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THE RISE AND FALL OF U.C.C. SECTION 1-207 AND THE FULL PAYMENT CHECK— CHECKMATE?

Paula G. Walter*

I. INTRODUCTION

The common-law doctrine of accord and satisfaction is in danger of losing its distinctive status as an efficient, informal, inexpensive and quick out-of-court means of resolving and settling disputes.¹

The accord and satisfaction doctrine is predicated on the assumption that when a bona fide or good faith disagreement as to an unliquidated claim arises between two individuals, an offer by one party² to

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1. For a discussion of the "conditional" or "full payment" check and the U.C.C. section 1-207 dilemma, see generally, J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* (2d ed. 1980); Burnham, *A Primer on Accord and Satisfaction*, 47 MONT. L. REV. 1 (1986); Carabello, *The Tender Trap: U.C.C. Section 1-207 and Its Applicability To An Attempted Accord and Satisfaction by Tendering a Check in a Dispute Arising From a Sale of Goods*, 11 SETON HALL L. REV. 445 (1981); Del Duca, *Handling "Full Payment" Checks*, 13 U.C.C. L.J. 195 (1981); Grosse & Goggin, *Accord and Satisfaction and the 1-207 Dilemma*, 89 COM. L.J. 537 (1984); Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L. J. 329 (1969); Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48 (1978); Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 BUFFALO L. REV. 539 (1969); Comment, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check?*, 11 CREIGHTON L. REV. 515 (1977); Note, *Contracts—Section 1-207 of the Uniform Commercial Code Not Intended to Apply to Doctrine of Accord and Satisfaction*, Jahn v. Burns, 593 P.2d 828 (Wyo. 1979), 15 LAND & WATER L. REV. 737 (1980); Comment, *Accord and Satisfaction—Release—Check Tendered in Full Payment of Liquidated Debt and Subsequently Endorsed Under Protest by Creditor Operates as a Written Release*, 1 MEM. ST. U.L. REV. 425 (1970); Comment, *Accord and Satisfaction Under Uniform Commercial Code Section 1-207: Scholl v. Tallman*, 38 OHIO ST. L.J. 921 (1977) [hereinafter Comment, *Accord and Satisfaction*]; Comment, *Rights, Fights, and Delights of U.C.C. 1-207: On the Reservation in the Land of Uniformity*, 15 SW. U.L. REV. 791 (1985); Note, *Commercial Transactions—Michigan Rejects UCC and Adopts Minority Common Law Standard for Conditional Check Accord and Satisfaction*, 26 WAYNE L. REV. 1067 (1980) [hereinafter Note, *Commercial Transactions*].

2. Usually the party is the debtor or the obligor in the contractual relationship.

settle the dispute is an accord, which, if accepted by the other party,³ constitutes a satisfaction.

The common law's all-or-nothing approach gave birth to the recognition that in some instances permitting a debtor to place the creditor in, what one commentator aptly termed, an "exquisite form of commercial torture"⁴ is both unwise and unreasonable. Those aware of the need to accommodate the businessman's cash-flow needs, while simultaneously preserving his ability to pursue his legal remedies within the court system, argue that adoption of section 1-207⁵ of the Uniform Commercial Code grants the businessman that precise avenue of redress. On the other hand, adversaries of this view contend that the drafters of section 1-207 never intended to have these consequences imparted to it. The case law reflects this muddle.

The crux of this controversy is whether such a unilateral attempt by the debtor to modify an existing agreement will be deemed a settlement of the parties' differences. In particular, should the tender of partial payment, in the form of a check,⁶ in an amount less than the full amount required under that contract, result in a discharge of the respective parties' obligations under that contract without further liability to either side?

Under the classic common-law doctrine of accord and satisfaction, the creditor-payee had two options available if he deemed the proffered settlement inappropriate. He could either return the check to the debtor-drawer or he could choose to negotiate the check. If the creditor elected the latter course of action, however, and obtained immediate use of the funds, he simultaneously relinquished any successful legal claim to the balance.

The common law responded to the creditor-payee's choice to negotiate the check after obliterating the debtor-drawer's conditional "full payment" notation, or after endorsing the check with his own restrictive conditions, by imputing to the creditor an objective intention to accept the offer of settlement. At common law, the creditor's true subjective intention was of little consequence. As Chief Judge Cardozo wrote in

3. Usually the party is the creditor or the obligee in the contractual relationship.

4. J. WHITE & R. SUMMERS, *supra* note 1, §§ 13-21.

5. Section 1-207 of the Uniform Commercial Code provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in 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." U.C.C. § 1-207 (1978).

6. There is no one universally accepted term to describe this check. Consequently, the terms "conditional check" or "full payment check" will be used interchangeably to refer to this check.

*Hudson v. Yonkers Fruit Co.*⁷: "Protest will . . . be unavailing if the money is retained. What is said is overridden by what is done, and assent is imputed as an inference of law."⁸ Actions speak louder and more clearly than words, and the common law treated the author of language of protest on a "full payment" check accordingly. The question is, has the Uniform Commercial Code abrogated the common law?

Immediately after the adoption of section 1-207, one scholar⁹ concluded that the majority viewpoint favored the position that the common-law doctrine had indeed been abrogated. However, in the aftermath of several decisions,¹⁰ the academic community¹¹ recognized that in what might originally have been an overlooked section of the Code resided potentially explosive consequences to informal settlements as embodied in the common-law doctrine of accord and satisfaction. When did the majority position turn into the minority position? Some of the credit for the about-face can be directly attributed to scholarly articles.¹²

Another observable trend is that of the "bandwagon effect." Where a greater number of jurisdictions have adopted a particular view, the courts of sister jurisdictions assume that the "majority view" is the "better view," irrespective of the merits of that view.¹³ One author¹⁴ characterized this viewpoint as one of judicial timidity wherein, "[i]n view of this limited precedent and the lack of agreement among legal scholars, we withhold adopting a particular judicial interpretation of section 1-207 at this time."¹⁵

The purpose of this Article is to determine to what extent, if any, section 1-207 has altered the common-law doctrine of accord and satisfaction. Is there a national law or a state-by-state law? In addition, an attempt will be made to explore and define the parameters of section 1-207. Does the section apply to non-Code-covered transactions as well as

7. 258 N.Y. 168, 179 N.E. 373 (1932).

8. *Id.* at 171, 179 N.E. at 374.

9. Del Duca, *supra* note 1.

10. *Hanna v. Perkins*, 2 U.C.C. Rep. Serv. (Callaghan) 1044 (Westchester [N.Y.] County Court, 1965); *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Scholl v. Tallman*, 247 N.W.2d 490 (S.D. 1976).

11. See *Hawkland*, *supra* note 1; *Rosenthal*, *supra* note 1.

12. See *supra* note 8.

13. *R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass'n*, 680 P.2d 1342, 1344 (Colo. 1984). "The view, which has been adopted by the majority of jurisdictions and which we hereby adopt, is that section 4-1-207 does not alter the well established law of accord and satisfaction [cites Alabama, Florida, Georgia, Michigan, New Jersey, Washington & Wyoming cases]". *Id.*

14. Note, *Commercial Transactions*, *supra* note 1.

15. *Fritz v. Marantette*, 404 Mich. 329, 338, 273 N.W.2d 425, 429 (1978).

to Code-covered transactions? Does the usage of a check always transform the underlying obligation into a Code-covered transaction? Is there a state-by-state distinction in this matter?

In the recent decision of the New York Court of Appeals in *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*,¹⁶ the highest court in that state focused its attention on the essential nature of section 1-207. There the court held:

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. . . . A fortiori, if liberally construed, as the Code's provisions are explicitly intended to be, it seems clear that the reach of § 1-207 is sufficiently extensive to alter the doctrine of accord and satisfaction by permitting a creditor to reserve his rights though accepting the debtor's check.¹⁷

However, the conflicting case law within New York state and the inconsistent decisions of its sister jurisdictions do not provide the certainty, finality or predictability which is of critical importance to businessmen. The purpose of this Article is to provide guidance in approaching this crucial issue.

II. THE COMMON-LAW DOCTRINE OF ACCORD AND SATISFACTION

Contract law permits the rescission or variation of a contract by subsequent agreement.¹⁸ The object of a rescission is to release the parties from the contract as drawn. When the parties to a contract still have outstanding rights against each other, that is, where the contract is executory, the subsequent agreement to rescind the original contract is supported by consideration.¹⁹ However, when the contract is wholly executed by one party, the subsequent agreement to release the other party to the contract from performing his obligations is not supported by consideration because the obligor does not give up anything by agreeing to rescind. Therefore, separate and valid consideration must be found, or the subsequent agreement will not be a binding contract. The question

16. 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310 (1985).

