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REDRAFTING U.C.C. SECTION 2-207: AN ECONOMIC PRESCRIPTION FOR THE BATTLE OF THE FORMS

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Perhaps more criticism has been leveled against section 2-207 than any other provision of the Uniform Commercial Code.[1] The section addresses contract scenarios in which commercial parties have failed to bargain effectively. In the typical case, both the offeror and offeree used standardized forms to memorialize their agreement, yet neither read the other's form. When contractual problems materialize, the parties discover that the terms on the two forms conflict. Section 2-207 attempts to answer three questions. First, does the exchange of conflicting forms constitute a binding contract? Second, if a binding contract exists, what are its enforceable terms? Third, if the exchange of forms does not establish a contract, but the parties nonetheless perform, what are the terms of the contract established by conduct? Unfortunately, judicial interpretations of section 2-207 vary widely, making the answers to these questions far from clear.[2]

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1. For a representative sampling of the literature, see Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of Section 2-207*, 68 VA. L. REV. 1217 (1982); John E. Murray, Jr., *The Chaos of the 'Battle of the Forms': Solutions*, 39 VAND. L. REV. 1307 (1986) [hereinafter Murray *Chaos*]; Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327 (1983). The *Business Lawyer* devoted a recent symposium issue to the current efforts to redraft § 2-207. Contributions include: Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods, the Common Law, and the Uniform Commercial Code*, 49 BUS. LAW. 1053 (1994); Daniel A. Levin & Ellen B. Rubert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision Be Adopted?*, 11 J.L. & COM. 175 (1992); Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the 'Battle of the Forms'*, 49 BUS. LAW. 1019 (1994); Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065 (1994); John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029 (1994).

For a useful appendix summarizing all known proposals for redrafting § 2-207, see Mark E. Roszkowski, *Ending the Battle of the Forms: A Proposed Revision of U.C.C. Section 2-207*, 26 UCC L.J. 144, 164-71 (1993). Articles cited in Professor Roszkowski's appendix include: John E. Murray, *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815 (1992) [sic]; and Charles M. Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code Section 2-207*, 32 S.D. L. REV. 181 (1987).

2. Professors White and Summers devote 21 pages of their treatise to problems generated by § 2-207. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 28-49 (3d ed. 1988). Their review of applicable case law reveals a variety of inconsistent interpretations and

Current efforts to redraft Article 2 include reforms to section 2-207.[3] This article addresses the redrafting effort. It begins with a brief review of the problems associated with the battle of the forms. Next, it identifies and applies three central tenets associated with the economic analysis of the law: respect for individual autonomy, reduction of transaction costs, and provision of legal stability. Armed with these economic insights, the article next turns to the proposed section 2-207, and suggests ways to improve the final product. The article emphasizes the need to uphold the clear intent of the parties, but when that intent is not clear, the courts should draw upon the Article 2 gap-filling provisions, including the customary business practices that the parties are presumed to understand. The article concludes with proposed language for a new section 2-207.

I. THE BATTLE OF THE FORMS: CURRENT STATUTORY TREATMENT

A. *The Mirror Image Rule*

The common law of contracts took shape in the simpler days of the late-eighteenth and early-nineteenth centuries.[4] The formation rules in particular were based on quaint notions of agreement. For example, if two farmers dickered over the sale of a horse, the principals negotiated the terms of the contract face to face. The buyer checked the horse's teeth, inquired into its lineage, and haggled over the sales price. If the seller and buyer reached a meeting of the minds, a contract was formed. If the offer and the acceptance conflicted, however, there was no agreement. Under the rubric of the "mirror image rule,"[5] the common law demanded strict evidence of contractual agreement before imposing a binding transfer on the parties.[6]

Much of modern contract law involves a strikingly different social setting. Industrialization, mass marketing, and the creation of large and sometimes market-dominating firms led to the prevalence of standardized forms.[7] Today, the typical commercial sales agreement involves corporate agents exchanging forms, complete with unread and unexamined boilerplate.[8] The purchasing

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problems associated with the section. *Id.*

3. A Drafting Committee was created by the Permanent Editorial Board for the Uniform Commercial Code, with the approval of the National Conference of Commissions on Uniform State Laws and the American Law Institute. The Drafting Committee began work in 1991 and has produced a series of draft revisions. The most current official draft of § 2-207 is dated December 20, 1994. *See infra* notes 62-73 and accompanying text.

4. Professor Horwitz observes that "the entire conceptual apparatus of modern contract doctrine—rules dealing with offer and acceptance, the evidentiary function of consideration, and especially canons of interpretation" were firmly in place by the early nineteenth century. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 160-61 (1977).

5. Under the "mirror image rule," a reply that purports to be an acceptance but that varies the offer's terms is not an acceptance, but a counteroffer. RESTATEMENT (SECOND) OF CONTRACTS §§ 58, 59 rep.'s note regarding cmt. a; WHITE & SUMMERS, *supra* note 2, at 29.

6. Professors Baird and Weisberg argue that the mirror image rule was seldom applied so rigidly as to allow parties to welsh. Baird & Weisberg, *supra* note 1, at 1233-36.

7. Professor Slawson estimates standard forms are used in up to 99% of all contracts. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

8. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28

agent fills in a few blanks on her purchase order, then signs and mails the document. The sales agent notes the quantity, price, and subject matter reflected on the order form and responds with a confirming memo, invoice, or other acknowledgment form reflecting these central terms. The problem, of course, is that the boilerplate on the purchase order may conflict with that found on the acknowledgment. The respective corporate agents nonetheless assume that the uninspected forms constitute a contract, staple the two forms together, and toss them in a filing cabinet. The forms are removed and inspected only if a conflict arises.

Under the mirror image rule, the exchange of conflicting forms does not establish a contract. Prior to performance, either party is free to back out of the deal.[9] If the parties nonetheless perform, that is, if the goods are shipped and received, then the conduct of the parties forms a contract.[10] The purported "acceptance" form is interpreted as a counteroffer which the buyer accepts by his or her actions.[11]

The mirror image rule can be criticized on two fronts. First, by refusing to recognize a contract upon the exchange of forms, the law provides a perverse incentive for parties to "welsh" on bona fide agreements.[12] Both agents initially assume that the exchange of forms creates a contract. If market conditions change, and one party decides to renege on the agreement, that party can assert the mirror image rule and refuse to follow through with the deal. Second, the mirror image rule gives an unwarranted preference to the terms contained in the acceptance/counteroffer.[13] Since taking delivery is interpreted as "accepting" the unread terms of the seller's acknowledgment, the acknowledgment controls, and the purchase order becomes irrelevant. Though the drafters of section 2-207 sought to correct these shortcomings,[14] the results have been less than stellar.

AM. SOC. REV. 55, 56-58 (1963); *see also* Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1 (surveying current contract practices and practitioners' opinions on elimination of the legal sanctions for breach, the role of the law in practitioners' behavior, and the proper treatment of frustration).

