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RESTORING PEACE IN THE BATTLE OF THE FORMS: A FRAMEWORK FOR MAKING UNIFORM COMMERCIAL CODE SECTION 2-207 WORK

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The promulgation of Uniform Commercial Code section 2-207 led to a host of difficulties in interpretation and application. In this Article, Professor Brown argues that many of the problems associated with section 2-207 are avoided when one interprets the statute in light of its pre-Code foundation. Relying upon the commercial context and analogy to section 2-206(1)(b), she demonstrates that section 2-207 represents the latitude in acceptance implicitly extended by the offeror in the special context of form contracts. She concludes that most additional terms in the offeree's form automatically become part of the contract, limiting the "material alteration" exclusion of subsection (2)(b) to terms which would be substantially surprising to the offeror.

I. INTRODUCTION

Section 2-207¹ of the Uniform Commercial Code has bedeviled the legal community ever since its promulgation.² Indeed, interpretations and applica-

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1. U.C.C. § 2-207 provides:

(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.

U.C.C. § 2-207 (1990).

2. See, e.g., *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962) ("not too happily drafted"); *Reaction Molding Tech., Inc. v. General Elec. Co.*, 585 F. Supp. 1097, 1104 (E.D. Pa. 1984) ("a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair"), modified, 588 F. Supp. 1280 (E.D. Pa. 1984); *Southwest Eng'g Co. v. Martin Tractor Co.*, 205 Kan. 684, 694, 473 P.2d 18, 25 (1970) ("murky bit of prose"); R. DUESENBERG & L. KING, *SALES AND BULK TRANSFERS*, 3 BENDER'S U.C.C. SERVICE, §§ 3.01-3.08 (1986); Letter from

tions of this statute vary so widely that the "battle of the forms" may appear a more insoluble problem now than when section 2-207 first was enacted.³ Cases and commentary have succeeded in tapping every possibility for confusion inherent in the statutory language or invited by the ambiguities of its practical context.⁴ Although "battle of the forms" issues often are litigated and have been the subject of numerous articles, this attention has generated more controversy and confusion than clarity.⁵ Instead of a sound, practical solution to a commercial problem, the section has become an enigma.

The purpose of this Article, then, is to explore the appropriate function of section 2-207 in the context of its underlying commercial necessities⁶ and in

Grant Gilmore to Robert Summers, in R. SUMMERS & J. WHITE, *COMMERCIAL & CONSUMER LAW* 54 (3d ed. 1981) (describing § 2-207 as "a miserable, bungled, patched-up job") [hereinafter Gilmore Letter]; J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 1-3, at 28-29 (3d ed. 1988); Baird & Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1220-21 (1982); Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171, 213 (1975); Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms under Uniform Commercial Code Section 2-207*, 34 BUS. LAW. 1477, 1477 (1979); Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 804, 818; Hawkland, *Major Changes under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 PRAC. LAW., May 1964, at 73, 79-82; Murray, *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337, 337 (1986) [hereinafter Murray, *A Proposed Revision*]; Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1308 (1986) [hereinafter Murray, *Chaos of the "Battle of the Forms"*]; Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 8 (1981) [hereinafter Murray, *The Article 2 Prism*]; Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597, 599 (1978) [hereinafter Murray, *Incipient Unconscionability*]; Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269, 270 (1972) [hereinafter Murray, *The Realism of Behaviorism*]; Murray, *Intention Over Terms: An Exploration of U.C.C. 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317, 329 (1969) [hereinafter Murray, *Intention Over Terms*]; Shanker, *Contract by Disagreement? (Reflections of UCC 2-207)*, 81 COM. L.J. 453, 453 (1976); Taylor, *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 U. CIN. L. REV. 419, 421 (1977); Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 U.C.C. L.J. 237, 240-41 (1984); Travaglio, *Clearing the Air After The Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. 327, 327-28 (1983); Note, *Contracts: Sales of Goods: Acceptance of Offer: Additional or Different Terms: Section 2-207, Uniform Commercial Code: Section 84-a, New York Personal Property Law (New)*, 46 CORNELL L. REV. 308, 316 (1961) ("Section 2-207 appears to complicate . . . judicial interpretation of the chronology of offer and acceptance. . . . [C]ourts . . . will need more than a scorecard to distinguish the players."). For a comparable study of the "battle of the forms," see Von Mehren, *"The Battle of the Forms": A Comparative View*, 38 AM. J. COMP. L. 265 (1990).

3. See Murray, *A Proposed Revision*, *supra* note 2, at 344; Murray, *Chaos of the "Battle of the Forms"*, *supra* note 2, at 1311-30; Thatcher, *supra* note 2, at 239-40.

4. See Baird & Weisberg, *supra* note 2, at 1249-50 (terms supplied under § 2-207(3) not suitable for some transactions); Barron & Dunfee, *supra* note 2, at 179; Murray, *Chaos of the "Battle of the Forms"*, *supra* note 2, at 1323-24, 1349-51.

5. See, e.g., Murray, *Chaos of the "Battle of the Forms"*, *supra* note 2, at 1308 ("this chaos threatens the institution of contract in our society").

6. An informal information-gathering effort by the author revealed that actual commercial practice involving the use of forms is quite disparate and difficult to generalize about, except for a few fundamental observations. Some forms lack any fine print at all; some have copious amounts. Almost any form from a purchase order to an acknowledgment to an invoice can be used as the original or sole communication. More often, telephone or personal conferences precede the forms; in such cases, actual agreement may be reached, or the conversations may serve merely as a preliminary stage in negotiation before forms are sent.

Because of the great disparity in commercial practice, this Article makes no effort to address the function of § 2-207 in *all* cases. Rather, the Article is designed to set the stage for the statute's

light of the larger body of law in which it is set. When the statute is understood *in its context*, both commercially and within its broader framework of common-law contract law and Uniform Commercial Code policy, the most difficult issues posed by section 2-207 can be resolved and the results made both fairly predictable and predictably fair. To facilitate its proper application, the Article suggests a general methodology for applying the statute in most cases. This approach supports a simpler, more predictable analysis of "battle of the forms" problems without sacrificing underlying statutory principles. The approach at first may appear unorthodox; in actuality, it is derived from long-established principles of contract law. Not only does it enjoy the advantage of employing the ordinary and familiar tools of Code and common-law contracts doctrine, but it is well-designed to achieve section 2-207's discernible statutory objectives.

An analysis of the purpose of section 2-207 reveals that its underlying policy is no less consistent with the common law of contracts than are its sister provisions in Article 2. Far from working any overwhelming reform in the fundamental policies of contract law, section 2-207 restores the common-law relationship of offeror and offeree, adjusting only the application of certain rather mechanical contracts rules to fit the modern use of preprinted forms. Applied in this context, the old rules worked poorly, because parties rarely read anything on a form except the filled-in portion.

If unawareness of the preprinted content of forms is the commercial reality, intent to enter into a contract must be based on blanket assent rather than on agreement term by term. To effect this, it was necessary to adjust the old rules based on a presumption of careful reading. The modern practice of making contracts by the exchange of preprinted forms had rendered some of the old rules, notably the mirror-image rule,⁷ not merely useless, but an actual barrier to an

application by elucidating the fundamental principles underlying it. The very disparity in commercial practice itself argues for a focus on general principles rather than on particularities. The lack of commonality in the use and content of forms argues for the advisability of continuing as much as possible to treat their use consistently with long standing common-law principles, rather than to change the law radically when forms are used. Thus, it seems appropriate that § 2-207, as it is analyzed here, accommodates the law to the context of forms by a rather modest shift in focus. When the forms are actually read and negotiated with particularity, § 2-207's applicability seems wholly unnecessary because the transaction is indistinguishable from a similar one in which forms are not used.

This Article makes no attempt to evaluate the potential effect upon the usefulness of § 2-207 of the developing practice of contracting through electronic means, for example, through "electronic data interchange" (EDI). Although it has been predicted that "one-third of all business documents will move via EDI by 1995," only "an infinitesimal fraction of all documents are transferred electronically" today. Dziewit, Graziano & Daley, *The Quest for the Paperless Office Electronic Contracting: State of the Art Possibility But Legal Impossibility?*, 5 COMPUTER & HI-TECH. L.J. 75, 76 (1989). Because of lack of experience, evaluation of the impact upon the "battle of the forms" seems premature. It has been predicted, however, that EDI will "eliminate many of the problems spawned by paper contracts such as the 'battle of the forms' and the 'mailbox rule.'" *Id.* at 78.

7. The mirror-image rule is embodied in both the First and Second Restatements of Contracts. For example, § 59 of the First Restatement provides: "Except as this rule is qualified by §§ 45, 63, 72, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." RESTATEMENT OF CONTRACTS § 59 (1932). The analogous provision of the Second Restatement provides: "An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979). The Reporter's Note to this section attributes the omission

appropriate appraisal of the parties' objective manifestations of intent to contract.⁸

In keeping with fundamental principles of contract law,⁹ section 2-207(1) assesses the efficacy of an offeree's response by focusing on the nature and extent of the offeror's invitation. When, as in some other contexts,¹⁰ preprinted forms are used, inquiry into the offeror's manifested purpose reveals that most com-

of the word "exactly" in the original provision to its redundancy in light of the word "requirement." *Id.* reporter's note.

The rule is carried through in a number of other provisions of both Restatements. For purposes of this Article's subject, however, its implications for the effect of a purported acceptance with terms additional to or different from the offeror's are particularly relevant. Both Restatements apply the mirror-image rule as the general rule in such a case to invalidate the response's effect as an acceptance, recognizing it instead as a counter offer. See RESTATEMENT OF CONTRACTS § 60 (1932) ("A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter offer."); RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter offer."). The Reporter's Note to § 59 of the Second Restatement notes the influence of U.C.C. § 2-207 in the drafting of that provision, and refers to the rule by its popular appellation as the "basic 'mirror image' rule." *Id.* reporter's note.

8. Perhaps the most notorious case illustrating the problems of the mirror-image rule's application to contracts formed through the use of preprinted forms is *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915).

9. That an acceptance's effectiveness is predicated upon the manifestation of the offeree's assent to the deal proposed by the offeror and not to some other deal, is a principle inherent in many of the formation provisions of both Restatements of Contracts. See RESTATEMENT OF CONTRACTS § 53 comment a (1932) ("in order to constitute acceptance, whatever the offeror requests must be given"); RESTATEMENT (SECOND) OF CONTRACTS § 35 comment b (1979) ("Since the acceptance must have reference to the offer it is ordinarily necessary that the offeree have knowledge of the offer."). But the principle is also articulated explicitly in both Restatements. See RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1979) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.") (emphasis added); RESTATEMENT OF CONTRACTS § 52 (1932) ("Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror.") (emphasis added).

10. The following examples are taken from the Second Restatement. Many examples can be found in the First Restatement as well.

Section 30(2) of the Second Restatement provides: "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." RESTATEMENT (SECOND) OF CONTRACTS § 30(2) (1979). Comment b to this section provides: "Insistence on a particular form of acceptance is unusual. . . . Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation. . . ." *Id.* § 30(2) comment b. Comment c follows the same theme, noting that an offer may invite a number of choices by the offeree, in which case the offeror is understood to assent in advance to the offeree's choice. *Id.* § 30(2) comment c.

Section 60 of the Second Restatement provides: "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded." *Id.* § 60. Comment a to this section offers some guidance as to which offers should be determined to suggest, rather than prescribe: "But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed." *Id.* § 60 comment a (emphasis added).

Comment a to the Second Restatement § 58 observes that the principle of offeror mastery is "mitigated by the interpretation of offers, in accordance with common understanding, as inviting acceptance in any reasonable manner unless there is contrary indication." *Id.* § 58 comment a.

Comment a to the Second Restatement § 62 notes that "[t]he offeror can insist on any mode of acceptance, but ordinarily he invites acceptance in any reasonable manner; in case of doubt, an offer is interpreted as inviting the offeree to choose between acceptance by promise and acceptance by performance." *Id.* § 62 comment a.

mercial offers permit significant latitude in the character of the acceptance. The commercial realities implicit in the use of preprinted forms make such invited latitude an inescapable conclusion:¹¹ without it, a contract could not result from the exchange of preprinted forms, and most modern deals would go unmade.

Section 2-207 refocuses the judicial eye, enabling recognition of the latitude that the offer implicitly allows the offeree whose preprinted form may include terms additional to or different from the offeror's.¹² Consistent with the general liberalization of contract formation rules accomplished by Article 2, section 2-207 implements ordinary contracts doctrine, simply fine-tuned for the special context of the use of preprinted forms, which parties rarely read.

The first section of this Article explores the policies that account for section 2-207's enactment. An examination of the statute's role within the common law and among its sister statutes reveals its primary purpose: to restore the traditional balance of power between offeror and offeree in contract formation when forms are used. The first section concludes with an analysis and rejection of any role for section 2-207 in equalizing term-setting power between the contracting parties.

The second section of the Article applies a purposive construction of the statute. An initial discussion of the basic rule of subsection (1) addresses the making of a contract through the use of forms, concluding that an acceptance should be found in nearly every instance in which the filled-in portions of the offeree's form match the offeror's. Careful analysis shows that the offeree's use of "proviso" language¹³ invoking the last clause of the subsection does not undermine this conclusion. The discussion of subsection (1) concludes with a refutation of subsection (3)'s ability to resolve many cases in which forms are exchanged.

The Article's construction of the statute then proceeds to subsection (2)'s rules governing the terms of the contract. Of note are the conclusions that subsection (2)'s automatic inclusion rule applies to "additional" but not to "different" terms, and that the majority of "additional" terms in the offeree's form automatically should become part of the contract. Recognizing that the offeree, likely unaware of the offeror's fine print, requires some protection also, attention is given to the enforceability of unfair terms found in the offer. The Code's good faith and unconscionability provisions achieve adequate protection for the offeree against the offeror's overreaching.

11. Although the Second Restatement, like the first, lacks any provision analogous to § 2-207 of the U.C.C., Official Comment a to § 59 distinguishes the contract formed using § 2-207 from other contracts, indicating that additional or different terms in such a purported acceptance should not be given the customary effect under the mirror-image rule: "But a definite and reasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms. See § 61; Uniform Commercial Code § 2-207(1)." RESTATEMENT (SECOND) OF CONTRACTS § 59 comment a (1979).

12. *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 176, 154 N.W.2d 5, 16 (1967).

13. The last clause of § 2-207(1) is called the "proviso" in this Article, as it was by Thatcher, *supra* note 2.

The final part of the Article's section on purposive construction concerns the application of subsections 2-207(1) and (2) to forms used as confirmations of existing contracts, rather than as operative offer or acceptance. The Article explores the role of the "knock-out" rule of official comment 6 and concludes that the rule is uniquely appropriate when forms are used as confirmations.

The Article concludes by offering a "roadmap" for applying section 2-207. The "roadmap" avoids the pitfalls evident in the statutory language and is designed to support a coherent, sensible, and predictable analysis of a "battle of the forms."

II. THE PURPOSE OF SECTION 2-207

Even more than most provisions of Article 2, section 2-207 should not be read standing alone.¹⁴ The statutory language is so contorted and imprecise that any effort to apply it without reference to its context inevitably will result in the confusion and error so common since the statute's beginnings.¹⁵ Placing section 2-207 properly in context requires reference to other provisions of the Code, to the common law of contracts, and to the commercial factors that prompted the statute's drafting. This is no pedagogical exercise, but a pressing necessity if section 2-207 is to be understood.

Fortunately, the Code itself leaves no doubt about the propriety of taking these factors into account when construing any provision of the statute. Section 1-102(1) mandates that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."¹⁶ A purely formal or literal reading of the statute therefore is impermissible; the Code's meaning is understood only upon appreciation of its purposes.¹⁷ The drafters envisioned Article 2 as a fabric of statutory law that takes its essential character from its framework of common law and commercial reality. This vision is reflected in section 1-102(2),¹⁸ which requires responsiveness to commercial necessity when construing and applying the Code, and in section 1-103,¹⁹ which recognizes the

14. "The sections of Article 2 may be viewed as a prism with each face contributing to the total illumination of commercial law while each is inextricably linked to the others." Murray, *Incipient Unconscionability*, *supra* note 2, at 599; see also Murray, *The Article 2 Prism*, *supra* note 2, at 1-3, 8.

15. In *Boese-Hilburn Co. v. Dean Machinery Co.*, the Missouri Court of Appeals noted that "[d]ue to its wording, critics abound who cast doubt as to whether U.C.C. § 2-207 satisfactorily achieved its designed purpose." 616 S.W.2d 520, 523 (Mo. App. 1981).

16. U.C.C. § 1-102(1) (1990).

17. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 219-21 (1966).

18. This section provides:

- (2) Underlying purposes and policies of this Act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102(2) (1990).

19. Section 1-103 provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal

general applicability of supplementary common-law principles.

A. *Recognized Purpose: Implementing Section 2-204 Policy*

Section 2-207 is one of a set of statutes which implements Article 2's policy concerning the formation of contracts. This broad policy is designed to effectuate the parties' intent,²⁰ eliminating some of the common law's rather cumbersome and mechanical requirements.²¹ Thus, an enforceable contract depends upon the parties' agreement, and is not frustrated by the difficulties one would encounter in attempting to fit the transaction into the traditional models of common-law offer and acceptance doctrine. The policy regarding the general formation of contracts is articulated in section 2-204:

(1) 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 a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.²²

Among the statutes immediately following section 2-204, section 2-207 is designed to surmount the technical difficulties posed by the use of preprinted forms to better effectuate the intentions of the parties as required by section 2-204.

