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Victor P. Goldberg
Columbia Law School, vpg@law.columbia.edu

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The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule

After the parties agree to a sale, the buyer sends a purchase order with one set of boilerplate terms on the reverse side; the seller responds with an acknowledgment and invoice with another set of boilerplate terms. Do they have a contract? If so, on what terms? This so-called "battle of the forms" has given rise to a great outpouring of scholarship¹ and a legislative solution widely perceived as inartfully drafted and generally unsatisfactory.² In particular, the Code solution has been criticized because it attempted to solve both the formation and interpretation problems with one rule. The Uniform Commercial Code is now undergoing revision,³ and the most recent drafts have disentan-

* Thomas Macioce Professor of Law and Co-director of the Center for Law and Economic Studies, Columbia University. B.A., Oberlin College, 1963; Ph.D., Yale University, 1970. The author would like to thank Lisa Bernstein, Barbara Black, Marvin Chirelstein, Thomas McCarthy, Jim Mooney, Linda Silberman, and George Triantis for helpful comments.

¹ See, e.g., John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986); Thomas J. McCarthy, *An Introduction: the Commercial Irrelevancy of the "Battle of the Forms,"* 49 BUS. LAW. 1019 (1994); John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029 (1994). For a general discussion, see 1 E. ALAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 3.21, 3.21a, at 258-74 (1990).

² U.C.C. § 2-207. Grant Gilmore, one of the drafters of the UCC, described § 2-207 as "a miserable, bungled, patched-up job." Letter from Grant Gilmore to Robert Summers (Sept. 10, 1980), in R. SPEIDEL ET AL., *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 54-55 (3d ed. 1981).

³ This project of the American Law Institute (ALI) and National Conference of Commissioners on Uniform State Laws (NCCUSL) began in the late 1980s. For a brief history of the revision process, see McCarthy, *supra* note 1, at 1020. When I began this project, the July 1996 draft was current. U.C.C. Art. 2, Sales (Tentative Draft, July 12-19, 1996) [hereinafter Sales, Tentative Draft, July 1996; on file with author]. The July draft has been superseded by at least three subsequent variations: U.C.C. Art. 2, Sales (Council Draft No. 2, Nov. 1, 1996) [hereinafter Sales, Council Draft, Nov. 1, 1996; on file with author]; and a proposed draft adopted by the Article 2 Drafting Committee, U.C.C., Art. 2, Sales (Proposed Draft, Nov. 16, 1996) [hereinafter Sales, Proposed Draft, Nov. 16, 1996; on file with author]. After this paper was in page proofs yet another draft appeared: U.C.C. Art. 2, Sales (Discussion

gled the two issues.⁴ The revised Code has undergone at least two significant revisions between the July 1996 draft and the end of 1996. The target date for presenting the Code to state legislatures is fall 1998,⁵ so it is not unlikely that the draft will evolve yet again before final passage. While the revisers' separation of the two issues is laudable, their execution leaves something to be desired. They fail to address what I perceive to be the primary problem: when designing their forms, the parties have insufficient incentive to take their counterparties' concerns into account.

Most of the commentary fails to recognize the incentive question as a problem. One significant exception is the Baird-Weisberg⁶ analysis, which concludes that the old common-law rule—the “mirror-image” rule—induces the parties “to adapt the terms in their forms to the needs and abilities of buyers and sellers in their particular market.”⁷ That argument fails for reasons that I will spell out in Part I. My proposed solution entails two notions seldom associated with economists: fairness and the golden rule (“Do unto others as you would have them do unto you”). When interpreting a contract with inconsistent forms, courts should choose the fairer of the two to determine the governing contract terms. I will explain in Part II why this leads to convergence between the terms of buyers and sellers, how it can be operationalized, and what the golden rule has to do with it.

Draft, April 14, 1997) [hereinafter Sales, Discussion Draft, April 14, 1997]. The drafting history of the § 2-207 revision is summarized there at pages 29-32. There was no significant substantive change although the drafting committee adopted new terminology which would transform the “battle of the forms” to a “battle of the records.” In addition, a new section has been carved out, Section (2B), dealing with licenses, and in particular the licenses for “information,” such as computer software. U.C.C. Art. 2B, Licenses (Tentative Draft, July 12-19, 1996) [hereinafter Licenses, Tentative Draft, July 1996; on file with author]. That too has been updated. See U.C.C. Art. 2B, Licenses (Discussion Draft, April 14, 1997) [hereinafter Licenses, Discussion Draft, April 14, 1997].