17. *Id.* at 327, 488 N.E.2d at 59-60, 497 N.Y.S.2d at 313-14.

18. *San Gabriel Valley Ready-Mix v. Casillas*, 142 Cal. App. 2d 137, 298 P.2d 76 (1956); *Currie v. Trammel*, 289 S.W. 736 (Tex. Civ. App. 1926); *Cooke v. McAdoo*, 85 N.J.L. 692, 90 A. 302 (1914).

19. *Pinnel's Case*, 77 Eng. Rep. 237, 237 (1602) ("but the gift of a horse, hawk, or robe, etc. in satisfaction is good."). Such analysis could not be said to apply to the fully executed contract since there would be no consideration for the initial cancellation. A. CORBIN, *CONTRACTS* § 1284 (1962).

arises whether a creditor's acceptance of a sum of money tendered as "full payment" which is less than the amount owed under the original contract is supported by sufficient consideration.²⁰

A. *Liquidated Claims Versus Unliquidated Claims*

A further distinction has arisen in the case law to clarify those categories of claims where subsequent agreements are supported by consideration and, therefore, enforceable. Where the subject matter of the subsequent agreement is a liquidated claim—one with regard to which there is no dispute by the contracting parties—a subsequent promise by a party to pay less than the amount due under the original agreement is not supported by consideration because that party is already under a pre-existing legal duty to pay that amount.²¹ Conversely, if the subject matter of the subsequent contract relates to an unliquidated claim—a claim that one of the parties is honestly disputing²²—a settlement of that dispute provides the necessary ingredient of consideration. In this situation, an accord and satisfaction has taken place. The accord²³ consists in the agreement and the satisfaction²⁴ in the execution of that agreement. An accord is a contract under which an obligee-creditor promises to accept a stated performance in satisfaction of the obligor's-debtor's existing duty. Performance of the accord discharges the original duty.

B. *Case Law*

An accord and satisfaction occurs even where a creditor simultaneously cashes a check and rejects the condition upon which the check is tendered.²⁵ "The actual subjective intent of the creditor does not matter[;] if the creditor cashes a 'full payment check' the creditor is deemed

20. The debtor (offeror) makes it clear to the creditor (offeree) that he is making an offer by way of tender of a check. This offer is not negotiable but must be accepted as all other offers, that is, on its terms.

21. *Pinnel's Case*, 77 Eng. Rep. 237 (1602); *Foakes v. Beer*, 9 App. Cas. 605 (H.L. 1884); *Dickinson v. Fletcher*, 181 Or. 316, 182 P.2d 371 (1947).

22. The Restatement (Second) of Contracts has defined the term "bona fide" to mean honesty. *Merriman v. Thomas*, 133 Me. 326, 177 A. 615 (1935).

23. The Restatement (Second) of Contracts, section 281, comment a, states that "[a]n accord is a contract by which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty. . . ." RESTATEMENT (SECOND) OF CONTRACTS § 281 comment a (1981).

24. Section 35 of the Restatement (Second) of Contracts states that "it is the essence of an accord that the original duty is not satisfied until the accord is performed . . ." *Id.*

25. *Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc.*, 63 Or. App. 364, 664 P.2d 419 (1983); *Wilcox Press v. Beauty Fashion, Inc.*, 73 A.D.2d 988, 423 N.Y.S.2d 564 (1980). *But cf.* *Kroulee Corp. v. A. Klein & Co.*, 103 Misc. 2d 441, 426 N.Y.S.2d 206 (1980); *Kilander v. Blickle Co.*, 280 Or. 425, 571 P.2d 503 (1977).

to have accepted the debtor's condition of tender."²⁶

In some jurisdictions, where a creditor merely scratches out or erases the notation on the back of the check without expressly reserving any rights to claim the balance from the debtor, that obliteration is not sufficient to prevent an accord and satisfaction.²⁷ Moreover, in one case, the creditor scratched out the debtor's condition on the check and endorsed the check, writing the words "without recourse." This endorsement was held not to be an explicit reservation of rights.²⁸ Where the creditor obliterates the debtor's conditions on the check, cashes the check and thereafter sends a letter to the debtor purporting to reserve his rights, that too will fail to reserve the creditor's rights since the debtor will not have had an opportunity to consider the options of accepting the creditor's decision or stopping payment.²⁹

In one case, however, the Appellate Division of the Supreme Court of New York held section 1-207 to be applicable where the checks offered by the debtor and cashed by the creditor had neither been conditioned by the debtor in any way nor restrictively endorsed by the creditor.³⁰ The debtor urged for purposes of finding an accord that section 1-207 was applicable only to an accord and satisfaction by way of a "conditional check." The court was not persuaded by this interpretation and stated that "there is nothing in the language of the Code imposing such a limited application to U.C.C. section 1-207. We are required liberally to construe and apply the provisions of the U.C.C. to promote [these] underlying purposes and policies (U.C.C. section 1-102)."³¹ Similarly, an

26. *Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc.*, 63 Or. App. 364, 664 P.2d 419 (1983).

27. *In re Zerodec Mega Corp.*, 47 Bankr. 304 (Bankr. E.D. Pa.), *aff'd in part and rev'd in part*, 60 Bankr. 884 (E.D. Pa. 1985), *on remand*, 59 Bankr. 272 (Bankr. E.D. Pa. 1986). For examples of jurisdictions where decisions are made without considering the interplay between section 1-207 and the common law, see *Field Lumber Com. v. Petty*, 9 Wash. App. 378, 512 P.2d 764 (1973); *Evans v. Columbia Int'l Corp.*, 9 Wash. App. 955, 478 P.2d 785 (1970).

28. *Bivins v. White Dairy*, 378 So. 2d 1122, 1124 (Ala. App. 1979), *cert. denied sub nom. Ex parte Bivins*, 378 So. 2d 1125 (Ala. 1980).

The term "explicit," as used in § 7-1-207, means that which is so clearly stated or distinctively set forth that there is no doubt as to its meaning. . . . [T]he words "without recourse" [do] not indicate an explicit reservation of rights as required by § 7-1-207.

In fact, the words "without recourse" are held to express a declaration of the absence of responsibility.

Id. at 1123-24.

29. *Air Van Lines, Inc. v. Buster*, 673 P.2d 774, 779 (Alaska 1983).

30. *Continental Information Sys. Corp. v. Mutual Life Ins. Co.*, 77 A.D.2d 316, 321, 432 N.Y.S.2d 952, 955 (1980).

31. *Id.* at 320, 432 N.Y.S.2d at 955.

appellate court in Texas³² held that not reserving rights in accordance with section 1-207 did not constitute a waiver of these rights because "the statute provides machinery for reserving contractual rights, but failure to do so does not compromise a party's position in later proceedings under the Code. The statute is permissive rather than mandatory."³³

Where the creditor has retained the debtor's check bearing a legend of full payment, the courts have held that mere retention in the creditor's possession of that check without any additional act of negotiation constitutes an accord and satisfaction.³⁴ On the other hand, where the creditor retains the check and notifies the debtor that the checks are not being accepted on the tendered terms, courts have held that such notice reserves the creditor's right to recover the balance.³⁵

One Florida case had suggested at the trial level that the creditor-payee must notify the debtor-drawer of his reservation of rights prior to negotiating the check. The court of appeals, however, rejected this argument, stating that "[t]o require actual notification prior to negotiation would eviscerate the purpose of the section [A] Florida statute . . . in this instance frees up or minimizes impediments to the flow of commercial paper while reserving the rights of the immediate parties."³⁶ Moreover, if a creditor-payee causes a check to be certified, rather than cashing the check, the court will deem the certification to be an acceptance or a satisfaction of the accord. This results because the effect of a bank's certification of a check is the cashing of funds: in both situations the funds are removed from the debtor's control.³⁷

In a case where a creditor deposited the funds with the county clerk without benefitting himself, the court held that since the funds had effectively been removed from the debtor, there was an acceptance and a consequent satisfaction.³⁸ In a different case, however, a check was

32. *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743 (Tex. Civ. App. 1977). For the opposite judicial viewpoint, see *Shea-Kaiser-Lockheed-Healy v. Department of Water and Power*, 73 Cal. App. 3d 679, 140 Cal. Rptr. 884 (1977). Here, only the seller's express reservation of rights in view of the buyer's breach preserved the seller's rights to contest the breach despite his continued delivery under the contract. Failure to have made this explicit expression while continuing to make deliveries, the court held, would have been a fatal course of action for the seller. *Id.* at 690, 140 Cal. Rptr. at 890.

