

## ESCAPE FROM THE BATTLE OF THE FORMS: KEEP IT SIMPLE, STUPID

by  
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*This Article reviews the history of the “battle of the forms” issue arising when contracting parties submit conflicting terms to each other in attempting to form a contract and how courts have resolved issues arising from this, both under the original Uniform Commercial Code (UCC) Article 2 and the Revised Article 2. The author reviews the economic circumstances that gave rise to the current use of standard form contracts, such as lower transaction costs and the ability of a company to control the terms and the discretion of its personnel. He discusses how battle of the forms issues were resolved before Article 2 of the UCC was adopted, using common law interpretation tools such as the “last shot” and “mirror image” rules. The author then reviews the motivations for implementing UCC § 2-207, and surveys the problems that this section has created for the ability of courts to provide consistent resolution to battle of the forms disputes given ambiguities in the code’s wording. He then reviews the Revised § 2-207, comparing the old and new versions of the section, and discusses both how the revision may change how courts resolve battle of the forms disputes and the problems that still remain. The author ultimately proposes a more straightforward solution to the battle of the forms problem that has the advantages of the certainty provided by common law rules with the flexibility to consider the particular circumstances of a given transaction.*

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## I. INTRODUCTION

Keep it simple, stupid. Not an eloquent response to the classic contracts “battle of the forms” issue. Nonetheless, it’s a practical solution to a historical dilemma. This Article explores how simply going back to the basics could obviate the legal quagmire created by a hundred years of “battle of the forms” decisions and commentaries.

Standard form contracts, that is, contracts with preprinted terms containing “boilerplate” language, have been in common use in the United States since at least the late nineteenth century.<sup>1</sup> In 1894, the Supreme Court held that the standard form used by Western Union in its telegraph transmission contracts was enforceable.<sup>2</sup> Shortly thereafter, standard forms became the subject of scholarly review and comment.<sup>3</sup> Today, standard forms are estimated to account for more than ninety-nine percent of all contracts made in both

<sup>1</sup> See W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 31 (1984). In *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619, 620 (N.Y. 1915), the court referred to contracts that were entered into in 1910. A clear inference from the court’s opinion was that standard form contracts were not new.

<sup>2</sup> See *Primrose v. W. Union Tel. Co.*, 154 U.S. 1 (1894). In 1888, the reverse side of Western Union’s standard message form contained non-negotiable terms limiting Western Union’s liability for failed message transmissions to the price of the transmission or, in case of non-delivery, to fifty times that price. The Supreme Court held that Primrose accepted the terms of the contract by writing his message and signing the blank form. See also Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-AM. L. REV. 255, 259 (1986). Burgess observes that in England, standard form contracts run back to the end of the eighteenth century, when large railway companies used standardized terms to disclaim liability for goods damaged during carriage.

<sup>3</sup> See generally Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).

consumer and non-consumer transactions.<sup>4</sup> Standard forms now appear in both paper and electronic media, and are routinely used in all manner of contractual dealings—simple and complex—ranging from goods, to services, to intellectual property.

The universal use of standard form contracts reflects certain economic realities. Efficiency demands that businesses engaged in the mass production and distribution of products develop identical contracts regulating their rights, liabilities, and obligations.<sup>5</sup> Substantial savings in transaction costs are realized by the use of standard form contracts. It is simply too costly for management to negotiate and draft individually every term that might be relevant to a particular transaction.<sup>6</sup> Having counsel review individual standard forms is even more cost prohibitive in this world of high volume transactions. Standard forms promote the efficient use of expensive managerial and legal talent.<sup>7</sup> The party that drafts the standard form has the opportunity to control and allocate the risks to which it is exposed, and the expenses that it must incur in the subject transaction, thereby enabling the drafting party to reduce its price even more. Further, the drafting party may be able to control remedies and enforcement mechanisms to which it and the other party may be entitled, resulting in the resolution of any conflict being consistent and predictable. Moreover, the use of a standard form may lead to judicial economy, since the terms of such forms typically will have already withstood judicial scrutiny.<sup>8</sup> Lastly, and perhaps of most significance, the standard form enables the drafting party to control the conduct and limit the discretion of its employees. As a result, relatively low-level personnel, with no special training in commercial law, can be used to process routine transactions.<sup>9</sup> It should not be surprising, therefore, that modern contract formation is dominated by the use of standard forms. In short, “[s]tandard form contracts are a logical result of large-scale enterprise and complex economies.”<sup>10</sup>

So long as one party proposes a standard form contract to the other party for the other party to accept (or reject), there is no other contract document, and the other party accepts, there is no question of contract formation based on

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<sup>4</sup> See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971); see also John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000).

<sup>5</sup> Burke, *supra* note 4, at 289; see also Slawson, *supra* note 4, at 530–31.

<sup>6</sup> Gregory M. Travaglio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327, 331 (1983).

<sup>7</sup> See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1221 (1983).

<sup>8</sup> See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 439 (2002).

<sup>9</sup> Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 UCC L.J. 115, 116 (1999); see also Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent*, 72 TUL. L. REV. 2043, 2082 (1998).

<sup>10</sup> Burke, *supra* note 4, at 290.

varying language of conflicting forms.<sup>11</sup> However, in a typical commercial transaction for the sale of goods, the transaction is not confined to one standard form contract. The buyer's standard form contract is contained in its purchase order. The seller's standard form contract is contained in its invoice, acknowledgement, or other commercial reply form.<sup>12</sup>

The buyer's standard form is pro-buyer. Among other things, the buyer's standard form may contain a warranty, and does not limit liability in the event of the seller's breach. The seller's standard form is pro-seller. For example, the seller's standard form may contain an arbitration clause, since arbitrators are often members of the seller's trade. The seller's standard form may also limit or even disclaim warranties, and may limit the remedy for breach. The seller's and buyer's respective standard forms may also conflict on risk of loss, payment of attorney's fees, payment of interest, choice of forum and choice of law, manner and method of modifications and amendments to the contract, and even what constitutes a default. To complicate the issues even more, each party's standard form may also state that it constitutes the sole and exclusive contract between the parties.

Despite the conflict between the buyer's standard form and the seller's standard form, the parties only consider the "dickered" terms, that is, the essential terms over which they expressly negotiated—description, price, quantity, and delivery terms. As a result, generally, each party is ignorant of the standard terms ("boilerplate") in the other party's document.<sup>13</sup> Once the parties reach an agreement on the dickered terms and exchange their standard forms, they *assume* that a contract has been formed.

The question then becomes what happens when one of the parties "breaches" the agreement. Specifically, was a contract ever formed? If not, what if the parties consummate the transaction, is there then a contract? If a contract was formed, either initially or by virtue of performance, what are the terms of the contract? The buyer's standard form? The seller's standard form? Something else?

This dilemma is called the battle of the forms. This Article will examine the historical approaches to the battle of the forms and will analyze the problems with each putative solution. Section II discusses the pre-Code solution; Section III explores the Code solution; and Section IV reviews the alleged solution under the proposed revisions to the Code. Not one of these alleged solutions satisfactorily resolves the battle of the forms; each is replete with problems in construction, interpretation, and application. As a consequence, this Article will conclude with the author's proposed solution to

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<sup>11</sup> Of course, absent fraud, mistake, duress, incapacity, unconscionability, or the like.

<sup>12</sup> See E. Hunter Taylor, Jr., *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 CIN. L. REV. 419, 421 (1977); see also Travaglio, *supra* note 6, at 331–32.

<sup>13</sup> See John E. Murray, Jr., *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597, 605 (1978) (reporting his experience with over 5,000 purchasing agents that convinced him that such agents never read the forms of sellers); see also Travaglio, *supra* note 6, at 332–33.

the battle of the forms. The author's solution takes into account the strengths and inadequacies of all the other alleged solutions.

## II. PRE-CODE SOLUTION

Before the drafting and adoption of Article 2 of the Uniform Commercial Code ("UCC"), the battle of the forms problem was resolved by applying the common law contract doctrines of "mirror image" and "last shot."

At common law, the offeror was deemed to be the master of his offer.<sup>14</sup> That is, the offeror was master of the terms of the contract created by acceptance of the offer. As such, the offeree could accept the offer only by exactly complying with the terms of the offer. Unless the acceptance was identical to the offer, that is, was a "mirror image" of the offer, which did not omit, change, or add terms to the offer, it would not operate as an acceptance, but rather as a rejection and a counteroffer.<sup>15</sup> Accordingly, no contract would be formed. This was called the mirror image rule of contract formation.<sup>16</sup>

Even though no contract was formed under the mirror image rule where the seller's standard form did not "mirror" the buyer's standard form, the parties nevertheless routinely consummated the transaction. That is, the seller shipped the goods, and the buyer accepted the goods. Neither party anticipated a problem since the dickered terms had been agreed upon.<sup>17</sup> If all goes well, the conflicts in the standard forms do not matter. But what happens if a dispute arises regarding the goods? Which standard form, if any, is the controlling document? That is, is there a contract between the parties, and if so, what are its terms?

Common law resolved this battle of the forms problem by applying the "last shot" rule. Under the last shot rule, the last set of terms on the table prior to performance is the last counteroffer, and the subsequent performance constituted acceptance of that counteroffer. A contract was formed, therefore, pursuant to the terms contained in the counteroffer.<sup>18</sup> For example, suppose a

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<sup>14</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 29, 58 (1979).

