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## **Intention over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts**

### **Cover Page Footnote**

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# INTENTION OVER TERMS: AN EXPLORATION OF UCC 2-207 AND NEW SECTION 60, RESTATEMENT OF CONTRACTS

JOHN E. MURRAY, JR.\*

WITH the adoption of the Uniform Commercial Code in all states except Louisiana, American courts are presented with a significant challenge. The consensus is that the Code is a clear and welcome improvement over pre-existing statutory devices in the commercial law area. Yet, there is little doubt that the Code will continue to spawn some of the most sophisticated arguments ever presented to American courts. There are detailed provisions which afford a high degree of certainty and predictability. But some of the most important changes in pre-existing law are contained in sections which have been drafted in generic terms. Nowhere in the Code is this more evident than in certain sections dealing with the formation of contracts for the sale of goods.

Since pre-Code statutes in the commercial law area did not substantially affect the orthodox law of contracts, the fact that the Code contains several sections in Article 2 dealing with basic contract law is unique in itself. More important, however, are the radical changes found in several of these sections.<sup>1</sup> With limited trepidation, it may be suggested that if there is any area in which the lawyer feels secure, it is in the area of the agreement process. *Inter alia*, he remembers only too well the rules of offer-acceptance and that venerable distinction between unilateral and bilateral contracts. Indeed, he has a vested interest in preserving that structure which he worked so hard to learn in his first semester of law school. It has served him well though monolithic in approach, unrealistic and, at least in certain situations, unjust in results were achieved through its application. When he learns, as only some lawyers have, that this fondly-remembered structure has been substantially changed, he accepts the changes slowly for many reasons, not the least of which is his unwitting resistance to the emasculation of the taught doctrine which he assumed would prevail for his lifetime as a lawyer. Not only are the changes often radical, but they lack the certainty of a Williston approach. They call for a fuller analysis of the facts and only through an understanding of the purposes of the changes rather than the language of the statute can substantial predictability be attained. Even then, they have been untested for the most part. When one or two courts

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1. For an exploration of other changes see Murray, *Contracts: A New Design for the Agreement Process*, 53 *Cornell L. Rev.* 785 (1968).

have been confronted with the necessity of interpreting a particular section, the aftermath has often been a torrent of criticism which makes the initial interpretations doubtful precedents. There is the additional factor that rules of contract law in the Code are concerned only with contracts for the sale of goods. The other questions arise: Will we have a traditional approach for contracts other than those for the sale of goods and the significantly different Code standards for sale-of-goods contracts? Will the Code be used analogously by courts where it is technically inapplicable? An answer has been clearly suggested in the tentative drafts of the new Restatement of Contracts which incorporates the basic Code changes for all contracts.<sup>2</sup> The safe prediction is that the basic changes in the law of contracts found in the Code will be accepted for all contracts because of the desire for uniformity and the respect for the American Law Institute in its new Restatement of Contracts. At least, the lawyer must be immediately aware of the Code changes in relation to sale-of-goods contracts because the legislatures have enacted them.

Most of the published efforts to acquaint the bar and law students with the changes have been of the survey variety. Often, this has resulted in little more than a listing of changes with little insight into the problems surrounding them. An effort must be made to consider each of the substantial changes in depth so that its full impact can be clearly discerned. This article concentrates on one of the most controversial changes in Article 2 of the Code and its assimilation in the new Restatement of Contracts. Section 60 of the original Restatement of Contracts set forth the rule to be applied where the purported acceptance stated terms different from or additional to the terms of the offer: "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer."

There is no dearth of authority holding, "A variation in the substance of the offered terms is material, even though the variation is slight."<sup>3</sup> In terms of the monolithic notion of contract law, the logic of this rule is unassailable. If the offeror is master of his offer, he may create a power of acceptance with whatever limitations he chooses. The precise power of acceptance created is the only one the offeree may exercise. An attempt to exceed the boundaries thereof is impossible since there is no power of acceptance outside the limitations created and imposed by the offeror. The underlying assumption, of course, is that the offeror does consciously create a power of acceptance which has precise boundaries and that he is concerned with unerring adherence to those boundaries. This assump-

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2. Restatement (Second) of Contracts (Tent. Drafts Nos. 1, 1964, 2, 1965, 3, 1967, & 4, 1968) cover the first 225 sections of the original Restatement.

3. 1 A. Corbin, *Contracts* § 86 (1963). See also *Id.* § 82; Restatement of Contracts §§ 58-59 (1932).

tion is not unlike the notion that the offeror genuinely cares how his offer is accepted (*i.e.*, by performance or by a promise). Thus, the taught doctrine would have courts deciding exactly how the offeror intended the offer to be accepted and then requiring the power of acceptance to be exercised in that precise fashion.<sup>4</sup> In either situation, the assumption is fallacious. In the latter situation, most offers are indifferent as to how they are to be accepted. In the former, most offers do not even *state* with great precision the boundaries of a power of acceptance. The Code and the new Restatement of Contracts seek a reconciliation of the doctrine with reality.

The principal event giving rise to new thinking in this area has been the development of the printed form or "pad" contract. The use of the order form (or purchase order form) is prevalent in commercial life. It has been drafted by one or more lawyers and since lawyers tend to draft to the edge of the possible,<sup>5</sup> the order form is replete with provisions and provisos protecting the buyer. The seller is also advised by his legal knights and his acknowledgment form is similarly filled with protective boilerplate. Invariably there will be differences and even contradictions in the forms exchanged. Yet, in the overwhelming majority of cases, buyer and seller think they have a "closed deal" and proceed to perform with few or no hitches. Sometimes a situation arises, however, which precipitates the "battle of the forms." The most obvious situation is one in which one of the parties decides that the "closed deal" is a bad bargain. The market has changed, his needs have changed or some other unforeseen event has occurred creating in him the wish that he had never entered the contract at all. It is at this point that he returns to his shield, the form which he sent to the other party. The probabilities are that this is the first time he has read the form completely and he certainly has not read the form received from the other party. He (or his lawyer) begins a microscopic analysis of both forms and with triumphant delight produces a provision which proves that there never was a contract at all. When the argument is presented to the court, the outward manifestations of the alleged contract are found in the forms. Since a provision in one form was materially different from the other form, the court must conclude that there is no contract. What could be simpler? The fact that the parties did intend a contract to be formed and both had a reasonable commercial understanding that the deal was closed, is ignored.

It is not difficult to set forth the foregoing illustration of how the

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4. For an analysis of the significant change in this doctrine, see Murray, *supra* note 1.

5. Report of the New York Law Revision Commission for 1954, Hearings on the Uniform Commercial Code, vol. 1 at 113 (1954) (Statement by Professor Karl Llewellyn, Chief Reporter of the Code).

wooden rule that the acceptance must exactly match the offer can be used as an escape hatch for a party who decides that the bargain is undesirable. It is, however, quite another matter to draft a workable rule to avoid that obviously unjust result and other unjust results which are not so obvious. The task was formidable and its execution left something to be desired.

Before exploring the efforts of the draftsmen, in the interest of clarity it is desirable to eliminate certain fundamental issues which are not involved. First, it should be noted that we are not dealing with the clear, unequivocal acceptance of an offer which merely *requests* additional terms or a change in the terms of the offer. Unless the "acceptance" is made to depend on assent to the changed or added terms, the acceptance is valid.<sup>6</sup> The second situation is one dealt with by the Code and one which can be complex. However, it is not the central question dealt with in this paper because it will probably not be significantly difficult for courts to resolve. If the parties to a contract for the sale of goods have made an oral contract followed by an exchange of confirmatory memoranda, the memoranda may be conflicting. The Code solution to this problem is reasonably clear: each party must be assumed to object to a clause in the other's memorandum which conflicts with his own. Thus, the contract consists of the terms upon which the parties originally agreed, terms on which the confirmations agree and terms supplied by the Code.<sup>7</sup> Again, it must be emphasized that this is the solution afforded by the Code when the parties have entered into an oral contract and thereafter exchanged memoranda of that contract which do not match.

The problem which promises great difficulty is the one in which the offeror sends his order form to the offeree and the latter sends the purported acceptance on his form which contains additional or variant terms. The question here is whether there is a contract at all, and only if that question is answered affirmatively are we then concerned with the terms of the contract.

#### I. THE 1952 VERSION OF 2-207

The inquiry may effectively start with section 2-207 of the Code in the 1952 official text:

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6. See Restatement of Contracts § 62 (1932) which remains intact in Restatement (Second) of Contracts (Tent. Draft No. 1, 1964). It should also be noted that evidence has always been admissible to show that what appears to be a variance between the terms of the offer and the terms of the acceptance is not a variance at all. This is nothing more than interpretation of the terms of the writings and, therefore, in no way violates the parol evidence rule.

7. Uniform Commercial Code § 2-207, Comment 6 (1958 Official Text) [hereinafter cited as U.C.C.].

“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.