33. *Jon-T Farms*, 554 S.W.2d at 747.

34. *See, e.g., Miller v. Montgomery*, 77 N.M. 766, 768, 427 P.2d 275, 276 (1967).

35. *See, e.g., Kelly v. Kowalsky*, 186 Conn. 618, 620, 442 A.2d 1355, 1356 (1982).

36. *Miller v. Jung*, 361 So. 2d 788, 789 (Fla. Dist. Ct. App. 1978).

37. *Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co.*, 94 Misc. 2d 15, 19, 403 N.Y.S.2d 1012, 1015 (1978).

38. *Department of Fisheries v. J-Z Sales Corp.*, 25 Wash. App. 671, 680, 610 P.2d 390, 395 (1980).

deposited by the creditor's mailroom in accordance with the creditor's internal procedures before that check could come to the attention of an authorized representative of the creditor. In that case, the court held that a waiver of section 1-207 could not take place until a responsible individual in the creditor's organization received notice of the conditional check.³⁹ The court further held that if an explicit reservation of rights is sent by letter on the first business day following such notification, the requirements of the section have been met. In another case, where the creditor did retain the proceeds of a check after it was cashed, but immediately sent a letter after learning of the check, the court held the accompanying letter to be "a proper and explicit reservation of rights within the purview of section [1-207]." The court based its holding on the fact that the debtor had been put on notice by the wording of the letter.⁴⁰

1. *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*⁴¹

The most recent appellate level decision on the section 1-207 dilemma comes from the state of New York. The plaintiff, Horn Waterproofing, brought an action in which it claimed a right to the balance due for labor, services and materials furnished to the defendant, Bushwick Iron Co. The parties had entered into an oral agreement whereby the plaintiff agreed to perform certain repairs to the roof of the defendant's building. The litigants conceded that under their contract a new roof was to be installed if the initial repair job proved inadequate. Two working days after the initial repairs had been completed, the plaintiff in-

39. *Slavenburg Corp. v. Kinli Corp.*, 36 U.C.C. Rep. (Callaghan) 8 (E.D. Pa. 1983). The court, in an opinion authored by Judge Newcomer, stated:

I note that the statute makes no requirement that the reservation of rights be done in any particular manner, and that the letter sent by plaintiff's Philadelphia counsel probably gave defendant better and speedier notice of plaintiff's refusal to compromise its claim than would mere obliteration of the conditional endorsement or the writing of "without prejudice" on the check prior to deposit.

Id. at 13.

40. *Flambeau Prods. Corp. v. Honeywell Information Sys., Inc.*, 111 Wis. 2d 317, 324, 330 N.W.2d 228, 231 (Wis. Ct. App. 1983), *rev'd*, 116 Wis. 2d 95, 341 N.W.2d 655 (Wis. 1984). The court, in an opinion by Judge Cane, held:

Although Honeywell retained the proceeds after the check was cashed, it sent a letter to Flambeau immediately after it learned of the check Although the usual method of reserving rights is for the payee to endorse the conditional check with words indicating protest, Northern Trust had already negotiated the check without authorization when Honeywell, the payee, learned of the transaction. A reservation of rights via letter was the only route available to Honeywell, which it immediately pursued. Honeywell therefore explicitly reserved its rights under sec. 401.207, and its retention of the check proceeds did not effect an accord and satisfaction.

Id. at 324-25, 330 N.W.2d at 231.

41. 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310 (1985).

formed the defendant that the entire roof needed replacement and submitted an invoice for \$1241.92 which allegedly represented the value of those two working days. The defendant disputed that invoice, whereupon the plaintiff revised the amount downward and submitted a second invoice for \$1081.00. The defendant also rejected this second invoice, but this time tendered a \$500.00 check with a restrictive endorsement.⁴² Before negotiating this check, the plaintiff endorsed it with the notation that the check's presentation was made "under protest."

This case raised two issues: first, whether section 1-207 applied to service contracts specifically and to non-Code-covered transactions generally; and second, whether the common-law doctrine of accord and satisfaction was altered by section 1-207. The court of appeals laid to rest the earlier case law distinction between Code and non-Code-covered transactions⁴³ and held that section 1-207 applies to all situations where

42. The restrictive endorsement in *Horn Waterproofing* read as follows: "This check is accepted in full payment, settlement, satisfaction, release and discharge of any and all claims and/or demands of whatsoever kind and nature." *Id.* at 322, 488 N.E.2d at 57, 497 N.Y.S.2d at 311.

43. In New York, the case law was divided according to the sales-services dichotomy. Two decisions, both arising from the same judicial level (the Appellate Division of the Supreme Court of New York), but from different departments, reached opposite conclusions.

In *Ayer v. The Sky Club, Inc.*, 70 A.D.2d 863, 418 N.Y.S.2d 57 (1979), the plaintiff, Ayer, appealed from dismissal of summary judgment on an action for the balance due for services performed by the defendant club for a party given at defendant's premises. The court held that section 1-207 applies to a service contract, stating that "[w]e perceive the transaction underlying the billing dispute between the parties to be one in which, while occurring in an area to which the statute Uniform Commercial Code might not expressly apply, nevertheless, the rule of the statute should be applied." *Id.* at 864, 418 N.Y.S.2d at 58.

By contrast, *Geelan Mechanical Corp. v. Dember Constr. Corp.*, 97 A.D.2d 810, 468 N.Y.S.2d 68 (1983), dealt with a dispute about the amount due for "work and extras" on a plumbing contract. A legal issue arose as to whether an endorsement by the debtor, Dember Construction Corp., on the face of the check bearing the notation "Accepted in Full & Final Payment on all Contract extras - C.O.'s etc." which was negotiated by the plaintiff, Geelan Mechanical Corp., with the restrictive endorsement "subject to any claims by Geelan Mechanical Corp. against Dember Construction Corp.," could prevent the application of section 1-207. The court held *per curiam* that section 1-207 did not apply. The court stated:

Under New York law it is therefore almost beyond dispute that this contract—in which barely any mention is made of "goods" to be "sold," while there is exhaustive attention paid to the work to be performed—is not covered by the Uniform Commercial Code. We are cognizant of the fact that in *Ayer v. Sky Club*, the Appellate Division, First Department, held that section 1-207 of the Uniform Commercial Code should apply in a case involving a dispute over a bill to plaintiff for a party given at defendant's premises, despite that court's statement that the Uniform Commercial Code might not expressly apply to the underlying transaction. However, in view of the clear holding of the Court of Appeals in *Milau*, it is our opinion that the provisions of the Uniform Commercial Code should not be held to govern this standard form construction subcontract.

Id. at 811, 468 N.Y.S.2d at 681 (emphasis added) (citation omitted).

In *Aguiar v. Harper & Row Publishers, Inc.*, 114 Misc. 2d 828, 452 N.Y.S.2d 519 (1982),

a check has been used irrespective of the underlying transaction. Through use of the check, section 1-207 came to govern the result of the case.⁴⁴ The court of appeals further held that "[w]e are persuaded, how-

the court decided a dispute over royalties to be paid to plaintiff, Aguiar, for reproduction rights to photographs. The court held that section 1-207 applies, stating:

It is this Court's determination that the facts in this case constitute the type of commercial transaction contemplated by the men and women who drafted the U.C.C. provisions, and that it is certainly one of those "*vast number of similar situations*" to which the reasoning of the Code should be applied

. . . This Court finds that the business conducted between Mr. Aguiar and Harper & Row was *not* one of those situations to which the U.C.C. *clearly* does not apply, and, therefore, this court must deny the defendant's motion for summary judgment.

Id. at 833, 452 N.Y.S.2d at 523 (emphasis added).

In *Wm. McCaffery, Inc. v. Cointreau America, Inc.*, 36 U.C.C. Rep. (Callaghan) 1108 (N.Y. Sup. Ct. 1983), the court held that "[s]ervice contracts, such as the one at bar, are clearly not governed by the U.C.C." *Id.* at 1109.

At the lower New York court levels, the case law is similarly divided. In *Blottner, Derico, Weiss & Hoffman, P.C. v. Fier*, 101 Misc. 2d 371, 420 N.Y.S.2d 997 (1979), the court considered the issue of whether section 1-207 applied to a conditional check tendered by the defendant Fier for legal services rendered which plaintiff negotiated while purportedly attempting to reserve their rights to claim the balance. The court held:

The bill was based upon legal services rendered which, from its very nature, was clearly unliquidated. . . .

