

Civil Law Compromise, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?

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INTRODUCTION

*Jack and Jill went up the hill,
To fetch a pail of water;
Jack fell down, and broke his crown,
And Jill came tumbling after.¹*

*Each filed suit against the brute,
Who owned the land and well;
Jack sued the med who fixed his head,
And the maker of the pail.*

*Jack stopped short of going to court,
For compromise reared its head;
Parties met to settle their debt,
And litigation henceforth was dead.*

Jack and Jill are by no means anomalies: the majority of litigation ends in settlement rather than judgment.² This comes as no surprise given the general “belief that it is good policy to favor compromises” over litigation.³ Louisiana jurisprudence and legislation, however, undermine that goal. There is a tangled web of judicial confusion surrounding settlement agreements in Louisiana, specifically surrounding the doctrines of compromise and accord and satisfaction, thus leaving creditors and debtors

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1. *Jack and Jill*, reprinted in THE REAL MOTHER GOOSE 49 (Scholastic Inc. 1994) (1916).

2. See Patricia Munch Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEG. STUD. 345, 365 (1983) (stating that “less than 10 percent of [medical malpractice claims] are tried to verdict”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 405 (1982) (“Eighty-five to ninety percent of all federal civil suits end by settlement.”).

3. Albert J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48, 55 (1978). Courts have also noted this desire to have parties settle disputes. See *Potter v. Pac. Coast Lumber Co.*, 234 P.2d 16, 22 (Cal. 1951) (“The law wisely favors settlements.”); *Thomas v. Hollowell*, 155 N.E.2d 827, 829 (Ill. App. 2d 1959) (“It has always been the policy of the law to favor compromise and settlement, and it is especially important to sustain that principle in this age of voluminous litigation.”). Such policy goals are also recognized in Louisiana jurisprudence. See *Carney v. Hartford Accident & Indem. Co.*, 250 So. 2d 776, 779 (La. App. 1st Cir. 1970) (“It is well settled that the law favors compromise and voluntary settlement of disputes out of court with the attendant saving of time and expense to both the litigants and the court.”).

unsure of whether they have settled a dispute. Such uncertainty in the law discourages rather than encourages settlement.⁴

Imagine a run of the mill situation between Jack and Jill. Slightly older and wiser, but still lacking indoor plumbing, Jill makes a deal with Jack: she will pay him \$10 to provide her with a *regular* sized pail of water. Jack shakes her hand, masters the hill, and returns with an *extra-large* sized pail of water, which he leaves on her doorstep. Jack sends Jill a bill for \$15—the pail was, after all, *extra-large*—and she replies with a check for \$10, noting on the back, “For the full amount.” Jack sees the notation, cashes the check, and sends a letter to Jill stating, “I cashed your check, but you still owe me \$5.”

Can Jack sue Jill for the remaining \$5, or, by cashing her check, did Jack settle the dispute? In Louisiana, it depends because the state has adopted both the civil law doctrine of compromise and the common law doctrine of accord and satisfaction. Applying the doctrine of compromise, Jack may have a cause of action against Jill for the disputed amount.⁵ Applying the traditional common law doctrine of accord and satisfaction, however, the dispute between Jack and Jill was settled the moment Jack cashed the check.⁶ But, under a different interpretation of accord and satisfaction utilized by some Louisiana courts, Jack may still be able to litigate his claim.⁷ In short, the answer to the question is

4. The notion that uncertainty in the law encourages litigation is discussed at length by law and economics scholars George L. Priest and Benjamin Klein. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16–17 (1984). Priest and Klein illustrate how uncertainty in the law can lead to more litigation by comparing the situation to betting on a sporting event. When the outcome of the game is certain, as when “a powerful team is scheduled to play a weak one,” the lack of uncertainty generates less interest in the game among bettors. *Id.* at 16. When there is great uncertainty in the outcome, however, bettors are more likely to gamble. Priest and Klein argue that, “[i]n litigation, as in gambling, agreement over the outcome leads parties to drop out.” *Id.* at 17.

5. See, e.g., *RTL Corp. v. Mfr.’s Enters., Inc.*, 429 So. 2d 855 (La. 1983); *Willard v. R & B Falcon Drilling USA, Inc.*, 836 So. 2d 424 (La. App. 1st Cir. 2002); *Angelo & Son, Inc. v. Rapides Bank & Trust Co.*, 671 So. 2d 1283 (La. App. 3d Cir.), *writ denied*, 675 So. 2d 1083 (La. 1996); *Shell Oil Co. v. Jackson*, 655 So. 2d 482 (La. App. 1st Cir. 1995); *Hall v. Mgmt. Recruiters of New Orleans, Inc.*, 332 So. 2d 509 (La. App. 4th Cir. 1976).

6. See, e.g., *Henriques v. Vaccaro*, 56 So. 2d 236 (La. 1951); *Berger v. Quintero*, 127 So. 356 (La. 1930); *Davis-Wood Lumber Co. v. Farnsworth & Co.*, 171 So. 622 (La. Ct. App. 1937); *Sentell v. Wilcox*, 3 Teiss. 503 (La. Ct. App. 1906).

7. See, e.g., *Selber Bros., Inc. v. Newstadt’s Shoe Stores*, 14 So. 2d 10 (La. 1943); *Pool Co. v. Universal Mach. Co.*, 701 So. 2d 1014 (La. App. 5th Cir. 1997); *McClelland v. Sec. Indus. Ins. Co.*, 426 So. 2d 665 (La. App. 1st Cir. 1982), *writ denied*, 430 So. 2d 94 (La. 1983).

that Jack's outcome depends on which doctrine and what interpretation of that doctrine is applied. To make matters worse, Jack has no means of determining which doctrine or what interpretation will apply until he sees the inside of a courtroom.

At least that was the state of settlement agreements in Louisiana prior to June 25, 2007, when the Civil Code articles pertaining to compromise were amended.⁸ This Comment strives to establish how the revised articles—specifically Louisiana Civil Code article 3071 regarding compromise and article 3079 regarding accord and satisfaction—may harmonize the present discord between these settlement mechanisms, thereby firmly establishing the rights of creditors and debtors, and, in turn, promoting settlement as opposed to litigation.⁹

To reach this end, this Comment is divided into four parts. Part I defines the doctrines of compromise and accord and satisfaction within the legal systems from which Louisiana drew them. The history of the foundation of Louisiana's legal system¹⁰ and the similarities between Louisiana's original compromise article and that of the Code Napoleon¹¹ provide evidence that Louisiana acquired the concept of compromise from its civilian ancestors.¹²

8. 2007 La. Acts No. 138.

9. See Priest & Klein, *supra* note 4.

10. From the time it was discovered by Europeans in 1699, to the time it was purchased by the United States in 1803, Louisiana was consistently under the French or Spanish rule of law. It was well-documented that these civilian legal systems continued to influence Louisiana's legal system even after 1803, as the Code Napoleon of 1804 was heavily relied on by those tasked with drafting the Louisiana Digest of 1808 and the Louisiana Civil Code of 1825. For excellent discussions on the legal history of Louisiana, see Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law*, 56 TUL. L. REV. 477 (1982); John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7 (1958); J.-R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019 (2003).

11. Compare LA. DIG. art. 1, at 434 (1808) ("A transaction is an agreement between two or more persons who for preventing or putting an end to a law suit, adjust their differences, by mutual consent, in the manner which they agree on and which every one of them prefers to the hope of gaining, balanced by the danger of losing.") with CODE CIVIL [C. CIV.] art. 2044 (1804) (Fr.) (trans. author) ("La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître." ["A transaction is a contract whereby the parties terminate a litigation which has arisen, or prevent a litigation from arising."]).

12. It should be noted that while Louisiana's compromise articles were largely influenced by its French ancestors, compromise is not exclusive to French civil law; it is also included in German civil law. See BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 18, 1896, § 779. It has been stated that the German form of compromise is similar to the French version. SAÚL

The doctrine of accord and satisfaction, on the other hand, was borrowed by Louisiana courts from the American common law.¹³ Part II looks beyond the textual definition of the settlement agreements and depicts the analytical approaches used by their respective legal systems to determine whether a settlement has been reached. Generally speaking, the civil law inquiry for compromise focuses on the subjective intent of the parties, whereas the common law examination for accord and satisfaction relies predominately on the parties' outward actions.¹⁴ Part III examines the application of each method of settlement in Louisiana and identifies how the muddled use of both doctrines has created judicial confusion. Part IV suggests how the newly enacted articles may provide a solution to the problems that have surrounded Louisiana settlement agreements. Finally, this Comment concludes that the recent revision has untangled the web of judicial confusion but has done so at a potentially high price.

LITVINOFF, OBLIGATIONS § 372, in 6 LOUISIANA CIVIL LAW TREATISE 636 (1969) [hereinafter LITVINOFF (OBLIGATIONS)]. Be that as it may, given the French influence on Louisiana (*supra* note 10), this Comment focuses on the French version of compromise, and, in as much as they help explain concepts presented herein, the legal systems of countries that have been predominately influenced by the Code Napoleon.

13. Based on the sources initially cited by Louisiana courts to support the use of this settlement method, it is evident that Louisiana was strongly influenced by the American common law. In *Berger v. Quintero*, 127 So. 356, 357 (La. 1930), an early case in which the court applied the doctrine of accord and satisfaction, the Louisiana Supreme Court cited five cases for support of the use of the doctrine. All of the cases were from common law states. Accord and satisfaction, however, is not limited to the American common law; it exists under the English common law, as well. *See, e.g., Foakes v. Beer*, (1884) 9 Eng. Rep. 605, 616 (H.L.) (holding that a valid accord and satisfaction requires consideration, such as “a horse, hawk, or robe”). Due to the sources originally cited by Louisiana courts, this Comment concentrates on the American common law.

14. This Comment employs the terms subjective and objective as descriptions of the analytical approaches adopted by the two legal systems. A subjective approach is defined herein as an inquiry into “a party’s will to bind himself”; an objective approach is defined as an examination of the “outward manifestation or expression of that will.” Saúl Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 700 (1987). Use of these correlative terms should not imply that civil law judges use *only* a subjective approach or that common law judges use *only* an objective approach. That is a false caricature of the two legal systems. As described in this Comment, *infra* Part III.B, use of the approaches may be viewed as if on a spectrum, pure objectivity sitting at one end and pure subjectivity standing at the other. The terminology used within this Comment indicates which side of the spectrum each legal system leans towards; it does not indicate that either legal system’s analysis occupies an actual endpoint of that spectrum.

I. DEFINITION: WHAT ARE COMPROMISE AND ACCORD AND SATISFACTION?

To unravel Louisiana's tangled web regarding settlement agreements, the first questions that must be answered are ones of definition. What is civil law compromise? What is common law accord and satisfaction?

A. Civil Law Compromise

In civil law jurisdictions, a compromise is an agreement by which parties end or prevent litigious obligations through reciprocal concessions.¹⁵ There are four requirements for a valid compromise: (1) existence of litigation, (2) agreement between the parties, (3) intention of ending or preventing the litigation, and (4) reciprocal concessions made by the parties.¹⁶

For an illustration of how these requirements operate, recall the dispute between Jack and Jill. Upon leaving the pail of water for Jill, Jack thinks he is owed \$15. Jill believes she only owes \$10. Instead of rushing to the nearest courthouse, the two sit down,

15. C. CIV. art. 2044 (1999) (Fr.) (trans. author) ("La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître." ["A transaction is a contract whereby the parties terminate a litigation which has arisen, or prevent a litigation from arising."]); CÓDIGO CIVIL [C.C.] art. 1809 (2006) (Spain) (trans. author) ("La transacción es un contrato por el cual las partes, dando, prometiendo o reteniendo cada una alguna cosa, evitan la provocación de un pleito o ponen término al que había comenzado." ["A transaction is a contract by which the parties, by giving, promising, or retaining something, avoid the filing of a suit or put an end to one that has already been instituted."])).