Although the drafters failed to make explicit their intention to limit section 2-207's innovations to agreements in which at least one party's preprinted form plays a role, such a limitation is generally understood²³ and makes good sense.

and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

Id. § 1-103.

20. Obviously, there are some limitations on the effectiveness of party intentions under Article 2, as at common law. *See, e.g., id.* § 2-201 (statute of frauds); *id.* § 2-209(2) (giving effect to "no oral modification" clauses).

21. "Section 2-207 requires courts to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens." *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 100, 569 P.2d 751, 758, 141 Cal. Rptr. 157, 164 (1977); *see Mooney, supra* note 17, at 219-21. The drafters of Article 2 sought to obviate the practical difficulties caused by what Professor Mooney called the "artificialities of peppercornism" in the common law of contracts. *Id.* at 219. Their efforts met with much resistance from lawyers educated within the common-law traditions. As Professor Llewellyn, the principal drafter, observed concerning the law of offer and acceptance:

This is therefore no area of "rules" to be disturbed. It is an area where we want no disturbance, and will brook none. It is the Rabbit-Hole down which we fell into the Law, and to him who has gone down it, no queer phenomenon is strange; he has been magicked; the logic of Wonderland we then entered makes mere discrepant decision negligible. And it is not only hard, it is obnoxious, for any of us who have gone through that experience to even conceive of Offer and Acceptance as perhaps in need of re-examination.

Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, I, 48 YALE L.J. 1, 32 (1938), *quoted in Mooney, supra* note 17, at 219.

22. U.C.C. § 2-204(1)-(3) (1990).

23. This conclusion is not shared by everyone. Official Comment 1 to § 2-207 recognizes the

Consider, for example, an offeree's inclusion of a significant new term in a purported acceptance where neither party uses a form. Such a term would lead not only a lawyer, but also the offeror, to conclude that no assent to the offer has been indicated; instead a counter offer has been made.²⁴ This inference is clearest if the offeree's addition works a material change in the deal originally proposed.

The use of preprinted forms complicates matters, however. The offeree's inclusion of a new term materially altering the original proposal may not undermine a finding that the offeree has manifested assent to the offer when at least one form is involved.²⁵ For one thing, neither the offeree nor the offeror may be even aware of the presence of the new term in the offeree's form. Or, if the

provision as generally applicable not only to forms, but also to letters or wires, for example. But on closer inspection, one can see that the terms in the letters or wires that are cited as examples of acceptances despite new terms are characterized as "further minor suggestions or proposals such as 'ship by Tuesday,' 'rush,' 'ship draft against bill of lading inspection allowed,' or the like." *Id.* § 2-207 Official Comment 1. These additions are typical of clauses that the commentator would not regard as material alterations, and that probably should not be understood as deal-breakers in the commercial context.

On the other hand, Official Comment 1 refers to exchanges of preprinted forms as frequently encountered examples of the necessity for the rule of § 2-207(1), by dint of the frequent inconsistency in the terms of the forms, apparently without regard to the materiality of those terms. This seems appropriate when a form is used, because even a very material change buried in fine print is an unlikely deal-breaker as it is quite unlikely to come to the offeror's attention.

When forms are not used, the common-law rules, which do tend to emphasize materiality of the offeree's additions, already suffice to assure the outcome sought by the drafters. *Compare* RESTATEMENT OF CONTRACTS § 60 (1932) (Purported Acceptance Which Adds Qualifications) and RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979) (Purported Acceptance Which Adds Qualifications) with RESTATEMENT OF CONTRACTS § 62 (1932) (Acceptance Which Requests Change of Terms) and RESTATEMENT (SECOND) OF CONTRACTS § 61 (1979) (Acceptance Which Requests Change of Terms). If there were any uncertainty about the law's capacity to recognize contract where the parties' intent is clear despite a nonconforming acceptance, for example, by letter, § 2-204 is certainly enough to resolve it. But it is when forms are used, where the additions or differences are material, that the innovations of § 2-207 are needed, and where the mechanism of subsection (2) is particularly likely to reflect what the parties would do but for their failure to read the forms.

Moreover, there is some evidence within the official comments themselves, that the commentators considered the statute's import essentially in the context of forms. For example, official comment 6 provides that "[w]here 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." U.C.C. § 2-207 official comment 6 (1990) (emphasis added).

For cases holding that § 2-207 only applies where forms are used, see *East Europe Domestic Int'l Sales Corp. v. Island Creek Coal Sales Co.*, 572 F. Supp. 702, 705 (S.D.N.Y. 1983) (Telex containing additional terms in response to a purchase order was not a form and therefore the case was not covered by § 2-207. The additional terms acted as notice of objection and a counter offer under the common law.); *Koehring Co. v. Glowacki*, 77 Wis. 2d 497, 503-05, 253 N.W.2d 64, 67-68 (1977) (The court found that only the conditional-on-assent language after the comma in § 2-207(1) was relevant to telegrams that contained different F.O.B. terms because the telegrams were not form contracts and general contract law governed the exchange. The court held, therefore, that the offeree's response containing different terms constituted a counter offer.).

24. See, e.g., *Johnson v. Star Iron and Steel Co.*, 9 Wash. App. 202, 511 P.2d 1370, 1373 (1973) ("It is axiomatic that an expression of assent that changes the terms of an offer in any material respect may operate as a counter offer, but is not an acceptance. The issue then raised is whether the exceptions noted above were *material* modifications of the offer." (emphasis by the court) (citation omitted)).

25. *Marlene Indus. Corp. v. Carnac Textiles Inc.*, 45 N.Y.2d 327, 332, 380 N.E.2d 239, 241, 408 N.Y.S.2d 410, 412 (1978). A notorious case reaching the opposite conclusion by a tortured analysis of § 2-207 is *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

offeror has used a form silent on the topic of the offeree's new term, it may be inferred that the offeror means for the offeree to provide that term, making the "acceptance" perfectly compatible with the offer. Because the use of forms undermines the ordinary inferences otherwise arising from the parties' communications, special rules are needed to assess their meaning in this context. That is what subsections 2-207(1) and (2)(b) do. By enabling a court to recognize agreement in fact despite the offeree's inclusion of terms ordinarily thought to indicate counter offer rather than acceptance, section 2-207 effects the realistic policies of section 2-204 in the context of forms.

1. Reversing the "Mirror-Image" Rule

a. The Necessity: Commercial Background

As the discussion above intimates, the principal function of section 2-207 is to prevent the inevitable discrepancies between forms from defeating the commercial expectation that their exchange results in an enforceable contract.²⁶ The danger to enforceability of such a contract lays primarily in the common law's "mirror-image rule," the rule that an acceptance must match the offer perfectly to be effective.²⁷

This rule, mechanically applied, made no sense at all in transactions entered into through the exchange of forms whose preprinted terms no one ever read except lawyers.²⁸ As Professor Macaulay concluded following his well-known study almost 30 years ago:

Typically, [preprinted] terms and conditions are lengthy and printed in small type on the back of the forms. . . .

[S]alesmen and purchasing agents, the operating personnel, typi-

26. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972) (discussing purposes of § 2-207 and observing that the parties may not "impart such significance to the terms on the printed forms"); *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 346, 408 N.E.2d 1041, 1047 (1980) ("The general purpose of section 2-207 is to allow parties to enforce their agreement, whatever it may be, despite discrepancies . . ."); see, e.g., *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th Cir. 1979) ("Section 207 . . . converts a common-law counteroffer into an acceptance even though it states additional or different terms.").

"[P]arties should be able to enforce their agreement . . . despite discrepancies [between offer and acceptance], if enforcement can be granted without requiring either party to be bound to a material term to which he has not agreed." *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5, 12 (1967); see also Murray, *The Realism of Behaviorism*, *supra* note 2, at 278-79 (discussing § 2-207's emasculation of the "classic theory [which holds] that any significant difference in the terms of the purported acceptance *must* turn the so-called acceptance into a counter offer").

27. See Barron & Dunfee, *supra* note 2, at 177; Murray, *The Realism of Behaviorism*, *supra* note 2, at 278; Travaglio, *supra* note 2, at 332; see also Murray, *The Article 2 Prism*, *supra* note 2, at 8 (suggesting acceptance rule). The mirror-image rule is articulated in both Restatements of Contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979); RESTATEMENT OF CONTRACTS § 59 (1932).

28. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 512, 380 N.E.2d 571, 575 (1978) (drafters of § 2-207 "recognized that the parties to a commercial transaction seldom were aware of the conflicting terms"). "Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction." U.C.C. § 2-207 official comment 1 (1979).

cally are unaware of what is said in the fine print on the back of the forms they use.

... [T]he seller may fail to read the buyer's 24 paragraphs of fine print and may accept the buyer's order on the seller's own acknowledgment-of-order form. Typically this form will have ten to 50 paragraphs favoring the seller, and these provisions are likely to be different from or inconsistent with the buyer's provisions. The seller's acknowledgment form may be received by the buyer and checked by a clerk. She will read the *face* of the acknowledgment but not the fine print on the back of it because she has neither the time nor ability to analyze the small print.²⁹

The variance between the parties' reasonable expectations and the effects of the common-law rule often resulted in seriously unpleasant economic surprises.³⁰ The results made the law, at best, a hidden trap for the innocent and, at worst, an instrument of evil in the hands of their less-blameless brethren.³¹

The typical pre-Code scenario was as follows.³² Because no preprinted form ever matches exactly the terms of another, the offeree's response, often in the form of a "seller's acknowledgment" form, was denied its intended effect as an acceptance by virtue of the mirror-image rule. Consequently, when the parties thought an agreement had been consummated, the law still insisted there was no contract. Instead, the law recognized merely a pending counter offer from the original offeree. Since the parties believed themselves already to have entered a binding agreement, they naturally proceeded to perform. This added insult to injury by finally producing a legally cognizable contract, but to the surprise of both parties, on the terms supplied by the *offeree*. This result obtained because the seller (who was most often the offeree)³³ proceeded to ship the goods as she felt contractually bound to do. The buyer-offeror just as naturally accepted the goods without any qualms: in doing so, the offeror was held in the eyes of the law to have accepted not only the goods, but the terms of the seller's counter offer as well. Thus did the offeree become master of the terms of the run-of-the-mill commercial contract. Of course, it was not until later, when some quarrel arose requiring consultation with an attorney, that the parties would discover that the law did not reflect their own understanding.³⁴

In the more common battle over terms, the use of preprinted forms under pre-Code law gave the offeree an unprecedented advantage by making available

29. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-59 (1963).

30. See Travaglio, *supra* note 2, at 329-31 (summarizing circumstances leading to the creation of § 2-207).

31. See *infra* note 35.

32. See, e.g., *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1165-66 (6th Cir. 1972).

33. Cf. *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989) ("As a general rule, orders are considered as offers to purchase."). The seller is less often the offeror, probably because of the general rule that price quotations are not offers.

34. In a less common variation upon this theme, the result would be a finding of no contract if one party decided not to ship, for example, because the market price had changed to his advantage. Despite the conviction of both buyer and seller that the failure to perform was a breach, the law denied the protection of contract.

to her the alternative of a hidden counter offer.³⁵ That the offeree's form constituted a counter offer rather than an acceptance was an effectively hidden secret because the very reason for the forms' use, namely economic efficiency, dictated that the forms were rarely read.³⁶ Moreover, the legal effect of the offeree's form usually was masked further by the offeree-seller's shipment. The buyer-offeror's receipt of the goods would tend to validate the inference, already supported by the vast volume of experience, that an agreement had been consummated upon the offeree's dispatch of the form.

Although *technically* losing the protection of a contract already enforceable against the offeror when shipment was made, a seller-offeree was relatively safe in shipping, because the buyer's subjective impression that a contract had already been formed virtually ensured the offeror's acceptance of the goods without further contemplation of the contract's advantage to him.³⁷ Rarely did the offeror refuse the goods. In most cases, then, the performance that followed the exchange of the unread forms went smoothly and litigation did not ensue. In the comparatively infrequent cases where trouble arose, the dispute was likely to concern the terms of the contract. The presence alone of the additional or different terms in the offeree's form convinced the courts that a counter offer had been made despite the commercial spuriousness of such a conclusion.

b. The Solution: Compromising the Effect of Preprinted Terms

One manner of dealing with the havoc wrought by the mirror-image rule might have been to fashion a rule of law ignoring altogether most of the preprinted terms of one or both forms,³⁸ giving effect instead only to the matching terms and supplementing these with terms provided by Code gap-fillers. If the drafters had chosen this solution, they might have produced only the third subsection of section 2-207.³⁹ But regardless of the ultimate advisability of such

35. This is not to imply that typical offerees had any such actual intention when they sent forms. Nevertheless, they or their counsel could include terms favorable to them without fearing the contract would be upset by the terms. An offeree could take advantage of the inclusion after the performance when a dispute arose.

36. Murray, *The Standardized Agreement Phenomenon in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 778 (1982).

37. Actually, offerees would not ordinarily recognize the legal advantage until they sought legal advice, but the argument would be there ready to use whenever a dispute arose.

38. Courts occasionally have refused to give effect to fine print. For example, despite the comparatively easier discoverability of the fine print (full payment language) on a check, the court in *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wash. 2d 523, 439 P.2d 416 (1968), refused any effect because the import of the language was not brought to the plaintiff's attention.

39. Section 2-207(3) of the U.C.C. provides:

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.

U.C.C. § 2-207(3) (1990). Official comment 7, added in 1966, explains:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only

a rule, it is clear from the presence of subsections (1) and (2) that the drafters were not ready to go so far. They chose instead a middle route, to give effect to the terms of the preprinted forms insofar as they could without flying in the face of the probable intentions of the parties, given the commercial context.

The drafters apparently believed that if the time and money spent in the drafting of preprinted forms for use in modern commerce were not to be wasted, the forms' preprinted terms must be given *some* effect. But they seem to have recognized as well that it is pure fantasy to construct a theory of effectiveness based on the presumption that the form will be read. It might be so, but the likelihood is very small.⁴⁰ Consequently, the significance of a simple exchange of forms (or an exchange of forms coupled with performance) must be determined in large part by rather mechanical rules derived from the drafters' presumptions of what the parties expected based on their reading only the filled-in terms.⁴¹

As to the overriding issue of effective contract formation, section 2-207(1) supplies a rule designed to recognize an enforceable contract in the vast majority of transactions in which the offeree returns a form with filled-in terms matching those of the offer, regardless of *anything* in the preprinted portion of the forms. Subsection (2) ordinarily gives the offeree the advantage of those preprinted terms that are not repugnant to the terms of the offer without the necessity of the offeror's specific assent. In this way, the statute provides an adjustment in the application of ordinary contract law to accommodate the special circumstances of the parties' use of preprinted forms.

2. Restoring the Offeror to Dominance: The Underlying Principle of Invited Latitude in the Acceptance

a. Background and Statutory Language

Common law dictated unequivocally that the offeror was master of the terms of the contract created by acceptance of the offer.⁴² At the very center of their objection to the commercial ravages of the mirror-image rule in which

question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Id. § 2-207 official comment 7.

40. *See, e.g.*, *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 512, 380 N.E.2d 571, 575 (1978).

41. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 5 comment b (1979). The comment states: Much contract law consists of rules which may be varied by agreement of the parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement. They often rest, however, on considerations of public policy rather than on manifestation of the intention of the parties.

Id.

42. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 58 comment a (1979) ("This rule applies to the substance of the bargain the basic principle that the offeror is the master of his offer."). In *Weidman v. Tomaselli*, 81 Misc. 2d 328, 331, 365 N.Y.S.2d 681, 686-87, *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (1975), the court articulated this rule:

[A]t common law, the offeror is master of his offer, and may decide his own terms and conditions. Whether the terms are harsh, "unfair", disliked by the offeree, or disparaged by acquaintances to whom the offeree turns for comforting words of agreement with his

forms were used was the drafters' abhorrence of its effect in conferring upon the offeree the power to effectively dictate the contract's terms by the device of a hidden counter offer.⁴³ By allowing an offeree's preprinted form to effect a contract despite its inclusion of terms additional to, or even different from, those proposed by the offeror, the drafters reversed that distortion in modern contract formation.⁴⁴ Section 2-207 clearly signifies the restoration of the traditional common-law relationship of the parties, in which the offeror is master of the terms of the contract.⁴⁵ That this long-honored rule should continue seems inescapably the implication of the formation rule of section 2-207(1).⁴⁶ Not even the offeree's term-setting power under section 2-207(2) is self-generated. It derives from the implied invitation of the offeror, just as it does at common law.⁴⁷

There is nothing, in fact, to indicate that section 2-207's anchor does not lie solidly within the common law of contracts.⁴⁸ Consequently, the common-law

opinion of the offeror, the offeror is supreme. The alternatives of the offeree are to make a counter offer and to reject the offer.

Id.

43. See, e.g., R. DUESENBERG & L. KING, *supra* note 2, §§ 3-12, 3-13.

44. See, e.g., *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th Cir. 1979); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1165 (6th Cir. 1972).

45. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 29 comment a (1979). The comment states that:

The offeror is the master of his offer; just as the making of any offer at all can be avoided by appropriate language or other conduct, so the power of acceptance can be narrowly limited. The offeror is bound only in accordance with his manifested assent; he is not bound just because he receives a consideration as good as or better than the one he bargained for. . . . These considerations apply to the identity of the offeree or offerees as well as to the mode of manifesting acceptance . . . and the substance of the exchange

Id. The same principle is expressed in comment a to § 30: "The offeror is the master of his offer. . . . [T]he offeror is entitled to insist on a particular mode of manifestation of assent. The terms of the offer may limit acceptance to a particular mode; whether it does so is a matter of interpretation." *Id.* § 30 comment a.

