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Two Decades of 2-207: Review, Reflection and Revision

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THE FIRST QUESTION THAT MUST SURELY COME TO MIND IS: *Why another article on section 2-207 of the Uniform Commercial Code?*¹ The adoption of article 2 of the Code by 49 States,² the District of Columbia and the Virgin Islands has been accompanied by a virtual avalanche of articles,³ notes⁴ and comments⁵ discussing and dissecting this section. In all likelihood, this scholarly attention has

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¹ UNIFORM COMMERCIAL CODE (1962 Official Text, as amended in 1966 and 1972) [hereinafter cited as CODE].

² Article 2 of the Code has not been adopted in Louisiana.

³ See, e.g., Curman, *The Law of Sales under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14 (1962); Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75 (1963); Hawkland, *Major Changes under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 PRAC. LAW. 73 (1964); Kove, "The Battle of the Forms": A Proposal to Revise Section 2-207, 3 U.C.C.L.J. 7 (1970); Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 BUS. LAW. 789 (1969); Murray, *Intention over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37 FORD. L. REV. 317 (1969); Pucki, *The Battle of the Forms — Section 2-207 under the U.C.C.*, 7 AM. BUS. L.J. 19 (1969); Resnick, *Conflicting Boiler Plate-Effect of the Uniform Commercial Code*, 18 BUS. LAW. 401 (1963); Weeks, "Battle of the Forms" under the Uniform Commercial Code, 52 ILL. B.J. 660 (1964). The compilation in this and the following footnotes is not all inclusive. Only materials directly relevant to the subject matter scope of this article are referenced.

⁴ See, e.g., Note, *Contracts: Sale of Goods: Acceptance of Offer: Additional or Different Terms: Section 2-207 Uniform Commercial Code: Section 84-a, New York Personal Property Law (New)*, 46 CORNELL L.Q. 308 (1961); Note, *Uniform Commercial Code: Variation Between Offer and Acceptance under Section 2-207*, 1962 DUKE L.J. 613; Note, *In Defense of the Battle of Forms: Curing the "First Shot" Flaw in Section 2-207 of the Uniform Commercial Code*, 49 NOTRE DAME LAW. 384 (1973); Note, *Contract Draftsmanship under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564 (1964); Note, *All Quiet on the 2-207 Front?*, 35 U. PITT. L. REV. 685 (1974).

⁵ See, e.g., Comment, *A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code from the Seller's Point of View or What's So Bad About Roto-Lith?*, 8 AKRON L. REV. 111 (1974); Comment, *Contracts — An Interpretation of the Uniform Commercial Code Section 2-207(1)*, 51 KY. L.J. 563 (1963); Comment,

(Continued on next page)

focused on section 2-207 because it represents one of the more radical departures from the common law traditions that existed in most jurisdictions at the time article 2 of the Code was adopted.

In the roughly two decades since the Code's initial adoption,⁶ an ever-increasing number of cases applying and interpreting the section have appeared.⁷ Given the kaleidoscopic range of commercial transactions in which section 2-207 may find application, many of these cases have focused on relatively narrow contexts and issues. In turn, much of the academic and professional commentary has been mere reaction to the narrow issues raised by the courts. A broader, more comprehensive approach, consolidating all of the literature and court decisions for reflection and possible resolution of the basic issues involved in the application of section 2-207 now seems appropriate. In the process of this review, the authors have endeavored not only to present the existing trends in interpretation and application of the section, but to suggest preferred resolutions. The analysis of these resolutions culminates in a decision model proposed for use in every court decision under section 2-207. Finally, a statutory re-

(Continued from preceding page)

Section 2-207 and the "Counter Offer": Acceptance Unlimited?, 57 NW. U.L. REV. 477 (1962); 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 (1963); Comment, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836 (1957); Comment, *Section 2-207 of the Uniform Commercial Code — New Rules for the "Battle of the Forms,"* 32 U. PITT. L. REV. 209 (1971); 42 B.U.L. REV. 373 (1962); 76 HARV. L. REV. 1481 (1963); 111 U. PA. L. REV. 132 (1962).

⁶ The Code was first adopted in Pennsylvania in 1954. PA. STAT. ANN. tit. 12A, § 2-207 (1970).

⁷ *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345 (10th Cir. 1973); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972); *Southeastern Enamelling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970); *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968); *Roto-Lith, Ltd. v. F.P. Bartlett & Co., Inc.*, 297 F.2d 497 (1st Cir. 1962); *Baumgold Bros., Inc. v. Allan M. Fox Co., East*, 375 F. Supp. 807 (N.D. Ohio 1973); *Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc.* 366 F. Supp. 1 (S.D.N.Y. 1973); *Oskey Gasoline and Oil Co., Inc. v. OKC Refining Inc.*, 364 F. Supp. 1137 (D. Minn. 1973); *Bickett v. W. R. Grace & Co.*, 12 UCC REP. SERV. 629 (W.D. Ky. 1972); *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013 (S.D.N.Y. 1971); *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 101 Cal. Rptr. 347 (1972); *American Parts Co. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967); *Application of Doughboy Indus., Inc.*, 17 App. Div. 2d 216, 233 N.Y. Supp. 2d 488 (1962) (pre-Code case); *In re Tunis Mfg. Corp.*, 11 UCC REP. SERV. 544 (N.Y. App. Div. 1972); *Bauer Int'l Corp. v. Eastern Twp. Produce Ltd.*, 4 UCC REP. SERV. 735 (N.Y. Sup. Ct. 1967); *In re Barclay Knitwear Co., Inc.*, 8 UCC REP. SERV. 44 (N.Y. Sup. Ct. 1970); *J. A. Maurer, Inc. v. Singer Co.*, 7 UCC REP. SERV. 110 (N.Y. Sup. Ct. 1970); *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC REP. SERV. 292 (N.Y. Sup. Ct. 1972); *Tidewater Lumber Co., Inc. v. Maryland Lumber Co.*, 3 UCC REP. SERV. 351, (N.Y. Sup. Ct. 1966); *Trafalgar Square, Ltd. v. Reeves Bros. Inc.*, 7 UCC REP. SERV. 712 (N.Y. Sup. Ct. 1970); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.* 19 N.C. App. 678, 200 S.E.2d 668 (1973); *Ohio Grain Co. v. Swisshelm*, 15 UCC REP. SERV. 305 (Ohio Ct. App. 1973); *Just Born, Inc. v. Stein, Hall & Co., Inc.*, 59 Pa. D. & C.2d 407 (1971); *McAfee v. Brewer*, 214 Va. 579, 203 S.E.2d 129 (1974); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

vision is advanced as a viable alternative for insuring proper, consistent and, most importantly, fair resolutions of situations which section 2-207 was intended to cover.

To facilitate achievement of the above goals, this article is divided into six parts: (1) a description of the modern commercial context within which section 2-207 was created and is now applied; (2) a summary of the pre-Code rule; (3) an overview of the rule engendered by section 2-207; (4) an analysis of the interpretative history of section 2-207; (5) a proposed decision model for the application of section 2-207; and (6) the suggested statutory revision.

Commercial Context

It is impossible to understand the problems that existed under the pre-Code common law rule and the reason why section 2-207 took the form it did, without at least a general understanding of the commercial setting in which first the common law rule and then section 2-207 operated. Historically, as the purchase and sale of goods in the commercial setting became more complex, the results obtained under the common law acceptance rules came under increasing scrutiny. Individualized negotiation where the parties arranged in advance all of the terms of a transaction and memorialized them in a carefully drafted, unique document, became limited to special, important transactions. The everyday requirements had become speed, volume and the lowest possible transactional cost. The solution to these needs lay in the use of form documents administered by relatively low-level employees. This, in turn, resulted in documents which contained terms applicable to a whole range of situations which were often sent without careful regard for the particular point in the negotiations reached by the parties to the transaction.⁸ The following transactional characteristics represent an amalgam of those found in the litigated section 2-207 cases. Obviously, the characteristics discussed are those commonly found and some may not be present in certain specific transactions.

Preliminary Negotiations

When the parties are merchants, it is rare for there to have been no contacts at all prior to an offer being made. Often the parties have communicated with each other either orally or in writing relating to the specifics of the transaction. Many times this contact is between the technical people in the firms who in turn communicate with their respective salesmen or purchasing agents who carry out the documentation of the transaction. At the very minimum, the seller has sent out a general catalog or nonspecific price quotations or the buyer has distributed specifications and invited bids.

⁸ It is not unusual for businesses to have almost identical documents with different headings. Documents entitled "quotation," "acknowledgment" and "confirmation" often contain precisely the same terms modified only to conform to the heading on the front.

The Offer

If a document is used (generally the case), the offer will be made by either the buyer transmitting his "purchase order" or by the seller sending his "quotation form." Either offer form generally contains a blank portion on which the user types in the basic performance terms for that transaction. These will include a description of the goods, the price, the time, delivery terms and the quantity to be purchased.⁹ In addition, any special or unique terms relating to that particular transaction will be noted.

The balance of the front and/or back of the form will contain numerous additional printed terms.¹⁰ These terms will likely consist of two types. First, there will appear additional substantive terms running the gamut of detailed warranties of quality if it is a buyer's form, or disclaimer of warranties if it is a seller's form, to standard payment or delivery requirements. Second, at the behest of the party's legal department, there will be language attempting to limit any contract formed — either by the other party's response or the parties' performance — to the substantive terms set out in the offeror's form.¹¹

On occasion when there has been substantial prior negotiation, it is difficult, if not impossible, to determine the point at which and the party by whom an offer has been made since numerous documents have passed between the parties.¹² A similar situation occurs when the parties enter into a transaction at a face-to-face meeting where agreement is reached orally.¹³

The Response

Sometimes there is no response and the parties merely go on to perform. More often, the other party will send a document likely called an "acknowledgment," a "confirmation" or an "acceptance." If the offer has been made orally or the agreement was completely

⁹ Probably these are the only terms necessary to ensure that the contract will not fail from indefiniteness. The subject matter of the contract must be ascertainable, and the Code will supply all other missing terms but that of quantity. Cf. CODE § 2-201.

¹⁰ If the printed terms are found solely on the back, there will usually be a conspicuous statement on the front calling attention to the terms on the back in conformity with § 1-201(10) of the Code.

¹¹ The following language is typical; the bracketed variations change the clause from buyer's to seller's language:

By shipping the above goods [receiving and paying for the above goods] or by acknowledging receipt of this document, or by performing as required above, you agree to the terms and conditions of sale set forth on the reverse side hereof as well as those set forth on the face hereof. These terms and conditions constitute an offer by Buyer [Seller] and may only be accepted on the exact terms set forth and no other terms and conditions shall be controlling; and these terms and conditions supersede the terms and conditions of your proposal or acknowledgment form, if any.

¹² Such a situation is expressly dealt with in the Code. See CODE § 2-204(3).

¹³ The contract may not be enforceable because of the Code's Statute of Frauds provision, § 2-201. A later memorandum establishing enforceability will not eliminate the difficulty of determining who is the offeror and who is the offeree.

negotiated orally, both parties may send a response document. Such forms are typically very similar to the form offer documents with standard printed terms on the front and/or back and space for typed repetition of the unique, negotiated terms. The difference lies only in the fact that the substantive terms will favor the responding party and there will be language attempting to limit the contract to the terms of the response.

Post Response

At this juncture, if the negotiated terms match, and usually even if they do not, the most likely course of events will find the parties performing. However, on occasion, additional modifying or clarifying documents will be exchanged.

A few observations are in order at this point. Most of the above transactions probably take place without either party carefully reading the form portions of the documents sent by the other. In all cases, however, the typed negotiated terms set out in the offeror's document will be read by the offeree; otherwise, the offeree/seller would not know what to manufacture and/or ship, or the offeree/buyer would not know the terms of purchase. The response document, on the other hand, may not be checked carefully and completely by the offeror. In addition, given the volume of transactions, standardization of forms and the level of employees responsible for handling the form, the sending party may have only the most general idea of what is contained in his own form.¹⁴ In most circumstances the concern of both the buyer and seller will be to close a deal as quickly as possible and questions about subsidiary terms may often be postponed in the belief that any dispute will be resolved some time later.

Pre-Code Rule

Under the pre-Code common law rule, a response to an offer was effective as an acceptance *only* if the terms of the response(s) exactly matched those of the offer. Either a variation of the terms of the offer in the response or the addition of novel terms caused the response to fail as an acceptance. The bottom line result in either case was that no contract was formed. While not all courts felt comfortable with such a strict formulation and some sought fictions to avoid its application,¹⁵ by and large the requirement was rigidly enforced.¹⁶ This

¹⁴ One of the authors asked purchasing agents participating in a university continuing education program whether they could summarize the specifics of just a few of the boilerplate provisions on forms they regularly used. Most could not.