16. Some civilian scholars have written that there are three requirements for a valid compromise. See AUBRY & RAU, PETITS CONTRATS RESPONSABILITÉ, § 418, in VI DROIT CIVIL FRANÇAIS 242-43 (1951) [hereinafter AUBRY & RAU (DROIT CIVIL FRANÇAIS)] (trans. author) (a transaction requires: (1) consent of the parties, (2) existence or the possibility of a dispute between the parties, and (3) reciprocal concessions or sacrifices of the parties); GUILLERMO A. BORDA, OBLIGACIONES § 923, in 1 TRATADO DE DERECHO CIVIL 675 (4th ed.) (trans. author) (a transaction requires: (1) an agreement of wills, (2) reciprocal concessions, and (3) concessions extinguish the litigious or doubtful obligations); LITVINOFF (OBLIGATIONS), *supra* note 12, at 637 (a transaction requires: (1) existence of litigation, (2) intention of ending the litigation; and (3) reciprocal concessions of the parties). These interpretations are consistent with the four requirements discussed in this Comment. Aubry and Rau incorporate the intention to end or prevent litigation within the requirement that the possibility of litigation exists. Borda incorporates the requirement of litigation into the requirement that concessions be made to extinguish the litigious obligation. Litvinoff places all of the requirements as conditions for there being a valid agreement between the parties.

discuss their differences, and reach an agreement: Jill will pay Jack \$12.50 for the pail of water. At this point, Jack and Jill have compromised. They have reached an agreement that prevented litigation from occurring by making reciprocal concessions.

This simple situation highlights how the requirements for a valid compromise function. The first requirement—that litigation exist—does not require present *judicial* litigation to exist, though such would certainly suffice.¹⁷ Jack has not commenced an action against Jill; there is only a disagreement between the two. The mere existence of a disagreement, or even the belief that a dispute will arise,¹⁸ constitutes litigation for the purposes of reaching a compromise.¹⁹ It is easy to understand why such disagreement is required: if the parties did not disagree, there would be nothing about which to settle. Had Jack and Jill both initially believed that Jack was owed \$15, then the two would have no dispute to resolve.

Once a dispute has arisen, the second requirement is the natural next step towards reaching a compromise: there must be an agreement between the parties. In civil law jurisdictions, “an agreement is the accord of two or more persons on an object of juridical interest.”²⁰ Jack and Jill reached an agreement at the moment they both consented that payment of \$12.50 would settle their dispute.

The third requirement establishes the cause of the parties’ compromise. For a valid compromise to exist, the agreement must intend to end or prevent the litigation.²¹ If a dispute arises and the parties enter into an agreement, then the goal of that agreement must be to resolve the dispute via settlement rather than judgment. Otherwise, the agreement does not serve the purpose of a

17. CIVIL CODE [C.C.Q.] art. 2631 (2001) (Québec) (“Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.”); FRANCO-ITALIAN PROJET art. 588 (1927) (trans. J.-R. Trahan, translation on file with author) (“Transaction is a contract whereby the parties, by means of mutual concessions, terminate litigation that has already arisen or avert litigation that might arise between them.”); CIVIL CODE [C. CIV.] art. 3307 (1960) (Eth.) (“Transaction is a contract by which the parties, by making reciprocal concessions, terminate an existing dispute or prevent a future one.”).

18. AUBRY & RAU (DROIT CIVIL FRANÇAIS), *supra* note 16, at 242.

19. Such litigation is referred to as extra-judicial litigation. *Id.* at 244; LITVINOFF (OBLIGATIONS), *supra* note 12, at 637.

20. AUBRY & RAU, OBLIGATIONS § 340, *in* 1 CIVIL LAW TRANSLATIONS 296 (trans. La. State Law Inst. 1965) [hereinafter AUBRY & RAU (CIVIL LAW TRANSLATIONS)].

21. C.C. art. 1809 (2006) (Spain); C. CIV. art. 3307 (1960) (Eth.); FRANCO-ITALIAN PROJET art. 588 (1927) (trans. J.-R. Trahan, translation on file with author).

compromise, as the disagreement between the parties will continue to exist.

The last requirement for a valid compromise is not as intuitive as the first three, but it distinguishes a compromise from other forms of settlement in civilian jurisdictions: reciprocal concessions must be made by the parties.²² There are other methods of settling disputes in civil law systems “in which the sacrifice is made by one of the parties alone,” such as renunciation.²³ Requiring that Jack and Jill both concede something to one another is what makes their agreement a compromise.²⁴

In sum, a compromise is an agreement between parties that has the goal of ending or preventing litigation through reciprocal concessions. In order for a compromise to exist, there must be a dispute, the parties must reach an agreement that has as its goal to end or prevent litigation, and reciprocal concessions must be made.

B. Common Law Accord and Satisfaction

In the American common law, the term “accord and satisfaction” is used to express “the legal consequence of a creditor’s acceptance of a substitute performance for a previously existing claim or prior original duty.”²⁵ As the conjunctive name implies, accord and satisfaction consists of two distinct parts. The “accord” of an accord and satisfaction is an agreement in which the creditor promises to accept the substitute performance for the pre-existing claim or duty.²⁶ The “satisfaction” is the actual acceptance by the creditor of that substitute performance.²⁷ Used together, these terms represent the legal consequence of accepting

22. AUBRY & RAU (DROIT CIVIL FRANÇAIS), *supra* note 16, at 243 (“Transaction supposes reciprocal concessions or sacrifices on behalf of each party.”); BORDA, *supra* note 16, at 674 (“Transaction is the act by virtue of which the parties, making reciprocal concessions, extinguish litigious or doubtful obligations.”).

23. LITVINOFF (OBLIGATIONS), *supra* note 12, at 638. Renunciation is “an act whereby a person abdicates or abandons a right.” AUBRY & RAU (CIVIL LAW TRANSLATIONS), *supra* note 20, at 219.

24. In Jack and Jill’s dispute, the reciprocal obligations are Jack’s agreement to accept \$2.50 less than what he believes is owed, and Jill’s agreement to pay \$2.50 more than what she believes she owes. Though such reciprocal obligations are equal in monetary value, equality is not a requirement. *See* BORDA, *supra* note 16, at 674 (example of a doctor believing \$100 is owed, the patient believing \$10 is owed, and the parties compromising on \$50).

25. SARAH HOWARD JENKINS, DISCHARGE § 70.1, *in* 13 CORBIN ON CONTRACTS 301 (13th ed. 2003) [hereinafter CORBIN].

26. RESTATEMENT (SECOND) OF CONTRACTS § 281(1) (1981); E. ALLEN FARNSWORTH, § 4.24, *in* 1 FARNSWORTH ON CONTRACTS 468 (1990).

27. FARNSWORTH, *supra* note 26.

performance of the accord as satisfaction,²⁸ the legal consequence being the discharge of the prior claim or duty.²⁹

There are three requirements for a valid discharge of an existing claim or duty by accord and satisfaction: (1) existence of a claim or duty, (2) offer and acceptance of a substitute performance in full settlement, and (3) proper consideration.³⁰ The operation of these requirements can be demonstrated by the dispute of Jack and Jill. Jack believes he is owed \$15; Jill believes she only owes \$10. The two discuss their differences and reach an agreement that Jill will pay Jack \$12.50. Jill then writes Jack a check for \$12.50, which he accepts.

The first requirement—existence of a prior claim or duty³¹—is clearly met in the hypothetical. An existing claim or duty is required, because, without it, there is nothing for which to offer a substitute performance. Had Jill not had a duty to pay Jack a sum of money, she would have had no reason to offer the substitute payment.

In the common law, the prior existing claim or duty need not be in dispute or unliquidated.³² A valid accord and satisfaction may exist without an actual dispute, though such claims are rarely litigated.³³ Jack and Jill could have both initially agreed that Jill owed Jack \$15. Thereafter, the two could have revised that agreement to say that Jill would give Jack \$10 along with her

28. CORBIN, *supra* note 25.

29. RESTATEMENT (SECOND) OF CONTRACTS § 281(1) (1981).

30. See T.J. Trauner Assocs., Inc. v. Cooper-Benton, Inc., 820 F.2d 643, 645 (3d Cir. 1987) (“elements of accord and satisfaction are (1) a disputed debt, (2) a clear and unequivocal offer of payment in full satisfaction of the debt, and (3) acceptance and retention of payment by the offeree”); Nat’l Steel & Shipbuilding Co. v. United States, 49 Fed. Cl. 579, 589 (Fed. Cl. 2001) (“elements of an accord and satisfaction are: (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration”); 1 C.J.S. *Accord and Satisfaction* § 8 (2005) (For an accord and satisfaction, “there must be a proper subject matter, competent parties, offer and acceptance, a meeting of the minds of the parties, and a proper consideration.”) (footnotes omitted).

31. CORBIN, *supra* note 25; ALVA R. HUNT, A TREATISE ON THE LAW OF ACCORD AND SATISFACTION COMPROMISE AND COMPOSITION AT COMMON LAW 5 (1912).

32. CORBIN, *supra* note 25, at 308. Unliquidated is defined as “not previously specified or determined.” BLACK’S LAW DICTIONARY 1574 (Bryan A. Garner ed., 8th ed. 2004). A dispute, on the other hand, is a “conflict or controversy.” *Id.* at 505. For clarification of how disputed claims differ from unliquidated claims, imagine that Jack and Jill enter into an agreement that involves Jill paying Jack a sum of money. If the amount Jill owes has yet to be determined, the amount is *unliquidated*. If the two disagree about the amount owed, the amount is *disputed*.

33. CORBIN, *supra* note 25, at 308.

collection of eggshells.³⁴ Paying \$10 plus the eggshells is a substitute performance for the original agreement. As such, the promise by Jack to accept the \$10 plus the eggshells in lieu of receiving \$15 for fetching the pail of water operates as an accord. Upon acceptance of the substitute performance, the accord will be satisfied, and the existing duty will be discharged.

The requirement that a prior claim or duty exist gives rise to the second requirement: offer and acceptance of a substitute performance in full settlement.³⁵ In reaching this offer and acceptance, “there must be an assent to, and a meeting of the minds of both parties upon the terms of the new agreement.”³⁶ The parties must also agree that the substitute performance will satisfy the existing claim or duty.³⁷ Within this second requirement, there are three elements. First, there must be an offer and acceptance. Second, that offer and acceptance must be for a substitute performance. And third, the substitute performance must be in full settlement of the existing claim or duty.

In order for the second requirement to be met, there first must be an offer and an acceptance. This has also been characterized as requiring “a mutual agreement between the parties in which one pays or performs and the other accepts payment or performance in satisfaction of a claim or demand”³⁸ The use of the term “agreement” is not incorrect but may be misleading with regards to the timeframe within which an accord and satisfaction can operate. An agreement in the common law is “a manifestation of mutual assent on the part of two or more persons.”³⁹ Stating that Jack and Jill entered into an agreement paints a picture of the two sitting down, discussing their differing opinions, establishing the settlement amount, and subsequently performing their agreement. While this is one manner by which an accord and satisfaction occurs,⁴⁰ it is not the only manner, and it is not the manner most often litigated.⁴¹ An accord and satisfaction can also discharge a claim or duty without a prior agreement; the discharge may occur

34. The eggshells are a collector’s item, as they are from Humpty Dumpty’s great fall. *Humpty Dumpty*, in *THE REAL MOTHER GOOSE* 40 (Scholastic Inc. 1994) (1916).

35. 1 C.J.S. *Accord and Satisfaction* § 8 (2005); HUNT, *supra* note 31, at 5.

36. HUNT, *supra* note 31, at 6.

37. CORBIN, *supra* note 25, at 304; HUNT, *supra* note 31, at 5.

38. *Nev. Half Moon Mining Co. v. Combined Metals Reduction Co.*, 176 F.2d 73, 76 (10th Cir. 1949).

39. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

40. CORBIN, *supra* note 25, at 301–03.

41. *Id.* at 303.

by instantaneous offer and acceptance.⁴² In this situation, the acceptance by the creditor and the performance by the debtor occur simultaneously.

As an illustration of how these methods differ, assume Jill believes the amount owed is \$10; Jack believes the amount due is \$15. Jack and Jill discuss their differing opinions and decide that Jill will pay Jack \$12.50. Jill then pays Jack. At the moment when there is a meeting of the minds between Jack and Jill that payment of \$12.50 will settle their dispute, they have entered into an agreement. Not until that agreement is performed, however, will Jill's duty to Jack be discharged through a valid accord and satisfaction.

Now assume that instead of discussing the matter, Jill simply sends Jack a check for \$10 with the notation "in full settlement" on the back. Jack deposits the check. In this situation, a valid accord and satisfaction exists. Jill offered a substitute performance when she sent the notated check to Jack. Jack accepted this offer when he deposited the check. Though there is no prior agreement, Jack's acceptance and the discharge of Jill's existing duties occur simultaneously.⁴³ As such, it is not incorrect to state that the second requirement for a valid accord and satisfaction is that there must be an agreement for a substitute performance in full settlement. For clarification, however, the second requirement is better described as necessitating an offer and acceptance of a substitute performance in full settlement.