The principle of offeror mastery underlies the "mirror-image rule":

This rule applies to the substance of the bargain the basic principle that the offeror is the master of his offer. . . . That principle rests on the concept of private autonomy underlying contract law. . . . [T]he offeror is entitled, if he makes his meaning clear, to insist on a prescribed type of acceptance.

Id. § 58 comment a; see *Kroeze v. Chloride Group, Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978).

46. U.C.C. § 2-207(1) (1990); *Tecumseh Int'l Corp. v. City of Springfield*, 70 Ill. App. 3d 101, 104-05, 388 N.E.2d 460, 463 (1979); *Alan Wood Steel Co. v. Capital Equip. Enters., Inc.*, 39 Ill. App. 3d 48, 55, 349 N.E.2d 627, 634 (1976); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 516, 380 N.E.2d 571, 577 (1978).

47. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 30 comment c (1979). The comment states:

An offer may contain a choice of terms, and may invite or require an acceptance making a selection among the terms stated. Or the offer may indicate a term such as quantity to be filled in by the offeree. An acceptance to be effective must comply with the terms of the offer, and those terms or the circumstances may make it plain that the acceptance must specify terms. Section 60. . . . The offer assents in advance to the term chosen or filled in by the offeree.

Id. That the offeror's invitation is the standard for testing the effectiveness of an offeree's terms is also evidenced by the rule that an acceptance is effective despite the addition of an express condition if the same condition is implied from the terms of the offer. See *id.* § 59 comment b & illustration 3 (1979); RESTATEMENT OF CONTRACTS § 60 comment a & illustration 2 (1932).

48. "Rather than being opposed to the common law, section 2207 [sic] in its flexibility is in the best tradition of the common law." *American Parts Co. v. American Arbitration Assoc.*, 8 Mich. App. 156, 154 N.W.2d 5, 16 (1967).

rule should be instructive by virtue of section 1-103, which provides that, unless displaced, common-law rules supplement Code provisions.⁴⁹ Additional support lies in the Code's definition of "agreement,"⁵⁰ a term central to the principles of section 2-204, which also explicitly draws meaning from the law of contracts to supplement the Code's own provisions.

Moreover, the language of section 2-207 itself indicates the restoration of the offeror to the former position of dominance. At the heart of section 2-207, expressed in its introductory subsection, is the legal characterization of the offeree's form as an effective "acceptance."⁵¹ Although "acceptance" is not defined, its import here, as in other Code contexts, is the same as at common law.⁵² What the offeree accepts is the contract proposed by the offeror.⁵³ Acceptance here, as elsewhere, lies in the proper exercise by the offeree of a power granted her by the offeror.⁵⁴ Likewise, the test of "acceptance" found in the first words of section 2-207(1)⁵⁵ obviously refers to common-law standards, in the absence of any Code definition.

It is not the test of acceptance, but the context of the inquiry that marks the significant difference between the traditional common-law transaction and one falling under section 2-207. In the latter case, the nature and limitations of the power conferred by the offeror may not be discovered solely in his words, as they are unlikely to be read. The offeror's words must be evaluated in light of his use of a preprinted form or other evidence of a reasonable expectation that the offeree will respond by sending such a form.⁵⁶ The offeror's meaning is ascer-

49. This section provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103 (1990).

50. Section 1-201(3) defines agreement as:

the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103).

Id. § 1-201(3).

51. In the language of the statute, a "definite and seasonable expression of acceptance . . . operates as an acceptance . . ." *Id.* § 2-207(1).

52. See RESTATEMENT (SECOND) OF CONTRACTS §§ 50-70 (1979); RESTATEMENT OF CONTRACTS §§ 52-73 (1932).

53. See *supra* notes 45 and 47.

54. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1979) ("Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). The limitations upon an effective acceptance under this rule are provided by the offer. See *id.* § 35(1) ("An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer."); see also *id.* § 59 (1979).

55. "A definite and seasonable expression of acceptance" is the test articulated in § 2-207(1). U.C.C. § 2-207(1) (1990).

56. The Code, of course, often points to surrounding circumstances as a necessary reference in evaluating the conformity of conduct to standards set by law or by contract, either directly or by appending the adjective "commercial" to the standard of "reasonableness." See, e.g., *id.* §§ 1-204(2), 2-311(1); cf. *id.* § 2-302(2) ("evidence as to its commercial setting"). This awareness that words and conduct often take on meaning when their context is understood is also evident in the common law. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 5 comment a (1979) ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact

tained in part by the common expectations of commercial parties in like circumstances.⁵⁷

The commercial understanding made cognizable through application of section 2-207(1) reveals an enforceable contract in most cases upon the offeree's dispatch of a form.⁵⁸ This result is not a mechanical one, but a consequence of a proper understanding of the parties' manifestations. Consequently, it follows that the offeree who uses a form has not lost the power to make an effective counter offer. There is nothing in section 2-207 or in any other Code provision to indicate such an overwhelming and senseless change in the law. Nevertheless, the responsive dispatch of a form so strongly evidences assent to the terms of the offer that the offeree must do something very definite and perhaps rather extraordinary to effect a counter offer.⁵⁹ Of course, the common-law power of the

from other conduct. Both language and conduct are to be understood in the light of the circumstances . . .").

57. Legal rules reflecting common or customary expectations seem to have much in common with the principles of usage of trade, course of dealing, and course of performance as sources of implied terms or of the meaning of express terms in an agreement. The common law long has given effect to custom as a source of content in contracts. See, e.g. RESTATEMENT (SECOND) OF CONTRACTS § 30 comment d (1979). The comment states:

Interpretation of the offer is necessary in order to determine whether there is any limitation on the mode of acceptance. The meaning given the offer by the offeree controls if it is a meaning of which the offeror knew or had reason to know. . . . Since limitation is not customary, the offeror has reason to know that the offeree may understand that the offer can be accepted in any reasonable manner, and a contrary intention is not operative unless manifested.

Id. Recognition of the common significance of typical commercial forms is possible under the Second Restatement of Contracts:

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

...

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Id. § 69. The applicability of these provisions to form contracts is recognized in comment d to § 69:

Explicit statement by the offeree, usage of trade, or a course of dealing between the parties may give the offeror reason to understand that silence will constitute acceptance. In such a situation the offer may tacitly incorporate that understanding

In a number of recurring situations, statutes have codified the application of these rules. See U.C.C. § 2-207(2) on additional terms proposed in an acceptance or written confirmation of a contract between merchants for the sale of goods

Id. § 69 Official Comment d.

Although the comment does not explicate it, the rule of § 69(1)(c) seems analogous to § 2-207(1). The circumstances of the offeree's use of a preprinted form with filled-in terms matching the offeror's seem to justify the offeror's understanding that acceptance has occurred in such a case where the offeree fails to notify the offeror unambiguously to the contrary.

58. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 63(a), 30(2) (1979); RESTATEMENT OF CONTRACTS §§ 64, 66 (1932); cf. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, art. 18(2), U.N. DOC. A/CONF. 971/18 (1980).

59. The necessity of an unambiguous counter offer to negate the customary significance of the form is analogous to U.C.C. § 2-206(1)'s requirement of unambiguity to negate the customary presumption of latitude in manner and medium of acceptance; cf. RESTATEMENT (SECOND) OF CONTRACTS § 30 comment d (1979) (interpretation of offer is necessary).

offeror, restored under section 2-207, belongs to the offeree who becomes a counter offeror, just as it does to any offeror.

b. Analogy to Section 2-206

Although some courts and commentators⁶⁰ have noted the relevance of other provisions of Article 2 in construing section 2-207, the import of the other statutes generally is not emphasized sufficiently; indeed, most courts disregard the import of other statutes entirely. The effort to construe section 2-207 consistently with its sister statutes negates many of the arguments that section 2-207 is intended to effect radical change in the basic law of contracts. Of course section 2-207 reflects the liberalization of formation policy articulated in section 2-204 and carried through in other provisions of Article 2. But beyond this, section 2-207, like most of the formation provisions, reveals solid roots in the common law of contracts. Reference to the section's function within the fabric of Article 2's provisions verifies the impression that the drafters never intended to abandon the common-law rule giving the offeror the advantage in the balance of power.⁶¹

Perhaps the most persuasive evidence that section 2-207's effect is to restore, rather than upset the common-law relationship between offeror and offeree lies in the striking analogy between sections 2-206 and 2-207. Section 2-206⁶² recognizes reasonable latitude for the offeree in choosing the manner, medium, and mode of an effective acceptance for most offers, in keeping with the common-law rule.⁶³ Where forms are used, section 2-207 similarly provides latitude in the offeree's response, allowing the acceptance form to include additional or different terms.⁶⁴

Under both statutes, offerors retain the capacity that they had at common law to draw narrowly the range of responses that they will recognize as accept-

60. See, e.g., R. DUESENBERG & L. KING, *supra* note 2, § 3.04, at 3-41 to 3-50; Murray, *The Article 2 Prism*, *supra* note 2, at 599.

61. Reference to the comments accompanying the Second Restatement support the consistency between the common law and the Code insofar as offeror mastery is concerned, even where additional terms in an acceptance automatically become part of the contract between merchants under § 2-207(2). See RESTATEMENT (SECOND) OF CONTRACTS § 59 comment a (1979) ("Such proposals [made under 2-207(2)] may sometimes be accepted by the silence of the original offeror."); *id.* § 69(1)(b) & comment d (reprinted *supra* note 57).

62. U.C.C. § 2-206 states:

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) 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 of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

U.C.C. § 2-206 (1990).

63. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 30(2), 32, 60, 62 (1979).

64. See *id.* § 59 comment a.

ances,⁶⁵ thus closely delimiting the offerees' power to accept.⁶⁶ But the drafters recognized that in the vast majority of cases, a rather wide latitude in manner, medium, and mode of acceptance reflects both commercial necessity and reasonable expectations.⁶⁷ Likewise, latitude in permitting an effective acceptance despite inclusion of different or additional terms is a necessity if parties use preprinted forms to avoid turning commercial expectations upside down every time a transaction involving a form is analyzed. The significance of the analogous relationship between sections 2-206 and 2-207 is especially compelling if attention is directed to subsection (1)(b) of 2-206.⁶⁸

Before addressing the terms of subsection (1)(b), however, it is instructive to consider the place of that subsection in the general scheme of section 2-206.⁶⁹ The drafters intended that the offeror remain in control under the Code as at common law; thus, section 2-206(1) begins: "Unless otherwise unambiguously indicated by the language [of the offer] or circumstances, . . ." This clause reserves to offerors the right to restrict permissible manner and medium, but they must do so unambiguously to negate the ordinarily wide latitude customarily permitted the offeree. This reflects the commercial understanding that the offeror rarely requires any specific manner or medium of acceptance.⁷⁰

Section 2-206 then provides the general rule that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." Subsection (1)(b) confirms that the permissible latitude extends to the offeree's reasonable choice between an explicit promissory acceptance and prompt performance.⁷¹

Section 2-206(1)(b) also clarifies the Code's solution to one common type of nonconforming acceptance, explicitly adopting the rule that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting

65. "The offeror is the master of his offer. An offeror may prescribe as many conditions, terms or the like as he may wish, including but not limited to, the time, place and method of acceptance." *Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978); see also RESTATEMENT (SECOND) OF CONTRACTS § 59 comment a (1979) ("offeror is entitled, if he makes his meaning clear, to insist on a prescribed type of acceptance").

66. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1979).

67. The Official Comment to U.C.C. § 2-206 provides:

1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected . . . This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be "ship at once" or the like.

U.C.C. § 2-206 official comments 1, 2 (1990).

68. See *supra* note 62.

69. See *id.*

70. See U.C.C. § 2-206 official comment 1.

71. See *id.* official comment 2.

acceptance either by a prompt promise to ship or by the prompt or current shipment of *conforming or non-conforming goods*.”⁷² Offerees making prompt or current shipment accept offers inviting such shipment despite their failure to conform the goods themselves to the terms of the offer. Because the terms of the contract so made derive from the offer,⁷³ the offeree in such a case is in breach at the very moment of acceptance.⁷⁴

Under section 2-206(1)(b), an offeree who does not wish to be bound to the offeror's terms can ship nonconforming goods without making an acceptance by seasonably notifying the buyer that “the shipment is offered only as an accommodation to the buyer.”⁷⁵ Such notification makes the shipment a counter offer rather than an acceptance, but the shipping offeree is at risk of the offeror's refusal to accept the goods, since no contract exists until the goods are accepted. The customary significance of shipment as acceptance of a buyer's offer for prompt or current shipment is thus recognized in section 2-206. To negate this inference, the offeree who wishes not to be bound must resolve any ambiguity by notification to the offeror apart from the shipment itself. To be effective, the notification of accommodation generally must reach the offeror in time to alert him that a decision to reject the goods may be in order.

The Code recognizes that for many day-to-day commercial contracts, agreement is consummated simply by the offeree-seller's dispatch of the goods,⁷⁶ even if they fail to conform to the offeror's terms, unless it unambiguously appears that the offeree means to make a counter offer. The customary significance of shipment without a clarifying communication provides such a strong implication of acceptance that the statute provides no hint that even a patent nonconformity would be enough to negate the offeree's apparent assent.⁷⁷ A contract on the offeror's terms thus is recognized, even when the offeror immediately would discern the disparity between offer and acceptance, or, in other words, the disparity between what was ordered and what was received. The ambiguity created, on the one hand, by the message of acceptance inherent in a seasonable shipment without negotiation or notification of accommodation, and, on the other, by the relatively weaker message of unwillingness to accede to the buyer's

72. U.C.C. § 2-206 (1)(b) (1990) (emphasis added). Official Comment 4 to 2-206 provides: Subsection (1)(b) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non-conforming and is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

Id. official comment 4 (1990).

73. As U.C.C. Official Comment 2 to § 2-206 observes, § 2-206(1)(b) “interprets an order.”

74. U.C.C. § 2-206(1)(b) official comment 4.

75. *Id.*

76. U.C.C. § 2-206(1)(b), (2) (1990). Official Comment 2 points out that “shipment” under § 2-206 is “used in the same sense as in Section 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the seller's own truck might be a beginning of performance under subsection (2).” *Id.* § 2-206 official comment 2.

77. The Official Comment 4 to U.C.C. 2-206, does, however, indicate that even this rule may not be without exception: “Such a non-conforming shipment is *normally* to be understood as intended to close the bargain.” U.C.C. § 2-206 official comment 4 (1990) (emphasis added).

terms inherent in the nonconformity itself is resolved against the party who created the ambiguity.⁷⁸

The provisions of section 2-207 derive from the same principles as section 2-206.⁷⁹ Section 2-207 provides a general rule of latitude for a second significant class of nonconforming offeree responses widely understood in commerce to signify acceptance: responses by the use of preprinted forms.⁸⁰ Where section 2-206 establishes reasonableness as a standard providing latitude for manner, medium, and mode of acceptance, section 2-207 sets forth a "definite and seasonable expression of acceptance"⁸¹ as the standard providing latitude for variance in the terms of the offeree's response without sacrificing the form's effectiveness to make a contract as the parties would intend. The mechanical mirror-image rule is no longer the determinant for the legal consequences of a nonconforming *verbal* response by an offeree, any more than it is the standard for a nonconforming response by conduct alone.

The standards of the two sections are different because the contexts are not wholly analogous. Terms of the contract are much more likely to be a real sticking point in negotiation than are manner and medium of acceptance. Hence a standard of reasonableness, which section 2-206 applies to issues of formation mechanics, would make less sense when the issue of assent depends on the implications of the words in the context of a preprinted form. The standard of latitude in section 2-207 appropriately is directed at the implications in fact of the offeree's words in that context: do they indicate assent? It is arguable that a preferable approach would have been to avoid factual issues by making a bright-line rule analogous to the nonconforming shipment rule of section 2-206(1)(b). The drafters may have declined to do this because of the relatively recent introduction of such forms, leaving them too little experience to be wholly comforta-

78. See RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(b) (1979). The section states:

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if . . .

(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Id.; cf. § 57 comment b ("It is not enough that the words of a reply justify a probable inference of assent. But the circumstances may make it proper to protect an offeror who acts on such an inference."). Under U.C.C. § 2-206(1)(b), the statute recognizes an "ordinary commercial understanding" that makes the inference of assent not merely probable, but conclusively reasonable despite nonconformity of the goods, unless notification of accommodation is given. U.C.C. § 2-206(1)(b) (1990).

79. U.C.C. § 2-207 Official Comment 1 (1990) refers to "two typical situations" arising in commerce where the parties' actual understandings required statutory assistance for legal recognition. U.C.C. § 2-207 Official Comment 2 (1990) makes clear that the statute's effect is intended to reflect the "commercial understanding" that "a proposed deal . . . has in fact been closed . . ." Compare U.C.C. § 2-207 Official Comment 2 (1990) ("Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.") with U.C.C. § 2-206 official comment 2 (1990) ("In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by prompt promise to ship . . .").

80. Note that both statutes allow leeway in the terms of the offeree's response and not merely in the mechanics of that response. Sections 2-206 and 2-207 may both be applicable in some situations, notably where shipment by the offeree follows a form which is more ambiguous than most. See *infra* texts accompanying notes 143-47 and 155-64.

81. U.C.C. § 2-207(1) (1990).

ble with their suppositions concerning the customary significance of forms. A more cogent reason may be the tension between the urge to give effect to carefully drafted verbiage and the urge to recognize the unlikelihood of its being read. It is less troublesome to provide a bright-line effect for nonverbal conduct (nonconforming shipment) than for language whose effect may vary depending upon circumstances such as its location and appearance in a form. Unfortunately, ambivalence toward the role of preprinted terms resulted in drafting that lacks clarity of purpose.

