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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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FLYNN, J., dissenting. I respectfully dissent from the opinion of the majority. I would reverse the decision of the trial court, remand with a rescript ordering it to determine when the tortfeasor's insurer's check cleared and was paid, and if paid within six years of the date of the demand for arbitration, ordering it to compel arbitration and allow what is, in my opinion, a timely claim to proceed to arbitration in the usual manner.

First, I note that the plaintiff's attorney deposited the check received in settlement of the plaintiff's third party claim for collection in his account on the day it was received after proper indorsement by his client. The contract statute of limitations, which all agree governs, provides in pertinent part that "[n]o action . . . on any contract in writing, shall be brought but within six years after the right of action accrues . . . ." General Statutes § 52-576 (a). The insurer's liability for underinsured benefits is covered by a policy provision found on page ten of the written contract at issue, under the heading "Endorsements." The policy states in pertinent part: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." See also General Statutes § 38a-336 (b). I agree with the plaintiff's contention that "payment" was not made, nor was the third party tortfeasor's policy "exhausted," until the check cleared.

The majority defines "payment" as "[a] discharge in money or its equivalent of an obligation or debt owing . . . ." Under Connecticut law, an uncertified check does not discharge the underlying obligation.[1] Our Supreme Court has stated that "the giving of a check by a debtor to his creditor does not discharge the debt until the check is paid." *Tuckel* v. *Jurovaty*, 141 Conn. 649, 651, 109 A.2d 262 (1954). In fact, the majority quotes *Huybrechts* v. *Huybrechts*, 4 Conn. App. 319, 321, 494 A.2d 593 (1985), for the same proposition: "[T]he giving of a draft by a debtor to his creditor *does not discharge the debt itself* until the draft is paid, it being a means adopted to enable the creditor to obtain payment . . . ." (Emphasis added; internal quotation marks omitted.) If the delivery of an uncertified check is a means for later obtaining payment, I do not understand how we arrive at the legal conclusion that payment has already been made upon its mere delivery. It is

undisputed that the tortfeasor's insurer, USAA/General Indemnity Company (General Indemnity), issued an uncertified check. The Uniform Commercial Code § 3-310, enacted in Connecticut under General Statutes § 42a-3-310 and also cited by the majority, covers the same territory: "[When] an uncertified check is taken for an obligation, the obligation is *suspended* to the same extent the obligation *would be* discharged if an amount of money equal to the amount [indicated on] the instrument were taken . . . ." (Emphasis added.) General Statutes § 42a-3-310 (b). The same provisions contrast the effects of a *certified* check. When a certified check is taken for an obligation, "the obligation *is discharged* to the same extent discharge would result if an amount of money equal to the amount [indicated on] the instrument were taken in payment of the obligation. . . ." (Emphasis added.) General Statutes § 42a-3-310 (a). Thus, the code provision plainly states that the obligation is not yet discharged simply by handing over an uncertified check. I do not understand how General Indemnity's obligations under policy limits are "*exhausted* by payment" within the meaning of the policy and § 38a-336 (b) when the obligation to pay has not been discharged. The majority seems to agree, stating that "payment" is "[a] *discharge* in money or its equivalent of an obligation or debt owing . . . ." (Emphasis added; internal quotation marks omitted.)

A check is a form of written instruction to pay a sum of money to a payee. See General Statutes §§ 42a-3-103 and 42a-3-104.[2] If it is honored, it constitutes payment. Under most circumstances, a check also evidences a promise to pay a sum of money, in the event that the check is dishonored. See, e.g., *Tuckel* v. *Jurovaty*, supra, 141 Conn. 651. In *Tuckel*, the court stated that "[t]he indorsement of the check made it negotiable in the hands of the defendant but it did not convert it into money. . . . The check still retained its character as a written promise to pay in accordance with its terms." Id.

If an insurer agrees to a settlement of a third party claim and issues its check for the amount agreed upon, but the check is not honored, then payment of the claim has not been made.

It follows that payment of a claim made against an underlying tortfeasor's insurance policy and exhaustion of that policy sufficient to trigger a supplementary claim made under the underinsured motorists provisions of the claimant's own policy cannot occur or commence until the day the check is honored.

It seems to me that the situation is analogous to an executory accord until the check is honored and actually paid and that any statute of limitations which payment triggered the running of should not begin to run against the plaintiff until actual payment occurs.

" 'An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.' 2 Restatement (Second), Contracts § 281 (1981); *W. H. McCune, Inc.* v. *Revzon*, 151 Conn. 107, 109, 193 A.2d 601 (1963)." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 809, 626 A.2d 729 (1993).