For the second requirement to be met, the offer and acceptance must be for a substitute performance.⁴⁴ In the common law, a substitute performance must be distinguished from a substitute contract.⁴⁵ Though the two are very similar, the distinction between them for the purposes of accord and satisfaction is the timeline by which each discharges the prior existing claim or duty. A substitute contract discharges the prior duty at the moment the parties reach an agreement.⁴⁶ A substitute performance does not

42. *Id.*

43. *See, e.g.,* Deuches v. Grand Rapids Brass Co., 215 N.W. 392, 393 (Mich. 1927) (holding that "to effectuate accord and satisfaction a prior agreement is not necessary").

44. CORBIN, *supra* note 25, at 273.

45. "A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor's existing duty." RESTATEMENT (SECOND) OF CONTRACTS § 279(1) (1981). *See also* CORBIN, *supra* note 25, at 398-99 (A substitute contract acts as "a change in prospective rights or obligations without extinguishing or discharging a contractual relationship.") (footnote omitted).

46. RESTATEMENT (SECOND) OF CONTRACTS § 279(2) (1981).

discharge the existing duty until the performance is executed.⁴⁷ In the situation in which Jack and Jill reach an agreement regarding the amount owed, if that agreement operates as a substitute contract,⁴⁸ then Jill's original duty to Jack is discharged at the moment the agreement is formed. If the agreement does not operate as a substitute contract, then Jill's payment to Jack is a substitute performance. Her original duty, therefore, is not discharged until the moment of performance. The latter situation constitutes an accord and satisfaction; the former does not.

Finally, in order for the second requirement to be met, the substitute performance must be made in full settlement.⁴⁹ In other words, the substitute performance must completely discharge the prior claim or duty. This element is required to ensure that upon satisfaction of the accord, the prior claim or duty is fully extinguished.⁵⁰

The last requirement for a valid accord and satisfaction to exist is that "new, valuable, and legal consideration" be present.⁵¹ Consideration is a bargained for performance or return promise.⁵² Therefore, for a promise to give, do, or not do, there must be a quid pro quo, something given, done, or not done in return.⁵³ In the context of accord and satisfaction, courts have held that "[t]he consideration is the resolution of a disputed claim."⁵⁴ If Jill pays

47. *Noyes v. Pierce*, 122 A. 896, 898 (Vt. 1923) ("It was not the mere promise to pay the money, but the payment of the money itself, that the plaintiff agreed to accept in discharge of the obligation. To hold otherwise would be to enlarge the contract to an agreement to accept the new promise of defendant to pay the money in lieu of the money as agreed, which is not permissible."); RESTATEMENT (SECOND) OF CONTRACTS § 281(1) (1981); HUNT, *supra* note 31, at 161. For a recent court discussion of how accord and satisfaction and substitute contracts differ as to when existing claims and duties are discharged, see *Ryder v. Wash. Mut. Bank, F.A.*, 501 F. Supp. 2d 311, 319 (D. Conn. 2007).

48. Whether an agreement operates as a substitute contract is one of interpretation to be "gleaned from the expressions of the parties." CORBIN, *supra* note 25, at 403 (footnotes omitted).

49. *Id.* at 308–09; HUNT, *supra* note 31, at 5.

50. See 1 C.J.S. *Accord and Satisfaction* § 8 (2005) (stating that "the contract must finally and definitely close the matter covered by it, so that nothing of or pertaining to that matter is left unsettled, or open to further question or arrangement").

51. *Id.* at 6.

52. RESTATEMENT (SECOND) OF CONTRACTS § 71(a) (1981).

53. *Id.* For a valid consideration, the promise may also be one in which "the promisor should reasonably expect to induce action or forbearance on the part of the promisee." *Id.* at § 90(1).

54. *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 147–48 (3d Cir. 1999). See *AIU Ins. Co. v. Mitsui O.S.K. Lines, Ltd.*, 897 F. Supp. 724, 727 (S.D.N.Y. 1995) ("The settlement of the dispute constitutes consideration."); *Occidental Chem. Corp. v. Env'tl. Liners, Inc.*, 859 F. Supp. 791, 793 (E.D. Pa.

Jack \$15, the consideration for her performance is the resolution of the dispute.

In sum, parties may discharge prior existing claims and duties through accord and satisfaction. For a valid accord and satisfaction to exist, there must be an existing claim or duty, the parties must offer and accept a substitute performance in full settlement of that existing claim or duty, and there must be adequate consideration.

C. Intersection of Civil Law Compromise and Common Law Accord and Satisfaction

As is evident by their definitions, civil law compromise and common law accord and satisfaction strive to achieve the same goal, namely to end disputes through settlement rather than judgment. There are, however, characteristics that distinguish the two. A civil law compromise may only be made over a disputed claim;⁵⁵ a common law accord and satisfaction may exist over a disputed or undisputed claim.⁵⁶ An accord and satisfaction requires that the agreement between the parties be for a substitute performance.⁵⁷ A compromise agreement may be for a substitute performance, but a substitute contract will also suffice.⁵⁸

Understanding these distinctions allows for the recognition of the overlap of the two concepts. Both civil law compromise and common law accord and satisfaction discharge existing, disputed claims and duties when parties agree on a substitute performance. Therefore, whether a settlement has been reached when there is a disputed claim and a substitute performance may be determined by applying the rules of either civil law compromise or common law accord and satisfaction.

1994) (“The consideration [for a valid accord and satisfaction] is the resolution of an unliquidated or disputed claim.”) (citation omitted); *Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.*, 341 N.W.2d 655, 664 (Wis. 1984) (“Resolution of an actual controversy involving some subject of pecuniary value and interest to the parties is sufficient consideration of an accord and satisfaction.”).

55. AUBRY & RAU (DROIT CIVIL FRANÇAIS), *supra* note 16, at 242.

56. CORBIN, *supra* note 25, at 308.

57. RESTATEMENT (SECOND) OF CONTRACTS §281(1) (1981); HUNT, *supra* note 31, at 161.

58. LITVINOFF (OBLIGATIONS), *supra* note 12, at 644.

II. INTERPRETATION: ARE THE TWO DOCTRINES DIFFERENT?

The second questions that must be answered before understanding how Louisiana has incorporated the two settlement doctrines are questions of interpretation. How is existence of a compromise evaluated under the civil law? How is existence of an accord and satisfaction evaluated under the common law?

A. Civil Law Compromise: Subjective Inquiry

In French civil law, the literal meaning of the terms of a contract should be used unless “the terms employed by the parties involve in themselves some difficulty or ambiguity” or “[w]here, in spite of their clarity, these terms taken in their literal sense cannot be reconciled with the nature of the contract and the apparent intention of the parties.”⁵⁹ Courts are therefore encouraged to consider the subjective intent of the parties, at the very least to determine if the parties’ apparent intent conflicts with the words of the contract. As such, the “intellectual rigor with which the [contract] analysis is carried through to detailed consequences” in French law has been painted as the picturesque notion of the “subjective meeting of two minds.”⁶⁰

This subjective approach has been utilized by French courts to determine if a transaction—or what is referred to as a compromise in Louisiana⁶¹—exists. Such an analysis is illustrated in the case of *Lafon v. Rouquet*.⁶² *Lafon* involved an automobile accident that left

59. AUBRY & RAU (CIVIL LAW TRANSLATIONS), *supra* note 20, at 345. The literal meaning of the words of the contract may also be disregarded “where the *rapprochement* of two or more clauses of the agreement [give] rise to doubts on the scope of these various clauses.” *Id.* at 346.

60. BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 35 (2d ed. 1992).

61. In French law, the term *compromis* refers to a submission to arbitration. *See* C. CIV. arts. 2059–61 (1999) (Fr.). Transaction under French law is the equivalent of a compromise in the revised Louisiana law. *Compare* C. CIV. art. 2044 (1999) (Fr.) with LA. CIV. CODE ANN. art. 3071 (2008). Prior to the revision of the compromise articles in 2007, both the terms “transaction” and “compromise” were used in the Louisiana Civil Code. The term “transaction” was removed in the 2007 revision as it was found to be “superfluous and could lead to confusion.” LA. CIV. CODE ANN. art. 3071 cmt. c (2008). Regardless of whether such assertions are correct, the term “compromise” is used in this Comment solely to refer to an agreement by which parties end or prevent litigious obligations through reciprocal concessions. In other words, compromise is only used herein to refer to the French notion of *transaction*, not the French notion of *compromis*.

62. Cour d’appel [CA] [regional court of appeal] Montpellier, June 21, 1932, D. 1934, 1, 283 (Fr.) (trans. J.R. Trahan, translation on file with author).

one party seriously injured.⁶³ Thereafter, the involved parties entered into a settlement: the tortfeasor paid the victim 5,169 francs, and in exchange the victim gave an “acquittal final and without reservation,” meaning he forwent any future claims against the tortfeasor.⁶⁴ Two years later, the victim began experiencing seizures, which were attributed to the accident.⁶⁵ The victim then filed suit against the tortfeasor for damages of 60,000 francs.⁶⁶ In response to the litigation, the tortfeasor claimed that the victim had no right to judgment because the parties had settled the claim by a transaction two years prior.⁶⁷ In interpreting the alleged transaction, the court looked to the “common intention of the parties” and declared that despite the settlement agreement stating the “acquittal [was] final and without reservation,” the victim “intended [to repair] only the harm that had then been experienced”; future harm was not intended to be included.⁶⁸ By observing the subjective belief of the victim, the court found that no transaction existed.⁶⁹

The *Lafon* court’s use of the subjective intent, as opposed to only relying on the parties’ outward actions, has been mirrored in other French-influenced, civil law jurisdictions. In *Benoit v. Laurion*, the Superior Court of Québec was presented with the classic situation of a debtor owing a creditor a sum of money.⁷⁰ The debtor sent the creditor a check with a note saying, “If you do not accept this check in settlement, I will be forced to take procedural steps against you.”⁷¹ Before accepting the check, the creditor inserted his own conditions on its face, to the effect that he “did not accept [the check] as a settlement but as a payment on the account.”⁷² The creditor then sued the debtor for the remainder of the amount he believed was owed.⁷³

The debtor argued, *inter alia*, that the creditor “[could not] recover because he cashed the check.”⁷⁴ Judge Archambault for the Superior Court of Québec did not accept the debtor’s argument. “To admit that the cashing of this check was tantamount to

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 284.

69. *Id.*

70. *Benoit v. Laurion*, [1943] C.S. 236 (Québec) (trans. J.-R. Trahan, translation on file with author).

71. *Id.* at 238.

72. *Id.*

73. *Id.*

74. *Id.*

renunciation of his credit right by the [creditor] would be against all principles. It is axiomatic that tacit consent results from certain action or from certain facts that necessarily presuppose it.”⁷⁵ In reaching this conclusion, the court noted that even if the check had only borne the endorsement “in final settlement,” as opposed to the words actually written on the note, “its cashing would not have entailed an acquiescence in this demand on the part of the [creditor]. This acquiescence is a question of fact and not a question of law.”⁷⁶

The holdings in *Benoit* and *Lafon* highlight the subjective inquiry in which civil law jurisdictions engage when determining whether a compromise exists. This is not to say that the sole question of the courts is one of subjective intent; in both aforementioned cases the courts certainly examined the outward actions of the parties. However, in situations where the “terms employed by the parties” at the time the alleged compromise was entered into “cannot be reconciled with . . . the apparent intention of the parties,”⁷⁷ civil law jurisdictions place greater weight in the subjective beliefs of the parties as opposed to the actions the parties took.

B. Common Law Accord and Satisfaction: Objective Analysis

The common law “look[s] to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention.”⁷⁸ The Restatement (Second) of Contracts notes this reliance on an outward manifestation of intent of the parties by providing that “[t]he conduct of a party may manifest assent even though he does not in fact assent.”⁷⁹ As the comments to the Restatement establish, “[t]he phrase ‘manifestation of intention’ adopts an external or objective standard for interpreting conduct.”⁸⁰

In discussing the differences in objectivity and subjectivity, American contracts scholar Samuel Williston stated that “[t]he point of dispute is whether actual mental assent of the parties is a legal requisite, or merely whatever may have been in the minds of

75. *Id.* at 239.