¹⁵ See, e.g., *Milliken-Tomlinson Co. v. American Sugar Ref. Co.*, 9 F.2d 809 (1st Cir. 1925) (insertion of a term which would have been implied in fact from the offer); *Southern Bitulithic Co. v. Algiers Ry. & Lighting Co.*, 130 La. 830, 58 So. 588 (1912) (stipulation in conformity with trade usage).

¹⁶ See, e.g., *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915). This case is considered a classic example. The court held that the mere statement in the response — "The acceptance of this order which in any event you must promptly acknowledge . . ." — was a sufficient change in the offer to result in the response being ineffective as an acceptance.

approach became known as the "mirror image" rule. The alleged virtue of the mirror image rule was that it promoted greater certainty between the parties.¹⁷ As a result of its application, both parties would *know* what their obligations were because no contract would be formed until the terms of the offer and the response matched exactly. The assumption on which this theory was based had to be that both parties were aware, not only of each and every term in the the other party's offer or acceptance, but of each and every term contained in their own offer or acceptance. While such certainty might have been attainable in a time when commercial contracts were personally negotiated and original documents created for each transaction, it is not difficult to see that the complexity and needs of the modern commercial transaction made such knowledge virtually impossible. As a result, parties who were "certain" that they had a binding contract at the time they exchanged their forms often found themselves without protection if the other chose not to perform. The non-performing party merely had to find the slightest variation between the offer and the response, usually tucked away in the printed terms portion of the parties' forms, to sustain his position that no contract had been established. The availability of such an "out" gave rise to the real possibility that many refusals to perform were not due to concern over differences in terms, but rather to a change in market conditions which made withdrawal from the transaction economically advantageous for the non-performing party.¹⁸

Even greater problems were likely to arise when no contract was formed under the mirror image rule but the parties nevertheless went on to perform. Since the response was not the mirror image of the offer, it not only was ineffective as an acceptance, but also had the effect of rejecting the offer. The response *was* effective as a counter-proposal, however, and at that point it became the outstanding offer.¹⁹ When the parties thereafter performed, the action of performance by the original offeror became the necessary acceptance of the counter-proposal, however, and at that point it became the outstanding offer.¹⁹ Thus, the application of the mirror image rule had the effect of arbitrarily preferring the party sending the last document in the commercial transaction. This result also achieved a popular name in the literature — the "last shot" approach.²¹ The application

¹⁷ "The merit of the common-law standard for commercial transactions lay in the relatively high degree of certainty which it engendered." Comment, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, *supra* note 5, at 853.

¹⁸ In *Raisler Heating Co. v. Clinton Wire Cloth Co.*, 168 N.Y.S. 668 (Sup. Ct. 1918), for example, the seller sought to withdraw, after the market price of the goods had doubled, on the grounds that the specification furnished by the buyer differed significantly from the seller's offer.

¹⁹ 1 WILLISTON & THOMPSON, *WILLISTON ON CONTRACTS* § 77 (rev. ed. 1936).

²⁰ *Id.* § 22A.

²¹ See, e.g., Comment, *Section 2-207 of the Uniform Commercial Code*, *supra* note 5.

of the mirror image rule and the last shot approach often left an offeror in the uncomfortable position of being bound to the terms of the offeree if the parties performed, but with no enforceable contractual rights if the offeree chose to withdraw. These problems were prominent concerns when section 2-207 was proposed.

The Rule of Section 2-207

Section 2-207 reads as follows:

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 general approach and structure of section 2-207 is clear. Subsection (1) determines when a contract is created as a result of an exchange between the parties. In response to the realities of the modern commercial transaction, the rigid requirements of the mirror image rule have been abolished. Under the provisions of subsection (1), the response is effective as an acceptance, creating a contract, "even though it states terms additional to or different from those offered"²² While the response need not exactly match the offer, the response containing additional or different terms must meet two requirements to be effective as an acceptance. First, it must be couched

²² Compare this express statement of intention to eliminate the mirror image rule with the new *Restatement* position, *RESTATEMENT (SECOND) OF CONTRACTS* § 60 (Tent. Draft No. 1, 1964), which one writer suggested has the same result by implication. Murray, *supra* note 3, at 345.

in terms of a "definite and reasonable expression of acceptance" and second, it must not be "expressly made conditional on assent to the additional or different terms." The Code test of an operative acceptance under section 2-207 was thus designed to bring about a closer correlation between the controlling legal principles and the commercial understanding of when a "deal" had been closed.²³

The contract that is thus created by the parties' exchange is based — at least insofar as material terms are concerned — on the terms contained in the offeror's form. Subsection (2) is not concerned with the question of whether a response is in fact an acceptance. This is determined solely under subsection (1). Subsection (2) is intended only to resolve the effect of the additional and/or different terms²⁴ contained in the response which subsection (1) has already deemed an acceptance. Subsection (2) establishes two separate tracks for handling these variant terms depending on the characteristics of the parties. If the parties to the contract are not both merchants, the offeree's variant terms are "proposals for addition to the contract." The offeror can either agree to their inclusion or not as he wishes.²⁵ If the parties to the contract are both merchants, the variant terms automatically become part of the contract unless (a) the offeror has stated in his offer that he will agree only on the basis of his terms, (b) the variant terms will materially alter the existing contract, or (c) the offeror has already objected or thereafter objects within a reasonable time to the variant terms. The effect of subsection (2) is to allow changes in the contract which is based on the offeror's terms, only if they are found to be non-material. However, even non-material terms will fail to become part of the contract if the offeror objects to them either generally in advance or after receipt.

The result of the application of the subsections (1) and (2) is to form a contract at the time of the exchange between the parties, which is based essentially on the offeror's terms. Thus, the inequity fostered by the common law rules which enabled a party to withdraw easily when market conditions changed presumably has been remedied.

²³ See CODE § 2-207, Comment 2.

²⁴ There has been much debate as to whether subsection (2) encompasses "different" as well as additional terms and the scholarly comment is approximately evenly divided. Compare, e.g., Curman, *supra* note 3 (different not included), with Lipman, *supra* note 3. Section 2-207 itself is ambiguous. It uses only the word "additional" in subsection (2) after having referred to "additional to or different from" in subsection (1). Comment 3, however, states: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)." For the authors' view on this issue see the text accompanying notes 51 to 62 *infra*.

²⁵ Since these terms, if accepted, would be modifications of an existing contract, no additional consideration would be required. CODE, § 2-209(1).

Subsection (3) addresses the typical situation where, despite the fact that no contract has been created by the parties' exchange under the provisions of subsection (1), the parties, nevertheless, perform.²⁶ Under the pre-Code rule the last shot approach would apply and the contract would be formed on the terms contained in the offeree's response. When subsection (3) applies, however, since performance requires the finding of some contractual relationship, the contract consists of the terms on which the offer and the response agree, "together with any supplementary terms incorporated under any other terms of . . . [the Code]." The effect of the application of subsection (3) is to eliminate any preference for the terms of either the offeror or the offeree in a performance situation.²⁷

Thus, it would seem that the drafters of section 2-207 have attempted to cure the two basic problems that resulted when the common law rules were applied to the exchange of commercial forms. The language of section 2-207 indicates that the offeror will be protected during the executory stage and that the contract which is formed on the basis of performance will no longer give a preference to the party making the last response. However laudable the intent of the drafters, it is necessary to determine whether or not their attempts were effective. This question can only be resolved by considering what problems of application and result, if any, have arisen through use of section 2-207 over the past 21 years. It is to this inquiry we now turn.

An Interpretive History of Section 2-207

Review of the literature and cases relating to section 2-207 identifies five general problem areas in the interpretation of the language of the section. They are as follows: (a) What constitutes "a definite and seasonable expression of acceptance" which is not expressly "made conditional on assent to the additional or different terms"? (b) What is the meaning in subsection (1) of "a written confirmation" operating as an acceptance? (c) Does subsection (2) deal with both "additional and different" terms or only "additional" terms? (d) When may a court include a variant term contained in a response in a contract created under subsection (1)? And, (e) what is the effect of performance when no contract has been formed under subsection (1)?

²⁶ This provision does not apply to a situation where an offer is made, the offeree does not respond, and the parties perform under circumstances in which the offeree's performance constitutes the necessary acceptance under §§ 2-204(1) and 2-206 of the Code. The terms of the contract would be those contained in the offer, and neither party would be bound until there was performance.

What constitutes "a definite and seasonable expression of acceptance" which is not expressly "made conditional on assent to the additional or different terms"?

Logically, it would seem that these are two separate issues. One should first determine whether or not the response is an acceptance, and then if it is, determine whether or not the offeree has made it expressly conditional. However, the initial difficulty encountered by the courts in applying subsection (1) lay in dealing with the inclusion of materially variant terms in the response. Some courts and commentators viewed the inclusion of such terms as affecting the determination of what was a definite expression of acceptance, while others contended it went to the issue of whether or not the acceptance was conditional. In either event, whether the inclusion of such terms resulted in a determination that no definite acceptance had been made, or that even though a definite acceptance was made it was conditional, the conclusion was the same; the response was no more than a counter-proposal and no contract was formed. Thus it is necessary, at least initially, to treat these questions concurrently.

The now famous, but highly criticized case of *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*²⁸ was the first example of a court holding that the inclusion of materially variant terms turned the response into a counter-proposal. In that case the offeree/seller's acknowledgment and invoice sent in response to offeror/buyer's written order contained in the printed terms an exclusion of express and implied warranties. The court argued that

[i]f plaintiff's contention is correct that a reply to an offer stating additional or different conditions unilaterally burdensome upon the offeror is a binding acceptance of the original offer plus simply a proposal for the additional conditions, the statute would lead to an absurdity. Obviously no offeror will subsequently assent to such conditions.²⁹

The court therefore held:

To give the statute a practical construction we must hold that a response which states a condition materially altering

²⁸ 297 F.2d 497 (1st Cir. 1962). Articles critical of the court's reasoning include Murray, *supra* note 3; Comment, *Contracts — an Interpretation of the Uniform Commercial Code Section 2-207(1)*, *supra* note 5; Comment, *Section 2-207 and the "Counter Offer": Acceptance Unlimited*, *supra* note 5; Comment, *Nonconforming Acceptances Under 2-207 of the Uniform Commercial Code*, *supra* note 5; Comment, *Section 2-207 of the Uniform Commercial Code*, *supra* note 5; 76 HARV. L. REV. 1481 (1963); 111 U. PA. L. REV. 132 (1962). *But see* Note, *Uniform Commercial Code: Variation Between Offer and Acceptance Under Section 2-207*, 1962 DUKE L.J. 613, 617 ("the interpretation adopted by the First Circuit Court of Appeals commends itself to other UCC jurisdictions as an equitable recognition of reasonable commercial expectation."); Comment, *A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code*, *supra* note 5.

²⁹ *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962).

the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly . . . conditional on assent to the additional . . . terms.'³⁰

This position reflected the old pre-Code view that no offeree would knowingly agree to the offeror's terms if the offeree still had additional or different terms he wanted included in the contract. The offeree's acceptance would remove any leverage he might have to induce the offeror to agree to the new or different terms. Further, only the most benevolent of offerors, freed from the danger that the offeree might withdraw from the negotiations, would accede to a material change requested by the offeree. Yet, it is clear, notwithstanding the somewhat misleading statements in Comment 1,³¹ that the drafters, in fact, intended a response that contained variant terms which materially altered the offer to be effective as an unconditional acceptance. If, in every case, a term in the response which would materially alter the offer resulted in a counter-proposal then there would never be a situation to which subsection (2) (b) could apply. By its terms, subsection (2) (b) contemplates a contract formed under subsection (1) where the variant terms materially alter the contract and are thus not includable without agreement by the offeree.³²

The explanation for the approach of section 2-207 in establishing a new, much broader concept of acceptance lies in the recognition that section 2-207 was intended to apply to modern commercial transactions where there is almost exclusive reliance on form documents. As a consequence, the *Roto-Lith* court's arguments regarding the offeree's expectations are subject to qualification. Thus, it is necessary, to apply properly section 2-207, to differentiate between variant terms which the offeree made part of the actual negotiation and those which are found tucked away — although conspicuous as defined by the Code³³ — in the printed terms. The use of variant terms in the typed portion of a response which materially alter the terms actively under negotiation certainly should not be deemed a definite and seasonable expression of acceptance.³⁴ In such a case, the

³⁰ *Id.*

³¹ "The other situation is offer and acceptance, in which a wire or a letter expressed an acceptance or the closing of an agreement adds further *minor* suggestions or proposals . . ." CODE § 2-207, Comment 1 (emphasis added). One commentator has suggested that Comment 1 be revised to remove the misleading statement. Lipman, *supra* note 3.