. . . The Uniform Commercial Code, however, is not applicable to the rendition of services. . . .

While this statute may even give guidance to the court in a situation where its application is not clear (*cf. Ayer v. The Sky Club, Inc.*), it cannot, in an area where it 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.

Id. at 373-74, 420 N.Y.S.2d at 1002.

In *United States v. Consolidated Edison Co.*, 590 F. Supp. 266 (S.D.N.Y. 1984), the court stated that "[i]n New York, electricity is not considered 'goods' and the U.C.C. therefore is not directly applicable to contracts involving the provision of electricity. However, the New York courts have drawn upon the U.C.C. reservation of rights provision in areas to which the Code does not expressly apply." *Id.* at 269 (footnote omitted).

44. *Horn Waterproofing*, 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310. The court stated:

The provision [section 1-207] is set forth in the introductory article 1 Presumably, section 1-207, as with other provisions in the introductory article, is to apply to any commercial transaction within the reach of one of the substantive articles—i.e., to any "Code-covered" transaction There is simply no language in section 1-207 expressing or intimating a more restrictive intention to limit its application to specific kinds of transactions particular to one of the articles, or sections, of the Code. . . . Rather, the nonlimiting language of section 1-207 and its placement in the Code with the other generally applicable provisions of article 1 is persuasive that the section is, indeed, applicable to all commercial transactions fairly considered to be "Code-covered". . . .

. . . Whether the underlying contract between the parties be for the purchase of goods, chattel paper or personal services, the use of a negotiable instrument for the purpose of payment or attempted satisfaction of a contract debt is explicitly and specifically regulated by the provisions of article 3 and, therefore, undeniably a Code-covered transaction.

ever, that the common law was changed with the adoption of section 1-207 pursuant to which a fairer rule now prevails."⁴⁵ The court, evidencing its familiarity with the section 1-207 debate, cited the relevant case law on point in a footnote. The court also cited scholarly literature and comments.⁴⁶ The court discussed the two polarized positions represented in the academic literature.

On the one hand is the view typified by Corbin:

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 checks. There is no reason why § 1-207 should be interpreted as being an exception to the basic duty of good faith, when it is possible to interpret the two sections consistently.⁴⁷

On the other hand is the view which finds that receipt of a full payment check by a good faith creditor creates a cruel dilemma for that creditor.⁴⁸ This view, in keeping with the intention of the Code drafters to make the common law more liberal in commercial transactions, is that section 1-207 should be viewed as abrogating the common law. "Offering a check for less than the contract amount, but 'in full settlement' inflicts an exquisite form of commercial torture on the payee."⁴⁹ This is especially true since section 1-207 can be literally construed to lend itself to such an interpretation, something which even the critics of this view in the academic community concede.⁵⁰ Furthermore, if section 1-207 is in-

Id. at 329-30, 488 N.E.2d at 61, 497 N.Y.S.2d at 315.

45. *Id.* at 327, 488 N.E.2d at 61, 497 N.Y.S.2d at 313.

46. The opinion quotes Dean Rosenthal's article extensively. *See* Rosenthal, *supra* note 1.

47. 6 A. CORBIN, CORBIN ON CONTRACTS § 1279, at 473 (2d ed. Supp. 1984).

48. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 13-21, at 544-47 (2d ed. 1980).

49. *Id.* at 544.

50. Most notably, Rosenthal stated:

Article three ("Commercial Paper"), however, is a special case. Does the fact that a check is used as the device to effect a settlement in itself bring the transaction within the Code (and therefore make section 1-207 arguably applicable) even if the underlying transaction was one not otherwise covered by the Code? Article three contains no scope provision analogous to the "transactions in goods" language in Section 2-102.

....
[I]t seems fairly clear that if such a check is tendered in settlement, the transaction must be regarded as being within article three, and if section 1-207 is otherwise relevant its application cannot be avoided by showing either that article one was not meant to be applied to non-Code transactions or that the underlying obligation did not arise out of one of the other substantive articles of the Code.

Rosenthal, *supra* note 1, at 70.

tended to serve as the "flexible adjustment machinery" for the simplification, clarification, modernization and continued expansion of commercial practices, then that section must mark the death knell of the common-law doctrine of accord and satisfaction.

The *Horn Waterproofing* court supported this position by incorporating into its decision the Report of the State of New York Commission on Uniform State Laws, which specifically addressed the issue of accord and satisfaction and took the position that the common-law doctrine had been altered. That report stated that "[t]he 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."⁵¹ The court held that this report demonstrated the legislature's intent to change the common-law rule of accord and satisfaction. That was the *ratio decidendi* of the case.

2. Early case law subsequent to the enactment of section 1-207

One of the first cases to rule on section 1-207 was the New York case of *Hanna v. Perkins*.⁵² There, the defendant, on receipt of the plaintiff's bill for labor performed and material furnished, deducted an amount for property damages he sustained, allegedly from the plaintiff's negligence.⁵³ The defendant did not dispute the bill, and this led the court to hold that:

The check sent and endorsed by defendant attempts to compromise a liquidated amount claimed by plaintiff against defendant. . . . Where there is no bona fide dispute between the parties as to the amount due, payment of a lesser sum than the amount demanded will not operate as an accord and satisfaction.

. . . There can be no accord and satisfaction where there was no dispute.⁵⁴

51. REPORT OF THE COMMISSION ON UNIFORM STATE LAWS TO THE LEGISLATURE OF THE STATE OF NEW YORK 19-20 (1961).

52. 2 U.C.C. Rep. Serv. (Callaghan) 1044, 1044 (1965).

53. *Id.* Defendant moved for summary judgment based on his common law defense of accord and satisfaction. Plaintiff calculated that between July and October 1964, a balance of \$1204.90 was due for services performed and materials furnished to defendant. When defendant was presented with the bill, he deducted \$575 for property damages and tendered a conditional check to plaintiff with the endorsement on the back of the check, "In full for labor and material to date." Plaintiff negotiated the partial-payment check with the notation "Deposited under protest." *Id.* Nowhere in the case are there facts either showing that the defendant disputed the plaintiff's claim, or setting forth precisely how the alleged property damages occurred.

54. *Id.* at 1045 (citations omitted).

Therefore, the court held that the restrictive endorsement on the check did not create an accord and satisfaction. In keeping with this holding, the court found that, notwithstanding the lack of a bona fide dispute,⁵⁵ the adoption of section 1-207 and the remarks of the official commentator compelled the holding that the plaintiff had successfully reserved his rights to collect the balance due. This case appears to stand for the twin propositions that section 1-207 overruled the common-law doctrine of accord and satisfaction and that section 1-207 applies to liquidated as well as unliquidated claims.

The next case on point was decided by the Court of Appeals of North Carolina. As in the earlier New York case of *Hanna v. Perkins*,⁵⁶ *Baillie Lumber Co. v. Kincaid Carolina Corp.*⁵⁷ involved a liquidated claim since no controversy arose over the quality, quantity or price of certain lumber which was the subject of the contract in question.⁵⁸ The plaintiff, Baillie Lumber, cashed checks containing the restrictive endorsement "with reservation of all our rights." Baillie Lumber subsequently demanded full payment of the balance due, but the defendant,

55. The court goes to great lengths to establish that the nature of the claim was liquidated, since there was no "genuine, valid disputed claim," and "defendant does not dispute plaintiff's claim, but urges ambiguously that plaintiff was negligent and damaged to an extent (not genuinely shown) personal property of the defendant." *Id.*

56. 2 U.C.C. Rep. Serv. (Callaghan) 1044.

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

58. *Id.* at 344, 167 S.E.2d at 87. The plaintiff, Baillie Lumber company, a lumber distributor, sued the defendant, Kincaid Carolina Corporation, a furniture manufacturer, for the balance due on lumber sold and delivered. Defendant conceded that the claim was not disputed and that the contract price was \$2447.61, the amount plaintiff demanded. The defendant was faced with financial difficulties and through its attorneys wrote to its creditors. The attorney enclosed a financial statement and offered the creditors a 35 percent settlement. The plaintiff, by letter, agreed to the offer. The letter contained the following:

Provided that such letter and such Statement of Financial Position together contain all of the relevant [sic] information which is needed to be furnished to enable us, as a creditor of the Kincaid Carolina Corporation, to determine the action to be taken on the proposal therein made to creditors and provided that payment is made to us on or before September 20, 1967, we agree to accept 35% of our account in full settlement.

Id. at 345, 167 S.E.2d at 87.

