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# Defense of the Battle of Forms: Curing the First Shot Flaw in Section 2-207 of the Uniform Commercial Code

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## IN DEFENSE OF THE BATTLE OF FORMS: CURING THE "FIRST SHOT" FLAW IN SECTION 2-207 OF THE UNIFORM COMMERCIAL CODE

Section 2-207<sup>1</sup> of the Uniform Commercial Code<sup>2</sup> has realistically extended legal recognition to deals commercially considered closed even though the writings of the parties include additional or different terms. The effect has been to undercut the common law concept of counter-offer and eliminate the "last shot" doctrine: by submitting an acceptance varying from the terms of the offer, the offeree could create a counter-offer such that if the parties then completed performance, the counter-offer would constitute the contract terms. This "last shot" advantage allowed an offeree to battle for favorable contract terms by submitting a printed form replete with favorable terms.

Section 2-207 removes this advantage, but its further attempt to define the terms of this new category of contracts has produced an equally unacceptable "first shot" doctrine: the first party to make an offer now has the advantage in controlling the contract terms. This note will examine the judicial development of section 2-207, analyze the "first shot" flaw, and suggest a cure which makes the battle of the forms a commercially viable activity.

### I. Legal Sanction to Commercial Deals

Section 2-207 concerns three contract formation situations: oral or informal agreement, offer and acceptance, and conduct of the parties. Once a contract has been formed between merchants, additional terms become part of the contract unless they fall within one of the enumerated exclusions.

#### A. *Contract Formation*

##### 1. Oral or Informal Agreement

If the parties reach an agreement orally or by informal correspondence,<sup>3</sup> and either or both submit formal memoranda, a contract will be formed despite

1 Section 2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

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

2 Hereinafter referred to as the Code in the text and cited as U.C.C. in the footnotes.

3 See U.C.C. § 2-207, Comment 1.

the inclusion of different or additional terms.<sup>4</sup> An agreement could arise from a telephone order,<sup>5</sup> meetings and negotiations,<sup>6</sup> or telex communications.<sup>7</sup> A written confirmation must satisfy the statute of frauds<sup>8</sup> and may be a letter of confirmation,<sup>9</sup> an acknowledgment,<sup>10</sup> a confirmation of order,<sup>11</sup> a telephone order acknowledgment,<sup>12</sup> or exchanged purchase order and acknowledgment.<sup>13</sup> If only one party submits a written confirmation, its additional terms which do not materially alter the contract become part of it. On the other hand, if both parties submit written confirmations, the contract consists of the terms in the original agreement, the terms upon which the confirmations agree, and any additional terms which do not materially alter the contract.<sup>14</sup> This implies that if the writings conflict on some point, neither party's term will be included in the contract. Accordingly, a written confirmation should be submitted following an informal agreement since it can be used offensively to impose non-material additional terms and defensively to cancel conflicting terms in the other party's confirmation. This situation represents a proper and acceptable battle of forms: to introduce less significant terms and to rid the contract of any unbargained-for subject matter which is in conflict.

An advantage of establishing a prior oral or informal agreement is that the other party cannot submit a memorandum with additional or different terms and make the contract conditional on assent to these terms.<sup>15</sup> If neither prior agreement nor written confirmations can be properly established, there will be a contract only if the parties have exchanged offer and acceptance or have by their conduct recognized a contract.

## 2. Offer and Acceptance

A definite and seasonable acceptance of an outstanding offer creates a contract even though it includes additional or different terms.<sup>16</sup> The offer usually

<sup>4</sup> See *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

<sup>5</sup> *Tidewater Lumber Co., Inc. v. Maryland Lumber Co.*, 3 UCC Rep. Serv. 351 (N.Y. Sup. Ct. 1966).

<sup>6</sup> *Medical Development Corp. v. Industrial Molding Corp.*, 479 F.2d 345 (10th Cir. 1973); see also *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970).

<sup>7</sup> *Th. van Huijstee, N.V. v. Faehndrich*, 10 UCC Rep. Serv. 598 (N.Y. Civ. Ct. 1972).

<sup>8</sup> U.C.C. § 2-201. See, e.g., *Southwest Engineering Co., Inc. v. Martin Tractor Co., Inc.*, 205 Kan. 684, 473 P.2d 18 (1970) applying the three requirements of section 2-201: the memorandum must evidence a contract for the sale of goods, be signed, and specify quantity.