³² See CODE § 2-207, Comment 3:

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 (emphasis added).

³³ CODE § 1-201 (10).

³⁴ A variation on this problem that raises a difficult question occurs when the offeree uses words that are normally considered definite expressions of acceptance such as "I accept" or "I agree", but also adds, in the typed portion of his response, an additional or different

Roto-Lith argument that the offeree knows of his additional or different terms and does not want to be bound until he can attempt to get them resolved in his favor would be applicable. However, an additional or different performance or remedy term in the printed portion of the response does not really affect the present contractual expectations of the parties to make a "deal" on the negotiated terms. This is particularly true if the authors' assumption that the offeree is often not specifically aware of what is contained in his own printed terms is correct.

Hence, the proper approach in considering the effect of materially variant terms in the response is to determine whether or not they are *part of and/or affect* the terms under active negotiation. If they are and/or do, then the offeree should not be held to have made a definite expression of acceptance. Although a finding that the materially variant terms make the acceptance conditional would have the same effect as finding no definite acceptance had been made, analysis in terms of whether or not there is a definite expression of acceptance is preferable. This approach obviates the need for the court to grapple with the requirement that the desire to make an acceptance conditional be "expressly made." Since the decision in *Roto-Lith*, the courts seem willing to find that an acceptance has occurred even though terms in the form portion of the response document would materially alter the contract.³⁵

If the mere presence of materially variant terms in a response will not cause the response to be conditional, thereby creating an express counter-proposal, the issue becomes, what language will have such an effect? In line with the position taken above that courts should focus on statements that affect the parties' perceptions at the time they are entering into the transaction, the language used by the offeree must at least be phrased in such a manner and displayed in such a fashion in the response that a reasonable offeror will both see

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term which materially alters the terms being actively negotiated by the offeror. The underlying question is why the offeree chose to use such an expression. He may have merely made a mistake, or he may have been trying to make the offeror feel that there was a binding contract, but on the offeree's terms. We do not believe that the rule applied in this case should turn on the offeree's intent (particularly since it is difficult to ascertain) but rather on the effect that this contradictory response has on the offeror. If the offeror was misled, the authors would not be reluctant to see the offeree held to a contract, and on the offeror's terms. This would have the effect of "visit[ing] the consequences of ambiguity on the offeree" (*i.e.*, the party creating it). See Davenport, *supra* note 3; Murray, *supra* note 3; Weeks, *supra* note 3.

The same type of problem might arise when a prior course of dealing between the parties or a usage of trade indicates the parties normally understand a particular type of document, such as a form titled "confirmation" or "acceptance," to be a definite acceptance.

³⁵ See, e.g., *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973); *J.A. Maurer, Inc. v. Singer Co.*, 7 UCC REP. SERV. 110 (N.Y. Sup. Ct. 1970); *Just Born, Inc. v. Stein, Hall & Co.*, 59 Pa. D. & C.2d 407 (1971); *Air Products and Chem., Inc. v. Fairbanks-Morse, Inc.*, 581 F.2d 1193, 206 N.W.2d 414 (1973).

it and understand its meaning — that an express counter-proposal has been made and the negotiations are not closed. The Sixth Circuit in *Dorton v. Collins & Aikman Corp.*³⁶ went beyond this “clear understanding” approach and required that the offeree meet the precise language of subsection (1) by stating that the response is expressly conditioned on the offeror’s assent to the variant terms.³⁷

A Seventh Circuit case, *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*,³⁸ also has interpreted the conditional acceptance language of section 2-207. In that case a response “stating that Hewitt-Robins’ acceptance was predicated on certain modifications,”³⁹ including a substituted warranty clause and limitation of consequential damages (the terms of which were set out in full), was deemed a counter-proposal. This approach, requiring neither the clearest possible statement nor the precise words of the section as in *Dorton*, can be justified because the language in this case was in a letter rather than a form document, and the terms the offeree wanted changed were expressly set out in the response. This would thus seem to satisfy the “clear understanding” test. Less satisfying is *Bickett v. W.R. Grace & Co.*,⁴⁰ where the court held that the attachment of a printed tag to a bag of seed which both disclaimed warranties and provided for return of the seed unopened “unless accepted on these terms” met the requirements of subsection (1) for an expressly conditional acceptance. The explanation for this decision may lie in the fact that the custom in the trade was never to give warranties on sales of seed. As a result, the court may have been attempting to avoid a determination that the shipment of the seed was an acceptance of the offeror’s offer which, by application of the Code,⁴¹ would have included implied warranties. As much as one might agree with the result, the language by itself does not seem sufficient to satisfy the requirement of an *express* counter-proposal.

While the trend seems to lean toward at least a requirement of clear and conspicuous language before an acceptance will be found to be conditional and thus an express counter-proposal, one problem

³⁶ 453 F.2d 1161 (6th Cir. 1972).

³⁷ Viewing the Subsection (1) proviso within the context of the rest of that Subsection and within the policies of Section 2-207 itself, we believe that it was intended to apply to an acceptance which already reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms therein That the acceptance is predicated on the offeror’s assent must be directly and distinctly stated or expressed rather than implied or left to inference.

Id. at 1168. This view has been followed within the Sixth Circuit, in *Baumgold Brothers, Inc. v. Allan M. Fox Co., East*, 375 F. Supp. 807 (N.D. Ohio 1973).

³⁸ 404 F.2d 505 (7th Cir. 1968).

³⁹ *Id.* at 508.

⁴⁰ 12 UCC REP. SERV. 629 (W.D. Ky. 1972).

⁴¹ CODE §§ 2-314, 2-316.

has yet to be resolved by the courts. Should language such as: "This acceptance is expressly made conditional on offeror's assent to any additional or different terms contained herein" in the *printed* portion of the response form be sufficient to meet the requirement of conspicuousness? Notice this language itself is referring only to *material* additional or different terms contained in the printed portion of the form. The offeree should not be overly concerned if the variant terms are nonmaterial, since they will likely be included under subsection (2); or if material variant terms are contained in the typed portion of the form, since such location should result in the response failing as a definite acceptance.

If one accepts the authors' basic approach that the court should deal with the perceptions of the parties at the time of the negotiation of the agreement, and if one further assumes that the parties generally only consider the terms in the typed portion of the form document, then at the very least such conditional language should not be effective if only found in the printed portion of the form. This does not mean that the language must be in the typed portion of a form in order to meet the test of conspicuousness. Certainly putting it in an accompanying letter would have the same effect. The key lies in a determination that the offeror likely saw and understood the offeree's language indicating his intention to be bound only on the terms contained in the response.⁴²

This is clearly a perplexing and difficult problem for the courts, but even more so for the offeree. If the offeree fails to meet whatever test the courts impose regarding what constitutes a counter-proposal, he will find himself bound to a contract based essentially on the offeror's terms with little hope of getting his own additional or different terms into the contract. Yet, even if the offeree is successful in making a counter-proposal, the best the offeree can hope for is a nonpreferential contract to be formed under subsection (3) if the parties perform, given the present structure of section 2-207.⁴³ This is because the parties will rarely have the time or the inclination to work out the material difference between the printed terms in the forms. Thus, the offeree's counter-proposal is likely to go unanswered except by performance.

⁴² One possible way for the offeree to protect himself is to indicate in his expressly conditional statement precisely which of the offeror's printed terms he would like to change, and which of his own printed terms he would like to add, thus bringing these terms clearly into active negotiation. This is, however, a large burden on the offeree as he would have to carefully compare his own form with that of the offeror. This is, in effect, what the offeree did in *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968).

⁴³ It is clear that attempts by offerees to include language in their response which will either immediately form a contract based on the offeree's variant printed terms, or bind the offeror to these terms if the offeror remains silent or begins performance, is doomed to failure. Cf. Note, *All Quiet on the 2-207 Front?*, *supra* note 4. Nor should such

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What is the meaning in subsection (1) of "a written confirmation" operating as an acceptance?

Section 2-207 provides that "a written confirmation which is sent within a reasonable time operates as an acceptance . . ." At first glance such a statement seems nonsensical! As the term is generally used, a confirmation is merely a restatement of an agreement already reached.⁴⁴ Comment 1 reinforces this view by stating that the section was intended, in part, to cover the situation

where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms insofar as agreed upon and adding terms not discussed.⁴⁵

The commentators have attempted to resolve the confusion by suggesting that the drafters intended the written confirmation language to apply to a situation where, because of the Statute of Frauds requirement of section 2-201, the prior oral agreement is not binding and it is the written confirmation that makes the contract effective.⁴⁶ They argue that since it is the sending of the written confirmation that makes the agreement binding, it is operating as an acceptance.

While the courts have clearly applied the written confirmation language to the oral contract situation,⁴⁷ a sound argument can be made that the language does more than just equate a written confirmation to an acceptance when an oral contract becomes binding. Such language may also be intended to bring under the operation of subsection (2) the variant terms in any document sent by *either party* after an agreement was formed. This approach would allow variant terms, whether found in an actual acceptance or a written confirmation, to be handled under subsection (2). However, as indicated above, only a response to an offer could result in the finding that either no definite acceptance had been made or the acceptance

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language be considered sufficient to make the acceptance conditional even if inserted in the typed portion of the form. This is the most blatant example of an unthinking "battle of the forms" and should be ignored by the courts. The battle of the forms has produced some truly extraordinary (and meaningless) language where lawyers have attempted to insure that their clients will always prevail. One purchase order reviewed by the authors contained the following clause in conspicuous print. REJECTION OF THIS ORDER MUST BE MADE BY RETURN MAIL. The provision was followed by language reserving the right of the buyer to revoke his "offer."

⁴⁴ BENDER'S U.C.C. SERVICE, DUSENBERG & KING, BULK SALES AND TRANSFERS § 3.03 [1], at 3-15 (1975) [hereinafter cited as 3 BENDER'S U.C.C. SERVICE].

⁴⁵ CODE § 2-207, Comment 1 (emphasis added).

⁴⁶ See, e.g., Davenport, *supra* note 3.

⁴⁷ Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); American Parts Co. v. American Arb. Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967); Ohio Grain Co. v. Swishelski, 10 Ohio App. 3d 305 (Ohio Ct. App. 1973).

was expressly conditional resulting in a counter-proposal. The written confirmation, coming as it does after the agreement has been made, could have no such effect.⁴⁸ Thus, for example, the inclusion in a written confirmation of the language "this confirmation is expressly conditional on the assent by you of the additional or different terms contained herein" would not create a counter-proposal. The variant terms in the written confirmation would be treated as contained in an effective acceptance and included or excluded in the contract under the provisions of subsection (2).⁴⁹

A somewhat different case would exist where the parties have executed a written document which by its terms is not effective until accepted in writing by the home office of one of the parties. If the home office sends a written confirmation, it is in reality an acceptance of an outstanding offer represented by the prior document. Such a written confirmation should be treated as a normal response document to an offer.⁵⁰

Does subsection (2) deal with both "additional and different" terms or only "additional terms"?

Although subsection (1) considers both additional and different terms contained in a response to determine whether or not an acceptance has been made, subsection (2), which determines what variant terms in the acceptance will be included in the contract, refers only to additional terms. This raises the issue of whether the omission of "different" in subsection (2) was intended by the drafters to mean that such terms cannot be included in a contract formed under subsection (1). Comment 3 further confuses the issue by stating: "whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)."

⁴⁸ It is important, however, to differentiate between a written confirmation form used as an acceptance of an oral offer not previously accepted and one sent after oral agreement. Cf. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972). The possibility also exists that if the written confirmation document changed so many terms that it no longer reflected the prior oral agreement, it would no longer meet the memorandum requirements of § 2-201. *American Parts Co. v. American Arb. Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

⁴⁹ This is in effect the court's position in *American Parts*:

While section 2207 literally provides that an acceptance can expressly be "made conditional on assent to the additional or different terms," it omits to state that a "written confirmation" can so provide, and we conclude that the omission was a deliberate choice by the experienced, careful draftsmen of the uniform commercial code. We add that any other construction would be opposed to the policy of section 2207.

8 Mich. App. at 174, 154 N.W.2d at 15. Cf. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972). *Contra*, *Southwest Eng. Co. v. Martin Tractor Co.*, 473 P.2d 18 (Kan. 1970). This case may be explainable since the letter in question purported to be not a modifying document but rather a rejection of an offer.