The factual issue whether the form indicates assent must be answered in light of section 2-207's purpose of correlating the legal rule with the commercial understanding; the standard ought to be the offeror's reasonable understanding of the particular preprinted form he receives.⁸² When courts recognize that the common commercial significance of the offeree's return of a form with matching filled-in terms is that the offer has been accepted, it should be easy to find an acceptance in most cases under section 2-207(1).

Of course, just as the shipping seller may make a counter offer by notice of accommodation under section 2-206(1)(b), one who sends a preprinted form may also manifest an intention to make a counter offer rather than an acceptance.⁸³ It is more difficult to articulate a rule as easy to apply as the notice-of-accommodation rule when a form is used by the offeree. This is because the form's meaning ordinarily must be ascertained without presuming that the preprinted terms will be read.⁸⁴ Nevertheless, it is possible to illustrate some situations that justify finding a counter offer when a form is used. Most obviously, variance in the filled-in portions of the forms ordinarily should be understood to negate any intention of the offeree to accept.⁸⁵ Not being part of the preprinted verbiage, filled-in terms reflect not only a high degree of importance attached to them by the offeree, but also the term's particular applicability to the specific agreement. The term's conspicuousness guarantees the offeror is likely to read and to be aware of it and to understand it as signifying a condition to the offeree's unwillingness to conclude the deal. The original offeror should therefore understand the likelihood that a form with varying filled-in terms signifies not acceptance, but a counter offer.⁸⁶

In the usual case, however, when the filled-in terms match the offeror's, the offeree sending a form with additional or different preprinted terms seems as solidly within the ambit of her power of acceptance as does the offeree respond-

82. Murray, *Incipient Unconscionability*, *supra* note 2, at 603. As the Official Comment 2 to U.C.C. 2-207 states, "[A] proposed deal which in commercial understanding has in fact been closed is recognized as a contract." Thus, the 'definite expression of acceptance' is so characterized because it should be understood as such in commercial understanding. U.C.C. § 2-207 official comment 2 (1990).

83. See *supra* notes 42-59 and accompanying text.

84. See Barron & Dunfee, *supra* note 2, at 184; Murray, *The Article 2 Prism*, *supra* note 2, at 10-11; Murray, *Intention Over Terms*, *supra* note 2, at 341; Taylor, *supra* note 2, at 440-41; *supra* note 73 and accompanying text.

85. See Quaker State Mushroom Co. v. Dominick's Finer Foods, Inc., 635 F. Supp. 1281, 1285-86 (N.D. Ill. 1986); Murray, *Incipient Unconscionability*, *supra* note 2, at 612.

86. This result assumes that the variance is material enough to make it credible that the offeree's manifestation of assent is conditional upon it.

ing to an order for prompt or current shipment by sending nonconforming goods under section 2-206.

B. A Refuted Purpose: Reallocating Power to Set Terms

Some distinguished scholars have suggested that section 2-207 should be understood to effect a reallocation of term-setting power, equally distributing that power between the offeror and offeree.⁸⁷ However, that suggestion seems more a byproduct of the commentators' desire for reform than a conclusion based on the statute's language in light of its context within the Code and the common law.⁸⁸ The ambiguity of the statutory language⁸⁹ and the confusion implicit in some of the official comments may have tempted commentators dissatisfied with traditional contracts doctrine to stretch the statute beyond its proper context so as to accomplish a redistribution of term-setting power.⁹⁰

Such stretching may be responsible for excessively strained interpretations of the statutory language, which ignore the implications of the rest of Article 2 and of the body of the common law of contracts left intact by Article 2. Even more, such interpretations have undermined the legal recognition of the parties' commercial expectations in the typical contract made by the exchange of preprinted forms.⁹¹ Ironically, then, the statute is being used to sabotage its own principal purpose. Section 2-207 is not an appropriate vehicle to accomplish fundamental reforms in contract law affecting the power balance between

87. See Barron & Dunfee, *supra* note 2, at 197, 205. In introducing their discussion of § 2-207, Professors White and Summers reflect:

In our discussion of the forgoing types of cases, one central problem will be this: how may 2-207 be interpreted so as not to give an unearned and unfair advantage to the contracting party who by pure happenstance sends the first or in other cases the second form? When the parties to the contract send their forms blindly and after no, or only cursory examination of the bargained terms file the forms they receive, it may make little sense to give one an advantage over the other with respect to unbargained terms *simply* because he mailed the first form. Yet avoiding apparent favoritism under 2-207 is a difficult task.

J. WHITE & R. SUMMERS, *supra* note 2, at 31.

88. Duesenberg, *supra* note 2, at 1484-85. Duesenberg states:

The Code would not have stood the chance for passage of the proverbial snowball in hell had the legal profession been instructed that it was intended to jettison so fundamental a legal principle as that which for centuries has given to offerors the right to fashion the basis of their sanctionable bargains.

Id.

89. R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-17; see Barron & Dunfee, *supra* note 2, at 180-86; Murray, *Chaos of the "Battle of the Forms," supra* note 2, at 1322-30.

90. See Barron & Dunfee, *supra* note 2, at 186-88; Note, *In Defense of the Battle of Forms: Curing the "First Shot" Flaw in Section 2-207 of the Uniform Commercial Code*, 49 NOTRE DAME L. REV. 384, 390 (1973) (arguing that although the drafters of § 2-207 may have intended to favor the offeror as "a proper continuation of the common-law rule that the offeror is the master of his offer," the terms over which the parties differ should never become part of the contract because this result favors neither the offeror nor the offeree); see also *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 503-04, 567 P.2d 1246, 1254 (1977) (When the statutory language in the text and comments was ambiguous, the court adopted the view that different terms in the offer and an acceptance cancelled each other out because this result favors neither the offeror nor the offeree.), *appeal dismissed, cert. denied*, 434 U.S. 1056 (1990).

91. "The basic thrust of the revision is to create non-preferential contracts in every case where the courts, rather than the parties, are supplying the necessary terms." Barron & Dunfee, *supra* note 2, at 206.

offeror and offeree. The drafters of the U.C.C. intended to *restore* the common-law balance upset by the growing use of preprinted forms that distorted the effect of the mirror-image rule.⁹²

That section 2-207 is a tool for redistributing term-making power is an idea given some support by a rather common notion that the statute has *two* primary purposes: not only to facilitate recognition of contracts entered into by the exchange of forms in accordance with the parties' commercial understanding, but also to effect a major innovation in the legal determination of contract terms.⁹³ However, the fundamental purpose for which the statute is tailored is to facilitate the effectiveness of party intentions when preprinted forms are used.⁹⁴ Except for the implications arising from the presumption that the forms will not be read, these contracts are like those more traditionally formed. The terms of a contract formed under section 2-207 thus are determined for the most part as in a traditional common-law contract. The controlling terms are those in the offer.⁹⁵ Even the concessions to the offeree made in subsection (2) should be understood to reflect an understanding of the nature of the offeror's invitation and are an extension of common-law doctrine, rather than a new balance of term-setting power.⁹⁶

Much of the debate about the application of section 2-207 has stemmed from courts' and commentators' notions that it is unfair for either party to be master of the terms of the contract.⁹⁷ Which party sends the first form is said to be largely a matter of accident.⁹⁸ Hence, fairness requires an equal opportunity for both parties to supply the relevant terms.⁹⁹ Proposals concerning the treatment of "different" terms under subsection (2)¹⁰⁰ and the liberality with which subsection (3) is applied by many courts and commentators¹⁰¹ reflect this urge to right the balance. The consequence is to leave improperly in the offeree's hands some of the term-setting power she previously enjoyed under the old mirror-image rule.

But apart from issues of statutory construction, it seems highly questionable whether it would be a good idea to give the offeree an equal opportunity to

92. See Murray, *Incipient Unconscionability*, *supra* note 2, at 601-04.

93. See Barron & Dunfee, *supra* note 2, at 177-79; Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986).

94. See cases cited *supra* note 26.

95. See *supra* notes 42-59 and accompanying text.

96. See *infra* notes 170-80 and accompanying text; Murray, *Incipient Unconscionability*, *supra* note 2, at 601-04.

97. See, e.g., Krack, 794 F.2d at 1444; Barron & Dunfee, *supra* note 2, at 213-14.

98. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 98 Idaho 495, 502, 567 P.2d 1246, 1253 (1977), *cert. denied*, 434 U.S. 1056 (1978); see Barron & Dunfee, *supra* note 2, at 207; Murray, *Chaos of the "Battle of the Forms," supra* note 2, at 1369-70.

99. "One of the principles underlying section 2-207 is neutrality. If possible, the section should be interpreted so as to give neither party to a contract an advantage simply because it happened to send the first or in some cases the last form." Krack, 794 F.2d at 1444; see Barron & Dunfee, *supra* note 2, at 197.

100. See, e.g., Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1579 (10th Cir. 1984); Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp., 546 F. Supp. 533, 538 (D.Kan. 1982); J. WHITE & R. SUMMERS, *supra* note 2, at 32 (White's "knock-out" view).

101. Note, *supra* note 90, at 384.

control the terms. The offeror, most often the buyer, is in a position uniquely appropriate to determine the picky details of his necessity. To the extent his needs can be generalized to most purchases, the preprinted terms of the form may address them, and his expectations may hang upon such provisions.

The seller-offeree, on the other hand, is in an essentially responsive posture, which she ought to recognize,¹⁰² being in receipt of the offer. The offeree must determine whether she can fulfill the buyer's expressed needs. It therefore seems natural for her to examine the offeror's communication rather carefully. Even if the offer was made using a form, the offeree generally has a natural opportunity and practical incentive to examine it while looking carefully at the filled-in terms.¹⁰³ The seller might reasonably look to the preprinted terms for specifics relating to the particularities of the buyer's operation. Even as to the more general provisions of the form, if unwilling to deal on the sort of offeror-oriented terms one might expect to find in an offeror's form, the offeree may expand a careful reading to include the fine print, in which case it might be appropriate to adjust the price for the extra expense. It should be noted that the offeree is not hampered in the effort to understand the deal by any ambiguity in the offeror's communication. The offeree's position is to be contrasted sharply with that of the offeror, who, on receiving the offeree's form (often accompanying shipment), is led to believe a contract has already been made.

Of course, there are other factors to be considered. For example, it ordinarily will be economically efficient for the seller-offeree to ignore the small print of the buyer's purchase order. If the offeree's primary concern is to keep costs down, for example, to lure buyers away from competitors, the offeree may determine that the commercial risk of not reading the small print is outweighed by the costs of reading. This may be quite reasonable, especially if prior dealings with the buyer or even the seller's experience in the business has brought familiarity with the probable content of the buyer's form, minimizing the risk of any unpalatable surprise. The seller-offeree who chooses not to read the fine print should be deemed to have taken the risk of most of the buyer's terms that are inconsistent with her own preferences. This result obtains not because the offeree's failure to read is negligent, but because it is a choice to accept some risk in favor of an economic advantage.

In contrast, the offeror who does not read the offeree's fine print should be treated differently. Although one might suppose that the buyer-offeror should be deemed to accept similar risks when he fails to read the preprinted verbiage on the seller's acknowledgment form, this supposition is inconsistent with the realities of the offeror's position.¹⁰⁴ The offeree's dispatch of a preprinted form

102. See e.g., *Krack*, 794 F.2d at 1445; Murray, *The Realism of Behaviorism*, *supra* note 2, at 284.

103. Of course, this will be less true if the parties often deal with each other or if many of the terms reflect a strong trade usage. In the latter cases, statutory provisions such as U.C.C. §§ 1-205, 2-208, 1-201(3), (11), and 2-302 help ensure that the terms of the contract will reflect the offeree's reasonable expectations.

104. "The specific underlying assumption is the recognition that the fine print is not read by the commercially reasonable offeror." Murray, *Incipient Unconscionability*, *supra* note 2, at 605.

with the filled-in portion of the form matching the offeror's own is *generally recognized* to signify an intention to accept the offer.¹⁰⁵ An offeree using such a form takes this risk. (In fact, the offeree probably would be surprised if it were suggested that she had *not* entered into a contract.) Nothing else shown, the risk of the offeror receiving the form is minimized by its customary characterization as an acceptance.

Absent a "red alert,"¹⁰⁶ the ordinarily cautious offeror quite reasonably will assume a contract already exists when the offeree's form arrives. It was just this assumption on the part of commercial parties that persuaded the drafters of the need for section 2-207 in the first place.¹⁰⁷

The buyer-offeror in receipt of the offeree's form with matching fill-ins is not realistically in a responsive posture. Except for a cursory glance at the few filled-in terms to verify the impression that the form signifies an agreement already concluded, the offeror has no incentive, much less practical opportunity, to examine the fine details of the offeree's form.¹⁰⁸ The offeror justifiably expects that the responding offeree who wishes not to enter a contract on the terms proposed will signify that intention more clearly than by the inclusion of preprinted terms in a form.¹⁰⁹

An offeree who has communicated agreement according to the virtually universal language of parties using forms should not be heard to complain that her manifestation was misunderstood.¹¹⁰ It is the *offer* that the offeree is understood to have accepted. Consequently, absent an unambiguous expression of the offeree's lack of assent, the terms of the contract formed by the dispatch of the form with matching filled-in terms should be those proposed by the offeror.

105. *Id.* at 604-05.

106. To negate the customary significance of a form with matching fill-ins would require some additional communication of the offeree's intention not to enter a contract on the offeror's terms, such as a telephone call or a handwritten caveat on the form. See *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 288 S.C. 65, 69, 339 S.E.2d 527, 530 (1986).

107. See U.C.C. § 2-207 official comment 1 (1990).

108. Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller [offeree] may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960); see also RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(c) (1979) ("Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.").

109. *Cf.* LLEWELLYN, *supra* note 108, at 370.

110. Although it is generally recognized that a seller-offeree who inserts a proviso, but otherwise indicates acceptance by action such as shipping the goods, injects ambiguity into the contract, courts are split over how to treat the offeree's response. Some courts apply § 2-207(1) to this situation. See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1445 (9th Cir. 1986) (recognizing that the seller who was an offeree was the party most responsible for the ambiguity, but advocating the application of § 2-207(1) where the offeror did not expressly assent to the offeree's inclusion of the proviso language); *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228, 1238 (7th Cir. 1977) (finding that the seller's proviso injected ambiguity into the contract, but concluding that the seller must "bear the consequence of that ambiguity under subsection (1)").

Thus a construction of section 2-207 giving the terms of the offeror's form the advantage in determining the terms of the contract created by the exchange of forms is consistent with the realities of the workplace.

III. A PURPOSIVE CONSTRUCTION OF SECTION 2-207

A. *Making a Contract Through the Exchange of Forms: Section 2-207(1)*

1. Is There a Contract?

Section 2-207 implements the realistic formation policies of section 2-204 so that an offeree's dispatch of a preprinted form will be an acceptance in most cases. So long as the form is timely sent and the filled-in terms match those proposed by the offeror, its customary significance meets subsection (1)'s test of a "definite and seasonable expression of acceptance." A number of issues have arisen, however, that might undermine this conclusion, especially as offerees' attorneys become more sophisticated in using the statutory vagaries to their clients' advantages.

a. The Effect of Offeree's "Proviso" Language

One of the greatest dangers of section 2-207 lurks in the last clause of subsection (1): "unless acceptance is expressly made conditional on assent to the additional or different terms" (a "proviso"). This drafting is inartful in the extreme, and if the statute's legal effect is determined without appreciation of its commercial context, as it generally is, commercial expectations may be frustrated even more than in the days when the mirror-image rule reigned.¹¹¹

It is hard to imagine finding a "definite and seasonable expression of acceptance" where the offeree has expressly conditioned acceptance on the offeror's assent to the new or different terms. It is impossible to make sense of the language unless one admits it is redundant. There is a temptation to characterize the dispatch of a form with matching fill-ins as a "definite and seasonable expression of acceptance," only to decide that the form nevertheless is denied its legal effect as an acceptance because the preprinted terms contain a conditional-on-assent provision. The temptation is to make the test of "definite and seasonable expression of acceptance" a factual test of manifested assent, while giving the proviso clause a purely mechanical effect.¹¹² The language of subsection (1) appears to recognize the legal paradox of a conditional acceptance, inviting this result.¹¹³ Nevertheless, this approach is senseless.¹¹⁴ These two parts of section 2-207(1) should not be read as separate criteria, but as parts of one whole rule. The statute's meaning is readily discernible and eminently sensible in its effect, if

111. See Murray, *The Article 2 Prism*, *supra* note 2, at 11.

112. See, e.g., Travallo, *supra* note 2, at 364 (advocating the formal treatment of a conspicuous conditional-on-assent clause); Murray, *Incipient Unconscionability*, *supra* note 2, at 638.

113. See Murray, *Incipient Unconscionability*, *supra* note 2, at 609-10; Murray, *Intention Over Terms*, *supra* note 2, at 325.

114. See Murray, *Incipient Unconscionability*, *supra* note 2, at 613.

not in its articulation, when the commercial context of preprinted forms is considered.

