955 (1980) (sale of goods) *and* Kroulee Corp. v. A. Klein & Co., 103 Misc. 2d 441, ____, 426 N.Y.S.2d 206, 207, 28 U.C.C. REP. SERV. 969, 972 (1980) (sale of aluminum foil) *with* Geelan Mechanical Corp. v. Dember Constr. Corp., 97 A.D.2d 810, ____, 468 N.Y.S.2d 680, 681, 37 U.C.C. REP. SERV. 1458, 1459-60 (1983) (plumbing contract) *and* Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier, 101 Misc. 2d 371, ____, 420 N.Y.S.2d 999, 1002 (1979) (legal services).

64. The New York annotation to § 1-207 states: "This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment, . . . without losing his right to . . . sue for the balance of the payment, so long as he explicitly reserves his rights." N.Y. UNIFORM COMMERCIAL CODE LAW § 1-207 New York Annotations (1964).

In response to an inquiry, Professor Hogan, one of the authors of the New York annotation stated:

> I cannot find anything memorializing the reason for the comment on accord and satisfaction. Next, I do have some recollection about the topic but I offer no warranty about its accuracy or helpfulness. We looked at the Law Revision Commission studies and at the annotations of other states in doing the work. My recollection is that Massachusetts also had similar references. I do recall discussing the question with Bob Braucher (the other author) but we concentrated on the effect of the payee's striking the customary "payment in full" legend from the check upon the drawee bank's liability for failure to obey the drawer's order.

Letter from Professor Hogan to Patricia Fry (June 8, 1983) (discussing U.C.C.'s comment on accord and satisfaction).

offeree to override any form of offer by using words of protest.[65] These courts failed to apply basic contract principles to determine whether the full-payment condition constituted an offer of a modification of the original contract.

Another analysis initially focuses on the check, which is the normal form of payment. Under this analysis, which was adopted by the New York Court of Appeals, the first step is to explore the provisions of article 3 that might govern the effect of payment or use of the full-payment check.[66] Section 3-802 provides that the "underlying obligation" for which a check is tendered is satisfied pro tanto.[67]

Thus, when a full-payment check is tendered section 3-802 requires that we determine what "underlying obligation" is being paid: the original debt or the accord.[68] If section 1-207 permits the creditor to use the check while reserving the right to claim that a balance remains due, it would seem the "underlying obligation" referred to in section 3-802 is the original debt.[69] If, on the other hand, section 1-207 does not apply to the acceptance or rejection of a proposed settlement, the "underlying obligation" would be the performance offered in the accord.[70]

The latter construction is consistent with the traditional approach, which regarded the accord as a separate, executory agreement that was performed by the satisfaction.[71] The offer of an accord constitutes an offer to settle or modify the existing, disputed relationship between the parties.[72] When the accord is performed, the original claims are satisfied. This satisfaction is not the result of performance or payment of the original claims, but the result of the parties' agreement to accept a *different* performance.[73] Under the common law, the debtor can be certain the check will either be returned unused and all claims still subject to litigation, or the check will be used and the account satisfied.[74] Under the New York

65. *See, e.g.*, Aguiar v. Harper & Row Publishers, Inc., 114 Misc. 2d 828, ____, 452 N.Y.S.2d 519, 522-23, 34 U.C.C. REP. SERV. 6, 9-11 (1982).

66. *See* Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310, 41 U.C.C. REP. SERV. 1591 (1985).

For a discussion of *Horn Waterproofing*, see *infra* notes 124-36 and accompanying text.

67. U.C.C. § 3-802(1).

68. *Id.*

69. This is true because, under this construction of § 1-207, the check is applied against the balance due on the original, disputed transaction. *See, e.g.*, Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 66 N.Y.2d 321, ____, 488 N.E.2d 56, 62, 497 N.Y.S.2d 310, 316, 41 U.C.C. REP. SERV. 1591, 1598 (1985).

70. Since the operation of a satisfaction is the performance of the accord, the check would then satisfy the obligation.

71. 6 A. CORBIN, *supra* note 2, § 1271 (1962) at 95-96.

72. RESTATEMENT (SECOND) OF CONTRACTS § 281(1) (1979).

73. 6 A. CORBIN, *supra* note 2, § 1276 at 115.

74. Rosenthal, *supra* note 18, at 54-55.

construction of section 1-207, however, the check may be used "under protest" and the account balance still pursued. The debtor's risk escalates. If the debtor wants to offer a settlement, the debtor gambles that the check will not be used "under protest" despite the terms of the offer.[75] The burden in the event of litigation shifts to the debtor, requiring it to recapture funds previously paid if the creditor tries to litigate the claim.

The courts that have decided whether section 1-207 should displace the common law doctrine of accord and satisfaction are divided, and the history of the provision is ambiguous. In light of the diverse approaches taken by the courts as they confront the meaning of section 1-207, we will examine the decisions in some detail.

B. PROTEST PREVENTS ACCORD AND SATISFACTION

The first state to clearly rule that section 1-207 permits a creditor to override a debtor's restriction on a full-payment check was South Dakota. In *Scholl v. Tallman,*[76] relying on dicta in *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.* [77] and *Hanna v. Perkins,*[78]

75. Hawkland, *supra* note 18, at 332, 342.

76. 247 N.W.2d 490, 20 U.C.C. REP. SERV. 833 (S.D. 1976).

77. 4 N.C. App. 342, 167 S.E.2d 85, 6 U.C.C. REP. SERV. 480 (1969). In *Baillie Lumber,* an action for the balance due for lumber sold, the court found there was no dispute regarding the goods delivered or the balance due. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, ____, 167 S.E.2d 85, 89, 6 U.C.C. REP. SERV. 480, 480 (1969). The debtor had proposed a composition with its creditors, which was accepted by the plaintiff on the condition that payment be made before a specified date. *Id.* at ____, 167 S.E.2d at 89, 6 U.C.C. REP. SERV. at 480-81. Since there was no dispute regarding the underlying transaction and the payment was made over five months after the specified date, the court ruled that no accord and satisfaction had resulted. *Id.* at ____, 167 S.E.2d at 89, 6 U.C.C. REP. SERV. at 484. However, the *Baillie Lumber* court went on to state:

> Applying the provisions of [§ 1-207] to the facts of this case, it is clear that Baillie by indorsing the checks, "With reservation of all our rights," complied with that portion of the statute requiring an explicit rights. . . . We hold that Baillie, by its indorsement with explicit reservations, did not accept the second check in full payment but in the manner provided in [§ 1-207] reserved its right to collect the remainder of its unpaid bill.

Id. at ____, 167 S.E.2d at 93, 6 U.C.C. REP. SERV. at 484. A later panel of the North Carolina Court of Appeals distinguished *Baillie Lumber* by stating: "There is some language in *Baillie Lumber Co. v. Kincaid Carolina Corp., supra,* which would support a different result. That case involved a fully liquidated claim. It is not precedent for this case." Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, ____, 261 S.E.2d 266, 269 (1980).