⁵⁰ This situation was suggested in Lorensen, *The Uniform Commercial Code Sales Article Compared with West Virginia Law*, 64 W. VA. L. REV. 32 (1961). The author contended that the written confirmation language of subsection (1) applied. To the extent that Dean Lorensen would argue such a document should not be accorded the full rights of a response to an offer, we believe that he is correct.

Although this is an issue to which a substantial amount of scholarly comment has been directed,⁵¹ initially, one wonders why so much controversy has been generated. While subsection (2) determines which variant terms in the offeree's acceptance will be incorporated into the contract without the offeror's approval if the parties are merchants; given the language of (a), (b) and (c) of subsection (2), only the most inoffensive of terms, *whether different or additional*, are likely to find their way into the contract. Subsection (2) (b) immediately excludes any variant terms if they would materially alter the contract while (a) and (b) give the offeror a means of excluding even non-material terms from the contract formed under subsection (1) if he so desires.⁵² Nonetheless, the argument continues.

At least three cases have held that subsection 2-207(2) requires a distinction between additional and different terms.⁵³ On the other hand, while not directly holding that a distinction should not be made, one case dealt with a factual situation which implied that there was no distinction.⁵⁴ If the case arises in either Wisconsin or Iowa, the courts will make no distinction since the words "or different" have been added to the language of subsection (2) in those state statutes.⁵⁵

In the authors' opinion there are several strong reasons supporting the interpretation that no distinction between additional or different terms should be made in applying subsection (2). Although it would seem on first impression that it would be easy to identify situations where a term in the response clearly differs from an express term contained in the offer, in fact the actual process of identification may prove frustrating and surprisingly complex.⁵⁶ To add to the confusion, one can argue that a term found only in the response

⁵¹ For additional scholarly comment, see BENDER'S U.C.C. SERVICE, *supra* note 44, § 3.03; Note, *In Defense of the Battle of Forms . . .*, *supra* note 4 (noting or favoring the distinction); Murray, *supra* note 3; Comment, *Section 2-207 of the Uniform Commercial Code*, *supra* note 5 (opposed).

⁵² Section 2-207(a) and the first part of (b) allow the offeror to exclude the non-material variant terms, in a blanket manner, without prior knowledge of what they are. Since this can be done automatically, it would seem that few, if any, variant terms would be included under subsection(2).

⁵³ Dorton v. Collins & Aikman Corp., 453 F.2d 1181 (6th Cir. 1972); American Parts Co., v. American Arb. Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967); Air Prod. and Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

⁵⁴ Rite Fabrics, Inc. v. Stafford-Higgins Co., 366 F. Supp. 1 (S.D.N.Y. 1973). The court in *Rite Fabrics* considered under § 2-207 a variant term in the response which was clearly different from one in the offer, without reference to the additional/different issue. See also J.A. Maurer v. Singer Co., 7 UCC REP. SERV. 110 (N.Y. Sup. Ct. 1970) (the court characterized a limitation of consequential damages clause as an additional term without addressing the issue of the distinction).

⁵⁵ "(2) The additional or different terms are to be construed as proposals for addition to the contract." WIS. STAT. § 402.207 (1964). Identical language in IOWA CODE ANN. § 554.2207 (1967).

⁵⁶ One source indicates that the language "f.o.b. common carrier" in a response may be analyzed as either an additional or different term when the offer contained the language "f.o.b. truck." 3 BENDER'S U.C.C. SERVICE, *supra* note 44, § 3.03[1], at 3-35 to 3-36 (1973).

but contrary to a term implied by the Code⁵⁷ is a different, rather than additional, term. One court failed to consider this possibility and applied the literal language of the section holding that an express term contradicting an implied term was "additional."⁵⁸ The result is that terms which the offeror did not bother to include in the offer because they were implied by the Code would be treated differently from those where the offeror repeated the Code term expressly.

It is further disquieting to find that two of the courts⁵⁹ which have imposed a distinction between additional and different terms offered no justification whatsoever and a third, after recognizing that there was a counter argument, advanced a single, highly questionable argument as support for imposing such a distinction. The latter case, *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*,⁶⁰ cites *American Parts Co. v. American Arb. Ass'n*,⁶¹ as having limited the application of subsection (2) to additional terms because:

The policy of Section 2-207 is that the parties should be able to enforce their agreement, . . . *if enforcement can be granted without requiring either party to be bound to a material term to which he has not agreed.*⁶²

The court in *Air Products* continued:

The implication seems clear. A party cannot be expected to have assented to a different term.⁶³

In fact, the court in *American Parts* does not appear to have offered any justification for making the distinction other than the language of subsection (2). Moreover, the quote emphasized by the *Air Products* opinion refers to a "material term" and thus does not appear to be speaking to the problems under subsection (2) at all. Even if it were, the argument applies equally well to an additional term and does not justify the dichotomy between the two. Unless some policy justification relating to a significant variance between additional and different terms is advanced, there appears to be no basis for making such a distinction.

When may a court include a variant term contained in the response in a contract created under subsection (1)?

This is an issue of substantial concern to those who find themselves in the position of offeree. The offeree who makes a definite,

⁵⁷ *E.g.*, § 2-308, supplying place of delivery if not otherwise agreed; § 2-310, providing payment terms; and §§ 2-314, 2-315, implying warranties.

⁵⁸ *J.A. Maurer, Inc. v. Singer Co.*, 7 UCC REP. SERV. 110 (N.Y. Sup. Ct. 1970).

⁵⁹ *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972); *American Parts Co. v. American Arb. Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

⁶⁰ 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

⁶¹ 8 Mich. App. 156, 154 N.W.2d 5 (1967).

⁶² *Id.* at 423-24.

⁶³ *Id.* at 424.

non-conditional acceptance will be bound to a contract based on the offeror's terms, except as to variant terms contained in the response which are includable under subsection (2). The more narrowly subsection (2) is interpreted by the courts, the less likely any of the offeree's terms will find their way into the contract.

Two arguments can be advanced in favor of limiting the introduction of offeree terms into the contract. First since subsection (2) will generally apply only to questions involving terms in the printed portion of the form which are not part of the active negotiation, the offeree is unlikely to be severely disadvantaged. The underlying assumption suggesting this argument is that terms not in active negotiation are not likely to be very significant in the contract transaction. Such an assumption, however, is inconsistent with the fact that almost all of the disputes that have arisen under section 2-207 have been over rights and procedures upon breach contained in the printed portions of the forms.⁶⁴ Thus, it seems clear that a narrowly construed subsection (2) will result in the offeree losing more often in disputes deemed sufficiently important by the parties to warrant litigating the issue.

The second argument is a corollary to the first. If the issues found in the printed terms are really the important ones, then the offeree can protect himself merely by bringing them into the active negotiation, thus making the response *not* a definite expression of acceptance. Even if he is not willing to do that, the offeree can exercise the right to make his acceptance conditional thus making an express counter-proposal without having to pinpoint the precise terms he wishes accepted before he will agree.⁶⁴ This argument fails to take into account the realities of modern commercial transactions noted above. In the first place, as emphasized repeatedly, one must differentiate between issues that are important at the time of negotiation, and those that become important at the time of breach. It is the former which will be drawn into active negotiation and the latter which, by their very nature, will continue to be ignored. In the second place, the more general approach of making the acceptance conditional on the acceptance of the offeree's variant terms, no

⁶⁴ Of the twenty-five cases surveyed by the authors which directly applied § 2-207, twenty-two involved issues relating to remedies and procedures on breach; three involved inclusion or exclusion of arbitration clauses; five involved exclusion or conflict of warranties; three involved limitation of liability and one involved a unique industry risk of loss provision. Further, one of the two cases involving performance terms was the only case found which did not concern a contract between merchants, and thus it was not really a commercial form case, *See* McAfee v. Brewer, 214 Va. 579, 203 S.E.2d 129 (1974).

matter what they are, forces the offeree to run the risk of losing the deal when he does not even know which terms are a problem and does not have the time to find out.

One can argue that the failure to interpret subsection (2) narrowly ignores the traditional common law rule that the offeror is the master of his offer. If a contract is to be formed it must be on the offeror's terms. This rule is based on the view that an offeree will always know all of the terms of the offer and thus when he accepts his reasonable expectation is that he will be bound by those terms. However, the fallacy of this approach is one of the very reasons that section 2-207 was created. Because of the commercial setting, the terms involved in a later litigation will rarely be known to the offeree at the time of negotiation. Consequently, caution must be observed in drawing any conclusions that the parties have, are likely to have, or should have any *specific* expectation at all concerning "non-actively negotiated" terms.

If this view properly reflects the commercial situation, and we believe it does, then it follows that subsection (2) should be read broadly enough to include the offeree's reasonable terms at least part of the time. If this occurs, then the issue of inclusion of different as well as additional terms will become proportionately more important.

This brings us to a consideration of the meaning and application of subparts (a), (b) and (c) of subsection (2). The issue of whether the offeror has or has not objected to a specific term in the response within a reasonable time after receiving it is an easy question of fact. Subparts (a) and (b), however, offer more difficulty. To date, only one case has applied (a) directly. *In re Tunis Manufacturing Corp.*⁶⁵ involved the applicability of an arbitration clause contained in an invoice sent by the offeree in response to a purchase order. In the printed terms portion of the purchase order the offeror had stated that no change in the order could be made without the buyer's written acceptance. The court held that this language met the requirement of expressly limiting the acceptance to the terms of the offer. This decision raises the question of how far an offeror must go to be deemed to have limited the contract to only his terms. We believe, at the very minimum, the offeror should be required to make it clear to the offeree what the offeree is getting himself into if he sends a definite and seasonable acceptance. This is no more than the reverse of the obligation on the part of the offeree to make sure that the offeror knows the acceptance is conditional and the parties are not yet bound.⁶⁶ At least if the offeree is made definitely aware that none

⁶⁵ 11 UCC REP. SERV. 544 (N.Y. App. Div. 1972).

⁶⁶ See text accompanying notes 36 to 42 *supra*.
<https://engagedscholarship.csuohio.edu/clevstlrev/vol24/iss2/>

of his variant terms will be inserted in the contract because any acceptance will be limited solely to the terms of the offer, the offeree can make a commercially reasonable choice. Either, he can take the time to scrutinize both forms and identify and resolve differences that disturb him before accepting or he can make an expressly conditional acceptance containing his preferred terms which may endanger the deal. Finally, he can take his chances that no problems will arise and merely make a definite, unconditional acceptance. To ensure that the offeree will know that he must choose between these alternatives, the courts should require that the language limiting acceptance to the terms of the offer be as clear as possible and be displayed in a manner that will bring it to the attention of the offeree. In our view the best way to accomplish this would be to require that the offeror's intention must be clearly stated in the *typed* portion of the form document or in an accompanying letter.⁶⁷

Subsection (2) (b) has been the subject of far more litigation and has, at least to date, been one of the centers of controversy over the application of section 2-207. The problem is that "material" is nowhere defined in the Code. The experience under the cases has been varied and mixed to date. Some courts have found, for instance, that an arbitration clause constitutes a material variance as a matter of law⁶⁸ while another has come to the opposite conclusion.⁶⁹

Ironically, even though there are two comments to section 2-207 dealing specifically with the question of material variance, they are not in fact very helpful in indicating the intention of the drafters. Comment 4 attempts to provide guidance by citing examples of clauses

⁶⁷ The ambiguity as to when an offeror has qualified under subsection (2) (a) could be eliminated by an amendment adding the following language to the subsection:

No acceptance will be expressly limited to the terms of the offer unless the offer conspicuously contains the following language: "acceptance may occur only by returning a signed copy of this document or by performance without any further response, and acceptance may not involve any other document or terms."

Such a change would have several benefits. First, it provides the offeror with a surefire, precise method of limiting acceptance to his terms; the offeror does not have to depend upon the interpretative inclination of a court. Second, by virtue of the conspicuousness requirement and the specified language, it enables the offeree to identify those situations in which his variances will always be disallowed. If the offeree chooses to use some other document to reply, it would be proper for the courts to find no definite expression of acceptance had occurred and consider the transaction under subsection (3) if the parties perform. Finally, if the offeree responds with a different document, the offeror would be alerted to the fact that the offeree is probably suggesting other terms. This allows the offeror to choose to perform or not, as he sees fit. Subsection 2(a) only applies to situations between merchants. The imposition, if any, in requiring the use of specific language, would be consistent with the Code's basic approach of holding merchants to higher standards. The problem with this approach is that it brings into the determination of when a definite acceptance has been made under subsection (1) an additional confusing element.