⁴ “In transactions where standard terms in the records of one or both parties do not agree, the issue of contract formation has been detached from the original Section 2-207 and is treated in Sections 2-203(b) and 2-205(a)(1). . . . If some contract is formed, the question of what standard terms, if any, are included is treated in new Section 2-206 and revised Section 2-207.” Sales, Tentative Draft, July 1996, *supra* note 3, § 2-203, Note 1, at 21.

⁵ Minutes of 11/22-24/96 Meeting of NCCUSL/ALI 2B Drafting Committee, Thomas J. McCarthy, Chair (on file with author).

⁶ Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982).

⁷ *Id.*

In a modern economy, there are tremendous advantages to the mass production of contracts in which the inessential terms are boilerplate in forms that go largely unread. Fine tuning contracts to take into account the precise needs of the parties will often be impractical or, at least, costly. There is a tradeoff between obtaining the scale economies of standard forms and customizing the language to the particular needs of the parties.

The present Code and the proposed revision resolve the tradeoff in a similar way. In effect, the Code provides a set of default terms that will be read into all transactions with inconsistent standard terms. To avoid this outcome, the parties would have to sacrifice the economies of the standard form and particularize the transaction, by adopting master agreements, bargaining over the specific terms, or otherwise manifesting assent to those terms. If the Code default rules are generally thought desirable, then this resolution of the tradeoff is not particularly onerous. Indeed, Dean Murray, one of the current law's more vocal critics, proposed an even stronger rule: The Code's terms are a desirable starting point, and if a seller wants to propose deviant terms—for example, warranty disclaimers, limitations or exclusions of various damages such as consequential damages, and arbitration clauses—then the burden is on the seller to prove the buyer's assent to the deviant terms.⁸

I have less faith in the Code default rules. If parties had the time to bargain intelligently over these rules, I believe that they would generally choose not to compensate consequential damages or that they would at least limit such damages to a modest multiple of the contract price.⁹ Of course, I might just be wrong. Nevertheless, this predilection leads me to a somewhat different resolution of the tradeoff that would permit the parties to contract out of the default rules while at the same time obtaining the economies of standardization. It would induce parties to take the concerns of their potential counterparties seriously when it matters—when legal resources are being concentrated on the problem.

I must emphasize that the solution is an imperfect one and that its purpose is to salvage some of the benefits of standardization

⁸ John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1476 (1994).

⁹ See READINGS IN THE ECONOMICS OF CONTRACT LAW 86-104 (Victor P. Goldberg ed., 1989).

and the mass production of forms while still giving the parties at least some incentive to get it right. The Code revisers appear to have lost sight of this point. Thus, they are willing to entertain the suggestion that handwritten secondary terms should be treated the same as mass-produced boilerplate terms under § 2-207:

What difference does it make as to how the form is prepared in determining whether the term should be enforced? Assume I hand write out all my terms fresh from my head without consulting any bank of "standard terms" and I send those to a party. The other party sends to me handwritten terms fresh from their head without any consulting of any bank of "standard terms." Neither of these records would fulfill the definition of standard form in 2-102(30). We go ahead and perform without any discussion of any of the terms that we wrote out, given that we agreed on price, quantity, and delivery. A problem erupts, my terms say warranty, the other side's terms say no warranty. Do we have a separate rule for that situation that would be different than the 2-207 rule . . . ? If not, then 2-207 should not be limited to "standard forms" as defined in 2-102(30).

Nothing in the current redraft gives any justification for the limitation of the principles to the standard form situation as standard form is defined. . . . By bifurcating the sales world into "standard form" situations and non-standard form situations and having different rules apply to those two situations, the definition of standard form becomes critical and will be heavily litigated. Is it worth it?¹⁰

In the hypothesized situation, there is no tradeoff. It seems quite odd that two parties would simultaneously try to include conflicting one-shot terms in an agreement without calling the term to the other's attention. Why should the resolution of the harder problem—balancing the gains from standardization against those of customization to the parties' particular needs—be linked to solving the somewhat freakish problem posed by conflicting one-shot terms?

I

OF MIRROR IMAGES, FIRST SHOTS, LAST SHOTS, ETC.