(2) The additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them has already been given or is given within a reasonable time.”

The initial problem in subsection (1) is the apparent contradiction in the use of the term “acceptance” to characterize a communication which “states” different or additional terms. This is a frontal assault on the matching acceptance rule. The mitigating phrase, “operates as,” is helpful but it still did not make the new rule palatable to those who saw the orthodox doctrine of contract law in a sacred light. There was trouble with the term “confirmation” which allegedly could mean either the acceptance itself or “a redundant statement of or about an agreement which has already become a contract.”<sup>8</sup> The most serious obstacle was certain language in Comment 2 to this section in the 1952 edition: “[A] proposed deal[,] which in commercial understanding has in fact been closed, is recognized as a contract.”<sup>9</sup> What does the phrase “commercial understanding” mean? It was suggested that it was even more uncertain in meaning than “usage.” One distinguished contracts scholar suggested the following meaning of the 1952 version of 2-207:

Whenever proposals and counter-proposals have been exchanged and there comes in the communication of one party an expression of a “closed deal”, then both parties are bound by a contract even though the decisive expression states terms materially different from or in addition to those thus far agreed upon; these added or variant material terms are merely proposals which the other party can ignore without being bound by them. In such a case the terms of the contract are those *previously* proposed by each to the other and not rejected. This sounds fair enough until one considers that: (a) The offeror-party may not have included in his previous communications all of the terms which he wanted to insist upon. This result need not be further considered if “offered” in subsection (1) is used in its conventional legal sense. (b) The offeree-party may have intended his additional or altered term to be a prerequisite to closing the deal, and he will then be much surprised to find that he is bound by a contract which does not include that term. Comment 2 seems intended to put the burden upon the offeree of making his expression of acceptance “conditional on the acceptance of the additional terms.”<sup>10</sup>

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8. Report of the New York Law Revision Commission for 1955: Study of the Uniform Commercial Code, vol. 1, at 294 (1955) (Analysis by Professor Edwin W. Patterson, then of the Columbia University School of Law).

9. *Id.*

10. *Id.* at 294-95.

Assuming that the term "offered" in subsection (1) was used in its conventional sense, the great difficulty in this new device was the danger that the offeree would be bound to a contract on the offeror's terms which the offeree did not intend to make.<sup>11</sup> Thus, the paradox was unfolded early; yet, it was not focused upon as a paradox nearly so much as an atrocity upon the offeree. What greater offense imaginable than imposing a contract upon an offeree who did not intend to be bound thereby? Somehow the underlying question was ignored: If the offeree intended his additional or altered terms to be a prerequisite to closing the deal, then how can the deal be said to be closed in "reasonable commercial understanding?" If there is some outward manifestation that the offeree does not intend a "closed deal" without his additional or altered terms, then it is impossible to have a "closed deal." Apparently the major difficulty was that somehow the offeree may have expressed his intention that the deal be closed and yet his "real" intention would be that it should be closed only on the basis of the new terms in his response. The first concept which this notion revives is the traditional question of objective versus subjective intent. As long ago as the 1950's, it would seem reasonably clear that the objective test would prevail. Thus, a court should look to the total expression of the offeree to discern his intention. Hopefully, a return to some highly formalistic era and the use of magic phrases was not intended by the Code. Thus, even if the offeree at some point in his communication did use a phrase such as "the deal is closed," this would not be conclusive. If, after stating, "the deal is closed," or some such phrase, the offeree would have then indicated that he did not wish to be bound to a contract except on the basis of his added or different terms, the Code drafters certainly could not have intended that he should be bound on the offeror's original terms because this could not possibly be the "reasonable commercial understanding" of the parties. Though some insistence on the use of magic words by an offeree who did not intend to be bound may seem incredible, the statement in the Comment that the offeree has the burden of making his expression of acceptance "conditional on the acceptance of the additional terms" was apparently sufficient to suggest the bizarre. In defense of at least some writers who suggested this possibility, they were obviously attempting to suggest the ramifications of the new idea in 2-207 on the basis that the language of 2-207 and the comments would be literally interpreted by the courts. Certainly, if the plain-meaning rule of interpretation has any justification, it may be used legitimately to test the skill of the legislative draftsman.<sup>12</sup>

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11. See, e.g., Phalan, *Uniform Commercial Code—Sales—Inadvertent Acceptance of Buyer's Terms*, 62 *Dick. L. Rev.* 170 (1958).

12. It is submitted that this may be the only justification for the plain-meaning rule.



Yet, the concentration on the possible chaos and injustice to the offeree that would be created by the new rule if literally applied tended to obscure the purposes of 2-207. On the other hand, illustrations of the injustice often created by the orthodox rule that the acceptance must exactly match the terms of the offer were not difficult to find. Since it is at least foolish to expect parties to a contract to express themselves precisely and comprehensively, variances between expressions of an offer and expressions of an acceptance would continue to occur as a matter of course. The consensus was clear that it would be desirable to avoid the technical matching requirement when the parties intended to be bound. The critical question remained: How is the rule articulated or drafted to avoid such results? The difficulty of the task is evidenced by the intermediate drafts which were submitted.<sup>13</sup>

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Cf. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *Cornell L.Q.* 161 (1965).

13. See, e.g., U.C.C. § 2-207 (Supp. 1, 1955) for the following proposal to the 1952 Official Text:

- (1) Where a contract for sale is concluded by word of mouth and terms additional to or different from those of the agreement are included in the written confirmation of one party or of each, then the oral agreement controls. This provision is subject to the statute of frauds (Section 2-201) and to the provisions on final written expressions (Section 2-202) and to the operation of subsection (6).
- (2) Where a written offer is not accompanied by form clauses a seasonable and definite expression of acceptance operates as an acceptance even though it states terms additional to those offered unless the acceptance is explicitly made conditional on assent of the offeror to any additional term. Any additional term is to be read as a proposal for addition to the contract.
- (3) Where a written offer of one party is accompanied by form clauses prepared by the other party the clauses are incorporated into the offer unless they are manifestly unreasonable.
- (4) When a written offer is accompanied by form clauses prepared by the offeror, a definite and seasonable expression of acceptance operates as an acceptance even though it contains form clauses additional to or at variance with those of the offer, unless either
  - (a) the offer conspicuously makes its acceptance conditional on the offeree's agreement to any specified one of its form clauses or to all of them; or
  - (b) the expression of acceptance conspicuously makes its own operation conditional on the offeror's agreement to any specified one of its form clauses or to all of them.
- (5) Even though by reason of such conspicuous conditions as are described in subsection (4) a contract fails by reason of such exchange of writings, yet conduct by both parties which recognizes the existence of an agreement about the subject-matter is sufficient to establish the fact of agreement. In such case the terms of the particular agreement consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under either the next subsection or any other provisions of this Act.
- (6) Between merchants an additional term which has not been the subject of specific negotiation and which in good faith is added to a written expression or confirmation of acceptance becomes part of the contract unless it is at variance with a term of the offer or unless notification of objection has been given in advance or is given within a reasonable time after notice of the additional term is received or unless the additional term is manifestly unreasonable.

## II. THE CURRENT VERSION

The final product is found in the 1958 official text of 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.”

The most significant change in subsection (1) is the addition of the phrase, “unless acceptance is expressly made conditional on assent to the additional or different terms.” The same statement, absent the term, “expressly,” is found in a comment to the original version.<sup>14</sup> Moving it to the subsection itself not only emphasized its importance but made it part of the enacted law. The apparent intention was to make it clear that an offeree could control the terms of the agreement if he so desired by simply expressing his intention that he did not intend to “close the deal” except on his additional or different terms. In effect, the language makes clear the right of the offeree to make a counter-offer. This orthodox terminology (counter-offer) is not found in the subsection or in the comments. It is difficult to understand why an effort “to express more clearly what was intended”<sup>15</sup> would refrain from using this well-understood term. If not in the subsection itself, a statement in the comment to the effect that, if an offeree expressly indicates that he does

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14. U.C.C. § 2-207, Comment 2 (1952 Official Text).

15. ALI 1956 Recommendations of the Editorial Board of the Uniform Commercial Code § 2-207, at 28.

not intend the deal to be closed absent adherence to his additional or different terms, this constitutes a counter-offer, would have promoted the interests of clarity beyond that which is presently found in the subsection or comments. The angular phraseology in the subsection promotes the opposite of clarity. Instead of a term such as counter-offer, the interpreter must chop his path through seemingly contradictory terms. An "acceptance" which is "expressly made conditional on assent to the additional or different terms" is the opposite of "acceptance" in the traditional sense of that term; it is, quite literally, non-acceptance. Moreover, the drafters *intended* it to be non-acceptance. Thus, why use the term "acceptance" at all? This is quite different from the use of the term "acceptance" in the prior portion of the subsection. There, "acceptance" is used to denote what the drafters intended, to wit, "acceptance" notwithstanding the statement of additional or different terms. Thus, the term is justifiably used. However, the combination of a legitimate and illegitimate use of the term, "acceptance," in the same subsection is destined to produce peculiar if not absurd results.

