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The Limits of Empiricism: What Facts Tell Us: Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

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THE LIMITS OF EMPIRICISM: WHAT FACTS TELL US

Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

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INTRODUCTION

The conventional legal academic wisdom about empiricism is that empirical information is by-and-large a good thing, that we need more of it, and that empirical analysis is preferable to many scholarly alternatives now on offer in the law review literature.[1] I do not dispute the proposition that, all things considered, empirical information is a good thing. What I question is the notion that empirical information necessarily leads to knowledge.[2] Put differently, it is one thing to marshal the facts, and another to know what to make of the facts.[3]

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1. The ardor of some who call for more empirical work has led to statements that would bring joy to the heart of a logical empiricist. *See, e.g.*, Elizabeth Warren & Jay Westbrook, *Searching For Reorganizing Realities*, 72 WASH. U. L.Q. 1257, 1262-63 (1994) (footnote omitted):

> We will readily concede that our own commitment to empirical research is more than simply a matter of principle. We enjoy thinking about reality. We find great satisfaction in struggling to impose some coherence upon its unruly facts. We relish being utterly surprised, even flummoxed for a while, by some unexpected fact. We find it exhilarating to bring fact and theory together to speculate about the power of law to affect the world we observe. By contrast, we find reading purely theoretical articles rather like playing anagrams. They are fun, but not filling.

2. I actually think the point goes deeper, but this is not the place to explore the issue in depth. It is enough to mention that it is far from clear that any consistent distinction can be maintained between theory and fact. *See* Willard Van Orman Quine, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20, 42-46 (2d ed. 1961); *see also* PAUL FEYERABEND, AGAINST METHOD 19 (1975) ("[S]cience knows no 'bare facts' at all but that the 'facts' that enter our knowledge are already viewed in a certain way and are, therefore, essentially ideational."). I discuss the jurisprudential dimensions of these issues in DENNIS PATTERSON, LAW AND TRUTH 151-79 (1996).

3. Of course, one's starting point is crucial; and no number of "facts" can alter that. *See* Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 574 (1998):

> To be sure, new information requires scholars and policymakers to update their prior beliefs, but rarely will so much information be available that differences can be resolved among those who begin at separate starting places. Strongly held prior beliefs will converge only if new information is plentiful. Among modern bankruptcy scholars, the starting places are far apart and the chance that new information will do much to bring them closer together is remote.

I shall raise these points both in a general way and with specific reference to Professor Keating's fine contribution to the literature on U.C.C. section 2-207.[4] I applaud Professor Keating's efforts to uncover the facts surrounding the implementation and effectiveness of section 2-207. I agree with his observation that much of the literature in commercial law, and on section 2-207 in particular, simply assumes a worldview that may or may not be consistent with the way the world is. That said, I want to suggest that it takes more than knowledge of the way the world is to know what to do with section 2-207. While I disagree with some of Professor Keating's conclusions, I believe he makes a valuable contribution to the continuing discussion of one of the most nettlesome provisions of the U.C.C. Finally, I shall comment briefly on the latest revision of section 2-207, which looks quite promising.

THE CONVENTIONAL WISDOM

Professor Keating begins by observing that many people who write about section 2-207 do so against a background of dubious factual assumptions. The principal mistake scholars make is that section 2-207 "plays out in the field"[5] in ways that bear little relation to its language and structure. As he puts it: "[T]he classic battle of the forms situation seems to be, for a variety of reasons, much less prevalent than one would guess from reading most academic literature in this area."[6] Professor Keating's message is that there is a disconnect between the law on the books and the real-world problems it addresses. As further proof of the disconnect, Professor Keating reports that, without any legal incentives, firms "have shifted to drafting less one-sided forms, at least as to issues that are not seen as critical."[7]

Let me start by noting a piece of data mentioned in Professor Keating's article. We know from the pioneering work of Stuart Macaulay that for many firms, especially repeat players, explicit legal norms are not the most important dimension of the contracting context.[8] Over time, parties feel themselves governed more by norms central to their long-term relationship than to common law rules or the rules in the U.C.C. It is against this background that Professor Keating asks the question: To what extent do merchants using forms actually find themselves in disputes about whose form controls? Pro-

4. *See* Daniel Keating, *Exploring The Battle of The Forms in Action*, 98 MICH. L. REV. 2678 (2000).

5. *Id.* at 2680.

6. *Id.* at 2681.

