Chapter 4. Battle of the Forms

4.1. Introduction. In today's business world, buyers and sellers have developed standardized forms to use when offering to sell goods and when accepting an offer to buy goods. These forms typically have blank spaces to fill in for "material" or "dickered" terms, such as the type of good, quantity, price, and delivery date. These standardized forms also contain many paragraphs, even pages, of "fine print" or "boilerplate" terms, such as warranties, exclusions of warranties, payment terms, remedies (or limitations of remedies), choice of law, choice of forum, arbitration clauses, etc. UCC § 2-207 was designed to resolve the issue of what terms govern when these forms contain terms that either contradict each other (*i.e.*, "different" terms), or when one form contains terms not addressed in the other form (*i.e.*, "additional" terms).

Another fairly common situation today is an oral agreement followed up by written confirmations. For example, a law student calls Computer Warehouse to order a new computer, specifying the model, quantity, and price. Computer Warehouse accepts the order over the phone. When Computer Warehouse ships the computer, it sends along a nine-page "written confirmation" of its acceptance that contains numerous terms, such as warranties and choice of law clauses, none of which were discussed when the contract was originally formed on the phone. UCC § 2-207 provides the framework for determining whether the additional terms govern the transaction.

UCC § 2-207 is not a model of clarity. One commentator has this to say:

> Section 2-207, if not the most complex section in the Code, is certainly among the strong contenders. It is beset with awesome difficulties in its application and few, if any Code commentators would presume to know all there is to know about this troublesome section.

Thomas Quinn, *Quinn's Uniform Commercial Code Commentary and Law Digest* §2-207[A][1] (West 2d ed., 2002).

4.2. First Step: Work through Section 2-207(1) before the Comma. As discussed in Chapter 3, formation of a contract at common law requires "mirror" acceptance of the terms offered. An acceptance cannot contradict terms contained in the original offer, nor add terms to those originally proposed. Such an acceptance becomes a counter-offer, which the original offeror is now free to accept or reject. The purpose of § 2-207 is to allow, in some circumstances, a response to an offer that adds or varies terms of the original offer to nonetheless *operate* as an acceptance, whereas under common law it would be construed as a counter-offer.

Section 2-207(1) requires a communication that is either (i) a "definite and seasonable expression of acceptance" or (ii) a "written confirmation" following an oral agreement. Let's start by analyzing what constitutes a "definite and seasonable expression of acceptance."

☑ **Purple Problem 4-1.** Office Emporium and Megalfi Law Group have been talking about Megalfi Law Group's purchase of a new Hydron 1000 copier/scanner/printer ("copy machine," everyone calls it). Office Emporium writes to Megalfi Law Group. "We offer to sell the Hydron 1000 copy machine to you upon the terms contained in the enclosed purchase order form." That form is reproduced below:

> *Date:* January 10, 2014
>
> *Purchaser:* Megalfi Law Group
>
> *Description of Product*: Hydron 1000 copy machine
>
> *Quantity:* 1
>
> *Purchase Price*: $16,000.00
>
> *Delivery Date*: February 1, 2014

(1) Megalfi Law Group responds to this offer as follows: "We acknowledge receipt of your offer, and agree to enter into a contract upon the terms enclosed." Megalfi Law Group encloses the following:

> ***Date:*** **January 11, 2014**
>
> ***Purchaser:*** **Megalfi Law Group**
>
> ***Description of Product*: Hydron 1000 copy machine**
>
> ***Quantity:*** **1**

***Purchase Price*: $15,000.00**

***Delivery Date*: February 1, 2014**

Is Megalfi Law Group's response a "definite and seasonable expression of acceptance" under the UCC? Why or why not?

(2) What if Megalfi Law Group had responded: "We accept your offer, upon the terms enclosed." Megalfi Law Group encloses the following:

***Date:* January 11, 2014**

***Purchaser:* Megalfi Law Group**

***Description of Product*: Hydron 1000 copy machine**

***Quantity:* 1**

***Purchase Price*: $16,000.00**

***Delivery*: To be delivered by Office Emporium at its expense to the offices of Megalfi Law Group located at 100 Main Street, Missoula, Montana on February 1, 2014.**

Is Megalfi Law Group's response a "definite and seasonable expression of acceptance" under the UCC? Why or why not?

4.2.2. In determining whether there has been "a definite and seasonable expression of acceptance," what factors should you look at?

Look for words of acceptance. In the two problems above, Megalfi Law Group responds in the first letter with "we *agree to enter into a contract* upon the terms enclosed"; the other response indicates "we *accept your offer* upon the terms enclosed." Which presents a better case for arguing that Megalfi Law Group's response is a "definite and seasonable expression of acceptance"? Is usage of the word "accept" in a response to an offer conclusive?