In summary, the following interpretation of subsection (1) is submitted as reasonable: If an offeree responds to an offer with a statement which can be characterized as a definite and seasonable expression of acceptance, such response operates as an acceptance even though it states terms which are different from or additional to the terms of the offer. However, if the offeree's response expressly indicates that he intends to be bound to an agreement only if the offeror assents to the additional or different terms, the response does not operate as an acceptance but as a counter-offer which, like all offers, must be assented to or accepted if a contract can be said to result.

Again, the critical question is whether the offeree's response can be characterized as a definite and seasonable expression of acceptance. It has been forcefully urged that this question cannot be answered through reliance upon 2-207.<sup>16</sup> It is suggested that 2-204<sup>17</sup> is controlling in determining the question, was the acceptance "definite," *i.e.*, did the

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16. Comment, Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms, 30 U. Chi. L. Rev. 540, 545-47 (1963).

17. U.C.C. § 2-204 (1958 Official Text):  
Formation in General.

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
- (3) Even though 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.

offeree intend to be legally bound? It is difficult to gain much solace from this suggestion. 2-204 is intended to reflect the general flexibility in contract formation which the Code drafters were so anxious to include. Subsection (1) of 2-204 represents no significant change from pre-Code law. It merely emphasizes the rule that if the parties manifest their intention to be bound to an agreement in any reasonable manner, including conduct, a contract is formed. Subsection (2) rejects the eternal search for the precise moment when the contract was formed. If it is clear that the transaction emerged from the darkness of the tunnel an agreement to which both parties intended to be bound, the fact that we cannot pinpoint the exact moment of formation in the tunnel is irrelevant. Subsection (3) represents the most radical departure from pre-Code contract law in this section. It significantly attacks the old rule that a contract can fail for indefiniteness because one or more terms is missing. Under this subsection, assuming a reasonably certain basis for providing a remedy, a contract is formed even though one or more terms is missing *if the parties intend to make a contract*. It is important that 2-204 be read as totally dependent upon the last italicized phrase. In effect, the entire section may be construed as follows: If the parties intend a contract to be formed, it will be formed despite the facts (1) that it is expressed imprecisely and in terms of the conduct of the parties, (2) that the moment of its making cannot be precisely determined, and (3) that one or more terms of the agreement have not been expressed if there is some reasonable basis on which it can be enforced. *Now, could we simply add: (4) that the terms found in the offeree's definite expression of acceptance are different from the terms of the offer?* Is it reasonable to suggest that the concept found in 2-207(1) could be appropriately added to the three categories found in 2-204 since it is simply another category manifesting the philosophy of flexibility in contract formation introduced by the Code? Assuming that the addition is reasonable, the question remains: Did the parties intend to be bound by an agreement? That question is not answered by 2-207(1) nor by 2-204. Thus, a reference to 2-204 may identify the controlling question, but the criteria to be used in answering the question in a given fact situation remain undiscovered.<sup>18</sup>

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18. See 30 U. Chi. L. Rev., supra note 16, at 546 where certain general criteria are cited by the author: (1) the phrasing of the communication; (2) trade usage or course of dealing between the parties; (3) conduct of the parties relating to the alleged contract and (4) variances in non-form clauses. It is submitted that the comment falls short in not pursuing these criteria and other relevant concepts regarding the critical or controlling question. It is vitally important to identify the controlling question (i.e., was there an acceptance?) but the critical inquiry remains and the comment fails to pursue that inquiry.

It is also suggested that somehow a resort to 2-206<sup>19</sup> may alleviate the difficulties of 2-207.<sup>20</sup> Again, the suggestion is curious. Section 2-206 is designed to overcome the archaic and unrealistic notion that offerors usually care how their offers are accepted. It suggests that the indifferent offer (*i.e.*, indifferent as to how it is accepted, by promise or beginning performance) is the usual offer. Thereby, 2-206 makes a solid contribution to reconciling contract theory with reality.<sup>21</sup> It is difficult to see how this section provides any assistance to a court or lawyer wrestling with a 2-207 problem. If the offeree does intend to accept the offer, 2-206 makes the acceptance effective if it has been exercised in *any* reasonable manner or medium. Assuming the offeree has used a reasonable manner and medium in which to respond to an offer, the flexible requirements of 2-206 are met. But the question remains: Does the offeree's reasonable response, though stating different or additional terms, indicate that he intends to be bound to the terms proposed by the offeror? Or, does it indicate that he does not intend to be bound unless the offeror assents to the different or added terms? It is submitted that 2-206 is irrelevant in the determination of this question which will be discussed *infra*.

If it is true that 2-207(1) could be logically added as a fourth category to 2-204, as suggested, is there any need for a separate section? It would be more polemical than fruitful to attempt a reconstruction of legislative intent in this regard. It is fair to infer that a separate section was thought necessary because of the important ancillary questions which the principle in 2-207(1) precipitates. If there can be an acceptance of an offer even though the acceptance states different or additional terms, what happens to the additional or different terms? If a nonmerchant is involved in the transaction, the additional terms in the acceptance are mere proposals made to the offeror to which he must assent in order to be bound.

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19. U.C.C. § 2-206 (1958 Official Text):  
Offer and Acceptance in Formation of Contract.

- (1) Unless otherwise unambiguously indicated by the language or circumstances
  - (a) an offer to make contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
  - (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 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 is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

20. 30 U. Chi. L. Rev., *supra* note 16.

21. This concept is explored in Murray, *supra* note 1.

However, between merchants,<sup>22</sup> they become part of the contract unless: (1) the offer expressly restricted acceptance to its terms—the offeror is still the master of the offer; (2) the additional or different<sup>23</sup> terms materially alter the contract; or, (3) the offeror notifies the offeree of his objection to the variant terms within a reasonable time after the offeror is notified of the new terms.<sup>24</sup> The application of subsection (2) of 2-207 is not without difficulty. Whether the parties are merchants, whether the offer expressly restricted acceptance to its terms, whether the new terms are material alterations of the offer, whether notification, if any, from the offeror to the offeree objecting to the new terms was within a reasonable time—all of these questions can be difficult in a given fact situation. However, none raise conceptual difficulties. Again, the crucial question is: Did the offeree “accept”? If he did, though expressing added or different terms, the problem of what to do with the terms can be reasonably met.

The third and final subsection of 2-207 is a significant change from pre-Code law. Assuming that the writings or forms exchanged by the parties do not evidence a contract, their conduct may indicate that they intend to be bound. In that case, there is a contract but the question remains, what are the terms of this contract implied from their conduct? The typical illustration of the pre-Code law involved an offer submitted on an order form and a response thereto by a seller submitting his acknowledgment which did not match the terms of the offer. Thus, it was a counter-offer since it did not fulfill the matching requirement of pre-Code law. The seller then shipped the goods which were accepted and used by the buyer-offeror. Under orthodox contract law, there was a contract as manifested by the counter-offer and acceptance thereof through the buyer's receipt and use of the goods. The terms of the contract were the terms of the seller's counter-offer (rejecting the buyer's original offer) which terms were accepted by the buyer through receipt and use of the goods. The seller had the “last shot” through his counter-offer and the buyer accepted on this basis. Subsection (3) of 2-207 changes pre-existing contract law in a sale of goods situation by permitting a contract to be formed by the conduct of the parties, but then establishes the terms of the contract as those terms on which the writings of the parties agree together with any supplementary terms supplied by the Code. Thus, in the illustration, the seller would not have the “last shot.” His acknowl-

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22. See the definition of “merchant” in U.C.C. § 2-104(1) and the elaboration in Comment 2 to that section.

23. U.C.C. § 2-207(2) refers only to “additional” terms but it is submitted that the probable intention is to incorporate “different” terms as well.

24. U.C.C. § 2-207(2).

edgment form would control the terms of the contract only to the extent that its terms were in agreement with the terms on the buyer-offeror's form. The remaining terms would be supplied by the Code.<sup>25</sup> Since there is no difficulty under the Code in finding a contract even though one or more terms are missing, this subsection is consistent with the general formation concepts of the Code.<sup>26</sup>

### III. THE CRITICAL QUESTION

With this brief description of the general operation of 2-207, it is appropriate to consider the only significant judicial effort to interpret this troublesome section. The *Roto-Lith* case<sup>27</sup> has been extensively noted in the law reviews<sup>28</sup> and the consensus is clear that the case is not a reliable precedent. On October 23, 1959, the plaintiff mailed a written order to defendant for a drum of emulsion indicating the use intended. On October 26, the defendant executed an acknowledgment form and invoice form which were identical except for their titles. The acknowledgment form was mailed on October 26 but it was not known whether it was ever received. Thus, there was an un rebutted presumption of receipt of the form certainly no later than the goods were received. The acknowledgment form conspicuously disclaimed any warranties on its face.<sup>29</sup> On the reverse side, there appeared smaller but still conspicuous print containing terms of sale<sup>30</sup> and the following statement: "This acknowledgment contains all of the terms of this purchase and sale. No one except a duly authorized officer of Seller may execute or modify contracts. Payment may be made only at the offices of the Seller. If these terms are not acceptable, Buyer must so notify Seller at once."