7. *Id.*

8. *See* Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

fessor Keating reports that "virtually all of [the people he interviewed] said that post-sale disputes which depended upon conflicting forms were extremely rare and that litigation on the subject was rarer still."[9]

With respect to the question of how many firms might be involved in section 2-207 litigation,[10] I think Professor Keating asks the wrong question. To get a sense of this point, focus your attention, not on section 2-207, but on any other Code provision. Many firms never litigate any of the important provisions in the Code, yet, we certainly think every effort should be made to draft those provisions as well as possible. It is not at all clear to me that the best measure of the importance or significance of a Code section is the number of reported cases one finds in the case reporters.[11]

THE PEDAGOGICAL DIMENSION

Let us leave the realm of the empirical and turn our attention to pedagogy. If, as Professor Keating maintains, section 2-207 has had a limited impact on the world of commerce, is there anything it can teach us about commercial law or practice? Professor Keating believes that we remain fascinated with section 2-207 because "it provides a classic model for teaching students about the intricacies of statutory construction."[12]

On this point, I could not disagree more. Not only does the present section 2-207 teach students almost nothing about the proper interpretive approach to the Code, I believe it reinforces some of the more dangerous pathologies of modern legal culture. Chief among these pathologies is the notion that legal problems are best resolved through application of a formula or inflexible employment of a method.

The current section 2-207 requires that one of the two forms in question be labeled "the offer" and the other "the acceptance." Without this initial determination, the analysis cannot get off the ground. And yet, it seems almost gratuitous in many cases to label either form "the offer" or "the acceptance."

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9. Keating, *supra* note 4, at 2696.

10. While it may be true that the people interviewed by Professor Keating do not litigate many section 2-207 matters, a perusal of the UCCRS shows that section 2-207 is a heavily litigated section of the Code. I am not certain that it is safe to extrapolate from Professor Keating's sample to the world of commerce generally.

11. This is perhaps the clearest example of my point that it is not the facts, but what we make of the facts, that is important. Even if it is true that a given section of the Code is not the subject of many reported cases, that does not necessarily mean that it is not significant or important. Perhaps it is best to say that the number of reported decisions is not the best or only measure of significance or importance.

12. Keating, *supra* note 4, at 2679.

Consider a seller who sells through a widely-circulated catalog. In the catalog, interested buyers can find a section labeled "Terms of Sale." In this section, the seller sets forth all the principal terms upon which it sells its goods.

A buyer reading the catalog, and being fully apprised of the seller's terms, may nonetheless send a form to the seller that contains terms materially different from those in the seller's catalog. If the seller receives the buyer's order and ships the goods with an invoice referencing the terms found in its catalog, that invoice will be deemed an "acceptance." Terms in the seller's invoice that are additional to or different from those in the buyer's order form will be knocked out.[13] Because section 2-207 limits the inquiry into the meaning of the parties' agreement to the forms alone, there can be no inquiry into the nature of the trade practice, the knowledge of the buyer, nor the economy of the transaction. All issues are resolved by reference to the forms alone.

Contrast this picture with the capacious approach to agreement found everywhere else in the Code, and articulated in section 1-201(3). Here we learn that, under the Code, the point of the inquiry is to find "the bargain of the parties in fact."[14] The bargain of the parties in fact is the product of three sources: express terms, course of dealing, usage of trade, and additionally, in the case of Articles 2 and 2A, course of performance. Thus, in every instance, from Article 2 Sales Contracts, to Article 5 Letters of Credit, to Article 9 Security Agreements, the Code's interpretive palette is broad, contextually-sensitive and, most importantly, centered on the common law judge.

Rightly or wrongly, Llewellyn's jurisprudence[15] — reflected in the Code — is grounded in the belief that the agreement of the parties is a construct from a variety of sources.[16] Discerning how these elements come together to generate an agreement is a sublime art.[17] Far from presenting any generalizeable lessons about contract formation or interpretation, the present section 2-207 stands out as a stunning anomaly.

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13. *See* U.C.C. § 2-207(2).

14. U.C.C. § 1-201(3).

15. For criticism of Llewellyn's view of the relationship between commercial practices and commercial law norms, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

16. I discuss this in Dennis M. Patterson, *Good Faith, Lender Liability and Discretionary Acceleration: Of Llewellyn, Wittgenstein and the Uniform Commercial Code*, 68 TEXAS L. REV. 169 (1989).

17. For discussion of the centrality of agreement to the Code, see RICHARD HYLAND & DENNIS PATTERSON, AN INTRODUCTION TO COMMERCIAL LAW 27-90 (1999).