The defendant did not meet the deadline of September 20, 1967 but instead mailed two separate checks dated February 27, 1968 and April 12, 1968. The notations on the face of the checks respectively read, "[f]irst instalment [sic] of agreed settlement" and "[f]inal instalment [sic] of the agreed settlement." *Id.* at 345, 167 S.E.2d at 87-88. The plaintiff, in each case, negotiated the checks with the typed-in endorsement on the back of the checks reading, "[w]ith reservation of all our rights." *Id.* at 345, 167 S.E.2d at 88. Payment of \$856.66 was made, leaving a balance of \$1590.55 which plaintiff claimed was still due. Defendant, in response, argued that plaintiff had agreed on the settlement, and in any event by accepting the payment of a lesser sum, by cashing and keeping the proceeds of the two checks, an accord and satisfaction had resulted with the consequence of a full and complete discharge. Plaintiff argued that section 1-207 of the Uniform Commercial Code applied to this situation.

Kincaid Carolina Corporation, refused to pay on the ground that there had been an accord and satisfaction. As in *Hanna*, the issue in *Baillie* was whether an endorsement of a check, with knowledge of a dispute as to the amount due, constituted an acceptance in writing of the condition on the check. The court held that the enactment of section 1-207 precluded an accord and satisfaction, even as to the liquidated amount owed: "We think that the provisions of the Uniform Commercial Code are applicable to the giving and receiving of the checks in this case."⁵⁹ Commentators who wish to minimize the significance of the case point to the fact that the Code only became effective after the transaction between the parties was consummated. Therefore, they argue, this discussion was merely dictum.⁶⁰

The next case on point, *Scholl v. Tallman*,⁶¹ came from the Supreme Court of South Dakota. There, the plaintiff demanded payment for the balance due on labor and materials furnished under a construction contract.⁶² The defendants disputed the figure claiming that the appropriate credit for cash payments had not been made and submitted a check for a lesser sum which reflected this credit.

The plaintiff cashed the check only after noting on the check that "restriction of payment in full [is] refused." The court held that a conditional endorsement, particularly an explicit reservation of rights on a check regarding a disputed and unliquidated claim, constituted an explicit reservation under section 1-207 sufficient to override the doctrine of accord and satisfaction.

59. *Id.*

60. The U.C.C. became effective in the State of North Carolina at midnight on June 30, 1967. Although it is true that the goods were sold and delivered prior to that date, the checks tendered in settlement were made after that date, in February 1968 and April 1968. *Id.* at 344-45, 167 S.E.2d at 87.

61. 247 N.W.2d 490 (S.D. 1976).

62. The plaintiff, Scholl, had performed some construction work for the defendants, Mr. and Mrs. Tallman, in the calendar year 1971. The plaintiff claimed the outstanding balance of \$2077.37 which the defendants disputed. Defendants submitted a \$500.00 check with the words "Wesley Scholl Settlement in Full for all Labor & Materials to Date" typed on the back of the check. *Id.* at 491. Plaintiff cashed the check after scratching out the endorsement of the defendants and by writing the words "Restriction of payment in full refused. \$1,826.65 remains due & payable." *Id.* On May 5, 1976, at trial, defendant produced two cancelled checks in the amount of \$850.00 which had not been reflected in plaintiff's books. Upon production of these checks, plaintiff moved for a continuance to set his records straight and to determine exactly the outstanding amount owed. Defendants, however, testified under oath that they had also made additional payments. The plaintiff conceded that he had received some cash payment, but, he testified that he was unsure as to the amounts and the dates of these cash payments. When the trial resumed, plaintiff revised downward the outstanding amount due to \$907.29. The judge held for the defendants based on their common-law defense of accord and satisfaction. *Id.* at 492-93.

Until this decision, only two cases on this issue could be found. A persuasive argument could be made that both *Hanna v. Perkins* and *Baillie Lumber* dealt with section 1-207 only by way of dicta and thus had no binding effect. In 1976, however, the court in *Scholl* dealt directly with the issue for the first time, finding that section 1-207 overrode the doctrine of accord and satisfaction. The court specifically rejected the countervailing arguments in favor of retaining the common-law doctrine.⁶³ However, later decisions have criticized the *Scholl* court, noting that South Dakota has always followed the minority view on this issue.⁶⁴

Certainly, it would have appeared that the majority view was that section 1-207 tolled the death knell for the accord and satisfaction doctrine. What factors, then, led to the reversal of this opinion to the point that these cases now represent the minority view?

Courts in those jurisdictions which determined that section 1-207 of the Uniform Commercial Code does not abrogate the common-law doctrine of accord and satisfaction have adopted at least five lines of reasoning.

a. overlap of section 1-207 and section 3-802(3)

Dean Rosenthal,⁶⁵ in an examination of the legislative history of section 1-207, noted the curiosity in the apparent overlap between two identical sections, namely sections 1-207⁶⁶ and 3-802(3),⁶⁷ in the earliest versions of the Code. By the 1956 version of the Code, however, section 3-802(3) had been deleted. Moreover, during the four-year period that the two sections had co-existed, these sections did not refer to one another. Dean Rosenthal believed that the drafters could not have in-

63. *Id.*

64. *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979). The court stated:

In only one of [the cases previously cited by plaintiff] was the reservation of rights section of the Uniform Commercial Code . . . determinative, and in that case the court noted the establishment by statute in South Dakota of a minority position with reference to accord and satisfaction before the adoption of the Uniform Commercial Code.

Id. at 831 (footnote omitted). See Note, *Commercial Transactions*, *supra* note 1; see also Comment, *Accord and Satisfaction*, *supra* note 1.

65. See Rosenthal, *supra* note 1, at 58-61.

66. Section 1-207 Uniform Commercial Code provides that "[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."

67. Section 3-802(3) Uniform Commercial Code, as it appeared in its last (1952) version provides that "[w]here 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."

tended these two distinct sections to cover the identical legal point. Moreover, Dean Rosenthal argued that when section 3-802(3) was deleted in the 1956 Uniform Commercial Code draft, the drafters did not undertake to transfer its provisions to section 1-207. The argument thus proceeds that section 1-207 never covered the common-law doctrine of accord and satisfaction, either at its inception or as an historical postscript to section 3-802(3). The courts in *Chancellor, Inc. v. Hamilton Appliance Co.*⁶⁸ and *Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc.*⁶⁹ accepted this argument.

68. 175 N.J. Super. 345, 418 A.2d 1326 (1980). In that case, the defendant, a retail store, purchased twelve home video systems for \$2785.64 from the plaintiff, a wholesale distributor. After delivery of the units, the parties disputed the quality of the merchandise delivered and the repair services offered by the plaintiff. *Id.* at 346, 418 A.2d at 1327. Although the parties agreed to the return of eight units, only four units were returned. The parties also disagreed as to the wholesale price of each item. The plaintiff claimed a balance owing of \$979.88, while the defendant claimed that only \$734.88 was owed to plaintiff. *Id.* Defendant submitted a check in the amount of \$734.88 with the notation on the front "paid in full." The plaintiff negotiated the check adding a "without prejudice" endorsement on the back of the check. *Id.* The court, quoting extensively from Dean Rosenthal's article, stated:

Rosenthal noted that despite the apparent overlap of §§ 1-207 and 3-802(3) there was no indication in the Official Comments that these sections were intended to deal with the same subject matter although somewhat inconsistently. In fact, the drafters of the Code had failed to append any cross-references to either section. The absence of such references "suggests that § 1-207 was not conceived as affecting the efficacy of the full payment check."

Id. at 351-52, 418 A.2d at 1330 (citation omitted).

69. 63 Or. App. 364, 664 P.2d 419 (1983). In *Ivory Ranch*, the plaintiff claimed the balance of \$1,210.03 on an account for tires, service and finance charges. The defendant asserted, by way of defense, that the plaintiff had waived the right to collect the finance charges and that consequently, the true amount owed was \$1092.63. Thereupon, when defendant tendered a check of \$1164.93 to the plaintiff, he wrote on the face of the check, "[b]y endorsement this check when paid is accepted in full payment of the following account." Plaintiff negotiated the check, after crossing out the words "PAID IN FULL" and writing instead "[a]ccepted under protest and with reservation of rights." The trial court found for the plaintiff, deciding that section 1-207 applied reversing the common-law rule of accord and satisfaction. The appellate court reversed the judgment of the trial judge and held:

The history of ORS 71. 2070 intimates that its drafters did not intend or foresee that it would alter accord and satisfaction At that time Section 1-207 coexisted with another provision of the code that codified and expanded the doctrine of accord and satisfaction. . . . Section 3-802(3) expanded the common law by permitting accord and satisfaction when the obligation is undisputed and liquidated. Because the section might have been "open to abuse," it was deleted in the 1957 Official Draft. . . . The instructive value in Section 3-802(3) is that it existed entirely without reference to Section 1-207. The comments to neither section referenced the other. . . . This background indicates that the drafters of Sections 1-207 and 3-802(3) probably did not intend to write overlapping sections regarding accord and satisfaction but, rather, conceived of them as unrelated. . . .