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25. U.C.C. § 2-207(3) is mentioned by the court in *In re Particle Reduction Corp.*, 5 U.C.C. Rep. Serv. 242 (E.D. Pa. 1968). The court stated: "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. (U.C.C. § 2-207 (3))." 5 U.C.C. Rep. Serv. at 246-47.

26. See U.C.C. § 2-204(3) in note 17, supra.

27. *Roto-Lith Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

28. See, e.g., Comment, UCC Section 2-207 and the 'Counter Offer': Acceptance Unlimited?, 57 Nw. U.L. Rev. 477 (1962); 1962 Duke L.J. 613; 41 N.C.L. Rev. 113 (1962); 111 U. Pa. L. Rev. 132 (1962).

29. "All goods sold without warranties, express or implied, and subject to the terms on reverse side." 297 F.2d at 498.

30. "Due to the variable conditions under which these goods may be transported, stored, handled, or used, Seller hereby expressly excludes any and all warranties, guaranties, or representations whatsoever. Buyer assumes risk for results obtained from use of these goods, whether used alone or in combination with other products. Seller's liability hereunder shall be limited to the replacement of any goods that materially differ from the Seller's sample order on the basis of which the order for such goods was made." 297 F.2d at 499.

The plaintiff-buyer did not protest these terms. It proceeded to pay for and use the emulsion. The emulsion did not prove adequate and the plaintiff brought an action for breach of the implied warranties of merchantability and fitness for a particular purpose. The only issue considered by the court was whether the warranties were excluded by the defendant's acknowledgment. With no concern for the critical question of whether the seller-offeree's acknowledgment constituted "a definite and seasonable expression of acceptance," the court produced an interpretation of 2-207 which cannot be justified. The plaintiff, of course, argued that there was a completed agreement upon mailing of the acknowledgment by the defendant.<sup>31</sup> Since the acknowledgment contained different terms which materially altered the terms of the offer, under 2-207(2)(b) the different terms did not become part of the contract because the buyer did not express assent thereto.<sup>32</sup> Since the court allowed the 2-207 machine to be activated to the extent of becoming involved in an interpretation of subsection (2) rather than addressing itself to the critical question of subsection (1) (*i.e.*, Was there "a definite and seasonable expression of acceptance?"), it now had to either agree with the plaintiff's interpretation of subsection (2)(b) or engage in a spurious interpretation thereof. Never did a court create a more obvious Hobson's choice for itself. Whether its choice justly resolved the dispute between the parties before it, is arguable. However, there can be no doubt that its rationale contributed nothing to settling the law in this area. Instead, it looms as a potential shackle for other courts squarely confronted with the necessity of interpreting 2-207.

After agreeing that 2-207 changed the existing law, the court proceeded to suggest that the effect of 2-207 was not to change the law at all. It could not understand how a reply to an offer which stated conditions "unilaterally burdensome" upon the offeror could be an acceptance of the original offer and a mere proposal of additional terms. No offeror in his right mind would assent to "unilaterally burdensome" terms and the offeree would, therefore, be engaging in a useless exercise in responding by adding such burdensome terms. This premise led inevitably to the savage conclusion: "To give the statute a practical construction we

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31. "Under the Uniform Commercial Code . . . § 2-206, mailing the acknowledgment would clearly have completed the contract in Massachusetts by acceptance had the acknowledgment not sought to introduce new terms." *Id.*

32. "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. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time." U.C.C. § 2-207, Comment 3.



must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly . . . conditional on assent to the additional . . . terms.'<sup>33</sup>

This interpretation emasculated one of the possibilities clearly envisioned by 2-207. In an agreement between merchants, assuming a manifestation that they intend the deal to be closed, additional or different terms become part of the contract unless, *inter alia*, they are material changes. In that event they do not become part of the contract unless assented to by the other party. The *Roto-Lith* court suggests that this is not a possibility under the section. If the new terms are immaterial, they automatically become part of the contract. If they are material changes which alter the obligation to the disadvantage of the offeror, *there never was a contract*; the offeree must have intended not to be bound; he must have intended to make a counter-offer. Thus, in a fact situation like *Roto-Lith*, there has been no change in orthodox contract law; the holding is exactly what it would have been absent 2-207 even though the court deigns to use the language of 2-207(1). The *Roto-Lith* court, perhaps unwittingly, retrogressed to that comfortable conception which it knew so well in the taught doctrine of contract law.

If there was any doubt that the court could not acquiesce in the significant change wrought by 2-207, it was completely removed by the disposition of the case following the spurious interpretation of 2-207(1) and (2). Assuming the offeree-seller's acknowledgment to be a counter-offer, since the offeror-buyer received and used the goods, it accepted such offer. As suggested *supra*, the Code in 2-207(3) changes the "last short" principle; in the situation at hand, it could be argued that 2-207(3) does not permit the terms of the contract to be dictated by the terms of the offeree's acknowledgment. Rather, the terms are those on which the writings of the parties agree, supplemented by other provisions of the Code. Since the writings of the parties do not agree on the disclaimer of warranties, the disclaimer did not become part of the contract. Then, since the Code clearly promotes the implication of the usual warranties (merchantability and fitness),<sup>34</sup> these supplementary provisions of the Code are included in the contract. The court simply ignored subsection (3) of 2-207 and applied the pre-Code "last shot" principle. It held that the offeree's counter-offer having been accepted by the receipt and use of the emulsion by the offeror, the offeror was bound to a contract, the terms of which were completely supplied by the offeree's acknowledgment which, of course, included the disclaimer.<sup>35</sup>

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33. 297 F.2d at 500.

34. U.C.C. §§ 2-314, 2-315.

35. 297 F.2d at 500.

Consider the possible result and rationale if the court had focused upon the critical question: Was the acknowledgment form of the seller "a definite and seasonable expression of acceptance"? The form on its face contained a conspicuous disclaimer of warranties. On its reverse side, in smaller but still conspicuous print, it contained a merger clause<sup>36</sup> with the concluding sentence: "If these terms are not acceptable, Buyer must so notify Seller at once." It is submitted that the test which the court might have used is: Would a buyer in such circumstances reasonably understand that the seller is willing to perform on the buyer's terms or should the buyer have understood that the seller is willing to perform only on the different terms stated in the seller's response to the offer? This is a question of intention, a question of fact. Any attempt to create a more precise or detailed test with mechanical rules or magic words or phrases not only will fail in application but will contradict the basic purpose of this section of the Code. If the seller had included the following sentence, "This acceptance of your offer is expressly conditioned upon your assent to any additional or different terms contained in this acknowledgment," a literal application of 2-207(1) would characterize the acknowledgment as a counter-offer. In the absence of such "expressly conditional" language, is the acknowledgment form to be interpreted as a manifestation of acceptance notwithstanding a reasonable interpretation of it as an expression of the seller's unwillingness to be bound except on the new terms found in his form? Apparently, there is a strong feeling that the "expressly conditional" language of 2-207(1) is to be taken literally, *i.e.*, the seller must provide "that the acknowledgment is an acceptance if, but only if, the buyer is willing to assent to the additional or different terms contained therein."<sup>37</sup> The difficulties with this suggestion are myriad. In light of the infelicitous language of the last phrase of 2-207(1) ("unless acceptance is expressly made conditional") are some magic words literally required such as: "This acceptance is expressly conditional on assent to any new terms in this acknowledgment"? Or, would a statement such as, "The transaction between the parties to this agreement are subject to the following terms," be sufficient? Let us put aside the question of how a lawyer should advise his client who wishes to enter into the transaction only on the basis of his additional or different terms. In the absence of much case-law permitting looser phraseology (and even with such case-law) the safest course is always best and the client should be advised to use explicit language in precise conformity with the statute. But that is not the difficult question. The difficult

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36. See text following note 30 *supra*.