If a seller has promised to deliver goods at a particular price

¹⁰ Memorandum from Thomas J. McCarthy and Linda J. Rusch to Article 2 Drafting Committee, Nov. 8, 1996 (on file with author). McCarthy and Rusch are, respectively, chair and vice-chair of the ABA Subcommittee on Sales of Goods.

and the market price subsequently rises, that seller has an incentive to find a reason not to perform. Discrepant language in the forms of buyer and seller could provide such a reason: Because the terms were not identical, the parties had failed to agree; there was no contract and the seller could walk away without legal liability. The "mirror-image" rule, which, taken literally, requires that the terms of the offer and acceptance be identical, would facilitate the opportunistic invocation of non-identical language in forms to avoid performance of an onerous contract. In practice, courts have adopted a number of doctrines to soften that rule.¹¹ The Code has made it less likely that a party could use non-identical forms to escape a bad deal and the revised Code goes even further.¹² I presume that the Code drafting committee has dealt adequately with the question of whether a contract exists.¹³ My concern is with interpretation: The seller delivered goods, the buyer accepted them, and then a dispute arose. Their behavior indicates that they had a contract, but the content of that contract is unclear since the parties had forms with inconsistent language.

Under the mirror-image rule, the dickered terms (price, quantity, etc.) and the terms of the buyer's purchase order constitute an offer. If the seller returns an acknowledgment form with identical terms, those terms define the contract. If, however, the seller's boilerplate terms differ, then a court could find an acceptance with insubstantial differences (hence, the buyer's terms prevail), an acceptance with suggested modifications (the buyer's terms would again prevail since the buyer's silence is interpreted as rejection of the proffered modifications), or a counteroffer. If it is a counteroffer and the buyer accepts the goods without objecting to the seller's terms, then the contract is defined by the seller's terms. The parties have an incentive to jockey for position so that theirs is the last shot. The key feature of the mirror-image rule is that only one party can be deemed the offeror, and the offeror's terms control. In practice, the commentary suggests

¹¹ See FARNSWORTH, *supra* note 1, § 3.21, at 259-60; Baird & Weisberg, *supra* note 6, at 1222.

¹² See U.C.C. §§ 2-203(b), 2-205(a)(1).

¹³ After the October 1993 Drafting Committee meeting, the revision of § 2-207 "focused on the unfair surprise issue. Assuming that some contract was formed under §§ 2-203 and 2-205, the sole question was whether 'varying terms' became part of the contract." Sales, Council Draft, Nov. 1, 1996, *supra* note 3, Note 2, at 29.

that the last shot is typically fired by the seller.¹⁴

The present UCC § 2-207 changed this rule, although there is considerable dispute as to what was put in its place. A majority of jurisdictions have adopted the "knockout" rule.¹⁵ If the parties' boilerplate terms conflict, the discrepant terms knock each other out and the Code term is substituted.¹⁶ If, as the commentators argue, the gap fillers are skewed in favor of buyers,¹⁷ then UCC § 2-207 tends to impose buyers' terms. Sellers could try to avoid this outcome by including language in their forms which expressly limits the acceptance to the terms of their offer.¹⁸ Courts have not been inclined to give these expressions much weight.¹⁹ Farnsworth suggests that the only way that a seller could assure itself of having the last shot is to reject in clear and unambiguous terms the buyer's offer and make its own counteroffer, thereby taking the transaction out of § 2-207.²⁰

The proposed revisions more clearly favor the knockout rule although, unlike Article 2B (Licenses), which unambiguously adopts the knockout rule,²¹ Article 2 (Sales) provides only a modified version. In the July 1996 version, if there are discrepant terms, either the Code default rules apply or "the party claiming

¹⁴ See FARNSWORTH, *supra* note 1, § 3.21a, at 273-74.

¹⁵ See *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1178 (7th Cir. 1994).

¹⁶ Farnsworth questions this interpretation: "This would give a contract consisting, not of the offeror's terms, but of the terms as to which there is no conflict, with the gap left by the conflicting terms to be filled by other sections of the Code. There is, however, little reason to suppose that the drafters of the Code intended such a startling departure from the principle that the offeror is the master of the offer." FARNSWORTH, *supra* note 1, § 3.21, at 263-64 (footnote omitted). Murray claims that Karl Llewellyn, the Code's chief architect, did indeed intend such a departure. See *Murray*, *supra* note 8, at 1464-72.

¹⁷ See FARNSWORTH, *supra* note 1, § 3.21a, at 274; see also Baird & Weisberg, *supra* note 6.

¹⁸ "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.*" U.C.C. § 2-207(1) (emphasis added).

¹⁹ FARNSWORTH, *supra* note 1, § 3.21a, at 272-73; see also *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1445 (9th Cir. 1986) (disregarding such a statement even though parties had actually discussed the particular term, a disclaimer of liability, and seller had rejected buyer's efforts to remove that term from their contract).