78. 2 U.C.C. REP. SERV. 1044 (N.Y. Co. Ct. 1965). *Hanna* involved an undisputed claim for goods and services and the court, on that ground, denied defendant's motion for summary judgment. Hanna v. Perkins, 2 U.C.C. REP. SERV. 1044, 1045-46 N.Y. Co. Ct. 1965).

the South Dakota Supreme Court ruled that section 1-207 permitted the creditor to override a full-payment limitation.[79] The *Scholl* opinion was later followed in *Simpson v. Norwesco.*[80]

The essence of the ruling, however, was that section 1-207 did not affect pre-Code South Dakota law. South Dakota had rejected common law accord and satisfaction.[81] Decisions in the state had construed a pre-Code South Dakota statute to require written acceptance by a creditor before an accord and satisfaction would be effective.[82] As far as this writer can determine, South Dakota was the only state that had rejected common law accord and satisfaction.

The largest body of decisions ruling that section 1-207 alters the common law rule had been issued by the courts of New York. These decisions understandably rely heavily on the New York annotation, which explicitly states that section 1-207 permits the creditor to take a full-payment check and still collect any remaining balance.[83]

The first reported decision mentioning section 1-207 in connection with an accord and satisfaction was *Hanna v. Perkins,*[84] a 1965 decision of the Westchester County Court. In *Hanna,* the creditor submitted a bill for labor and materials, and the debtor sent a check for a lesser sum, bearing the legend "[i]n full for labor and material to date."[85] The creditor crossed out these words, wrote "[d]eposited under protest" and then used the check.[86] The trial court refused the debtor's motion for summary judgment, finding there was a triable issue of fact whether there was any genuine dispute.[87] The court went on to state, however:

> Also taken into consideration by the court was § 1-207 of the Uniform Commercial Code. . . . If it were not that this court finds that triable issues of fact are present, this court would deny the motion by holding this particular section of the code would seem to favor plaintiff's

79. Scholl v. Tallman, 247 N.W.2d 490, 492, 20 U.C.C. REP. SERV. 833, 835-36 (S.D. 1976).
80. 442 F. Supp. 1102, 1107 (D.S.D. 1977), *aff'd,* 583 F.2d 1007 (8th Cir. 1978).
81. *Scholl,* 247 N.W.2d at 492-93, 20 U.C.C. REP. SERV. at 836.
82. *Id.* at 491-92, 20 U.C.C. REP. SERV. at 834.
83. *See supra* note 64.
84. 2 U.C.C. REP. SERV. 1044 (N.Y.Co. Ct. 1965).
85. Hanna v. Perkins, 2 U.C.C. REP. SERV. 1044 (N.Y. Co. Ct. 1965).
86. *Id.*
87. *Id.* at 1045-46.

> overriding indorsement of 'Deposited under protest' as a reservation of his right to collect payment of balance.[88]

Three years later, in *Lange-Finn Construction Co. v. Albany Steel Iron Supply Co.*,[89] the Supreme Court of Albany County considered the impact of section 1-207 in an action for conversion of a check.[90] Upon completion of work the plaintiff general contractor delivered a statement and a check marked "[f]inal payment POA 75-1" to the defendant supplier.[91] The defendant challenged a backcharge arising out of defective materials.[92] To compromise, the plaintiff then sent a second check in a slightly larger sum, again marked 'final payment,' along with a cover letter explaining the higher figure and demanding return of the first check.[93] Instead of complying, defendant had both checks certified and paid. The plaintiff filed suit for conversion of the first check.[94]

The court granted plaintiff's motion for summary judgment for conversion of the first check.[95] In response to the plaintiff's claim that the use of the second check constituted an accord and satisfaction, the court pointed out there was no protest prior to certification and therefore section 1-207 would not apply.[96] In dicta, however, the court suggested section 1-207 altered the common law rule, referring to the New York annotation for authority,[97] as well as Professor Hawkland's article[98] and *Baillie Lumber*.[99]

In 1979, two New York courts disagreed over the applicability of the Code to non-sales transactions. In *Ayer v. Sky Club, Inc.*,[100] the Supreme Court, Appellate Division, First Department ruled that section 1-207 enabled a reservation of rights to prevent an accord and satisfaction.[101] The dispute was apparently between a landlord

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88. *Id.* at 1046.

89. 94 Misc. 2d 14, 403 N.Y.S.2d 1012, 24 U.C.C. REP. SERV. 11 (N.Y. Sup. Ct. 1978).

90. Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co., 94 Misc. 2d 14, 403 N.Y.S.2d 1012, 24 U.C.C. REP. SERV. 11 (N.Y. Sup. Ct. 1978).

91. *Id.* at ____, 403 N.Y.S.2d at 1013, 24 U.C.C. REP. SERV. at 12.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at ____, 403 N.Y.S.2d at 1014, 24 U.C.C. REP. SERV. at 13.

96. *Id.* at ____, 403 N.Y.S.2d at 1015, 24 U.C.C. REP. SERV. at 14.

97. *Id.* at ____, 403 N.Y.S.2d at 1014, 24 U.C.C. REP. SERV. at 13. For the text of the New York annotation, see *supra* note 64.

98. *Id.* at ____, 403 N.Y.S.2d at 1014, 24 U.C.C. REP. SERV. at 14 (citing Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. 329 (1969).

99. *Id.* For an analysis of *Baillie Lumber*, see *supra* note 77.

100. 70 A.D.2d 863, 418 N.Y.S.2d 57, 27 U.C.C. REP. SERV. 881 (1979), *appeal dismissed*, 48 N.Y.2d 705 (1979).

101. Ayer v. Sky Club, Inc., 70 A.D.2d 863, ____, 418 N.Y.S.2d 57, 58, 27 U.C.C. REP. SERV. 881, 882 (1978), *appeal dismissed*, 48 N.Y.2d 705 (1979).

and a tenant. The court said, "We perceive the transaction underlying the billing dispute . . . to be one in which, while occurring in an area to which the statute . . . might not expressly *apply*, nevertheless, the rule of the statute should be applied. . . ."[102]

That same year in *Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier,*[103] the Civil Court of the City of New York, Queens County, refused to apply section 1-207 in an attorneys' fee dispute.[104] The action was based on an agreement to pay for services rendered to a third party. The defendant objected to the fees as excessive and tendered a full-payment check.[105] The attorney responded with a letter objecting to the condition, but used the check.[106] Focusing on the underlying transaction, the *Blottner* court stated: "[I]t cannot, in an area where [the Uniform Commercial Code] clearly does not apply, be the basis for the overturning of the long and well settled rule that the acceptance of a check in full payment of a disputed claim operates as an accord and satisfaction of the claim."[107]

Neither the *Ayer* nor the *Blottner* courts questioned whether section 1-207 changes the rule on full-payment checks. Each appears to accept the idea that a reservation of rights by the payee of such a check will be effective if the original transaction was within the Code.