76. *Id.* at 238.

77. AUBRY & RAU (CIVIL LAW TRANSLATIONS), *supra* note 20.

78. *First Nat. Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937).

79. RESTATEMENT (SECOND) OF CONTRACTS § 19(3) (1981). *See also* *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (“The mental assent of the parties is not requisite for the formation of a contract.”).

80. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

the parties. Is the test objective or subjective?”⁸¹ Williston concluded that the test was objective and that the “expression of mutual assent, and not the assent itself, [was] the essential element of contractual liability.”⁸² Williston was not alone in this belief. Common law giants such as Justice Oliver Wendell Holmes⁸³ and Judge Learned Hand also followed this method. As Judge Hand famously wrote:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.⁸⁴

This objective analysis generally used for contract interpretation in the common law is also used to determine the existence of a valid accord and satisfaction. In doing so, common law courts focus on the parties’ outward actions, such as the cashing of a check,⁸⁵ rather than their subjective intent. Such an

81. Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85, 85 (1919).

82. *Id.* at 87.

83. As Justice Holmes wrote:

We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended.

O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897).

84. *Hotchkiss v. Nat’l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff’d*, 201 F. 664 (2d Cir. 1912), *aff’d*, 231 U.S. 50 (1913).

85. *See, e.g., Rang v. Hartford Variable Annuity Life Ins. Co.*, 908 F.2d 380, 383 (8th Cir. 1990) (holding that “the cashing of a check for less than the full amount ‘of a liquidated and undisputed claim’ that contained a ‘full settlement’ statement constituted an accord and satisfaction”); *Niebler & Muren, S.C. v. Brock-White Co. of Wis.*, 361 N.W.2d 732, 733 (Wis. 1984) (“Under the common-law rule of accord and satisfaction, the creditor’s cashing of a check offered as full payment constitutes a discharge of the entire debt.”); *Honeysett v. White Co.*, 159 A. 207, 208 (Pa. 1932) (“The general principle is well

analysis is exemplified in the case of *Dick Corp. v. Union Station Redevelopment Corp.*, in which a dispute arose between two contractually bound corporations.⁸⁶ The corporations submitted to arbitration, and one corporation, the creditor, was awarded a sum of money to be paid by the other corporation, the debtor.⁸⁷ The debtor did not pay the creditor the amount owed, so the creditor sought confirmation of the arbitration award in federal court.⁸⁸ At this point, the debtor paid the principal amount due but did not pay interest on that amount.⁸⁹ The debtor argued, *inter alia*, that its payment of the sum “operated as an accord and satisfaction, discharging any obligation [the debtor] had to pay interest.”⁹⁰ The *Dick Corp.* court questioned whether the creditor assented to such a condition, as the court was unable to find any outward “manifestation of intent” on the part of the creditor.⁹¹ In response, the debtor produced an affidavit from the creditor showing that the creditor “had an ‘understanding and belief’ that [the debtor’s] prompt payment of the principal would satisfy [the creditor’s] claim for interest.”⁹²

On this point, the court berated the debtor. “[C]ontracts can only be formed through objective manifestations of mutual assent.”⁹³ The creditor’s “subjective mental state is therefore irrelevant to the court’s determination of whether the parties arrived at an accord and satisfaction.”⁹⁴ The court found that because the creditor had performed no outward action to show his mutual assent that payment would be accepted in full settlement, a valid accord and satisfaction did not exist.⁹⁵

The holding in *Dick Corp.* highlights the objective analysis that common law jurisdictions perform when determining if prior existing claims and duties have been discharged through a valid

established that when a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted in full satisfaction of the claim, or not at all, the retention and use thereof by the creditor constitutes an accord and satisfaction.” (quoting *Barron Co. v. Fox & Co.*, 84 Pa. Super. 46, 49 (Pa. 1924)).

86. *Dick Corp. v. Union Station Redevelopment Corp.*, No. 90-1196, 1990 U.S. Dist. LEXIS 12939 (D.C. Cir. Sept. 26, 1990).

87. *Id.* at *1.

88. *Id.*

89. *Id.*

90. *Id.* at *1-2.

91. *Id.* at *9.

92. *Id.* at *7.

93. *Id.*

94. *Id.* at *8.

95. *Id.* at *10.

accord and satisfaction. This is not to say that common law courts are completely blind to subjective inquiries, but such questions are not at the forefront of the common law interpretive process. Therefore, situations exist in the common law in which parties are bound “to things which neither of them intended.”⁹⁶

C. Divergence of Civil Law Compromise and Common Law Accord and Satisfaction

As is evident from the courts’ analysis in *Lafon v. Rouquet*, *Benoit v. Laurion*, and *Dick Corp. v. Union Station Redevelopment Corp.*, the common law and civil law legal systems diverge in their analysis of whether a settlement has been reached. The French civilian tradition and its progeny engage in a subjective inquiry before determining whether a settlement agreement has been formed, allowing outward actions that indicate acceptance of a compromise to “be combated by any means, even by testimonial proof.”⁹⁷ The American common law tradition, on the other hand, takes a more objective approach, focusing on the outward actions of the parties, as opposed to their subjective beliefs, even when there is evidence that the subjective intent of the parties is at odds with their outward actions.⁹⁸

While the cases presented establish the general analytical approach undertaken by each legal system, their facts also highlight a greater disconnect between the two doctrines: if the alternate interpretive approach had been utilized in any of the aforementioned cases, the result might have been the opposite. Under an *objective* analysis, the Montpellier Cour d’Appel in *Lafon* could have relied on the document signed by the parties and the plain meaning of the words within that document. Taking this approach, the court could have found that the parties did reach a compromise. Instead, the court turned to the subjective intent of the victim in determining that a settlement had not been reached. Under a *subjective* analysis, the D.C. Circuit court in *Dick Corp.* may have found a valid accord and satisfaction, as the creditor subjectively understood the debtor’s actions indicated a settlement of the existing duty. Instead, the court focused solely on the creditor’s outward actions, finding that without an outward manifestation of intent, there was no valid accord and satisfaction. Thus, it is clear that while the two doctrines strive to achieve the

96. Holmes, *supra* note 83.

97. *Benoit v. Laurion*, [1943] C.S. 236, 238 (Québec) (trans. J.-R. Trahan, translation on file with author).

98. CORBIN, *supra* note 25, at 318.

same goal, their differing analytical approaches can lead to vastly different outcomes.

III. CAN THE TWO DOCTRINES COEXIST? A LOOK AT LOUISIANA LAW

The intersection in definition but divergence in analysis between civil law compromise and common law accord and satisfaction has created judicial confusion in Louisiana. Both doctrines have been utilized by courts but in analytically conflicting manners.

A. Louisiana Compromise—Civil Law Compromise

Prior to June 2007, a compromise in Louisiana was defined as “an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.”⁹⁹ In order for a valid compromise to exist, it must be reduced to writing.¹⁰⁰ This definition bears striking resemblance to the definition of compromise found in civil law jurisdictions¹⁰¹ and has been interpreted by Louisiana courts in a similarly subjective manner.¹⁰² Such a subjective analysis is highlighted in the Louisiana cases of *RTL Corp. v. Manufacturer’s Enterprises, Inc.*¹⁰³ and *Hall v. Management Recruiters of New Orleans, Inc.*¹⁰⁴

99. LA. CIV. CODE ANN. art. 3071 (1994).

100. “[A compromise] must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding.” *Id.*

101. See C. CIV. art. 2044 (1999) (Fr.); C.C. art. 1809 (2006) (Spain); C.C.Q. art. 2631 (2001) (Québec).

102. *Smith v. Walker*, 708 So. 2d 797, 802 (La. App. 1st Cir.), *writ denied*, 718 So. 2d 418 (La. 1998) (“A compromise instrument is the law between the parties and must be interpreted according to the intent of the parties to the agreement.”).

It has been stated that “[t]he underlying reason for [the writing] requirement is obvious—it insures that both parties fully understand the nature of the offer avoiding the need to surmise parties’ intent ‘after-the-fact.’” *Sweet v. Iberia Parish Sch. Bd.*, 746 So. 2d 256, 258 (La. App. 3d Cir. 1999), *writ denied*, 754 So. 2d 237 (La. 2000). Despite this statement, courts routinely engage in “after-the-fact” inquiries of the parties’ intent to determine if a valid compromise exists. See, e.g., *Willard v. R & B Falcon Drilling USA, Inc.*, 836 So. 2d 424, 429 (La. App. 1st Cir. 2002) (holding that when “the parties dispute exactly what claims were clearly contemplated to be covered by the settlement, the jurisprudential rule allowing consideration of parol evidence to determine the parties’ intent is applicable.”).

103. *RTL Corp. v. Mfr.’s Enters., Inc.*, 429 So. 2d 855 (La. 1983).

In *RTL Corp.*, a dispute arose between a lessor and a lessee over the amount owed on an equipment lease.¹⁰⁵ The lessee sent the lessor a check marked “[p]ayment in full for crane rentals.”¹⁰⁶ When the lessor telephoned the lessee to say that he only considered the payment a partial payment, the lessee voiced no response.¹⁰⁷ The lessor then “substituted the words ‘partial payment’ for ‘payment in full’” on the face of the check and deposited it.¹⁰⁸ After failed negotiations, the lessor sued the lessee for the remainder of the amount allegedly due.¹⁰⁹

The trial and appellate courts found a valid accord and satisfaction existed between the parties,¹¹⁰ but the Louisiana Supreme Court reversed, applying the doctrine of compromise.¹¹¹ In doing so, the court noted that “the lower courts failed to examine the parties’ intent,” and instead simply “concluded that, as a matter of law, the creditor’s deposit of a full payment check constituted an accord and satisfaction.”¹¹² The court pointed out that “under [Louisiana] law whether the parties altered their original contract or entered a transaction or compromise depends on whether there was mutual consent.”¹¹³ The court continued on to examine the parties’ intent and found that based on the lack of response by the lessee on the telephone and the subsequent negotiations, the parties “consider[ed] the tendered check as partial payment of the debt.”¹¹⁴

RTL Corp. highlights the court’s desire to look past the outward actions of the parties and inquire into their subjective beliefs. The *RTL Corp.* court could have stopped the investigation upon finding that the lessor cashed the lessee’s check, and held that the outward actions of the lessor indicated an acceptance of the lessee’s condition that acceptance would operate as full settlement. The court also could have held that the lessee’s silence on the telephone was a lack of outward action, and therefore there was a lack of mutual assent to the lessor’s statement that he did not

104. Hall v. Mgmt. Recruiters of New Orleans, Inc., 332 So. 2d 509 (La. App. 4th Cir. 1976).

105. *RTL Corp.*, 429 So. 2d at 856.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 857.

112. *Id.*

113. *Id.*

114. *Id.*

accept the check in full settlement. Instead, however, the court looked beyond the mere outward actions of the parties and engaged in an assessment of the parties' intent.

The case of *Hall v. Management Recruiters of New Orleans, Inc.*¹¹⁵ provides another example of Louisiana's preference to examine the doctrine of compromise through a subjective lens. In *Hall*, an employee resigned, demanding unpaid wages and accrued vacation pay.¹¹⁶ The employer tendered a check to the employee for less than the amount the employee believed she was owed.¹¹⁷ The check included the notation, "For final payment of all back due salaries, commissions, or any other emoluments."¹¹⁸ The employee deposited the check and then filed suit for the remainder of the amount she believed was due.¹¹⁹ The employer in *Hall* moved for summary judgment based on the theory that a valid accord and satisfaction existed.¹²⁰ The trial court entered judgment on the employer's motion and dismissed the employee's claim.¹²¹

On appeal, the Louisiana fourth circuit reversed, applying the doctrine of compromise.¹²² Noting the importance of evaluating the subjective intent of the parties when determining if a valid compromise exists, Judge Schott wrote:

[t]he simple notation on [the] check hardly establishes so as to entitle [the employer] to a summary judgment as a matter of law, that it offered the payment under the condition that it be accepted as full settlement of all wage-related claims or not at all. [The employee's] cashing the check does not establish a clear intention on her part to accept [the employer's] offer to compromise their differences.¹²³

Judge Schott continued, stating that the case facts "demonstrate[d] that there was not necessarily a meeting of the

115. *Hall v. Mgmt. Recruiters of New Orleans, Inc.*, 332 So. 2d 509 (La. App. 4th Cir. 1976).