9. *See, e.g.*, Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619 (N.Y. 1915) (buyer took advantage of the mirror image rule when market price fell); Cram v. Long, 142 N.W. 267 (Wis. 1913) (mirror image rule provided an excuse even though differences in offer and reply were relatively minor).

10. *See* JOHN E. MURRAY, JR., MURRAY ON CONTRACTS 113 (1974).

11. *Id.*

12. Professors White and Summers note that the primary purpose of § 2-207 was to change the mirror image rule so as to hold the bad faith welsher to the deal. WHITE & SUMMERS, *supra* note 2, at 28-29.

13. This is commonly referred to as the "last shot" rule. The party who sends the last form has an advantage. *See* JAMES BROOK, SALES AND LEASES: EXAMPLES AND EXPLANATIONS 56 (1994).

14. For a thorough discussion of the drafting history of § 2-207, see Wladis, *supra* note 1; *see also* Murray *Chaos*, *supra* note 1, at 1311-22 (discussing § 2-207 in light of the overall purposes of U.C.C. Article 2).

B. *Finding a Contract on the Exchange of Forms: Section 2-207(1)*

Section 2-207(1) provides that an executory contract can indeed be formed on the exchange of conflicting forms. It states:

> 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.[15]

The subsection explicitly addresses the welsher problem. Once the parties have exchanged forms that purport to establish an agreement, a contract is formed, and neither party may renege. This is true even if the acceptance contains *additional* or *different* terms.

The subsection works in concert with sections 2-204 and 2-206. Section 2-204 provides that a contract "may be made in any manner sufficient to show agreement."[16] Section 2-206 states that an offer "shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."[17] When section 2-207 is read with sections 2-204 and 2-206, an exchange of conflicting boilerplate suffices to show agreement (Section 2-204), and a conflicting acknowledgment can be a reasonable means of accepting an offer (Section 2-206). These three agreement provisions follow the basic themes of Article 2: emphasis on the factual bargains of the parties, good faith, and the relevance of general commercial understandings.[18]

The difficulty with section 2-207(1) lies in distinguishing a "definite expression of acceptance" from an "expressly conditional acceptance."[19] The subsection provides that an "expression of acceptance" serves as an "acceptance" even if it contains "different" or "additional" terms, *unless* the responding party makes its expression of acceptance "expressly conditional."[20] But what does it mean to make an acceptance expressly conditional? Will a sufficiently large discrepancy between offer and acceptance suffice? What if the expressly conditional language is lost in a tangle of fine print? Must the

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15. U.C.C. § 2-207(1) (West 1994).

16. Section 2-204 provides:

> (1) A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for the sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

U.C.C. § 2-204 (West 1994).

17. Section 2-206 provides in pertinent part:

> (1) Unless otherwise unambiguously indicated by the language or circumstances
>
> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . .

U.C.C. § 2-206(1)(a) (West 1994).

18. *See* Murray *Chaos*, *supra* note 1, at 1311-19.

19. *See* Baird & Weisberg, *supra* note 1, at 1224-26.

20. U.C.C. § 2-207(1).

expressly conditional language be conspicuous; and if so, how conspicuous?[21] Unfortunately, current law provides uncertain answers. Any redraft of section 2-207 must find a way to address this shortcoming.

C. *Determining the Terms of the Contract: Section 2-207(2)*

Once a court determines that an exchange of forms establishes a contract, it then must determine the terms of that contract. As quoted below, section 2-207(2) provides the statutory guidance. The subsection explains that when a term is reflected in the responding party's form, but absent in the initial form, the term enters the contract as a so called "additional term."

> 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 the 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.[22]

Unfortunately, section 2-207(2) contains at least two major difficulties. First, the subsection gives a strong preference to offerors. Section 2-207(2)(b) distinguishes between "material" and "immaterial" additions. Immaterial additions, therefore, can surreptitiously enter a contract through an unexamined acceptance form while material additions cannot. For a material addition to attach, the offeror must expressly consent. By definition, parties care much more about material additions than about immaterial ones; hence, it is much safer to be an offeror than an offeree. To compound matters, terms reflected in an offer that are not contradicted in the acceptance would seem to summarily enter a contract.[23] In other words, if the offer spells out an additional material term, such as a warranty provision, it becomes a term of the contract, but the same uncontradicted warranty provision in the acceptance does not.

This preference afforded to offerors creates an incentive to be the first party to send a confirming memorandum or standardized form. In many situations, however, it is unclear which party constitutes the true offeror. For example, if a corporation has a standing offer to sell to its repeat customers, then the purchase order may be considered an acceptance. Alternatively, if the parties discussed a sale informally and reached an agreement, section 2-207 suggests that the first party to send a confirming memorandum becomes the offeror. Surely, justice demands more than a casual inquiry into which corporate agent mails its form first.

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21. *See* discussion *infra* notes 58-61.

22. U.C.C. § 2-207(2).

23. Professors White and Summers consider whether silence in an acceptance can ever override an express provision contained in the offer, and conclude that it cannot. WHITE & SUMMERS, *supra* note 2, at 36.

A second problem with section 2-207(2) arises from its silence regarding "differing" terms. When conflicting boilerplate addresses the same issue differently, should the courts cancel both terms, should they follow the offer, or should the acceptance control? Section 2-207(1), seeking to remedy the weaknesses of the mirror image rule, made possible the creation of a contract despite "different" terms.[24] Section 2-207(2) addresses "additional" terms, but is silent regarding "different" or conflicting terms. Section 2-207(3) applies only when the writings of the parties do not constitute an agreement; hence, it provides no guidance with regard to differing terms when the forms establish a contract.[25]

Courts have not been consistent in their response to this statutory gap.[26] Professors White and Summers identify three widely divergent paths followed by various courts in assessing the effects of differing terms.[27] First, some courts seem to preserve portions of the mirror image rule. A differing form is viewed as either a "counteroffer" or as a "proposal to modify" that is accepted by the other party upon shipment or the taking of delivery.[28] Under this "last hit" rule, the advantage rests with the party who sends the last form. Second, and in stark contrast to the "last hit" rule, other courts seem to honor the first form. Here, the rationale is that since the U.C.C. does not explicitly provide a means for a differing term to modify an offer, such differing terms cannot enter the agreement.[29] Hence, under this "first hit" interpretation, the offer controls. Finally, other courts have reasoned that when terms conflict, the courts should cancel both terms and supply a judicial gap filler derived from the general provisions of Article 2.[30] Determining which rule will be followed, therefore, seems to depend more on the skill of the advocates and the identity of the judge than on the language of the U.C.C.[31]

D. *Opting Out of the Battle: Section 2-207(3)*

The final subsection addresses scenarios in which the exchange of forms or other writings are insufficient to establish a contract. Section 2-207(3) states:

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24. *See supra* text accompanying note 15.
25. *See infra* text accompanying note 32.
26. *See* WHITE & SUMMERS, *supra* note 2, at 33-35.
27. *Id.*
28. *Id.* at 33 (citing Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962)).
29. *Id.* at 34 (citing, among other cases, Reaction Molding Techs., Inc. v. General Elec. Co., 588 F. Supp. 1280 (E.D. Pa. 1984)).
30. *Id.* (citing Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984)).
31. In our view, the best interpretation of the current law on "differing terms" begins with a careful separation of contract *formation* from contract *content* issues. If no executory contract is created on the exchange of forms, but the parties nonetheless perform, then the gap filler approach of § 2-207(3) controls. *See infra* text accompanying note 60. By contrast, if the exchange of forms establishes an executory contract under § 2-207(1), then, under current law, the terms of the offer control. The point, however, is that alternative statutory constructions are not only possible, but followed in many courts. Interestingly, Professors White and Summers disagree on the preferred approach. White prefers the gap filler solution. WHITE & SUMMERS, *supra* note 2, at 34. Summers would create a preference in favor of the offer, the "first shot" rule. *Id.* at 34-35.

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the contract do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings agree, together with any supplementary terms incorporated under any other provisions of this Act.[32]

This provision becomes operable when the exchange of forms cannot reasonably be construed as forming a contract pursuant to section 2-207(1), but the parties nonetheless behave (by delivery and acceptance of goods) as though they have a contract.

Sometimes, express conflicts in the writings are inadvertent. For example, the parties informally agree on a sale, and each sends a confirming memo. One memo calls for a price twice that of the other. Notwithstanding the divergence on this central term, the seller delivers and the buyer takes delivery. Section 2-207(1) arguably would not create a contract because the memos do not state a "definite and seasonable expression of acceptance." But the conduct of the parties will salvage the contract, with the courts providing a reasonable price in accord with other provisions of Article 2.[33]

More commonly, section 2-207(3) becomes operable due to the design of one or both of the parties. Lawyers who draft form contracts are fully aware of the problems and pitfalls introduced by thirty years of judicial development. As a consequence, most commercial forms contain a clause stating that the terms contained in that particular form must control the agreement and no others.[34] In addition, these clauses typically state that performance by the other party will be construed as an acceptance of all the terms contained in the expressly conditional form.

If pursuant to section 2-207(1) the court determines that such a clause renders an agreement "expressly conditional," then no contract is established on the initial exchange of writings. If the parties nonetheless perform, then a statutory interpretation issue arises.[35] Under an expansive reading of section 2-207(3), one could argue that the "writings of the contract do not otherwise establish a contract"; hence, the terms of the contract "consist of those terms on which the writings agree, together with any supplementary terms" incorporated by Article 2. Alternatively, under a narrow reading, one could argue that these facts do not raise a section 2-207(3) issue at all. There simply was an offer, or perhaps a counteroffer, that was accepted in accord with its terms—through performance. Although we prefer the more expansive reading, the point is that both interpretations carry favor with the courts, again leading to inconsistent results and unnecessary litigation.

In conclusion, each of the three subsections of section 2-207 has created some confusion. Perhaps section 2-207(1) fairs best. Although it reflects an

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32. U.C.C. § 2-207(3).

33. U.C.C. § 2-305 provides judicial authority to impose a price term omitted by the parties.

34. *See* McCarthy, *supra* note 1, at 1022.

35. Professor Murray refers to this recurring fact pattern as the "counter-offer riddle." Murray *Chaos*, *supra* note 1, at 1322-26, 1343-54.

admirable attempt to keep the bad faith welsher in the deal, it provides little guidance on how to distinguish a "definite and seasonable expression of acceptance" from an acceptance "expressly made conditional." Section 2-207(2) appears to be a dismal failure on at least three fronts. First, it replaces the mirror image rule's preference for offerees with a preference for offerors. Second, the statutory gap with reference to "different" terms has led to inconsistent judicial results.[36] Third, section 2-207(2) provides scant guidance for the courts to distinguish immaterial terms from material terms. Finally, section 2-207(3) has failed to provide a clear answer to the expressly conditional "counter-offer riddle" addressed above. Any redraft of section 2-207 must find a way to address these shortcomings.

II. AN ECONOMIC PRESCRIPTION FOR REFORM

The economic approach to law can help guide current reforms of section 2-207.[37] At the heart of the inquiry are three basic tenets: respect for individual autonomy, reducing transaction costs, and providing legal stability.[38] These tenets provide a useful guide for solving the classic formation and terms questions presented by a battle of forms.

A. *Respect for Individual Autonomy*

The economic approach to contract law begins with the proposition that all mutually understood agreements between competent individuals should be summarily enforced. Expressed under the rubric of "freedom of contract," this governmental respect for individual autonomy has been a guiding tenet of economic theory since the days of Adam Smith.[39] It continues to guide the economic approach to contract law.

It is useful to divide the notion of freedom of contract into two parts: freedom *to* contract and freedom *from* contract.[40] Freedom *to* contract recognizes the truism that individuals do not agree to contractual exchanges unless each believes that the exchange will make him or her better off. Individuals have idiosyncratic knowledge about the details of a particular exchange unavailable to governmental authorities. Hence, any attempt by government to impose external limits on the substance of a private exchange must overcome

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36. *See supra* notes 26-31 and accompanying text.

37. By "economic" approach we refer to that body of literature usually traced to Ronald Coase's seminal essay and expounded by Judge Posner. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); R.H. Coase, *The Problems of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW (1979); READINGS IN THE ECONOMICS OF CONTRACT LAW (Victor P. Goldberg ed., 1989).

38. *See generally* Daniel T. Ostas & Burt A. Leete, *Economic Analysis of Law as a Guide to Post Communist Legal Reforms: The Case of Hungarian Contract Law*, 32 AM. BUS. L.J. 355 (1995) (developing and applying the three tenets in a comparative law setting); Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. (forthcoming 1996) (applying the three tenets to the doctrine of commercial impracticability).

39. *See* JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 185-87 (1954).

40. *See, e.g.*, Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982).

a strong burden.[41] Freedom *from* contract, by contrast, stands for the proposition that individuals should not be forced, absent prior consent, to transfer property rights, or other entitlements. By insisting that each trading partner obtain the informed consent of the other, each must take into account the idiosyncratic knowledge of the other. Thus, forced transfers imposed by the courts frustrate the information flow process, distort market prices, and lead to the inefficient allocation, distribution, and use of property rights.[42]

The "battle of the forms" reflects the tensions between the twin concerns of freedom *to* and freedom *from* contract. Allowing a party to welsh on a bona fide exchange erodes the principle of freedom *to* contract; yet, imposing unbargained for terms on a party violates the notion of freedom *from* contract. Section 2-207 strives to balance these competing concerns. It states that a "seasonable expression of acceptance or written confirmation" forms a binding contract. It then struggles to determine the terms of that contract.