37. 1 W. Hawkland, *A Transactional Guide To The Uniform Commercial Code* § 1.090303, at 21 (1964).

question is what should the reaction of a court be to language which is less than precise, *i.e.*, language which does not conform to the language of the statute? One of the principal developments in twentieth century contract law has been the increasing awareness that parties do not always express themselves precisely or comprehensively. Indeed, the twentieth century was not very old when a well-known jurist stated the emerging concept: "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."<sup>38</sup> Does the Code in 2-207(1) require a return to that "primitive stage of formalism"? Moreover, since an acceptance expressly conditioned upon assent to new terms is not an acceptance at all but a counter-offer, if the response from the seller is stated in terms of a counter-offer, is that to be construed somehow as an acceptance? Such notions suggest an excessive literalism in statutory interpretation. This subsection of 2-207 requires an examination of the probable purpose of the drafters. The basic idea was to find a contract if the parties seemed to have intended a binding agreement even though the technical operation of orthodox contract law would characterize the offeree's response as a counter-offer because of a different or additional term found therein. The subsection intends to rid contract law (at least in sale-of-goods contracts) of technical requirements which are at odds with the overriding intention of the parties. If, in order to accomplish that desirable goal, the subsection succeeds only in replacing old technical requirements with new technical requirements, it is of doubtful value and, therefore, such an interpretation is not to be preferred. If the offeree's response to the offer clearly indicates that the offeree does not wish to be bound except on his terms, *i.e.*, if the offeree clearly manifests a counter-offer, not in the technical, orthodox contract sense of counter-offer, but in terms of his intention, he has not definitely and seasonably expressed his acceptance of the offer and there is no acceptance even though the offeree has not used particular language to express such intention. Section 2-207 is predicated on the idea that a contract exists when a proposed deal, in reasonable commercial understanding, is closed.<sup>39</sup> The only means of determining whether the parties thought that the deal was closed is to consider whether reasonable parties, situated as were these parties to the transaction, would have naturally and normally thought of their agreement as binding, notwithstanding nonconforming terms. Some readers may recognize the striking similarity between this statement and a statement of the test to decide questions arising under the misnomer—the

38. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214 (1917).

39. "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract." U.C.C. § 2-207, Comment 2.

"parol evidence rule."<sup>40</sup> In the parol evidence rule situation, the same kind of test is used to decide whether the parties intended a writing to be integrated, *i.e.*, to contain all of the terms of their agreement, or whether a prior, extrinsic agreement was intended to be part of their total agreement. In deciding whether to admit such evidence, the trial judge is called upon to answer a question of fact (because juries may not be trusted to so answer) and the test he will often use is: Would parties, situated as were these parties to the transaction, naturally and normally include the extrinsic agreement in the writing?<sup>41</sup> The alleged mystery which surrounds the parol evidence rule<sup>42</sup> was largely due to a failure to discover this basic question and the failure to understand that this was a question of fact which the trial judge must decide. The current confusion surrounding 2-207 is largely due to the failure to concentrate on the critical question, did the offeree definitely and seasonably express an acceptance of the offer notwithstanding additional or different terms? The further necessity is to recognize what kind of question this is. Again, it is a question of fact which can only be decided under all of the surrounding circumstances.

When the question used to test the application of a legal principle is a question of fact, lawmen are not comfortable in applying it. The best evidence of this statement is the continuing confusion surrounding the parol evidence rule. Questions of fact contain variables; they lack precision and consequent predictability. Yet, the law of contracts is filled with the necessity of "considering all of the surrounding circumstances," a phrase which most law students quickly learn is to be repeated ad nauseam. Are there no certainties in applying 2-207 at the present time? Must we wait for the plethora of cases to frame anything like precise boundaries to the operation of this section? An exhaustive list cannot be created. However, some of the problems should be considered.

While the question of whether certain different or additional terms "materially alter" the terms of the offer can be difficult, 2-207 imposes no greater burden than heretofore on courts to determine questions of materiality.<sup>43</sup> If the determination is that the new term is an immaterial

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40. See Murray, *The Parol Evidence Rule: A Clarification*, 4 *Duquesne L. Rev.* 337 (1966).

41. See 4 S. Williston, *Contracts* § 638 (3d ed. 1961).

42. "Few things are darker than this, or fuller of subtle difficulties." J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 390 (1898).

43. The Code apparently contemplates no change in the determination of materiality. In U.C.C. § 2-207, Comment 3, in referring to an immaterial alteration, the concept is: a term which would not substantially change the bargain. *Id.* at Comment 4 suggests examples of material alterations: a clause negating standard warranties; a clause requiring a guaranty of 90% or 100% deliveries in a situation where trade usage allows greater quantity leeways;

alteration, between merchants it automatically becomes part of their contract unless objected to within a reasonable time. If a non-merchant is involved, the immaterial term is a mere proposal which does not become part of the contract unless assented to. Assume that the following hypothetical involves only merchants: Buyer offers to purchase 1,000 widgets at \$5.00 each. Seller replies, "Accept your offer for 1,000 widgets but price must be \$7.00 each. This is a closed deal."

Notwithstanding the "accept" or "closed deal" language, the deal is not closed, the seller has not accepted the offer and there is no contract. Nothing could be more fundamental since the offeror intends to buy at \$5.00 and the offeree intends to sell at \$7.00. Resort to the flexible formation concept of the Code in 2-204 will not change the result since that section requires evidence of an intention to be bound. It may be argued that subsection (3) of 2-204<sup>44</sup> permits a contract to be formed even though one or more terms are left open. Since the price terms do not match, why not simply treat the contract as being formed absent a price term under 2-204(3) and then supply the term under 2-305?<sup>45</sup> This circuitous route fails because, (a) 2-204(3) is predicated upon an intention to be bound. In the hypothetical, the seller does not intend to be bound except at his price, \$7.00 per widget. Moreover, there is no indication that the buyer wishes to be bound except at his price, \$5.00 per widget. Finally, there is no reasonably certain basis for an appropriate remedy. (b) A literal application of 2-305 precludes the addition of a price term under that section. The Code is consistent in 2-305 in clearly requiring an intention to be bound. With such intention, a reasonable price can be supplied if one of the three following conditions is met: nothing is said as to price; the parties contemplated agreement upon a price and did not agree; or the price is to be fixed in terms of some external standard. None of these situations exist in the hypothetical.

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a clause permitting the seller to cancel upon buyer's failure to meet any invoice when due; a clause requiring complaints to be made in a time substantially shorter than customary or reasonable. *Id.* at Comment 5 suggests examples of immaterial alterations: a clause slightly enlarging the seller's exemption due to supervening causes beyond his control; a clause fixing a reasonable time for complaints within customary limits; when a sub-sale is contemplated, a clause providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or establishing the seller's standard credit terms where they are within the range of trade practice; a clause limiting the right to reject for defects which fall within customary tolerances in the trade or otherwise reasonably limiting the remedy.

44. See note 17 *supra*.

45. U.C.C. § 2-305:

Open Price Term

- (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

A much more troublesome question arises in the unlikely situation of the seller shipping the widgets and the buyer receiving and using them with no further expression on either part of the terms of the contract. *Quaere*, does this invoke subsection (3) of 2-207?<sup>46</sup> Clearly, the conduct of the parties recognizes the existence of a contract for the purchase and sale of 1,000 widgets although their exchanged writings do not establish a contract. Are the terms of the contract as suggested by subsection (3) the terms on which the writings of the parties agree (assuming they agree on every term except the price term), together with supplementary terms supplied by the Code? Again, the difficulty here is in using 2-305 which is not designed to supply the price term (a reasonable price) in a situation where the parties *have* said something as to price or did *not* contemplate future agreement on price or did *not* contemplate the use of some external standard. Assuming the difficulties of applying 2-305 to supply the missing price term can be overcome, it might be argued that under 2-207(3) there is a contract for 1,000 widgets at "a reasonable price." But consider the result if the seller's response had been more elaborate. If the seller had replied to the offer: "I must receive \$7.00 each for my widgets and I am willing to supply them on that basis. I realize that you need the widgets now and, therefore, I am shipping them today. If you do not wish to pay \$7.00 each for them, do not accept them when they arrive." Upon receipt of this response, could the buyer say to himself: "When they arrive I will accept them, thus forming a contract by conduct. Under subsection (3) of 2-207 I will not be bound to pay \$7.00 each for them since that subsection renounces the 'last shot' principle. I will only have to pay a reasonable price." It is hard to believe that the result envisioned by the buyer is contemplated by 2-207(3). The buyer's interpretation is a repudiation of the seller's right to reject the buyer's offer and make a counter-offer which can only be accepted on the new terms proposed by the seller. The crucial question is: Does 2-207(3) merely indicate that the seller does not necessarily have the "last shot" or that he *cannot* have the "last shot"?

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- (a) nothing is said as to price; or
  - (b) the price is left to be agreed by the parties and they fail to agree; or
  - (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
- (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
  - (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
  - (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.
46. See text following note 13 *supra*.