116. *Id.* at 510.

117. *Id.*

118. *Id.* at 511.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 512 (emphasis omitted). The similarities in Judge Schott's analysis and that of Judge Archambault of the Superior Court of Québec are striking. Both find the mere cashing of a check does not indicate intent to accept payment as settlement, despite the words written on the check. For Judge Archambault's analysis on the topic, see *supra* Part II.A.

minds between [the] parties so as to bring about a binding contract of compromise.”¹²⁴

The analysis used in *Hall* and *RTL Corp.* exemplifies the subjective, civilian approach taken by Louisiana courts to determine if a compromise has been reached. Instead of relying solely on the parties’ actions, the courts in both instances demanded that attention be paid to the parties’ intentions.

To be sure, it should not be implied from *RTL Corp.* or *Hall* that Louisiana courts operate entirely in a sphere of subjectivity, examining only the “secret and unexpressed intention[s]” of the parties.¹²⁵ General rules of contract interpretation certainly apply,¹²⁶ such that “[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent.”¹²⁷ However, if the intent of the parties is not clear from the language used in the compromise agreement, “parol evidence is admissible to clarify the ambiguity or show the intention of the parties.”¹²⁸ The admissibility of such evidence highlights the subjective analysis that courts must undertake when existence of a compromise is in question. Though intent may be shown by the outward actions of the parties, these actions are subject to review

124. *Hall*, 332 So. 2d at 512.

125. *First Nat. Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937).

126. *Ortego v. State*, 689 So. 2d 1358, 1363 (La. 1997) (“A compromise instrument is the law between the parties and must be interpreted according to the parties’ intent. It follows that the compromise instrument is governed by the same general rules of construction applicable to contracts.”) (citations omitted); *Gaubert v. Toyota Motor Sales U.S.A., Inc.*, 770 So. 2d 879, 881 (La. App. 1st Cir. 2000) (stating that “the compromise instrument is the law between the parties and must be interpreted according to the parties’ true intent,” but “[t]he meaning and intent of the parties to a written instrument, including a compromise, is ordinarily determined from the four corners of the instrument”) (citations omitted).

127. LA. CIV. CODE ANN. art. 2046 (2008). *See, e.g.*, *Smith v. Walker*, 708 So. 2d 797 (La. App. 1st Cir.), *writ denied*, 718 So. 2d 418 (La. 1998). *See also* LA. CIV. CODE ANN. art. 9 (1999) (stating that “[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature”).

128. *Willard v. R & B Falcon Drilling USA, Inc.*, 836 So. 2d 424, 428 (La. App. 1st Cir. 2002) (citations omitted). *See also* *Shell Oil Co. v. Jackson*, 655 So. 2d 482, 486 (La. App. 1st Cir. 1995) (finding that as the documents submitted into evidence did not “indicate the intent of the parties clearly and unambiguously,” outside testimony was allowed which showed “[t]here was no meeting of the minds” so the “[p]laintiff failed to establish the parties had mutual intent to settle all aspects of the litigation,” thereby failing to prove a valid compromise existed).

to determine whether they truly capture the parties' subjective beliefs at the time of the compromise. Therefore, as Judge Schott said, a mere action, such as the endorsement and deposit of a check, does not establish the requisite intent for a valid compromise.¹²⁹

B. Louisiana Accord and Satisfaction — Common Law Accord and Satisfaction with an Interpretive Twist

Unlike compromise, prior to June 25, 2007, accord and satisfaction was not provided for in Louisiana legislation.¹³⁰ Despite this lack of legislative footing, the Louisiana Supreme Court recognized the notion of accord and satisfaction as early as 1826 in the case of *Findley v. Breedlove*.¹³¹ *Findley* involved a seller attempting to collect money due for the sale of a steam engine.¹³² The buyer claimed he did not owe the amount because the steam engine was defective.¹³³ In reply, the seller claimed his duty to fix the defective product was discharged because the buyer's agent agreed that if the seller provided replacement parts for the defective ones, any claims the buyer had against the seller would be extinguished.¹³⁴ Having performed this task, the seller argued the dispute between the parties regarding the defective parts had been settled; thus, the buyer owed the seller the full amount due.¹³⁵

The main question for the *Findley* court to address was whether “the evidence by which it [was] contended, [an] accord and satisfaction, [was] established.”¹³⁶ In answering this question, the

129. *Hall*, 332 So. 2d at 512.

130. Technically, the phrase “accord and satisfaction” has existed in legislation since 1992 when the legislature adopted amendment number 1133 to LA. REV. STAT. ANN. § 10:1–207 (2003). Both the statute and the amendment were part of Louisiana's partial adoption of the Uniform Commercial Code (UCC). The underlying statute provided, “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’, [sic] ‘under protest’ or the like are sufficient.” The amendment in 1992 added that, “Subsection (1) does not apply to an accord and satisfaction.” Though the amendment added the words “accord and satisfaction” to Louisiana legislation, it can hardly be said to be a legislative incorporation of the notion, as the legislature merely adopted the changes to the UCC.

131. *Findley v. Breedlove*, 4 Mart. (n.s.) 105 (La. 1826).

132. *Id.* at 105.

133. *Id.* at 106.

134. *Id.* at 111–12.

135. *Id.* at 109.

136. *Id.* at 111.

court found that a valid discharge of duties did not exist because the buyer's agent lacked the capacity to represent him.¹³⁷ Therefore, no agreement was ever reached between the parties.¹³⁸ Though no accord and satisfaction was found in *Findley*, the court acknowledged the doctrine and, in doing so, implicitly expressed its willingness to apply the doctrine if the appropriate circumstance arose.¹³⁹

The implicit incorporation of accord and satisfaction into Louisiana law suggested in *Findley* was made explicit in the case of *Sentell v. Wilcox*.¹⁴⁰ In *Sentell*, the debtor delivered a check to the creditor.¹⁴¹ The creditor returned the check to the debtor, claimed it was not for the full amount, and established the amount that he believed was owed.¹⁴² The debtor replied to the creditor with two new checks bearing the words "in settlement" on their faces.¹⁴³ The checks were, yet again, for less than the amount the creditor had informed the debtor he was owed.¹⁴⁴ This time, however, the creditor certified the checks, and then filed suit against the debtor for the remainder.¹⁴⁵

The court found that when the creditor certified the checks marked "in settlement," the debtor's existing debt was discharged, despite the fact that the creditor believed he was owed more money and had informed the debtor of that belief.¹⁴⁶ Highlighting that the focus of the inquiry for whether an accord and satisfaction existed should be on the creditor's outward actions, the court said that it was the creditor's "privilege either to return the checks and sue for the whole amount, or to keep them and accept the condition."¹⁴⁷ The court only looked to determine if the creditor did or did not keep the checks; any subjective beliefs of the creditor went without scrutiny.

137. *Id.* at 113.

138. *Id.* at 114.

139. *Id.* at 111–12.

140. *Sentell v. Wilcox*, 3 Teiss. 503, 507 (La. Ct. App. 1906) ("Where, however, a sum of money is tendered in satisfaction of the claim, and tender is accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that [t]he party to whom it is offered is bound to understand therefrom [sic] that if he takes it he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction.").

141. *Id.* at 505.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 507.

147. *Id.*

This objective interpretation of accord and satisfaction continued in the case of *Berger v. Quintero*.¹⁴⁸ In *Berger*, the court accepted an attorney's plea of estoppel after a client retained a check sent by the attorney for the amount the client was owed from a previous case settlement, minus the attorney's fee.¹⁴⁹ Enclosed with the check was a statement that said "the check was for the balance due."¹⁵⁰ The client retained the check for three years before certifying, after which he sued the attorney, claiming the attorney did not send him the full amount.¹⁵¹ Focusing particularly on the fact that the client had retained the check for three years, the court concluded that the client was "precluded from rejecting [the check] and suing [the attorney] upon the entire claim."¹⁵² Like the *Sentell* court, the *Berger* court relied solely on the parties' actions and did not inquire as to their subjective intent.

Since the early cases of *Sentell* and *Berger*, Louisiana courts have continued to apply the doctrine of accord and satisfaction, setting forth requirements very similar to those requirements set forth by American common law courts.¹⁵³ Not surprisingly, the interpretation numerous Louisiana courts have applied to accord and satisfaction has also mirrored that of the common law.¹⁵⁴

148. *Berger v. Quintero*, 127 So. 356 (La. 1930).

149. *Id.* at 356–57. The client was awarded \$5,354.12 in the partition. The attorney sent him only \$1,107.62. *Id.*

150. *Id.* at 357.

151. *Id.*

152. *Id.*

153. For common law requirements, see *supra* note 30. For Louisiana requirements, see *Pontchartrain Park Homes, Inc. v. Sewerage & Water Bd.*, 168 So. 2d 595, 598 (La. 1964) (The requirements of an accord and satisfaction are "(1) An unliquidated or a disputed claim; (2) a tender by the debtor; (3) an acceptance of the tender by the creditor."); *Henriques v. Vaccaro*, 56 So. 2d 236, 239 (La. 1951) (The requirements for an accord and satisfaction are "the presence of an unliquidated or disputed claim; a tender by the debtor of a certain amount as settlement thereof; and an acceptance . . ."); *Charles X. Miller, Inc. v. Oak Builders, Inc.* 306 So. 2d 449, 451 (La. App. 4th Cir. 1975) (The requirements for an accord and satisfaction are "(1) there was a disputed claim between debtor and creditor; (2) the debtor tendered a check for less than the sum claimed by the creditor; and (3) the creditor accepted the tender by negotiating the check."); *Braudway v. United Equitable Ins. Co.*, 208 So. 2d 359, 360 (La. App. 4th Cir. 1968) (The requirements for an accord and satisfaction are "(1) an unliquidated or a disputed claim; (2) a tender made by the debtor in full settlement of the claim; and (3) an acceptance of the tender by the creditor . . ."); *Davis-Wood Lumber Co. v. Farnsworth & Co.*, 171 So. 622, 625 (La. Ct. App. 1937) (same).

154. Louisiana courts have stated that the signing of a check with the words "endorsed and accepted in full payment of within account" on it provides no room for doubt that a debtor intended the check to satisfy the full obligations. *Davis-Wood Lumber Co.*, 171 So. at 624. See *Peavy-Welsh v. Hendrix*, 139 F.2d

A more recent example highlighting this objective approach can be seen in *Henriques v. Vaccaro*.¹⁵⁵ In *Henriques*, an attorney agreed to represent a client on a contingency fee basis in which payment was to include shares of stock.¹⁵⁶ At the conclusion of the representation, a dispute arose regarding the amount of payment, specifically over the value of the shares.¹⁵⁷ The client mailed the attorney a check for the amount he believed was owed and enclosed a letter stating that the check was “in full settlement of the contract.”¹⁵⁸ The attorney replied to the client, detailing the terms of the contract, and stating the value that he believed was due, an amount which was higher than the amount delivered.¹⁵⁹ In his correspondence, the attorney stated: “I have had the check you sent me certified, and will apply the amount of same as a credit on my correct fee when it is later fixed and paid by you.”¹⁶⁰ Ultimately the attorney filed suit against the client for the remainder.¹⁶¹

In *Henriques*, the Louisiana Supreme Court agreed with the trial court that a valid accord and satisfaction existed:¹⁶²

The effect of the acceptance of the check in the instant case could only be set aside because of error or fraud, and a careful review of the evidence has convinced us that the plaintiff received the payment with its eyes open and it cannot now be heard to say that its action in so doing did not have the legal effect of settling for all times the dispute between the parties.¹⁶³

403, 403 (4th Cir. 1943); *Mall Tool Co. v. Poulan*, 40 So. 2d 512, 513 (La. App. 2d Cir. 1940); *Myers v. Acme Homestead Ass’n*, 138 So. 443, 445 (La. Ct. App. 1931).

155. *Henriques*, 56 So. 2d 236.

156. *Id.* at 237.

157. *Id.* at 238.

158. *Id.*

159. *Id.*

160. *Id.* (emphasis omitted).

161. *Id.* at 237.

162. *Id.* at 239–40.

163. *Id.* at 239 (quoting from *Davis-Wood Lumber Co. v. Farnsworth & Co.*, 171 So. 622 (La. Ct. App. 1937)). In its conclusion, the *Henriques* court noted the seeming harshness of the decision, as the attorney had gone to great pains to avoid such results. “While we regret the inequities which sometimes result from an impartial application of the law, nevertheless, we cannot overrule established principles in a case which falls squarely within their scope. *Dura lex, sed lex.*” *Id.* at 240.