To an economist, only subjectively understood agreements satisfy the notion of a mutually beneficial exchange.[43] Ideally, the autonomy inquiry is a subjective one—what did the parties understand to be their agreement? Lacking divine insight, however, this subjective inquiry ultimately becomes objective. The courts ask not what the parties were thinking, but rather, whether there is sufficient *objective evidence to infer a subjective agreement.*[44]

Objective evidence of subjective intent originates from two sources. First, negotiated terms agreed to by the parties and those contained on each form give objective evidence as to those terms.[45] Second, conduct of the parties,

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41. *Id.* at 524. The burden, of course, is not insurmountable. For example, economic reasoning supports governmental intervention in cases of unconscionability and commercial impracticability. *See generally* Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535 (1991) (using economic theory to predict unconscionability outcomes); Ostas & Darr, *supra* note 38 (justifying governmental intervention for commercial impracticability on economic grounds). Governmental "intervention" is also needed to fill in the omissions in contracts. Omissions occur for a variety of reasons. For example, an omission may result from the calculated desire of a party in the weaker bargaining position to enter the bargain without a particular clause with the hope or expectation that the problem will not occur. E. Allan Farnsworth, *Disputes over Omission in Contracts*, 68 COLUM. L. REV. 860, 872-73 (1968).

42. *See generally* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519-30 (1945) (defending the doctrine of freedom of contract as a means to economize on idiosyncratic and widely dispersed information).

43. KRONMAN & POSNER, *supra* note 37, at 5.

44. Many contract doctrines serve this evidentiary inquiry. For example, doctrines that require a writing, insist upon an exchange of consideration, or inquire into the presence of fraud or duress, all seek to "objectify" an inherently subjective inquiry. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272-74 (1986); *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) (discussing the interplay between objective and subjective inquiries into consent). The inevitable slippage in these evidentiary surrogates leads to both over-enforcement and under-enforcement of contractual language. Over-enforcement occurs when the courts impose a contract absent true individual consent. Under-enforcement results from a judicial unwillingness to impose transfers that were indeed consensual. The battle of the forms must respond to this tension. If it follows an economic logic, it will seek to minimize the sum of over-enforcement and under-enforcement costs.

45. One must recognize that contractual terms may be inextricably integrated in the minds of the parties. The seller is willing to sell at price X, but only if its boilerplate warranty disclaimer is upheld. The buyer may be willing to pay X, but only if a standard warranty of merchantability applies. Hence, the apparent agreement on price becomes illusory, and holding the parties to that

trade practice, industry custom, and past dealings all play a role in determining intent. For example, each party is presumptively aware of the customary terms associated with their transaction. Each party knows or should know that a sale of goods typically includes a warranty of merchantability. Each knows or should know whether their industry typically submits contractual disputes to arbitration. They presumably are aware of the industry custom regarding the effect of acts of God. If they have dealt with one another in the past, they are aware of how they have resolved any prior disputes. Such shared customs and experiences facilitate communication and provide evidence of mutual, albeit tacit, understandings.[46] In the context of the battle of the forms, therefore, evidence of industry custom and past dealing may provide better evidence of mutual understandings than the fine print within the unexamined boilerplate on the conflicting forms.

In short, the principle of autonomy suggests a preferred emphasis on the negotiated terms and commonly implied terms based on usage of trade, industry practices, past dealings, and customary gap fillers provided by Article 2. The parties presumptively transact within this context, and it provides a ready basis for meaningful agreements. In this light, the key question becomes: do the incongruent forms give sufficient objective evidence to warrant a judicial inference that the parties have subjectively agreed to vary from trade customs? Of course, due deference to individual autonomy demands that parties be empowered to specifically tailor their own contracts. Custom must not become a straightjacket. But autonomy also demands sufficient evidence of both parties' consent to such tailoring.

B. *Reducing Transaction Costs*

Our second economic tenet provides that contract law should do more than passively enforce private transactions; it should proactively[47] seek to make transactions less costly for the parties.[48] It is important to recognize the sound business reasons for firms to use standardized forms. Standardized forms reduce bargaining costs by relieving firms of the burden of individually negotiating and drafting contract provisions regulating relatively routine transactions.[49] Such forms also reduce agency costs by limiting the contractu-

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express price can no longer be justified on the mere grounds that the forms do not conflict on that term. Since the principle of autonomy is no guide, the court should determine the price with an eye toward creating a precedent that encourages future parties to bargain more effectively. *See infra* text accompanying notes 47-54.

46. *See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 885-97 (1992).

47. Contract law reduces transaction costs in three ways: (1) by summarily enforcing express contractual agreements it provides a disincentive for breach; (2) by providing standard customary terms it removes the necessity to bargain over all the details of a particular exchange; and (3) through the laws of fraud, undue influence, duress, and unconscionability it discourages misleading conduct in contract negotiations. KRONMAN & POSNER, *supra* note 37, at 4. All three concerns are motivated by battle of the forms.

48. Transaction costs include the costs of bargaining, performing, and enforcing contractual matters. Ostas & Leete, *supra* note 38, at 366. Enforcement costs, including the costs of litigation, are discussed under our third tenet—providing legal stability.

49. Advances in technology continue to reduce these costs by replacing standard forms with

al discretion of subordinants within a firm's hierarchy, and facilitate centralized control by harmonizing contracts through that firm's national or international business activities. Any resolution of the battle of the forms problem, therefore, should respect the efficiency of standardized forms.

Current law, however, fails to take advantage of standardized forms. In some situations the seller's form will control, while in other cases the buyer's form will control. Thus, the current 2-207 creates a perverse incentive to carefully read and consider the fine print on each and every invoice or purchase order received. Someone within the corporate hierarchy should then be authorized to negotiate these terms. Such a rule increases costs and erodes the contractual harmony within an individual firm. For example, a seller may use a warranty disclaimer in all its forms. In transactions where the seller is deemed the offeror the disclaimer enters; when deemed the offeree it does not enter. Hence, the uniformity gains of form contracting erode.

The solution is to rethink the role of forms and the terms emerging from conflicting forms. Transaction-cost reasoning suggests that the preferred approach is to deemphasize the boilerplate language in favor of customary terms as derived from the past dealings of the parties, common trade practices, and standard gap-filling terms provided by the U.C.C. An emphasis on customs facilitates communication in accord with the principle of autonomy[50] and reduces bargaining costs by preserving the efficiency gains of standard forms. Gap fillers would provide a baseline understanding which boilerplate could not alter. Opportunism through surreptitiously entering an uncustomary or surprising term in unexamined boilerplate would not be rewarded. Once the parties form a contract under section 2-207(1), it would include terms agreed upon, terms reflected on both forms, and terms supplied by the Article 2 gap fillers.[51] There would be no need to scrutinize each other's forms, and the uniformity in a firm's sales activity would be enhanced. The rule would negate the incentive to be the offeror.