<sup>9</sup> *Th. van Huijstee, N.V. v. Faehndrich*, 10 UCC Rep. Serv. 598 (N.Y. Civ. Ct. 1972).

<sup>10</sup> *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972).

<sup>11</sup> *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

<sup>12</sup> *Tidewater Lumber Co., Inc. v. Maryland Lumber Co.*, 3 UCC Rep. Serv. 351 (N.Y. Sup. Ct. 1966).

<sup>13</sup> See *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

<sup>14</sup> U.C.C. § 2-207, Comment 6.

<sup>15</sup> Subsection (1) literally allows only an acceptance to be expressly made conditional. The rationale is that where an informal agreement has already been reached, neither party can obviate the agreement by requiring inclusion of subsequent terms.

<sup>16</sup> See U.C.C. § 2-207(1), *supra* note 1.

takes the form of a purchase order,<sup>17</sup> while the acceptance could be an acknowledgment of an order,<sup>18</sup> an invoice,<sup>19</sup> or even a letter.<sup>20</sup> The use of a purchase order and an acknowledgment will not place a contract in the offer-acceptance category where the parties have already reached an agreement.<sup>21</sup>

At common law an offer by its nature limited acceptance to the terms expressed in the offer. In section 2-207, "definite and seasonable" thus seems strangely juxtaposed with "acceptance." Once it has been recognized, however, that the word "acceptance" has been retained primarily to make use of the familiar offer-acceptance categorization, then the words "definite and seasonable" in conjunction with "different" and "additional" function as guidelines in expanding the concept of acceptance. Under section 2-207 the offeree may create a contract and still introduce certain additional terms. An attempt to expressly limit an acceptance to the terms of the offer now has no other effect than to keep additional terms in the acceptance from becoming part of the contract.<sup>22</sup>

If the parties complete performance after exchange of offer and acceptance and yet the acceptance failed to create a contract under subsection (1), either by not being definite and seasonable or by expressly being conditional on assent to additional or different terms, the contract will be recognized and its terms determined under subsection (3). Rather than revert to the common law approach of treating the defective acceptance as a counter-offer, the courts have properly kept the transaction within the framework of section 2-207 by applying subsection (3).<sup>23</sup>

### 3. Contract by Conduct

In the final contract formation situation, where the writings of the parties fail to establish a contract, conduct by both parties which recognizes the existence of a contract will be sufficient to establish one.<sup>24</sup> Examples of insufficient writings would be where an acceptance is expressly made conditional on assent to its additional or different terms,<sup>25</sup> an offer is not accepted in writing,<sup>26</sup> the buyer and seller retain but do not sign the other's writing,<sup>27</sup> or no informal agreement is found or the writing fails as a written confirmation.<sup>28</sup> Conduct recognizing

17 *E.g.*, *Matsushita Electric Corp. of America v. Sonus Corp.*, 284 N.E.2d 880 (Mass. 1972).

18 *See* *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

19 *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC Rep. Serv. 292 (N.Y. Sup. Ct. 1972).

20 *Matsushita Electric Corp. of America v. Sonus Corp.*, 284 N.E.2d 880 (Mass. 1972).

21 *See* *Southwest Engineering Co., Inc. v. Martin Tractor Co.*, 205 Kan. 684, 473 P.2d 18 (1970).

22 *See* U.C.C. § 2-207(2)(a), *supra* note 1.

23 *See* U.C.C. § 2-207(3), *supra* note 1; *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

24 *See* *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1169 n.6 (6th Cir. 1972).

25 *See* *Joseph Muller Corp. Zurich v. Commonwealth Petrochemical, Inc.*, 334 F. Supp. 1013 (S.D.N.Y. 1971).

26 *See* *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970).

27 *Cf.* *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

28 *See* U.C.C. § 2-207, Comment 7.

a contract occurs where goods are shipped, accepted, and paid for<sup>29</sup> and where an offer is accepted by performance.<sup>30</sup> Thus while the official comments give no definition of "conduct," the courts have begun to establish a transactional approach to the problem. The contract includes the terms on which the parties agree and "any supplementary terms incorporated under any other provision" of the Code. Since there seems little reason to exclude additional terms, "any other provision" should include subsection (2) of section 2-207.