THE NEW (NEW) SECTION 2-207

When I read my paper at the conference that gave rise to this symposium, I finished with the recommendation that section 2-207 be abolished. My reasoning was simple. Notwithstanding protracted reform efforts, generations of reformers had failed to solve even the most basic problems of section 2-207.[18] In addition, Professor Keating's research showed that whatever the content of section 2-207, it could have little or no impact. Hence my suggestion that, all things considered, it might be best to abolish section 2-207.[19]

I was chided for this suggestion, and by a person with good reason. Professor J.J. White heard my remarks and maintained that the very latest version of section 2-207 — which he and fellow members of the current Article 2 drafting committee had just completed — answered all of my objections.[20] I am pleased to say that I think he may be right.

I will refrain from providing a detailed commentary on this latest revised section 2-207, but I will take the liberty of making a few observations about its most salient features. It is these features that represent both a substantial departure from previous reform efforts and, thus, do the most to engender hope that, at last, we may have a section 2-207 that we can live with.

First, section (1) of the new (New) section 2-207 embraces the Code concept of agreement (see subsection (b)) and, at the same time, rejects all efforts to label one or the other form as "the offer" or "the acceptance." This means that courts must look at the documents (Records) in the commercial context to determine the substance of the parties' agreement. As with the inquiry into "Agreement" found elsewhere in the Code, the Agreement of the parties — their "bargain in fact" — is a construction of the court.

How might the new (New) section 2-207 work out in practice? Let us turn again to our catalog seller. Assume that the Terms of Sale spelled out in her catalog include the following:

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18. For example, the fact that the buyer almost always gets the better of the deal.

19. In this regard, I was following the suggestion of my colleague, Richard Hyland. *See* Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343 (1997). In *Draft*, Hyland argues decisively for repeal of the existing section 2-207. Additionally, in words that presage the next revision of section 2-207, Hyland writes: "Once we agree to permit the courts to decide the question of whether a contract was formed, there is no reason to take from them the question of the content of the parties' obligations. That is what courts do every day in commercial cases . . . ." *Id.* at 1357. The comments to the new (New) section 2-207, show that the drafters completely embrace Hyland's suggestion that matters of section 2-207 contract interpretation be returned to the discretion of the common law judge.

20. The Text and Comments of the new (New) section 2-207 are appended to these comments.

1. There is an express warranty of 90 days from date of delivery for all items in this catalog. **All other warranties, express or implied, are hereby disclaimed.**
2. Remedies are limited to repair or replacement of defective goods.

Buyer orders out of the catalog, sending a form that includes the following on the back of its form: "No disclaimer of warranties by Seller shall be binding on Buyer. There is no contract unless Seller accepts this term. Shipment of goods by Seller constitutes acceptance of this limitation." Assume Seller's clerk receives the form, and never bothers to read the back of Buyer's order form. An invoice for the goods is enclosed with the goods. If the goods are defective forty days after sale and delivery, and there are consequential damages, what result?

Under the current section 2-207, Buyer would have a contract either on its terms or, at worst, the article 2 gap fillers, which include the implied warranty of merchantability. As ever, Buyer has the better of the deal.

Under the new (New) section 2-207, comment 2 suggests that the result may well be different. It reads in pertinent part: "By inviting a court to determine whether one has 'agreed' to the other's terms, the section recognizes the enormous variety of circumstances that may be presented to a court under this section and this section gives the court greater discretion to include certain terms than former section 2-207 did." Unlike its predecessors, the new (New) section 2-207 allows a court to ask the question whether the Buyer in our hypothetical knew or should have known Seller's terms prior to placing its order. Such case-sensitive inquiries have, until now, been precluded by the formulaic machinations of the current section 2-207.

By returning to the question of the meaning of the parties' agreement to the purview of the common law judge, the current article 2 drafting committee has managed to break out of the conceptual gridlock that has held generations of reformers in its grip. I can only hope this effort survives the machinations of the approval process.[21]

21. I refer, of course, to the ALI and NCCUSL. Formidable interests often present obstacles to rational discussion. *See* Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 745-46 (1993).

APPENDIX

PROPOSED REVISIONS OF UNIFORM COMMERCIAL CODE ARTICLE 2 - 207 MARCH, 2000

SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION

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

(1) terms that appear in the records of both parties,

(2) terms, whether in a record or not, to which both parties have agreed, and

(3) terms supplied or incorporated under any provision of this [Act].

(b) Terms to which the buyer has not otherwise agreed that are delivered to the buyer with the goods become part of the contract, subject to 2-202, only if:

(1) the buyer does not within [twenty] [thirty] days of their receipt object to the terms and offer to return the goods at the seller's expense,

(2) the terms do not contradict the terms of the parties' agreement, and

(3) taken as a whole, the terms do not materially alter the contract to the detriment of the buyer.

[(c) A contract formed by the interaction of an individual and an electronic agent (Section 2-204(e)(2)) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided.]