In determining how to harmonize the opening and closing clauses of section 2-207(1), it helps to remember that pre-Code contracts cases exist in which an offeree attempted to make what the courts called a "conditional acceptance."¹¹⁵ In other words, the offeree purported to accept but only on condition of the offeror's assent to the new terms.¹¹⁶ Such a response had the legal effect of a counter offer;¹¹⁷ of course, this denied the offeree the advantage of contract. It was an "acceptance" in appearance only: on close inspection, it was revealed *not* to manifest the offeree's assent, and so would have failed the first test of section 2-207(1).¹¹⁸ Rarely was the offeror misled in such cases at common law. The condition was usually apparent to the offeror, who might then proceed as he saw fit.¹¹⁹

115. Both Restatements represent the rule of the cases. See RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979); RESTATEMENT OF CONTRACTS § 60 (1932). The interrelationship between the common-law cases and U.C.C. § 2-207 is recognized explicitly in the Reporter's Note to § 59 of the Second Restatement, which indicates that Illustration 1 was modified in its transition from the First Restatement to reflect § 2-207's influence. See RESTATEMENT (SECOND) OF CONTRACTS § 59 reporter's note (1978).

116. See, e.g., *Worley v. Holding Corp.*, 348 Ill. 420, 425, 181 N.E. 307, 309-10 (1932); *Alexanian v. Fidelity-Philadelphia Trust Co.*, 152 Pa. Super. 23, 26, 30 A.2d 651, 652 (1943).

117. "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter offer." RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979). "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter offer." RESTATEMENT OF CONTRACTS § 60 (1932); see *Tucker Duck & Rubber Co. v. Byram*, 206 Ark. 828, 830, 177 S.W.2d 759, 760 (1944); *Worley*, 348 Ill. at 425, 181 N.E. at 309-10; *Alexanian*, 152 Pa. Super. at 26, 30 A.2d at 652.

118. The test is whether the form constitutes a "definite and seasonable expression of acceptance," but the word "acceptance" is not defined in the Code. Consequently, it means what it ordinarily does at common law. U.C.C. § 1-103 (1990). The language of § 2-207(1) is reminiscent of the First Restatement's definition of acceptance: "Acceptance of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror." RESTATEMENT OF CONTRACTS § 52 (1932). The Second Restatement's definition is similar: "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." RESTATEMENT (SECOND) OF CONTRACTS § 50 (1979).

119. That the offeror is more likely to be misled in circumstances invoking § 2-207 is implicit in the changes in the illustration that the Reporter's Note to § 59 of the Second Restatement attributes to the statute's influence, although the reason for the change is not carried through sufficiently to have identified the purported acceptance as a preprinted form. The original illustration read: "A makes an offer to B, and B in terms accepts but adds, 'Prompt acknowledgment must be made of receipt of this letter.' There is no contract, but a counter offer." RESTATEMENT OF CONTRACTS § 60 illustration 1 (1932). The amended illustration provides: "A makes an offer to B, and B in terms accepts but adds, '*This acceptance is not effective unless prompt acknowledgment is made of receipt of this letter.*' There is no contract, but a counter offer." RESTATEMENT (SECOND) OF CONTRACTS § 59 illustration 1 (1979) (emphasis added).

If the change is made to coordinate the Restatement's rule with § 2-207, then it is logical to suppose that the reason must be that the original language was too equivocal a sign of the offeree's intention to make acceptance conditional in light of its inclusion as a preprinted term in a form. Otherwise, lacking the explicit language of condition, the inquiry as to whether the offeree has imposed a condition upon acceptance is dependent primarily upon the materiality of the term added. The analysis would be the same under the Code as at common law, which had long made provision for distinguishing apparent conditions to acceptance from other additions without the need of § 2-207. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 62 (1979) ("An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated *unless the acceptance is made to depend on an assent to the changed or added terms.*" (emphasis added)).

The proviso clause invokes the common-law rule that a conditional acceptance is not an effective acceptance.¹²⁰ Despite the offeree's use of a preprinted form, no acceptance has been made when she effectively manifests insistence on her own terms. Although section 2-207 does not spell out the legal consequences, there is no reason to suppose that they would be different from those obtaining at common law.¹²¹ Thus one would expect such a response to be characterized as a counter offer.¹²²

When preprinted forms are used, however, there is unique potential for confusion.¹²³ For example, one might find a more traditional "acceptance" conditional simply because it contains new or different terms, although courts commonly would examine the term's materiality.¹²⁴ It is, of course, the very

120. RESTATEMENT (SECOND) OF CONTRACTS § 59 reporter's note (1979); see *supra* notes 115 & 117. This was Llewellyn's interpretation as well. 1 State of New York, 1954 Law Revision Commission Report, Hearings on the Uniform Commercial Code 49 (117).

121. See *supra* notes 117-18. Many courts, however, find that a proviso aborts the transaction between the parties. If the offeror does not expressly assent to the condition, but the parties perform, those courts would find a contract by conduct under § 2-207(3) instead of the common-law result of a contract by conduct on the terms of the counter offer. See, e.g., *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443-44 (9th Cir. 1986) (rejects the common-law rule—"[i]f the offeror goes ahead with the contract after receiving the counteroffer, his performance is an acceptance"—as an unfair last shot and instead finds that if the parties perform without the express assent to the terms of the conditional assent clause, § 2-207(3) governs); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972); *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 552 (D. Del. 1981); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 513, 380 N.E.2d 571, 575 (1978).

122. See, e.g., *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 288 S.C. 65, 69, 339 S.E.2d 527, 530 (1986). Not all of the cases that refer to a proviso as a counter offer recognize the same legal consequences of a counter offer as at common law. These cases require the counter offeree expressly to assent to the additional or different terms or else the transaction ends. If the parties perform, the result is not a contract on the counter offeror's terms, as at common law, but a contract created by conduct under § 2-207(3). See, e.g., *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 509 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969); *Dresser Indus., Inc. v. Gradall Co.*, 702 F. Supp. 726, 733 (E.D. Wis. 1988); *Leonard Pevar Co.*, 524 F. Supp. at 551-52; *Falcon Tankers, Inc. v. Litton Sys., Inc.*, 355 A.2d 898, 906 (Del. Super. 1976) (characterizing the effect of a proviso as transforming the "offeree's document into a traditional counter offer," but finding in dictum that if the offeror does not expressly assent to the additional or different terms and the parties perform, the parties' conduct creates a contract under § 2-207(3)).

123. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 59 illustration 1 & reporter's note (1979) (qualified acceptance).

124. Materiality also has played a part in determining the outcome under § 2-207 in some cases. See *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962) (holding that a reply to an offer that contains a materially altering term must constitute an acceptance "expressly made conditional" on the offeror's assent to the new term); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 55 (1st Cir. 1986) ("In *Roto-Lith*, we held that under § 2-207, a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an acceptance expressly conditional on assent to the additional terms."); *Alloy Computer Prods., Inc. v. Northern Telecom, Inc.*, 683 F. Supp. 12, 14-15 (D. Mass. 1988) ("*Roto-lith* continues as binding precedent within this circuit, and its interpretation of § 2-207 has been cited several times, without suggestion that its holding has been modified or abandoned."); *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537, 546 (D. Mass. 1977) (following *Roto-Lith* and holding that an acknowledgment that contained warranty disclaimers which materially altered the original offer did not operate as an acceptance, but as a counter offer conditioned on the offeror's assent to additional terms).

Roto-Lith has been criticized widely for frustrating the purposes of § 2-207. See *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228, 1235 n.5 (7th Cir. 1977); *Alloy Computer Prods., Inc.*, 683 F. Supp. at 14 (following *Roto-Lith* despite recognizing that "*Roto-Lith* has been subjected to academic and judicial criticism, because it reverses the outcome that the plain language of section 2-207 would lead parties to expect"); *Gilbert & Bennett Mfg. Co.*, 445 F. Supp. at 547 (noting that "*Roto-Lith* 'has not been treated kindly by the cases or the commentaries' " despite following *Roto-*

possibility of such mechanical application of the law that section 2-207 sought to prohibit when forms are used, because every offeree's form inevitably contains variances. Consequently, under subsection (1), the offeree using a form otherwise consistent with acceptance does not make a "conditional acceptance" unless the condition is explicit.¹²⁵ This avoids courts' mistaking an ordinary form's preprinted terms as grounds for implied conditions, thereby converting the acceptance into a counter offer.

There is, however, another serious problem in applying the common-law rule concerning "conditional acceptances" to preprinted forms: because the offeror is likely to be misled, great care must be taken in assessing the legal significance of the offeree's language even when the condition is explicit.¹²⁶ Ironically, the statute has so confused courts and commentators that the opposite has occurred, and they have endorsed, and even advocated, a mechanical and mindless application of the proviso.¹²⁷

The difficulty lies in recognizing when express words of condition are effective and when they should be disregarded because they are hidden where the offeror cannot reasonably find them. Just as at common law, the intent of an offeree has no legal significance unless she undertakes appropriate means to communicate it to the offeror.¹²⁸ Care must be taken in assessing language in a

Lith) (quoting *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421, 437 (E.D. Pa. 1975); see, e.g., *Leonard Pevar Co.*, 524 F. Supp. at 551 ("Roto-Lith . . . does not reflect the underlying principles of the Code."); *Uniroyal, Inc.*, 177 Ind. App. at 517, 380 N.E.2d at 578 (The *Roto-Lith* rationale "revives the 'last shot' technique" and "subvert[s] the very purpose of § 2-207.")).

125. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1167-68 (6th Cir. 1972); *Reaction Molding Tech., Inc. v. General Elec. Co.*, 588 F. Supp. 1280, 1288 (E.D. Pa. 1984); *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 420 (Mo. Ct. App. 1989); *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 288 S.C. 65, 69, 339 S.E.2d 527, 530 (S.C. App. 1986).

126. [T]he last proviso of 2-207(1) must require courts to determine whether a reasonable offeree would have understood the reply to be a counter offer — not whether the offeree used some particular formulation of language which courts would be forced to treat as counter offer language, even though it would unfairly surprise the offeror to discover that by accepting the goods he has accepted the terms in the printed reply form.

Murray, Incipient Unconscionability, *supra* note 2, at 628.

127. For instance, in *Leonard Pevar Co. v. Evans Products Co.*, 524 F. Supp. 546 (D. Del. 1981), the court held that a proviso on the reverse side of the seller's acknowledgment form in the boilerplate language effectively created a counter offer, despite acknowledging that the Code drafters wrote § 2-207 with the recognition that "businessmen rarely read the terms on the back of standardized forms." *Id.* at 551.

In *C. Itoh & Co. (America) Inc. v. Jordan International Co.*, 552 F.2d 1228 (7th Cir. 1977), the court focused on the closeness with which the language of the conditional-on-assent clause tracked the proviso language in subsection (1), rather than whether the offeror reasonably would have noticed the clause. *Id.* at 1234-35. The court held that the offeree's use of language nearly identical to that of the proviso created a "counter offer" although the issues were then resolved under § 2-207(3) rather than the common-law rule. *Id.* at 1235-36.

See, e.g., *Falcon Tankers, Inc. v. Litton Sys., Inc.*, 355 A.2d 898, 903-07 (Del. Super. 1976); *Travallo*, *supra* note 2 (advocating that any conditional assent clause that tracks the subsection (1) proviso and is conspicuous by Code definition be given operational effect regardless of whether a reasonable offeror would notice it).

128. See RESTATEMENT (SECOND) OF CONTRACTS § 56 (1979) (Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.); cf. *id.* § 70 comment a (When acceptance is conditional on a change of terms, and thus has the effect of a counter offer, the original offeree's silence is not ordinarily sufficient manifestation of assent as acceptance of the counter offer, but the original offeror may have a

preprinted form to determine whether it effectively manifests to the offeror the offeree's intention to condition her apparent acceptance on the offeror's assent to the terms.¹²⁹

If the offeror is not expected to read the preprinted terms of the form, it seems ridiculous to allow the offeree to avoid the acceptance-effect of the form's dispatch merely by including proviso language in the preprinted form itself, no matter how unambiguous that language may be.¹³⁰ If this were the drafters' intention, then section 2-207's effectiveness might well be limited to a short period after its promulgation, until parties routinely began to include express conditions of assent in their preprinted forms.¹³¹ Such preprinted terms do not negate the assent implicit in the dispatch of the typical form with matching filled-in terms.¹³² Indeed, one cannot even find *ambiguity* unless one supposes against the weight of reality that the form *may* be read. Nor should even the addition of a handwritten *general* direction to the offeror to read carefully the preprinted terms of the form seem to make any difference; the very usefulness of the form is in dispensing with such a reading. If an offeree is serious about making a counter offer rather than an acceptance, it is comparatively easy and inexpensive to communicate this intention without ambiguity.¹³³

The proviso clause of section 2-207(1), taken in context, serves a function analogous to section 2-206(1)(b)'s reference to notification of accommodation. It protects the offeree from being deemed to have accepted an offer merely by using a form when she unambiguously has indicated a contrary intention. Where the offeree has sent a preprinted form in which the filled-in portions mirror the offeror's proposal, the offeree *ordinarily* has signified acceptance.¹³⁴ But the proviso language of subsection (1) cautions that the general rule of a form's effectiveness as an acceptance is not without exception. The proviso's role is to ensure that no acceptance will be found where there are other facts unambiguously negating the inference that the form has been used as an acceptance. An effective manifestation of the offeree's intent not to accept negates the form's usual meaning as a "definite and seasonable expression of acceptance" and renders the offeree's response a counter offer.¹³⁵

duty to speak.); *id.* § 19(2) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.").

129. See *Reaction Molding Tech. v. General Elec. Co.*, 588 F. Supp. 1280, 1288 (E.D. Pa. 1984); *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 288 S.C. 65, 69-70, 339 S.E.2d 527, 530 (S.C. App. 1986); Murray, *Incipient Unconscionability*, *supra* note 2, at 608-12.

130. See Barron & Dunfee, *supra* note 2, at 184; Murray, *Incipient Unconscionability*, *supra* note 2, at 613-14; cf. RESTATEMENT (SECOND) OF CONTRACTS § 57 comment b (1979) ("The circumstances may make it proper to protect an offeror who acts on . . . an inference" of assent.).

131. See Murray, *The Article 2 Prism*, *supra* note 2, at 11; Murray, *Incipient Unconscionability*, *supra* note 2, at 613.

132. See Murray, *Incipient Unconscionability*, *supra* note 2, at 612.

133. See Taylor, *supra* note 2, at 441.

134. See Murray, *The Realism of Behaviorism*, *supra* note 2, at 284-85.

135. In some cases, an offeree's response may be characterized neither as an acceptance nor as a counter offer. This could happen where the response is too equivocal to satisfy the traditional requirement of clarity for an effective acceptance. See RESTATEMENT OF CONTRACTS § 58 (1932) ("Acceptance must be unequivocal in order to create a contract."). But see RESTATEMENT (SEC-

One can, of course, imagine unambiguous cases in which forms are used in conjunction with effective counter offers. For example, a timely telephone call from the offeree alerting the offeror to the necessity of further negotiation before agreement should be effective to negate the implications of the form.¹³⁶ Likewise, sending the form to the attention of someone responsible for negotiation rather than to the ordinary party to whom a simple acceptance would be sent might suffice to draw practical attention to the conditional language in the form; this would be true especially if there were prior dealings between the parties supporting such an inference,¹³⁷ or if the terms requiring negotiation were highlighted in some way so as to justify a confident prediction of a reasonable offeror's attention.¹³⁸ A form labeled "Counter-offer" rather than "Acknowledgment" would also be likely to indicate the offeree's intention not to enter contract absent the offeror's assent to her terms.¹³⁹

The real difficulties with the meaning of the proviso language of section 2-207(1) arise where the proviso appears in the preprinted portion of the offeree's form. The effectiveness of such language must be evaluated in light of the statute's fundamental assumption that preprinted forms are customarily given very cursory examination by the offeror-recipient, generally extending only to the filled-in terms.¹⁴⁰

Obviously, section 2-207 does not mean that an offeree who wishes to manifest a clear intention not to enter a contract can never use a form.¹⁴¹ If the use of forms were to have such a mechanical effect, it would have been easy to provide for it explicitly. The section 2-207 offeree, like her counterpart under sec-

OND) OF CONTRACTS § 57 (1979) ("Where notification is essential to acceptance by promise, the offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance."). Section 57 of the Second Restatement assumes that the equivocal communication is intended as an acceptance by the offeree. Consequently, it does not address the effect of equivocation upon the offeree's own obligation.

An equivocal response, while failing to signify assent, may also fail to manifest to the reasonable offeror a clear intention to create a new power of acceptance, and so fail to constitute a counter offer. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). The Second Restatement defines counter offer as an offer made by an offeree. *Id.* § 39(1). In cases in which neither acceptance nor counter offer is found in the offeree's response, but performance follows, a court may choose to apply § 2-207(3). For an examination of the offeree's risk arising from the ambiguity of response where forms are used, see *infra* notes 153-65 and accompanying text.

136. See Taylor, *supra* note 2, at 441; Murray, *The Realism of Behaviorism*, *supra* note 2, at 281.

137. See Murray, *The Realism of Behaviorism*, *supra* note 2, at 281, 283.

138. See Murray, *Incipient Unconscionability*, *supra* note 2, at 613.

139. Compare *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 508-10, 411 N.E.2d 936, 944-45 (1980) ("[P]urchase order clearly, expressly and repeatedly stat[ing] that it was an offer to be accepted by the seller" could not act as an expression of acceptance, but was a counter offer even though the offer, in the purchase order, referred to itself as being in accord with the price quotation.) with *Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1203-04 (6th Cir. 1981) (label in fine print declaring the form an "offer" was not dispositive and the form labelled "offer" was an effective acceptance where it incorporated by reference the terms and conditions of the original offer). It is the author's opinion that "offer" language in a form ordinarily should be understood as indicative of the form's usual function, not as a limitation on other functions. Such a form should function equally well as an offer or acceptance.