### B. *Additional and Different Terms*

If a contract between merchants has been formed under subsection (1), the additional terms become part of the contract unless excluded under subsection (2). Since a literal interpretation of subsection (2) would preclude different terms from ever becoming part of the contract, the distinction between different and additional must be carefully drawn. While the official comments set no guidelines, one court has accepted the following test: terms are additional if they concern a subject matter not covered in the offer and different if they alter subject matter already covered in the offer.<sup>31</sup>

Some cases<sup>32</sup> and commentators<sup>33</sup> contend that subsection (2) should encompass "different" as well as "additional" terms, and one state has adopted this approach in its enactment of the Code.<sup>34</sup> The official comments are ambiguous,<sup>35</sup> but anything other than a literal interpretation of the first sentence of subsection (2) leads to an unmanageable or innocuous result. If a different term in the acceptance could become part of the contract, the contract would thus contain conflicting terms since nothing in section 2-207 deletes the variant term in the offer. If it is suggested that notification of objection has already been given in that the offer contains a conflicting term so as to excise the different term under section 2-207(2)(c), then a different term in the acceptance could never become part of the contract leaving little reason to include it in subsection (2).

While a simple and workable distinction has been drawn between additional and different terms, a problem does arise as to how a term in the acceptance which varies from a term implied by law, rather than expressly stated in the offer, should be treated. In *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*,<sup>36</sup> the seller's acceptance in the form of an acknowledgment of order contained a limitation of liability as to consequential damages. While the offer

<sup>29</sup> *Id.*

<sup>30</sup> *See* Joseph Muller Corp. Zurich v. Commonwealth Petrochemical, Inc., 334 F. Supp. 1013 (S.D.N.Y. 1971).

<sup>31</sup> *See* Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973). One party suggested the definition and the court indirectly accepted it by stating no other basis for its designation of a term as "different."

<sup>32</sup> *See, e.g., id.*

<sup>33</sup> *E.g., Note*, 32 U. PITT. L. REV. 209, 214 (1971).

<sup>34</sup> Iowa Code Ann. § 554.2207 (1967).

<sup>35</sup> U.C.C. § 2-207, Comment 2: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2). . . ." The specific omission here of different terms conflicts with U.C.C. § 2-207, Comment 3: "Whether or not additional or different terms will become part of the contract depends upon the provisions of subsection (2). . . ."

<sup>36</sup> 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

was silent as to consequential damages, the buyer claimed that they were implied by law, thus making the term in the acceptance "different" rather than "additional," and consequently not a part of the contract. The court held that consequential damages were implied terms which operated to make the limitation of liability a different term.

The problem is that the approach taken in this case introduces more artificiality into the already fragile structure of section 2-207. A possible development of the *Air Products* case might be that the offeree could never introduce a term contrary to a Code provision unless expressly agreed to by the offeror. If it is admitted that certain Code provisions are more fundamental than others, the proper approach would be to prohibit a term implied by law from making an acceptance term "different" and to consider the acceptance term as "additional" but subject to the material alteration test of section 2-207(2)(b).<sup>37</sup>

Arguably only those code sections without "unless otherwise agreed" provisions would operate to make a variant term in the acceptance "different." Such a distinction would be artificial because it implies that the mere inclusion of a term by the offeree and the failure to object by the offeror constitutes an agreement. At the very least, the suggestion that implied terms in the offer never operate to make acceptance terms "different" would provide an offeree the certainty of knowing that only those of his terms which conflict with terms expressed in the offer will absolutely never become part of the contract.

An additional term will not become part of the contract if the offer expressly limits acceptance to the terms of the offer.<sup>38</sup> This situation has arisen where a purchase order stipulates that no change could be made in the order except by a writing signed by the buyer,<sup>39</sup> irrespective of anything in the seller's form or of the buyer's acceptance or payment.<sup>40</sup>

Nor will additional terms become part of the contract if they materially alter it.<sup>41</sup> While the official comments do not specifically define material alteration, they suggest three somewhat similar tests: whether the additional terms materially change the bargain,<sup>42</sup> whether the additional terms will result in surprise or hardship if incorporated without express awareness by the other party,<sup>43</sup> and whether the additional terms involve an element of unreasonable surprise.<sup>44</sup> Some clarification is given by examples of clauses which are and are not material alterations.<sup>45</sup> Only a few courts have specifically relied on these tests.<sup>46</sup> Most

37 Support for this approach can be found in *J.A. Maurer, Inc. v. Singer Co.*, 7 U.C.C. Rep. Serv. 110 (N.Y. Sup. Ct. 1970). The seller's formal acknowledgment of order provided that the seller would not be liable for consequential damages. The court held that since the buyer's order did not provide for damages, the exclusion of consequential damages could not be considered inconsistent with the order.