<sup>15</sup> See, e.g., *Safeco Ins. Co. of Am. v. City of White House*, 36 F.3d 540, 546 (6th Cir. 1994); *Cook's Pest Control, Inc. v. Rebar*, 852 So. 2d. 730, 736 (Ala. 2002); see also E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.21 (3d ed. 2004); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 48 (4th ed. 2001).

<sup>16</sup> The case that is generally considered to be the classic example of the application of the mirror image rule is *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619 (N.Y. 1915). In *Poel*, the court held that a party's response which purportedly "accepted" the other party's offer, but added the requirement that the "acceptance" be promptly acknowledged, was a change in the offer rendering the response ineffective as an acceptance, and hence, it would be treated as a rejection and counteroffer. *Poel*, 110 N.E. at 623. See also ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 37 (1970).

<sup>17</sup> Again, generally, neither party read or otherwise knew the contents of the other's standard form.

<sup>18</sup> See, e.g., *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643, 655 (2d Cir. 1947); *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 992 (5th Cir. 2001); see also JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.21 (5th ed. 2003); MURRAY, *supra* note 15, § 49.

buyer submits its standard form pro-buyer purchase order to seller to purchase squiggles. The buyer's purchase order is generally considered to be an offer.<sup>19</sup> Seller "accepts" the buyer's purchase order by sending to the buyer its conflicting standard form pro-seller acknowledgement, and then ships the squiggles to the buyer. Under the mirror image rule, seller's acknowledgement is not an acceptance, but rather a rejection and counteroffer. However, if the buyer accepts the seller's shipment of squiggles, the buyer is deemed by his acceptance of the squiggles to have accepted the seller's counteroffer, thereby forming a contract on the terms contained in the seller's acknowledgement. The contract is determined, therefore, by the party who submitted the last standard form (fired the last shot) immediately before performance—in this example (and typically), the seller.<sup>20</sup> "Because the seller's acknowledgment . . . and shipment of [the] goods operated as a counteroffer, and the buyer's receipt and acceptance of the goods objectively manifested his intention to accept the counteroffer," the buyer is bound to the terms contained in the acknowledgement.<sup>21</sup> That is, the terms contained in the last offer (last shot) made before performance become the contract terms (the offer having been accepted by performance, i.e., acceptance of the goods by the buyer).

The sole virtue of the mirror image rule and the last shot rule, if there is one, is certainty.<sup>22</sup> Since a contract was formed only when the parties' forms exactly and perfectly matched, or alternatively when a party performed after receiving a counteroffer, courts could easily determine whether or not a contract existed, and the terms of any such contract. That virtue was attained by ignoring reality and mechanically rendering formalistic decisions.

First, these doctrines arose in a simpler time—a time when farmers met face to face to dicker over the terms of the sale of a horse, or cow, or pig, or a bale of hay.<sup>23</sup> As a result, the assumption on which these doctrines are based is that both parties are aware, not only of each and every term in the other party's document, but also of each and every term in its own as well. While that may have been true at a time when commercial contracts were personally negotiated and original documents were created for each transaction, that is not true for today's commercial transactions.<sup>24</sup> The practical result of the application of these doctrines is that it puts the buyer/offeror in the position of being bound to the terms of the seller/offeree if the parties perform, but there being no

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<sup>19</sup> See, e.g., *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. Ct. App. 1989) (recognition that purchase orders are considered to be offers to purchase).

<sup>20</sup> See PERILLO, *supra* note 18, § 2.21(a), at 98–99.

<sup>21</sup> 2 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 6:17 (4th ed. 1991); see also *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972).

<sup>22</sup> See Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171, 176 (1975).

<sup>23</sup> See Phillip A. White, *A Few Comments About the Proposed Revisions To UCC Section 2-207: The Battle of the Forms Taken to the Limit of Reason*, 103 COM. L.J. 471, 474 (1998).

<sup>24</sup> See Barron & Dunfee, *supra* note 22, at 173; Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1219 (1982).

enforceable contract if the seller/offeree chooses to renege. In short, the application of the mirror image rule and last shot rule makes no sense in transactions entered into through the exchange of forms whose standard preprinted terms rarely, if ever, are read by anyone involved in the transaction.<sup>25</sup>

Further, the mirror image rule makes no allowance for insignificant, immaterial, or irrelevant differences in the parties' forms. If the parties intend to enter into and be bound by a contract, the formation of the contract should not be frustrated by the addition of a term that the parties, at best, would have agreed to, had they known about it, or at worst, would have considered inconsequential.

In addition, the application of the last shot rule is arbitrary. A "first shot" rule makes just as much sense. That is, where the seller sends the goods to the buyer after receiving the buyer's purchase order, why shouldn't the sending of the goods constitute the seller's acceptance of buyer's purchase order, thereby creating a contract based on the purchase order? Instead, under the last shot rule, acceptance of the goods by the buyer after receiving the seller's acknowledgement constitutes the buyer's acceptance of the acknowledgement, thereby creating a contract based on the acknowledgement. There is no logical or reasonable basis for preferring the last shot to the first shot.<sup>26</sup>

Moreover, adopting the last shot rule ignores the factual bargain and true agreement of the parties.<sup>27</sup> Neither party viewed the seller's acknowledgement as a counteroffer; both viewed it as an acceptance of the buyer's offer, which closed the deal. By making the seller's acknowledgement the contract between the parties, the common law forced upon the parties a contract they never made. The imposed contract consisted of unread, standard terms in the seller's acknowledgment that both parties had ignored.<sup>28</sup>

The last shot rule also encourages silly gamesmanship. A savvy buyer can send a buyer confirmation form after the seller's acknowledgment in order to get the "last shot." The savvy seller can then retaliate by sending a sales confirmation form. This can go on *ad infinitum*, with each party attempting to fire the "last shot."

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<sup>25</sup> See *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978); see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58 (1963).

<sup>26</sup> See Baird & Weisberg, *supra* note 24, at 1233.

<sup>27</sup> See John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L. J. 1, 8 (1981); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 752 (1982).

<sup>28</sup> See Barron & Dunfee, *supra* note 22, at 173. Use of the first shot rule would be equally unfair. If the first shot rule were used, the imposed contract similarly would consist of unread, standard terms in the purchase order that both parties had ignored.

## III. UCC SECTION 2-207 SOLUTION

The draftsmen of UCC § 2-207, and in particular Professor Karl Llewellyn, who was the chief architect of the UCC and the principal draftsman of Article 2, recognized the reality of modern commercial transactions for the sales of goods. They recognized that in the typical transaction, the seller's standard form response (acknowledgement) to the buyer's offer contained different terms, which under the mirror image rule resulted in no contract being formed. They also recognized that notwithstanding the absence of a contract, the seller then ships the goods and the buyer thereafter accepts the goods. Despite the buyer's reasonable assumption that seller's response was an acceptance, the buyer later finds out to his surprise that the seller's response is a counteroffer and that he has unwittingly accepted the counteroffer by accepting the goods, the counteroffer being the last shot fired between the parties. Section 2-207 was promulgated to correct and remedy the injustices and inequities caused by the mirror image rule and last shot rule in modern day commercial transactions, and to modernize contract formation in light of present commercial realities.<sup>29</sup> Accordingly, UCC § 2-207 was intended to apply to modern commercial transactions where there is virtually exclusive reliance on standard form contracts.<sup>30</sup>

Section 2-207 provides as follows:

**§ 2-207. Additional Terms in Acceptance or Confirmation.**

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
  - (b) they materially alter it; or
  - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the

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<sup>29</sup> See, e.g., *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 362 (4th Cir. 1994); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443 (9th Cir. 1986); *Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F. Supp. 1441, 1445 (E.D. Cal. 1991); *Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502, 514 (1996); *Uniroyal, Inc.*, 380 N.E.2d at 578.

<sup>30</sup> See *Barron & Dunfee*, *supra* note 22, at 173.

particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.<sup>31</sup>

Despite the best intentions of the drafters, it became clear almost immediately that § 2-207 was a “puzzling,”<sup>32</sup> “enigmatic,”<sup>33</sup> “murky bit of prose”<sup>34</sup> that was a “statutory disaster whose every word invites problems in construction”<sup>35</sup> and was “incapable of generating consistently defensible interpretations and results.”<sup>36</sup> It has even been compared to “an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert.”<sup>37</sup> Others have characterized it as being “shrouded in uncertainty.”<sup>38</sup> Rather than fairly resolving the battle of the forms, § 2-207 has proved to be “a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.”<sup>39</sup>

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<sup>31</sup> UCC § 2-207 (1966). All references to the 1966 UCC incorporate any subsequent amendments prior to the revisions of Article 1 and Article 2 in 2001 and 2003, respectively.

<sup>32</sup> Charles M. Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L.REV. 181, 183 (1987).

<sup>33</sup> *Ebasco Servs., Inc. v. Pa. Power & Light Co.*, 460 F. Supp. 163, 205 (E.D. Pa. 1978).

<sup>34</sup> *Sw. Eng'g Co. v. Martin Tractor Co.*, 473 P.2d 18, 25 (Kan. 1970).