[Reporter's Note B Subsection (c) is bracketed as an internal place marker. This subsection is likely to be moved into the provisions on electronic contracting.]

[Reporter's Note B The following Preliminary Comment was drafted by a committee member.]

Preliminary Comment

Changes: Subsection (a) is in part a reformulation of original Section 2-207 (original Section 2-207(1), in modified form, has been moved and is now Section 2-206(c)). It also states the terms of contracts generally, including contracts in which there has been no "battle of the forms." Subsection (b) addresses the effectiveness of terms delivered with the goods after a contract has been formed.

Comments:

1. Subsection (a) applies only when a contact has been formed under other provisions of Article 2. Its function is to define the terms of that contract. Where forms are exchanged before or during performance, the subsection differs from former 2-207 and the common law in that it gives no preference to the first or the last form; it applies the same test to the terms in each. Terms in a record that insist on all of that record's terms and no others as a condition of contract formation have no effect on the operation of this subsection. (Of course where one party's record insists on its own terms as a condition to contract formation and where that party does not thereafter perform or otherwise acknowledge the existence of a contract, the record's insistence on its own terms will keep a contract from being formed under sections 2-204 or 2-206, and section 2-207 will not be applicable.) As with former 2-207, courts will have to distinguish between "confirmations" that are addressed in section 2-207 and "modifications" that are addressed in section 2-209.

2. By inviting a court to determine whether a party has "agreed" to the other party's terms, the section recognizes the enormous variety of circumstances that may be presented to a court under this section and this section gives the court greater discretion to include certain

terms than former section 2-207 did. In most cases mere performance should not be construed to be agreement to terms on another's record by one who has sent or will send its own record with additional or different terms. Thus a party who sends a confirmation with additional or different terms should not be regarded as having agreed to any of the other's additional or different terms by performance; in that case the terms are found under (a)(1) (terms in both records) and (4) (terms supplied by the code). By the same reasoning, performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms on the other's record unless that record is part of the original agreement.

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

In other cases a court might find agreement to some of the additional or different terms that appear in only one record. If, for example, both parties' forms called for the sale of 700,000 nuts and bolts but the purchase order or another record of the buyer conditioned the sale on a test of a sample to see if the nuts and bolts would perform properly, the seller's sending a small sample to the buyer might be construed to be an agreement to the buyer's condition. A court could also find that the contract called for arbitration where both forms provided for arbitration but each contained slightly different arbitration provisions. There is a limitless variety of verbal and non verbal behavior that may be claimed to be an agreement to another's record. The section leaves the interpretation of that behavior to the wise discretion of the courts.

3. Subsection (b) is intended to strike a balance between the buyer's need for protection from unexpected and unfair terms which the buyer does not see until the product is delivered and the seller's need for an inexpensive way of contracting with its buyers. To the extent that *Hill v. Gateway 2000*, 105 F.3d 1147(7th Cir. 1997) finds that no agreement exists at the end of a telephone exchange in which the seller agrees to ship and the buyer agrees to pay, the subsection rejects the reasoning in *Gateway*. The section also rejects the conclusion that the terms of the resulting contract are not to be found by applying section 2-207. However in normal commercial and consumer cases like *Gateway*, the rules in subsection (b) are intended to make terms that are delivered with a product part of the contract. Where the buyer does not object, the terms do not contradict the terms of the parties' "agreement" (*not* including Article 2 default terms, *see* 1-201(3)) and the terms delivered with the product contain some sugar (express war-

ranties, promises of help or maintenance) with the medicine (disclaimers, and other conventional limitations on remedies) those terms will become part of the contract under subsection (b).

Where the buyer makes a timely objection to the terms and offers to return the goods at seller's expense, and the seller accepts, the contract is canceled. Where the seller refuses that offer, the contract continues but without the terms that were delivered with the product.

4. Since subsection (b) applies only when the parties have not "otherwise agreed" to the terms, sellers who are fearful either that buyers will object or that the terms with the product may be found materially to alter the existing contract, may use other methods of contracting . For example some sellers may choose to get agreement to their terms electronically or orally before they ship.

5. Some records that may accompany the goods are not "delivered" with them under subsection (b). The subsection is intended to deal with terms on the container (*ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)), terms in the box (*Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997)), and terms on a label or booklet attached to the goods (Mainline Tractor & *Equipment C. v. Nutrite Corp.*, 937 F. Supp. 1095 (D. Vt. 1996)), but not with conventional commercial form contracting documents such as confirmations, invoices or acknowledgments that happen to accompany the goods. The terms on such invoices, acknowledgments or the like become part of the contract only under subsection (a).