38 See U.C.C. § 2-207(2)(a), *supra* note 1.

39 *In re Tunis Manufacturing Corp.*, 11 UCC Rep. Serv. 544 (N.Y. App. Div. 1972), where such a stipulation defeated an arbitration clause in the acceptance.

40 See *Application of Doughboy Industries, Inc.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962).

41 See U.C.C. § 2-207(2)(b), *supra* note 1.

42 U.C.C. § 2-207, Comment 3.

43 *Id.*, Comment 4.

44 *Id.*, Comment 5.

45 *Id.*, Comments 4 and 5.

46 See, e.g., *Th. van Huijstee, N.V. v. Faehndrich*, 10 UCC Rep. Serv. 598 (N.Y. Civ. Ct. 1972), where the court applied the "no element of unreasonable surprise" test.

have focused on the commercial setting. For example, the most common additional term seems to be the arbitration clause; and, with one exception,<sup>47</sup> arbitration clauses have been held to materially alter the contract.<sup>48</sup> The courts are split as to whether an additional term limiting liability is a material alteration;<sup>49</sup> but, somewhat understandably, an additional term waiving the Code has been discarded.<sup>50</sup> Additional terms requiring that goods be shipped immediately<sup>51</sup> or that complaints be submitted within 14 days<sup>52</sup> have been included in the contract.

The determination of material alteration is a question of fact and the Courts of Appeals in the Sixth<sup>53</sup> and Tenth<sup>54</sup> Circuits have correctly remanded cases for determination of the material alteration question. Course of dealing and usage of trade should be given careful consideration.<sup>55</sup>

Finally, additional terms do not become part of the contract if the other party has already objected to them or does so within a reasonable time after receiving notice of them.<sup>56</sup> Conflicting terms in written confirmations thus prevent inclusion of either party's term.<sup>57</sup>

## II. The Flaw

Section 2-207 ostensibly put an end to the "battle of the forms" by abrogating the "last shot" doctrine. While it is realistic to recognize contract formation even if additional or different terms appear in the acceptance, section 2-207 has produced the unfortunate result of replacing the "last shot" doctrine with a "first shot" doctrine. The first party to submit an offer now has the advantage since none of his terms can be defeated by a conflicting term in the acceptance<sup>58</sup> thus allowing all of the terms of the offer to become contract terms. The "different" acceptance term never becomes part of the contract, but the offeror's term with which it conflicts does. The traditional "battle of the forms" continues with the exception that the offeror now has the advantage.

47 See *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC Rep. Serv. 292 (N.Y. Sup. Ct. 1972). The seller's invoice for the sale of textiles included an arbitration clause. The court impliedly held that since such clauses were customarily used in the trade, they would not constitute a material alteration of the contract.

48 See, e.g., *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 101 Cal. Rptr. 347 (1972) (the sale of yarn for the manufacturing of rugs); *Trafalgar Square, Ltd. v. Reeves Bros., Inc.*, 7 UCC Rep. Serv. 712 (N.Y. Sup. Ct. 1970) (without stating the nature of the transaction); *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5 (1967) (the sale of fabrics for manufacture into auto seat covers).

49 *J.A. Maurer, Inc. v. Singer Co.*, 7 UCC Rep. Serv. 110 (N.Y. Sup. Ct. 1970) (limitation of liability as no material alteration). *Contra*, *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

50 See *Tidewater Lumber Co., Inc. v. Maryland Lumber Co.*, 3 UCC Rep. Serv. 351 (N.Y. Sup. Ct. 1966).

51 See *Matsushita Electric Corp. of America v. Sonus Corp.*, 284 N.E.2d 880 (Mass. 1972).

52 *Th. van Huijstee, N.V. v. Faehndrich*, 10 UCC Rep. Serv. 598 (N.Y. Civ. Ct. 1972).

53 *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972).

54 *Medical Development Corp. v. Industrial Molding Corp.*, 479 F.2d 345 (10th Cir. 1973).

55 See U.C.C. § 1-205.

56 See U.C.C. § 2-207(2)(c), *supra* note 1; e.g., *Silverstyle Dress Co. v. Aero-Knit Mills, Inc.*, 11 UCC Rep. Serv. 292 (N.Y. Sup. Ct. 1972).