The *Henriques* decision, like that of *Berger* and *Sentell*, indicates the courts' reliance on the outward actions of the parties in determining if existing claims and duties have been discharged by accord and satisfaction. In the cases in which this approach has been adopted, courts have ignored the parties' subjective intent, despite arguably clear evidence that at the time the substitute performance was accepted the actions of the parties were not indicative of their intent.

While the aforementioned cases suggest that Louisiana courts apply an objective analysis when determining if a valid accord and satisfaction exists, the courts have not always followed this rule. On numerous occasions, the courts have instead adopted a more subjective approach.¹⁶⁴ An example of such an interpretation can be found in *Selber Bros., Inc. v. Newstadt's Shoe Stores*, in which the Louisiana Supreme Court stated that when the evidence does not show that the parties understood or intended for the discharge of all liabilities from the acceptance of payment, no valid accord and satisfaction exists.¹⁶⁵ In *Selber Bros.*, a lessor and lessee had a contract by which the lessee agreed to pay rent of a stipulated amount plus a fixed percentage of monthly sales.¹⁶⁶ After failing to conduct business on the leased premises for several months, the lessee paid the lessor the stipulated amount of rent but did not include any percentage of monthly sales.¹⁶⁷ The lessee told the lessor that the amount in the checks constituted "all [he was] going to pay."¹⁶⁸ Ignoring this statement, the lessor deposited the rent payments and then sued the lessee for a percentage of monthly sales.¹⁶⁹ The lessee argued that the lessor was not entitled to any additional payment because acceptance of the original checks constituted a valid accord and satisfaction.¹⁷⁰

164. See, e.g., *Selber Bros., Inc. v. Newstadt's Shoe Stores*, 14 So. 2d 10, 13 (La. 1943) (holding that when the evidence does not show that the parties understood or intended for the discharge of all liabilities from the acceptance of payment, no valid accord and satisfaction exists); *Pool Co. v. Universal Mach. Co.*, 701 So. 2d 1014, 1016 (La. App. 5th Cir. 1997) (holding that "[e]ssential to a valid accord and satisfaction is that the creditor understands that the payment is tendered in full settlement of the dispute," and, therefore, if the terms of the contract do not ascertain the intent of the parties, "parol evidence is admissible to . . . show the intention of the parties") (emphasis omitted); *McClelland v. Sec. Indus. Ins. Co.*, 426 So. 2d 665, 670 (La. App. 1st Cir. 1982), *writ denied*, 430 So. 2d 94 (La. 1983) (same).

165. *Selber Bros., Inc.*, 14 So. 2d at 14.

166. *Id.* at 11.

167. *Id.*

168. *Id.* at 13.

169. *Id.*

170. *Id.*

The *Selber Bros.* court rejected the lessee's theory, noting that "[t]here was nothing in writing" to indicate that the checks would operate as full satisfaction if accepted.¹⁷¹ Despite the conversation between the lessor and lessee, the court found that the evidence did not show that the parties "understood or intended that the discharge of all liabilities would result from the acceptance" of payment.¹⁷² As such, the court found that the lessor was entitled to a percentage of monthly sales.¹⁷³ This reasoning highlights a willingness of the court to look past the outward actions of the parties and also examine their subjective intent in determining whether a dispute has been settled through accord and satisfaction.

*Henriques*¹⁷⁴ and *Selber Bros.*¹⁷⁵ represent divergent methods of analyzing accord and satisfaction in Louisiana. *Henriques* highlights a great deference for objectivity, despite subjective intent to the contrary.¹⁷⁶ *Selber Bros.* represents a leaning towards subjectivity, despite the parties' outward actions.¹⁷⁷ These cases may be viewed as the endpoints of a spectrum that balances an objective analysis with a subjective inquiry. As with any spectrum, there are cases that fall somewhere in between.

On the more subjective end of the spectrum, courts have said that the cashing of a check with the words "full payment" on the back is not necessarily an acceptance of the check as full settlement, if, based on past performances of the debtor, the creditor does not believe the check is for full settlement.¹⁷⁸ In *Antoine v. Elder Realty Co.*, the Louisiana third circuit found that the creditor had no reason to conclude that the checks were tendered in full settlement because the debtor "frequently failed to make full monthly payments" while "accompany[ing] his payments with slips of paper indicating 'part payment' or 'full payment.'"¹⁷⁹ The court's analysis focused on the creditor's beliefs, as opposed to his actions, but required those beliefs to be shaped by the outward actions of the debtor. Such a situation

171. *Id.* at 14.

172. *Id.*

173. *Id.* The percentage owed was determined based on the average amount of previous monthly sales. *Id.*

174. *Henriques v. Vaccaro*, 56 So. 2d 236 (La. 1951).

175. *Selber Bros., Inc.*, 14 So. 2d 10.

176. *Henriques*, 56 So. 2d at 239.

177. *Selber Bros., Inc.*, 14 So. 2d at 13.

178. *Antoine v. Elder Realty Co.*, 255 So. 2d 625, 629 (La. App. 3d Cir. 1971).

179. *Id.*

indicates that the understanding between the parties trumps the actions they take.¹⁸⁰

Leaning more towards the objective end of the spectrum, courts have said that “[t]he unilateral action of the creditor in changing the endorsement on the reverse side of the check from payment in full to a partial payment” does not negate acceptance of the check as full satisfaction.¹⁸¹ In fact, such actions suggest the creditor “was fully aware of the nature of the tender.”¹⁸² These holdings indicate reliance by the courts on the outward actions of the parties, though in such situations the courts note that the parties’ actions reflect their subjective intent.

C. The Tangled Web of Judicial Confusion for Louisiana Settlement Agreements

The application of the doctrine of accord and satisfaction alone has been problematic for Louisiana jurisprudence, as the principles of objectivity and subjectivity are in constant competition.¹⁸³ The existence of the doctrine of compromise in Louisiana further compounds this confusion, as the concept has been most often applied in a subjective manner.¹⁸⁴ Attempting to determine how these two doctrines work—or perhaps do not work—together is taxing both on the mind and on the jurisprudence.

At least one Louisiana court has recognized the dissonance between the doctrines. In *Davis-Wood Lumber, Co. v. Farnsworth & Co.*, the Orleans appellate court applied the doctrine of accord and satisfaction to determine if a dispute between a subcontractor and general contractor had been settled.¹⁸⁵ The subcontractor and general contractor disagreed about the amount of money the general contractor owed the subcontractor.¹⁸⁶ After attempting negotiations to no avail, the general contractor sent the subcontractor a check with the notation “endorsed and accepted in

180. See also *Hebert v. D. Frugé, Contractor, Inc.*, 192 So. 2d 574, 575 (La. App. 3d Cir. 1966) (finding accord and satisfaction did not exist because “there was no agreement between the parties that the check sent by defendant to plaintiff and cashed by plaintiff was in full payment of the indebtedness”).

181. *Charles X. Miller, Inc. v. Oak Builders, Inc.*, 306 So. 2d 449, 452 (La. App. 4th Cir. 1975). See *Harrington v. Aetna Life & Cas. Co.*, 411 So. 2d 1255, 1257 (La. App. 1st Cir. 1983).

182. *Eppling v. Jon-T Chems., Inc.*, 363 So. 2d 1263, 1266 (La. App. 4th Cir. 1978).

183. *Supra* Part III.B.

184. *Supra* Part III.A.

185. *Davis-Wood Lumber Co. v. Farnsworth & Co.*, 171 So. 622, 624 (La. Ct. App. 1937).

186. *Id.*

full payment of within account” on its face.¹⁸⁷ The subcontractor deposited the check and sued the general contractor for the remainder.¹⁸⁸ The court found the dispute was settled when the subcontractor cashed the check.¹⁸⁹ In reaching this conclusion, however, the court noted that the result would have been different had the doctrine of compromise been applied.¹⁹⁰ “[T]he effect of the acceptance of [a] check may not be considered as a compromise as defined by the Code” due to a lack of consideration.¹⁹¹

Though the court cited a lack of consideration as the reason why the result under compromise would have been altered, the court more appropriately should have said that a different result would have been reached under the doctrine of compromise because of the parties’ subjective intent. Immediately prior to receipt of the check, the subcontractor had made known to the general contractor the amount it believed it was owed.¹⁹² Given the negotiations between the two parties,¹⁹³ it is implausible that the general contractor truly believed when sending the check that all prior existing claims and duties would be discharged.

Be that as it may, the comment of the *Davis-Wood Lumber Co.* court does shed light on the inherent problem with the manner in which civilian compromise and common law accord and satisfaction have coexisted in Louisiana. Both strive to achieve the same end—to terminate disagreements through settlement rather than judgment—but they employ different means to reach that end. Compromise follows a more subjective course, balancing the parties’ beliefs with their outward actions. Accord and satisfaction, on the other hand, pursues a more objective analysis in which the parties’ actual intent is not necessarily determinative. However, at other times, courts applying the doctrine of accord and satisfaction engage in a more subjective inquiry, allowing the parties’ inner beliefs to trump the actions they take. Because of these differences, similar fact patterns have led to conflicting opinions depending upon what doctrine is applied. This creates the impression that the “black letter law” of Louisiana settlement agreements is entangled

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* For purposes of a civil law compromise, it is more appropriate to state that the compromise would not exist for lack of reciprocal concessions, not for lack of consideration.

192. *Id.* at 624.

193. *Id.*

as follows: the mere signing¹⁹⁴ or depositing¹⁹⁵ of a check *does not* establish the intent necessary for a valid *compromise*, but the cashing of a check *does* constitute a valid *accord and satisfaction*, even when the creditor expressly informs the debtor that he does not believe the check was paid in full settlement;¹⁹⁶ however, the cashing of a check *does not* constitute a valid *accord and satisfaction* if the creditor does not intend for an accord and satisfaction to exist, regardless if the debtor relays his intent to the creditor that payment is given in full settlement.¹⁹⁷ Judicial confusion has clearly run rampant.

IV. THE 2007 REVISION: A SOLUTION?

Such judicial confusion reflects the two problems regarding settlement agreements in Louisiana. First, conflicting interpretations of the doctrine of accord and satisfaction have been adopted. Second, one interpretation of accord and satisfaction—arguably the more frequently used interpretation—works at odds with the doctrine of compromise.

The recent revision to the compromise articles, however, may have mitigated these problems. To determine if that is so, the same questions asked before must be answered again: under the new articles, what is a compromise? What is accord and satisfaction? How will the two doctrines be interpreted?

A. Louisiana Compromise Remains the Same

The recent revisions of the Civil Code did little in the way of altering Louisiana's doctrine of compromise.¹⁹⁸ A compromise is defined by article 3071 as “a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship.”¹⁹⁹ The new articles also maintain the writing requirement for a valid compromise by stating that “[a] compromise shall be made in

194. *Hall v. Mgmt. Recruiters of New Orleans, Inc.*, 332 So. 2d 509, 512 (La. App. 4th Cir. 1976).

195. *RTL Corp. v. Mfr.'s Enters., Inc.*, 429 So. 2d 855, 857 (La. 1983).

196. *Henriques v. Vaccaro*, 56 So. 2d 236 (La. 1951); *Davis-Wood Lumber Co.*, 171 So. 622.

197. *Selber Bros., Inc. v. Newstadt's Shoe Stores*, 14 So. 2d 10, 14 (La. 1943).

198. Compare LA. CIV. CODE ANN. art. 3071 (Supp. 2008) with LA. CIV. CODE ANN. art. 3071 (1994). For the text of article 3071 in 2007 prior to the revision, see *supra* Part III.A.