In three 1980 decisions, New York courts ruled that section 1-207 allows a reservation of rights to override a full-payment check or other full-payment tender. In each case, the transaction giving rise to the disputed accounts was within the scope of article 2.[108] A fourth 1980 case arose out of printing services, and, without discussing whether section 1-207 applied, the court found an accord and satisfaction had occurred.[109]

Since 1980, the decisions of the trial and intermediate appellate courts in New York have been quite consistent. If the underlying transaction was within the Uniform Commercial Code, the courts have ruled that a creditor's protest was effective to prevent the operation of an accord and satisfaction when a full-

102. *Id.* (emphasis added).

103. 101 Misc. 2d 291, 420 N.Y.S.2d 999, 27 U.C.C. REP. SERV. 882 (1979).

104. Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier, 101 Misc. 2d 291, ____, 420 N.Y.S.2d 999, 1001, 27 U.C.C. REP. SERV. 882, 885 (1979).

105. *Id.*

106. *Id.*

107. *Id.* at ____, 420 N.Y.S.2d at 1002, 27 U.C.C. REP. SERV. at 885.

108. Kroulee Corp. v. A. Klein & Co., 103 Misc. 2d 371, ____, 426 N.Y.S.2d 206, 207, 28 U.C.C. REP. SERV. 969, 971 (Sup. Ct. 1980) (sale of aluminim foil); Continental Information Sys. Corp. v. Mutual Life Ins. Co. of New York, 77 A.D.2d 316, ____, 432 N.Y.S.2d 952, 955, 31 U.C.C. REP. SERV. 816, 820 (1980) (sale of goods); Braun v. C.E.P.C. Distrib., Inc., 77 A.D.2d 358, ____, 433 N.Y.S.2d 447, 449, 30 U.C.C. REP. SERV. 8, 10 (1980) (sale of goods).

109. Wilcox Press, Inc. v. Beauty Fashion, Inc., 73 A.D.2d 988, ____, 423 N.Y.S.2d 565, 566, 28 U.C.C. REP. SERV. 1, 2 (1980).

payment check has been tendered.[110] However, if the underlying transaction was not covered by the Code, the common law rules of accord and satisfaction have governed and the creditor's protest has been unavailing.[111]

One danger to the certainty of business expectations has developed in these cases. The potential exists that a court may apply the Code in close cases where the transaction does not clearly fall within its coverage and where the parties might not be expected to anticipate such a ruling. An example of such a decision may be found in *Aguiar v. Harper & Row Publishers, Inc.*,[112] where a dispute arose out of a publisher's claimed wrongful use of photographs.[113] The photographer had authorized the publisher to reproduce the photographs "[s]olely for one-time, non-exclusive, U.S. English language, hard cover, single edition rights. . . ."[114] Some copies of the book in which the pictures were reproduced were shipped to and sold in Canada. The photographer demanded additional compensation and a dispute arose, which Harper & Row attempted to resolve by the use of a full-payment check.[115] After the check was deposited under protest, suit was filed for additional compensation and the publisher contended that an accord and satisfaction had resulted.[116]

The court reasoned that the sale of rights to use photographs was more analogous to the sale of goods than services, and that therefore this was not a case where the Code clearly did not apply.[117] The court denied the publisher's motion for summary judgment on the grounds that section 1-207 prevented the operation of an accord and satisfaction.[118]

The decisions in *Ayer*,[119] *Blottner*,[120] and *Aguiar*[121] present one of the best arguments for rejecting an analysis based on whether the underlying transaction was Code-covered. Under the analysis utilized by these New York courts, if the underlying transaction is clearly within the coverage of the Code, section

110. *See, e.g.*, Slavenburg Corp. v. Kenli Corp., 36 U.C.C. REP. SERV. 8, 13 (D.E.D. Pa. 1983) (applying New York law).

111. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 105 A.D.2d 684, ____, 481 N.Y.S.2d 125, 127, 39 U.C.C. REP. SERV. 776, 778-79 (1984).

112. 452 N.Y.S.2d 519, 34 U.C.C. REP. SERV. 6 (1982).

113. Aguiar v. Harper & Row Publishers, Inc., 452 N.Y.S.2d 519, 520, 34 U.C.C. REP. SERV. 6, 7 (1982).

114. *Id.*

115. *Id.* at 520-21, 34 U.C.C. REP. SERV. at 7-8.

116. *Id.*

117. *Id.* at 522, 34 U.C.C. REP. SERV. at 10.

118. *Id.* at 523, 34 U.C.C. REP. SERV. at 11.

119. *See supra* note 100.

120. *See supra* note 103.

121. *See supra* note 112.

1-207 prevents the operation of accord and satisfaction. In cases where the underlying transaction is clearly not within the coverage of the Code, section 1-207 will not operate and a full-payment check may be used to effect an accord and satisfaction. In still other cases, the underlying transaction may or may not be governed by the Code. In those cases, the parties are unable to predict whether or not an accord and satisfaction can be effected. As other courts have noted, this can only result in confusion.[122] Sophisticated parties will be able to resolve their affairs without concern, but unsophisticated parties will have their expectations upset. The courts are not encouraging parties to settle their disputes; the courts are encouraging them to litigate.[123]

In October 1985, the New York Court of Appeals first considered the application of section 1-207 to an accord and satisfaction in *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc.*,[124] and rejected any analysis based upon whether the transaction that gave rise to the dispute was within the Uniform Commercial Code.[125] The case involved a dispute over repairs to a leaking roof.[126] The court ruled that using a negotiable instrument to make a payment renders the payment itself "undeniably a Code-covered transaction."[127]

However, the court of appeals refused to follow the lead of other states which have ruled that section 1-207 does not alter the common law of accord and satisfaction.[128] The defendant had sent a check in response to the bill for repair services bearing the notation "[t]his check is accepted in full payment, settlement, satisfaction, release and discharge of any and all claims and/or

122. In his dissent to the per curiam opinion in *Horn Waterproofing,* Justice Weinstein stated that there is conflicting authority in New York regarding the application of § 1-207 to nonsales cases, citing *Ayer.* He argued that § 1-207 should be applied whether or not the transaction was Code-covered and that any creditor should be able to override a full-payment condition. 105 A.D.2d at ____, 481 N.Y.S.2d at 129-30, 39 U.C.C. REP. SERV. at 779-82 (Weinstein, J., dissenting).

123. Flambeau Prods. Corp. v. Honeywell Information Sys., 116 Wis.2d 95, ____, 341 N.W.2d 655, 663 (1984). *See also* Rosenthal, *supra* note 18, at 71-74.

124. 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310, 41 U.C.C. REP. SERV. 1591 (1985).

125. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 66 N.Y.2d 321, ____, 488 N.E.2d 56, 61-63, 497 N.Y.S.2d 310, 315-17, 41 U.C.C. REP. SERV. 1591, 1599-1601 (1985).

126. *Id.* at ____, 488 N.E.2d at 56, 497 N.Y.S.2d at 310, 41 U.C.C. REP. SERV. at 1592. In *Horn Waterproofing,* the parties orally agreed that the plaintiff would repair a leaking roof on the defendant's building. *Id.* After two days work, the plaintiff concluded that a new roof was needed and submitted a bill for work already done. *Id.* The defendant disputed the amount charged and the plaintiff revised the bill from $1,244 to $1,080. *Id.* The defendant remained unsatisfied, and sent the plaintiff a full-payment check in the amount of $500. *Id.*

127. *Id.* at ____, 488 N.E.2d at 61, 497 N.Y.S.2d at 315, 41 U.C.C. REP. SERV. at 1599.

128. *See id.* at ____, 488 N.E.2d at 58 n.3, 497 N.Y.S.2d at 312 n.3, 41 U.C.C. REP. SERV. at 1594 n.3. The court in *Horn Waterproofing* noted that "an admittedly greater number of jurisdictions have held that the common law rule is not affected [by § 1-207]." *Id.* For a discussion of those jurisdictions holding that § 1-207 does not alter the common law of accord and satisfaction, see *supra* note 58, and *infra* notes 137-200 and accompanying text.

demands of whatsoever kind and nature."[129] Plaintiff Horn Waterproofing printed the words "Under Protest" beneath the full-payment legend, indorsed and deposited the check into its account.[130] The court of appeals affirmed a summary judgment for defendant, ruling that section 1-207 enabled the plaintiff to override the full-payment legend.[131] The court relied heavily on the New York annotation and the comments of Professors White and Summers, and stated:

> Indeed, the common law doctrine of accord and satisfaction creates a cruel dilemma for the good faith creditor in possession of a full payment check. Under that rule, the creditor would have no other choice but to surrender the partial payment or forfeit his right to the remainder. We are persuaded, however, that the common law was changed with the adoption of § 1-207 pursuant to which a fairer rule now prevails.[132]

The court of appeals acknowledged that one of the purposes of the Code was to make the law among the various jurisdictions uniform.[133] It is unfortunate that the New York Court of Appeals nevertheless has chosen to reject the analysis of other thoughtful courts and commentators.[134] In the final footnote to its opinion the court suggested that the National Conference of Commissioners on Uniform State Laws should "give serious thought to a clarifying revision."[135] However, the court emphasized that the ruling in *Horn Waterproofing* would remain the law of the State of New York until such a revision was made by the commissioners and adopted by the New York legislature.[136]

C. PROTEST INEFFECTIVE TO BLOCK ACCORD AND SATISFACTION

Prior to 1979, despite critical academic comment, judicial

129. 66 N.Y.2d at ____, 488 N.E.2d at 57, 497 N.Y.S.2d at 310, 41 U.C.C. REP. SERV. at 1592.

130. *Id.*

131. *Id.* at ____, 488 N.E.2d at 62-63, 497 N.Y.S.2d at 316-17, 41 U.C.C. REP. SERV. AT 1901.

132. *Id.* at ____, 488 N.E.2d at 59, 497 N.Y.S.2d at 313, 41 U.C.C. REP. SERV. at 1596 (citation omitted).

133. *Id.* at ____, 488 N.E.2d at 62 n.11, 497 N.Y.S.2d at 316 n.11, 41 U.C.C. REP. SERV. at 1601 n. 11 (citing U.C.C. § 1-102(2)(c)). Section 1-102(2)(c) of the Code provides: "Underlying purposes and policies of this Act are . . . (c) to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2)(c).

134. For a discussion of those jurisdictions holding that § 1-207 does not alter the common law of accord and satisfaction, see *supra* note 58, *infra* notes 137-200, and accompanying text.

135. 66 N.Y.2d at ____, 488 N.E.2d at 62 n.11, 497 N.Y.S.2d at 316 n.11, 41 U.C.C. REP. SERV. at 1601 n. 11.

136. *Id.*

opinion consistently held that a debtor's attempt to effect an accord and satisfaction could be blocked by a protesting creditor.[137] This position was buttressed by the views expressed by White and Summers in their treatise,[138] and by dicta in several cases.[139] The first indication that this position would not prove to be conclusive came, perhaps appropriately, from a Western court.

On April 23, 1979, the Wyoming Supreme Court handed down its opinion in *Jahn v. Burns,*[140] ruling that an accord and satisfaction had been effected despite an attempt to protest the full-payment condition contained on a full-payment check.[141] The check had been issued by one of the parties to an automobile accident, bearing a full-payment legend and accompanied by a letter stating that it was intended as payment in full for all personal and property damages resulting from the collision.[142] The plaintiff crossed out the full-payment legend on the check, wrote on the back of it that it was "[d]eposited under protest and with full reservation of all my rights," and then endorsed and cashed the check.[143] On appeal from the grant of summary judgment for the defendant, the plaintiff argued that no accord and satisfaction had been consummated because of the protest.[144] The Wyoming Supreme Court found the langugage of section 1-207 to be clear and not applicable to the transaction.[145] The court relied heavily on Professor Hawkland's comment that the section was not designed to affect accord and satisfaction, but rather was intended to permit parties to proceed with the performance of a contract without fear of waiver.[146]

The plaintiff in *Jahn v. Burns* had also argued that section 1-207 was applicable to the case despite the fact that the underlying transaction was not Code-covered because of the fact that a check, governed by article 3, was used.[147] Addressing itself to that issue, the Wyoming Supreme Court agreed with plaintiff that the use of a check would involve article 3, but only to the extent that the issues of a case arose out of the interpretation, transferability, negotiability, rights of holders, and other aspects of the instrument

137. *See supra* notes 83-102 and accompanying text.
138. J. WHITE & R. SUMMERS, *supra* note 4, at 453-54.
139. *See, e.g.,* Bivins v. White Dairy, 378 So. 2d 1122, 1124, 28 U.C.C. REP. SERV. 316, 318 (Ala. Civ. App. 1979); Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, ____, 167 S.E.2d 85, 91, 6 U.C.C. REP. SERV. 480, 484 (1969).
140. 593 P.2d 828, 26 U.C.C. REP. SERV. 257 (Wyo. 1979).
141. Jahn v. Burns, 593 P.2d 828, 829, 26 U.C.C. REP. SERV. 257, 258 (Wyo. 1979).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 830, 26 U.C.C. REP. SERV. at 259.
146. *Id.* at 830-31, 26 U.C.C. REP. SERV. at 260 (citing Hawkland, *supra* note 18, at 31).
147. *Id.* at 829, 26 U.C.C. REP. SERV. at 260.