Next, look at whether a purported acceptance manifests assent by the offeree to the offeror's proposed ***"dickered"*** or ***material*** terms. In the first problem above, did Megalfi Law Group express consent to the ***material*** terms? If in its response to an offer the offeree does not manifest assent to the material terms proposed by offeror, for example, by proposing a different price, quantity, type of

good, delivery date or something inconsistent with any other important, dickered term, then you have good grounds to argue that the response is not an acceptance, but a counter-offer. On the other hand, a response containing a contradictory non-dickered term, or adding non-material terms not discussed, should not preclude acceptance.

To put it another way, § 2-207 is concerned with reasonable expectations. Parties usually read the material terms in the acceptance to be sure they conform to the terms of the offer. But they don't read all the fine print. The intent of § 2-207 is to allow formation of a contract even if the fine print differs.

4.2.3. Now let's look at the ***written confirmation*** portion of § 2-207(1). Note first that the written confirmation must follow "within a reasonable time." Section 1-205 tells us that ***reasonable*** depends on the "nature, purpose and circumstances of the action," so it will be determined on a case by case basis.

Comment 1 gives two examples in which the "written confirmation" provision could apply. The first is a written confirmation following an agreement reached orally. The second is a written confirmation following an agreement reached by "informal correspondence." In other words, key terms, such as the description of the good, quantity, and purchase price, are agreed to in an exchange of faxes, and then one or both of the parties follows up with its five-page standard purchase agreement that includes numerous other terms not discussed in the exchange of correspondence, such as warranties and choice of law clauses.

4.3. Second Step: Look for Language Sufficient to Satisfy Section 2-207(1) after the Comma. Let's assume you have concluded that so far § 2-207(1) applies because there exists either a "definite and seasonable expression of acceptance" of an offer or a "written confirmation" of an oral or informal agreement. Normally, either of these will operate as an acceptance even though they propose "additional" or "different" terms (the effect of which we discuss at Section 4.4). But there is an exception found after the comma in § 2-207(1): is the acceptance "expressly made conditional on assent to the additional or different terms"?

☑ **Purple Problem 4-2.** In preparation for spring sales of its potted herbs, HerbPots submits a purchase order to TerraGreen for 10,000 4" x 4" plant containers made from recycled materials, at $.25/pot, to be delivered by February 1. In its "fine print," the purchase order states that HerbPots will pay within thirty days of receipt of the goods. TerraGreen responds with its standard form entitled "acknowledgement of order," the first clause of which states (in large italicized font): *"TerraGreen's acceptance of your*

purchase order is conditioned upon your assent to all of the following terms and conditions." As part of the standard terms printed on back, TerraGreen provides that payment must be made within twenty days of receipt of the goods, and that a late payment fee of 5% will be assessed against any payment made after the twenty-day period.

(1) Does TerraGreen's acknowledgement operate as an acceptance of HerbPots' order?

(2) What would your conclusion be if, instead of the italicized language above, TerraGreen's acknowledgement had commenced with the following phrase: *"The printed terms contained in this form shall become a part of the contract between the parties."*

4.3.1. Language making an offeree's acceptance conditional upon assent to its proposed additional or different terms may not trigger the exception if that language is buried in fine print somewhere in its written acceptance form. In *Daitom, Inc. v. Pennwalt Corp*., 741 F.2d 1569 (10th Cir. 1984), Pennwalt offered to sell commercial vacuum dryers to Daitom. Daitom's response expressed its consent to the "dickered" material terms; however Daitom's response also contained language -- in fine print on the back -- that Daitom's "acceptance is *expressly limited to [Daitom's]terms and conditions, unless each deviation is mutually recognized therefore in writing*." The court found that in order to constitute a "conditional acceptance," the offeree "***must explicitly communicate*** his or her unwillingness to proceed with the transaction unless the additional or different terms in its response are accepted by the offeror." *Id*. at 1577 (emphasis supplied). The court found that Daitom did not adequately bring its conditional acceptance to the attention of Pennwalt, and thus the exception did not apply.

4.3.2. If a party has used language sufficient to satisfy the language of exception after the comma in § 2-207(1), then there is no acceptance. If there is no acceptance, at this point there is no contract. There are three possibilities as to what will happen next:

- the parties will refuse to agree on terms;
- the parties will agree on terms; or
- the parties will go ahead and ship the goods and pay for them, moving the parties into § 2-207(3).