199. LA. CIV. CODE ANN. art. 3071.

writing or recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings.”²⁰⁰

Since little definitional change was made to the doctrine of compromise, one can expect that little interpretive change will occur. Courts examining a compromise agreement will continue to scrutinize the subjective intent of the parties, particularly when their outward actions create an uncertainty as to what that intent was. Therefore, a lone action, such as endorsing or depositing a check, may continue to be insufficient to establish the requisite intent for a valid compromise.²⁰¹

B. Louisiana Accord and Satisfaction—Common Law Accord and Satisfaction, no Twist

Following the revision, article 3079 provides that “[a] compromise is also made when the claimant of a disputed or unliquidated claim, regardless of the extent of his claim, accepts a payment that the other party tenders with the clearly expressed written condition that acceptance of the payment will extinguish the obligation.”²⁰² The comments establish that this article is the “validation . . . of the dispute- settling [sic] mechanism known at common law as accord and satisfaction.”²⁰³ Under this definition, accord and satisfaction requires: (1) the existence of a disputed or unliquidated claim and (2) offer and acceptance of a substitute payment in full settlement. These requirements are quite similar to the requirements previously provided by Louisiana courts.²⁰⁴

200. LA. CIV. CODE ANN. art. 3072 (Supp. 2008).

201. *Supra* Part III.A.

202. LA. CIV. CODE ANN. art. 3079 (Supp. 2008).

203. *Id.* cmt. a.

204. *Supra* note 153. These requirements are also very similar to the requirements for a valid accord and satisfaction in the common law, though not identical. The Louisiana codified version of accord and satisfaction only applies to disputed or unliquidated claims, whereas the common law accord and satisfaction applies to all prior existing claims and duties. Though litigation over undisputed or liquidated claims is not as common as litigation over disputed or unliquidated claims, it is worth noting that should litigation in the former instance arise in Louisiana, article 3079 would *not* apply. An example of such a situation is the earlier stated hypothetical in which Jack and Jill agree Jack is owed \$15, and then subsequently agree Jill will pay Jack \$10 plus her collection of eggshells. In this situation, though, Jill’s substitute performance of the \$10 plus eggshells operates as an accord and satisfaction under the common law. However, under Louisiana law, it would *not* operate as an accord and satisfaction because the claim was not disputed or unliquidated. Instead, in Louisiana, it would effectuate an objective novation or *dation en paiement*. See LA. CIV. CODE ANN. arts. 1881 (2008), 2655 (2005).

Though the definition of accord and satisfaction reflects the definition previously adopted in the Louisiana jurisprudence, there is a substantial change in the placement of the doctrine. Whereas accord and satisfaction was previously not embedded in legislation, it is now. Giving the doctrine legislative footing was a goal of the Louisiana State Law Institute²⁰⁵ during the redrafting process,²⁰⁶ clearly indicating the civilian desire to incorporate accord and satisfaction into a primary source of law. In civil law systems, including Louisiana,²⁰⁷ jurisprudence is not a primary source of law.²⁰⁸ Therefore, while courts have applied the doctrine of accord and satisfaction for decades, the doctrine lacked authority from the Civil Code,²⁰⁹ which in turn meant the courts

205. The Louisiana State Law Institute (LSLI) is an institute “dedicated to law revision, law reform and legal research.” John H. Tucker, Jr., President of the Louisiana State Law Institute, Address at the First Annual Meeting (Mar. 16, 1940) (transcript available at <http://www.lsi.org>). See also LA. REV. STAT. ANN. § 24:201 (2007) (stating the Institute is “chartered, created and organized as an official advisory law revision commission, law reform agency and legal research agency of the state of Louisiana”). As part of its duties, the LSLI considers needed improvements to Louisiana law and makes recommendations of those improvements to the state legislature. LA. REV. STAT. ANN. § 24:204(1) (2007). Beginning in 1997, the LSLI began redrafting the Civil Code articles on transaction and compromise. The revisions were submitted to the state legislature in the 2007 Regular Session as House Bill 73.

206. Louisiana State Law Institute, Policy Questions Prepared for Meeting of the Council 7 (Nov. 14–15, 1997) (on file with Louisiana State Law Institute) (“Since the doctrine of accord and satisfaction is well established in the Louisiana jurisprudence, it seems advisable to incorporate that doctrine into the Louisiana statutory framework.”).

207. In Louisiana, primary sources of law include legislation and custom. LA. CIV. CODE ANN. art. 1 (1999).

208. For a discussion on civilian sources of law, see FRANÇOIS GÉNY, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* 19–27 (trans. La. State Law Inst., 1963) (1954).

209. On multiple occasions, then Judge Lemmon remarked on the lack of authority for the doctrine of accord and satisfaction in the Civil Code, noting that it was “unnecessary and ‘uncivilian’ to import the common law doctrine of accord and satisfaction to decide issues involving transaction and compromise.” *Terra Trucks, Inc. v. Weber*, 346 So. 2d 275, 276 (La. App. 4th Cir. 1977) (Lemmon, J., concurring). See also *La. Nat'l Bank of Baton Rouge v. Heindel*, 365 So. 2d 37, 39 (La. 1978) (Lemmon, J., concurring). In *Terra Trucks, Inc.*, a debtor sent a creditor a check for less than the amount the creditor believed was due. 346 So. 2d at 275. The check included no notation on it that it was given in full settlement. *Id.* The creditor cashed the check and sued the debtor for the remainder. *Id.* Despite the debtor’s claim to the contrary, the majority found that a valid accord and satisfaction had not discharged the debtor’s duty to pay the creditor the full amount because the debtor had not informed the creditor that “the check was being tendered in full settlement of the entire debt.” *Id.* at 276. Justice Lemmon, concurring in result, stated that he “prefer[ed] to decide this

had no legislative guidance as to how the doctrine should be defined or interpreted. Arguably, the lack of legislative placement and guidance is at least part of the reason that two divergent interpretations of accord and satisfaction developed in the Louisiana jurisprudence.

Though the doctrine now has legislative footing, the question remains as to how the newly enacted article will be interpreted.²¹⁰ Courts could focus solely on the outward actions of the parties, or courts may engage in a more subjective inquiry. Examining the text of the article, the most likely analytical approach that courts will take is the former. Article 3079 states that the claimant must accept a payment with a “clearly expressed written condition that acceptance of the payment will extinguish the obligation.”²¹¹ This means that two actions must occur in order for an accord and satisfaction to exist. First, there must be a payment made with a condition on its face that clearly establishes that the payment is given with the intent of extinguishing the existing duty. Second, the claimant must accept the payment. This reading leads to the conclusion that courts should engage in an objective analysis, disregarding any subjective intent of the parties. The court should only look to see if the two requirements are met; if the requisite condition is placed on the face of the payment, and if the claimant accepts that payment, then a valid accord and satisfaction exists. A court need only determine first, if Jill included words on the face of her check that fulfilled the “clearly expressed written condition” requirement of article 3079, words such as “in full settlement,” and second, if Jack took some action to accept the check, such as endorsing or depositing it. If both occur, Jill’s existing obligation to Jack is extinguished by accord and satisfaction, and any subjective belief Jack—or Jill—had to the contrary is irrelevant. To reach this conclusion, though, the court must ensure that it clearly defines what actions fulfill these two requirements. In other

case by simply citing the appropriate article,” the appropriate article being article 3071 on compromise. *Id.* (Lemmon, J., concurring).

Similar criticisms of the use of the non-legislatively established doctrine of accord and satisfaction have been raised in other mixed jurisdictions. In Puerto Rico, the judicial incorporation of accord and satisfaction “has been criticized [by scholars] because the same results could be obtained using the transaction contract.” Ennio M. Colón García et al., *Puerto Rico: A Mixed Legal System: Emergence of New Legal Creations*, 32 REV. JURIDICA U. INTER. P.R. 291, 293 (1998).

210. As of September 5, 2008, no court has interpreted article 3079 following the revision.

211. LA. CIV. CODE ANN. art. 3079 (Supp. 2008).

words, the court must establish what qualifies as a “clearly expressed written condition” and what qualifies as an “acceptance.”

Through basic civilian interpretive techniques,²¹² Louisiana courts can readily determine what constitutes a “clearly expressed written condition” and an “acceptance.” Following the legal maxim *interpretatio cessat in claris*,²¹³ the plain text of the article states that there must be a “clearly expressed written condition that acceptance of the payment will extinguish the obligation,” meaning that all that is required are words clearly expressing that the payment is intended to discharge prior existing claims and duties. This suggests that phrases such as “in full settlement,” “in full payment,” and “in full indebtedness” will meet the required written condition. Indeed, these exact phrases have previously been found to provide no room for doubt that the debtor intended the check to satisfy the existing obligation.²¹⁴ Such an interpretation would also not disrupt holdings like that of *Selber Bros.*, as there was no actual writing involved; the “condition” was merely said aloud by the debtor.²¹⁵ From a purely plain text reading of the article, courts are likely to hold that such phrases qualify as the required “clearly expressed written condition.”

Courts must also determine what constitutes an acceptance of the payment. Following the technical meaning²¹⁶ of the word “accepts” as it relates to contracts in the Civil Code, courts may conclude that the inquiry should center around the outward actions of the parties. “When an offeror invites an offeree to accept by performance . . . [the] contract is formed when the offeree begins the requested performance.”²¹⁷ Under this general principle of

212. The Louisiana Civil Code establishes how laws are to be interpreted. See LA. CIV. CODE ANN. arts. 9–13 (1999).

213. Interpretation ends in clarity. For Louisiana’s codified acceptance of this manner of interpretation, see LA. CIV. CODE ANN. art. 9 (1999).

214. See, e.g., *Peavy-Welsh Lumber Co. v. Hendrix*, 139 F.2d 403, 403 (4th Cir. 1943); *Mall Tool Co. v. Poulan*, 40 So. 2d 512, 513 (La. App. 2d Cir. 1940); *Davis-Wood Lumber Co. v. Farnsworth & Co.*, 171 So. 622, 624 (La. Ct. App. 1937); *Myers v. Acme Homestead Assoc.*, 138 So. 443, 445 (La. Ct. App. 1931).

215. *Selber Bros., Inc. v. Newstadt’s Shoe Stores*, 14 So. 2d 10, 14 (La. 1943).

216. “The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter.” LA. CIV. CODE ANN. art. 11 (1999).

217. LA. CIV. CODE ANN. art. 1939 (2008). Recall that under the common law, an accord and satisfaction may exist when a debtor invites a creditor to accept by performance. There need not be a prior agreement between the parties; the creditor may merely accept the debtor’s offer, in which case acceptance of a

contract law in Louisiana, whether a party has accepted an offer is judged based on the party's action, not the party's intention. When Jack endorses Jill's check, he has begun the requested performance, that performance being to accept the check as full payment. Thus, it is Jack's outward action that determines acceptance, not his subjective intent.

Such an interpretation is also to be expected when evaluating past Louisiana jurisprudence. Numerous courts have held that endorsing a check,²¹⁸ cashing a check,²¹⁹ and even retaining a check for an extended period of time²²⁰ constitutes acceptance. An objective analysis based on the outward actions of the parties would give credence to such interpretations. The comments to article 3079 state that the new article "is not intended to change the law."²²¹ The "law" prior to the revision—again, according to the comments—is represented by objectively analyzed cases, such as *Berger v. Quintero*.²²² Thus, the continuance of such past interpretations appears to be the intention of the new article.

Furthermore, accord and satisfaction was incorporated from the common law. In the American common law, whether a party has accepted a payment that discharges a prior existing duty is determined by examining the party's outward actions, not the party's intentions.²²³ As Louisiana is incorporating this common law notion, it should also incorporate its analysis.²²⁴

By using the phrase "accepts a payment," the drafters of the article also ended the dispute as to what to do if the creditor performs two actions that indicate a conflict between the subjective intent and the outward actions of the creditor. If Jack cashes the check after crossing out the words "in full settlement," there is now no question whether the parties have settled. Under article 3079 they have because Jack has accepted the payment. The article does not require Jack to accept the condition; it only requires for the

substitute performance in full settlement and performance of that substitute performance occur simultaneously. *Supra* Part I.B.

218. *Davis-Wood Lumber Co.*, 171 So. at 624.

219. *Henriques v. Vaccaro*, 56 So. 2d 236, 239 (La. 1951).

220. *Berger v. Quintero*, 127 So. 356, 357 (La. 1930).

221. LA. CIV. CODE ANN. art. 3079 cmt. a (Supp. 2008).

222. *Id.*

223. *Supra* Part II.B.

224. When interpreting legislation that has been incorporated from an outside source, the "interpreter must examine the sources, if any, from which that legislation was taken." Katie Drell Grissel, Comment, *The Legal Fiction of "Clear Text" in Willis-Knighton v. Caddo-Shreveport Sales and Use Tax Commission*, 67 LA. L. REV. 523, 536 (2007).

condition to be on the payment and for Jack to accept the payment.²²⁵ By cashing the check he has accepted the payment; whatever he does to the “condition” on the payment is of no concern to the court.