itself.[148] The *Jahn* court stated that the use of a check did not turn the entire transaction into a commercial transaction.[149]

Finally, apparently in response to an argument that the policy of uniformity should persuade the court to follow the decisions in New York and South Dakota, the court quoted White and Summers to the effect that "from time to time a court bows to this policy, but in most cases the court seems more concerned that its decision be right than that it be parallel with another state's."[150] With great clarity, the Wyoming Supreme Court said that it considered its disposition of the matter to be correct whether or not other courts had ruled to the contrary.[151]

A few weeks earlier, the Vermont Supreme Court, in *Gallagher Lumber Co. v. Shapiro,*[152] rendered a somewhat cryptic opinion which may be read to sustain an accord and satisfaction in the face of a protest and in the face of claims that the Uniform Commercial Code had changed the rule.[153] The issuer of a check had disputed a balance claimed due for materials furnished by an architect and had tendered a full-payment check. The check was negotiated after the architect inked out the full-payment condition.[154] In ruling that an accord and satisfaction had resulted despite the protest, the court did not refer to section 1-207. However, the court did state that the common law rule is not affected by the Uniform Commercial Code and cited section 1-103, which provides that the Code does not displace supplementary general principles of law.[155] The opinion thus suggests that the issue was argued to the court and rejected by it.

The following year, in *Brown v. Coastal Truckways, Inc.,*[156] the Court of Appeals of North Carolina also ruled that an accord and satisfaction had occurred despite the attempt by the payee to protest a full-payment condition.[157] A panel of that court, in *Baillie Lumber Co. v. Kincaid Carolina Corp.,*[158] had earlier opined that section 1-207 permitted a creditor, by such a protest, to override a full-payment condition.[159] The *Brown* court distinguished the *Baillie*

148. *Id.* at 831-32, 26 U.C.C. REP. SERV. at 260-61.
149. *Id.*
150. *Id.* at 832, 26 U.C.C. REP. SERV. at 261 (citing J. WHITE & R. SUMMERS, *supra* note 4, at 9).
151. *Id.*
152. 137 Vt. 139, 400 A.2d 984 (1979).
153. Gallagher Lumber Co. v. Shapiro, 137 Vt. 139, ___, 400 A.2d 984, 985-86 (1979).
154. *Id.* at ___, 400 A.2d at 985.
155. *Id.* at ___, 400 A.2d at 986.
156. 44 N.C. App. 454, 261 S.E.2d 266, 28 U.C.C. REP. SERV. 3 (1980).
157. Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, ___, 261 S.E.2d 266, 267, 28 U.C.C. REP. SERV. 3, 4 (1980).
158. 4 N.C. App. 342, 167 S.E.2d 85, 6 U.C.C. REP. SERV. 480 (1969).
159. Baillie Lumber Co., Inc. v. Kincaid Carolina Corp., 4 N.C. App. 342, ___, 167 S.E.2d

Lumber decision, pointing out that the case had involved an attempt to compromise a fully liquidated, nondisputed claim and thus the language regarding the effect of a full-payment check was dicta.[160] The *Brown* court, as did the Wyoming Supreme Court in *Jahn v. Burns,* ruled that section 1-207 applies to continuing performance under an existing contract.[161] It pointed out that when a creditor protests a full-payment condition, the requested performance is being refused.[162]

The *Brown* court also had to confront the question of whether section 1-207 should be considered when the original transaction was not within the ambit of the Uniform Commercial Code. The dispute in *Brown* was between a salesman and his former employer over the balance of commissions owing to the salesman.[163] Contrary to the *Jahn* court, the *Brown* court reasoned that the use of the check brought the Code into play in this transaction.[164] Citing section 3-802, which regulates the effect of a check on an underlying transaction, the court held "that whether the defendant is discharged on the plaintiff's claim depends on the extent to which he is discharged on the check. The employment contract is subject to the Uniform Commercial Code to this extent."[165]

At about the same time, the Georgia Court of Appeals ruled that a protest did not prevent the operation of an accord and satisfaction in *American Food Purveyors v. Lindsay Meats, Inc.*[166] That court was not persuaded by the decision in *Jahn* and stated that the contrary views were more persuasive.[167] However, it concluded that the 1976 opinion of the Georgia Supreme Court in *Anderson v. Shelby Mutual Insurance Co.,*[168] which had not discussed the impact of section 1-207, precluded it from reaching the question of whether section 1-207 altered the common law rule.[169]

A third appellate court directly addressed the question in a decision rendered approximately a month later. In *State Department of Fisheries v. J-Z Sales Corp.,*[170] the Washington Court of Appeals

85, 93, 6 U.C.C. REP. SERV. 480, 484 (1969). For a discussion of the opinion in *Baillie Lumber,* see *supra* note 76.

160. *Brown,* 44 N.C. App. at ____, 261 S.E.2d at 269, 28 U.C.C. REP. SERV. at 7.

161. *Id.* at ____, 261 S.E.2d at 268, 28 U.C.C. REP. SERV. at 6. *See Jahn,* 593 P.2d at 830-31, 26 U.C.C. REP. SERV. at 260.

162. *Brown,* 44 N.C. App. at ____, 261 S.E.2d at 268, 28 U.C.C. REP. SERV. at 6.

163. *Id.* at ____, 261 S.E.2d at 267, 28 U.C.C. REP. SERV. at 4.

164. *Id.* at ____, 261 S.E.2d at 268, 28 U.C.C. REP. SERV. at 6-7.

165. *Id.*

166. 153 Ga. App. 383, ____, 265 S.E.2d 325, 326, 28 U.C.C. REP. SERV. 966, 966-67 (1980).

167. American Food Purveyors v. Lindsay Meats, Inc., 153 Ga. App. 383, ____, 265 S.E.2d 325, 327, 28 U.C.C. REP. SERV. 966, 967 (1980).

168. 237 Ga. 687, 229 S.E.2d 462 (1976).

169. *American Food Purveyors,* 153 Ga. App. at ____, 265 S.E.2d at 327, 28 U.C.C. REP. SERV. at 967.

170. 25 Wash. App. 671, 610 P.2d 390, 28 U.C.C. REP. SERV. 1284 (1980).

did feel at liberty to address the impact of section 1-207 despite post-Code common law decisions.[171] The dispute in that case arose out of estimates that had been used by the parties in calculating the extent of the obligation incurred by J-Z Sales when it agreed to purchase all surplus salmon carcasses and eggs from the department of fisheries.[172] The quantity that the department actually tendered to J-Z Sales far exceeded the estimates, and the market was poor.[173] J-Z Sales accepted all of the carcasses and eggs tendered after being advised, in response to its protests, that adjustments would be made. Adjustments were never made, however, and J-Z Sales was billed at the original contract price. A full-payment check was tendered, returned a month later, and then retendered.[174]

The Washington court first analyzed the case under the common law of accord and satisfaction and determined that a common law accord and satisfaction had occurred.[175] It then turned its attention to the impact of section 1-207 on the transaction, an issue raised for the first time on appeal. This court ruled that section 1-207 did not apply to accord and satisfaction, which involves an offer of a new contract rather than performance under the original.[176]

By the end of 1980, it was thus apparent that the once consistent rulings that section 1-207 alters the common law had not carried the tide. A strong division among the courts had developed and, outside of New York, the courts were rather consistently rejecting claims that the section changes the common law rule. Since then, a substantial number of states have ruled that the New York position is wrong.