We believe that section 1-207 was designed to serve a purpose unrelated to accord and satisfaction. Its purpose was to protect against waiver and estoppel.

Id. at 371, 664 P.2d at 422-23 (citation omitted).

b. overlap of section 1-207 and section 1-103

Similarly, section 1-103 of the Uniform Commercial Code can be utilized to counteract a literal application of section 1-207. Litigants have successfully argued that section 1-103 preserves the common law to the extent that it has not been explicitly displaced by statute: "Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, . . . shall supplement its provisions."⁷⁰ Those who wish to sustain the pre-Code rule advance the rationale that the common law in all areas, including the contractual area of accord and satisfaction, remains in effect unless explicitly displaced by a particular Code section, either in the text or in the Official Comments to the text. Since such an intention is not clearly apparent with respect to the common-law doctrine of accord and satisfaction, this doctrine should continue to govern notwithstanding a contrary indication from a literal reading of the text. Courts in several jurisdictions have accepted this argument.⁷¹

70. U.C.C. § 1-103 (1978).

71. For example, in *Stultz Elec. Works v. Marine Hydraulic Eng'g Co.*, 484 A.2d 1008 (Me. 1984), the defendant appealed from an order which held that section 1-207 abrogated the common-law rule of accord and satisfaction. In reversing the lower order and vacating the judgment, the court held:

[W]e look to the relationship between sections 1-207 and 1-103, . . . in order to lay to rest any contention that section 1-207 alters the common law doctrine of accord and satisfaction.

We first note that the premise set forth in 11 M.R.S.A. § 1-103 (1964) is instructive in interpreting the Uniform Commercial Code as enacted in this State. Section 1-103 provides that principles of law and equity are not to be displaced unless done so explicitly. Significantly, section 1-207 makes no mention of displacing the common law doctrine of accord and satisfaction and thus should not be interpreted to effectuate such an intent.

Id. at 1010-11.

Similarly, in *Department of Fisheries v. J-Z Sales Corp.*, 25 Wash. App. 671, 610 P.2d 390 (1980), a Washington court held that section 1-207 was not applicable to a conditional check tendered by J-Z Sales as "payment in full" for surplus fish and fish eggs. The order of the lower court held that the department's acceptance of the check constituted an accord and satisfaction notwithstanding section 1-207. In affirming, the appellate court stated:

Elsewhere in the Uniform Commercial Code, RCW 62A.1-103 and official comment 1 thereto require that the principles of law and equity are not to be displaced by particular provisions of the Code unless done so explicitly by the Code. . . . The statute does not explicitly supersede the law pertaining to accord and satisfaction, and it should not be inferred as doing so.

Id. at 681-82, 610 P.2d at 395-96.

The same result was reached in *Milgram Food Stores, Inc. v. Gelco Corp.*, 550 F. Supp. 992 (W.D. Mo. 1982). In that case, the court held that a full payment check constituted an accord and satisfaction and was not displaced by section 1-207. The court was mindful that section 1-103 specifically mandated that common-law principles were to remain intact unless "explicitly displaced." *Id.* at 997.

Finally, in *Connecticut Printers, Inc. v. Gus Kroesen*, 134 Cal. App. 3d 54, 58, 184 Cal.

c. *literal construction of section 1-207—performance*

Another line of cases, typified by *Jahn v. Burns*,⁷² has emphasized the literal meaning of the words "party who with explicit reservation of rights . . . assents to performance in a manner . . . offered by the other party does not thereby prejudice the rights reserved."⁷³ These words are construed to mean that the debtor's reservation of rights on a check can never be the subject of assent by the creditor to that negotiable instrument because the assent must be to performance in a manner offered. However, in the case of a reservation of rights, there is never an assent to performance in "a manner . . . offered" because the part payment is specifically conditioned on its being in full settlement.⁷⁴ Thus interpreted, the section focuses on continuation of performance in an existing con-

Rptr. 436, 437-38 (1982), a California court also held that section 1-207 does not eliminate the applicability of the common-law doctrine of accord and satisfaction. The court, quoting from the Uniform Code Comment to section 1-103, stated:

"This section indicates the continued applicability to commercial contracts of all supplemental bodies of law, except insofar as they are explicitly displaced by this Act." . . . It may not reasonably be said that the former decisional, or common law rule, was 'explicitly displaced' by the California Uniform Commercial Code's section 1207.

Id.

72. 593 P.2d 828 (Wyo. 1979). In *Jahn*, the plaintiff and defendant were involved in a car accident. The defendant mailed a \$200 settlement check with an accompanying letter which stated, "I intend this check as payment in full for all personal and property damages resulting from our accident of Feb. 10, 1978." *Id.* at 829. The plaintiff scratched out this notation, endorsed the check with the notation "[d]eposited under protest and with full reservation of all my rights," and cashed the check. The court held that an accord and satisfaction had been effected of this unliquidated claim. In focusing on the meaning of the words "assent to performance in the manner offered," the court held that "[t]he words of the statute are plain. Construction or interpretation . . . is unnecessary. In construing a statute, its words must be given their plain and ordinary meaning." *Id.* at 830.

73. U.C.C. § 1-207.

74. See *Milgram Food Stores*, 550 F. Supp. at 997. For decisions of other jurisdictions making use of identical legal reasoning, see *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 261 S.E.2d 266 (1980). *Brown* involved an employment contract in which the plaintiff worked as a salesman on a commission basis. A dispute arose as to the actual amount of commission owed to the plaintiff. The plaintiff cashed the defendant's check marked "account in full" after striking out these words. In upholding the lower court's ruling that an accord and satisfaction had been effected by the cashing of the check notwithstanding section 1-207, the court, quoting from the Official Comment to section 1-207, held that the common-law rule had not been changed:

From reading the Official Comment, it would appear that this section applies when one party desires to continue performance under a contract without waiving any rights in a pending dispute. The plaintiff in this case did not propose to continue to perform but did want to preserve his right to collect his claim in full. This was apparently not within the coverage of the section as contemplated in the Official Comment.

Id. at 457-58, 261 S.E.2d at 268.

tract rather than on a new agreement between the parties, which is the case in an accord and satisfaction.

Both the case law and the scholarly literature have criticized such a literal construction. In *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*,⁷⁵ the Georgia Court of Appeals held: "We reject this reasoning [of *Jahn v. Burns*]. By defining the term 'assent to performance' as 'acceptance of the condition,' the Supreme Court of Wyoming defeats the policy expressed in section 1-207 that a party be permitted to reserve rights under a contract."⁷⁶ The premise of this argument is that the judiciary is defeating the intent of the drafters to liberalize the law. Consequently, section 1-207 is said to "provide machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment 'without prejudice,' 'under protest,' 'under reserve,' 'with reservation of all our rights,' and the like."⁷⁷

This interpretation implies that an accord and satisfaction involves a new contract, not the contemplated performance of the original contract. A proposal to preserve this right to collect a claim in full is not a proposal to continue to perform. Certainly, through the usage of the "full payment check," or the "conditional check," the defendant is seeking to fulfill, not to continue, his duty.⁷⁸ Thus, the application of section 1-207

75. 153 Ga. App. 383, 265 S.E.2d 325 (1980). The defendant, American Food Purveyors, after accepting shipment of certain food products, disputed their condition and claimed that the \$13,196.22 value claimed for these goods was in fact worth only \$2696.08. Thus, they sent a check for only this amount with the notation "[t]his constitutes payment in full for all indebtedness." *Id.* at 384, 265 S.E.2d at 326. After striking this endorsement, plaintiff brought action for the balance. The defendant countered by arguing that the cashing of the check constituted an accord and satisfaction. The court reversed the earlier judgment and held that section 1-207 displaced the common law rule. *Cf. Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743 (Tex. Ct. Civ. App. 1977). The court stated that "[i]t is recognized that the statute provides machinery for reserving contractual rights, but failure to do so does not compromise a party's position in later legal proceedings under the Code. The statute is permissive rather than mandatory." *Id.* at 747. See *Jahn*, 593 P.2d 828; see also Note, *Commercial Transactions*, *supra* note 1, at 1087-89.

76. *American Food Purveyors*, 153 Ga. App. at 327, 265 S.E.2d at 386.