Transaction-cost logic also provides insights into the substance of customary terms. Many customs, or gap fillers, involve the allocation of risk. For example, an implied warranty in the sale of goods assigns the risk of faulty workmanship to the seller rather than the buyer. Liability for goods damaged during shipping is customarily assigned to the common carrier. In each case, it is in the interest of all parties that contractual risks be allocated to the party who can absorb them more efficiently.[52] Hence, reliance on custom not only

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"electronic data interchanges." McCarthy, *supra* note 1, at 1024.

50. *See supra* text accompanying note 45-46.

51. Relational interests developed over a period of time often create enforceable legal obligations. *See generally* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980) (dealing with the roots of contract, its role in projecting exchange into the future, and the normative aspects of contracts). While a sales contract, standing alone, is hardly the prototypical relational contract, the courts will look to the parties' history to determine the materiality of an additional term. *See, e.g.*, St. Charles Cable TV v. Eagle Comtronics, Inc., 687 F. Supp. 820, 827 (S.D.N.Y. 1988), *aff'd*, 895 F.2d 1410 (2d Cir. 1989). Thus, context and history of the transaction serve important roles in limiting the parties' negotiating costs.

52. *See* POSNER, *supra* note 37, at 85.

facilitates communication and preserves the efficiency gains associated with form contracting, it also tends to reduce performance costs.[53]

Of course, parties must be permitted to individually craft their contract to vary from custom. Although a seller *usually* is more efficient in taking precautions that assure product quality, sometimes the buyer is more efficient.[54] In such cases, the parties should not rely on standard forms. Instead, they should negotiate fully. An "expressly conditional" form as envisioned by section 2-207(1) would signal the need for meaningful negotiations. If the uncustomary warranty disclaimer is really in the interests of both parties, then reaching an agreement on a disclaimer should not be difficult. The need for allowing an expressly conditional form is borne out by the next tenet as well.

C. *Providing Legal Stability*

Properly conceived, transaction costs include not only the costs of negotiating and performing contracts, but also the costs of enforcing or litigating contractual matters. Vagueness or uncertainty in the law frustrates attempts by the parties to settle their own disputes and increases the need for costly litigation. Any redraft of section 2-207, therefore, should strive for clarity and ease of judicial administration.

As discussed previously, judicial interpretations of section 2-207 vary widely.[55] Hence, when judged by a stability standard, the section generally fails. On first blush, the mirror image rule appears to fair better. By insisting that the parties reach a full accord on all express terms, the rule seems to limit judicial discretion. But even with the mirror image rule, if there has been part performance, the court must still order restitution or fashion some sort of quasi-contractual adjustment. Thus, the gains in legal predictability are not as great as may first appear.

By contrast, a rule which emphasizes customary gap fillers should be much easier to implement. First, the courts would ask whether the exchange of forms together with the conduct of the parties indicates an intention to be bound. "A definite expression of acceptance"[56] as envisioned by section 2-207(1), or "[c]onduct by both parties which recognizes the existence of a contract," as envisioned by section 2-207(3),[57] would suffice to bind the parties. Welshing would not be permitted. Once the contract was formed, the terms would be: (1) those upon which the parties had in-fact agreed; (2) those that consistently appeared on both forms; and (3) supplemental gap fillers derived from industry customs, past dealings, and provisions of Article 2.

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53. As part of the reform process, all Article 2 gap fillers are under review. Sellers seem particularly keen on changing the implied warranties provided by the U.C.C. *See* Roszkowski & Wladis, *supra* note 1, at 1068-69.

54. *See* Baird & Weisberg, *supra* note 1, at 1250-51 (using this illustration as a reason to return to a modified version of the mirror image rule).

55. *See supra* text accompanying notes 26-31.

56. This standard would complement §§ 2-204 and 2-206. *See supra* notes 12-14 and accompanying text.

57. *See supra* text accompanying note 32.

Either party could avoid the creation of a contract on the above terms by *conspicuously* indicating on its form that its offer or acceptance was "expressly conditional,"[58] and then refuse to deliver the goods or to take delivery until the other party expressly agreed to the non-customary term.[59] The conspicuously conditional language would preserve the right to "welsh," and would signal the need to negotiate. The conditional terms, however, could not be agreed to by mere performance.[60] If the parties shipped and took delivery without first engaging in meaningful negotiations, then agreed terms, matching terms, and gap fillers would control. In effect, the gamesmanship associated with trying to be the last party to send a form (described as the counteroffer riddle) would be avoided by simply eliminating it.

The principle of legal stability would be served on a number of fronts. First, the conspicuousness requirement would provide a "safe harbor" for parties who wished to enter meaningful negotiations, instead of relying on standard forms, thereby clarifying section 2-207(1). Second, under our proposal there would be no need to distinguish between offeror or offeree, between material and immaterial terms, or between "different" and "additional" terms as envisioned by section 2-207(2).[61] Finally, there would be no need to distinguish between contracts formed through exchange of forms, conduct, or a combination of writings and conduct as currently envisioned by section 2-207(3).

D. *Summary*

Thus, the current practice of using unexamined forms to introduce uncustomary provisions must change. Formation should be treated as a separate issue from the determination of terms. If the parties manifest an intent to be bound, either through words or actions, then a contract is formed and welshing should not be permitted. The terms should be determined on the basis of those on which the parties negotiate or on which their forms agree, supplemented by default terms provided by Article 2's gap fillers including trade usage, course of performance, and course of dealing. If a party wants to propose an uncustomary term, such as a warranty disclaimer, it should not engage in the current practice of exchanging unread boilerplate. It must provide the courts with

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58. *See generally* Baird & Weisberg, *supra* note 1, at 1260-61 (weighing the advantages and disadvantages of a conspicuousness requirement in this context).

59. Under this proposal, the shipping of goods is interpreted as an offer to contract based on agreed terms, matching terms, and gap fillers. If the receiving party takes delivery, then that offer is accepted. Hence, either party could avoid contract formation by expressly conditioning its form and then refusing to deliver or to take delivery.

60. This is the counteroffer riddle. *See supra* text accompanying note 35.

61. Our proposal would also remove the present incentive to draft long and detailed form contracts. Under current law, reciting all U.C.C. gap fillers in one's form is well advised. Since it is harder to introduce "different" terms into a contract than it is to include "additional" terms, it is important to make sure customary as well as non-customary terms appear on one's form. Under our proposal, the only terms needed on a standardized form are those terms that contradict custom. There would be no advantage in reciting U.C.C. gap fillers chapter and verse. This should help the parties maintain the advantages of form contracting while simultaneously empowering them to craft their own exchange.

more evidence than its own form coupled with an accepted delivery; it must also show that the term was subjectively agreed to by the other party. If an uncustomary term is reasonable, then that meaningful consent should be easily obtained. Finally, the counteroffer riddle should be resolved in favor of Code gap fillers. Such an approach would be both just and economically efficient.