<sup>35</sup> Baird & Weisberg, *supra* note 24, at 1224. Moreover, in a letter to Professor Robert Summers, Grant Gilmore, one of the principal drafters of the Code, made the following statement regarding UCC § 2-207:

The 1952 version of 2-207 was bad enough . . . but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster. . . .

My principal quarrel with your discussion of 2-207—and all the other discussions I have read—is that you treat the section much too respectfully—as if it had sprung, all of a piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and Comment—to which various hands—Llewellyn, Honnold, Braucher and my anonymous hack—contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in light of what “the draftsman” “intended.” (I might note that, when subsection (3) was added, Llewellyn had ceased to have anything to do with the code project).

Letter from Professor Grant Gilmore to Professor Robert Summers (Sept. 10, 1980), reprinted in RICHARD E. SPEIDEL, ROBERT S. SUMMERS & JAMES J. WHITE, *COMMERCIAL AND CONSUMER LAW: TEACHING MATERIALS* 54–55 (3d ed. 1981).

<sup>36</sup> Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815, 822 (1991).

<sup>37</sup> JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1-3, at 30 (5th ed. 2000).

<sup>38</sup> Travaglio, *supra* note 6, at 328.

<sup>39</sup> *Reaction Molding Techs., Inc. v. Gen. Elec. Co.*, 585 F. Supp. 1097, 1104 (E.D. Pa. 1984), amended by 588 F. Supp. 1280 (E.D. Pa. 1984).

A. *UCC Section 2-207(1)*

Section 2-207 states that:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.<sup>40</sup>

Section 2-207(1) abolished the rigid mirror image rule by treating the offeree's response as an acceptance even where it does not mirror the offer. A response to an offer that is an "expression of acceptance" is treated as an acceptance, even though the response contains terms that are different from or additional to the terms that are in the offer. In other words, § 2-207(1) converts a common law counteroffer into an acceptance, even though it contains different or additional terms.<sup>41</sup> Section 2-207(1) was designed to recognize as a contract "a proposed deal which in commercial understanding has in fact been closed . . ." <sup>42</sup> Section 2-207(1), therefore, focuses on whether there has been a bargain in fact, not whether there has been a bargain in form.<sup>43</sup>

1. *Expression of Acceptance Standard*

Although abolishing the mirror image is commendable, § 2-207(1) is problematic at best. Neither § 2-207(1) nor the comments to § 2-207 indicate what criteria should be applied in determining what constitutes a "definite expression of acceptance." One could apply the reasonable person standard, and look at whether or not a reasonable person would view the response of the offeree as a "definite expression of acceptance." Alternatively, one could use the subjective standard, and look at whether or not the *offeree* subjectively intended his response to be a "definite expression of acceptance." On the other hand, applying the same subjective standard, one could require that the

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<sup>40</sup> UCC § 2-207(1) (1966).

<sup>41</sup> Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979).

<sup>42</sup> See UCC § 2-207 cmt. 2 (1966) ("Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.").

<sup>43</sup> Professor Murray calls this "intention over terms." See John E. Murray, Jr., *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37 *FORDHAM L. REV.* 317 (1969). See also John E. Murray, Jr., *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 *OR. L. REV.* 269, 299 (1972), wherein Professor Murray states:

In order for commercial practices to expand, *i.e.*, to change, and in order for the law to react effectively to these changes, courts must become accustomed to digging into the nature of the practices surrounding the transaction. In order for courts to determine what the bargain of the parties was, *in fact*, courts must begin to empathize with the behavior patterns of the parties under the particular circumstances of their transaction. This requires empirical verification which will, on many occasions, require courts to depart from the documentary evidence of the transaction and consider other manifestations of the parties and the surrounding circumstances to identify more precisely their circle of assent. Parties do make agreements *in fact* and these are the agreements which should be enforced—not the agreements mechanically constructed from the printed pieces of paper which the parties happened to use as partial tools.

response of the offeree is a “definite expression of acceptance” only where the *offeror* subjectively viewed it as such.

### 2. *Expression of Acceptance Determination*

Another problem with § 2-207(1) is that it fails to clarify what constitutes a “definite expression of acceptance.” How much can a response differ from the offer and still be considered a “definite expression of acceptance?” Apparently there is no limit. Both § 2-207(2) and Comment 3<sup>44</sup> to § 2-207 make it clear that a contract is formed even though the different or additional terms in the “definite expression of acceptance” *materially* alter the offer. That is, a party’s response that materially alters the offer can still be treated as a “definite expression of acceptance” under § 2-207(1). Although that position seems to be patently nonsensical, § 2-207(1) nonetheless adopts it. If an offeree’s response to an offer is materially different from the offer, if it materially alters the offer, then it defies logic and common sense to view that response as a “definite expression of acceptance.” Even in the absence of the mirror image rule, such a response that materially alters the offer indicates that the offer is unacceptable. Another term for a response that indicates that an offer is unacceptable is “*rejection*.” Section 2-207 does not divulge the legal legerdemain that was used to convert a clear rejection into a definite expression of acceptance. Nor does § 2-207 or the related Comments explain how a response to an offer that materially altered the offer can be considered to be a “definite” expression of acceptance. At best, the response is an *indefinite* expression of acceptance, or a definite expression of non-acceptance.

### 3. *Confirmation*

Another perplexing element of § 2-207(1) is the provision that “a written confirmation . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon . . . .”<sup>45</sup> What is baffling about this language is that, by definition, a confirmation *confirms* that a contract has already been made. A confirmation is not itself an acceptance, it confirms that there has already been an offer and an acceptance. Moreover, if a confirmation states terms additional to or different from those offered or agreed upon, as set forth in § 2-207(1), then it cannot be a confirmation. Again, by definition, a confirmation purportedly *confirms* what the parties have already agreed upon.<sup>46</sup>

### 4. *Conditional Acceptance*

Section 2-207(1) further provides that a definite expression of acceptance will operate as an acceptance “unless acceptance is expressly made conditional on assent to the additional or different terms.” The formulation of this proviso

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<sup>44</sup> See UCC § 2-207 cmt. 3 (1966) (“Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party.”).

<sup>45</sup> See UCC § 2-207(1) (1966).

<sup>46</sup> See BLACK’S LAW DICTIONARY 318 (8th ed. 2004) (defining “confirmation” as “[t]he act of verifying or corroborating; a statement that verifies or corroborates”).

is also puzzling. An “acceptance” which is expressly made conditional on assent to additional or different terms is *not* an acceptance. Rather, a response to an offer which purports to be an acceptance, but is conditional on the offeror’s assent to terms additional to or different from those offered is a counteroffer.<sup>47</sup>

Nevertheless, as indicated earlier, § 2-207(1) eliminates the mirror image rule in recognition of the modern commercial reality that the parties to a commercial contract for the sale of goods generally only consider the dickered terms and do not read or have knowledge of the boilerplate language. Accordingly, § 2-207(1) takes the approach that different or additional terms in a response to an offer do not prevent the response from being a definite expression of acceptance nor do they prevent the formation of a contract, even where such different or additional terms materially alter the offer. If one accepts that approach, which evidently the drafters of the Code did, then the above-referenced conditional language, to the extent it is boilerplate, should be treated the same as the rest of the boilerplate. It should not affect an acceptance or the formation of a contract. If boilerplate language which materially alters the offer does not preclude an acceptance, such conditional language that is boilerplate also should not preclude an acceptance.

Moreover, courts are even divided on when an acceptance is “expressly made conditional” on assent to the additional or different terms. Some courts hold that an acceptance that states a term that materially alters an offer to the disadvantage of the offeror is an acceptance expressly conditional on assent to the additional or different terms.<sup>48</sup> Other courts hold that in order for the “expressly conditional” language to apply, the acceptance must be *expressly* conditional on the offeror’s *assent* to the additional or different terms, and the offeror’s assent must be directly and distinctly expressed rather than implied.<sup>49</sup> Other courts fall between these two extremes and provide that whether or not an acceptance is “expressly conditional” *may be* implied from the language of the acceptance, whether or not it is a material alteration.<sup>50</sup>

#### B. UCC Section 2-207(2)

UCC § 2-207(2) provides:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or

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<sup>47</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

<sup>48</sup> See, e.g., *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

<sup>49</sup> See, e.g., *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972).

<sup>50</sup> See, e.g., *Constr. Aggregates Corp. v. Hewitt-Robbins, Inc.*, 404 F.2d 505 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.<sup>51</sup>

If a contract is found under § 2-207(1), that is, if there is an expression of acceptance (acceptance) by the offeree, but the acceptance contains different or additional terms from the offer, the next question becomes, what are the terms of the contract? The offer? The acceptance? Section 2-207(2) “answers” that question in an inartful, confusing, and perhaps even incomprehensible manner.