²⁰ See FARNSWORTH, *supra* note 1, § 3.21a, at 274.

²¹ Licenses, Tentative Draft, July 1996, *supra* note 3, § 2B-309, Note 2, at 46-48; see also Licenses, Discussion Draft, April 14, 1997, *supra* note 3, § 2B-309, Note 2, at 87.

inclusion [of the discrepant terms] establishes that the other party . . . had reason to know of them from course of performance, course of dealing or usage of trade and that they were intended for inclusion in the contract."²² The language of the November 16, 1996 and April 14, 1997 versions is different, but the result is basically the same.²³ So for sales (but not for licenses) the knockout rule is supplemented by trade practice and course of dealing to determine content. The drafters are silent on how to use trade practice and course of dealing. How, for example, should a court weigh the fact that every seller in a particular industry tries to waive consequential damages and every buyer knows it?

The knockout rule produces some anomalous results, knocking out terms that would yield the same result in a particular case and replacing them with a default rule yielding a different outcome. Thus, the drafters state:

Suppose the standard form records of both parties contained arbitration clauses which differ in material ways. For example, Buyer's clause might agree to arbitrate "all disputes arising out of or relating to" the contract and Seller[s] clause might agree to arbitrate only disputes "involving breach of warranty claims." Here the terms vary. Under § 2-207(a)(2) neither clause becomes part of the contract. The "knock out rule" is in effect. The parties are left with the usual default rules.

On the other hand, if the form records contained arbitration clauses which agreed in substance, the parties must arbitrate to the extent of that agreement.²⁴

If the dispute related to a breach of warranty claim, both forms would have resulted in arbitration, but the net result of the knockout rule is that the Code default rule—no arbitration—would apply.²⁵

The revisers alter the way that a party can word its form so as to make its assent conditional: "Language in a standard form record expressly conditioning the intention of the drafter to be bound to a contract upon agreement by the other party to terms

²² Sales, Tentative Draft, July 1996, *supra* note 3, § 2-207(a)(2), at 27-28.

²³ See Sales, Discussion Draft, April 14, 1997, *supra* note 3, at 29.

²⁴ Sales, Council Draft, Nov. 1, 1996, *supra* note 3, Illustration E(4), at 33.

²⁵ A court could, perhaps, determine that since either clause would have required arbitration, the clauses are not sufficiently different *for this particular purpose*. That sensible result is at odds with the revisers' language which requires that the knockout rule be applied before considering the purpose of the clause.

in the standard form must be conspicuous."²⁶ Since it is anticipated that most businesspeople will not read most of the terms most of the time,²⁷ it is not clear what purpose is served by making the terms "conspicuous."²⁸ If a tree falls in a forest and no one hears it, is it conspicuous? Nonetheless, the proposed revision does provide a possible out for a party that wants to condition its assent via a standardized clause.

When drafting boilerplate language under the knockout rule, the parties have no incentive to take the other's interests into account. As Murray suggests, the forms "are designed by their drafters to use the latest weaponry in a surreptitious fashion to win the battle of the forms."²⁹ If the party is lucky, its terms will govern; if unlucky, the worst that can happen is that the Code default rules will govern. There is no cost to a seller (or a buyer) in adding increasingly one-sided terms to its standard forms, save the possibility that someone will actually read the fine print and refuse to transact on the objectionable terms.

While the costs of producing a one-sided form are low, are there any benefits? If the Code default rules will prevail, why would a seller even bother to produce a self-serving form that courts would ignore when interpreting the contract? The answer is that in some subset of transactions, the seller's terms might prevail. Litigation might take place in a jurisdiction that does not follow the knockout rule. Or the buyer might fail to return a form (either because it does not issue forms for such transactions at all or because its delivery of the form was not timely: performance preceded dispatch of the form³⁰); there is no battle, and the seller's form would govern. Or the court might accept the ex-

²⁶ Sales, Council Draft, Nov. 1, 1996, *supra* note 3, § 2-203(d), at 20.

²⁷

The agents who handle these transactions rarely take the opportunity to review the forms and this reality is well understood by all. Thus, both parties can include advantageous standard terms and *know that the other party won't read it* and will probably manifest a blanket assent to all terms without objection.

Sales, Tentative Draft, July 1996, *supra* note 3, § 2-207, Illustration C, at 31 (emphasis added).

²⁸ "Conspicuous terms" are defined as follows: "'Conspicuous,' with reference to a term, means so displayed or presented that a reasonable person against whom it is to operate would likely have noticed it." Sales, Discussion Draft, April 14, 1997, *supra* note 3, § 2-102(a)(7), at 2.