"Satisfaction of a claim may be found in either the promise to settle or the full performance of that promise. Connecticut law comports with the view that the intention of the parties is determinative of whether a settlement agreement constitutes an executory accord or a substitute agreement. *Halloran* v. *Fischer*, 126 Conn. 44, 46, 9 A.2d 290 (1939)." *Air-Care N.O. Nelson Co.* v. *Patchet*, 5 Conn. App. 203, 205, 497 A.2d 771 (1985).

"It is frequently difficult to determine as a matter of fact whether the parties agreed that the settlement agreement itself constituted satisfaction of the original cause of action, or whether the performance of the agreement was intended to be the satisfaction. 15 Williston, Contracts (3d Ed. Jaeger) § 1847." *Air-Care N.O. Nelson Co.* v. *Patchet*, supra, 5 Conn. App. 205.

" '[I]t is not a probable inference that a creditor intends merely an exchange of his present cause of action for another. It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was performed.' 15 Williston, supra, § 1847." *Air-Care N.O. Nelson Co.* v. *Patchet*, supra, 5 Conn. App. 206.

In this kind of factual scenario, I would hold that the six year contract statute of limitations did not begin to run until the check of the tortfeasor's insurer was honored because not until payment was the policy exhausted by payment.

The majority treats the delivery of an uncertified check by the tortfeasor's insurer as the commencement date of the statute of limitations period, or not, depending on future events unknown at the time of the check's delivery. Under this rule, if the uncertified check "is in fact paid in due course" at a later date,

then the earlier delivery is treated as the beginning of the statute of limitations period. Conversely, ''if the check is [later] dishonored on presentment,'' the majority states that delivery is then deemed not to have triggered the limitations period after all. Where does this leave the plaintiff when he takes delivery of the check? Under this rule, the plaintiff's time to exercise his rights to recover underinsured benefits begins to run before he even has any such rights. This rule is ''inconsistent with basic limitations principles.'' *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of California, Inc.*, 522 U.S. 192, 200, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997). A statute of limitations is a ''period during which suit [can] be brought''; *Clark* v. *Jeter*, 486 U.S. 456, 463, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988); and ''during which [a defendant's] rights may be subject to challenge.'' *United States* v. *Beggerly*, 524 U.S. 38, 49, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). The United States Supreme Court stated: ''The question presented [in an earlier Supreme Court case] was whether a statute of limitations could commence to run on one day while the right to sue ripened on a later day. We answered that question, and only that question, 'no,' [unless the legislature has told us otherwise in the legislation at issue]. . . . [If not] a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief. See *Reiter* v. *Cooper*, 507 U.S. 258, 267, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) ('While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute')." (Citation omitted.) *TRW, Inc.* v. *Andrews*, U.S. , 122 S. Ct. 441, 450 n.6, L. Ed. 2d (2001).

A statute of limitations is a span of time in which a plaintiff has the right to bring a cause of action and after which the action is barred. Our Supreme Court's use of the term '' '*exhausted* by payment' ''; (emphasis added) *Ciarelli* v. *Commercial Union Ins. Cos.*, 234 Conn. 807, 810, 663 A.2d 377 (1995); does not contemplate a looming cloud over the plaintiff's right to demand arbitration and to ask a court to compel arbitration if the demand is refused. By exhaustion, our Supreme Court meant that on the date in question, without the information derived from any later hindsight review, the plaintiff could have successfully demanded arbitration because the policy limits were

paid. The policy limits of the insured tortfeasor cannot be ''exhausted'' when the value indicated by the limits has not yet been transferred. The payment process has perhaps begun, but it has not been completed, and thus the policy has not been exhausted, until the plaintiff has the money.

For these reasons, I respectfully dissent from the majority opinion.

[1] In this case, the underlying obligation of the tortfeasor's insurance was to pay the policy limits, which would thereby ''enforce'' them, triggering the accrual of the plaintiff's cause of action for statute of limitations purposes.

[2] Title 42a of the General Statutes is Connecticut's enactment of the Uniform Commercial Code and may be cited as such. See General Statutes § 42a-1-101 et seq. Under these provisions, a check is defined in relevant part as a ''draft, other than a documentary draft, payable on demand and drawn on a bank . . . .'' General Statutes § 42a-3-104 (f). A draft is defined as an ''instrument'' that is ''an order.'' General Statutes § 42a-3-104 (e). Finally, an order is a form of ''written instruction to pay money . . . .'' General Statutes § 42a-3-103 (6).