III. APPLYING THE ECONOMIC APPROACH TO PROPOSED SECTION 2-207

The Proposed section 2-207, as part of the larger revision of Article 2 by the National Commission of Uniform State Laws, incorporates much of the approach suggested in the prior section. In 1988, the Commission formed a study group that issued its first report in 1990.[62] A task force addressed the issues presented in the 1990 report, and its critique was published, along with the 1990 report, in 1991.[63] Further discussions and revisions resulted from a 1993 review.[64] In 1994, the National Commission conducted a first reading of the proposed revision and conducted extensive discussions.[65] A final proposal is not expected until 1996 or 1997.[66]

The above mentioned process involved several revisions to proposed section 2-207. The Study Group's initial suggestion followed the general structure proposed by John Murray in a pair of 1986 articles.[67] The 1991 task force criticized the complexity of that approach and the abandonment of the structure of the existing section 2-207, which the task force felt worked in a majority of situations.[68] The version produced in 1993 took on a more mechanical nature with the careful identification of formation and term issues.[69] The version discussed in 1994 further refined the language of the 1993 version and reorganized its sections.[70]

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62. McCarthy, *supra* note 1, at 1020 n.5.

63. *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991) [hereinafter *Preliminary Report*].

64. McCarthy, *supra* note 1, at 1020.

65. *Proceedings in the Committee of the Whole, Uniform Commercial Code, Article 2, Sales*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1994) (Chicago, Ill., July 29-Aug. 4) [hereinafter *Proceedings*].

66. Zan Hale, *UCC Article 2 Drafting Committee Faces Critics*, CORP. LEGAL TIMES, Oct. 1994, at 24. The changes discussed in this section are one part of a significant proposed redesign of Article 2 to accommodate the growth of leasing and sale of software as well as to revise problematic sections of the existing Article 2. *See* Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337 (1994).

67. *Preliminary Report*, *supra* note 63, at 1056 (citing Murray, *supra* note 1; Murray *Chaos*, *supra* note 1). For further discussion of the *Preliminary Report*, see Alex Devience, Jr., *The Recommendations to Revise Article 2*, 24 UCC L.J. 349, 352 (1992) (suggesting that the changes reflect a broader agenda to weaken the traditional approach to formation and move the Article toward principles consistent with the *Restatement (Second) of Contracts*).

68. *Preliminary Report*, *supra* note 63, at 1056-57.

69. Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1325 (1994).

70. For the text of the 1994 revision, see *infra* text accompanying note 71.

A. *The Battle of Forms Revision: Circa 1994*

The 1994 revision separates the problems of formation and terms into different sections of the Code. Sections 2-204 and 2-206 provide the basis for finding a contract. Section 2-207 describes the process for determining the terms of the contract.

The formation provisions direct the parties and courts to look for the existence of the contract without reference to the niceties of common law offer and acceptance rules, and they rejected the mirror image rule. Proposed section 2-204 provides:

> (a) A contract for sale may be made in any manner sufficient to manifest agreement, including offer and acceptance and conduct by both parties recognizing the existence of the contract.
>
> (b) If the parties so intend, an agreement is sufficient to make a contract for a sale even if the moment of the making of the agreement is not determined, one or more terms are left open or to be agreed upon, or writings or records of the parties contain varying terms as defined in Section 2-207(a).
>
> (c) If a contract for sale is made and one or more terms in the agreement are left open, the contract does not fail for indefiniteness if there is a reasonably certain basis for an appropriate remedy.[71]

Section 2-206 further provides:

> (a) Unless otherwise unambiguously indicated by the language or circumstances:
>
> > (1) an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances including an expression of assent which contains varying terms as defined in Section 2-207(a).
> >
> > (2) an order or other offer to buy goods for prompt or current shipment must be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods. However, a shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
>
> (b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.[72]

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71. *Proceedings, supra* note 65, at 56. The first reading of § 2-204 produced no comments from the attending commissioners. *Id.*

72. *Id.* at 58. The first reading of § 2-206 produced no comments from the attending commissioners. *Id.* at 59.

The effect of the two sections is to remove the constraints of the traditional rules of offer and acceptance. This result is achieved in several ways. First, pursuant to section 2-204(a), circumstances demonstrating the existence of a contract are expanded beyond the traditional model of a negotiated offer and acceptance to include the parties' conduct. Second, section 2-204(b) references the intent of the parties which would presumably include the customary understandings associated with the transaction. More importantly for the battle of forms problem, under section 2-204(c), the terms of the offer and acceptance need not agree if the parties' intent demonstrates the existence of a contract. Welshing would not be permitted. This provision is an obvious rejection of the mirror image rule.

The demise of the mirror image rule is carried out in the determination of the terms of the contract created by a mixture of conduct and other actions. If the parties intended to contract, then the terms may be determined under proposed section 2-207. That section provides:

> (a) In this article, "varying terms" means terms prepared by one party and contained in a standard form writing or record.
>
> (b) If an agreement of the parties contains varying terms, a contract results if Sections 2-204 and 2-206 are satisfied.
>
> (c) Varying terms contained in the writings and other records of the parties do not become part of the contract unless the party claiming inclusion proves that the party against whom they operate expressly agreed to the terms or assented to and had notice of the terms from trade usage, previous course of dealing or course of performance. Between merchants, the burden of proof is by a preponderance of evidence. Otherwise, it is by clear and convincing evidence.
>
> (d) If a contract with varying terms is formed under subsection (a), the terms are:
>
> (1) terms upon which the writings or records agree;
>
> (2) terms varying terms [sic] included under subsection (c);
>
> (3) terms to which the parties have otherwise agreed; and
>
> (4) any supplementary terms incorporated under any other provisions of this [Act].[73]

This revision constitutes a significant change from existing law in that it rejects the distinction between additional and different terms, drops the "unless proviso" that has become the basis of modern form drafting,[74] and eliminates the convoluted parsing necessary for determining the fate of additional terms.[75]

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73. *Id.* at 59-60.

74. McCarthy, *supra* note 1, at 1022.

75. The complexity and inconsistency of § 2-207 decisions have led proponents of some variation of the existing statute to suggest that this complexity has allowed the courts to do justice in particular cases. *Preliminary Report*, *supra* note 63, at 1062. We do not attempt to enter that particular fray. Some have suggested that the criticism is to hide a more broadly based concern

B. *Critiquing Proposed Sections 2-204, 2-206, and 2-207*

The proposed sections reflect many of the elements suggested by the economic approach to the battle of the forms. Both the treatment of formation issues and the manner of determining contractual terms tend to contemplate a solution that is consistent with the goals of autonomy, reduction of transaction costs, and stability. Hence, the revision is a major step in the right direction. Further refinements, however, could improve the final product.

Proposed sections 2-204 and 2-206 largely conform with our economic model. Instead of emphasizing a moment in time when the proper formalities are accomplished, the proposed sections ignore the sequential trading of forms in favor of the substance of formation as demonstrated by the content of the forms and the actions of the parties. The approach serves the principles of autonomy and freedom to contract, and reduces the potential of costly opportunism through welshing.