²⁹ Murray, *supra* note 1, at 1373.

³⁰ See, e.g., Harlow & Jones, Inc. v. Advance Steel Co., 424 F. Supp. 770 (E.D. Mich. 1976).

pressly conditional language in one of the forms and convert the form into a counteroffer accepted by performance, with the original offeror's form being read out of the transaction.³¹ Seller's counsel is rewarded not for bringing the parties closer together, but for producing creative language which increases the likelihood that its terms would define the contract rather than the Code's default rules.³²

The problem with the knockout rule is that it fails to induce the parties to provide an honest indication of their willingness to deviate from the Code terms, unless they are willing to forego the convenience of exchanging mass-produced, unread forms.³³ In describing the virtues of a return to the mirror-image rule, Baird and Weisberg argue that it would overcome this non-revelation problem: "Under the mirror-image rule . . . each party, in designing its form for a particular type of transaction, has an incentive to hypothesize the terms that the parties would have settled upon had they dickered over them."³⁴ Nonreaders of forms would be protected by the efforts of the few that read. Market discipline, they suggest, would prevent the seller from making its form overly one-sided. The seller would recognize that at least some buyers would be careful enough to read the forms and that if the forms were too biased in the seller's favor, the buyer would walk away. As Baird and Weisberg argue:

[T]he mirror-image rule, compared to other possible approaches, takes maximum advantage of these market forces. It makes printed forms matter more by encouraging or even forcing parties receiving documents to read them more carefully. The rule thereby encourages parties sending documents to make them attractive to their intended recipients.³⁵

³¹ See, e.g., *Salt River Project Agric. Improvement & Power Distr. v. Westinghouse Elec. Corp.*, 694 P.2d 267, 274-75 (Ariz. Ct. App. 1983), *rev'd on other grounds*, 694 P.2d 198, 204 (Ariz. 1984) (en banc) (seller's terms prevailed because buyer's language made clear the seller's response was a counteroffer).

³² "Sellers will not quit. Like a frustrated cartoon character, the seller has an endless supply of thrusts. The next thrust is the ingenious one of turning its quotations or proposals into offers." Murray, *supra* note 8, at 1472.

³³

A standard that allows a court to substitute general off-the-rack terms for fine print cannot at the same time give the parties an incentive to draft forms in their mutual interest. The more the off-the-rack terms control, the less the fine print matters, both to the courts and to the parties themselves.

Baird & Weisberg, *supra* note 6, at 1256.

³⁴ *Id.* at 1257.

³⁵ *Id.* at 1255.

I am skeptical.³⁶ First, suppose that some buyers actually would be induced to read the sellers' mass-produced documents more carefully. It is far from clear that inducing such behavior would be socially useful. Maintaining lawyers on the loading docks is not cheap. The advantage of standardized transactions is that the lawyering is concentrated on the drafting of documents, with the costs thereby spread over a large number of similar transactions. These benefits are dissipated if the rule induces some parties to expend resources scrutinizing boilerplate language. Thus, even if the Baird-Weisberg marginal buyer's scrutiny does police the seller's self-serving drafting—and it probably does not—it does so by sacrificing some of the economies of standardization.

Second, suppose that a buyer does read the form and finds a term it does not like. What happens next? The parties could negotiate over the contested term, taking the transaction out of the battle of forms context. Or the buyer could accept the terms on the presumption, or perhaps even the salesman's assurance, that the offensive terms would not apply to this transaction—the terms are only there to deal with the bad guys. In neither case does the seller who accedes to the concerns of the reluctant buyer find it necessary to change the language in the form. The marginal buyers who care enough can be accommodated while the basic form remains unchanged. Baird and Weisberg must rely on buyers who would find the terms offensive enough to refuse, yet still not worth fighting over.

Third, and most important, if the Baird-Weisberg argument were correct, it should be symmetric. If the marginal buyer could police seller's terms under the mirror-image rule, then the marginal seller could just as easily influence the buyer's terms under the knockout rule.³⁷ The result should be the same neutral, mutually beneficial terms under either rule. There is no reason to believe that the occasional scrutiny given to buyer's forms by sellers would be any less efficacious. Indeed, rational sellers need not even bother with forms incorporating their boilerplate. Buyers would design their forms to be attractive to sellers. If the seller's language were identical to the buyer's, it would be redun-

³⁶ Others are too. See Robert M. Rosh, *Demilitarizing the Battle of the Forms: A Peace Proposal*, 1990 COLUM. BUS. L. REV. 553, 569.