*1. Merchants Versus Non-Merchants*

First, § 2-207(2) has one rule if the contract is between merchants, and a different rule if the contract is not between merchants. Generally, a merchant is one “who deals in goods” of the type involved in the contract, or is an expert with respect to the goods involved in the transaction.<sup>52</sup> Under § 2-207(2), if the contract is not between merchants, that is, if one or both of the parties to the contract is not a merchant, the additional terms in the acceptance are treated as proposals. That is to say, the additional terms in the acceptance “fall out,” and the terms of the contract are the terms contained in the offer. This has been called the “fall out rule.”<sup>53</sup> The effect of using the fall out rule in such a contract is that the last shot rule that emanated from the use of the mirror image rule under common law, has morphed into the first shot rule under the Code. So, instead of mechanically applying the arbitrary last shot rule to resolve the battle of the forms as would be required under common law, § 2-207(2) requires us to mechanically apply the arbitrary first shot rule. The contract under the Code then is determined by the offeror rather than the offeree. The first shot rule does achieve the result of making the offeror the master of his offer again. However, the drafters of § 2-207 apparently did not see that as a consistently worthy goal since they saw fit to apply the first shot rule only to contracts *not* between merchants, and not to contracts between merchants.

Neither the Code nor the Comments proffer any justification or rationale why the terms of a contract formed under § 2-207(1) should be contingent upon whether both of the parties are merchants or why the first shot rule is used in a contract not between merchants. If the purpose for the distinction between merchants and non-merchants was to protect consumer buyers (non-merchants) from being victimized in the battle of the forms by merchant sellers, by binding the consumer buyer to terms to in the seller’s acknowledgment to which the consumer did not agree, then the protection is not needed. Consumer buyers typically do not use their own standard form contracts when dealing with

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<sup>51</sup> UCC § 2-207(2) (1966).

<sup>52</sup> UCC § 2-104(1) (1966) states that a merchant “means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” *See, e.g.,* Vince v. Broome, 443 So. 2d 23 (Miss. 1983); Foley v. Dayton Bank & Trust, 696 S.W.2d 356 (Tenn. Ct. App. 1985).

<sup>53</sup> *See, e.g.,* Reaction Molding Techs., Inc. v. Gen. Elec. Co., 585 F. Supp. 1097 (E.D. Pa. 1984), *amended by* 588 F. Supp. 1280 (E.D. Pa. 1984).

merchant sellers, and there is no exchange of standard form contracts. Accordingly, the battle of the forms issues never arise. If the purpose for the distinction is not to protect consumers, then no distinction should have been made.

## 2. *Material Alteration*

If a contract formed under § 2-207(1) is between merchants, the additional terms in the acceptance become part of the contract.<sup>54</sup> So now § 2-207 has shuttled back to the last shot doctrine, and made the terms of the acceptance the terms of the contract. It would have been too simple and straightforward for that to have been the entirety of § 2-207(2). Section 2-207(2), not content with already being a model of ambiguity, further provides that such additional terms in the acceptance do not become part of the contract if, *inter alia*, the additional terms “materially alter” the offer.<sup>55</sup> The obvious question that arises is when is an additional term considered a material alteration? Neither “material” nor “materially alter” is defined anywhere in the Code.

Comment 4 to § 2-207 indicates, but does not directly state, that the standard to be utilized in determining whether the acceptance materially alters the offer is “surprise” or “hardship.”<sup>56</sup> Comment 4 then cites four terms that would be material alterations.<sup>57</sup> If surprise or hardship were the criterion, however, then virtually every additional term in the acceptance would be a material alteration. That is, the battle of the forms problem is based on terms in the acceptance that are not read by the offeror and rebound to the detriment of the offeror. Therefore, all additional terms in the acceptance would meet the surprise or hardship requirement. Consequently, if one reads Comment 4 literally, the “material alteration” exception would swallow the rule. If Comment 4 is not read literally, then it is not clear how to read it.

For reasons unknown, when Comment 4 cites four examples of material alteration, the only example appearing regularly in standard forms is the warranty disclaimer. The comment ignores several other terms that generally appear in standard forms, including arbitration, risk of loss, payment of attorneys’ fees, and modification of contract terms. As a result, courts are in conflict whether these terms constitute a material alteration.<sup>58</sup> There is even a

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<sup>54</sup> See UCC § 2-207(2) (1966).

<sup>55</sup> *Id.*

<sup>56</sup> UCC § 2-207 cmt. 4 (1966) provides:

Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *Am. Ins. Co. v. El Paso Pipe & Supply Co.*, 978 F.2d 1185 (10th Cir. 1992); *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102 (3d Cir. 1992); *Sethness-*

conflict whether *vel non* the determination of a material alteration is a question of law or a question of fact.<sup>59</sup> With respect to an arbitration clause, for example, some courts have ruled that as a matter of law the addition of an arbitration clause is a material alteration,<sup>60</sup> while other courts have ruled that whether the addition of an arbitration clause is a material alteration is an issue of fact.<sup>61</sup>

Further, curiously, Comment 4 cites as an example of a material alteration “a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due.” Payment of the invoice when due is the buyer’s principal, if not sole, obligation.<sup>62</sup> The Code recognizes this in § 2-703 by allowing a seller to cancel the contract where the buyer “fails to make a payment due . . . .”<sup>63</sup> Consequently, if such a clause is in the seller’s acknowledgment, not only should it not be a surprise, but since cancellation is already allowed by the Code where the buyer fails to pay when due, it is not even an alteration, much less a material alteration.<sup>64</sup>

Comment 5 to § 2-207 lists additional terms that *are not* deemed to materially alter an offer. True to form, the drafters of § 2-207 continue their apparent effort to confound, confuse, and frustrate any effort to resolve the battle of the forms smoothly. Comment 5 changes the Comment 4 standard of material alteration from “surprise” or “hardship” to “*unreasonable surprise*,” and does not even mention hardship.<sup>65</sup> Of course, Comment 5 does not set forth

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Greenleaf, Inc. v. Green River Corp., 65 F.3d 64 (7th Cir. 1995); *see also* William H. Danne, Jr., Annotation, *What Are Additional Terms Materially Altering Contract Within Meaning of UCC § 2-207(2)(b)*, 72 A.L.R.3d 479 (1976).

<sup>59</sup> *See, e.g.*, Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758 (10th Cir. 1983); Clifford-Jacobs Forging Co. v. Capital Eng’g & Mfg. Co., 437 N.E.2d 22 (Ill. App. Ct. 1982).

<sup>60</sup> *See, e.g.*, Marlene Indus. Corp. v. Carnac Textiles, Inc., 380 N.E.2d 239 (N.Y. 1978); Just Born, Inc. v. Stein, Hall & Co., 59 Pa. D. & C.2d 407 (C.P. Northampton 1971); *In re Barclay Knitwear Co.*, 8 UCC Rep. Serv. 44 (N.Y. Sup. Ct. 1970).

<sup>61</sup> *See, e.g.*, Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); *see also* Silverstyle Dress Co. v. Aero-Knit Mills, Inc., 11 UCC Rep. Serv. 292 (N.Y. Sup. Ct. 1972).

<sup>62</sup> *See* UCC § 2-301 (1966).

<sup>63</sup> *See* UCC § 2-703 (1966).

<sup>64</sup> *See* 3 RICHARD W. DUESENBERG & LAWRENCE P. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 3.02 (1990).

<sup>65</sup> UCC § 2-207 cmt. 5 (1966) provides:

Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonable given are: a clause setting forth and perhaps enlarging slightly upon the seller’s exemption due to supervening causes beyond his control, similar to those covered by the provision of this article on merchant’s excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller’s standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance “with adjustment” or otherwise limiting remedy in a reasonable manner.

how one determines whether a surprise is unreasonable. Nor does Comment 5 explain why “hardship” was eliminated altogether as a criterion for determining material alteration. Having read Comments 4 and 5, one is now left to guess on the standard to be applied to determine whether a term in an acceptance is a material alteration. Is the standard “surprise,” or “unreasonable surprise,” or “hardship?”

The difficulty in using examples to define material alteration is its tendency to lead to *per se* rules. Ignored by § 2-207 is the fact that what is or is not a material alteration is dependent upon a number of factors and variables, including the value of the transaction, the quantity involved in the transaction, the relationship of the parties to each other, the custom and usage of the trade, and the course of dealing and course of performance between the parties.<sup>66</sup> Only by considering all of the above factors can a court make a determination whether a term is truly a material alteration.

### 3. *Additional Versus Different Terms*

In determining the terms of a contract formed under § 2-207(1), § 2-207(2) only addresses additional terms contained in the acceptance. It does not address different terms contained in the acceptance. Of course, an additional term in the acceptance would be, in fact, a different term from what is contained in the offer. In fact, all different terms are additional, and all additional terms are different.<sup>67</sup> One can conclude, therefore, that “additional terms” referred to in § 2-207 were meant to include both different and additional terms. Although not directly addressed in the Code, Comment 3 to § 2-207 lends some support to that interpretation when it states: “Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2).”<sup>68</sup> Some courts and commentators, relying on Comment 3 and the above analysis, believe that “different” was inadvertently omitted from § 2-207(2), and that § 2-207(2) should be read as though “different” were included,<sup>69</sup> and any attempt to distinguish “different” from “additional” would be “hair-splitting” and “metaphysical.”<sup>70</sup>

Other courts and commentators observe that § 2-207(1) refers to both “different” and “additional” terms, indicating that “different terms” were not subsumed in “additional terms.” As a result, they take the position that if the drafters intended for § 2-207(2) to include different terms, they would have included “different” in the text of § 2-207(2). The absence of “different” in the text of § 2-207(2) means that the intent of § 2-207(2) was only to include additional terms, not different terms.<sup>71</sup> In addition, it can be argued that

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<sup>66</sup> See Murray, *supra* note 13.