57 U.C.C. § 2-207, Comment 6.

58 The only recourse available to the offeree is to make his acceptance expressly conditional on assent to its additional and different terms so as to make subsection (3) applicable.

There seems little reason to favor one party over the other in the offer and acceptance situation. The drafters of section 2-207 either did not recognize this flaw or considered it a proper continuation of the common law rule that the offeror is the master of his offer. If the latter is the case, it has no place within the rationale of section 2-207; it is incongruous with this section's realistic determination of contract terms in the other two contract formation situations of informal agreement followed by a written confirmation and contract by conduct.

The primary purpose of section 2-207 is to expand contract formation situations and only incidentally to define what the terms will be. Accordingly, there seems little reason to allow more than the skeletal terms upon which the parties agree plus any additional terms which do not materially alter the contract. Where a contract is established either by informal agreement followed by written confirmations or by conduct recognizing a contract, neither party's term on a point in disagreement will become part of the contract. This seems quite reasonable in that if the parties do not bother to bargain for a term and their writings later differ on it, neither should be given an advantage. In the final situation where a contract is established by offer and acceptance, however, this realistic determination of terms is abandoned. Even if the offer and acceptance differ on some point, the contract will include the offeror's term and exclude the offeree's.

While it has been suggested that section 2-207 be redrafted,<sup>59</sup> the "first shot" flaw could be corrected by more frequent use of subsection (3). Since an acceptance found not to be definite and seasonable<sup>60</sup> triggers the application of subsection (3), a greater willingness on the part of the courts to hold an acceptance indefinite where the acceptance contains different terms would solve the problem.

Subsection (1) allows an acceptance to create a contract even if it includes additional or different terms; thus a term could not make an acceptance indefinite simply by being different. However, unless an acceptance is to be effective, irrespective of the magnitude by which a term differs from an offer term, the nature of the different term in the acceptance must bear upon whether or not an acceptance is definite. For example, if a written offer to buy goods indicated that delivery must be made within two weeks and the seller's acceptance stated that delivery would be made within two months, it would be foolish to hold that the seller had made a definite acceptance and had interjected a "different" term which would be dropped in favor of the buyer's delivery term. A more reasonable response would be to say that the acceptance was not definite, that the writings did not agree on time of delivery, and that the Code would supply the delivery term.

The standard for "definite" would demand dual considerations: (1) whether it would be commercially reasonable to assume that the offeree would still consider his writing an acceptance if his "different" term were deleted and

59 Kove, *"The Battle of the Forms": A Proposal to Revise Section 2-207*, 3 U.C.C. L.J. 7 (1970).

60 See U.C.C. § 1-204(3) stating that an action is seasonable if taken at or within the time agreed; or, if no time is agreed, at or within a reasonable time. Since timeliness has not been a problem in the reported cases, this inquiry will center around whether the acceptance is "definite."



(2) whether recognizing the writing as a definite acceptance would give the offeror an unbargained-for advantage. The standard of commercial reasonableness is a touchstone throughout the Code and would include such considerations as course of dealing and usage of trade.<sup>61</sup> Additionally, if the "different" term were typed or written rather than being part of the printed form, it would suggest added importance to the offeree.

Under this suggested approach, either party can ensure that no unbargained-for subject matter will be included in the contract simply by inserting in his writing a term negating the subject matter. For example, if one party does not want disputes to be arbitrated, he simply says so in his writing. If the other party's writing does not address arbitration, the first party's term will control. On the other hand, if the other party inserts an arbitration clause, it would be labeled "different" and neither party's term would become part of the contract. Since the contract would then be silent as to arbitration, the party who wanted to avoid arbitration has achieved his purpose and used his form to battle defensively.

### III. Conclusion

Section 2-207 has expanded contract formation situations by recognizing deals commercially considered closed even though the writings include additional or different terms. Unfortunately, this section's further attempt to determine contract terms has effectively replaced the "last shot" doctrine with a "first shot" doctrine. The traditional battle of forms whereby one party could gain an advantage by using a printed form with its cluster of favorable terms has not been eradicated. Neither party would have an appreciable advantage, however, if the courts were more disposed to hold an acceptance indefinite where it includes "different" terms.

Buyers and sellers thrust their forms on each other. The suggested approach encourages this battle of forms within a proper and more restrictive framework—offensively to introduce non-material terms and defensively to ensure that unbargained-for subject matter will not become part of the contract.

*John Henry Davis*

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61 See U.C.C. § 1-205.