⁶⁸ Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962) (dictum); *In re Barclay Knitwear Co.*, 8 UCC REP. SERV. 44 (N.Y. Sup. Ct. 1970); *Trafalgar Square, Ltd. v. Reeves Bros.*, 7 UCC REP. SERV. 712 (N.Y. Sup. Ct. 1970); *Just Born, Inc. v. Stein, Hall & Co.*, 59 Pa. D. & C.2d 407 (1971).

⁶⁹ *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC REP. SERV. 292 (N.Y. Sup. Ct. 1972).

representing material terms, while Comment 5 provides specific examples of nonmaterial terms.⁷⁰ The basic test of materiality suggested by the comments seems to be whether the terms would involve "unreasonable surprise." Yet certain of the clauses deemed material would be normal custom not likely to cause surprise to the offeror, while some of the examples of nonmaterial terms appear contrary to custom and practice.⁷¹ An additional difficulty with the use of examples to define materiality is its tendency to lead to per se rules. As aptly stated by Duesenberg and King:

What is and what is not material is an enormously complex issue, dependent upon a variety of circumstances almost as broad as human conduct itself. A variance in one situation

⁷⁰ CODE § 2-207, Comment 4:

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

CODE § 2-207, Comment 5:

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

⁷¹ See 3 BENDER'S U.C.C. SERVICE, *supra* note 44, § 3.03[1].

When closely examined, this official explanatory comment on the term "material" may create more problems in interpretation than it solves. If the examples given are to serve as guidelines for identifying what is a material term, quarrel may be raised with the inclusion among them of an additional term which is nothing more than what, without its express statement, would otherwise be implied under the Code. That is exactly what is involved when the right of cancellation in the event of a buyer's failure to pay an invoice when due is given as an example. Payment of the price when it is due is the buyer's primary obligation of performance. Additionally, Section 2-703 specifically permits a seller to cancel where the buyer, among other things, fails to make payment when due. If he does not pay when payment is due, should he be heard to assert surprise at the expressed term?

The example of the Official Comment is poor from another analytical view. If a term stated on a responsive document merely iterates what the law would otherwise impose, it is arguably not an additional term. This would be true whether the term were implied by operation of a Code section, through custom and usage, prior course of dealing, or any other means by which a matter on which the parties are silent nonetheless becomes a part of their agreement. A written provision which states what an agreement already includes is no alteration at all. If it is no alteration, it cannot be either an additional term or material.

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may be material, but not in another. Factors such as the amount involved in a transaction, both in dollars and in quantity, the posture of the parties to each other, the nature of the marketplace, custom and usage, intention, and conduct in reliance on a variance are all relevant to determining materiality, and a serious question may be raised as to the propriety of the *in vacuo* examples of the comments as guideposts.⁷²

This view deserves broad endorsement. Only by giving consideration to the whole range of factors mentioned in the above quotation, particularly custom and usage both between the parties and within the industry, can the courts fairly determine which of the offeree's terms should be turned aside as a material alteration.⁷³ Certainly, if the disputing parties in the past, or similar parties as a matter of practice, normally include the variant term in their contract, it is difficult for the offeror to argue that its inclusion will result in undue surprise. If this approach is taken, the rather large area of discretion available to the courts on this issue will not be reduced and may in fact be enlarged. Such a risk is necessary if the reasonable expectations of offerees as to their variant terms are to be served at least to some extent. The more restrictive approach will almost surely force offerees to make only counterproposals in hopes that the Code will add some of the variant terms under subsection (3) when and if the parties subsequently perform.⁷⁴ The making of such counterproposals will have the result of creating the same uncertainty during the executory phase of a transaction that existed under the common law rules, and one of the prime objectives of section 2-207 will be lost.

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This is the underlying principle of the many common law decisions which did not prevent a purported acceptance from operating as such simply because a term was added which otherwise would have been implied by law. The Comments to Section 2-207, discussing "material," seem to have slipped up by including an example which even under the strict concepts of exact acceptance under the common law would not likely have converted the acceptance into a counteroffer. And this in the Comments to a section allegedly designed to liberalize the effects of the common law mirror image rule and to clarify the pre-Code confusion!

Id. at 3-24 to -26 (footnotes omitted).

⁷² *Id.* at 3-28 to -29.

⁷³ A question of relative materiality might arise concerning this issue. It is not difficult to imagine circumstances in which a term is of considerable import to one party and of little or no import to the other. From whose perspective is the factual question of materiality to be determined? One commentator has argued, perhaps only intending to be fatuous, that the mere fact that a party seeks to litigate over a term makes it, by definition, material. Comment, *Contracts — an Interpretation of the Uniform Commercial Code Section 2-207(1)*, *supra* note 5.

⁷⁴ Such technique has been suggested by several "practical" commentaries. See, e.g., Lipman,

What is the effect of performance when no contract has been formed under subsection (1)?

This question raises the issue of the proper interpretation of subsection (3). Although the courts have yet to clearly articulate the range of alternatives, two possible approaches to the timely application of subsection (3) are discernable. The first is somewhat restrictive. It would provide that when no contract was formed under subsection (1) because the response was not a definite and seasonable expression of acceptance, and the parties subsequently performed, subsection (3) would apply. However, if no contract was formed under subsection (1) because the response, while a definite and seasonable expression of acceptance, was expressly made conditional on assent to the variant terms, the response would be treated like a common law counter-proposal and the offeror's performance would be the necessary acceptance of the offeree's terms. In this situation, subsection (3) would not apply.

The second approach to the application of subsection (3) would result in the use of subsection (3) any time no contract was formed under subsection (1) regardless of whether the failure to form a contract was because there was no definite and seasonable expression of acceptance, or because the acceptance was conditional and the parties then performed. Leaving aside for a moment the question of which is the better approach, it should be noted that when subsection (3) applies, it provides that the contract will consist of the terms on which the writings of the parties agree and will be supplemented, where necessary, by terms provided by the Code.

Three cases, *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*,⁷⁵ *Universal Oil Products Co. v. S.C.M. Corp.*⁷⁶ and *Bickett v. W.R. Grace & Co.*,⁷⁷ seem to be examples of the first approach although the court opinions do not expressly consider the problem in the context of subsection (3). In each case the court found that a counter-proposal had been made and, thus, no contract had been created under subsection (1). The courts then determined that the counter-proposals had been accepted by the offeror's actions⁷⁸ in accepting the goods and the contract was formed on the terms contained in the counter-proposal. Two other cases, *Bauer International Corp. v. Eastern Township Produce, Ltd.*⁷⁹ and *Jones & McKnight Corp. v. Birdsboro Corp.*,⁸⁰ refer to

⁷⁵ 297 F.2d 497 (1st Cir. 1962).

⁷⁶ 313 F. Supp. 905 (D. Conn. 1970).

⁷⁷ 12 UCC REP. SERV. 629 (W.D. Ky. 1972).

⁷⁸ In *Universal Oil Products Co. v. S.C.M. Corp.*, 313 F. Supp. 905, 906 (D. Conn. 1970), the court cited § 2-206 as the basis for finding acceptance of the counter-proposal.

⁷⁹ 4 UCC REP. SERV. 735 (N.Y. Sup. Ct. 1967).

subsection (3) in situations involving exchanged documents containing similar terms. In both cases the court's opinion notes that the exchange may have satisfied subsection (1), but then goes on to state that a specific finding of the applicability of subsection (1) is not necessary because the same result would be obtained under subsection (3). Neither case, however, addressed the counter-proposal followed by performance issue directly.⁸¹ Thus, there is some case law supporting the first approach.

Little authority presently exists in favor of the second approach. On the face of the subsection itself, no distinction is made between writings which did not create a contract under subsection (1) because there was no definite acceptance, and those where there was a conditional acceptance creating a counter-proposal. Subsection (3) says only "although the writings of the parties do not otherwise establish a contract."⁸²

Two circuit court opinions, *Dorton v. Collins*⁸³ and *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*,⁸⁴ have discussed generally the proper application of subsection (3). In both, however, the contract was found on the basis of actual agreement of the parties and thus the court's comments are merely dicta. The court stated in *Dorton*:

Conversely, when no contract is recognized under Subsection 2-207(1) — either because no definite expression of acceptance exists *or*, more specifically, because the offeree's acceptance is expressly conditioned on the offeror's assent to the additional or different terms — the entire transaction aborts at this point. If, however, the subsequent conduct of the parties — particularly, performance by both parties under what they apparently believe to be a contract — recognizes the existence of a contract, under Subsection 2-207(3) such

⁸¹ Although § 2-207(3) was not cited in *Joseph Muller Corp. Zurich v. Commonwealth Petrochem.*, 334 F. Supp. 1013 (1971), for this proposition, arguably it could be considered an example of the first approach. In this case Muller was seeking to compel arbitration. The court held that Commonwealth's response to Muller's contract form was a counter-proposal which encompassed all of the correspondence between the parties, and that Muller's shipment was acceptance of that counter-proposal. Yet the support this case provides for the first approach is tenuous since the clause in question, arbitration, actually appeared in Muller's contract and was not expressly included in Commonwealth's alleged counter-proposal. Thus, this is not really an example of the last shot approach. Actually it appears that the court is merely trying to develop an approach which will allow inclusion of arbitration to which the court believed both parties had agreed.

⁸² This is repeated again in Comment 7.

In such cases, *where the writings of the parties do not establish a contract*, it is not necessary to determine which act or document constituted the offer and which the acceptance. The only question is what the terms are included in the contract, and subsection (3) furnishes the governing rule.

CODE § 2-207, Comment 7 (citation omitted) (emphasis added).

⁸³ 453 F.2d 1161 (6th Cir. 1972).

⁸⁴ 404 F.2d 505 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

conduct by both parties is sufficient to establish a contract, notwithstanding the fact that no contract would have been recognized on the basis of their writings alone. Subsection 2-207(3) further provides how the terms of contracts recognized thereunder shall be determined.⁸⁵

Similarly, language in the *Construction Aggregates* opinion⁸⁶ indicates that in the case of an express counter-proposal, subsection (3) would apply.⁸⁷

It appears that the courts have been reluctant to directly apply subsection (3). Instead they have strained to find either outright agreement concerning the disputed terms or the formation of a contract under subsection (1) thereby causing subsection (2) to come into play to determine the appropriate term. In fact, of the 25 cases discovered by the authors applying section 2-207 directly, not a single case clearly applied subsection (3) as the sole basis for finding a contract.

Upon substantial reflection, we believe that the second approach of applying subsection (3) to every case where the writings did not create a contract under subsection (1)⁸⁸ is the sounder approach.

Perhaps the strongest argument in favor of the first approach is that when the offeree has made his acceptance expressly conditional

⁸⁵ 453 F.2d 1161, 1166 (6th Cir. 1972) (emphasis added).

⁸⁶ 404 F.2d 505, 509-10 (1968):

Section 2-207(3) recognizes that the subsequent conduct of the parties can establish a contract for sale. Since CAC's July 3 purchase order and H-R's July 20 counter offer did not in themselves create a contract, Section 2-207(3) would operate to create one because the subsequent performance by both parties constituted "conduct by both parties which recognizes the existence of a contract". Such a contract by operation of law would consist only of those terms on which the writings of the parties agree together with any supplementary terms incorporated under other provisions of this act" Here, however, there is no occasion to create a contract by operation of law in default of further action by the negotiating parties, for CAC can be said to have accepted the terms of H-R's counter-offer.

⁸⁷ It has been suggested by two commentators, W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964) and Murray, *supra* note 3, that under some circumstances involving a precise, clear counter-proposal, when the original offeror later performs, he should be held to have accepted the terms of the counter proposal. Even assuming that one can sensibly differentiate between a "clear" counter-proposal, where last shot applies, and an "unclear" counter-proposal, where subsection (3) would apply, the authors believe this approach does not square with the realities of the modern commercial transaction. Interpretation of § 2-207 should be based on an assumption that the parties *do not* read the documents sent to each other. Therefore, even if the offeree has made a clear counter-proposal, it is not necessarily valid to presume that the offeror would be responding solely to that document and not the entire transaction. This is particularly true where the offeree immediately performs as part of the response. In such a factual setting, it is even more unlikely that the offeror will carefully read the response.