One writer believes that the offeree *cannot* have the "last shot": "There would seem to be no way to keep the last-shot principle by contract."<sup>47</sup> This is an incredible construction of subsection (3). It suggests that once an offer is made the offeree may still be bound to its terms if he rejects the offer, clearly makes a counter-offer and the offeror, completely aware of the terms of the counter-offer and the fact that this is the only basis upon which the offeree is willing to contract, accepts the goods when they are shipped. Is this reasonable commercial understanding? Where is there any mention in the Code that the purpose is to find a contract on terms which one party (the offeree-counter-offeror) clearly did not intend and which the other party should not have reasonably expected? This kind of snarl is not intended by the Code in 2-207(3) and only the most superficial kind of statutory interpretation can lead to such an absurd result. The question is: What is the meaning of 2-207(3) if it is still possible for the offeree to retain the "last shot"? Whenever he makes a counter-offer (*i.e.*, whenever it can be said that his response to the offeror is not a definite and seasonable expression of acceptance) then ships the goods which are received and used by the offeror-buyer, will the terms of his counter-offer be the terms of the contract? The answer must be no if subsection (3) is to have any meaning at all. It is submitted that the better interpretation of subsection (3) is that the offeree *does not necessarily* have the last shot. The typical situation envisioned by the drafters seems to be one in which the parties exchange forms, then proceed to begin performance of what they think is the contract. Assume that in the seller's acknowledgment there is an arbitration provision and there is no such provision in the offeror's purchase order form. A dispute arises and the seller insists upon arbitration. He proves that, notwithstanding what the parties thought, their exchange of forms did not form a contract at all. Since his acknowledgment form was the last writing, and the buyer received such writing and then proceeded to accept and use the goods, under traditional contract law the seller's form evidenced a counter-offer and the buyer's receipt and use of the goods with awareness of that form would be an acceptance of the counter-offer on the seller's terms. Under subsection (3) this result would change, and rightly so. The buyer never assented to arbitration which was only in the seller's form. The parties proceeded to act on the basis of what they both thought was a contract even though it later appeared that the forms were so different that there was no executory contract. The contract the parties now have is a contract manifested by their conduct and there is no reason to impose a variant term of either party's form on the other. In order to achieve this result, subsection (3) was drafted and

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47. 1 W. Hawkland, *supra* note 37.

enacted. If the language of that subsection is literally interpreted without regard to the purposes apparently intended, it is possible to conclude that the "last shot" principle is emasculated. Again, it is submitted that it is not destroyed. Rather, it will not operate to impose terms upon one party to the contract without justification. However, if the buyer is clearly informed that the seller rejects the buyer's offer and is willing to deal only on the seller's terms, and further, that the shipment is being made on such terms so that the buyer's receipt of the goods will operate as an acceptance on the seller's terms, there is no imposition of terms on the buyer. The reasonable commercial understanding of the buyer is that he is taking the goods on the seller's terms. To suggest that the seller's terms do not prevail in this situation (*i.e.*, by suggesting that the "last shot" principle cannot apply) is an unwarranted interference with freedom of contract which cannot be reconciled with the basic purposes of 2-207.

The hypothetical suggesting different prices for the widgets is clearly not within the intended scope of 2-207. An equally clear illustration would be one where the price term is agreed upon but there is a substantial discrepancy in the crucial quantity term.<sup>48</sup> If the offer states the quantity term at 1,000 widgets and the response states, "I accept but I will ship only 500 widgets at the price offered," there can be no contract under the most liberal interpretation of the flexible formation provisions of the Code in 2-204. Thus, in 2-207(1), there is no "definite and seasonable expression of acceptance." But these are not the kinds of situations which are probable. The kind of situation which will raise the issue of interpreting 2-207 will be the kind found in the example just mentioned (arbitration provision)<sup>49</sup> or the *Roto-Lith* case<sup>50</sup> (disclaimer of warranty in seller's form). In these situations, courts will have to face the critical question: Did the offeree intend to be bound notwithstanding the added or different terms? The test, again, should be: Should a reasonable offeror in the position of the offeror in the fact

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48. While U.C.C. § 2-204(3) (see *supra* note 17) apparently would allow a contract to be formed notwithstanding an indefinite quantity term, if the contract for the sale of goods is \$500 or more, U.C.C. § 2-201 (Statute of Frauds) must be satisfied. As to what must appear in the memorandum to satisfy the requirement found in U.C.C. § 2-201, Comment 1 states in part: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted."

49. See *Doughboy Indus. Inc. v. Pantasote Co.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488, 1 UCC Rep. Serv. 77 (1st Dep't 1962). This case was not decided under the Code which was not yet effective in New York. However, the court discussed the possible application of 2-207 to the facts of the case.

50. Note 27 *supra*.



situation, have reasonably understood that the offeree definitely accepted the offer? This question of fact must be decided under all the surrounding circumstances. Suppose, for example, that buyer and seller have established a prior course of dealings. They have always used their standard forms and the seller's form contains a disclaimer of warranty. On a previous occasion, the buyer informed the seller of a breach of warranty and the seller supplied substitute goods. Subsequently, another breach of warranty occurs. Will the seller be able to rely on his form to suggest a material variance and, therefore, no acceptance? Even under pre-Code law, such a result is doubtful because of a reliance factor on the part of the buyer. Under 2-207, the result is clear. The parties intended to be bound; the seller's acknowledgment was a definite and seasonable expression of acceptance and the material alteration (the disclaimer) did not become part of the contract because it was not expressly assented to by the offeror.

Suppose there had been no prior course of dealing. The disclaimer on the seller's form was not printed boldly on the face but appeared inconspicuously on the reverse side among other boiler plate provisions. Is the disclaimer term valid? Under 2-316 of the Code,<sup>51</sup> where implied warranties are excluded by a writing (and the implied warranty of fitness may be excluded only by a writing), the exclusion must be conspicuous. This relates to the validity of any disclaimer of implied warranties under the Code, not to whether the offeree has accepted. Thus, if the exclusion is not conspicuous, it will fail because it does not meet the Code requirements even though the offeree has accepted the offer. Assuming that the disclaimer *is* conspicuous, meeting the requirements of 2-316, what result? Using the test of what the offeror should understand upon receipt of the offeree's form containing such a conspicuous disclaimer, should the reasonable offeror assume that the offeree intends to accept the offer with implied warranties attached, *i.e.*, that the offeree's intention is a contradiction of this form? Would it be relevant that in reasonable commercial practice, seller's acknowledgment forms are not read? Certainly, if the seller's acknowledgment form contained a statement such as, "This acceptance is expressly conditioned upon buyer's assent to the following terms," and this statement were followed by the conspicuous disclaimer, there would be no executory contract unless the buyer assented to the different term. Thus, 2-207(1) does not

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51. U.C.C. § 2-316(2) (exclusion or modification of warranties) reads as follows:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

permit the buyer to ignore the seller's form. By the troublesome phrase in 2-207(1), "unless acceptance is expressly made conditional on assent to the additional or different terms," were the Code drafters attempting to require the seller to say: "In regard to this disclaimer on my form, I really mean it. Unless you assent to this disclaimer, we have no deal.?" The language of subsection (1) clearly permits the seller to expressly so indicate his intention and, if he does, he is making a counter-offer. The inference drawn from the troublesome language in subsection (1) is that a different or additional term on the seller's form, in and of itself, is not sufficient to indicate the seller's intention not to be bound except on the basis of the new term. Is this because the new term is on a form, as contrasted with a separate writing to the same effect sent to the offeror? Suppose, for example, that instead of an acknowledgment form, the seller sends the buyer a *letter* stating, "I accept your offer as stated in your purchase order form. There are no implied warranties attached to this transaction." Is this enough to indicate that the seller only wants to be bound without warranties? Another possibility is that a particular seller is well-known in the trade as one who never sells on a warranty basis. It can be shown that the buyer dealing with him knows or should have known this and the seller's form disclaims warranties conspicuously but not with "expressly conditional" language. Is the seller making a counter-offer? The examples can be multiplied but without significance. The basic guide for the court must be: Did the offeror reasonably understand the offeree's response to be a closed deal notwithstanding new terms, or did he understand offeree's intention not to be bound except on the basis of the new terms, *i.e.*, the offeree has made a counter-offer? The more clear the offeree's response, the less difficult it will be for a court to answer this question. But the difficulties surrounding this question of fact cannot be overcome by resort to some mechanical guide. The court should receive all relevant evidence such as prior course of dealing, trade usage and custom, oral or written expressions extraneous to the written forms to more clearly identify the intention of the parties, whether the response of the offeree was on a printed form or on a separate writing prepared for the individual transaction and any other evidence which will assist in answering the question of fact. In so doing, the court will fulfill the basic purpose of 2-207: to find a contract according to the intention of the parties notwithstanding variant written terms which the parties did not intend to preclude a binding agreement.

