The Accord and Satisfaction and 1-207 of the UCC

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Blue Ribbon Stables and Sunnydale Farms, a thoroughbred horse breeding farm, enter into a contract for the sale of Handsome Charlie, a race horse. Sunnydale fully performs by delivering Charlie. Several weeks later, Sunnydale receives a check from Blue Ribbon for $500,000, an amount substantially less than the $1,000,000 contract price. The check carries the notation “payment in full.” Should Sunnydale: (a) deposit the check as is; (b) strike “payment in full,” add the notation “without prejudice,” and deposit the check; or (c) return the check to Blue Ribbon and demand full payment?

If Blue Ribbon had sent the check to pay for a stud fee, a service, rather than for Handsome Charlie, himself, would the same course of action as to the check be appropriate?

If Blue Ribbon had sent the check to compensate Sunnydale for personal injury committed through the negligence of a Blue Ribbon employee on the owner of Sunnydale Farms, would the same course of action be appropriate?

In each transaction, Sunnydale either had fully performed or had no duty to perform and Blue Ribbon is attempting to discharge its duty to pay. If both Sunnydale and Blue Ribbon had outstanding duties, Blue Ribbon’s attempt to discharge its duty would not involve an accord and satisfaction but rather a modification or a substitute contract. This article is limited to the potential accord and satisfaction situation, that is, where the payee has fully performed or had no duty to perform.

What Is an Accord and Satisfaction?

The accord, a contract to pay a stated amount to discharge a prior obligation, begins with a traditional offer, a promise for consideration. In the offer for the accord, the drawer promises to pay the payee the amount stated on the check as full payment in exchange for the payee’s promise to take this stated amount as full payment for the drawer’s prior obligation. While this discussion presents the accord as a bilateral contract (a promise for a promise), an accord could be a unilateral contract (a promise for a performance) if the consideration for the drawer’s promise were not “the payee’s promise to take the stated amount as full payment of the drawer’s obligation” but rather “the payee’s taking the stated amount as full payment of the drawer’s obligation.”

By promising to take the stated amount as full payment in exchange for the drawer’s promise to pay the stated amount as full payment, the payee accepts the offer and forms the accord contract. The payee’s performance of his or her promise (exercising dominion over the check by an act such as negotiating the check) is the satisfaction—satisfaction being no more than the performance of the accord contract. If the payee does not expressly promise to take the stated amount as full payment, the payee’s promise may be implied from the payee’s performance (exercising dominion over the check). Thus when the payee negotiates the check, this exercise of dominion acts as both the acceptance of the offer for the accord and the satisfaction of the accord.

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The accord and satisfaction promotes fairness by protecting the bona fide expectations of the drawer who tenders payment on condition that it will be accepted as payment in full and provides a method of settling disputes without litigation.

Does an Accord Exist When the Drawer’s Obligation Is Neither Unliquidated nor in Dispute?

Since the accord is merely a contract, the traditional rules of offer and acceptance, including the rules of consideration, apply. For an offer to exist under classical contract law, there must be consideration for the drawer’s promise. The consideration for “the drawer’s promise to pay the stated amount as full payment” would be “the payee’s new promise to take the lesser amount as full payment.” Thus an offer would be made. For an acceptance to exist, there must be consideration for the payee’s promise. The consideration for “the payee’s promise to take the lesser amount as full payment” would have to be, under the mirror image rule, “the drawer’s promise to pay the lesser amount as full payment.” If neither the existence nor the amount of the drawer’s obligation is disputed, the drawer has a pre-existing contractual duty to pay the undisputed higher amount. A promise to pay only a part of that undisputed amount cannot be new consideration for the payee’s promise and thus is not an acceptance of the accord offer. Without an acceptance and thus without an accord contract, the drawer’s notation on the check, “payment in full,” is irrelevant and the payee may exercise dominion over the check without losing his or her right to enforce the drawer’s original promise to pay.1

Even if the drawer’s obligation is neither unliquidated nor in dispute, new consideration for the payee’s promise can be manufactured if the payee requires the drawer to promise to do something that the drawer was not legally obligated to already do. For example, if the payee required the drawer to promise to pay a day or even an hour before the debt is due, pay at a different place, pay a third person, or pay in personal property or anything other than money, then the drawer’s promise would be consideration for the payee’s promise to take the lesser amount as full payment.2

Does an Accord Exist When the Drawer’s Obligation Is Either Unliquidated or in Dispute?

If the existence or amount of the drawer’s obligation is disputed, the notation “payment in full” is significant. When the existence or amount of the drawer’s duty under the original contract is disputed, the drawer’s promise to pay a stated amount as full payment, by not reaffirming a pre-existing duty, can be consideration for the payee’s promise to take the stated amount as full payment. With this acceptance of the offer, an accord contract comes into being. Performance of the accord contract, the payee’s exercise of dominion over the check, is the satisfaction. Upon satisfaction, the original contractual duties are discharged.3

When a dispute exists, classical contract law precludes the payee from rejecting the offer for the accord by altering the notation on the check.4 The payee, however, may negotiate the check without discharging the drawer if an accord cannot be proven5 or the payee does not see the obscure “payment in full” notation.6 A pleading oversight by the drawer’s attorney also may benefit the payee, since the accord and satisfaction is an affirmative defense to a claim on the original contract and must be alleged in the drawer’s answer to the petition. Failure to do so constitutes a waiver.7

Does UCC 1-207 Provide the Creditor with a Method for Accepting the Drawer’s Check without the Accord?