An excellent exemplar of these cases, and one which has generated some comment, is the 1984 decision of the Wisconsin Supreme Court in *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*[177] The lower courts in Wisconsin had been faced several times with arguments that section 1-207 alters the common law of accord and satisfaction, and the court of appeals had adopted the New York position in it's *Flambeau decision*.[178] The Wisconsin

171. State Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 682, 610 P.2d 390, 395, 28 U.C.C. REP. SERV. 1284, 1292 (1980).

172. *Id.* at 673, 610 P.2d at 391, 28 U.C.C. REP. SERV. at 1285.

173. *Id.*

174. *Id.* at 674-75, 610 P.2d at 392, 28 U.C.C. REP. SERV. at 1286.

175. *Id.* at 676-81, 610 P.2d at 292-95, 28 U.C.C. REP. SERV. at 1290-91.

176. *Id.* at 682, 610 P.2d at 395-96, 28 U.C.C. REP. SERV. at 1292.

177. 116 Wis. 2d 95, 341 N.W.2d 655, 37 U.C.C. REP. SERV. 1441 (1984).

178. Flambeau Prods. Corp. v. Honeywell Information Sys., Inc., 111 Wis. 2d 317, 122-24, 330 N.W.2d 228, 231, 35 U.C.C. REP. SERV. 1397, 1403 (Wis. Ct. App. 1980), *rev'd*, 116 Wis. 2d 95, 341 N.W.2d 655, 37 U.C.C. REP. SERV. 1441 (1984).

Supreme Court disagreed.[179]

Flambeau Products Corporation had purchased computer equipment from Honeywell Information Systems under a contract that provided an allowance for programming services.[180] In late 1976 or early 1977, Flambeau asked Honeywell for the amount necessary to prepay the balance on the contract.[181] In January 1977, Flambeau sent a full-payment check for a lesser sum, along with a letter stating that the check was in full payment and indicating that it had deducted the cost of the unused programming services from Honeywell's prepayment demand.[182]

The check and letter were received by a lock-box depositary used by Honeywell to process incoming checks.[183] Contrary to its authority under its agreement with Honeywell, the lock-box processed and deposited the full-payment check.[184] Immediately upon learning of the deposit, Honeywell wrote to Flambeau stating that it did not agree to the deduction and demanding the remaining balance, plus interest.[185] However, Honeywell did not return any of the proceeds from the cashed check to Flambeau.[186]

Flambeau brought an action for declaratory relief against Honeywell and was granted a summary judgment by the trial court.[187] On the first appeal, the case was remanded to the trial court because the record contained no evidence of a disputed or unliquidated claim.[188] After trial on remand, judgment was once again granted to Flambeau on the grounds that an accord and satisfaction had been effected.[189] Honeywell Information Systems appealed this judgment and the Wisconsin Court of Appeals ruled that section 1-207 operated to permit Honeywell to retain the proceeds of the check without being bound to an accord and satisfaction.[190]

The Wisconsin Supreme Court reversed and reinstated the judgment for Flambeau.[191] That court did not find the language of

179. Flambeau Prods. Corp. v. Honeywell Information Sys., Inc., 116 Wis. 2d 95, ____, 341 N.W.2d 655, 667, 37 U.C.C. REP. SERV. 1441, 1452 (1984).

180. *Id.* at ____, 341 N.W.2d at 657, 37 U.C.C. REP. SERV. at 1442.

181. *Id.*

182. *Id.* at ____, 341 N.W.2d at 657-58, 37 U.C.C. REP. SERV. at 1442-43. The Wisconsin Supreme Court pointed out that the facts are set out in detail in the decision of the court of appeals and merely summarized those facts in its decision. *Id.* at ____, 341 N.W.2d at 657, 37 U.C.C. REP. SERV. at 1442. All further citations to the facts in this article will be taken from the decision of the court of appeals.

183. 111 Wis. 2d at 319, 330 N.W.2d at 229, 35 U.C.C. REP. SERV. at 1399.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. 111 Wis. 2d at 325, 330 N.W.2d at 231, 35 U.C.C. REP. SERV. at 1403.

191. 116 Wis. 2d at ____, 341 N.W.2d at 667, 37 U.C.C. REP. SERV. at 1452.

the statute and its comment as persuasive as had the *Jahn* court,[192] nor did it find the legislative history of the section particularly enlightening.[193] Noting the conflict in the decisions, the *Flambeau* court looked to section 1-102 which provides that the Code is to be liberally construed and applied to promote its underlying purposes and policies.[194] The court noted that section 1-102(2) provides that one of those purposes is to simplify, clarify and modernize the laws governing commercial transactions. The court stated that applying section 1-207 to the full-payment check would not accomplish these purposes.[195] It would instead eliminate a simple technique for settlement while permitting sophisticated parties to arrange their affairs to secure the benefits of the full-payment check.[196] The court pointed out that the common law doctrine of accord and satisfaction rests both on principles of contract law and public policy, the policy of encouraging the informal resolution of disputes without litigation and the policy of fairness.[197] It disagreed with the view of the court of appeals that it would be unfair to require Honeywell to return the proceeds of the check if it wished to preserve its claim to the balance, and stated:

> The interests of fairness dictate that a creditor who cashes a check offered in full payment should be bound by the terms of the offer. The debtor's intent is known, and allowing the creditor to keep the money disregarding the debtor's conditions seems unfair and violative of the obligation of good faith which the UCC makes applicable to every contract or duty.[198]

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192. *Id.* at ____, 341 N.W.2d at 659-60, 37 U.C.C. REP. SERV. at 1444-47.

193. *Id.* at ____, 341 N.W.2d at 661-62, 37 U.C.C. REP. SERV. at 1448-50. The court also pointed out that the Wisconsin comment suggested that the section was intended to apply to fact situations other than full-payment checks. *Id.* at ____, 341 N.W.2d at 661, 37 U.C.C. REP. SERV. at 1447. The Wisconsin comment to § 1-207 states:

> [Section 401.207] provides a method of procedure whereby one party claiming a right which the other party feels to be unwarranted can make certain that the fact that he proceeds with or promises or assents to performance will not operate as a waiver of his claim to such right; there is no similar general provision in the present law, though the policy of Wis. Stat. § 121.49 is similar.