4.3.3. Section 2-207(3), which was added in 1966, is intended to apply when the writings of the parties do not establish a contract, but they act as if they have reached an agreement. Recall that if acceptance is expressly made conditional on assent, the response is not an acceptance but a counter-offer. If there is no

acceptance then there is no contract established by the writings. But a contract might nevertheless be established by conduct. In the case of *Uniroyal, Inc. v. Chambers Gasket and Manufacturing Company*, 380 N.E.2d 571 (Ind. App. 1978) the court concluded that the writings exchanged between Chambers and Uniroyal did not create a contract, because Uniroyal's acceptance of Chambers' offer to purchase goods was expressly conditioned on Chambers' assent to the new terms and the record revealed no manifestation of Chambers' assent to those terms. Because Uniroyal shipped the goods ordered by Chambers, and Chambers accepted the shipment, the parties' conduct was "sufficient to establish a contract." In such a situation, § 2-207(3) provides that the terms of the contract are those on which the writings agree, as supplemented by applicable Code provisions. In other words, the additional or different terms are subject to a "knock-out" rule, the application of which is discussed in more detail at Section 4.4.4.

4.4. Third Step: Determine the Effect of Different or Additional Terms.

Now let's back up. Assume that we have concluded that the requirements of § 2-207(1) before the comma are satisfied, and there is not sufficient language to invoke the exception after the comma. We now know that an acceptance has occurred even though the acceptance proposes additional or different terms from those offered. The problem now is to find out which terms govern – those in the offer or those in the acceptance. Section 2-207(2) provides the framework for answering that question.

4.4.1. Introduction. Section 2-207(2) tells us what to do with "***additional***" terms, but does not mention "***different***" terms. However, Comment 3 states that subsection (2) determines whether or not either "additional" or "different" terms will become part of the contract. The dilemma of "different" terms is discussed at Section 4.4.4 below. With regard to additional terms, one set of rules applies to contracts between merchants (Section 4.4.2) and another set of rules applies to contracts in which one or both parties are non-merchants (Section 4.4.3).

4.4.2. Additional Terms Between Merchants. Subsection (2) states that any ***additional*** terms "are to be construed as proposals." Where both parties are ***merchants***, a proposed additional term becomes a part of the agreement ***unless***:

> (1) the ***offer expressly limits acceptance*** to the terms of the offer;
>
> (2) the additional term ***materially alters*** the contract (Comment 4 explains that a term which would "materially alter" the contract is one that would result in *surprise* or *hardship* if incorporated into the contract; Comment 5 gives examples of terms that would not result in surprise); or

(3) the ***offeror gives notice of its objection*** to the additional term, which can be done either at the time the contract is made by appropriate language in the offer (*i.e.*, limiting acceptance to the terms of the offer or otherwise making it clear that no additional terms will be considered part of the contract) or within a reasonable time after receipt of notice of the additional terms.

If any one of these three possibilities occur, the terms of the offer control *unless* the offeree assents to the additional terms. Several courts have ruled that in contracts between merchants, it is *presumed* that any additional terms proposed by the offeree become a part of the agreement, and the offeror bears the burden of proof as to the existence of one of the exceptions. See, for example, *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1284 (10th Cir. 1997); *Bayway Refining Co. v. Oxygenated Marketing & Trading A.G.*, 215 F.3d 219, 223-224 (2nd Cir. 2000).

☑ **Purple Problem 4-3.** On January 15, Sir Scrubs-A-Lot, a local car washing business, submits a purchase order to Western States Car Wash Supplies, a wholesaler of commercial car wash supplies, for $10,000 worth of colored foaming detergents, specifying the quantity and price of a variety of foaming soaps, to be delivered by February 1. The purchase order is silent as to when the purchase price will be paid. Western States responds with its standard form titled "Order Acknowledgement," which does not contain any "conditional assent" language. As part of the standard terms printed on back, Western States provides that payment must be made within thirty days of receipt of the goods, and that any payments made after such date will incur interest at the rate of 8% per annum. Is Western States entitled to collect interest if Sir Scrubs-A-Lot does not pay within thirty days of its receipt of the goods? Why or why not?

☑ **Purple Problem 4-4.** In addition to the 6% interest clause, Western States' standard "acknowledgment of order" form includes the following term:

> "Purchaser may return any defective goods for refund of the purchase price or for replacement within sixty days of knowledge of the defect. Except for a refund of the purchase price or replacement of the defective good, Purchaser shall have no other remedies, including, without limitation, a claim for consequential damages."

Assume that Sir Scrubs-A-Lot's order form is silent as to remedies. Does Western States' additional term limiting damages become a part of the contract?

4.4.3. Additional Terms *Not* Between Merchants. Whereas UCC § 2-207(2) specifically states what happens to proposed additional terms as between merchants, it does not say what to do when either party to the agreement is a ***non-merchant***.

☑ **Purple Problem 4-5.** A local bar orders a new karaoke machine over the phone from Southeastern Karaoke Supply, specifying the model, quantity, and price, which order is accepted by an agent of Southeastern Karaoke Supply over the phone. When Southeastern Karaoke Supply ships the karaoke, it sends along a "written confirmation" of its acceptance, which is a nine-page document containing numerous terms, such as warranties and choice of law clauses, which were never discussed when the contract was originally formed on the phone. Do these terms become part of the contract under § 2-207?