³⁷ As Baird and Weisberg observe, for their mechanism to work, "the courts must be willing and able to enforce the rule." Baird & Weisberg, *supra* note 6, at 1258. The same would be true of the knockout rule.

dant. If not, the knockout rule would apply, and the parties would be stuck with the Code default rules. But if sellers really believed that the Baird-Weisberg market mechanism worked, they would find that by producing a document they risked undoing the buyer's terms; presumably, sellers would prefer the buyer's "attractive" terms to the Code's default rules. Rational sellers would, therefore, issue no forms. There would be no battle, the buyer's form would govern, and sellers would be content. Not credible.

The Baird-Weisberg market discipline stems from the seller's concern that some fraction of the potential customers will read the form, and if it is unreasonable, go elsewhere. They ignore the converse. Many potential buyers will rationally choose not to subject the boilerplate to intense, or even casual, scrutiny. Some sellers will, as Baird and Weisberg suggest, temper their terms for fear of losing a deal. Others will presume that the random buyer they run into will not have read the form and that, by stacking the deck, the seller can perhaps gain more from the nonreaders than it loses to the readers. The rational buyer who does not carefully parse sellers' forms might plausibly believe that the seller has chosen the self-serving form route. That is, after all, what sellers believe buyers would do under the knockout rule. If they believe that, one plausible response is to draft defensively, which is cheaper than reading defensively. It is not inevitable that the noncooperative strategy would dominate. But that seems the more plausible outcome of a game in which players expect only a small fraction of their counterparts to read the terms of their forms.³⁸

In sum, competition between either buyers or sellers on the terms of their standardized forms is unlikely to induce either party to eschew self-serving language in their forms under either the mirror-image or knockout rules. The lawyer drafts language in a vacuum with virtually no incentive to consider the concerns of the other side. What is needed is a mechanism that would bring the counterparties' concerns to the lawyer's attention when the standardized form is being produced.

³⁸ Rosh criticizes Baird and Weisberg for failing to recognize that the problem can be viewed as a prisoner's dilemma. Rosh, *supra* note 36, at 569. For a readable account of game theory and its application to legal questions, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994).

II

THE BEST-SHOT RULE

Suppose two parties were trying to determine the price of an asset or service one is attempting to sell to the other. One possible device is final-offer arbitration. Each side proposes a price and a third party chooses one or the other. The arbitrator does not compromise—it has only the two alternatives. The seller recognizes that if it gets too greedy, the probability that the arbitrator will choose its price declines. Likewise, the buyer. Each must temper its final offer lest it end up with the other party's bid setting the price. If the possible bids are thought of as being located along a line with the high numbers on the right, the seller would want to move as far to the right as possible and the buyer to the left. However, they are drawn by the decision rule toward the center.

My proposed mechanism is a variation on final-offer arbitration. When confronted with two nonconforming forms, the court must choose only one to govern the transaction. Which one? The one that it perceives to be the fairer of the two—the one closest to the “center.” The court looks not to the first shot, nor the last shot; it looks to the *best shot*. Leaving aside for the moment the question of how to determine fairness, this has the same basic structure as final-offer arbitration. If either side tries to tilt its offer too much in its favor, it risks having its entire set of terms disregarded. Each side has an incentive to move toward the center. The only difference is that when everything is measured in a single unit—dollars—it is easier to ascertain where the center is.

While it might seem paradoxical to have the court's treatment of an arbitration clause turn on the respective treatment in the two forms of unrelated terms—say, the disclaimer of consequential damages—the all-or-nothing approach is essential. The more terms that are considered at the same time, the easier it will be to judge the overall reasonableness of the package. Moreover, when drafting, a seller will have an incentive to make tradeoffs between terms depending on which it perceives the most important. If limitations on the warranty period are extremely important to a seller, then it can include them, but give up on some other features; if they are sufficiently important, of course, they can be lifted out of the boilerplate entirely.

Operationalizing fairness will not be easy. If the Code's default terms were taken as *prima facie* fair, then this proposal might have minimal impact. If, as many claim, the Code rules favor buyers, the buyers would never have an incentive to move toward the sellers; indeed, they might be induced to take an even more extreme position.