77. U.C.C. § 1-207 Comment 1 (1978). Comment 1 is also quoted extensively in *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980).

78. *Brown*, 44 N.C. App. at 457, 261 S.E.2d at 268. See *supra* note 71. In *Stultz Electric Works*, the court held that because an unambiguous notation of full payment is an accord, or an offer to create a new contract, the reservation of rights constitutes a counter-offer. Since the debtor never had an opportunity to respond to this counter-offer, there could not have been an "assent to performance offered." The court also held that section 1-207 arguably applies only to cases involving installment deliveries. 484 A.2d at 1011 n.6. See also *supra* note 78 for an alternate holding in the case.

In *Milgram Food Stores*, the court held that "section 400.1-207 is by its own terms inapplicable to the situation presented here. Feld did not assent 'to performance in a manner . . .

is limited to continuing disputes in an executory contract because "section 1-207 was designed to serve a purpose unrelated to accord and satisfaction. Its purpose was to protect against waiver and estoppel. Without the protection of [section 1-207] a party might waive the right to recover fully by acquiescence in another's nonconforming conduct."⁷⁹ In essence, therefore, section 1-207 provides a mechanism whereby one party can continue to carry forward his obligations under an ongoing contract despite the fact that a dispute has arisen between the parties to that contract and where the other party has expressly reserved his rights. Therefore, section 1-207 is really an exception to the doctrine of accord and satisfaction rather than a legal substitute for that doctrine.⁸⁰

d. "performance" versus "payment": the effect of The 1961 Report of the Commission on Uniform State Laws to the Legislature of the State of New York

Similarly relying on the literal meaning of the word "performance," some case law⁸¹ focuses on the fact that the word "payment" is not included in the text of section 1-207.⁸² Consequently, that section can, by its very terms, never refer to conditional payment or to a check. Furthermore, if it had truly been the drafters' intent to have subsumed "payment" as a method of, or substitute for, "performance," then such a term would have been used. The drafters must have chosen their words carefully. Where it later transpires that the drafters' choice was incorrect, the legislature, and not the judiciary, is the appropriate body to correct them. Until a legislative amendment has been effected, therefore, it is the judiciary's role merely to interpret the words of the statute in accordance with their plain meaning.

offered' because it rejected the essential condition upon which Milgram tendered the check—full payment and settlement of all claims concerning the eleven vehicles." 550 F. Supp. at 997.

In *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980), the court upheld the lower court's ruling that the plaintiff's negotiation of a conditional check for house painting services did not constitute an accord and satisfaction, but was instead governed by section 1-207. The court, quoting *Brown*, held that the statute by its plain language could not apply to full payment checks. *Id.* at 113, 264 S.E.2d at 386.

79. *Ivory Ranch*, 63 Or. App. at 371, 664 P.2d at 423 (citation omitted).

80. *In re Zerodec Mega Corp.*, 47 Bankr. 304, 308 (Bankr. E.D. Pa. 1985).

81. *Hixson v. Cox*, 633 S.W.2d 330 (Tex. Ct. App. 1982) (court of appeals affirmed lower court ruling that plaintiff-creditor's acceptance and cashing of conditional check tendered by defendant-debtor for engineering services performed by plaintiff constituted accord and satisfaction notwithstanding section 1-207).

82. *Id.* at 331. "Section 1. 207 bespeaks of 'performance,' by one party or the other, but does not speak of 'payment,' whether as demanded, or less than demanded conditioned on settlement." *Id.*

A stronger argument is found in the New York Annotation to the Code which states:

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 rights 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. . . .

. . . 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.⁸³

Consequently, a jurisdiction which either did not adopt the New York Study Commission's report or which conducted its own analysis of the Code⁸⁴ could not have given any indication to its legislature that a change of the common-law rule was intended. Thus the New York posi-

83. REPORT OF THE COMMISSION ON UNIFORM STATE LAWS TO THE LEGISLATURE OF THE STATE OF NEW YORK, at 19-20 (1962) (emphasis added).

84. See *Chancellor*, 175 N.J. Super. 345, 418 A.2d 1326.

The court stated:

The New York cases which have concluded that § 1-207 permits a party to reserve his rights while cashing a check offered in full payment are distinguishable.

. . . .

The New York annotation clearly deals with the effect of section 1-207 on the "full-payment check" and concludes that the rule of accord and satisfaction has been changed. However, . . . the New Jersey Study Comment did not adopt the New York Study Commission's report and conducted its own analysis of the Code.

Id. at 349, 418 A.2d at 1328-29. The following states by their own comments to the statute, have indicated that section 1-207 displaces the common-law doctrine of accord and satisfaction: Delaware, DEL. CODE ANN. tit. 6, § 1-207 (1975), Florida, FLA. STAT. ANN. § 671.1-207 (West 1966), Massachusetts, MASS. GEN. LAWS ANN. ch. 106, § 1-207 (West 1958), Minnesota, MINN. STAT. ANN. § 336.1-207 (West 1966), New Hampshire, N.H. REV. STAT. ANN. § 382-A:1-207 (1961), and New York, N.Y. COM. LAW § 1-207 (McKinney 1964). The following by their own comments to the statute, appear to limit section 1-207 to "goods," although a specific disclaimer to the common-law doctrine of accord and satisfaction is not made: California, CAL. COM. CODE § 1207 (West 1964), Illinois, ILL. ANN. STAT. ch. 26, § 1-207 (Smith-Hurd 1963), Missouri, MO. ANN. STAT. § 400.1-207 (Vernon 1965), New Jersey, N.J. STAT. ANN. § 12A:1-207 (West 1962), North Carolina, N.C. GEN. STAT. § 25-1-207 (1965), Pennsylvania, PA. CONS. STAT. ANN. § 1207 (Purdon 1984), and Washington, WASH. REV. CODE ANN. § 62A.1-207 (1966). The following states, by their own comments to their statutes, appear to disclaim section 1-207: Florida, FLA. STAT. ANN. § 671.1207 (West 1966), and Maine, ME. REV. STAT. ANN. tit. 11, § 1-207 (1964). Finally, the following states have neither adopted the official comments nor their own comments to section 1-207: Oregon, OR. REV. STAT. § 71.70 (1984), South Dakota, S.D. CODIFIED LAWS ANN. § 57A-1-207 (1980), and Wyoming, WYO. STAT. § 34-21-126 (1977).

tion, once judged to be in the forefront of the majority position, evolved into the minority view.

e. public policy considerations

Many decisions have been based on "public policy" considerations. The following statement is typical:

If the court were to conclude that a creditor could reserve his rights on a "full payment check," a convenient and informal device for the resolution of disagreements in the business community would be seriously impeded. The court is hesitant to impair such a valuable, informal settlement tool where there is no indication that the legislature intended that result.⁸⁵

Courts are reluctant to dispose of a convenient tool for the compromise of a dispute by permitting unilateral action by a protesting creditor.⁸⁶ This argument is especially persuasive in a court system which is overburdened and understaffed. However, the pivotal question is whether the "better" substantive law rule should be rejected merely because of an administratively failing court system. Is it appropriate to respond to a substantive legal question with an administrative response?

A countervailing argument on public policy grounds alone comes from a decision of the Court of Appeals of the State of Wisconsin⁸⁷ where the court stated:

Although some have criticized this interpretation on the ground that it may discourage settlements and unfairly favor creditors, it is also recognized that the common-law doctrine of accord and satisfaction often gives debtors an unfair advantage

85. *Chancellor*, 175 N.J. Super. at 352, 418 A.2d at 1330.

86. In *Pillow v. Thermogas Co.*, 6 Ark. App. 402, 644 S.W.2d 292 (1982), an argument arose over the correct amount of debt for fertilizer supply at a set per acre application cost. The court of appeals held that section 1-207 does not abrogate the common law rule of accord and satisfaction, stating:

We hold that § 85-1-207 has not altered our common law rule of accord and satisfaction. If we were to decide that a creditor can reserve his rights on a "payment in full" check, it would seriously circumvent what has been universally accepted in the business community as a convenient means for the resolution of disagreements. . . . A unilateral action by the creditor in protest or an attempted reservation of rights by the alteration of a check offered as payment in full is of no legal consequence.

Id. at 404-05, 644 S.W.2d at 294.