☑ **Purple Problem 4-6.** Assume that the nine-page document delivered by Southeastern Karaoke Supply with the karaoke machine states in bold print at the very top: "By keeping your karaoke machine beyond 10 days after the date of delivery, you assent to these Terms and Conditions."

1. Does the bar's conduct of keeping the machine constitute acceptance of the additional terms?

2. Is there anything the bar can do, if it keeps the machine, to prevent the additional terms and conditions from becoming a part of the contract?

4.4.3.1 Case: *Klocek v. Gateway*

Klocek v. Gateway, Inc.

U.S. District Court for the District of Kansas
2000

104 F. Supp. 2d 1332

VRATIL, District Judge

[Klocek and other individuals purchased computers from Gateway. Plaintiff brought individual and class action law suits against Gateway for breach of contract. Gateway sought to dismiss the actions, and requested enforcement of an arbitration clause contained in the Standard Terms included with the computers when they were delivered to the plaintiffs.]

….

The Uniform Commercial Code ("UCC") governs the parties' transaction under both Kansas and Missouri law.... Thus the issue is whether the contract of sale includes the Standard Terms as part of the agreement.

State courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties' agreement. Authority from other courts is split. Compare *Step-Saver*, 939 F.2d 91 (printed terms on computer software package not part of agreement); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (license agreement shipped with computer software not part of agreement); and *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201 (D. Kan. 1998) (single use restriction on product package not binding agreement); with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808 (1997) (arbitration provision shipped with computer binding on buyer); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (shrinkwrap license binding on buyer); and *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (Wash. 2000) (following *Hill* and *ProCD* on license agreement supplied with software). It appears that at least in part, the cases turn on whether the court finds that the parties formed their contract *before* or *after* the vendor communicated its terms to the purchaser. Compare *Step-Saver*, 939 F.2d at 98 (parties' conduct in shipping, receiving and paying for product demonstrates existence of contract; box top license constitutes proposal for additional terms under § 2-207 which requires express agreement by purchaser); *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest by shipping goods to buyer; license agreement constitutes proposal to modify agreement under § 2-209 which requires express assent by buyer); and *Orris*, 5 F. Supp. 2d at 1206 (sales contract concluded when vendor received consumer orders; single-use language on product's label was proposed modification under § 2-209 which requires express assent by purchaser); with *ProCD*, 86 F.3d at 1452 (under § 2-204 vendor, as master of offer, may propose limitations on kind of conduct that constitutes acceptance; § 2-207 does not apply in case with only one form); *Hill*, 105 F.3d at 1148-49 (same); and *Mortenson*, 998 P.2d at 311-314 (where vendor and purchaser utilized license agreement in prior course of dealing, shrinkwrap license agreement constituted issue of contract formation under § 2-204, not contract alteration under § 2-207).

Gateway urges the Court to follow the Seventh Circuit decision in *Hill*. That case involved the shipment of a Gateway computer with terms similar to the Standard Terms in this case, except that Gateway gave the customer 30 days -- instead of 5 days -- to return the computer. In enforcing the arbitration

clause, the Seventh Circuit relied on its decision in *ProCD*, where it enforced a software license which was contained inside a product box. See *Hill*, 105 F.3d at 1148-50. In *ProCD*, the Seventh Circuit noted that the exchange of money frequently precedes the communication of detailed terms in a commercial transaction. See *ProCD*, 86 F.3d at 1451. Citing UCC § 2-204, the court reasoned that by including the license with the software, the vendor proposed a contract that the buyer could accept by using the software after having an opportunity to read the license.[8]*ProCD*, 86 F.3d at 1452. Specifically, the court stated:

> A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.

ProCD, 86 F.3d at 1452. The Hill court followed the *ProCD* analysis, noting that "practical considerations support allowing vendors to enclose the full legal terms with their products." *Hill*, 105 F.3d at 1149.[9]

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[8].Section 2-204 provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract."

[9] Legal commentators have criticized the reasoning of the Seventh Circuit in this regard. See, e.g., Jean R. Sternlight, Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers, Fla. Bar J., Nov. 1997, at 8, 10-12 (outcome in *Gateway* is questionable on federal statutory, common law and constitutional grounds and as a matter of contract law and is unwise as a matter of policy because it unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., Survey: Uniform Commercial Code, 53 Bus. Law. 1461, 1465-66 (Seventh Circuit finding that UCC § 2-207 did not apply is inconsistent with official comment); Batya Goodman, Honey, I Shrink-Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319, 344-352 (Seventh Circuit failed to consider principles of adhesion contracts); Jeremy Senderowicz, Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts, 32 Colum. J.L. & Soc. Probs. 275, 296-299 (judiciary (in multiple decisions, including *Hill*) has ignored issue of consumer consent to an arbitration clause). Nonetheless, several courts have followed the Seventh Circuit decisions in *Hill* and *ProCD*. See, e.g., *Mortenson*, 2000 WL 550845 (license agreement supplied with software); *Rinaldi v. Iomega Corp.*, 1999 Del. Super. LEXIS 563, 1999 WL 1442014, Case No. 98C-09-064-RRC (Del. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging); *Westendorf v. Gateway 2000, Inc.*, 2000 Del. Ch. LEXIS 54, 2000 WL 307369, Case No. 16913 (Del. Ch. March 16, 2000) (arbitration provision shipped with