The only plausible exegetical argument that can reasonably be made for the use of the parties’ subjective intent in determining whether the claimant has accepted the check is that the doctrine of accord and satisfaction has been placed within the Civil Code section on compromise.²²⁶ Therefore, *in pari materia*, accord and satisfaction should be interpreted in the same manner as compromise. As compromise invites a more subjective analysis to occur,²²⁷ accord and satisfaction should also be examined under a subjective lens. Such an analysis would allow courts to utilize Judge Schott’s statement in *Hall* that “cashing [a] check does not establish a clear intention” to accept the offer.²²⁸ In applying this analysis when determining if a party has accepted a payment, the court would need to look not only at the outward actions of the parties, but at their subjective intent as well.

Though this argument is validated by the interpretive methods provided in the Civil Code,²²⁹ the counter is readily apparent: *generalia specialibus non derogant*.²³⁰ As defined, accord and satisfaction is a subset of compromise.²³¹ Therefore, the rules

225. The implication of the requirement that the claimant accept the payment is that in accepting the payment, the claimant is also accepting the condition on the payment. Be that as it may, the text of the article only requires that the claimant accept the actual payment.

226. Article 3079 is found within Book III (Of the Different Modes of Acquiring the Ownership of Things), Title XVII (Of Transaction and Compromise).

227. *Supra* Part III.A.

228. *Hall v. Mgmt. Recruiters of New Orleans, Inc.*, 332 So. 2d 509, 512 (La. App. 4th Cir. 1976).

229. LA. CIV. CODE ANN. art. 13 (1999) (“Laws on the same subject matter must be interpreted in reference to each other.”).

230. Special dispositions derogate from general dispositions.

231. Article 3079 begins by stating that “[a] compromise is also made when” LA. CIV. CODE ANN. art. 3079 (Supp. 2008). This definition establishes that accord and satisfaction is a form of compromise. It is interesting to note that draft versions of the article—as presented to the Louisiana State Law Institute—by and large did not define an accord and satisfaction as a compromise. Draft versions instead stated that an accord and satisfaction “[had] the effect of a transaction or compromise” or “assimilated to a compromise.” See Louisiana State Law Institute, Minutes of Meeting of the Council 2–3 (Oct. 17–18, 2003) (on file with the Louisiana State Law Institute); Louisiana State Law Institute, Accord and Satisfaction Prepared for Meeting of the Council 6–7 (Apr. 19, 1999) (on file with the Louisiana State Law Institute); Louisiana State Law Institute, Accord and Satisfaction Prepared for Meeting of the Committee 6–7 (Apr. 9, 1999) (on file with the Louisiana State Law Institute).

regarding the more specific type of compromise should apply. Even if the subjective intent of the parties is examined under the doctrine of compromise in general, the outward actions of the parties should suffice when applying the doctrine of accord and satisfaction in particular.

The majority of reasonable interpretations of article 3079 favor the application of an objective analysis in determining if a valid accord and satisfaction exists. This being the case, courts should look solely at the parties' outward actions to determine if the appropriate condition was placed on the payment, and, if so, whether the claimant accepted the payment. If these actions required by article 3079 have occurred, then the court should hold that the prior existing claims and duties have been discharged through accord and satisfaction. Accepting this interpretation of the newly enacted article means that codification of accord and satisfaction has solved the first problem relating to Louisiana settlement agreements: it has provided an answer for the analytical method courts should use to determine if a valid accord and satisfaction is present. Courts should apply an objective analysis in making such a determination, focusing on the outward actions of the parties.

C. Can the Two Doctrines Coexist in Louisiana?

Assuming *arguendo* that the above analysis is adopted by the Louisiana courts, the second problem—whether the civilian form of compromise can coexist with the common law doctrine of accord and satisfaction in Louisiana—appears to remain unresolved. If accord and satisfaction is interpreted to require an objective analysis, and compromise remains interpreted through a more subjective inquiry, then for the cases in which either doctrine could be used—those cases including an existing dispute that is allegedly settled by a substitute performance²³²—the outcome of the case appears to continue to depend upon what article is applied. At first glance, the state of discord between the settlement agreements seems to be perpetuated in the revision.

However, a closer reading of the revised articles indicates that a method for determining when which article should be followed has been provided. For a valid accord and satisfaction to exist, there must be a “clearly expressed written condition that acceptance of payment will extinguish the obligation.”²³³ This is not an explicit requirement for a valid compromise. For a

232. *Supra* Part I.C.

233. LA. CIV. CODE ANN. art. 3079 (Supp. 2008).

compromise to exist, the contract must be made in writing.²³⁴ However, there is no requirement set forth by the Civil Code that the written compromise must include a clearly expressed written condition that acceptance of the payment will extinguish the prior obligation. Certainly the intention of ending or preventing litigation must be present for a valid compromise to exist,²³⁵ but those intentions need not be clearly or expressly stated in the agreement.²³⁶ Therefore, if there is a clearly expressed written condition on the face of the payment that establishes that the payment is meant to extinguish the obligation, then the more specific form of compromise—accord and satisfaction as defined in article 3079—should be applied. However, if there is no such condition on the payment, then the general form of compromise—as defined in article 3071—should be applied. This interpretation is supported by comment (b) to article 3079, which provides that “[a]n act that fails to meet the requirements for accord and satisfaction may be a valid compromise if it meets the general requirements for the validity of a compromise.”²³⁷

If Jill’s check meets the specific requirements of an accord and satisfaction by having on it a “clearly expressed written condition that acceptance of payment will extinguish the obligation,” then whether the two have settled is a question of accord and satisfaction under article 3079, and the courts should look solely at the outward actions of the parties. If this specific requirement does not exist on Jill’s check, then whether the two have settled is a question of compromise under article 3071, and the courts should

234. LA. CIV. CODE ANN. art. 3072 (Supp. 2008).

235. *Supra* Part I.A.

236. Revised article 3076 provides that “[a] compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express.” LA. CIV. CODE ANN. art. 3076 (Supp. 2008). The comments provide that this is a reproduction of article 3073, which provided that “[t]ransactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed” LA. CIV. CODE ANN. art. 3073 (1994). As interpreted, article 3073 in the 2006 Civil Code did not require that parties provide a clearly expressed written condition that acceptance of the compromise would extinguish the prior existing obligation. *See Angelo & Son v. Rapides Bank & Trust Co.*, 671 So. 2d 1283 (La. App. 3d Cir.), *writ denied*, 675 So. 2d 1083 (La. 1996). In *Angelo*, the dispute concerned whether the compromise agreement between the parties was for full settlement of all existing claims. *Id.* at 1286–87. The court found that the compromise did settle all disagreements between the parties because the parties “understood that the agreement would end all problems,” though such was not explicitly written in the compromise agreement. *Id.* at 1287.

237. LA. CIV. CODE ANN. art. 3079 cmt. b (Supp. 2008).

look at the subjective intent of the parties as well as at their outward actions.

Reading revised article 3079 with articles 3071 and 3072 provides a clear method for parties to determine whether a court will examine an alleged settlement agreement under the doctrine of compromise or the doctrine of accord and satisfaction. In doing so, the revision solves the second problem that existed in Louisiana settlement agreements. The web of judicial confusion is untangled.

CONCLUSION

Jill makes a deal with Jack: she will pay him to provide her with a pail of water. Jack agrees, fetches a pail, and sends Jill a bill for \$15. Jill replies with a \$10 check, noting on the back, "In full settlement." Jack sees the notation, cashes the check, and sends a letter to Jill stating, "I cashed your check, but you still owe me \$5." Can Jack sue Jill?

Prior to the 2007 revision of the compromise articles, the answer was unclear, but following the revision, the answer in Louisiana is firmly no. On the check there was a clearly expressed written condition that acceptance would extinguish the obligation. Jack accepted the check at the time he cashed it. Therefore, the requirements for a valid accord and satisfaction in Louisiana exist. Had Jill not included such a notation on the check, then whether the parties reached a settlement would be a question of compromise, in which case the court would examine not only the outward actions of the parties, but also their subjective intent.

If this interpretation of the revised articles herein described is adopted, then the revision will have successfully ended the judicial confusion surrounding Louisiana settlement agreements. The revision establishes the analytical method to be used when applying the doctrine of accord and satisfaction and provides a clear manner for determining under what circumstances to apply each settlement agreement. As such, the general policy desire to end disputes in settlement rather than judgment²³⁸ is now furthered instead of hindered. The revision has clarified the law, such that now creditors and debtors are—or at least should be—aware of their rights and duties, thereby decreasing legal uncertainty, which arguably will lead to less litigation.²³⁹

The subsidence of judicial confusion that will likely result from the revision does come at a price, one not mentioned in the documents prepared by the Louisiana State Law Institute or in the

238. *Supra* note 3.

239. Priest & Klein, *supra* note 4.

testimony that was given on the revision of the compromise articles before the Louisiana House Committee on Civil Law and Procedure of the Louisiana State Legislature.²⁴⁰ The cost of the doctrine of accord and satisfaction is that the law will inevitably trap some individuals into unintentionally discharging prior existing obligations.²⁴¹

As infantile as the dispute of Jack and Jill may seem, it is indicative of the situation that will occur in real life, though the real life dispute will not revolve around a pail of water and a five dollar bill. A creditor will receive a check with the proper notated condition on it. The creditor will send the debtor a note stating that the check has been cashed, but that such action should not be viewed as acceptance of the payment in full settlement. When the debtor fails to pay further, the creditor will file suit. Following the revision, the court should dismiss the creditor's action based on his cashing the check. In doing so, the court should pay no heed to the creditor's actions attempting to prevent such a result, and the court should ignore the creditor's subjective intent at the time he "accepted" payment. The only questions should be what was written on the check and what the creditor did with that check.

This fact pattern exists in every Louisiana case discussed herein in which accord and satisfaction was applied under an *objective* analysis. The creditor always believed that his actions would not discharge the prior obligation because he had manifested such belief through some outward action, be it by writing the debtor, calling the debtor, or taking some other action.

240. The only testimony regarding the incorporation of article 3079 presented during the hearing in front of the House Civil Law and Procedure Committee was as follows:

We have something called accord and satisfaction, which is a common law device and we are making it part of our Code. It's just like a compromise. It's if you've got a disputed claim, and I say, "Look, here is \$1,000 for that \$3,000 claim. And you say okay." That's accord and satisfaction. If that's in writing, it is a compromise. That's important because there are a lot of provisions relating to compromise that would not relate to accord and satisfaction. This is not a significant change at all because the accord and satisfaction can exist anyway.

Archived Broadcasts of House of Representatives Civil Law Committee Meeting (May 15, 2007), http://house.louisiana.gov/rmarchive/Ram/RamMay07/0515_07_CLP.ram (testimony of William E. Crawford, Director of Louisiana State Law Institute).

241. That this would result from the incorporation of a common law doctrine is of no surprise upon recognition that, generally, the common law places a greater emphasis on transactional security and efficiency than on morality, whereas the civil law promotes the latter over the former. NICHOLAS, *supra* note 60, at 212 ("French law takes a moral stance while English law emphasizes the security of transactions and economic efficiency.").

However, in all of these cases, the courts always found the existing duties had been discharged, despite the creditor's efforts to the contrary. Therefore, in every case, the creditor unintentionally discharged existing obligations.

Some may argue that this side effect of adopting the doctrine of accord and satisfaction is not a negative one, as creditors should be more mindful when accepting payments. Some may also argue that this is, in fact, a positive effect, as creditors should not be allowed to unilaterally alter the terms and conditions proposed by debtors. Reasonable minds may certainly differ as to whether the effects of the revision are positive or negative.

But at the end of the day, when rules regarding how parties enter into agreements are altered, a policy decision must be made: should the rules err on the side of binding people to contracts when they do not intend to be bound, or should the rules err on the side of not enforcing contracts when people intend for contracts to be enforced? During the 2007 regular legislative session, Louisiana—perhaps unwittingly—opted to adopt the former policy. In doing so, the previous judicial confusion regarding settlement agreements was inarguably cleared up, but at a price. As such, the state of the law in Louisiana regarding settlement agreements can now best be described as “[d]ura lex, sed lex.”²⁴²

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242. The law is harsh, but it is the law. *Henriques v. Vaccaro*, 56 So. 2d 236, 240 (La. 1951) (emphasis added).

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