<sup>67</sup> See Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1175 (7th Cir. 1994); see also MURRAY, *supra* note 15, § 50, at 187.

<sup>68</sup> See UCC § 2-207 cmt. 3 (1966).

<sup>69</sup> See, e.g., Steiner v. Mobil Oil Corp., Inc., 569 P.2d 751 (Cal. 1977); see also MURRAY, *supra* note 15, § 50, at 186–87.

<sup>70</sup> Northrop Corp., 29 F.3d at 1175.

<sup>71</sup> See, e.g., Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972); S. Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 567 P.2d 1246, 1253 (Idaho 1977);

different terms were not meant to be included in § 2-207(2) because no different term would ever survive § 2-207(2)(c).<sup>72</sup> That is, any different term in the acceptance would have already have been objected to by the different term in the offer, resulting in the different term in the acceptance not becoming part of the contract. For example, if the buyer's purchase order provides for a three year warranty, then a "notification of objection . . . has already been given" to a warranty disclaimer or any other different term in the seller's acknowledgment.

This is more than just a matter of semantics. If § 2-207(2) does not apply to different terms, then the question that arises is what are the terms of the contract when the acceptance contains different terms from the offer? If § 2-207(2) only applies to additional terms, but not different terms, then one must engage in the "metaphysical" and "hair-splitting" exercise of distinguishing between different terms and additional terms, however disingenuous that may be. In such a case, an additional term may be construed to be a term in the acceptance that alludes to a matter not addressed in the offer, whereas a different term may be construed to be a term in the acceptance that conflicts with a term in the offer. Courts and commentators who have taken the position that § 2-207(2) does not address different terms in the acceptance are split as to how to handle such different terms. Some take the position that the different terms in the offer and acceptance "knockout" each other.<sup>73</sup> The contract, therefore, becomes the terms on which the parties agree, with the Code supplementing or filling any gaps in the contract.<sup>74</sup> This is called the "knockout rule." For example, suppose that the buyer's purchase order contains a warranty clause providing for three-year warranty on the goods to be purchased. The seller accepts the purchase order of the buyer by responding with an acknowledgement that contains a clause disclaiming all warranties. Under the knockout rule, the warranties clauses knock out each other. The contract, therefore, under the knockout rule, would not provide for a warranty. The warranty gap in the contract is filled in and supplemented by the Code gap fillers. Since the Code does not provide a three-year warranty, there is no three-year warranty.<sup>75</sup>

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Am. Parts Co. v. Am. Arbitration Ass'n, 154 N.W.2d 5, 11 (Mich. Ct. App. 1967); Reaction Molding Techs., Inc. v. Gen. Elec. Co., 585 F. Supp. 1097, 1106 (E.D. Pa. 1984); see also WHITE & SUMMERS, *supra* note 37, § 1-3, at 32; John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1355-56 (1986).

<sup>72</sup> Under § 2-207(2)(c), between merchants, the additional terms in the acceptance become part of the contract unless "notification of objection to them has already been given or is given within a reasonable time after notice of them is received." UCC § 2-207(2)(c) (1966).

<sup>73</sup> See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984); *Superior Boiler Works, Inc. v. R.J. Sanders, Inc.*, 711 A.2d 628, 635 (R.I. 1998); *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 326-27 (N.M. 1983).

<sup>74</sup> See, e.g., *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83, 86 (N.D. 1985); *Daitom, Inc.*, 741 F.2d at 1579; *S. Idaho Pipe & Steel Co.*, 567 P.2d at 1254.

<sup>75</sup> There may be an implied warranty of merchantability under UCC § 2-314, but that would not extend to future performance.

The asserted basis for applying the knockout rule for different terms is Comment 6<sup>76</sup> of § 2-207.<sup>77</sup> However, Comment 6, by its terms, is expressly restricted to different terms in conflicting *confirmation forms*; that is, forms that confirm the existence of a contract where there has already been an offer and acceptance. It does not address what § 2-207(2) addresses, *to wit*, variant terms in the offer and acceptance themselves.<sup>78</sup> Reliance on Comment 6 to support the use of the knockout rule in § 2-207(2), therefore, is misplaced. Realizing that neither § 2-207(2) nor Comment 6 support the use of the knockout rule where different terms are contained in the acceptance, other cases and commentators support the use of the “fall out rule” where different terms appear in the acceptance.<sup>79</sup> That is to say, different terms in the acceptance fall out and are not part of the contract. In the foregoing example, where the buyer’s purchase order provided for a three-year warranty on the purchased goods, but the seller’s acknowledgement provided that all warranties were disclaimed, the disclaimer in the seller’s acknowledgement would fall out of the contract. The contract then, under the fall out rule, would require a three-year warranty.

#### 4. *Fall Out Rule Versus Knockout Rule with Respect to Merchants*

Section 2-207(2) provides that in a transaction between merchants, the additional (or additional and different) terms in the acceptance become part of the contract *unless* the offer expressly limits acceptance to the terms of the offer, the additional terms materially alter the offer, or the offeror objects to the additional terms. In effect, in a contract between merchants, the old last shot rule is used unless one of the above three exceptions applies. If one of the exceptions applies, the additional terms then would not become part of the contract. True to form, however, another problem arises. Do the additional terms in the acceptance simply fall out so the contract becomes the offer? Do the additional terms in the acceptance knockout the conflicting terms in the offer so that neither the additional terms in the acceptance nor the conflicting

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<sup>76</sup> UCC § 2-207 cmt. 6 (1966) provides:

If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act, including subsection (2). The written confirmation is *also* subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section failure to respond permits additional terms to become part of the agreement. [Emphasis added.]

<sup>77</sup> WHITE & SUMMERS, *supra* note 37, § 1-3. Professor White subscribes to the knockout rule.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *Reaction Molding Techs., Inc. v. Gen. Elec. Co.*, 585 F. Supp. 1097, 1106 (E.D. Pa. 1984); see also WHITE & SUMMERS, *supra* note 37, § 1-3. Professor Summers subscribes to the fall out rule.

terms in the offer are part of the contract? In other words, is the fall out rule or the knockout rule used? Again, if the fall out rule was used, the contract would be the offer. If the knockout rule was used, the contract would be those terms upon which the parties agree. If there was a gap in the contract, it would be filled and supplemented by the Code. Use of either rule would technically comply with § 2-207(2) as it relates to merchants. Not surprisingly, the Code provides no guidance as to which rule to apply.

C. *UCC Section 2-207(3)*

UCC § 2-207(3) provides:

Conduct by both parties, which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.<sup>80</sup>

Section 2-207(3) applies to situations where the parties consummate a transaction, even though no contract is formed by the writings of the parties. In such a case, there is apparently a contract by conduct. Section 2-207(3) attempts to articulate the terms of this contract by conduct. Not surprisingly, and consistent with the other provisions of § 2-207, questions have arisen regarding the proper interpretation of § 2-207(3).

1. *Supplemental Terms*

Section 2-207(3) formally adopts the knockout rule in that it provides that where a contract is formed under § 2-207(3), the contract consists of those terms on which the parties agree, with the Code supplementing the contract by filling in any gaps. However, courts have clashed over which supplemental terms of the Code may be used as gap-fillers. Some courts take the position that the supplemental terms to be supplied by the Code may include only the terms which are expressly stated in the Code, such as an implied warranty.<sup>81</sup> Other courts have observed that UCC § 1-205(3)<sup>82</sup> provides that course of dealing and trade usage give meaning to, supplement, and qualify the terms of a contract. In addition, pursuant to UCC § 2-208(1), course of performance is also made part

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<sup>80</sup> UCC § 2-207 (1966).

<sup>81</sup> *See, e.g.,* C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1237 (7th Cir. 1977).

<sup>82</sup> UCC § 1-205(3) (1966) ("A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."); UCC § 1-205(1) (1966) ("A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."); UCC § 1-205(2) (1966) ("A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. . .").

of a contract.<sup>83</sup> As a result, those courts argue that the terms of a contract formed under § 2-207(3) include not only the express provisions of the Code, but also course of dealing, course of performance, and trade usage.<sup>84</sup>

### 2. *Effect of Performance*

A second problem relating to the proper interpretation of § 2-207(3) involves the effect of performance when no contract has been formed under § 2-207(1). Some courts hold that if no contract is formed under § 2-207(1) because the response is not a definite and seasonable expression of acceptance, but the parties subsequently perform, then § 2-207(3) applies. However, if no contract is formed under § 2-207(1) because the response, while a definite and seasonable expression of acceptance, is expressly made conditional on assent to the additional or different terms, then § 2-207(3) does not apply. Rather, the response is treated as a common law counteroffer, and performance by the offeror (typically acceptance of the goods) constitutes acceptance of the offeree's terms. The contract then is formed on the offeree's terms.<sup>85</sup> One could call that approach the resurrection of the last shot rule.