The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*. In each case the Seventh Circuit concluded without support that UCC § 2-207 was irrelevant because the cases involved only one written form. See *ProCD*, 86 F.3d at 1452 (citing no authority); *Hill*, 105 F.3d at 1150 (citing *ProCD*). This conclusion is not supported by the statute or by Kansas or Missouri law. Disputes under § 2-207 often arise in the context of a "battle of forms," see, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984), but nothing in its language precludes application in a case which involves only one form. The statute provides:

> 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 [if the contract is not between merchants]. . . .

By its terms, § 2-207 applies to an acceptance or written confirmation. It states nothing which requires another form before the provision becomes effective. In fact, the official comment to the section specifically provides that § 2-207(1) and (2) apply "where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed." Official Comment 1 of UCC § 2-207. Kansas and Missouri courts have followed this analysis. See *Southwest Engineering Co. v. Martin Tractor Co.*, 205 Kan. 684, 695, 473 P.2d 18, 26 (1970) (stating in dicta that § 2-207 applies where open offer is accepted by expression of acceptance in writing or where oral agreement is later confirmed in writing); *Central Bag Co. v. W. Scott and Co.*, 647 S.W.2d 828, 830 (Mo. App. 1983) (§ 2-207(1) and (2) govern cases where one or both parties send written confirmation after oral contract). Thus, the Court

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computer); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (same); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611, 33 U.C.C. Rep. Serv. 2d (Callaghan) 1060 (N.Y. Sup. Ct. August 12, 1997) (same).

concludes that Kansas and Missouri courts would apply § 2-207 to the facts in this case. Accord *Avedon*, 126 F.3d at 1283 (parties agree that § 2-207 controls whether arbitration clause in sales confirmation is part of contract).

In addition, the Seventh Circuit provided no explanation for its conclusion that "the vendor is the master of the offer." See *ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149 (citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. See *Brown Mach., Div. of John Brown, Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989) (as general rule orders are considered offers to purchase); *Rich Prods. Corp. v. Kemutec Inc.*, 66 F. Supp. 2d 937, 956 (E.D. Wis. 1999) (generally price quotation is invitation to make offer and purchase order is offer). While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff).[11] Accord *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest, by shipping goods).

Under § 2-207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms. "The conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract." *Brown Machine*, 770 S.W.2d at 420.[12]

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[11] UCC § 2-206(b) provides that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment . . ." The official comment states that "either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment." UCC § 2-206, Official Comment 2.

[12] Courts are split on the standard for a conditional acceptance under § 2-207. See *Daitom*, 741 F.2d at 1576 (finding that Pennsylvania would most likely adopt "better" view that offeree must explicitly communicate unwillingness to proceed with transaction unless additional terms in response are accepted by offeror). On one extreme of the spectrum, courts hold that the offeree's

Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms. Moreover, the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms. See, e.g., *Arizona Retail*, 831 F. Supp. at 765 (conditional acceptance analysis rarely appropriate where contract formed by performance but goods arrive with conditions attached); *Lighton Indus., Inc. v. Callier Steel Pipe & Tube, Inc.*, 1991 WL 18413, Case No. 89-C-8235 (N.D. Ill. Feb. 6, 1991) (applying Missouri law) (preprinted forms insufficient to notify offeror of conditional nature of acceptance, particularly where form arrives after delivery of goods).

Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them. See K.S.A. § 84-2-207, Kansas Comment 2 (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees). Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-

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response stating a materially different term solely to the disadvantage of the offeror constitutes a conditional acceptance. See *Daitom*, 741 F.2d at 1569 (citing *Roto-Lith. Ltd v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)). At the other end of the spectrum courts hold that the conditional nature of the acceptance should be so clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed without the additional or different terms. See *Daitom*, 741 F.2d at 1569 (citing *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972)). The middle approach requires that the response predicate acceptance on clarification, addition or modification. See *Daitom*, 741 F.2d at 1569 (citing *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968)). The First Circuit has since overruled its decision in *Roto-Lith*, see *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, and the Court finds that neither Kansas nor Missouri would apply the standard set forth therein. See *Boese-Hilburn Co. v. Dean Machinery Co.*, 616 S.W.2d 520, (Mo. App. 1981) (rejecting *Roto-Lith* standard); *Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 538 (D. Kan. 1982) (acceptance is not counteroffer under Kansas law unless it is made conditional on assent to additional or different terms (citing *Roto-Lith* as comparison)); *Daitom*, 741 F.2d at 1569 (finding that *Dorton* is "better" view). Because Gateway does not satisfy the standard for conditional acceptance under either of the remaining standards (*Dorton* or *Construction Aggregates*), the Court does not decide which of the remaining two standards would apply in Kansas and/or Missouri.