WIS. STAT. § 401.207 comment (1964).

194. 116 Wis. 2d at ____, 341 N.W.2d at 662, 37 U.C.C. REP. SERV. at 1450.

195. *Id.*

196. *Id.* at ____, 341 N.W.2d at 663, 37 U.C.C. REP. SERV. at 1450.

197. *Id.* at ____, 341 N.W.2d at 663, 37 U.C.C. REP. SERV. at 1451.

198. *Id. See also* 6 A. CORBIN, *supra* note 2, at 396-97. Corbin states as follows:

> It is unfair to the party who writes the check thinking that he will be spending his money only if the whole dispute will be over, to allow the other party, knowing of that reasonable expectation, to weasel around the deal by putting his own markings on the other person's check. . . .

Id. at 396.

It is apparent on reading the opinion of the Wisconsin Supreme Court in *Flambeau* that the most persuasive arguments were those premised on the public policies of encouraging informal settlement of disputes and fairness. The court was not impressed by Honeywell's argument that a debtor might be guilty of overreaching but nonetheless protected by the doctrine of accord and satisfaction. It pointed out that overreaching can be policed through the doctrine of good faith, that the parties in the case dealt at arm's length and that both understood the usual effect of commercial practices.[199] The utility of accord and satisfaction as a simple device for settling disputes without litigation and the fairness of requiring the creditor to accept the burdens of the offered accord if it wished to enjoy its fruits outweighed, in the eyes of the majority, the claim that the full-payment check gave an unfair advantage to the debtor.[200]

D. OTHER POST-CODE CASES

Since the adoption of the Code, a number of decisions have been reported which are based on the common law rule and fail to mention section 1-207.[201] It generally cannot be determined whether the failure to consider section 1-207 resulted from the failure of counsel to raise the issue,[202] the rejection of such an argument, the fact the underlying transaction was not Code-covered, or for some other reason.[203] The fact remains, however,

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199. 116 Wis. 2d at ____, 341 N.W.2d at 667.

200. *Id.*

201. *E.g.*, Vance v. Hammer, 105 Ariz. 317, 464 P.2d 340 (1970) (well-drilling contract); Quaintance Assoc., Inc. v. PLM, Inc., 95 Ill. App. 3d 818, 420 N.E.2d 567 (1981) (executive recruiting services); Cole Assoc., Inc. v. Holsman, 181 Ind. App. 431, 391 N.E.2d 1196 (1979) (construction subcontract); Ingraham Concrete Structures, Inc. v. Champion Shipyards, Inc., 423 So. 2d 752 (La. Ct. App. 1982) (site preparation contract); Eppling v. Jon-T Chems., Inc., 363 So. 2d 1263 (La. Ct. App. 1978) (realty appraisals); A.R. Guglielmo, Inc. v. Weber, 315 So. 2d 427 (La. Ct. App. 1975) (construction contract), *cert. denied,* 323 So. 2d 133 (1975); Charles X. Miller, Inc. v. Oak Builders, Inc., 306 So. 2d 449 (La. Ct. App. 1975) (construction contract); Graffam v. Geronda, 304 A.2d 76 (Me. 1973) (sale of oil); Air Power, Inc. v. Omega Equip. Corp., 54 Md. App. 534, 459 A.2d 1120 (Md. Ct. Spec. App. 1983) (court refused to consider issue because not raised below); Goes v. Feldman, 391 N.E.2d 943 (Mass. App. Ct. 1979) (landlord-tenant dispute); Dix v. Trigger Contractors, Inc., 337 So. 2d 694 (Miss. 1976) (agreement to move and reassemble drilling rig); Henderson v. Eagle Express Co., 483 S.W.2d 767 (Mo. Ct. App. 1972) (wage disputes); Growers Cattle Credit Corp. v. Swanson, 184 Neb. 612, 169 N.W.2d 692 (1969) (promissory notes); Swaner v. M.P. Smith Constr. Co., Inc., 526 S.W.2d 492 (Tenn. App. 1975) (construction contract). *But see* Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 39 U.C.C. REP. SERV. 1186 (Me. 1984) (section 1-207 does not alter common law rule); Milgram Food Stores, Inc. v. Gelco Corp., 35 U.C.C. REP. SERV. 31 (W.D. Mo. 1982) (holding that the Missouri courts would rule that § 1-207 does not alter common law rule).

202. *E.g.*, Air Power, Inc. v. Omega Equip. Corp., 54 Md. App. 534, 459 A.2d 1120, 1124 (1983).

203. In several cases, the courts have noted the issue but refused to rule on it. *See, e.g.*, Kelly v. Kowalsky, 186 Conn. 618, ____, 442 A.2d 1355, 1357, 33 U.C.C. REP. SERV. 801, 803 (1982) (court found no common law accord and satisfaction had occurred); Fritz v. Marantette, 404 Mich. 329, ____, 273 N.W.2d 425, 429, 25 U.C.C. REP. SERV. 625, 630 (1978) (determination reserved

that the common law rule of accord and satisfaction has been applied in a number of jurisdictions subsequent to the enactment of the Code.

V. CONCLUSION

As the cases construing section 1-207 now stand, the highest courts of New York and South Dakota have ruled that the provision affects the common law doctrine of accord and satisfaction.[204] The highest courts of Alaska,[205] Maine,[206] Vermont,[207] Wisconsin[208] and Wyoming[209] have, on the other hand, ruled that section 1-207 does not affect the common law doctrine of accord and satisfaction. Intermediate appellate courts in Arkansas,[210] California,[211] Colorado,[212] Georgia,[213] North Carolina,[214] New Jersey,[215] Oregon,[216] Texas[217] and Washington[218] have agreed. In Florida, there is division in the intermediate courts,[219] and in other states decisions continue to be based upon the common law doctrine without discussion of section 1-207.[220] In other words, the numbers alone seem to suggest that a consensus is emerging that the doctrine of accord and satisfaction has survived intact.

A court will not need to address the issue until a case presents

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pending further developments in case law and commentary); Kilander v. Blickle, 280 Or. 425, ____, 571 P.2d 503, 505, 23 U.C.C. REP. SERV. 16, 18 (1977) (en banc) (the creditor did not protest the full-payment condition before cashing the checks).

204. *See supra* notes 76-136 and accompanying text.

205. Air Van Lines, Inc. v. Buster, 673 P.2d 774, 779, 37 U.C.C. REP. SERV. 1454, 1456 (Alaska 1983).

206. Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 1011, 39 U.C.C. REP. SERV. 1186, 1189 (Me. 1984).

207. Gallagher Lumber Co. v. Shapiro, 137 Vt. 139, ____, 400 A.2d 984, 986 (1979).

208. Flambeau Prods. Corp. v. Honeywell Information Sys., Inc., 116 Wis. 95, ____, 341 N.W.2d 655, 662, 37 U.C.C. REP. SERV. 1441, 1450 (1984). *See supra* notes 177-200 and accompanying text.