But we can do better. One source of evidence on fairness is the behavior of the parties. Specifically, I propose that the courts give serious weight to the golden rule. That is, since firms are often both buyers and sellers, the standard forms that the parties use when they are on the other side of transactions should be taken as evidence of what they perceive to be fair. If a firm's forms disclaimed liability when it acted as a seller, but rejected disclaimers when it acted as a buyer, this should weigh heavily against the firm when determining whether its form or its counterpart's would win. Thus, lawyers drafting standardized forms for a client would, in effect, be bargaining with an informed party—themselves. It is easy to add a consequential damage disclaimer to a form if your client is always a seller selling to anonymous future buyers who can't talk back and will not bother to read the form. If the client is also a buyer and the clause would prevent it from recovering, then the lawyer has to weigh the merits of the disclaimer at the one point in time when it actually makes sense for the lawyer to give the problem careful attention.

Implementation of the golden rule presents a number of difficulties. Most important, it might result in a one-size-fits-all approach. It might turn out, for instance, that under the circumstances a particular firm should have very different terms when it is a seller rather than a buyer. Yet it might be difficult to make that argument credible in the litigation context. Of course, that is precisely the problem with the Code's default rules. If the golden rule does result in a single standard, at least that standard would be generated by counsel with a direct stake in the outcome rather than by drafters of a statute. Sympathetic interpretation should give counsel drafting forms some leeway to vary terms depending on the context. Firms might maintain a portfolio of forms and match them to particular contexts.

Of course, that will raise another set of problems. If a firm has, say, half a dozen different purchase orders, which should be used when applying the golden rule? Should the court look to the most-used form (by number of transactions or by dollar

value)? Should it consider all of them, and, if so, what weights should be attached to the different forms? Will sellers have incentives to produce purchase orders for litigation purposes only? Should the seller in one division or subsidiary be constrained by the purchase orders from its corporate relatives?

It is conceivable that problems of this sort will overwhelm the golden rule, but I think not. A seller might be able to convince a court that the only purchase order in its portfolio that limits consequential damages is indeed the only one relevant to this particular transaction. But that will not be an easy argument to make. The golden rule, in essence, requires litigants to justify deviations between the standardized form at issue in the particular dispute with the form or forms it would use when on the opposite side of the transaction.

At first blush it would appear that the best-shot rule would be more expensive to litigate and would provide less certain outcomes. If the terms of the two forms are clearly at odds, and if neither form made assent conditional, then the knockout rule easily wins on the certainty issue. Neither contract governs and the Code's default rules apply (unless course of dealing or trade practice suggest otherwise). I will suggest below that the knockout rule's superiority with regard to litigation costs, even under these ideal conditions, is less clear. For the moment I want to focus on certainty because in some circumstances the knockout rule both increases uncertainty and leads to a result that neither party desired at the formation stage. Recall the arbitration illustration discussed above.³⁹ Under a best-shot rule, the dispute would clearly be arbitrable. Under the knockout rule a court would have to determine whether the two "arbitration clauses . . . agreed in substance."⁴⁰ Both parties wanted arbitration at the formation stage; under the knockout rule, one party might have the ability to renege if it can show a large enough difference.

Similar problems might arise with regard to liability limitations. Consider the following clauses:

Seller

No claim of any kind, whether as to products (or materials) delivered or for non-delivery of products, and whether or not based on negligence, shall be greater in amount than the purchase price of the products in respect of which damages are

³⁹ See text accompanying note 23.

⁴⁰ *Id.*

claimed; and failure to give notice of claim within ninety (90) days from date of delivery, shall constitute a waiver by Buyer of all claims in respect of such products. No charge or expense incident to any claims will be allowed unless approved by an authorized representative of Seller. Products shall not be returned to Seller without Seller's prior permission, and then only in the manner prescribed by Seller. The remedy hereby provided shall be the exclusive and sole remedy of Buyer, and in no event shall either party be liable for special indirect or consequential damages, whether or not caused by or resulting from the negligence of such party.

Buyer

(A) Should any goods, other than equipment, fail to conform with the express warranties, Seller's sole liability and Buyer's sole remedies shall be as follows: Seller shall replace the non-conforming goods promptly following Buyer's notification or, at Buyer's option, refund the purchase price. Seller also shall reimburse Buyer for any costs incurred by Buyer to remove, store, transport or dispose of non-conforming goods. Seller shall, however, have no liability under this Paragraph A if Buyer fails to notify Seller of non-conformance (i) within 90 days after date of delivery; or (ii) if the non-conformance is not reasonably discoverable within that time, then within 90 days after date on which the non-conformance was or should have been discovered.