return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.[14] See *Step-Saver*, 939 F.2d at 99 (during negotiations leading to purchase, vendor never mentioned box-top license or obtained buyer's express assent thereto). The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. Accord *Brown Machine*, 770 S.W.2d at 421 (express assent cannot be presumed by silence or mere failure to object). Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss....

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4.4.4. Different Terms. Now let's discuss what happens to "different" terms contained in offeree's acceptance if, under § 2-207(1), you have concluded that there is in fact an operative acceptance. Section 2-207(2), on its face, applies only to "additional" terms. What happens if the terms contained in the acceptance are "different" rather than additional?

4.4.4.1 Case: *Daitom, Inc. v. Pennwalt Corp*

Daitom, Inc. v. Pennwalt Corp.

U.S. Court of Appeals for the Tenth Circuit
1984

741 F.2d 1569 (10th Cir. 1984). William E. Doyle, Circuit Judge delivered the opinion of the 10th Circuit Court of Appeals.

WILLIAM E. DOYLE, Circuit Judge:

[Daitom invited bids from manufacturers of commercial vacuum dryers to supply it with machinery to be incorporated into a chemical manufacturing plant being built by Daitom. Pennwalt submitted a proposal specifying the equipment to be sold, the price, and delivery and payment terms. Several

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[14.]The Court is mindful of the practical considerations which are involved in commercial transactions, but it is not unreasonable for a vendor to clearly communicate to a buyer -- at the time of sale -- either the complete terms of the sale or the fact that the vendor will propose additional terms as a condition of sale, if that be the case.

pages of pre-printed terms and conditions were attached and incorporated into the offer, including a clause providing for a one-year statute of limitations and a clause providing certain express warranties and disclaiming all other warranties. Daitom accepted the offer by issuing its own "purchase order" containing 17 pages of fine print terms and conditions. When the machinery failed to work properly, Daitom brought a proceeding against Pennwalt alleging, among other things, breach of implied warranties that had been disclaimed by Pennwalt in its offer. The District Court dismissed Daitom's breach of warranty claims, ruling that the claims were barred by the one-year statute of limitations specified in Pennwalt's offer.]

…. The trial court concluded that the parties' exchanged writings formed a contract. Thus, there was not a formal single document. Pennwalt's September 7, 1976 proposal constituted the offer and Daitom's October 5, 1976 purchase order constituted the acceptance....

Having found an offer and an acceptance which was not made expressly conditional on assent to additional or different terms, we must now decide the effect of those additional or different terms on the resulting contract and what terms became part of it. The district court simply resolved this dispute by focusing solely on the period of limitations specified in Pennwalt's offer of September 7, 1976. Thus, the court held that while the offer explicitly specified a one-year period of limitations in accordance with § 2-725(1) allowing such a reduction, Daitom's acceptance of October 5, 1976 was silent as to the limitations period. Consequently, the court held that § 2-207(2) was inapplicable and the one-year limitations period controlled, effectively barring Daitom's action for breach of warranties.

While the district court's analysis undertook to resolve the issue without considering the question of the application of § 2-207(2) to additional or different terms, we cannot accept its approach or its conclusion. We are unable to ignore the plain implication of Daitom's reservation in its boilerplate warranties provision of all its rights and remedies available at law. Such an explicit reservation impliedly reserves the statutory period of limitations; without such a reservation, all other reservations of actions and remedies are without effect.

The statutory period of limitations under the U.C.C. is four years after the cause of action has accrued. U.C.C. § 2-725(1). Were we to determine that this four-year period became a part of the contract rather than the shorter one-year period, Daitom's actions on breach of warranties were timely brought and summary judgment against Daitom was error.

We realize that our conclusion requires an inference to be drawn from a construction of Daitom's terms; however, such an inference and construction are consistent with the judicial reluctance to grant summary judgment where there is some reasonable doubt over the existence of a genuine material fact. *See Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1980). When taking into account the circumstances surrounding the application of the one-year limitations period, we have little hesitation in adopting the U.C.C.'s four-year limitations reservation, the application of which permits a trial on the merits. Thus, this court must recognize that certain terms in Daitom's acceptance differed from terms in Pennwalt's offer and decide which become part of the contract. The district court certainly erred in refusing to recognize such a conflict.