Concern has been expressed that section 1-207 of the Uniform Commercial Code alters the classical accord and satisfaction doctrine.8 Section 1-207, entitled “Performance or Acceptance Under Reservation of Rights,” 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.9

It should be noted that since 1-207 is located in article one it has broad application, that is, it applies to all subsequent articles. Had 1-207 not been located in article one but rather in one of the subsequent articles (two through nine), its application would have been limited to the scope of that article.10 But while section 1-207 should not be limited to article two transactions, that is, transactions in goods, courts have not agreed upon its
The Wyoming Supreme Court in *Jahn v. Burns* limited 1-207 to “commercial” transactions and would not apply 1-207 to non-commercial transactions such as a check arising out of a tort claim. A Texas Court of Appeals in *Hixson v. Cox* held that 1-207 would not apply to a check sent to pay for engineering and related services since the transaction did not involve a sale of goods.

This view requires the payee, upon receiving a check marked “payment in full,” to determine whether the underlying transaction was a sale of goods or not. If the transaction were a sale of goods, it would come within the scope of article two and 1-207 would apply. The payee then could write on the check “without prejudice” or “under protest,” negotiate the check, and avoid an accord and satisfaction. If the transaction were not a sale of goods, the payee’s notation on the check would be of no avail and the payee would be bound by an accord and satisfaction. Whether a transaction is a sale of goods is not always simple, especially in those hybrid transactions that are part sale of goods and part service. This view, which creates an unnecessary dilemma for the payee, has not been embraced by most courts.

Several state courts (Alabama, Missouri, New York, and South Dakota) have held that section 1-207 negates the accord if the payee adds his or her notation to the check. Under this view the payee could strike out the drawer’s statement, write on the check the words “without prejudice” or “under protest,” and negotiate the check without losing his or her rights for the balance in dispute.

The majority of state courts having 1-207 opinions (Alaska, Arkansas, California, Colorado, Maine, New Jersey, North Carolina, Oregon, Utah, Washington, Wisconsin and Wyoming), however, refuse to apply 1-207 to the classical accord and satisfaction. The Wisconsin Supreme Court in *Flambeau Products Corp.* best summarized the reasons why 1-207 does not apply to the accord and satisfaction. The court found that although the language of 1-207 could be read to apply to the accord, the words of 1-207 do not compel this conclusion. Moreover, if the drafters had intended to change the accord and satisfaction doctrine in such a significant way, the change would have been noted in the comment, and none so appears. In fact the comments to 1-207 suggest that 1-207 was intended to apply to ongoing contracts and not to full payment checks that terminate the contractual arrangement. Also, applying 1-207 to the accord and satisfaction would not necessarily serve to “simplify,” or “clarify,” or “modernize the law governing commercial transactions” as dictated by 1-102(2)(a) or promote these purposes and policies of the Code as directed by section 1-102(2)(b). The comment to 1-102(2) advises that “the text of each section should be read in the light of the purpose and policy of the rule or principle in question.” Since the purpose of the accord and satisfaction is the resolution of disputes fairly and informally without litigation, the application of 1-207, which would permit the payee to disregard the drawer’s known intent and conditions, would seem unfair and violative of the good faith obligation of 1-203.

Several states have discussed the 1-207 problem and still face interesting dilemmas. The Florida District Courts of Appeal are split in their treatment of the accord. The Second District in *Miller v. Jung*, held 1-207 applicable so that a payee’s notation could negate the accord; the Fourth District in...
The obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord. (3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach.

10. The 1950 draft of the Code did include a statement concerning the accord in article three. U.C.C. §3-702(3) and comment 6 (1950). This statement did not appear in the 1958 draft of the Code.
13. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 105 A.D.2d 684 (N.Y. 1984), discussed whether a contract to perform roofing repair, that ultimately led to a new roof, was a sale of goods.


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The Bottom Line—Should the Check Be Returned or Negotiated?

Although the earlier Code cases hold that 1-207 authorizes a payee to negate the common law accord and satisfaction doctrine by striking "payment in full" and adding the notation "without prejudice," the more recent cases disagree. Therefore with the national trend preserving the common law accord and satisfaction doctrine and with no reported Oklahoma cases to the contrary, an Oklahoma attorney would be well advised to inform his or her client to return the check to the drawer if indeed the amount is disputed and the client does not want to settle the drawer's obligation for the amount stated on the check. Only if the amount is undisputed should a check for a lesser amount with the notation "payment in full" be negotiated.


The "Restatement (Second) of Contracts" §281 (1979) makes the following statement as to the accord and satisfaction:

(1) An accord is a contract under which an obligee promises to accept a stated performance as satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.
(2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of

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18. 116 Wis. 2d 95, 341 N.W.2d 655 (1984).

19. For an extensive discussion of these issues, see Rosenthal, “Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code,” 78 Colum. L. Rev. 48 (1978).