A different approach taken by other courts is that any time a contract is not formed under § 2-207(1), whether it is because there is no definite and seasonable expression of acceptance, or because the acceptance was expressly made conditional on assent to the additional or different terms, but the parties subsequently perform, then § 2-207(3) applies. Under this approach, the contract then would be as provided in § 2-207(3), that is, the terms on which the writings of the parties agree, supplemented by terms provided by the code (knockout rule).<sup>86</sup>

### 3. *One Form or Two Forms*

As stated earlier, § 2-207 was drafted to resolve the battle of the forms. That is, § 2-207 was meant to resolve the issues of contract formation and contract terms when parties to a transaction exchange forms and the offeror's standard form does not match the offeree's standard form. Accordingly, many courts argue that § 2-207 has no application where there is no battle of the forms, as where there the contract is oral and there are no standard forms exchanged, or where there is only one standard form. To further buttress the argument, they point out that the language of § 2-207(3) expressly provides that conduct is sufficient to establish a contract where "the *writings of the parties* do

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<sup>83</sup> UCC § 2-208(1) (1966) ("Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.").

<sup>84</sup> See, e.g., *Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1450 (7th Cir. 1992).

<sup>85</sup> See *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962); *Universal Oil Prods. Co. v. S.C.M. Corp.*, 313 F. Supp. 905, 906 (D. Conn. 1970); *Bickett v. W.R. Grace & Co.*, 12 UCC Rep. Serv. (CBC) 629, 643-44 (W.D. Ky. 1972).

<sup>86</sup> See *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972); *Constr. Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 509 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

not otherwise establish a contract.” Therefore, unless both parties have exchanged their respective “writings,” § 2-207(3) cannot apply.<sup>87</sup> If § 2-207(3) does not apply, the terms of the contract formed by the conduct of the party will be determined by the last shot doctrine. That is, the terms of the last counteroffer before performance will be the contract. Predictably, consistent with the rest of § 2-207, the courts are in conflict. Other courts apply § 2-207(3) whenever a contract has not been formed, but the parties nevertheless perform (consummate the transaction) without regard to an exchange of forms or the number of forms.<sup>88</sup>

#### IV. REVISED ARTICLE 2 SOLUTION

Current § 2-207 is irreparably fraught with problems and inconsistencies. Cases and commentators are hopelessly divided on when it should be applied, how it should be applied, and how it should be interpreted. To paraphrase Winston Churchill, § 2-207 has proven to be a riddle, packed in a puzzle, wrapped in a mystery, inside an enigma, surrounded by a conundrum.<sup>89</sup> In an attempt to end the havoc wrought by § 2-207, the National Conference of Commissioners on Uniform State Laws and the American Law Institute proposed and approved amendments to UCC Article 2, including § 2-207.<sup>90</sup>

##### A. *Formation of Contract*

The proposed revisions to Article 2 extricate the formation segment from § 2-207 and place it in Revised § 2-204, the formation section. Revised § 2-204 reads as follows:

##### **SECTION 2-204. FORMATION IN GENERAL.**<sup>91</sup>

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of ~~such~~ a contract, the interaction of electronic agents, or the interaction of an electronic agent and an individual.

<sup>87</sup> See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997); *Slocomb Indus., Inc. v. Chelsea Indus.*, 36 UCC Rep. Serv. 1543 (E.D. Pa. 1983); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980); *Lockwood Corp. v. Black*, 501 F. Supp. 261, 265 (N.D. Tex. 1980), *aff'd.*, 669 F.2d 324 (5th Cir. 1982).

<sup>88</sup> See, e.g., *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

<sup>89</sup> In a radio broadcast on October 1, 1939, Winston Churchill said of Russia: “It is a riddle, wrapped in a mystery, inside an enigma.” Winston S. Churchill, *The First Month of War* (radio broadcast Oct. 1, 1939), in 6 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897–1963, at 6160 (Robert Rhodes James ed., 1974). Section 2-207 is even worse.

<sup>90</sup> The Uniform Law Commissioners (“ULC”) approved the amendments in Summer, 2002. The American Law Institute (“ALI”) approved the amendments in Spring, 2003. The Uniform Commercial Code is a joint enterprise of the ALI and ULC.

<sup>91</sup> The underlined portions are additions to the original text; strikes are deletions from the original text. UCC § 2-204 (2003).

(2) An agreement sufficient to constitute a contract for sale may be found even ~~though~~ if the moment of its making is undetermined.

(3) Even ~~though~~ if one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:

(a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(i) cause the electronic agent to complete the transaction or performance;  
or

(ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

The effect of this change is that Revised § 2-207 only deals with contract terms, instead of contract terms *and* contract formation, both of which are the subject of the current § 2-207, and Revised § 2-204 only deals with contract formation. This move has the advantage of consolidating contract formation in one section. Revised § 2-204 provides that a contract can be formed in any manner sufficient to show agreement, *including* offer and acceptance, and conduct. Revised § 2-204 apparently recognizes, therefore, that an offer and acceptance and conduct are just two of the ways, but not the only ways, in which a contract may be formed. However, it is not clear in what other ways a contract can be formed, and Revised § 2-204 does not clarify that uncertainty.

One critical question raised by Revised § 2-204 is what constitutes an acceptance? That issue is addressed in Revised § 2-206, which provides:

**SECTION 2-206. OFFER AND ACCEPTANCE IN FORMATION OF CONTRACT.<sup>92</sup>**

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

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<sup>92</sup> The underlined portions are additions to the original text; strikes are deletions from the original text. UCC § 2-206 (2003).

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but ~~such a~~ the shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror ~~who~~ that is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(3) A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.

Unfortunately, Revised § 2-206(3) has continued the ambiguous and problematic formulation of what constitutes an acceptance: “A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.” Although the mirror image rule is rejected,<sup>93</sup> Revised § 2-206(3) suffers from the same shortcomings as the current Code. Neither Revised § 2-206, nor the comments to Revised § 2-206, clarify what constitutes an expression of acceptance. To what extent must a response be so different from the offer that it is no longer considered to be a “definite expression of acceptance,” but rather a rejection? What standard is used to determine whether a response is a “definite expression of acceptance”? Just like the current Code, these questions are not answered in the Revised Code.

#### B. *Terms of Contract*

Revised § 2-207 only applies if a contract has been formed under Revised § 2-204.

If a contract has been formed under Revised § 2-204, Revised § 2-207 is applied to determine the terms of that contract.<sup>94</sup> Revised § 2-207 provides:

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<sup>93</sup> UCC § 2-206 cmt. 2 (2003) states: “The mirror image rule is rejected in subsection (3), but any responsive record must still be fairly regarded as an ‘acceptance’ and not as a proposal for a different transaction such that it should be construed to be a rejection of the offer.” UCC § 2-206 cmt. 2 (2003).

<sup>94</sup> UCC § 2-207 cmt. 2 (2003) states:

This section applies only when a contract has been formed under other provisions of Article 2. This section functions solely to define the terms of the contract. When forms are exchanged before or during performance, the result from the application of this section differs from the original Section 2-207 and the common law in that this section gives no preference to the first or the last form; it applies the same test to the terms in each. Terms in a record that insist on all of that record’s terms and no others as a condition of contract formation have no effect on the operation of this section. When one party’s record insists on its own terms as a condition to contract formation, if that party does not subsequently perform or otherwise acknowledge the existence of a contract, if the other party does not agree to those terms, the record’s insistence on its

**SECTION 2-207. ADDITIONAL TERMS IN ACCEPTANCE OR TERMS OF CONTRACT; EFFECT OF CONFIRMATION.**<sup>95</sup>

~~(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.~~

~~(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:~~

~~(a) the offer expressly limits acceptance to the terms of the offer;~~

~~(b) they materially alter it; or~~

~~(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.~~

~~(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.~~

If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

(a) terms that appear in the records of both parties;

(b) terms, whether in a record or not, to which both parties agree; and

(c) terms supplied or incorporated under any provision of this Act.

This section is perhaps the biggest disappointment of the Revised Code. Applying Revised § 2-207 to determine the terms of a contract raises several questions and problems. Comment 1 makes it clear that Revised § 2-207

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own terms will keep a contract from being formed under Sections 2-204 or 2-206, and this section is not applicable. As with original Section 2-207, courts will have to distinguish between “confirmations” that are addressed in this section and “modifications” that are addressed in Section 2-209.

<sup>95</sup> The underlined portions are additions to the original text; strikes are deletions from the original text. UCC § 2-207 (2003).

applies to all contracts for the sale of goods.<sup>96</sup> As stated above, Revised § 2-204 states that a contract may be made in any manner sufficient to show an agreement, *including, inter alia*, offer and acceptance, and conduct. Again, Revised § 2-204 apparently recognizes, therefore, that an offer and acceptance and conduct are just two of the ways, but not the only ways, in which a contract may be formed. However, Revised § 2-207 does not indicate what the terms are in a contract formed in such other ways. It only addresses contracts formed by offer and acceptance and by conduct. This problem could have been avoided if Revised § 2-207 began by simply saying, “If a contract is formed under 2-204, the terms of the contract are . . . .” Why that was not done remains a mystery, especially since Comment 2 to Revised § 2-207 indicates that was its intent.<sup>97</sup>

Revised § 2-207 also allows a subsequent confirmation of a contract to change the terms of a contract after the contract has already been formed. Under Revised § 2-207, if a contract formed in any manner is confirmed by a record that contains terms that are additional to or different from the terms in the contract being confirmed, the contract terms are the terms that appear in the record of both parties, terms on which both parties agree (whether in a record or not), and terms supplied or incorporated under the Code.<sup>98</sup> This provision potentially allows a party to change a contract unilaterally *after* it has been formed by sending a non-conforming “confirmation.” For example, suppose the buyer’s purchase order provided that “payment due 90 days,” and seller’s acknowledgment also provided that “payment due 90 days.” Later, seller sends a confirmation which states “payment due 60 days for balances over \$10,000.” Arguably, this additional term in the confirmation subjects the contract to Revised § 2-207. Since the buyer did not expressly address balances above \$10,000, but the seller, in his confirmation, did, then this issue would be resolved by reference to the provisions of the Code. Since the Code does not allow ninety days for payment,<sup>99</sup> the buyer would not be allowed ninety days for balances over \$10,000. Solely by issuing a non-conforming confirmation of a contract already formed, the seller is able, *ex post facto*, to unilaterally modify the contract. Neither the Revised Code nor the comments explain this gross deviation from general contract law.