(B) All equipment shall conform with the express warranties and for 12 months from date of installation but no more than 18 months from date of shipment. Seller shall repair or replace any non-conforming equipment promptly after Buyer's notification or, at Buyer's option refund the purchase price. Seller shall also reimburse Buyer for (i) any costs incurred by Buyer to remove, store, transport or dispose of non-conforming equipment and to install repaired or replaced equipment, and (ii) any resulting costs incurred by Buyer for the standby charges of Buyer's other contractors up to a maximum of the Order value.

(C) To the extent permitted by law, neither party shall be liable to the other for any special, consequential or punitive damages, even if caused by negligence, willful misconduct or breach of contract.

The terms do not differ by much; is the difference large enough so that the buyer could claim that the terms knock each other out so that it might recover consequential damages?⁴¹ Variations on these clauses would make it even harder for the damage limita-

⁴¹ Interestingly, both terms are duPont's. Thomas McCarthy, duPont's corporate counsel and chair of the American Bar Association's Task Force on the Article 2 Revision, graciously provided me with duPont's standard forms. Contrary to the conventional wisdom, duPont did not stack the deck in its favor; it would likely be content as a seller living with its purchase form and as a buyer with its standard

tion to survive the knockout rule despite the obvious intent of buyers to forego the Code's default remedies.

In many cases, to be sure, the knockout rule will be clear (the terms conflict, so go directly to the default rules) compared to the fairness test of the best-shot rule. The more predictable the rule, other things being equal, the less costly it would be to litigate. Other things are not equal, however. If the best-shot rule works properly, the forms of the parties should be less divergent. The stakes should therefore be smaller. The smaller the stakes, the less parties should be willing to spend on litigating a dispute. This second factor is probably not enough to offset the first, although I will suggest below a slight variation on this theme which makes complete offset more likely.

The certainty of the knockout rule is undermined if a party can interject uncertainty with regard to the assent. It is not at all obvious that the conspicuousness of the conditional assent clause would be any less fuzzy than the fairness of the form. Under the best-shot rule a court would not have to agonize over whether language in one party's form making assent conditional were sufficiently conspicuous. Such a clause would be lumped with the rest in a fairness inquiry and would, most likely, count against the drafter. This does not, of course, preclude a party from making assent conditional; it just means that it would have to be done out in the open.

Further, if, as I believe, the best-shot rule resulted in parties generally limiting damage recovery (in particular, consequential damages),⁴² the litigation costs of ascertaining those damages

conditions of sale. The warranty terms also were similar, but with enough variation that a court could choose to knock out both:

Seller

Seller warrants that the products (or materials) delivered hereunder meet Seller's standard specifications for the products or such other specifications as may have been expressly agreed to herein. Buyer assumes all risk and liability resulting from use of the products delivered hereunder, whether used singly or in combination with other products.

Buyer

Seller warrants good materials and workmanship, merchantability, and compliance with the following with respect to any goods sold hereunder: Seller's product literature and all referenced or attached specifications, drawings, samples and information.

⁴² Forms drafted by trade associations for commodities like grains and coffee are drafted in a forum which enables buyers and sellers (often the same people) to weigh the merits of the boilerplate terms; my understanding is that they typically do not allow recovery for consequential damages.

need not be incurred, while under the knockout rule (modified or not) those damages would likely be recoverable and would therefore be an additional source of litigation costs. Economizing on litigation costs is one concern of parties structuring their contractual relations. To the extent that the best-shot rule enables them to fine-tune their agreements, it would permit them to avoid default rules that might result in increased litigation costs. It is, therefore, hardly inevitable that the best-shot rule would be more expensive to litigate than would the alternatives.⁴³

If the cost of litigation were really a high-priority item for the Code's drafters, they could, as the preceding paragraph suggests, deal with it more directly by choosing default rules that were less litigation-prone. Their proposal reflects a choice. Altering the default rules by standard form language will be very difficult. If sellers do not like this, they will have to sacrifice the advantages of the standard form. The best-shot rule, unlike the present Code or its proposed revision, gives at least some attention to the crucial question: How might the Code balance the scale economies of standardization of boilerplate terms against the virtues of fine-tuning the form language?

The clock is ticking. As I write this, the scheduled date for approval of the revised Code is fall 1998. Perhaps it is too late to derail the process. My hope is that by reframing the question and proposing one alternative that deals with the reformulated problem, I can slow it down and, perhaps, put it on the right track.

⁴³ This "inconclusive" proposition is similar to my argument that litigating a strict liability standard in tort need not be cheaper than litigating a negligence standard, despite the fact that it requires proof of one less fact—fault. See Victor P. Goldberg, *Litigation Costs Under Strict Liability and Negligence*, 16 RES. IN L. & ECON. 1 (1994).