⁸⁸ Of course, subsection (3) would not apply to the situation where there was only one document and, in response to it, the other party performed. In such a case it is fair to assume that the performing party is agreeing to the terms in the single document since

in a clear, conspicuous manner⁸⁹ the offeror is aware of the situation and if he thereafter performs it can be assumed he is responding to the terms in the counter-proposal and accepting them. The difficulty with this argument is that it assumes that the offeror will recognize that the response is a conditional acceptance rather than an indefinite expression of acceptance. To base ultimate contractual rights on this extremely nebulous distinction would introduce the grossest kind of uncertainty into the commercial process. In addition, there is a real question of whether the original offeror's performance should be viewed as directed solely at the expressly conditional acceptance. Presumably the original offeror can expressly accept the additional terms in the conditional acceptance if that is his intention. By its nature this situation will involve prior documents by both sides. Thus, the performance after the expressly conditional acceptance should be viewed as being in response to the *entire exchange* between the parties and not just in response to the last writing.

To take the first approach is to allow the offeree to place himself in the more favorable position merely by having written the last document. This would represent a return to the pre-Code policy of "last shot" analysis. The better alternative is to construct a non-preferential contract whenever formation results from the equivocal act of performance. One can argue that such an approach is more likely to coincide with the parties actual expectations, thus serving the general commercial interest.

On the other side, the risk from applying subsection (3) to all cases where the writings do not create a contract under subsection (1) seems small. At the very most, the offeree will have to accept the provisions supplied by the Code. And if the authors' position as to the applicability of course of dealing and usage of trade suggested *infra* is adopted,⁹⁰ these very provisions are likely to be the ones the parties would have expected to control.

If the offeree is so concerned about the inclusion of his terms, he can always refuse to perform until he has the clear unequivocal assent of the offeror to his terms. Subsection (3) will not apply until the offeree also performs. Thus, if the offeree chooses to perform, he should be exposed to the same risks of performance without agreement as is the offeror.

Two final issues should be noted in the operation of subsection (3). First, what constitutes conduct sufficient to recognize the existence of a contract? Certainly it must, by the terms of subsection (3), be by "both parties." Action by only one clearly does not show the

⁸⁹ See text accompanying note 41-42 *supra*.

⁹⁰ See text accompanying notes 92 to 99 *infra*.

intention of the non-acting party. One commentator suggested that the joint action can be less than delivery, acceptance and payment.⁹¹ At the very least, the conduct by each party should be sufficient to make it clear to the other that both believe a contract has been made.

The second issue involves the meaning of the language "together with any supplementary terms incorporated under any other provisions of the Act."⁹² To the extent there has been consideration of this issue, both the courts and the commentators have interpreted this language literally. Thus, if the contract has been formed under subsection (3) and a term exists in only one document, it is excluded from the contract unless the Code provides that the term would have been implied in a contract which is silent on the issue.⁹³ We believe that this is a much too restrictive view. In the same way that we urged consideration of all of the surrounding circumstances, particularly usage of trade and course of dealing, to determine materiality in subsection (2), we suggest that usage of trade and course of dealing should help determine the terms incorporated by the Code under subsection (3). If the parties had in the past arbitrated their differences, or if it is standard in the industry to do so, should one party be able to contend that arbitration should not be a term in this transaction simply because the contract is formed by conduct under subsection (3) and the Code does not by its terms impose arbitration?

Although no court has, as yet, taken this approach,⁹⁴ we believe it is totally consistent with the language of subsection (3). Subsection (3) calls for addition of terms "incorporated under any other provisions of this Act." In section 1-205, subsections (1)⁹⁵ and (2)⁹⁶ define course of dealing and usage of trade. Subsection (3) of section 1-205 then states:

⁹¹ Lipman, *supra* note 3.

⁹² CODE § 2-207(3).

⁹³ This is the approach taken by the District Court, as reported in *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972), where the arbitration clause was in only one document and the Code did not imply it. The Circuit Court quoted the District Court as follows:

[T]he U.C.C. does not impose an arbitration term on the parties where their contract is silent on the matter. Hence, a conflict between an arbitration and an (sic) no-arbitration clause would result in the no-arbitration clause becoming effective.

Id. at 1165.

⁹⁴ *But cf.* *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66 (Me. 1974); *Oskey Gas. & Oil Co. v. OKC Ref. Inc.*, 364 F. Supp. 1137 (D. Minn. 1973).

⁹⁵ CODE § 1-205(1):

A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

⁹⁶ CODE § 1-205(2):

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it

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A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and *supplement* or qualify terms of an agreement.⁹⁷

Similarly, section 2-208 involves the use of the two terms as integrated interpretative tools.

If this approach is taken, the contract resulting from application of subsection (3) is more likely to be a non-preferential one. If course of dealing or usage of trade is ignored, the contract is likely to favor the buyer. This results from the fact that the Code, while recognizing that the parties could generally take any approach they wanted by express agreement, implies terms favorable to the buyer when no agreement exists. For example, while the Code recognizes that warranties can be excluded or modified,⁹⁸ if there is no such exclusion, full warranties of merchantability and fitness for a particular purpose will be implied.⁹⁹ Thus, an order for goods with no reference to warranties followed by a response using clear counter-offer language which includes disclaimer of warranty terms will result in no contract under subsection (1). If the parties then perform and subsection (3) is applied, the contract formed under subsection (3) under the restrictive view presently taken by the courts will exclude the offeree's disclaimer since there is no agreement between the writings, and insert instead the implied warranty terms. While it may be the proper approach to favor warranties in most cases when the parties have not agreed on the issue, there are at least some occasions when the normal practice in the industry is to exclude warranties — particularly between merchants — because of the nature of the goods sold.¹⁰⁰ In those circumstances the usage of trade should supply the disclaimer term. An equally compelling argument could be made in the case of an arbitration clause found in a counter-proposal.

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will be observed with respect to the transaction in question. The existence and scope of such usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing, the interpretation of the writing is for the court.

⁹⁷ CODE § 1-205(3) (emphasis added).

⁹⁸ CODE § 2-316.

⁹⁹ CODE §§ 2-314, 2-315.

¹⁰⁰ *Bickett v. W.R. Grace & Co.*, 12 UCC REP. SERV. 629 (W.D. Ky. 1972) is an example of this problem. The offeror Bickett sent an order for seed to the offeree W.R. Grace & Co. Grace responded by shipping the seed and attaching a tag which, consistent with the practice in the industry, stated that all warranties were disclaimed and the buyer was to return the seed unopened if he did not agree to these terms. Bickett used the seed and later sued on implied warranties. The court held that the tag constituted a counter-proposal and then applied the last shot doctrine. Presumably, a problem troubling the court was that if it applied subsection (3), it would have to exclude the disclaimer term. If the approach we have suggested is followed the court could have included in the subsection (3) contract the disclaimer clause because of the normal usage of trade.

Proposed Model for Interpretation of Section 2-207

The extended discussion in the preceding section substantiates the fact that the interpretation and application of section 2-207 has caused the courts considerable difficulty. These difficulties have manifested themselves in a number of ways. Some courts have interpreted the same language of the section differently,¹⁰¹ some have applied the section without reference to issues considered necessary by other courts in cases with similar fact settings,¹⁰² and some have ignored the section altogether.¹⁰³ There have been many disappointing opinions and unsatisfactory results, with the ultimate effect being a composite group of cases exceptionally difficult to compare. A major factor contributing to the extraordinarily erratic development of the law of section 2-207 has been the plethora of possible issues, which led to considerable variance in the the central issue being litigated in a given case. Moreover, the courts have demonstrated an understandable tendency to develop the pivotal issue involved in the case before them at great length, leaving the reader to make assumptions and guesses concerning the necessary but unarticulated underlying findings.

We believe that a standardized decisional format should help bring increased direction to the formation of the law and greater certainty to its interpretative application. The following model proposes steps that judges should follow in their initial analysis and the findings they should summarize in their written opinions in *every* section 2-207 decision. We have avoided a lengthy philosophical discourse concerning the concept of a decision-making/opinion-writing model. The pros and cons of such a model are obvious; the brief discussion above should suffice to establish the relevancy of such an approach in this context.¹⁰⁴

Step 1: Does the situation involve a response to an offer or written confirmation?

The first determination must be whether the situation involves an offer and response or a prior contract with a written confirmation. As indicated above¹⁰⁵ the inclusion of the concept of written con-

¹⁰¹ Compare, e.g., *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968), with *Bickett v. W.R. Grace & Co.*, 12 UCC REP. SERV. 629 (W.D. Ky. 1972), on the issue of what constitutes a counter-offer under § 2-207.

¹⁰² Compare, e.g., *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC REP. SERV. 292 (N.Y. Sup. Ct. 1972), with *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

¹⁰³ See, e.g., *Joseph Muller Corp. Zurich v. Commonwealth Petrochem., Inc.*, 334 F. Supp. 1013 (S.D.N.Y. 1971).

¹⁰⁴ See Dunfee & Stern, *Potential Competition Theory as an Antimerger Tool Under Section 7 of the Clayton Act*, 69 NW. L. REV. _____ (1975) for a similar proposal concerning the application of section 7 of the Clayton Act to potential competition conglomerate mergers.

¹⁰⁵ See text accompanying notes 44 to 50 *supra*.

firmations in subsection (1) was to give the courts a procedure for handling additional or different terms contained in a document sent after a contract was formed. Therefore, if the issue in litigation is whether terms found in a written confirmation are part of the contract, then the court need not consider further the contract formation provisions of subsection (1) and should proceed to steps 4-7, *infra*.¹⁰⁶

If an offer and response situation is involved, it is necessary for the court to determine which is the offer document and which is the response. This may be difficult in some cases where there has been an exchange of multiple documents, but such a step is necessary if the court is to determine whether or not there has been an acceptance and on which party's terms. Once this factual issue has been resolved, the court should proceed to Step 2.

Step 2: Is the response a definite and seasonable expression of acceptance?

In resolving this question the court should consider the factors suggested in the preceding section of this article. In particular, language contained in the typed portion of the response should be compared with that of the offer. If the offer and response agree as to the material items and indicate that the parties assent thereto, that will strongly indicate that the response is an acceptance. Additional factors which should be considered, but should not in themselves be controlling, include the use of acceptance language and/or a document commonly used in the trade as an acceptance.

If this question is answered affirmatively, a contract would be created based on the offeror's terms as modified by Steps 4-7, *infra*, unless the question in Step 3 is also answered affirmatively. If this question is answered negatively, no binding contract exists and during the executory phase of the transaction either party had the opportunity to withdraw with impunity. If the parties have performed subsequent to an exchange which failed to satisfy subsection (1), subsection (3) might apply and the court should proceed to Step 8.

Step 3: Is the acceptance expressly made conditional on assent to the variant terms which it contains?

The express counter-proposal must be just that — expressly stated, clear and unambiguous. When letters and other non-form documents are used, the usual principles for interpretation of contractual language should be applied to determine objectively the intent of the writer. Printed provisions on documents ordinarily used to accept offers, however, should not be found to constitute counter-offers. The document should either be clearly identified as a counter-offer document and not look like an acceptance form, or it should contain non-

¹⁰⁶ Many of the written confirmation situations will turn on the question of fact of whether or not the alleged additional terms were part of the oral understanding of the parties.

printed, conspicuous language expressly stating the conditional nature of the acceptance.¹⁰⁷ If an express counter-offer is found, then the counter-offeree may accept the counter-offer only by express statement and not by performance standing alone. Such a requirement avoids the arbitrary preference of the last shot approach. If there is no express acceptance, there will not be a binding contract during the executory phase of the the transaction. If the parties thereafter perform, subsection (3) might apply and the court should proceed to Step 8. If the court finds that the acceptance is not conditional, it should proceed with Step 4.

Step 4: Is the transaction between merchants?

This question must be determined under the definitional language of section 2-104(1) and (3) of the Code.¹⁰⁸ If the contract is not between merchants, then the additional terms are merely proposals and are excluded under subsection (2) unless expressly agreed to by the original offeror.¹⁰⁹ If the contract is between merchants the variant terms¹¹⁰ in the acceptance automatically become part of the contract unless any one of the questions in Steps 5, 6 and 7 are answered affirmatively. Thus, once the contract is determined to be between merchants the court must consider all three of the next steps.

Step 5: Has the offer expressly limited acceptance to its terms?

As with the determination of whether or not an express counter-offer has been made under Step 3, the court should only give effect to clear, unambiguous *non-printed* language, either in the typed portion of the offer document or in a covering letter. If the answer is in the affirmative the court is finished and a contract exists solely on the terms contained in the offer. If the answer is in the negative the court should proceed to Step 6.

Step 6: Do the variant terms materially alter the contract?

The question should be treated as one of fact. Relevant factual considerations include the economic value of the variant terms as compared to the contract as a whole, consistency of the term with

¹⁰⁷ For an extended discussion of this point, see text accompanying notes 36 to 43 *supra*.