140. See Murray, *The Article 2 Prism*, *supra* note 2, at 10-11.

141. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 59 illustration 1 & reporter's note (1979); *supra* notes 115-18 (qualified acceptance).

tion 2-206(1)(b), retains the power to make an effective counter offer. If the proviso means anything, it must mean this. But the offeree choosing to make a counter offer must do so unambiguously: she cannot take advantage of the likelihood that the offeror will not read preprinted terms and will proceed to perform believing he has formed a contract.¹⁴²

The finding of an "acceptance expressly made conditional" should rarely if ever rest solely upon the offeree's inclusion of a preprinted proviso in an ordinary form where the filled-in portions match the offeror's proposal.

This is even more true where the offeree ships the goods without any clarifying communication with the offeror.¹⁴³ In such a case, the offeree's manifestation of intention to accept seems clear from the offeror's perspective.¹⁴⁴ Were shipment the sole response, section 2-206(1)(b) would support a finding of contract on the offeror's terms in many such cases. That statute also applies to assess the implications of shipment even in the context of a "battle of forms" under section 2-207. The additional factor of the form, given matching fill-ins, only further supports the conclusion that, at least by the time of shipment, the offeree has agreed to contract on the offeror's terms.¹⁴⁵ Surely if there is disagreement significant enough to preclude acceptance, the offeree hardly would take the risk of shipping without obtaining the buyer's explicit assent to her terms.¹⁴⁶ The shipment supports the inferences customarily drawn from the form, and vice versa. Not only would it be very unreasonable to find anything other than an acceptance in this case, but it would fly in the face of the provisions of *both* sections 2-207 and 2-206.¹⁴⁷

b. The Effect of Offeree's Shipment: When Is Section 2-207(3) the Answer?

The import of section 2-207(3)¹⁴⁸ also must be considered when appraising

142. *Cf. id.* § 57 comment b ("It is not enough that the words of a reply justify a probable inference of assent. But the circumstances may make it proper to protect an offeror who acts on such an inference.").

143. *Id.* Comment b to § 57 concludes, "Or subsequent conduct of one or both parties may bind one to an agreement in accordance with the understanding of the other." *Id.*

144. *Cf. Mace Indus. v. Paddock Pool Equip. Co.*, 288 S.C. 65, 69, 339 S.E.2d 527, 530 (1986) (When seller's price quotation constituted an offer, the court held that buyer's purchase order containing new terms constituted an acceptance rather than a counter offer based upon buyer's willingness to proceed with the transaction, despite seller's subsequent objection to those new terms proposed by buyer.).

145. *See Reaction Molding Tech., Inc. v. General Elec. Co.*, 588 F. Supp. 1280, 1288 (E.D. Pa. 1984) (The district court refused to recognize a proviso, in part because the clause was "preprinted on a form contract rather than typed or written into the contract," as well as because the acceptance stated that it was "expressly limited" rather than "expressly conditioned" and therefore was not explicit enough.).

146. *Cf. RESTATEMENT (SECOND) OF CONTRACTS* § 70 (1979) ("A late or otherwise defective acceptance may be effective as an offer to the original offeror, but the offeror's silence operates as an acceptance in such a case only as stated in § 69.").

147. Because the form taken alone is at worst an indication of acceptance and at best an ambiguous signal of intent to make a counter offer, the use of the form is not notice of accommodation to make the shipment a counter offer under § 2-206(1)(b).

148. U.C.C. § 2-207(3) provides:

Conduct by both parties which recognizes the existence of a contract is sufficient to estab-

the legal significance of a seller-offeree's dispatch of a form followed by or accompanied by shipment. Many courts and commentators have recognized the role of subsection (3) in such cases, but few have attempted to coordinate the effects of that statute with the implications of section 2-206. The two statutes must be read together to make sense in the context of form transactions.

Section 2-207(3) provides that "[c]onduct 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."¹⁴⁹ In a contract so formed, subsection (3) states that the terms are those "on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act."¹⁵⁰ The subsection is not as clear as it could be concerning the circumstances triggering its application.¹⁵¹ Consequently, to examine the statute's proper function when there is potential for overlap with section 2-206, it is useful to examine a few cases where it might apply.

In each hypothetical case, it is assumed that a buyer-offeror in the offer has requested prompt or current shipment.¹⁵² In the first case the offeree promptly ships, but also sends a timely notice that the shipment is offered for the accommodation of the buyer. Under section 2-206, the effect of the seasonable notice of accommodation is to make the nonconforming shipment operate not as an acceptance,¹⁵³ but as an effective counter offer, likely to be accepted by the buyer's conduct in accepting the goods. The language of section 2-207(3), which refers to the failure of the parties' "writings" to "establish a contract," would seem to argue its applicability. Nevertheless, few courts or commentators would think of applying it. Most would see such a case as clearly within section 2-206(1)(b) and not within section 2-207 at all.

In providing for notice of accommodation as a seller's means of avoiding the acceptance-effect of shipment, section 2-206(1)(b) contemplates the possibility of the seller's use of some writing that is not itself an acceptance. Not every writing sent by an offeree must trigger section 2-207's application. It is obvious that the application of section 2-207(3) in these circumstances would subvert the intentions of the drafters, making it impossible for a seller to make a counter offer without stopping shipment, an effect that would have little commercial utility and would render the last clause of section 2-206(1)(b) a nullity. Yet if sec-

lish 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.

U.C.C. § 2-207(3) (1990).

149. *Id.*

150. *Id.*

151. "The 1952 version of § 2-207 was bad enough . . . but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster." Gilmore Letter, *supra* note 2.

152. Such an order invokes the rule of § 2-206(1)(b).

153. U.C.C. § 2-206(1)(b) (1990). For a discussion of the analogy between §§ 2-206 and 2-207, see *supra* notes 60-86 and accompanying text.

tion 2-207 is construed to apply beyond the context of the use of preprinted forms, it is hard to see why this case is not covered by both sections.

The tension between sections 2-206(1)(b) and 2-207(3) is inescapable when one considers that the offeree may give unambiguous notice of accommodation by using a form. The use of a form argues the propriety of applying section 2-207,¹⁵⁴ and the terms of subsection (3) then would apply. Few would argue that the contract resulting from the buyer's acceptance of the goods shipped pursuant to an unambiguous and seasonable notice of accommodation should reflect any terms other than the offeree's. It seems entirely proper in this case that the court should hold the offeror subject to the terms of the counter offer accepted by the offeror's acceptance of the goods, as was the case at common law. The scope of section 2-207(3) must be limited by the import of section 2-206(1)(b) whenever the offeree gives unambiguous notice of accommodation. It is clear, then, that not every case where a seller ships when the writings conflict justifies the power-sharing of offeror and offeree mandated by section 2-207(3).

The second case useful to consider in determining the proper scope of section 2-207(3) is the more frequently encountered transaction: the offeree responds by shipping, and also dispatches a form with filled-in terms matching the offeror's, but the offeree's preprinted terms include a provision tracking the last clause of section 2-207(1). In this second case, the "proviso" is sufficiently highlighted or emphasized by some preprinted distinction, for example, by color, size of print, or location, so that the buyer reasonably could be expected to notice it. At common law, such a response, unless found to be a mere inquiry,¹⁵⁵ likely would be deemed a counter offer.¹⁵⁶ In the world of form contracts, however, the consequences are not so clear. Particularly in light of the traditionally heavy burden placed on parties to establish the formation of a contract,¹⁵⁷ the offeree's response may have too ambiguous an effect within its context to constitute "a definite and seasonable expression of acceptance."

The offeree may succeed in persuading a court that her form lacks the requisite definiteness to meet section 2-207(1)'s acceptance test if she shows a real likelihood (more than a mere possibility) that a reasonable person in the position of the offeror would have read the conditional language. Unless the evidence establishes a very strong probability that the offeror will have read it, however, a court may be unwilling to characterize the offeree's response as a counter offer. The flagging of the proviso by devices incorporated into the form itself, such as typeface or color, should be enough to alert the offeror to the *meaning* of the term if the offeror reads beyond the fill-ins on the form. It may not be enough, however, to alert the offeror to the *presence* of the term.

The trouble is that to discover the proviso, the offeror must give *some* attention to the preprinted portion of the form. The customary significance of a form

154. See *supra* notes 75-77 and accompanying text.

155. RESTATEMENT (SECOND) OF CONTRACTS § 61 (1979); RESTATEMENT OF CONTRACTS § 62 (1932).

156. See RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979); RESTATEMENT OF CONTRACTS § 60 (1932).

157. See RESTATEMENT OF CONTRACTS § 58 (1932).

with matching filled-in terms as an acceptance may weigh so heavily in a reasonable offeror's mind that preprinted terms might be missed, including many preprinted methods of flagging the proviso. The offeror will suppose a form's preprinted terms are consistent with the form's general purpose; the offeree will hardly be expected to have *drafted* a form designed to effect a counter offer rather than an acceptance.¹⁵⁸ Moreover, the offeror's natural tendency not to read the preprinted form is bolstered by the prompt or contemporaneous appearance of the goods, leading the offeror to believe the offeree considered himself already bound. Furthermore, the offeror's representative who receives the form may have neither the training nor the authority to evaluate or respond to the form's preprinted terms. The ordinary assumption that the offeror will not read, therefore, still applies. Although the offeree in this second hypothetical case has made the proviso conspicuous within the preprinted provisions, this offeree probably has not done enough to ensure that the offeror will be aware of its presence, much less its significance.

The form in this case is equivocal in its effect: it evidences unambiguously neither assent nor counter offer. Thus, it is insufficient to constitute notice of accommodation for purposes of section 2-206(1)(b). But the timely dispatch of the form in this example, with the proviso highlighted by color, typeface, or location, still might be given effect sufficient to remove the shipment from the ambit of section 2-206(1)(b), by gracing the shipment with sufficient commercial ambiguity to make a court unwilling to characterize it as an acceptance. Although section 2-206 itself does not provide for such an exception, it is necessary to recognize the possibility if an effort is made to reconcile the effects of that statute with section 2-207.

This hypothetical case, then, may illustrate agreements properly covered by section 2-207(3).¹⁵⁹ Not only does the offeree's form represent assent with insufficient certainty to qualify as an acceptance, but it has no other ascertainable positive legal effect. Not being definite enough to qualify as a counter offer, the offeree's form creates no power of acceptance in the original offeror. The writings fail to demonstrate either offer and acceptance, or offer and counter offer, or offer and inquiry, or offer and notice of accommodation. Consequently, the conduct of the parties is the *only* evidence that they have made an agreement.¹⁶⁰ The offeree's shipment takes enough ambiguity from the form itself to be disqualified as an acceptance of the offer's terms.

One solution in such a case might be to leave the offeree with the burden of the ambiguity she has created¹⁶¹ and to find a contract on the offeror's terms. This may not be a bad solution pragmatically, but it is not the solution the Code

158. Courts occasionally do refuse to give effect to preprinted language where circumstances negate any intention that it be generally effective. See *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wash. 2d 523, 528, 439 P.2d 416, 420 (1968) ("It is the fact that the notation is obviously formal and applies to all payments made by check, whether or not they are intended as full payment, that renders the language ineffective . . .").

159. See *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977).

160. See U.C.C. § 2-204(1) (1990).

161. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally pre-

requires. Section 2-207(1) does not lay down an absolute rule that every form with matching filled-in terms is an acceptance; its test depends on the commercial significance of the particular form. The preprinted portion of the form cannot be wholly disregarded, at least if there is evidence that the offeror may have had a realistic opportunity to be aware of its import.¹⁶²

The Code balances, on the one hand, the need to give effect to commercial expectations created by the common exchange of unread forms with the need, on the other hand, to give some effect to the forms' preprinted terms, perhaps to justify the expense and effort of their drafting. Subsection (3) enforces terms on which the writings agree, which usually include the fill-ins, and then applies statutory terms to fill the gaps. Because the Code's terms are generally buyer-protective, they favor the original offeror in most cases.¹⁶³ Legally, then, the offeror and offeree share equally the power to set terms; functionally, however, the buyer has the advantage. When an offeree-seller's shipment creates ambiguity by dispatching a form with an ambiguously highlighted proviso, usually the burden of the ambiguity comes to rest upon the seller-offeree.¹⁶⁴

But courts and commentators have overused section 2-207(3), treating it as a solution to all sorts of cases considered difficult to resolve under subsection (1).¹⁶⁵ The temptation to resort so frequently to subsection (3) may be compelling for two reasons: it frees a court from the apparent complexities and confusion generated by the inartful drafting of subsection (1), and it serves the popular notion of fairness by refusing any advantage in setting terms based upon either party's position as offeror or offeree.¹⁶⁶

Section 2-207(3) should be reserved for cases in which the commercial import of the offeree's preprinted response arguably, but not conclusively, manifests to the offeror an intention to make a counter offer. Care should be taken to consider the implications of the offeree's response in its commercial context rather than to make universal rules. In most cases, the ambiguity is fostered by the probability that the offeror will not read the preprinted form. Nevertheless, section 2-207 mandates that at least insofar as they are not merely buried and undiscoverable in fine print, the preprinted terms of the form may not be wholly ignored. By utilizing subsection (3), the effort of an offeree in the

ferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

162. See Murray, *Intention Over Terms*, *supra* note 2, at 339-40; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 15 (1969) [hereinafter Murray, *Unconscionability: Unconscionability*].

163. See Murray, *A Proposed Revision*, *supra* note 2, at 347.

164. C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1238 (7th Cir. 1977).

165. See, e.g., Barron & Dunfee, *supra* note 2, at 194-99; Travalio, *supra* note 2, at 335-79.

166. See, e.g., Barron & Dunfee, *supra* note 2, at 179. For instance, in Leonard Pevar Co. v. Evans Products Co., 524 F. Supp. 546 (D. Del. 1981), the court refused to recognize a contract where the counter offeree did not expressly assent to the proviso. Express assent is required to cure the original offeror's confusion created by the court's recognition of a proviso on the reverse side of the offeror's form in the boilerplate, which an offeror probably would not even notice. If the offeror did not assent, but shipment followed, a contract by conduct would arise under § 2-207(3). The court explained that "[t]he Code disfavors an attempt by one party to impose unilaterally conditions that would create hardship on another party." *Id.* at 551.

drafting of a preprinted form to highlight its negation of effective assent to the offeror's terms may be given appropriate effect without indulging a presumption that the form will be read.

But too ready reference to subsection(3) for the controlling law upsets the purpose of section 2-207(1). Although subsection (3) does not reinstate the old mirror-image rule, it pushes aside the offeror's common-law advantage in favor of a new and insidious principle of offeror-offeree equality in the balance of power. Nor is it only the original offeror whose interest is jeopardized by over-application of subsection (3); seller-offerees are vulnerable as well to having an inappropriate application of the section sabotage their attempts to protect themselves by making an effective counter offer.¹⁶⁷

2. What Are the Terms?

a. Offeree's Terms: Section 2-207(2)

1) The Underlying Principle of Offeree's Latitude

Once a contract is recognized as having been formed under section 2-207(1), the terms are determined primarily by reference to common-law principles. Except for those terms that are excluded as unconscionable¹⁶⁸ or bad faith¹⁶⁹ attempts of the offeror to take undue advantage through the use of a preprinted offer form, the primary terms of the contract are those contained in the offer.¹⁷⁰ When both parties are merchants,¹⁷¹ however, the drafters recognized¹⁷² that the offeror is unlikely to be jealous of the power to set *all* the terms of the contract: latitude can be extended to the offeree to set new terms so long as the new terms do not significantly alter the bargain proposed in the offer. In this context, the latitude in term-setting is analogous to the latitude recognized

167. See Murray, *The Article 2 Prism*, *supra* note 2, at 12.

168. U.C.C. § 2-302 (1990).

169. *Id.* § 1-203.

170. See *supra* notes 106-10 and accompanying text.

171. "Merchant" is defined as:

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

U.C.C. § 2-104(1) (1990).

The comments to § 2-104 add a substantial gloss to this definition, suggesting that the specialized knowledge to be emphasized depends upon the context in which the inquiry arises. See *id.* § 2-104 official comment 2 (advising that the definition of merchant differs depending on which section of the code applies).

172. Section 2-207(2) provides:

(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.

U.C.C. § 2-207(2) (1990).

in section 2-206 regarding manner and medium of acceptance.¹⁷³ The offeree's reasonable additions are those implicitly invited by the offeror; they should be relatively easy to identify when the parties are both in commerce. This is not a principle unfamiliar to the common law of contract formation.¹⁷⁴ Even under the strict common-law mirror-image rule, a court might both recognize an acceptance and enforce the offeree's new term where the term was relatively peripheral to the bargain.¹⁷⁵ In the context of the use of preprinted forms, however, this principle has implications much more advantageous to the offeree than are commonly acknowledged. The offeror's use of a preprinted form is an implicit invitation to the offeree to provide any reasonable term not inconsistent with the offer, no matter how important that term might be.¹⁷⁶

Section 2-207(2) is an appropriate reference to the common-law rule in the context of form contracts. Given the enormous variety of such forms and the unlikelihood that preprinted terms will be read by either party, the drafters extended the common-law principle permitting invited additions to a general rule recognizing a presumption of the offeror's prior blanket assent to reasonable additions.¹⁷⁷ Where both parties are merchants, certain additional terms in the offeree's response automatically become part of the contract under section 2-207(2).