Yet a troublesome formation issue remains. Under the current section 2-207(1), a "definite expression of acceptance" forms an agreement, unless the acceptance is made "expressly conditional." Distinguishing a definite expression of acceptance from an expressly conditional one has proven particularly difficult for the courts and has generated a good deal of private gamesmanship.[76] The proposed treatment deletes the expressly conditional language of current law in favor of the language of section 2-206(a). It provides: "Unless otherwise unambiguously indicated by the language or circumstances: (1) an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances." Our fear is that the interpretation of "unless otherwise unambiguously indicated" may prove just as troublesome as interpreting the current term "unless expressly conditional."

Our proposed solution is to construct a "safe harbor" through which a party could "unambiguously indicate" that its attempt to contract is conditional on the agreement of the parties to that party's terms. One alternative is to include a provision that creates a boilerplate set of requirements that notify the other party of the intent of the initiating party.[77] Alternatively, this could be achieved through an official comment. Either approach would specify particular language unambiguously indicating that a party does not intend to be bound unless its uncustomary terms are expressly agreed to. The provision or comment should also provide that such language be "conspicuous." A party that used such conspicuous language would know that no express contract

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that any alternative that results in the explicit recognition of using gap fillers would result in contracts that are unfair to vendors. Roszkowski & Wladis, *supra* note 1, at 1068-70.

76. By "gamesmanship" we refer to the practice of each party drafting a clause that states the terms on its form must control and no others, and that shipment or taking delivery constitutes acceptance of these terms. *See supra* note 34 and accompanying text. Armed with such a clause, parties have an incentive to additionally "game" the system by being the last party to send a form. *See supra* text accompanying note 35.

77. An example of this approach is taken in U.C.C. § 2-719 (West 1995). In this section, the seller must indicate that the intended remedy is exclusive. Similarly, under § 2-316(2), an attempt to disclaim a warranty of fitness for a particular purpose must be in writing and conspicuous.

would be formed on the exchange of conflicting forms. In effect, it would expressly reserve the right to welsh. A party using such language would also know that it should not deliver goods or take delivery of goods until the uncustomary language is expressly agreed to by its trading partner.

Proposed section 2-207 also seems to follow our economic prescriptions. The statute plainly rejects the possibility of surprising the parties with unbargained for terms by defining the terms of the agreement to be those terms that the parties expressly agree to, either in their forms or otherwise, and those terms provided by the U.C.C.[78] Varying terms on the forms (including different and additional terms identified by comparing the forms)[79] must be agreed to or the party must have notice and must have provided some prior assent to the term before it is included in the contract. Hence, proposed section 2-207 eliminates the need to distinguish between offeror or offeree, between material and non-material terms, or between additional and differing terms.

The goal of providing freedom to and from contract is enhanced by this approach. In general, parties are bound only to the terms to which they agree and those terms provided by statute and custom as defaults for terms that are not properly resolved by agreement. Moreover, transaction costs are reduced in those instances in which the forms do not agree by the provisions directing the inclusion of the U.C.C.'s supplementary terms. Since a supplementary term will always enter unless it is expressly negated through mutual agreement, there is no need to provide customary terms in one's boilerplate. Such forms should become much shorter and easier to use. Conspicuously conditional language would point the parties to the need to negotiate for different terms if they desire a different result (consistent with concerns for autonomy). Finally, reliance on supplementary terms assures a level of stability in those instances when the parties fail to define the particular terms in their agreement. In effect, the default terms are provided by the U.C.C. The parties may alter them, but if they fail to do so, the U.C.C. provides the terms for them.

Notwithstanding the virtues of proposed section 2-207, two problems are apparent. First, the counteroffer riddle needs to be treated more directly. The simple case is suggested by a traditional offer to buy that is limited by its terms to that offer. The seller rejects the uncustomary terms reflected in the offer, but nonetheless ships the goods and the buyer takes delivery. Under section 2-207(c), the "varying terms" of the offer are not expressly agreed to, so they do not become part of the contract. Under section 2-207(d), however, terms to which the parties have "otherwise agreed" do enter the agreement. One could argue that shipment reflects agreement to the uncustomary terms of the offer. To compound matters, proposed section 2-206 specifies that an offer to buy is accepted by shipment, but does not specify whether uncustomary terms in such an offer become part of the agreement. Perhaps this is not a case involving section 2-207 at all, but merely is an offer that has been accepted in its entirety by performance. This result, however, presents the parties

78. *Proceedings, supra* note 65, at 59-60.
79. *But see infra* text accompanying notes 82-83.

with a return to the last hit rule; the last party to send a form gets its terms by wrapping the offer or acceptance in nonnegotiated language.

Reading the proposed sections in their entirety suggests that the redrafting committee intends to resolve the counteroffer riddle in favor of supplementary terms. This is also the solution suggested by our economic tenets. Again, an official comment should specifically address the counteroffer riddle. The comment should state that an uncustomary term appearing on a standardized form will never enter a contract unless it matches express language on the other party's form or has been *expressly* agreed to by both parties.[80] Merely shipping goods or taking delivery is not sufficient evidence that uncustomary language has been subjectively agreed to.

The second problem with proposed section 2-207 is similar in nature. As noted before,[81] the mere agreement of forms on a particular term may not indicate actual agreement of the parties. For example, the forms may agree that the parties will arbitrate claims, but one form is premised on the availability of implied warranties while the other form disclaims them. Under these circumstances, the parties' forms would direct arbitration (pursuant to section 2-207(d)(1)), but the warranty may or may not be included. If there is no reason to include either term under subsection (c), the default term would be an implied warranty of merchantability. Under these circumstances, the injured party, likely the seller, would have arbitration, but not upon the circumstances that it bargained for. It never agreed to arbitrate a warranty. The only apparent solution is for the seller to incur additional costs to put the buyer on notice and attempt to negotiate a different deal. If the buyer refuses, the deal is lost and the seller should not deliver the goods. Again, considering the recurring nature of this "integration problem," an official comment indicating the preferred results seems appropriate.

In summary, the focus should be on finding those terms on which the parties agreed and determining the proper default terms based on the U.C.C. and the historical and industrial customs. The goal is to find agreement without forcing any surprising or unexpected terms on any party. Businesspersons will soon learn that uncustomary and surprising language will not enter an agreement simply by printing such language on an unread form. While at times this may work to the advantage of one party or the other, the solution for the disadvantaged party is to negotiate better terms than those provided in the existing contract, by the U.C.C., or by custom.

C. *Additional Drafting Problems of Proposed Section 2-207*

Despite the obvious strengths of the revision, several apparent drafting problems are likely to cause problems.[82] The first, and potentially most

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80. In this context, express agreement is a necessary, but not sufficient, reason for an uncustomary term to enter the contract. Express language does not control if derived through duress, misrepresentation, or unconscionable business conduct.