¹⁰⁸ CODE § 2-104:

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(3) "Between merchants" means any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

¹⁰⁹ *McAfee v. Brewer*, 214 Va. 579, 203 S.E.2d 1209 (1974).

¹¹⁰ We have used the phrase "variant terms" here so as not to raise again the issue of additional versus different terms. For our views on this, see text accompanying notes

any prior course of dealing between the parties, consistency with industry trade practices, and the context of the negotiations themselves.¹¹¹ In addition, the courts should avoid at all costs using per se rules in resolving questions of materiality. The court should attempt to make this determination as of the time of the formation of the contract. The question should be: if the conflict between the terms of the offer and the response had been raised at the time of negotiation rather than when an alleged breach had made them extremely important, would the offeror have considered them non-material and agreed to include them? Otherwise, the fact that the term is the subject matter of litigation is likely to result in an almost automatic conclusion that the term is material resulting in its exclusion from the contract.

If the answer to the question in Step 6 is affirmative the court is again finished and the contract is based solely on terms of the offer. If the answer is negative the court should proceed to Step 7.

Step 7: Has an objection to the variant terms been made by the offeror?

To the extent that this refers to objection by the offeror after receipt of the acceptance, it is a simple question of fact. The objection must have been forthcoming within a reasonable time after notice of the variant terms was received. The meaning of notification of objection to a specific term prior to notice thereof being received is more obscure. As in Steps 5 and 6, if the court answers the Step 7 question in the affirmative, the variant terms do not become part of the contract. If the answer is in the negative, the variant term has met the test of Step 5, 6 and 7 and is included as part of the contract. In either case the court is finished and the terms of the contract are determined.

Step 8: Has there been conduct by both parties which recognizes the existence of a contract?

A court will reach this step only if the response either was not a definite expression of acceptance under Step 2 or was expressly made conditional in Step 3. When either of these situations occurs the court must determine if both parties have shown by their conduct that they believed there was a contract.¹¹² If the court finds no such conduct, that ends the inquiry and there is no contract. If such conduct has occurred the court proceeds to Step 9.

¹¹¹ See text accompanying notes 68 to 73 *supra*.

¹¹² See text accompanying notes 91 *supra*.

Step 9: Which contract terms appear in the documents of both parties?

In this step the court merely compares the terms of each party's document(s) and strikes out any term that does not appear on *both sides*. The concurrent terms become part of the contract.

Step 10: What contract terms are missing and what terms would be implied by the Code?

If a contract term that will resolve the dispute between the parties is missing after Step 9, the court must supply it by reference to the Code provisions. In so doing the court should not merely supply terms generally implied by the express provision of the Code, but should also consider the prior course of dealings between the parties or the usages of trade in the industry to help determine what terms should be supplied. To the extent that the course of dealing or usage of trade would supply a different term than the normal implied Code term, the course of dealing or usage of trade should take precedence.¹¹³

Once the court has finished this step it has completed the model and the applicable terms of the contract are determined.

A Suggested Statutory Revision

The preceding sections of this article discuss at length preferred resolutions of the interpretive problems presented by section 2-207.¹¹⁴ The analysis culminated in a model for court decision-making, which, if followed, should result in decisions evincing greater consistency and fairness than existing case law. Particular emphasis has been placed on the expanded use of subsection (3). In addition, it has been argued that course of dealing and usage of trade should be used as important factors in determining what terms will become part of the contract formed under either subsection (1) or subsection (3).

However, there are problems with placing a continuing reliance on the existing section. First, the present language is at best ambiguous and there is little assurance that the courts will rigorously and consistently consider all the appropriate issues in section 2-207

¹¹³ See text accompanying notes 93 to 99 *supra*.

¹¹⁴ The central factual question will typically be the problem of which terms will be included in a contract formed under § 2-207. Based on the cases decided to date, there have only been three, *Oskey Gas. & Oil Co. v. OKC Ref., Inc.*, 364 F. Supp. 1137 (D. Minn. 1973); *American Parts Co. v. American Arb. Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967); *Bauer Int'l Corp. v. Eastern Twp. Prod., Ltd.*, 4 UCC REP. SERV. 735 (N.Y. Sup. Ct. 1967), where a party was attempting to get out of a contract on the theory that there had been no agreement on the terms. Of the three, only *Bauer* came up in the truly executory stage of the transaction; the other two transactions broke down only after substantial performance. The vast majority of the cases involved the question of what terms were to be included in a contract formed under subsection (1) or (3). The conclusion that must be drawn from this is that the real problem is not in creating binding contracts — since the parties almost always perform there is at least a contract under subsection (3) — but rather which terms will be included or excluded from the contract.

cases and then resolve those issues in a manner consistent with proper commercial policy. Moreover, even if every court could be persuaded to follow the model set out in the preceding section, the basic structure of subsection (2) would continue to affect an arbitrary preference for the offeror at least some of the time.

This likely preference in favor of the offeror results from the fact that the section is couched in terms of offeror and offeree. The "variant terms" are, by definition, those of the offeree and the basic purpose of subsection (2) is to determine whether or not they are included in the contract. As analysis in this article demonstrates, in most cases the offeree's terms will not be included.¹¹⁵ Certainly one reason behind the change from the old mirror image rule to that of section 2-207 was that the parties to a commercial transaction dealt in form documents and thus, at least as to the printed terms, did not know, or very much care at the time of negotiations, what was in them. Under such circumstances it made little sense to allow a party out of a contract when there had been agreement as to the terms under active negotiation merely because there were differences in the printed terms. Such reasoning, however, also points up the fallacy in assuming that the offeror knows or cares more about his printed terms than the offeree. In fact, it is more likely that the parties are essentially interested in making a deal and having assurances that the goods will be delivered and accepted. Further it is reasonable to assume that as to the balance of the terms contained in the printed portion, the parties (to the extent they consider them at all) expect that the printed terms which applied in prior dealings between them, or in like contracts between like parties, would also prevail in this transaction. If these standards did not resolve the issue, the parties would expect the courts to select a fair and reasonable term.

The most direct and effective way to remove the ambiguities of section 2-207 and simultaneously ensure the elimination of an arbitrary preference for either the offeror or offeree¹¹⁶ is by proposing a new statutory draft for consideration by the Commission on Uniform State Laws and the respective state legislatures.

¹¹⁵ The decided cases under section 2-207 indicate that care should be taken to avoid the assumption that the seller will almost always be the offeree. In four of the cases the opinion never made clear which party was the offeror. In those cases where a conclusion has been reached on the issue (in several cases the court did not formally identify the acceptor/offeree, but a reasonable conclusion could be drawn by inference) the seller and the buyer were the offeror approximately an equal number of times. Certainly future data may change this result, but on the information thus far, policies should not be formulated, nor specific judicial decisions made, based on an assumption that the seller will nearly always be the offeree (or offeror).

¹¹⁶ Many commentators have criticized general preferences in favor of the offeror. See, e.g., Note, *In Defense of the Battle of Forms*, *supra* note 4. While it has received the name "first shot" approach this is somewhat of a misnomer since it implies that first shot is the opposite of the "last shot" approach under the common law. This is not really the case. The last shot doctrine was applied when the writings did not form a contract while first shot under § 2-207 refers to the preference for the offeror when the parties exchange does form a contract.

Generally, the proposed revision would create a contract when the parties agree concerning all of the material terms under active negotiation, and neither party has expressly indicated that he wants to be bound only if his terms apply. The contract thus formed would protect the parties' expectation during the executory stage of the transaction in a manner similar to that of the present statutory scheme. However, the proposed revision differs significantly from the present statute in that the terms of the contract would be determined in all cases in a *non-preferential manner*. The interpretive method would be similar to the approach taken under subsection (3) of the present section 2-207. That is, the terms would be those on which the parties agree plus usage of trade as modified by prior course of dealing between the parties. If usage of trade and prior course of dealing would not supply all of the necessary terms, then the Code would be used to supply the balance.¹¹⁷

If the parties do not agree concerning all the material terms under negotiation or if either party expressly indicates that he wishes to be bound only on his terms, no contract is formed, and, as with the present section, the parties forego contract protection during the executory phase of the transaction. If the parties then perform, a contract is created. Again, the contract would be based on non-preferential terms, *e.g.*, those on which the parties have agreed plus usage of trade as modified by a prior course of dealing between the parties. If any term necessary for determining the obligations of the parties is still missing, it will be supplied by the Code.

The basic thrust of the revision is to create non-preferential contracts in every case where the courts, rather than the parties, are supplying the necessary terms. The language of such a revised section would read as follows:

Formation of Contracts — Variant Terms in Offer and Response

(1) Subject to any other requirement of this Act for the formation of a contract, an exchange between parties which agrees as to material terms actively under negotiation, establishes a contract even though a writing of one party states terms additional to or different from the terms of the other party; unless either party states expressly in writing that there is no intention to be bound except on the terms contained in that party's writing. Such intention not to be bound will be deemed to be expressly stated only when:

¹¹⁷ If there is no course of dealing or usage of trade on which to rely, then the choice of terms made by the drafters of the Code should be considered the fairest and most reasonable approach under the circumstances.

- (a) the following words are contained in conspicuous language, in a writing sent to the other party: “(*Insert name of party*) intends to be bound only on all of the terms, both typed and *printed*, contained in this writing and no other document will establish terms under this contract,” and
- (b) these words are *not* part of the printed portions of the writing.

(2) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract even though a contract has not been established under subsection (1).

(3) The terms of a contract established under subsection (1) or (2) will consist of those terms on which the parties have agreed and, to the extent necessary to interpret the contract, terms supplied by the usage of trade as modified by any course of dealing between the parties, together with any supplementary terms incorporated under any other provision of this Act. To the extent that the supplementary terms incorporated under any other provision of this Act and the usage of trade as modified by any course of dealing between the parties cannot be construed consistently with each other, the usage of trade as modified by any course of dealings between the parties will control.

Although on first impression this revision may seem radical, the proposal retains that which is salutary in the present provision, and corrects many of the problems discussed in prior portions of this article. Initially, the revised statute is not couched in terms of whether or not there has been an effective acceptance as is the case with the present provision. Rather, the approach zeros in on the fundamental issue — whether or not there is a contract when parties send documents to each other which do not mesh exactly. The proposed revision eliminates use of the concepts of offer and acceptance and interposes a transactional approach. Emphasis upon the characteristics of the entire bargaining exchange is necessary to prevent summary preference of one party based solely on his characterization in the litigation process as offeror or offeree. When results are dependent upon this characterization, the parties (directed by counsel) are likely to engage in ritualistic steps in a battle to obtain the preferred legal status position. Many of the famous examples of the battle of the forms have been nothing more than this. The proposed approach seeks to avoid decisions based on legal formalisms and to emphasize instead the *commercial* nature of the transaction and the expectations that **flow therefrom.**

The manner in which this change of emphasis is achieved can best be understood in the context of the precise language of the revision. The introductory phrase of subsection (1): "Subject to any other requirement of this Act for the formation of a contract," was inserted to make clear that the revised section is not the sole basis for determining the existence of a contract.¹¹⁸ For example, this language would forestall the argument that the provisions of section 1-103 relating to supplementary general principles of law no longer apply to the determination as to whether or not a contract exists. Another situation in which this language would apply occurs where a court determines that one or both of the parties considered their exchange merely preliminary negotiations even though they technically had agreed on the material terms actively under negotiation.

Assuming all other requirements for contracts are met, subsection (1) of the proposed revision provides for formation of a contract even though the exchange between the parties includes additional or different terms, in much the same fashion as the present section. However, the test of agreement is changed. The existing provision requires a finding of a "definite acceptance" without giving any definitional guidance as to what constitutes a definite acceptance. The language of the new section affords a specific test which is consistent with the concept found in Comment 2 of the present section, *i.e.*, a contract exists when the parties think they have a deal in the commercial sense of that word. The pertinent language provides that the contract is formed when the "exchange between the parties . . . agrees as to material terms actively under negotiation."¹¹⁹ Under this approach a court must initially identify the material terms about which the parties are seriously concerned at the time of negotiation and then determine whether the parties have agreed to all such terms.¹²⁰ Normally, the negotiated material terms will be contained in the typed portion of a form document, but they may also be found in an accompanying letter or even be made orally.¹²¹ The reference to "material" terms in the section permits a court to find agreement on the terms under active negotiation even though some minor term, such as shipping instructions, was included in the typed portion of only one document. In this setting, one useful test of a "material term" would be to

¹¹⁸ The first question that must be disposed of in litigation in this area would be whether or not the revised § 2-207 would apply to the factual situation in litigation. The title of the proposed revision indicates that there must be variant terms in the response in order that the section apply — otherwise §§ 2-204 and/or 2-206 control.