The exceptions to this rule reserve to the offeror the common-law power to set terms: thus, under sections 2-207(2)(a)¹⁷⁸ and (2)(c),¹⁷⁹ the offeror can negate the customary permission to the offeree to set new terms by so stipulating in the offer or by objecting before or after the fact. Section 2-207(2)(b)¹⁸⁰ recognizes that the substance of the offer's own terms circumscribes the permissible ambit of the offeree's invitation to supply new terms. If the underlying justification is the offeror's implicit invitation, the offeree's power must extend only to terms not inconsistent with the bargain proposed in the offer itself. Thus, no term "materially alter[ing]"¹⁸¹ the offeror's proposal is enforceable without the offeror's assent¹⁸² because it is impossible to suppose that the offeror has left

173. See *supra* notes 62-64 and accompanying text.

174. What seems reasonable in the context is implicitly within the offeror's invitation. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 30(2) (1979) ("Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." (emphasis added)).

175. See *id.* § 58 comment a and reporter's note.

176. See *infra* notes 194-205 and accompanying text.

177. The Second Restatement commentators recognized that § 2-207(2) represents a codification of the common-law rule. RESTATEMENT (SECOND) OF CONTRACTS § 69 comment d (1979); see Baird & Weisberg, *supra* note 2, at 1234.

178. U.C.C. § 2-207(2)(a) provides an exception to the rule that additional terms become part of the contract between merchants. This exception applies if "the offer expressly limits acceptance to the terms of the offer." U.C.C. § 2-207(2)(a) (1990).

179. The exception to § 2-207(2)'s merchant rule applies when "notification of objection to [the additional terms] has already been given or is given within a reasonable time after notice of them is received." *Id.* § 2-207(2)(c).

180. The U.C.C. precludes terms from automatically becoming part of the contract if "they materially alter it." *Id.* § 2-207(2)(b).

181. *Id.*

182. Assent to the materially altering term may be found either through conduct or express consent. See, e.g., *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 1334-35 (7th Cir. 1985).

such terms to the offeree's discretion.

2) Exclusion of "Different" Terms

The offeree's statutory power to set new terms under section 2-207(2) derives from and is coextensive with the power implicitly granted to the offeree by the commercial offeror in modern usage. This fact carries very significant implications for the construction of section 2-207, including an answer to the controversy over whether subsection (2) should apply to "different" terms¹⁸³ or only to "additional" terms.¹⁸⁴ An understanding of the policy underlying the section

(Although offeree's warranty disclaimer was a material alteration, the offeror assented to that alteration through its conduct where it had actual knowledge of the warranty terms, inquired about the warranty, assigned the warranty to its customers, and processed over 210 claims on the warranty.). Performance of the contract would not, however, indicate assent to any proposal for modification.

183. Some courts and commentators maintain that it is often impossible to distinguish "different" terms from "additional" terms and conclude that subsection (2) applies to both. See, e.g., *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 102 n.5, 569 P.2d 751, 759 n.5, 141 Cal. Rptr. 157, 165 n.3, (1977) (en banc); *Boese-Hilburn Co. v. Dean Mach. Co.*, 616 S.W.2d 520, 527 (Mo. App. 1981); *Barron & Dunfee*, *supra* note 2, at 187; Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D.L. REV. 181, 245 (1987); cf. *Ebasco Servs. Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421, 440 & n.27 (E.D. Pa. 1975) (noting that "perhaps" subsection (2) also applies to different terms and deciding whether differing language between offeror's and offeree's warranties was material).

While the legislative history is not clear, it has been suggested that the failure to include different terms in § 2-207(2) was a printer's mistake. See, e.g., Murray, *Chaos of the "Battle of the Forms," supra* note 2, at 1354-56; Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 U.C.C. L.J. 103, 111 (1983). Other commentators, however, have contended that the drafters knew what they were doing and intended to include only additional and not different terms. See, e.g., R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-38; J. WHITE & R. SUMMERS, *supra* note 2, at 32; Duesenberg, *supra* note 2, at 1488; cf. Baird & Weisberg, *supra* note 2, at 1240 n.61, 1242-45 (although stressing the difficulty of distinguishing "additional" terms from "different" ones, suggesting that the drafters intended to make this distinction and that conflicting fine print terms should cancel each other out).

184. See, e.g., *Reaction Molding Tech., Inc. v. General Elec. Co.*, 588 F. Supp. 1280, 1289 (E.D. Pa. 1984); *Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg. Co.*, 107 Ill. App. 3d 29, 31-32, 437 N.E.2d 22, 24 (1982); *American Parts Co., Inc. v. American Arbitration Ass'n*, 8 Mich. App. 156, 154 N.W.2d 5, 11 (1967); R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-38; Duesenberg, *supra* note 2, at 1488; Taylor, *supra* note 2, at 434 n.44; Note, *supra* note 90, at 387.

Courts and commentators who agree that subsection (2) only applies to additional and not to different terms disagree over whether the different terms cancel one another out or whether the offeror's terms control and the different terms in the acceptance fall out. The debate between Professors White and Summers epitomizes this controversy. White believes that an offeree who includes a different term has only accepted those terms in the offer that did not conflict; the two different terms cancel each other out and Code gap-fillers come in to supply the terms. J. WHITE & R. SUMMERS, *supra* note 2, at 32-34. For cases following White's "knock-out" rule, see *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984); *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 713 F. Supp. 1350, 1356 (D. Idaho 1989) (alternate holding); *Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 538 (D. Kan. 1982); *Lea Tai Textile Co., v. Manning Fabrics, Inc.*, 411 F. Supp. 1404, 1407 (S.D.N.Y. 1975); *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 503, 567 P.2d 1246, 1254 (1977), *appeal dismissed, cert. denied*, 434 U.S. 1056 (1978); *Challenge Mach. Co. v. Mattison Mach. Works*, 138 Mich. App. 15, 24-26, 359 N.W.2d 232, 236-37 (1984); *S.C. Gray, Inc. v. Ford Motor Co.*, 92 Mich. App. 789, 807, 286 N.W.2d 34, 41 (1979); *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83, 86 (N.D. 1985); cf. *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 429-30, 237 N.W.2d 488, 489-90 (1975) (when a contract is formed under § 2-207(1) but the provisions conflict, a contract is formed under § 2-207(3) on the terms upon which the writings agree and terms supplied by the Code).

Summers takes the better view that the offeror's terms control and the different terms in the acceptance fall out. J. WHITE & R. SUMMERS, *supra* note 2, at 34-35. For a case adopting Sum-

makes it clear that only "additional" terms are covered by subsection (2) and that the determination whether a term is additional or different must be made by comparing it against the offer's *explicit* terms.¹⁸⁵ It should be remembered that if a term is found to lie within the purview of subsection (2), it stands a chance of becoming automatically part of the contract under the merchant rule of that section. Terms that do not come within subsection (2) become part of the contract only if assented to by the offeror under common-law rules.

When the offeror has provided *nothing* explicit on the subject of an offeree's term, it is reasonable to infer that the offeree may have latitude to set new terms reasonable in the context and consonant with the broad meaning of the offer. Permissible latitude for the offeree is an especially reasonable inference where forms are used. This is because the extensive care taken by each party or its representative in drafting or purchasing its own forms supports the inference that offerors have already covered the waterfront as to terms they consider essential.¹⁸⁶ Certainly where forms are used, there is opportunity for such care. Consequently, whenever a form is used, without regard to the inclusiveness of its provisions (assuming there is no negotiation beyond the use of the form itself), it is reasonable to suppose that the party using it has manifested a general invitation to the other to round out the deal with appropriate new terms covering matters on which the offer is silent.

When the offeror has taken care to provide a term in his preprinted form, however, it would be unreasonable to infer any implicit invitation to the offeree to provide a different term.¹⁸⁷ Subsection (2)'s automatic inclusion should never extend to terms in the offeree's response that differ from the explicit terms of the offer.¹⁸⁸ Such "different" terms function as proposals for modification under common-law rules even without the aid of subsection (2).¹⁸⁹ They can become effective upon the offeror's assent, but not merely by virtue of performance.¹⁹⁰

That a term "different" from the offer's explicit terms should stand no chance of automatic effectiveness under section 2-207(2) is supported not only by reference to the underlying policy, but also by the statutory provisions themselves. The silence of section 2-207(2) concerning "different" terms implies that

mers's view, see *Reaction Molding Tech., Inc. v. General Elec. Co.*, 588 F. Supp. 1280, 1289 (1984) (agreeing "with the approach of Summers that § 2-207(2) does not apply to different (as opposed to additional) terms and that different terms would never become part of the contract"). Although the court's language is somewhat ambiguous and does not detail the "fall-out" view, it supports it because that is Summers's approach. Cf. *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 102 & n.5, 569 P.2d 751, 759 & n.5, 141 Cal.Rptr. 157, 165 & n.5 (1977) (although finding that subsection (2) does not distinguish between additional and different terms, holding that if varying terms materially alter the offer, the terms of the offer prevail).

185. See *Oskey Gasoline & Oil Co., v. OKC Ref., Inc.*, 364 F. Supp. 1137, 1145 (D. Minn. 1973); J. WHITE & R. SUMMERS, *supra* note 2, at 32; Taylor, *supra* note 2, at 434 n.44.

186. See *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972).

187. See Taylor, *supra* note 2, at 434 n.44.

188. See R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-38.

189. See J. WHITE & R. SUMMERS, *supra* note 2, at 34.

190. This is because the offeror is entitled to performance once the offeree has accepted; in fact, the offeree is bound to perform. Consequently, performance carries no implication of assent to anything at all.

it applies only to additional and not to different terms,¹⁹¹ especially given subsection (1)'s use of both terms. Moreover, this reasoning is consistent with subsections (2)(a) and (2)(b): the invitation to provide additional terms is recognized only if not negated in the offer, and the invitation extends only to terms that do not materially alter the offeror's proposed contract. Under subsection (2)(c), the offeror also retains the power to prohibit effectiveness of a new term even by later objection, regardless of the term's immateriality. The offeror's own provision of any term should be understood as an exercise of his power implicitly negating an invitation to the offeree to provide a different one.¹⁹² Thus the restriction of automatic effectiveness under section 2-207(2) to "additional" but not "different" terms is consistent with the rationale of the statute and with the import of the other listed exceptions.

3) *How To Distinguish Between "Different" and "Additional" Terms*

If the foregoing principles are applied, the test to determine whether a term in the offeree's form is "additional" or "different" must be made by comparison only to the express terms of the offer. Incorporating implied terms into the comparison makes the offeror's expressed intention impossible to determine. In fact, it obliterates the distinction between additional and different terms. This is because even "additional" terms are "different" when compared to the otherwise applicable gap-fillers. To limit subsection (2)'s effects to terms that merely duplicate what already would be implied in the offer would deprive the subsection of any effect at all. To extend its effects to terms inconsistent with those already provided explicitly by the offeror is to shift inappropriately the term-setting power.

The important distinction concerns the scope of the offeror's invitation of latitude in term-setting to the offeree. There is no general reason to suppose that an offeror who remains silent as to a particular term would choose the gap-filler's implied term over what the offeree provides. It is the offeror's silence itself that implies the invitation to the offeree to provide an additional term. Consequently, in judging the nature of the offeror's invitation as grounds for automatic inclusion of the offeree's term, the critical factor is whether the offeror has spoken, negating an intent to invite the offeree's provision of the term, or whether the offer is silent as to the term, making reasonable the inference that the offeree may provide a new term consistent with the offer's invited latitude. The classification as "additional" or "different" is not an arbitrary one, but underlies a rule designed to implement the offeror's reasonable intent as perceived by the drafters. Whether a term is "different" or "additional" is a determination that should be made with reference only to the explicit terms in the offer.¹⁹³

Concerns about the additional terms' inconsistency with terms otherwise

191. See R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-38; J. WHITE & R. SUMMERS, *supra* note 2, at 32; Duesenberg, *supra* note 2, at 1488; Taylor, *supra* note 2, at 434 n.44.

192. See R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-38.

193. Oskey Gasoline & Oil Co., v. OKC Ref., Inc., 364 F. Supp. 1137, 1144-45 (D. Minn. 1973); see Taylor, *supra* note 2, at 434 n.44.

implied by law,¹⁹⁴ not relevant here, are addressed under the issue of "material alteration" below.¹⁹⁵

4) Section 2-207(2)(b): *What Is a Material Alteration?*

The power of the offeree to supply enforceable terms not included in the offer may be limited not only by the offer's express terms, but also by terms properly found to be implied in the offer. This issue is raised by section 2-207(2)(b), the subject of much of the litigation arising under the statute. Nevertheless, when subsection (2)(b) is construed in light of the policies examined above, it appears that commentators have overrated its role in excluding additional terms from the contract.

The relationship between offeror and offeree in ordinary commercial contracts supports a wide latitude in the offeree's permissible responses.¹⁹⁶ Commentators and courts generally have failed to recognize that the limitations inherent in the latitude allowed by the offeror are reflected in the exceptions of subsections (2)(a)-(c), which restrict the automatic effectiveness of an offeree's additional terms between merchants. This recognition carries implications especially for the proper construction of the "material alteration" exception of section 2-207(2)(b).

In determining whether an additional term in the offeree's document automatically may become part of the contract under the merchant rule of section 2-207(2), the issue whether the term constitutes a "material alteration" under subsection (2)(b) is often critical. Although often encountered in contracts lore, the term "material" is commonly used in circumstances too disparate to provide much guidance. The Uniform Commercial Code does not define it, nor are the comments to section 2-207 very helpful.¹⁹⁷ "Materiality" must be defined, therefore, by reference to the commercial context, especially to the use of preprinted forms.¹⁹⁸

First, it is important to note that it is not the materiality of the *term* but the materiality of the *alteration* wrought by it that is the standard of section 2-207(2)(b). That statute provides:

(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:

. . .

194. See, e.g., Barron & Dunfee, *supra* note 2, at 187-88.

195. See *infra* notes 196-205 and accompanying text.

196. See *supra* notes 166-80 and accompanying text.

197. See *Dale R. Horning Co. v. Falconer Glass Indus.*, 710 F. Supp. 693, 699 (S.D. Ind. 1989) (In determining whether the limitation of remedies constitutes a material alteration, "[t]he Official Comments are inconclusive . . . at best."): *See also* *supra* note 2, at 187-88.

198. See *Ebasco Servs., Inc. v. Pennsylvania Power & Light*, 402 F. Supp. 421, 442-43 (E.D. Pa. 1975) ("[T]he materiality of a change is to be judged in large part by the expectations of the parties involved in the transaction."); R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-26 to 3-33; Barron & Dunfee, *supra* note 2, at 202-03.

(b) they materially alter it¹⁹⁹

The "it" of subsection (2)(b) is not the offer, but the "contract" stated in introductory language of subsection (2).²⁰⁰ This contract, of course, is the one formed upon the offeree's acceptance under subsection (1). Consequently, commentators have suggested that not only the explicit terms proposed by the offeror, but also gap-fillers implied by law, must be considered when the test of "material alteration" is applied. This argument partially misses the point because it fails to take into account fully the principles underlying the statutory provisions. The "contract" by which the issue of "material alteration" is measured is the contract *proposed by the offeror*. It is not necessarily or even likely coextensive with a contract whose terms include only the offer's express terms supplemented by rules of law. The offeror may leave gaps to be supplied by law *or to be supplied by the offeree*. In the latter case, the gaps properly are filled not by reference to statute or common law, but to the terms set by the offeree exercising a power conferred upon him by the offer. Because subsection (2)'s automatic exclusion rule reflects the commercial reality of permissible latitude extended by the offeror to the offeree to provide new terms, the "contract" must include open space for the offeree's choices.

An offeror conceivably might leave quite an important term, for example, one affecting delivery, warranty, even price or quantity, to the offeree to set. If the offeror's proposal contemplates the offeree's setting such a critical term, the offeree is perfectly within the proper exercise of her power in doing so and the term should be enforceable; it is a material term, but not a material alteration. Other provisions of the Code clearly recognize that a term might be left by the offeror for the other party to set, even after contract formation.²⁰¹ Obviously, nothing in section 2-207 should bar enforceability of any term, however material, which is set by the offeree at the invitation, explicit or implicit, of the offeror.

Perhaps the most significant observation when preprinted forms are used is that the invitation to the offeree to provide terms of the contract may be made not only explicitly, but also by the offeror's *silence*. When preprinted forms are used, silence as to any particular term can be especially communicative. It is clear, then, that when one is testing for "material alteration," the question whether the explicit terms of the offer should be considered alone, or whether they should be supplemented by terms implied by law, can never be answered by an unthinking "yes" or "no."²⁰² The issue is one of the offeror's reasonable intention manifested by the preprinted form in the context of the particularities

199. U.C.C. § 2-207(2)(b) (1990).

200. Thatcher, *supra* note 183, at 244 n.352.

201. *E.g.*, U.C.C. §§ 2-305(2), 2-307, 2-311 (1990).