81. *See supra* note 45.

82. In addition to the comments in the text, there were two identifiable drafting errors in the 1994 draft. The reference to subsection (a) in the opening clause of subsection (d) should read

significant, is the definition of varying terms found in section 2-207(a).[83] On its face, "varying" suggests the notion of difference or additional. The apparent goal was to find a term that encompassed both categories of terms under existing law without using the words "additional" or "different." That goal is understandable, given the semantic confusion created by the current language. The definition, however, states that it refers to terms prepared by one party and contained in a standard form. The meaning is clarified somewhat in subsections (b), (c), and (d), in which there is a suggestion that varying terms are those on which the forms do not agree. But even here the meaning is ambiguous, since varying terms are brought into the contract if they are agreed to or assented to with notice. In short, the definition of "varying" gives too little guidance about the kinds of terms that it is meant to address. This definitional problem is further complicated by the remaining subsections.[84]

Our proposed solution is to define varying terms as those terms prepared by one party and contained in a standard form writing or record that *vary from trade usage, previous course of dealing, course of performance, or any supplementary terms incorporated under any other provisions of Article 2*. The heart of the battle of forms problem is that unread boilerplate language can sometimes be used to introduce uncustomary (surprising) terms. Under our definition, it would be clear that where boilerplate conflicts and where both parties have suggested an uncustomary term, neither term would enter the contract; the court would supply a customary gap filler. If boilerplate conflicts, with one party suggesting an uncustomary term and the other reciting the customary treatment, then again, custom would control. In short, we believe that our definition would better capture the essence of the battle of forms problem and would also will harmonize well with the cross-references to section 2-207(a) contained in sections 2-204 and 2-206.

The use of the word "agreement" in subsection (b) raises a second drafting problem. First, it is not clear what agreement means.[85] This ambiguity is further complicated by the use of "contract" in the same subsection. It is far from clear what is meant by "agreement" when "contract" is defined by sections 2-204 and 2-206. The drafters were probably referring to the collective forms or records issued by the parties.[86] If so, then the phrase "forms or records issued by the parties" should replace the word "agreement."

Third, subsection (c) presents a difficulty by referring to "assented to" terms through notice of trade usage, previous course of dealing, or course of performance. The same sentence makes reference to "agreed . . . terms." Nowhere is there a suggestion of how an agreed term differs from an assented term, nor how assent and agreement to terms differ. The context of assent suggests a prior performance under the term, or an agreement with a similar

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"subsection (b)" and the first use of "terms" in subsection (d)(2) should be removed. *Proceedings, supra* note 65, at 60, 64.

83. A discussion draft circulated in December, 1994 dropped the reference to "varying terms." Copy on file with the authors.

84. Roszkowski & Wladis, *supra* note 1, at 1077-78.

85. *Proceedings, supra* note 65, at 60.

86. *Id.*

term (course of dealing), but it is not clear whether that constitutes assent. The language does nothing to identify those instances in which the assent is effective to bring a varying term into the contract because assent itself is ambiguous.[87] The solution is to focus on actual agreement. We suggest placing a period after the phrase "expressly agreed to the terms," and deleting the phrase following the "or."

Fourth, subsection (d)(3) is not clear in its context. Subsection (d)(3) provides that the agreement includes "terms to which the parties have otherwise agreed." It would appear to apply to those terms that the parties orally agreed to but failed to include in the forms. This reading would be consistent, though redundant, with the notion that any agreed to terms are already incorporated into the contract by subsection (d)(1). More importantly, care must be taken to avoid resurrecting the counteroffer riddle through the language of (d)(3).[88] Varying terms (uncustomary boilerplate) contained in the "last form" should not be deemed accepted merely through conduct. To avoid this pitfall, we suggest inserting the word "expressly." The new language could read: "(d)(3) terms to which the parties have otherwise *expressly* agreed." Alternatively, a comment could clarify that the "terms" referenced in (d)(3) do not include "varying terms."

Finally, subsection (d)(4) should make explicit reference to usage of trade and course of performance as terms to be included in the contract as supplementary terms.[89] This is particularly true if the reference to usage of trade and course of performance is deleted from subsection (c) as suggested above. Currently, the section's simple reference to supplementary terms may suggest only those terms that are substantively described in the Article such as the warranty of merchantability. Anything that is not specifically set out might then be lost in the search to find a second step. On the other hand, if the section makes it explicit that these provisions are part of the contract by default, there will be added incentives for the parties to take any necessary steps to make clear their intent, thus stabilizing the relationship and avoiding the gamesmanship inherent in the current maze created by section 2-207.

Taken together, the critique and drafting suggestions would result in the following proposed redrafting of section 2-207:

> (a) In this Article, "varying terms" means terms prepared by one party and contained in a standard form writing or record that vary from trade usage, previous course of dealing, course of performance, or any supplementary terms incorporated under any other provisions of Article 2.
>
> (b) If an agreement of the parties contains varying terms, a contract results if sections 2-204 and 2-206 are satisfied.
>
> (c) Varying terms contained in the writings and other records of the parties do not become part of the contract unless the party claiming

87. Roszkowski & Wladis, *supra* note 1, at 1074.

88. Roszkowski and Wladis raise a similar concern in a prior version of proposed § 2-207 containing similar language. *Id.*

89. For a similar argument, see *id.* at 1074-75, 1078.

inclusion proves that the party against whom they operate expressly agreed to the terms. Between merchants, the burden of proof is by a preponderance of evidence. Otherwise, it is by clear and convincing evidence.

(d) If a contract with varying terms is formed under subsection (b), the terms are:

(1) terms upon which the writings or records agree;

(2) varying terms included under subsection (c);

(3) terms to which the parties have otherwise expressly agreed; and

(4) any supplementary terms, including those provided by previous course of dealing, course of performance, or usage of trade, incorporated under any other provisions of this [Act].

In addition, we recommend the inclusion of official comments that suggest the preferred outcomes to the counteroffer and integration problems noted before.

CONCLUSION

The proposed revisions to the battle of the forms make important steps toward remedying one of the most notorious problems under the current Article 2. The proposed approach to section 2-207 emphasizes the customary terms associated with the sales of goods. Such an approach is consistent with the vision initially offered by Karl Llewellyn, the chief draftsperson of Article 2. Llewellyn wrote that "the modern contract scholar's task is to find six to twelve transaction-types, to locate, describe, and test proper specifics for an iron core of exchange expectations."[90] Trade customs, previous course of dealing, course of performance, and the supplementary provisions of Article 2 provide these expectations. Pursuant to proposed section 2-207, unread boilerplate will no longer suffice to vary these expectations. Moreover, such an approach reflects sound economic reasoning based on the needs to preserve individual autonomy, reduce transaction costs, and provide legal stability.

90. KARL LLEWELLYN, THE COMMON LAW TRADITION 368-69 (1960).