There is one kind of evidence which requires special attention. If the seller's form varies the terms of the offer but immediately after sending the form, the seller ships the goods before receiving assent to his new terms, does this conduct of shipping, in and of itself, indicate that the seller intended a closed deal even without the new term in his acknowledgment form? Again, the important question is what the reasonable buyer

should understand from the seller's response under all surrounding circumstances. The Code itself permits the seller to make a counter-offer even though he ships immediately after sending the form and before any response to his counter-offer is forthcoming. The counter-offer is effected through the use of clear language ("expressly made conditional"). In the absence of such clear or particular language, does the act of shipment conclusively indicate the seller's intention that the deal be closed notwithstanding his new terms? There is no escape from the hard inquiry. The act of shipment after sending a nonconforming response is ambiguous. It may have been commercially reasonable for the seller to ship even though he intended to make a counter-offer. This is not to suggest that the act of shipment may not be some evidence of the seller's intention to treat the deal as closed regardless of the variant term in his acknowledgment form. By itself, however, the act of shipment is not sufficient to reach this conclusion.

#### IV. THE ESCAPE FROM 2-207 THROUGH THE PRINTED FORM

Suppose counsel for the offeree decides to attempt to overcome the whole problem of 2-207 by having a conspicuous statement printed on all acknowledgment forms of his client: "The acceptance of the order contained herein is expressly conditioned on assent to all terms contained in this writing." To protect his client, counsel, in effect, attempts to place the offeree in a position of saying: "I never accept anything unless the offer happens to precisely match my acceptance. If it does not, I always make a counter-offer." In the face of such a conspicuously printed statement on the acknowledgment form, is it yet possible to find that the offeree did intend the deal to be closed and therefore has submitted a definite and seasonable expression of acceptance? If the purpose of 2-207 is to be served, to wit, that the parties' intention rather than statements on their forms will determine contract formation, the answer must be yes. Certainly, the hypothetical printed statement on the acknowledgment form deserves some weight. In the absence of any other evidence, it may be controlling. But, suppose there is other evidence. For example, the offer is to buy specially manufactured goods. The offeree replies by his printed form with the statement that, in effect, makes his response appear to be a counter-offer. Yet, before receiving further communication from the offeror, the seller proceeds to start manufacturing the goods. Or, consider terms written or typed in the blank spaces of the form which suggest a closed deal. The old rule of construction can be unearthed to assist a court here: written or typed provisions will control printed provisions.<sup>52</sup> Prior course of dealing, trade usage or custom and other relevant evidence should be admitted to show that the

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52. Restatement of Contracts § 236(e) (1932).

seller intended the deal to be closed, notwithstanding his printed statement of counter-offer. It has been suggested that such printed clauses which the seller uses on every acknowledgment form should be denied recognition because they are an obvious attempt to avoid 2-207 and, if literally enforced, they will have that effect.<sup>53</sup> It is difficult to accept this argument if any generally used term on the seller's acknowledgment form is to be given effect. The crucial point is that they should not be given the conclusive effect which would result if the language of the statute is literally applied with no regard for its purpose.

Suppose the offeror's counsel decides to provide maximum protection to his client. In every order form used by the buyer, the following phrase conspicuously appears: "The power of acceptance created by this offer may be exercised only in precise accordance with all terms, material or immaterial, of this offer." The protection afforded by such a clause which is expressly recognized by the Code in 2-207(2)(a) may be superfluous except for any immaterial terms added by the offeree. If the offeree's response attempts to add material terms, they do not become part of the contract under 2-207(2)(b) unless expressly assented to by the offeror. In the absence of a restrictive clause such as the foregoing in the offer, any immaterial additions become part of the contract between merchants unless objected to by the offeror under 2-207(2)(c).

Suppose a further complication. Upon receipt of the buyer's order form containing the restrictive phrase, *supra*, the seller sends his acknowledgment form which apparently agrees to all material terms proposed by the buyer, but proceeds to conspicuously add the following printed phrase: "Buyer agrees that he has full knowledge of the conditions printed on this form and such terms are part of the agreement between the buyer and seller. These terms shall bind both parties if the goods involved are delivered to and accepted by the buyer, or if the buyer does not object within ten days to any terms contained in this acknowledgment form." In a case involving similarly conflicting forms, the court remarked: "In short, the buyer and seller accomplished a legal equivalent to the irresistible force colliding with the immovable object."<sup>54</sup> The court concluded that an additional material term (arbitration) in the seller's form was not binding upon the buyer because it was a material term and, under 2-207 the buyer would have to expressly assent which he did not. Moreover, the court was not faced with a difficult problem in this case because the seller had accepted prior to the receipt of his acknowledgment form by the purchaser. This was evidenced by an oral acceptance followed by a partial shipment of goods before the acknowledgment form was

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53. Note, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. Pa. L. Rev. 836, 856-68 (1957).

54. *Doughboy Indus. Inc. v. Pantasote Co.*, 17 App. Div. 2d 216, 216-17, 233 N.Y.S.2d 488, 490, 1 UCC Rep. Serv. 77, 78 (1st Dep't 1962).

received. Thus, the fact situation could be rather easily resolved on the basis of contract with contradictory confirming memoranda. As comment 6 to 2-207 indicates:

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).

Suppose, however, there had been no acceptance prior to the acknowledgment form being sent and there had been no partial performance. Would there be an executory contract simply on the basis of the forms exchanged? Does the seller's form with its conspicuous<sup>55</sup> statement that the seller is willing to ship only in accordance with the terms in the acknowledgment form suggest a definite and seasonable expression of acceptance? In the absence of other evidence, the answer must be no. A reasonable construction of the seller's response would be: "I have received your offer which expressly limits my acceptance to the precise terms in your order form. I cannot accept on that basis. I can only accept on the basis of the terms of my form and, if you accept the goods when they are duly tendered to you, you will be accepting them on that basis." In the actual case, the seller's acknowledgment form contained the restrictive statement on its face, in red typography and the statement was preceded by the word, "IMPORTANT." If this form was sent and received by the buyer and thereafter the seller shipped all or part of the goods, the only evidence that the seller intended to accept the offer notwithstanding the different or additional terms in his acknowledgment form would be the act of shipment. Is this act of shipment sufficient to indicate that the seller was not insisting upon his form but was willing to be bound according to the buyer's terms? Unless it can be said that sellers do not ship in such circumstances unless they intend to be bound notwithstanding the variant terms in their forms, there is a contract not on the buyer's terms but on the seller's terms. This again, on the assumption that the "last shot" principle is not dead but that it can be made operative if the offeree clearly expresses his intention to be bound only on his terms.

#### V. THE NEW RESTATEMENT OF CONTRACTS AND 2-207(1)

In the interest of clarity, it is important to set forth the three provisions to be compared:

(1) original section 60:<sup>56</sup> "A reply to an offer, though purporting to

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55. For the definition of "conspicuous," see U.C.C. § 1-201 (10).

56. Restatement of Contracts § 60 (1932).

accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.”

- (2) 2-207(1) of the Code: “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.”
- (3) new section 60:<sup>57</sup> “A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.”

These provisions represent (1) the original requirement of a matching acceptance, (2) the Code effort to change the technical operation of the matching acceptance rule for contracts for the sale of goods, and (3) the new Restatement draft which attempts to incorporate the change for all contracts. Some of the difficulties in the Code language have already been explored, *e.g.*, the use of the word “acceptance” in two different senses and the unfortunate decision not to use the term “counter-offer” when that is what the drafters intended. The new Restatement draft does not suffer from these deficiencies. First, it retains the term “reply” from the original Restatement. This is an important advantage over the Code language in that the question is whether the manifestation coming from the offeree constitutes an acceptance. The Code use of the word “acceptance” is immediately confusing. In effect, the new Restatement language begins by suggesting what is to be done when there is a reply to an offer which purports to be an acceptance, *i.e.*, a reply which might appear to be an acceptance. It proceeds to indicate what happens when this kind of “reply” is communicated to the offeror. The second major improvement in the new Restatement over the Code language is the use (retention, if you will) of the term “counter-offer.” The advantages of using this term have been sufficiently indicated. It is unfortunate that praise for the drafters of new section 60 must end here.

A major problem in new section 60 is its negative quality. It focuses upon a situation in which there is no acceptance, leaving the interpreter to infer that the absence of a crucial element in the reply should cause the reply to be characterized an acceptance. The crucial element in the reply which will indicate that it is not an acceptance but, rather, a counter-offer, is a condition that the offeree’s assent to any bargain proposed by the offeror is based only on the offeror’s assent to the additional or different terms in the reply. The absence of this crucial element inferentially allows

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57. Restatement (Second) of Contracts § 60 (Tent. Draft No. 1, 1964).

the reply to be interpreted as an acceptance. It is the inference, therefore, which constitutes the major change from the matching acceptance rule found in original section 60. As the new rule stands, literally it does not change the original, technical rule though the intention of the drafters of new section 60 clearly indicates that the inferential change is the only purpose of the new draft.<sup>58</sup> It is highly unlikely that any court will be misled by this curious drafting effort though any lawyer is likely to remember one or more plain-meaning interpretations of some statute or Restatement section by some court. Thus, the danger is not significant though it does exist.