Under Revised § 2-207, if a contract has been formed, but the terms of the parties are different, the terms of the contract are the “terms that appear in the records of both parties,” “*the terms, whether in a record or not, to which both parties agree*,” and terms supplied under any provision of Article 2.<sup>100</sup> The obvious problem with interpreting and applying this provision is determining the terms that the parties have agreed to when those terms are in only one

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<sup>96</sup> UCC § 2-207 cmt. 1 (2003): “This section applies to all contracts for the sale of goods, and it is not limited only to those contracts where there has been a ‘battle of the forms.’”

<sup>97</sup> UCC § 2-207 cmt. 2 (2003).

<sup>98</sup> UCC § 2-207 (2003).

<sup>99</sup> UCC § 2-507(1) (2003) provides: “Tender of delivery is a condition to the buyer’s duty to accept the goods and, unless otherwise agreed, to the buyer’s duty to pay for them.”

<sup>100</sup> UCC § 2-207 (2003) (emphasis added).

party's document, or even worse, are in neither party's document.<sup>101</sup> This problem did not elude the drafters. Preliminary Comment 3 to Revised § 2-207 observes that "[b]y inviting a court to determine whether a party 'agrees' to the other party's terms, the text recognizes the enormous variety of circumstances that may be presented under this section, and the section gives the court greater discretion to include or exclude certain terms."<sup>102</sup> By giving courts discretion to

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<sup>101</sup> See Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41, 58 (2003).

<sup>102</sup> Preliminary Comment 3 reads in its entirety:

By inviting a court to determine whether a party "agrees" to the other party's terms, the text recognizes the enormous variety of circumstances that may be presented under this section, and the section gives the court greater discretion to include or exclude certain terms than original Section 2-207 did. In many cases, performance alone should not be construed to be agreement to the terms in another's record by one that has sent or will send its own record with additional or different terms. Thus a party that sends a record (however labeled or characterized, including an offer, counteroffer, acceptance, acknowledgment, purchase order, confirmation or invoice) with additional or different terms should not be regarded as having agreed to any of the other party's additional or different terms by performance. In that case, the terms are determined under paragraph (a) (terms in both records) and paragraph (c) (supplied or incorporated by this Act). Concomitantly, performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms in the other's record unless that record is part of the original agreement.

The result would be different where no agreement precedes the performance and only one party sends a record. If, for example, a buyer sends a purchase order and there is no oral or other agreement, and the seller delivers in response to the purchase order but the seller does not send the seller's own acknowledgment or acceptance, the seller should normally be treated as having agreed to the terms of the purchase order.

Of course, an offeree's unqualified response, such as "I accept," to an offer that contained many terms would show agreement to all of the offer's terms. In some cases an expression of acceptance accompanied by one or more additional terms also might demonstrate the offeree's agreement to the terms of the offer. For example, consider a buyer that sends a purchase order with technical specifications and a seller that responds with a record stating "Thank you for your order. We will fill it promptly. Note that we do not make deliveries after 3:00 p.m. on Fridays." Here a court could find that both parties agreed to the technical specifications.

In some cases a court might find nonverbal agreement to additional or different terms that appear in only one record. If, for example, both parties' forms called for the sale of 700,000 nuts and bolts but the purchase order or another record of the buyer conditioned the sale on a test of a sample to see if the nuts and bolts would perform properly, the seller's sending a small sample to the buyer might be construed to be an agreement to buyer's condition. A court could find that the contract called for arbitration where both forms provided for arbitration but each contained immaterially different arbitration provisions. It is possible that trade practice in a particular trade or course of dealing between contracting parties might treat the offeree's performance as acceptance of the offeror's terms even when the offeree sent its own record; conversely trade practice or course of dealing might bind the offeror to terms in the offeree's form when the expectation

determine the terms to which a party has agreed that are not contained in his form, and which terms to include or exclude in a contract, Revised § 2-207 has substituted inconsistency and unpredictability for the certainty inherent in the mirror image rule and the ambiguity inherent in the current § 2-207. A court, in its discretion, would be allowed to decide which terms to include or exclude from a contract, without regard to the provisions in the Code or the written terms in a party's form.

*C. Analysis of Revision*

Revised Article 2 includes a series of improvements over the current Article 2 by separating contract formation from a determination of the contract terms, thereby underscoring the fact that those are separate and discreet issues. Revised Article 2 first asks whether a contract has been formed. If so, it then asks what are the terms of the contract. The answer to the first question is dealt with in Revised §§ 2-204 and 2-206. The answer to the second question is dealt with in Revised § 2-207. Revised § 2-207 arguably is made to apply to all contracts, however formed.

The revision also eliminates the merchant versus non-merchant distinction in the battle of the forms. No rationale was advanced in the current § 2-207 for making that distinction, and it only added confusion to the section.

The "material alteration" language has been removed from the revision, and with it the concomitant issues of how it is determined. Further, under the revision, there is no longer any need for courts or commentators to exert any effort to try to distinguish different terms from additional terms, or to create disingenuous or incomprehensible arguments as to why different terms should not be treated the same as additional terms. No distinction is made between different terms and additional terms.

Further, the terms of a contract are not determined by which party fired the first shot or the last shot, so neither the offeree nor offeror has an advantage. The knockout rule is used in all cases to determine the contract terms.<sup>103</sup> Moreover, since Revised § 2-207 applies to all contracts, no longer would there be an issue whether it applies to a contract in which there is only one form as opposed to two forms.

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in the trade or in the course of dealing so directs.

In a rare case terms in the records of both parties might not become part of the contract; that might happen where the parties contemplated agreement to a single negotiated record, each exchanged similar proposals and commenced interim performance but never reached a negotiated agreement because of differences over crucial terms. There is a limitless variety of verbal and nonverbal behavior that may be claimed to be an agreement to another's record. The section leaves the interpretation of that behavior to the wise discretion of the courts.

UCC § 2-207 preliminary cmt. 3 (2003), available at [http://w3.uchastings.edu/lefstin\\_01/PDF/Contracts/RevisedUCC.pdf](http://w3.uchastings.edu/lefstin_01/PDF/Contracts/RevisedUCC.pdf).

<sup>103</sup> See John D. Wladis, *The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2*, 54 SMU L. REV. 997, 1010-11 (2001).

Despite its virtues, Revised Article 2 is not without its problems. For inexplicable reasons, Revised Article 2 repeats the “expression of acceptance” language contained in the current § 2-207. There will continue to be, therefore, issues relating to what constitutes an expression of acceptance, and the standard to be used in determining whether there is an expression of acceptance.

In addition, despite the drafters’ intent as expressed in Comments 1<sup>104</sup> and 2,<sup>105</sup> the language of Revised § 2-207 does not include all contracts formed under Revised § 2-204, only those contracts formed by an offer and acceptance or by conduct.<sup>106</sup> Revised § 2-207 also perpetuates the misapprehension of the current § 2-207 that a confirmation that is inconsistent with the terms of a contract is a response to an offer, thereby invoking the knockout doctrine. Again, a confirmation occurs only after a contract is formed, and should not be used to change the terms of a pre-existing contract.

Moreover, Revised § 2-207 provides the contract includes “terms supplied or incorporated under any provision of this Act.” Presumably, the intent of the drafters in adding “supplied” was to resolve the conflict in the current § 2-207 regarding whether course of performance, usage of trade, and course of dealing supplemented the contract terms. The most unequivocal way to resolve that conflict, however, would have been to have expressly stated that those doctrines are part of the contract.

Lastly, Revised § 2-207 provides that the contract terms include those term to which both parties agree, “whether in a record or not.”<sup>107</sup> As a result, Revised § 2-207 allows a court, in its discretion, to decide which terms to include or exclude from a contract, without regard to the provisions in the Code or the written terms in a party’s document.

## V. PROPOSED SOLUTION

As has been amply demonstrated, all of the above solutions to the battle of the forms are so flawed that they defy any effort to produce consistent, just, and impartial results. The battle of the forms begs for a solution that is simple, straightforward, fair, sensible, and free of problems in construction, interpretation, and application. It shouts for a solution that leads to certainty and predictability, but is not a formulaic process that is rigidly and mechanically applied. It cries for a solution that is sufficiently flexible to take into account the parties to the subject transaction and any peculiar characteristics and circumstances of the transaction.

### A. *Contract Formation*

In resolving the battle of the forms, a contract should be found when the parties manifest an intent and commitment to be bound. Revised Article 2 took

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<sup>104</sup> UCC § 2-207 cmt. 1 (2003).