209. Jahn v. Burns, 593 P.2d 828, 830, 26 U.C.C. REP. SERV. 257, 259 (Wyo. 1979). *See supra* notes 140-51 and accompanying text.

210. Pillow v. Thermogas Co. of Walnut Ridge, 6 Ark. App. 402, ____, 644 S.W.2d 292, 296, 35 U.C.C. REP. SERV. 1404, 1405 (1982).

211. Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, 61, 184 Cal. Rptr. 436, 439, 34 U.C.C. REP. SERV. 1, 3 (1982).

212. R.A. Reiter Constr., Inc. v. Wheatland Rural Elec. Ass'n, ____ Colo. App. ____, ____, 680 P.2d 1342, 1344, 38 U.C.C. REP. SERV. 420, 422 (1984).

213. American Food Purveyors, Inc. v. Lindsay Meats, Inc., 153 Ga. App. 383, ____, 265 S.E.2d 325, 327, 28 U.C.C. REP. SERV. 966, 969 (1980).

214. Brown v. Coastal Truckways, Inc., 44 N.C. App. 454, ____, 261 S.E.2d 266, 268, 28 U.C.C. REP. SERV. 3, 6 (1980).

215. Chancellor, Inc. v. Hamilton Appliance Co., 175 N.J. Super. 345, ____, 418 A.2d 1326, 1330, 30 U.C.C. REP. SERV. 12, 18 (1980).

216. Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc., 63 Or. App. 364, ____, 664 P.2d 419, 421, 36 U.C.C. REP. SERV. 1100, 1104 (1983).

217. Hixson v. Cox, 633 S.W.2d 330, 331, 39 U.C.C. REP. SERV. 783, 784 (Tex. Civ. App. 1982).

218. State Dep't of Fisheries v. J-Z Sales Corp., 25 Wash. App. 671, 682, 610 P.2d 390, 395-96, 28 U.C.C. REP. SERV. 1284, 1292 (1980).

219. *Compare* Miller v. Jung, 361 So. 2d 788, 789 (Fla. Dist. Ct. App. 1978) *with* Eder v. Yvette B. Gervey Interiors, Inc., 407 So. 2d 312, 314 (Fla. Dist. Ct. App. 1981).

220. *See supra,* notes 201-203 and accompanying text.

itself in which each of the common law elements is present: a bona fide dispute between the parties, an offer of payment now in full settlement of the dispute which is communicated to the other party, and that party's use of the proffered check of payment while seeking to reserve the right to claim more.[221] Only when these elements are present will a court be required to consider whether or not section 1-207 is relevant.

If the problem is raised, the analysis should be divided into two parts. The first issue is whether or not the Uniform Commercial Code applies to the problem at all. Although this issue may be resolved without discussion in cases where the underlying transaction was a sale of goods, this author believes the issue should be resolved by the utilization of analysis under article 3 of the Code.[222] Section 3-802 deals with the effect of the use of a check as payment and article 3 clearly applies to all checks. Most attempted accords involve the use of the full-payment check, and one uniform rule would be preferable. An analysis that results in one rule for some transactions and a different rule for other transactions would result in confusion at the expense of the least-informed.

Deciding that the Code does govern the effect of the full-payment check still leaves the critical issue to be determined: whether or not section 1-207 alters the common law rule. The language of the section refers to the original transaction between the parties. The comment addresses the effect of estoppel and waiver where a party makes demands under the original contract. The section is clearly applicable when demands are made under an existing agreement. It is designed to permit a party to continue to perform without having to fear that such continued performance, or receipt of less than the agreed performance, will operate as an estoppel or waiver.[223]

The section does not clearly apply, however, to offers of modification or settlement. An accord and satisfaction is a second contract which operates to settle disputes that have arisen.[224] The policy of the Code, as indicated by numerous other provisions, seems to be to facilitate settlement agreements by abandoning the pre-existing duty rule and permitting parties to freely modify

221. *See, e.g.*, Kelly v. Kowalsky, 186 Conn. 618, 442 A.2d 1355, 1357, 33 U.C.C. REP. SERV. 801, 803-04 (1982); Kilander v. Blickle Co., 280 Or. 425, ____, 571 P.2d 503, 504, 23 U.C.C. REP. SERV. 16, 17 (1977) (en banc).

222. *See supra* notes 67-75 and accompanying text.

223. *See, e.g.*, Shea-Kaiser-Lockheed-Healy v. Dep't of Water & Power, 73 Cal. App. 3d 679, ____, 140 Cal. Rptr. 884, 888, 22 U.C.C. REP. SERV. 607, 611 (1977) (gravel was delivered under protest after excessive demands were made under a supply contract).

224. *See supra* notes 71-73 and accompanying text.

existing contractual relations.[225] Nothing in the language of section 1-207 indicates that it was intended to be an exception to this policy. The history of the drafting of the Code seems to indicate that the drafters did not view the provision as affecting accord and satisfaction.

Finally, no reason or need to alter the common law rule of accord and satisfaction has been suggested. Some writers with whom this author has discussed the issue have indicated dissatisfaction with the common law rule. The New York Court of Appeals has expressed displeasure, a sense that the common law rule permits a debtor to take unfair advantage of the creditor.[226] This author believes the displeasure results from a failure to recognize the identity of a full-payment check as a useful and valuable settlement mechanism. Any overreaching by the debtor was resolved by the common law and can be resolved under the Code through the duty of good faith expressed in section 1-203. Contrary to the view of Professors White and Summers, an accord and satisfaction is merely a particular kind of settlement offer, and all settlement offers present the offeree with a dilemma — should I take what I can get now or hold out for more? One rule for a settlement offer embodied in a legend on a full-payment check and another rule for any other settlement offer seems incongruous, to say the least.[227]

In the absence of any clear indication that section 1-207 was designed to alter the common law rule, the better approach appears to be that the doctrine of accord and satisfaction survives intact. Thus our two issues are resolved by holding that the Uniform Commerical Code does apply to the transaction, through article 3, but that the Uniform Commercial Code does not alter the existing common law rule. The creditor who receives a full-payment check to settle a disputed account must decide whether to accept the money in hand or reject it and try to get more.

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225. *See supra* notes 50-54 and accompanying text.

226. *See* Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 66 N.Y.2d 321, ____, 488 N.E.2d 56, 59, 497 N.Y.S. 2d 310, 313, 41 U.C.C. REP. SERV. 1591, 1596 (1985).

227. *But see* Shanker, *The Folly of Full Settlement Checks — and a Declaration of Their Independence,* 90 COM. L.J. 7 (1985) (arguing that the use of checks should be confined to the transfer of credit and an accord and satisfaction should occur only if the offer is made outside the payment instrument itself).