The draft does not focus upon the critical question: Can there be an acceptance of an offer even though the reply to the offer states additional or different terms? Consider the following substitute for new section 60:

A reply to an offer which clearly manifests the offeree's intention to accept the offer on the offeror's terms is an acceptance of the offer even though it states terms additional to or different from those offered. If the reply manifests insistence on the additional or different terms before the offeree intends to be bound, the reply is a counter-offer.

This substitute draft achieves certain ends which elude new Section 60. (1) It is a clear repudiation of the technical aspect of the matching acceptance rule, *i.e.*, it clearly expresses the intention that an acceptance of an offer is not destroyed simply because new terms are found in the offeree's reply. (2) The major change is not left to inference and, in its last sentence ("If the reply manifests insistence. . ."), the substitute draft clearly identifies the situation found in the present draft, *i.e.*, the offeree indicates that he does not wish to be bound unless the offeror assents to the new terms. It identifies this manifestation as a counter-offer. Thus, nothing is left to inference. (3) It dispenses with a condition concept, a major source of confusion in 2-207(1) which the new section 60 drafters perpetuate. The use of the term "conditional" requires an interpretation which may lead to a great confusion. At a minimum, the interpreter is required to follow a maze such as: "The offeree is making his reply conditional upon assent to his new terms. This apparently manifests his intention not to be bound unless the bargain includes these new terms. Thus, his reply (or 'conditional acceptance') is really a counter-offer." New section 60 does use the desirable term "counter-offer." But the effectiveness of that term is undermined, to some degree, by the use of the term "conditional." (4) Finally, the substitute draft concentrates on the ultimate critical question: Did the offeree *intend* to accept notwithstanding additional terms in his reply?<sup>59</sup>

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58. *Id.*, comment a at 252-53.

59. A better draft of new section 60 might have been the language found in comment a thereto, *Id.*: "[a] definite and seasonable expression of acceptance is operative despite

There is an alarming indication that new section 60 places great emphasis upon some expression of condition in the offeree's reply if the reply is to be characterized a counter-offer. This is indicated by a comparison of illustration 1 of original section 60 and illustration 1 of new section 60:

original: "A makes an offer to B, and B in terms accepts but adds, 'Prompt acknowledgment must be made of receipt of this letter.' There is no contract, but a counter-offer."

new: "A makes an offer to B, and B in terms accepts but adds, 'This acceptance is not effective unless prompt acknowledgment is made of receipt of this letter.' There is no contract, but a counter-offer."

The Reporter's Note to new section 60 states in part, "Illustration 1 was Illustration 1 to § 60 of the original Restatement, but is modified in the light of Uniform Commercial Code § 2-207."<sup>60</sup> Apparently the reply to the offer in original illustration 1 did not constitute a counter-offer. On the other hand, the use of certain magic words or phrases in new illustration 1, giving the reply a conditional character, is sufficient to clearly indicate a counter-offer. The Reporter's Note to new section 60 also suggests a comparison with a well-known case, *Poel v. Brunswick-Balke-Collender Co.*<sup>61</sup> In that case the court was faced, *inter alia*, with the interpretation of a purchase order which contained certain language in a portion of the form that was printed rather than written: "The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time."<sup>62</sup> A fair inference was that the buyer intended this form to be an acceptance notwithstanding this printed language in its form. The court, however, applied the usual matching-acceptance rule and interpreted the buyer's response as a counter-offer since it required an acknowledgment. More important for present purposes, the court characterized this part of the buyer's form as follows: "[I]t specified that the order therein given was conditional upon the receipt of its order being promptly acknowledged . . ."<sup>63</sup> *Quaere*: Was the language in the buyer's form conditional? A fair interpretation of that language is: You must promptly acknowledge this order and when you do, you will also be guaranteeing prompt delivery. As to the acknowledgment, there-

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the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms." The comment cites U.C.C. § 2-207. This language is, of course, very similar to the language in U.C.C. § 2-207(1) and suffers from the difficulties suggested therein. However, it does not focus negatively and it does not leave the major change to inference.

60. Restatement (Second) of Contracts § 60, Reporter's Note (Tent. Draft No. 1, 1964).

61. 216 N.Y. 310, 110 N.E. 619 (1915).

62. *Id.* at 317, 110 N.E. at 621.

63. *Id.* at 318, 110 N.E. at 622.



fore, it is simply a mandatory requirement in the buyer's form. How does it differ from the language in illustration 1 of original section 60? It is submitted that there is no significant difference. Yet, *new* illustration 1 would insist that some language of condition be inserted to ascertain that the reply constitutes a counter-offer. In the *Poel* case, the court construed the language as conditional even though it did not contain a conditional-sounding term such as, "unless." This raises the possibility that courts interpreting new section 60 may imply a condition in the offeree's reply. There is no literal requirement of an *express* condition in new section 60 as there is in 2-207(1) of the Code. If the Reporter's Note to new section 60 would have stated that the court's analysis in the *Poel* case is repudiated, the language of the section and illustration 1 would have become more clear. It would have still been alarming, but less ambiguous.

The principal difficulty in the *Poel* case was that the buyer's form, in a printed portion, contained a requirement that the seller acknowledge. The suspicion, again, was that the buyer really did not care if the seller acknowledged and the seller reasonably understood that it did not have to acknowledge. The probabilities were that the seller did not read the buyer's form. There is no certainty as to the placement or conspicuousness of the acknowledgment requirement on that form. There is no evidence of trade usage or custom in the use of such forms or the prior course of dealings between the parties. Evidence of the buyer's own course of dealing with other sellers would have been helpful. For example, did the buyer normally insist on an acknowledgment from other sellers, or did it usually choose to ignore the acknowledgment requirement in its own form? Evidence of the market price might also have been significant if, *e.g.*, it had declined just before the buyer announced that it was not bound because of the acknowledgment provision in the form? All of these inquiries and others are relevant to determine if the buyer intended to be bound notwithstanding a printed provision in its form. These are the critical inquiries. To attempt a mechanical resolution of this difficult fact question by focusing upon whether the reply contained words of condition transforms the inquiry into something resembling a well-known children's game in which a contestant may lose because he forgot to say "May I?" The court in *Poel* did not focus upon the critical question and sub-questions. It felt bound by the old matching-acceptance rule: the form required an acknowledgment and, therefore, evidenced a counter-offer. Does new section 60 seriously intend to instruct the court to the effect that, in the future, it may come to that conclusion only if the offeree's reply contains words of condition but, as in the past, the court may disregard all of the circumstances surrounding the transaction? If so, it will be easy for counsel to include printed words of condition in the form and the matching-acceptance rule will be replaced by a formalistic requirement of at least equal inferiority.

Apparently the drafters of new section 60 did not undertake a significant analysis or evaluation of 2-207(1). With some unfortunate notion of its meaning and apparently little appreciation of its purpose, they simply incorporated it in ambiguous form in the new Restatement of Contracts. In so doing, they perpetuate the difficulties suggested by the literal language of 2-207(1). One of the unique advantages of the new Restatement of Contracts is the possibility that courts will use it as an aid in their interpretation of Code sections which are the product of legislative compromise at various levels and, therefore, demonstrate a curious and unfortunate choice of language. It has been suggested elsewhere that the new Restatement could be very helpful along these lines with respect to certain Code sections.<sup>64</sup> In relation to 2-207(1), however, not only does new section 60 afford no assistance; it promotes greater confusion and it may even lead to the adoption of mechanical notions which will not serve the purposes intended by 2-207.

#### VI. CONCLUSION

In light of the difficulties suggested in relation to 2-207 and new section 60, it is not difficult to urge their redrafting and the substitution of new comments which will establish clearer judicial guidelines. As suggested at the start of this article, it is no easy task to draft a workable principle which will allow courts to ignore the matching acceptance rule when its technical application results in a perversion of the intention of the parties to the agreement. Such a working principle must be part of our law for *all* contracts if the desire is to have the law react rationally and effectively to the felt needs of society. While the remedial drafters are, hopefully, busy at their task, courts faced with interpretations of the current language should make every effort to analyze the purposes most probably intended, refusing to adopt a plain-meaning interpretation of the language. When a court is faced with the necessity of interpreting 2-207 or when an argument presses for recognition of new section 60 in its present form, the judicial reaction should include a reasoned elaboration of the purposes of these provisions and the ramifications of applying the language literally. This will not only promote desirable current interpretations, but it may also urge a more expeditious effort in redrafting.

The current confusion and alarm surrounding 2-207 and its counterpart in the new Restatement of Contracts is unfortunate and unnecessary. It is unfortunate in that it promotes a continuation of the old matching-acceptance rule or, perhaps worse, the substitution of an unfamiliar and rigid notion. It is unnecessary because the consensus of what must be done is relatively clear. At this time, society anxiously awaits the available remedy.

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64. See Murray, *supra* note 1.