¹¹⁹ *Accord*, *e.g.*, Lipman, *supra* note 3; Murray, *supra* note 3.

¹²⁰ Code provisions which add missing terms, such as §§ 2-305, 2-306 and 2-308, would still apply. Here the court is concerned solely with whether or not there is agreement concerning the material terms the parties have actually raised in active negotiation.

¹²¹ Any intention that there was no agreement on an oral term actively under negotiation will, of course, be subject to the provisions of the parol evidence rule. CODE § 2-202.

determine if it had significant economic import in the context of the bargain between the parties.

The language of the proposed revision indicates that a contract is formed at the moment agreement on the terms under active negotiation is reached. This relieves the court from the burden of determining for *contract creation purposes* the meaning of subsequent documents. Agreement could be established on the basis of an oral exchange or an oral statement by one party and a document by the other as well as by the exchange of two or more documents. This does not mean, however, that once agreement has been found all future documents would be ignored. Rather, the effect of any additional or different terms contained in any additional documents would be considered under subsection (3).

Subsection (1) does not provide what the terms of a contract formed thereunder would be, except as to the material terms actively under negotiation, which are obviously included. Determination of the terms is made pursuant to subsection (3) of the revision.

The second half of subsection (1) of the proposed revision is identical in intention to the "unless . . . expressly made conditional" language in the present provision, *i.e.*, the parties are given the opportunity to insist on inclusion of their form terms before they will be bound. It is unlikely that this portion of the revision would see much use since its only effect is to forestall formation of a contract during the executory phase. If the parties later perform, their position will be unaffected by any indication of their intention to be bound only on their own terms. That is, on performance, the terms of the contract will still be nonpreferential terms under subsection (3) of the revision. Thus a party will condition his document only if he intends to resolve any differences prior to performance. If he conditions his document as a matter of course in every transaction, intending merely to perform in any event, he loses the protection of a binding contract during the executory phase of the transaction without gaining any advantage. Our intention is to give the party who truly wants to negotiate the printed terms *before* he is bound the right to do so. But that right exists only up to the point of performance. Once the party performs, he becomes bound to a non-preferential contract as though he had not exercised this option. Thus the often unproductive "battle of the forms" strategies will be rendered ineffective because a party cannot cause his terms always to prevail by the mere use of certain "magic" words. Instead, a party can ensure that his terms control only by obtaining the other party's express agreement to them.

The balance of subsection (1) of the proposed revision establishes the method by which a party must give notice of his intention to be bound only on the terms contained in his own document, if he wishes

such intention to be effective. Subparts (a) and (b) require the use of precise unqualified language which is conspicuous and cannot be printed. The requirement of standardized, conspicuous language maximizes the likelihood that the party using the language actually intends to make a conditional response, and that the party receiving such a document would see the conditional language and, more importantly, understand its legal implication. Since the use of such language by one party precludes the formation of a contract prior to appropriate performance by both parties, it is important that the receiving party recognize the nature of this language so that he can move to protect himself against the possibility of withdrawal from the transaction by the other party. Additionally, the requirement that a party use precise language makes a court's determination of whether or not there has been a conditional response a simple issue of fact. Either the exact language was used and in the proper fashion, or it was not.

This approach may seem somewhat inflexible since it requires a party to act in such a precise way. It can be argued that this is the very problem the drafters sought to avoid when they replaced the mirror image rule with section 2-207. In this case, however, one must balance the utility of the approach with the actual dangers. First, as discussed above, it is likely to see little use. Second, if there is an attempt to use it and the conditions of response are not met, the party concerned about obtaining favorable terms, thinking he had successfully conditioned his response, would surely contact the other party. It would do him no good to await performance. When such contact took place, the parties would resolve their differences and each side would be satisfied. In the event such contact did not occur, the parties would be bound only to a non-preferential contract. In either event, some inflexibility is surely a small price to pay for an approach that eliminates the costly and litigation-producing battle of the forms.

Subsection (2) of the proposed revision provides that when the parties have either failed to agree on the material terms under active negotiation or one or both parties have made conditional responses, and they later perform, this performance will establish a contract. This is much like the provision contained in subsection (3) of the present section. As is the case under subsection (1), the terms of the contract formed under subsection (2) will be determined under subsection (3) of the proposed revision.

Subsection (3) of the proposed revision utilizes essentially the same approach for determining the terms of a contract formed under subsection (1) or (2) as the present section uses for contracts formed only by performance. That is, the terms are those on which the parties agree, supplemented by terms inserted by the court. However, the proposal expressly augments the sources of such terms to include course of dealing and usage of trade in addition to supplementary terms provided in the Code.

One could argue that compelling the use of these additional sources interjects further uncertainty. For example, how does one determine the usage of trade when the parties' documents contain different terms, or it is a one shot transaction, or the parties have different trade practices because each is in a different "industry"? The authors admit that these represent difficult factual questions for the courts. However, these are the very problems with which courts contend every day. As with any statutory language, these issues will have to be resolved in specific adversary cases. The important fact still remains that if courts can identify a course of dealing or usage of trade relevant to a transaction then it should become part of the agreement. In addition, if a court can not find a course of dealing or usage of trade, the parties are no worse off than they are under the present statute. The court merely falls back on the terms provided by the Code. If anything, this approach is more certain in the sense that it is more likely to result in a contract with terms closer to the expectations of both parties.

Under the proposed subsection (3), course of dealing, usage of trade and supplemental Code terms will apply to an express agreement carefully negotiated between the parties. Again, it might be argued that the proposed revision thus adds unnecessary uncertainty to express agreements. Such a criticism is inappropriate. First, the parties can easily exclude course of dealing and usage of trade by an express clause to that effect if they so desire. Second, the Code already implies a number of terms which can control express agreements unless explicitly excluded. Thus, the approach is hardly novel.

The proposed provision has a number of advantages. A court no longer must determine whether or not a variant term is material or nonmaterial. Express terms are only included if they are agreed to by both parties. All other necessary terms must be implied by course of dealing, usage of trade or Code provisions. The proper question, provable on the basis of factual evidence, is whether or not the "extra" term would normally be found in this type of transaction. If such a term had normally been included in prior dealings between the parties or would normally be included in this type of transaction, the term would be included in the transaction under review. Thus, if arbitration or disclaimer of warranties are part of the parties' prior course of dealing or are usually part of similar transactions they would be included. If they are not part of a prior course of dealing or usage of trade, the terms would be excluded regardless of whether or not they would alter materially the terms contained in the other party's document. This seems to present a fairer result, particularly as to disclaimers of warranties or a case where a party seeks limitation on liability. Under the existing subsection (3) provision, the Code would insert the opposite result in every case.¹²²

It should be noted that under the proposed revision the terms implied in the contract need not be mentioned in the documents of either party. For example, neither party may mention warranties but if the court discovers that the course of dealing or usage of trade would normally require a warranty, one would be inserted in the contract. This result is not really any different from what would occur under the present subsection (3). If the contract is formed under that subsection and the issue is warranties, the court would include the warranties under the "supplementary terms incorporated under" the Code language, even though the buyer never requested them and, in fact, even though the seller had, in his documents, expressly disclaimed them. What the new approach would require is that the court first determine if there is any course of dealing or usage of trade between the parties as to warranties. If a determination that there is no course of dealing or usage of trade is made then the court again turns to the Code terms for guidance. If, however, a course of dealing or usage of trade is found, that determination would control even though it was a finding that no warranties should prevail.¹²³ This result is more in keeping with the parties' expectations than is blind adherence to the buyer oriented provisions provided by the Code even though the term is not mentioned in either document.

In actuality, if the documents are extensive, it is unlikely that a court will find a course of dealing or usage of trade where neither party has mentioned the term to be considered. To the extent such a situation would occur, the negotiations would be essentially oral and the documents sketchy. This will be particularly true with a term such as arbitration which is not considered either way by the Code. If the use of arbitration in a particular situation is so normal as to permit a finding that it is either part of the parties' course of dealing or the usage of trade in like transactions, one party at least, will generally include arbitration in its form.

The revision also solves the problem of what to do with different, as opposed to additional, terms when a contract is established based on the parties' exchange. No distinction is made between different and additional terms since all terms not in both parties' documents will be tested for inclusion in the same way. That is, would they normally occur in such a contract?

¹²³ This result is consistent with the approach taken in § 2-316 of the Code. While a disclaimer of warranty under § 2-316(2) would normally require (at least as to fitness) a conspicuous writing, subsection (3)(c) provides:

(3) Notwithstanding subsection (2)

....

(c) an implied warranty can also be excluded or modified by course of dealing, or course of performance or usage of trade.

In addition, no distinction is made between merchant and non-merchant transactions. This was felt to be an unnecessary distinction for three reasons. First, as indicated above, the section has been invoked rarely in non-merchant situations. Non-merchants tend not to use form documents and they read responses carefully. If the transaction is between a merchant on the one hand and a consumer on the other, the provision will also have little impact since these tend to be one document arrangements. Second, since the terms of the resulting contract will not have a preference, it is unlikely that either non-merchant party will be unreasonably disadvantaged. Finally, although the Comments are silent on the point (Comment 3 which describes the basic operation of the section fails to make the distinction at all), presumably one purpose for the distinction is to insure that only the merchant offeror will end up being "stuck" by the addition of some term of the offeree without further action. Under the proposed revision, the determination of terms is not influenced by a party's status as buyer or seller and thus there is no longer a special case for protecting the non-merchant offeror.

Summary and Conclusion

The two decades of use of section 2-207 of the Code has resulted in substantial academic criticism of the language accompanied by concern over the commercial policy implications of certain interpretative approaches taken by courts in applying the section. In response to this environment of criticism and concern, the authors have undertaken a review of the statute with a view toward resolving many of these problems.

This review has emphasized the commercial context in which section 2-207 litigation is usually found. Essentially, the modern commercial transaction requires the use of form documents handled by low-level employees. These documents typically include standard printed terms which often are ignored by the parties until a dispute arises. Prior to the enactment of section 2-207, this meant that under the "mirror image rule" the exchange of forms which usually contain variant printed terms failed to form a contract. In addition, the further result was that often the party sending the last document prior to performance prevailed as to terms. Section 2-207 attempts to deal with this situation by providing that a contract is formed upon receipt of a definite and seasonable expression of acceptance, regardless of the presence of variant terms. The resolution of which variant terms control is determined by reference to subsection (2) of the section.

The basic criticism of section 2-207, as interpreted, is that it still contains a preference for the terms of one party over another, allowing that party's terms to dominate the transaction. In most instances, the dominant party will be the original offeror whose terms

control except as to non-material variations under the straightforward application of subsections (1) and (2) of section 2-207. However, under the present interpretation of subsection (3), this preference will belong to the buyer. The authors criticize these results and advocate, first a liberalized interpretation of "material variance" under subsection (2), and second, the consideration of usage of trade and course of dealing in determining "supplementary terms" supplied by the Code under subsection (3) in order to achieve a fairer, more balanced approach to the determination of controlling terms.

In addition, other substantial, but less critical issues are considered. The distinction made by some courts between additional and different terms in applying subsection (2) is criticized and policy arguments are advanced that no distinction be made. Court decisions interpreting what constitutes an express counter-proposal and an express limitation of acceptance to the terms of the offer are analyzed and the authors propose the requirement that both limitations be expressly made, in clear, conspicuous, non-ambiguous, *non-printed* language.

As a final step in reviewing the present section 2-207, the authors propose a decision model for use by the courts in every case applying section 2-207 to aid in achieving these preferred resolutions. This model is offered as a guide for the orderly formation of the law in this area so as to achieve greater consistency and certainty.

The article concludes by proposing a revision of section 2-207 designed to emphasize the transactional nature of the parties' exchange rather than the status of the parties as offeror or offeree, buyer or seller. The proposed revision is designed to create non-preferential contracts and thus overcome the basic criticism of the present provision. A contract would be formed when the parties expressly agree concerning all material terms under active negotiation; or, in lieu of express agreement, when the parties appropriately perform. In *both cases* the resulting contract would be comprised of the terms common to the forms or statements of both sides, terms normally used in the trade as modified by prior course of dealing by the parties and, where necessary, supplemental Code terms. Enactment of the proposed revision would be the surest way of establishing a fair, predictable rule determining non-preferential terms and at the same time discouraging mindless battles of the forms.