87. In *Flambeau Products*, 111 Wis. 2d 317, 330 N.W.2d 228, Honeywell sold computer equipment to Flambeau and granted it a \$14,000 computer programming credit to be used by Oct. 1, 1976. Flambeau, in a check following the expiration date, deducted \$14,000 for unused programming. At trial, the judge concluded that an accord and satisfaction had occurred. Finding that section 1-207 applied in such a transaction, the appellate court reversed the trial court's decision.

over creditors, and that section 1-207 may be an effort to balance the scales.⁸⁸

III. THE APPLICATION OF SECTION 1-207 TO CODE AND TO NON-CODE TRANSACTIONS

The *Horn Waterproofing*⁸⁹ case also highlights the recurring question concerning what transactions section 1-207 governs. In *Horn Waterproofing*, the New York Court of Appeals resolved the problem for New York. However, some other jurisdictions have reached opposite conclusions.⁹⁰

Before *Horn Waterproofing*, a series of conflicting decisions⁹¹ in New York state had arisen as to the status and applicability of section 1-207 to service contracts. There was significant case law which held that the Code clearly did not apply to non-sales-related transactions. However, the uncertainty involved categories of service transactions which had their payment settled by check. The question is whether the issuance of a check invokes section 1-207 even if the underlying transaction is not Code covered. The New York Court of Appeals recognized the sales-service dichotomy and held that to determine whether the Code applies

88. *Id.* at 323, 330 N.W.2d at 230.

89. *Horn Waterproofing*, 66 N.Y.2d 321, 488 N.E.2d 56, 497 N.Y.S.2d 310.

90. *Van Sistine v. Tollard*, 95 Wis. 2d 678, 291 N.W.2d 636 (1980), involved an appeal from the lower court's judgment that found an accord and satisfaction to have been effected where a conditional check had been tendered to settle differences between contracting parties. The court of appeals affirmed the lower court's decision because the contract called for the performance of services (house siding) and section 1-207 could not be applicable to service contracts. The court stated:

"The test for inclusion or exclusion [within the Code] is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . ."
... We conclude that the predominant factor . . . is the furnishing of services, with an incidental sale of materials.

Id. at 684, 291 N.W.2d at 639 (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

In *Jahn*, the court stated: "The fact that a negotiable instrument was used in a transaction does not make the entire transaction a commercial one. . . . If the other portions of the transaction are not 'commercial,' the use of commercial paper does not cause them to fall within the provisions of the code." 593 P.2d at 831. *Cf. Miller v. Jung*, 361 So. 2d 788 (Fla. Dist. Ct. App. 1978) (section 1-207 held to apply to landscaping services). *But see Eder v. Yvette B. Gervy Interiors, Inc.*, 407 So. 2d 312 (Fla. Dist. Ct. App. 1981) (section 1-207 held not to apply to interior decorating services). At the same judicial level, the court chose to hold directly in contradiction to the *Miller* case: "We . . . certify that our opinion expressly and directly conflicts with *Miller v. Jung*." *Id.* at 314. *See also American Food Purveyors, Inc. v. Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980). "By limiting application of § 1-207 to 'commercial transactions' independent of the mode of payment, the court ignores the fact that payment by check is a Code-covered transaction." *Id.* at 386, 265 S.E.2d at 327.

91. *See supra* note 43.

to a hybrid transaction, a court must first determine which aspect of the transaction predominates.⁹² Obviously, where the predominant character of the transaction is service oriented, the Uniform Commercial Code does not apply. Therefore, the use of a check to settle disputes relating to such a contract would not import the rule of 1-207.⁹³ In other words, the court would not permit the Code rule where it would otherwise be inapplicable.

The conflicting New York appellate court view is typified by the decision in *Geelan Mechanical Corp. v. Dember Construction Corp.*⁹⁴ There, the Second Department of the Appellate Division stated:

The New York appellate courts have several times addressed this issue in the context of construction contracts, guided by the rule that a contract is one for the sale of goods only if the element of transfer of personal property predominates over the element of work, service etc. . . . Under New York law it is therefore almost beyond dispute that this contract—in which barely any mention is made of “goods” to be “sold,” while there is exhaustive attention paid to the work to be performed—is not covered by the Uniform Commercial Code.⁹⁵

An earlier case, also from the appellate division court level, but from the First Department,⁹⁶ held that the use of a check ipso facto caused Code rules to apply. “We perceive the transaction underlying the billing dispute between the parties to be one in which, while occurring in an area to which the statute (Uniform Commercial Code) might not expressly apply, nevertheless, the rule of the statute should be applied.”⁹⁷

This discrepancy was resolved in *Horn Waterproofing*. There, the court held that where a negotiable instrument is used, the underlying

92. In *Milau Assoc., Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247, 398 N.Y.S.2d 882 (1977), Justice Wachtler stated for the court: “[T]he court’s sensitivity to these policy considerations, rather than restrict the scope of its holding, should suggest the need to assess all hybrid transactions along the sales-services continuum both legally and pragmatically.” *Id.* at 486, 368 N.E.2d at 1250, 398 N.Y.S.2d at 884.

93. See *United States v. Consolidated Edison Co.*, 590 F. Supp. 266 (S.D.N.Y. 1984) (contract to supply electricity); *Geelan Mechanical Corp. v. Dember Constr. Corp.*, 97 A.D.2d 810, 468 N.Y.S.2d 680 (1983) (plumbing contract); *Aguiar v. Harper & Row Publishers, Inc.*, 114 Misc. 2d 828, 452 N.Y.S.2d 519 (N.Y. Civ. Ct. 1982) (sales of reproduction rights to photographs); *Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier*, 101 Misc. 2d 371, 420 N.Y.S.2d 999 (N.Y. Civ. Ct. 1979) (legal services); *Wm. McCaffrey, Inc. v. Cointreau America, Inc.*, 36 U.C.C. Rep. Serv. (Callaghan) 1108 (N.Y. 1983). See also *supra* note 43.

94. *Geelan*, 97 A.D.2d 810, 468 N.Y.S.2d 680.

95. *Id.* at 811, 468 N.Y.S.2d at 681.

96. *Ayer v. The Sky Club, Inc.*, 70 A.D.2d 863, 418 N.Y.S.2d 57 (1979).

97. *Id.* at 864, 418 N.Y.S.2d at 58.

transaction is disregarded, and the provisions of the Code apply without exception. In settling the services-sales dichotomy, the court stated:

[The] nonlimiting language of § 1-207 and its placement in the Code with the other generally applicable provisions of article 1 is persuasive that the section is, indeed, applicable to all commercial transactions fairly considered to be "Code-covered."

. . . .

. . . Whether the underlying contract between the parties be for the purchase of goods, chattel paper or personal services, the use of a negotiable instrument for the purpose of payment or attempted satisfaction of a contract debt is explicitly and specifically regulated by the provisions of article 3 and, therefore, undeniably a Code-covered transaction. Consequently, a debtor's tender of a full payment check is an article 3 transaction which is governed by § 1-207, regardless of the nature of the contract underlying the parties' commercial relationship.⁹⁸ Other jurisdictions have decided this issue in a different way:

Regardless of its construction, [section] 1-207 of the code cannot apply unless the underlying transaction is subject to the code. . . . Section 2-102 of the Uniform Commercial Code . . . provides that unless the context otherwise requires, that chapter applies to transactions in "goods."

. . . In determining whether a mixed contract for goods and services is a sale of goods under the code, the "test for inclusion or exclusion [within the Code] is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved [W]e conclude that the predominant factor [in this case] is the furnishing of services, with an incidental sale of materials. Accordingly the transaction is not subject to the Uniform Commercial Code— . . . and [section] 1-207 of the code . . . is inapplicable."⁹⁹

98. *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 66 N.Y.2d 321, 329-30, 488 N.E.2d 56, 61, 497 N.Y.S.2d 310, 316 (1985).

99. *Van Sistine v. Tollard*, 95 Wis. 2d 678, 684, 291 N.W.2d 636, 639 (Wis. Ct. App. 1980).

IV. CONCLUSION

Section 1-207 has engendered extensive controversy to the point of creating a majority-minority schism in the common-law doctrine of accord and satisfaction. The majority view gives effect to the use of the "full payment" check, or the "conditional" check, as a means to facilitate compromise. For public policy reasons, those jurisdictions adopting the majority view prefer to help effect a private resolution of disputes rather than to refer these disputes to an overburdened court system. Those jurisdictions subscribing to the minority position have succeeded in heralding the demise of the common law of accord and satisfaction. Much can be said for the benefits of maintaining the private sector as a forum for compromise through the continued use of the accord and satisfaction mechanism. However, one must also remain alert to the possibility that this view may unduly favor the debtor. Because of this split, however, counsel should conduct careful research to determine whether the applicable jurisdiction follows the majority or the minority view. A service transaction also raises the issue whether section 1-207 applies.