<sup>105</sup> UCC § 2-207 cmt. 2 (2003).

<sup>106</sup> UCC §§ 2-204, 2-207 (2003).

<sup>107</sup> UCC § 2-207 (2003).

a significant first step when it proposed that § 2-204, the contract formation section (entitled “Formation in General”), be amended to provide that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, [and] conduct by both parties which recognizes the existence of such a contract.”<sup>108</sup> This formulation, in essence, rightly finds that a contract has been formed by either words or conduct when the parties have manifested an intent and commitment to be bound. Revised § 2-204 would also amend current Article 2 by removing the contract formation language that was embedded in § 2-207, thereby making § 2-204 the only section governing contract formation. Revised § 2-204 also expressly adds that a contract may be formed by “offer and acceptance.” These proposed changes were long overdue, and this author enthusiastically applauds and endorses them.

That said, where the issue is whether a contract has been formed by an offer and *acceptance*, that is, whether the offeree has *accepted* the offeror’s offer, Revised § 2-206 misses the mark by proposing that current § 2-206, “Offer and Acceptance in Formation of Contract,” be amended by adding a subsection (3) which imports the ambiguous and troublesome “expression of acceptance” language.<sup>109</sup> This author proposes that a subsection (3) be added to § 2-206, but that it provide as follows: “A seasonable response to an offer which a reasonable person would understand as an acceptance operates as an acceptance.”

This short and simple sentence, in deleting “expression of acceptance,” eliminates all ambiguity regarding what constitutes an acceptance. If this proposal were adopted, there would no longer be a question regarding the extent to which a non-conforming response can differ from the offer before it is no longer an “expression of acceptance,” but rather a rejection. This proposal also clears up the standard to be used in determining “acceptance.” Under the proposal, if from the objective perspective of a reasonable person, a non-conforming response to an offer is understood as an acceptance, it will be treated as an acceptance. Since the objective reasonable person standard is a standard that permeates virtually all areas of the law, courts and parties are already familiar with it, and it requires no novel or abstruse interpretation or construction. Further, the determination of reasonableness would be a factual issue, so that it would have the requisite flexibility to accommodate the circumstances and characteristics peculiar to any transaction. Furthermore, the harsh rigidity of the mirror image rule is abolished, which unfairly allowed inconsequential, immaterial differences between the offer and acceptance to prevent the formation of a contract.<sup>110</sup> In addition, the reasonable person

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<sup>108</sup> UCC § 2-204 (2003).

<sup>109</sup> UCC § 2-206(3) (2003) (“A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.”).

<sup>110</sup> Some courts have recognized the unfair rigidity of the mirror image rule and used fictions to avoid its application, or simply did not apply it if the variance was immaterial. *See, e.g., Propstra v. Dyer*, 189 F.2d 810 (2d Cir. 1951); *Newspaper Readers Serv., Inc. v.*

standard is party neutral, so neither the offeree nor the offeror is advantaged or disadvantaged by its use. Lastly, all references to “additional” or “different” terms have been excised. Accordingly, the issue is focused solely on the understanding of a reasonable person, not on “additional” or “different” terms and the attendant definitional, interpretation, and application problems.

*B. Contract Terms*

With § 2-204 addressing all issues of contract formation under this proposal, the author would revise § 2-207 to only address contract terms. The determination of contract terms, like contract formation, should be simple, clear, unambiguous, fair, and easy to interpret and apply. It should also recognize the commercial reality that the boilerplate in standard forms is customarily not read by the parties, a fact which should not redound to the benefit or detriment of either party.

Incorporating all of those considerations, this author proposes that § 2-207<sup>111</sup> be amended as follows:

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Canonsburg Pottery Co., 146 F.2d 963 (3d Cir. 1945); *Milliken-Tomlinson Co. v. Am. Sugar Ref. Co.*, 9 F.2d 809 (1st Cir. 1925); *see also* Frederick D. Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 *BUS. LAW.* 789, 791–92 (1969); Baird & Weisberg, *supra* note 24, at 1233–34.

<sup>111</sup> *See* UCC § 2-207 (1966):

**§ 2-207. Additional Terms in Acceptance or Confirmation.**

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

**Proposed § 2-207 Terms of Contract**<sup>112</sup>

The terms of a contract formed under § 2-204 shall consist of:

Terms that appear in the records of both parties;

Course of Dealing;

Course of Performance;

Usage of trade; and

Terms incorporated under any provisions of this Act.

Unlike current § 2-207, this proposal does not apply the all or nothing approach of either the first shot rule and the last shot rule in determining the terms of the contract. It consistently applies the “knockout” rule that neutrally sets the contract terms so that they do not favor either the offeree or the offeror, and neither party is stuck with the other party’s boilerplate. Neither party benefits from the battle of the forms or has an incentive to draft one-sided terms.

This proposal does not differentiate between merchants and non-merchants. Proposed § 2-207 is applied the same way, no matter who the parties are. Again, neither party, regardless of its status, has an advantage in determining the terms of the contract. This makes sense. The terms of a contract should not be determined by who the parties to the contract are.

Proposed § 2-207 does not refer to “different terms” or “additional terms”—if, in fact, a true distinction can be made—nor does it refer to material alterations. The use of such terms is no longer necessary. Pursuant to Proposed § 2-207, an acceptance occurs if a reasonable person understands the response as an acceptance. The focus, therefore, is on whether the response is reasonably understood as an acceptance even though it is not identical to the offer, not on whether there are different terms, additional terms, or a material alteration in the response. Also eliminated in Proposed § 2-207 is the need to figure out whether a material alteration should be predicated upon a “surprise” or a “hardship” indicated in Comment 4,<sup>113</sup> or “unreasonable surprise” indicated in

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<sup>112</sup> The hierarchy of UCC §§ 1-205 and 2-208 (1966) is retained. UCC § 1-205(4) provides:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

UCC § 2-208(2) provides:

The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

The “[t]erms that appear in the records of both parties” under this author’s proposed § 2-207(1) are the “express terms of the [an] agreement” referred to above.

<sup>113</sup> UCC § 2-207 cmt. 4 (1966).

Comment 5.<sup>114</sup> Hence, all of the definitional, interpretation, and application problems relating to these matters are supplanted by the simple and familiar factual determination of reasonableness.

Under Proposed § 2-207, where there is a battle of the forms, the knockout rule is used so that the terms of the contract are the terms that are in both parties' documents. Those terms are then expressly supplemented by course of dealing, course of performance, usage of trade, and the provisions of the Code. As indicated earlier, unlike the fall out rule, use of the knockout rule is neutral in that neither party is favored or bound to terms in the other party's boilerplate (unless the boilerplate is contained in both parties' forms). Moreover, expressly making course of dealing,<sup>115</sup> course of performance,<sup>116</sup> and trade usage<sup>117</sup> part of the contract insures that the intent of the parties will be effectuated.<sup>118</sup> How the parties have acted with respect to the subject contract (course of performance), and in other transactions (course of dealing) is the best and clearest indication of the intent and agreement of the parties. Further, if there is a trade usage or custom, there is a presumption that that trade usage or custom will be observed in the subject transaction.<sup>119</sup> The Code already provides that course of dealing, course of performance, and trade usage are part of the contract.<sup>120</sup> However, the express inclusion of these doctrines in Proposed § 2-207, as well as providing that the Code supplements the contract, is done for clarity and to preclude the argument made by some that only terms expressly stated in the Code can supplement the contract.<sup>121</sup>

## VI. CONCLUSION

The battle of the forms that resulted from the exchange of standard form contracts has gone on for over one hundred years. Yet every attempt to end the battle has proven only to inflame it. The mirror image rule often ignored the intent and commitment of the parties to be bound to a contract, and often rendered intended contracts unenforceable because of immaterial, inconsequential, and ignored terms. The concomitant last shot rule arbitrarily favored the party who sent the last form. The promulgation of Article 2 of the Uniform Commercial Code further compounded the problem. The Article 2 resolution to the battle of the forms was internally inconsistent, complex, and confusing. It used terms that were ambiguous, and imposed standards that were

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<sup>114</sup> UCC § 2-207 cmt. 5 (1966).

<sup>115</sup> See note 82 *supra*.

<sup>116</sup> See note 83 *supra*.

<sup>117</sup> See note 82 *supra*.

<sup>118</sup> If the parties do not intend to be bound by course of dealing, course of performance, or usage of trade, they may expressly agree otherwise, and their express agreement controls. See UCC § 2-207 (2003).

<sup>119</sup> UCC § 2-207 (2003).

<sup>120</sup> See notes 82 and 83 *supra*. See also UCC § 2-102 (1966), which provides in pertinent part that "this Article applies to transactions in goods."

<sup>121</sup> See *C. Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228, 1237 (7th Cir. 1977).

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vague and inconsistent. As a result, cases are in disarray, and legal experts clash over its construction, interpretation, and application. Revised Article 2 also fails to hit the mark. A new approach is needed to resolve the battle of the forms—an approach that is direct, fair, uncomplicated, flexible, and above all simple. It is submitted that the author's proposed revisions effectively and efficiently resolve the battle of the forms, are easy to interpret, will produce consistently equitable results, and above all, they KEEP IT SIMPLE, STUPID.