The difficulty in determining the effect of different terms in the acceptance is the imprecision of drafting evident in § 2-207. The language of the provision is silent on how different terms in the acceptance are to be treated once a contract is formed pursuant to § 2-207(1). That section provides that a contract may be formed by exchanged writings despite the existence of additional or different terms in the acceptance. Therefore, an offeree's response is treated as an acceptance while it may differ substantially from the offer. This section of the provision, then, reformed the mirror-image rule; that common law legal formality that prohibited the formation of a contract if the exchanged writings of offer and acceptance differed in any term.

Once a contract is recognized pursuant to § 2-207(1), § 2-207(2) provides the standard for determining if the additional terms stated in the acceptance become a part of the contract. Between merchants, such *additional* terms become part of the resulting contract *unless* 1) the offer expressly limited acceptance to its terms, 2) the additional terms materially alter the contract obligations, or 3) the offeror gives notice of his or her objection to the additional terms within a reasonable time. Should any one of these three possibilities occur, the *additional* terms are treated merely as proposals for incorporation in the contract and absent assent by the offeror the terms of the offer control. In any event, the existence of the additional terms does not prevent a contract from being formed.

Section 2-207(2) is silent on the treatment of terms stated in the acceptance that are *different*, rather than merely additional, from those stated in the offer. It is unclear whether "different" terms in the acceptance are intended to be included under the aegis of "additional" terms in § 2-207(2) and, therefore, fail to become part of the agreement if they materially alter the contract.

Comment 3 suggests just such an inclusion.[7] However, Comment 6 suggests that different terms in exchanged writings must be assumed to constitute mutual objections by each party to the other's conflicting terms and result in a mutual "knockout" of both parties' conflicting terms; the missing terms to be supplied by the U.C.C.'s "gap-filler" provisions.[8] At least one commentator, in support of this view, has suggested that the drafting history of the provision indicates that the word "different" was intentionally deleted from the final draft of § 2-207(2) to preclude its treatment under that subsection. The plain language, comments, and drafting history of the provision, therefore, provide little helpful guidance in resolving the disagreement over the treatment of different terms pursuant to § 2-207.

Despite all this, the cases and commentators have suggested three possible approaches. The first of these is to treat "different" terms as included under the aegis of "additional" terms in § 2-207(2). Consequently, different terms in the acceptance would never become part of the contract, because, by definition, they would materially alter the contract (*i.e.*, the offeror's terms). Several courts have adopted this approach. [citations omitted.]

The second approach, which leads to the same result as the first, is that the offeror's terms control because the offeree's different terms merely fall out; § 2-207(2) cannot rescue the different terms since that subsection applies only to *additional* terms. Under this approach, Comment 6 (apparently supporting a mutual rather than a single term knockout) is not applicable because it refers only to conflicting terms in confirmation forms following *oral* agreement, not conflicting terms in the *writings* that form the agreement. This approach is

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[7] Comment 3 states (emphasis added): "Whether or not *additional or different* terms will become part of the agreement depends upon the provision of subsection (2)." It must be remembered that even official comments to enacted statutory text do not have the force of law and are only guidance in the interpretation of that text. *In re Bristol Associates, Inc.*, 505 F.2d 1056 (3rd Cir. 1974) (while the comments to the Pennsylvania U.C.C. are not binding, the Pennsylvania Supreme Court gives substantial weight to the comments as evidencing application of the Code).

[8] Comment 6 states, in part: "Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself …. The contract then consists of the terms expressly agreed to, terms on which the confirmations agree, and terms supplied by the Act, including subsection (2)."

supported by Professor Summers. J. J. White & R. S. Summers, *Uniform Commercial Code*, § 1-2, at 29 (2d ed. 1980).

The third, and preferable approach, which is commonly called the "knock-out" rule, is that the conflicting terms cancel one another. Under this view the offeree's form is treated only as an acceptance of the terms in the offeror's form which did not conflict. The ultimate contract, then, includes those non-conflicting terms and any other terms supplied by the U.C.C., including terms incorporated by course of performance (§ 2-208), course of dealing (§ 1-205), usage of trade (§ 1-205), and other "gap fillers" or "off-the-rack" terms (e.g., implied warranty of fitness for particular purpose, § 2-315). As stated previously, this approach finds some support in Comment 6. Professor White supports this approach as the most fair and consistent with the purposes of § 2-207. *White & Summers, supra*, at 29. Further, several courts have adopted or recognized the approach. [citations omitted.]

We are of the opinion that this is the more reasonable approach, particularly when dealing with a case such as this where from the beginning the offeror's specified period of limitations would expire before the equipment was even installed. The approaches other than the "knock-out" approach would be inequitable and unjust because they invited the very kind of treatment which the defendant attempted to provide.

Thus, we are of the conclusion that if faced with this issue the Pennsylvania Supreme Court would adopt the "knock-out" rule and hold here that the conflicting terms in Pennwalt's offer and Daitom's acceptance regarding the period of limitations and applicable warranties cancel one another out. Consequently, the other provisions of the U.C.C. must be used to provide the missing terms.

This particular approach and result are supported persuasively by the underlying rationale and purpose behind the adoption of § 2-207. As stated previously, that provision was drafted to reform the infamous common law mirror-image rule and associated last-shot doctrine that enshrined the fortuitous positions of senders of forms and accorded undue advantages based on such fortuitous positions. *White & Summers, supra* at 25. To refuse to adopt the "knock-out" rule and instead adopt one of the remaining two approaches would serve to re-enshrine the undue advantages derived solely from the fortuitous positions of when a party sent a form. Cf., 3 Duesenberg & King at 93 (1983 Supp.). This is because either approach other than the knock-out rule for different terms results in the offeror and his or her terms always prevailing solely because he or she sent the first form. Professor Summers argues that this advantage is not wholly unearned, because the offeree has an opportunity to review the offer, identify the conflicting terms and make his or

her acceptance conditional. But this joinder misses the fundamental purpose of the U.C.C. in general and § 2-207 in particular, which is to preserve a contract and fill in any gaps if the parties intended to make a contract and there is a reasonable basis for giving an appropriate remedy. U.C.C. § 2-204(3); § 2-207(1); § 2-207(3). Thus, this approach gives the offeree some protection. While it is laudable for business persons to read the fine print and boilerplate provisions in exchanged forms, there is nothing in § 2-207 mandating such careful consideration. The provision seems drafted with a recognition of the reality that merchants seldom review exchanged forms with the scrutiny of lawyers. The "knock-out" rule is therefore the best approach. Even if a term eliminated by operation of the "knock-out" rule is reintroduced by operation of the U.C.C.'s gap-filler provisions, such a result does not indicate a weakness of the approach. On the contrary, at least the reintroduced term has the merit of being a term that the U.C.C. draftpersons regarded as fair.

[The appellate court remanded the matter to the district court for application of the "knock-out" rule.]

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4.4.4.2 Various Questions and Notes about *Daitom, Inc. v. Pennwalt Corp*

1. The original offer by Pennwalt contained a one-year statute of limitations. Daitom's acceptance was silent as to the applicable statute of limitations. How, then, did the Tenth Circuit conclude that Daitom's acceptance contained a "different" four-year statute of limitations?

2. The Tenth Circuit, in discussing the first approach of treating "different" terms in the same manner as "additional" terms was not acceptable, stating that "different terms in the acceptance would never become part of the contract, because by definition, they would materially alter the contract." Do you agree that different terms would always "materially alter" a contract? For example, if an offer, in fine print, provided for delivery by UPS, and the acceptance, in fine print, provided for delivery by the USPO, and this was not a "dickered" term, would this be a material alteration as defined by Comment 4?

3. The second approach discussed by the court is to apply § 2-207(2) to "additional" terms only, because § 2-207(2) fails to mention "different" terms. Under this approach, the different terms would be disregarded, giving deference to the offeror's terms. Is this approach more consistent with common law than the "knock-out" rule adopted by the court?

4. Several commentators feel the *Daitom* approach is supported by Comment 6. Do you agree that Comment 6 implements a "knock-out" rule?

5. The "knock-out" rule has been adopted by a majority of jurisdictions.

☑ **Purple Problem 4-7.** HerbPots' purchase order form states in fine print on the back that HerbPots will pay within thirty days of receipt of the goods. TerraGreen's acknowledgement form (which does not make its acceptance conditional on assent to any additional or different terms) provides that payment must be made within ten days of receipt of the goods. After the exchange of forms, TerraGreen ships an order of pots to HerbPots. Applying § 2-207(2), when is payment due:

(1) under the first approach cited in Daitom?

(2) under the second approach cited in Daitom?

(3) under the knock-out rule?

(4) would the result vary if HerbPots' order form was silent as to date of payment?

4.5. The Attempted Amendment of UCC § 2-207 and the Declining Importance of § 2-207.

4.5.1 In recognition of the problems that have arisen in the interpretation and application of § 2-207, it was entirely rewritten in Amended Article 2. The revised version provided:

> **§ 2-207. Terms of Contract; Effect of Confirmation.**
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> If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:
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> (a) terms that appear in the records of both parties;
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> (b) terms, whether in a record or not, to which both parties agree; and
>
> (c) terms supplied or incorporated under any provision of this Act.

Recall that the Amendments have been withdrawn, but it is interesting to see how the drafters proposed to solve the problems created by the original version.

Query: Under the Amendment, what rule applies to different terms? What rule applies to non-merchants?

4.5.2. As parties increasingly enter into transactions through the internet, the importance of § 2-207 is subsiding. Unless one of the parties has leverage, it may have to agree to the offered terms. And if there is negotiation, the parties will only have one document that constitutes the agreement.

[printing 1.01, 2017-09-09 0534]