202. *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1169 n.8 (6th Cir. 1972) (material alteration is an issue of fact); Dale R. Horning Co. v. Falconer Glass Indus., 710 F. Supp. 693, 701 (S.D. Ind. 1989) (same); Wheaton Glass Co. v. Pharmex, Inc., 548 F. Supp. 1242, 1245 (D.N.J. 1982) (same); Leonard Pevar Co. v. Evans Prods. Co., 524 F. Supp. 546, 550 (D. Del. 1981) (same); Ebasco Servs., Inc. v. Pennsylvania Power & Light, 402 F. Supp. 421, 442-43 (E.D. Pa. 1975) (same); Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg., 107 Ill. App. 3d 29, 33, 437 N.E.2d 22, 25 (1982) ("Generally, the issue of a material alteration should not be resolved on a motion for

of the transaction and such circumstances as course of dealing or trade usage.²⁰³

It might at first appear extraordinarily difficult to distinguish offers in which the offeror's manifested intention is to rely upon terms implied by law from offers in which silence represents an invitation to the offeree to provide a term. When preprinted forms are used, however, the implications of the offeror's silence as to a particular term seem much easier to evaluate than in other contexts. This is so because, while forms are rarely read, once drafted, their drafting allows each party an opportunity for a unique thoroughness in addressing explicitly those terms that seem necessary or advisable for protection in every conceivable circumstance. Because the form is designed to be used in so many transactions, there is time and incentive for careful consideration of risks and advantages. The beauty of fine print is that so little space is required to produce so much of it. Consequently, one might quite reasonably find an express provision in the offeror's form as to every issue at all likely to arise and likely to be of importance to him, with the possible exception of those matters so firmly a part of usage that they are taken utterly for granted.

Applying these observations, the answer to the issue of the "materiality" of the alteration wrought by an offeree's additional term is obvious in some cases. A term that simply makes explicit what would otherwise be imported into the contract through course of dealing or usage in the trade is not a material alteration; in fact, it is no alteration at all.²⁰⁴ The opposite case is also manifestly resolvable: a term that contradicts a trade usage or course of dealing is certainly a material alteration and cannot be part of the contract without the explicit assent of the offeror. Most cases, however, fall somewhere between these two easy poles.

Because contracting parties can be extremely thorough in addressing all possible contingencies by using preprinted forms, the offeror's silence as to a matter not covered by an applicable usage or course of dealing often demonstrates the matter's unimportance to the offeror. In any case, it implies a willingness to allow the offeree to govern the term.

An exception to this implication must be recognized as to terms that no reasonable person in the offeror's position would anticipate the offeree providing. Thus, in an industry where arbitration is never utilized, the offeror's silence on the issue of binding arbitration might be attributable to not having thought of it; one might then say that the offeree's arbitration term materially alters the proposed contract, which included by implication access to the courts to resolve disputes.²⁰⁵ Or, in a business in which warranties are typically disclaimed, the

summary judgment since the issue of whether the clause constitutes an unreasonable surprise is simply a corollary question to an ascertainment of the parties' bargained agreement.").

203. See *Ebasco Servs.*, 402 F. Supp. at 442; R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-27, 3-33; Taylor, *supra* note 2, at 434-35.

204. See *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150, 1152 (E.D. Pa. 1978); *Oskey Gasoline & Oil Co. v. OKC Ref., Inc.*, 364 F. Supp. 1137, 1145 (D. Minn. 1973).

205. See R. DUESENBERG & L. KING, *supra* note 2, § 3.03[1], at 3-31 to 3-33 (reviewing arbitration cases); cf. *Schulz & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 713 (7th Cir. 1987) (when arbitration is common in the industry, the inclusion of an arbitration clause is not a material alteration of the contract).

offeree's inclusion of a full warranty should fail the test of subsection (2)(b). The offeror's silence as to any term in the preprinted form, then, should be taken as pre-approval of the offeree's provision as to that term, as long as the term proposed by the offeree is within the reasonable range of provisions the offeror reasonably would expect to encounter, and hence, the proposed term should constitute no surprise. Terms implied by law to fill blanks in contracts (simple "gap-fillers") ordinarily should play no part in applying the "material alteration" test of section 2-207(2)(b).

Assuming that the transaction is between merchants and that there is nothing communicated by the offeror triggering (2)(a) or (2)(c), the offeree's additional term ordinarily should become part of the contract. The offeree's burden under this analysis is a light one indeed: all the offeree must do in such a case to negate "material alteration" is to establish that the term is common enough in the industry or in transactions between the two parties to negate the possibility of the offeror's surprise²⁰⁶ and that it is not inconsistent with expectations created by the parties' prior dealings. When preprinted forms are used, such latitude seems reasonable when the offeror has made no contrary provision, without regard to the Code's gap-fillers.

For example, a warranty disclaimer commonly is held to be a "material alteration" despite the offer's silence on the issue of warranty, because it negates the warranty terms that would ordinarily be supplied by the Code.²⁰⁷ But the analysis on which these results depend should be different.²⁰⁸ Only when the evidence shows that warranty disclaimers are encountered rarely in the trade and have never been invoked effectively between the same parties in the past should the offeror's failure to provide warranty terms in the preprinted form be taken as a manifestation of an intention to rely on the Code's warranty provision.

Only in the presence of evidence tending to show that the offeree's term is extremely unusual in the industry or between the parties should a gap-filler weigh heavily in determining whether the term constitutes a material alteration. This is so even if the evidence of the term's observance falls far short of the standard of regularity necessary to show a usage or course of dealing. The preprinted form offer invites the offeree not merely to parrot terms that the law

206. See *Schulz & Burch Biscuit Co.*, 831 F.2d at 713; cf. *Clifford-Jacobs Forging Co. v. Capital Eng'g & Mfg.*, 107 Ill. App. 3d 29, 33, 437 N.E.2d 22, 25 (1982) (no unreasonable surprise occurred as a matter of law when offeree's inclusion of an additional term on prices was not in conflict with, but was in agreement with, plaintiff's term on prices).

207. See, e.g., *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1334 (7th Cir. 1985); *South-eastern Adhesives Co. v. Funder Am., Inc.*, 89 N.C. App. 438, 443, 366 S.E.2d 505, 508 (1988).

208. See *St. Charles Cable TV, Inc. v. Eagle Comtronics*, 687 F. Supp. 820, 827 (S.D.N.Y. 1988) (The question of material alteration depends on the facts of each case. A disclaimer of warranties was not a material alteration when the offeror could claim no surprise or hardship, as the parties had orally discussed the offeree's warranty provision.), *aff'd*, 895 F.2d 1410 (2d Cir. 1989); cf. *Wheaton Glass Co. v. Pharmex, Inc.*, 548 F. Supp. 1242, 1245 (D.N.J. 1982) (rejecting the view that a limitation of remedies clause is per se a material alteration and holding that it is a question of material fact to be decided by looking at the parties' expectations and other circumstances); *Ebasco Servs., Inc. v. Pennsylvania Power & Light*, 402 F. Supp. 421, 442-43 (E.D. Pa. 1975) (finding that whether a limitation of remedies clause is a material alteration is an issue of fact, and therefore denying motion for summary judgment).

would otherwise provide, but to choose among reasonably expected alternatives. The issue is whether the deal proposed by the offeror is materially altered by the new term, not whether a standard deal envisioned by the Code drafters is so altered.

b. Limitations on Offeror's Control: Good Faith and Unconscionability in Form Contracts

While the offeror ordinarily controls the terms of the section 2-207 contract, either through express terms or through implicit invitation to the offeree, there may be limitations on the enforceability of some terms in the offeror's own preprinted form. Although the offeree who responds without reading the small print should bear the risk for most of the offer's terms, she is entitled to some protection for preprinted terms too far beyond her expectations. A really shocking surprise buried in the small print of the offeror's form is not properly within the risks an offeree should be held to have accepted when responding to the offer without carefully reading its fine print.²⁰⁹

It is not necessary, however, to manipulate the terms of section 2-207 or to force an unnatural interpretation upon the statute to prevent an unscrupulous offeror from imposing unfairly upon the offeree. Elsewhere the Code affords protection to the offeree similar to that accorded to the offeror by the "material alteration" provision of section 2-207(2)(b). Terms of the preprinted offer that seem unfairly imposed upon the offeree unless she explicitly assents may be excluded from the contract, most notably under sections 2-302 and 1-203.²¹⁰ An understanding of the relationship of these provisions to section 2-207 allows ample protection for the offeree who fails to discover a real bombshell in the offeror's preprinted terms.

When a reasonable offeror sends an offer by way of a preprinted form, he should anticipate that economic pressures may incline the offeree not to read the fine print.²¹¹ Terms within the offeree's reasonable contemplation as likely to be found in the offer seem properly within the risk the offeree assumes by not reading.²¹² But the risks properly borne by the offeree should not include terms that no one in her position would have expected to find in the offer, unless, of course, she has been warned.²¹³ The inclusion of a "bombshell"—a preprinted term wholly outside the reasonable expectations of the offeree—should be found unconscionable and the bombshell term should be excluded from the contract under section 2-302.²¹⁴ Moreover, the offeror's attempt to enforce a preprinted

209. Murray, *supra* note 36; see Murray, *The Realism of Behaviorism*, *supra* note 2, at 286-87; Murray, *Unconscionability: Unconscionability*, *supra* note 162, at 3-4.

210. U.C.C. §§ 1-203, 2-302 (1990); see Murray, *Incipient Unconscionability*, *supra* note 2, at 611-12.

211. "A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms." RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1979). See Travalio, *supra* note 2, at 331-32.

212. Murray, *Unconscionability: Unconscionability*, *supra* note 162, at 4.

213. Murray, *supra* note 36, at 776-77.

214. Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1512 (S.D.N.Y. 1985); see Murray, *Unconscionability: Unconscionability*, *supra* note 162, at 14-16.

bombshell included in the offer without warning is inconsistent with the obligation of good faith imposed in every transaction under the Code by section 1-203.²¹⁵

The offeree's position in such a case resembles that of the offeree in a contract of adhesion;²¹⁶ although there is an obvious distinction in that the recipient of the preprinted form may have ample bargaining opportunity if he reads it,²¹⁷ the commercial likelihood of failing to do so makes apparent the offeree's practical powerlessness to negotiate any modification or exclusion where the objectionable term is buried in a preprinted form.²¹⁸ In addition, the offeree's unawareness of the presence of the bombshell obviates any bargained-for accommodation for the bombshell's effect in the other provisions of the contract.

Rules that are *not* helpful here are those that rely on an offeree's legal duty to read or negligence in failing to do so. The risk of a bombshell in the offer is not properly placed upon the non-reading offeree on grounds of negligence; it is not negligent to fail to read the preprinted terms of a form.²¹⁹ The obvious utility of preprinted forms²²⁰ rests in part upon their customary use without being read by either party.²²¹ No rule of law is likely to change this economic reality; nor would many argue for the advisability of change were it possible.²²² The customary failure to read forms is the very reality intentionally accommodated by section 2-207. Although, as has been recognized above, the offeree is in a responsive posture and has some incentive to read, failure to do so represents a fair and reasonable assumption of foreseeable risks based upon utility; it is not a negligent failure.

Under ordinary contract law, the formation of a contract depends on a mu-

215. U.C.C. § 1-203 (1990) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). For a discussion of the growing role of the good faith concept in the control of standardized terms and the distinction between good faith and unconscionability, see Dugan, *The Application of Substantive Unconscionability to Standardized Contracts—A Systematic Approach*, 18 NEW ENG. L. REV. 77, 81-83 (1982).

Even if the relevant definition of "good faith" is the subjective one found in U.C.C. § 1-201(19) ("honesty in fact in the conduct or transaction concerned") rather than the more objective definition applicable to merchants under Article 2 statutes stated in U.C.C. § 2-103(1)(b) ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"), there is insufficient reason for the offeror to believe that the bombshell term is part of the parties' agreement in fact. See U.C.C. §§ 1-201(19), 2-103(1)(b) (1990).

216. See Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176-80 (1983).

217. See *id.* at 1178 & n.13.

218. "The term ['contract of adhesion'] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, delegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781, 784 (1961).

219. See Rakoff, *supra* note 216, at 1254; Travaglio, *supra* note 2, at 331-32.

220. See, e.g., Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (estimating that 99% of all contracting is done through standard forms).

221. "One of the purposes of standardization is to eliminate bargaining over details of individual transactions and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms." RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1979).

222. See, e.g., Travaglio, *supra* note 2, at 332 (observing that "the economic advantages of transacting business in the form mode far outweigh[] the risks").

tual manifestation of assent.²²³ Although in form transactions the offeree's response implies no actual assent to the *particular* terms of the offeror's preprinted form, the acceptance does imply the offeree's blanket assent to the offeror's choice among a pool of terms reasonably to be anticipated in the offeror's form. That such blanket assent should be implied is consistent with the commercial understanding typical of parties in such transactions and is supported by analysis of the risk a nonreading offeree consciously takes (if she thinks of it). No such inference is supported, however, in the case of the bombshell term, such terms falling outside the range of risks fairly supposed to be undertaken by the offeree who fails to read the preprinted form. Nor is there any utility in placing the offeree at risk for hidden bombshells.

The imposition of such a term by an offeror is objectionable as unconscionable under section 2-302.²²⁴ As that section's first official comment points out, "[t]he principle is one of the prevention of oppression and unfair surprise, and not of disturbance of allocation of risks."²²⁵ The proper allocation of risks as to unread terms in preprinted offers is best served by ready recourse to section 2-302 when a court is persuaded of an offeree's unfair disadvantage because of the offer's surprising and onerous term.

Although this might be thought to pose a danger of unnecessarily increasing litigation because of difficulties determining which terms in the offer should be excluded as unconscionable, a practical analysis shows that most terms in the offer ought to pass muster easily. Obviously, terms reflective of course of dealing or trade usage are enforceable; these terms would apply even if the form was silent. But the offeror fairly may include in the preprinted portion of the form terms that come nowhere near any level of customary observance, either between the parties or in the industry. The test for the effectiveness of the offeror's terms should not be whether they are so frequently encountered as to be found customary, but whether they are so rarely encountered and so burdensome to the offeree as to represent a substantial commercial surprise.²²⁶

For example, if arbitration is virtually unheard of in the offeree's trade, an

223. *E.g.*, *Youngstown Steel Erecting Co. v. MacDonald Eng'g Co.*, 154 F. Supp. 337, 339 (N.D. Ohio 1957) ("[I]t is elementary that in order to constitute a binding contract there must have been a manifestation of assent by the parties thereto.").

224. Unconscionability has both "procedural" and "substantive" elements. See Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489, 509 (1967); *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 489, 396 N.Y.S.2d 427, 431 (1977). Unconscionability's procedural element focuses on two different factors: "oppression" and "surprise." *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114, 121 (1982); cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (describing factors focusing on the procedural element which make a contract unconscionable without specifically distinguishing between procedural and substantive elements of unconscionability). Substantive unconscionability is more difficult to define, however, because a contract is an allocation of risks between the parties. A term is substantively unconscionable when it "reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." *A & M Produce Co.*, 135 Cal. App. 3d at 487, 186 Cal. Rptr. at 122. Arguably, bombshell terms in a preprinted form offer are both procedurally and substantively unconscionable.

225. U.C.C. § 2-302 official comment 1 (1990) (citation omitted).

226. See RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f (1979) (bizarre or oppressive terms are excluded from enforceability in standardized agreements on grounds that they are beyond the range of reasonable expectations of the adhering party).

arbitration clause in the offeror's form may be held inapplicable unless the offeror has some reason, apart from the clause's mere inclusion in the form, to suppose that such a term was within the offeree's contemplation as part of the agreement.²²⁷ A warranty disclaimer or exclusion of consequential damages by a seller-offeror might be enforceable if such a term would be encountered frequently enough in the offeree-buyer's trade to be unsurprising; if such terms are common enough to the offeror's own trade as to be notorious, and so within the knowledgeable offeree's business expectations; or if the context of the transaction would lead the offeree to anticipate the seller-offeror's attempt to limit liability, for example, because the potential liability vastly outweighs the consideration given for the product. If the test is unfair surprise to the offeree, the offeror can demonstrate the fairness of the term by showing any reason why a reasonable person in the offeree's position should not be surprised. Unconscionability in the terms of a preprinted offer should be found only where the offeree can carry the burden of establishing that the presence of the preprinted term was unfairly surprising in the commercial context of the particular transaction.²²⁸

B. *Use of Forms in Confirmation of Contract*

1. Confirmations Under Section 2-207(1)

Because the effects of section 2-207 discussed above derive from the statute's reinstatement of the offeror's control over the terms of the contract, it follows that confirmatory writings must be treated quite differently under the statute. Neither of the parties sending confirmations is an offeror, the formation process already having culminated in a contract before the forms are exchanged. Both parties therefore stand in equal positions for purposes of proposing changes or additions to their contract.

Some confusion has been generated by the inclusion of confirmatory memoranda in section 2-207(1).²²⁹ If the language is taken literally, the provision seems to indicate that a confirmation may function as an acceptance. However, this is inescapably a contradiction in terms. Because a form is properly characterized as a confirmation only if a contract has been formed prior to its dispatch, no true confirmation ever can function as an acceptance of the original offer.²³⁰

The purpose of the inclusion of confirmations in subsection (1) was to clar-

227. Cf. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 821, 623 P.2d 165, 173, 171 Cal. Rptr. 604, 612 (1981) (upholding the validity of an arbitration clause in a contract between a concert promoter and a performer based upon the frequency of arbitration clauses in similar contracts in the music industry).

228. See *Spence v. Omnibus Indus.*, 44 Cal. App. 3d 970, 975, 119 Cal. Rptr. 171, 173 (1975).

229. See, e.g., J. WHITE & R. SUMMERS, *supra* note 2, at 44 (questioning whether there is a contract when parties file confirmatory forms including terms different from or additional to those previously agreed upon orally and, if so, on what terms); Murray, *Incipient Unconscionability*, *supra* note 2, at 614 n.56 (observing that "the definitive analysis of the written confirmation problem has yet to appear in any judicial opinion," and that there are "myriad problems which must be confronted in any attempt to provide guidance in this slippery area").

230. The dichotomy between operative offer and acceptance on the one hand and confirmation on the other is also evident in the language of the statute of frauds' "reply doctrine" section, which speaks of "a writing in confirmation of the contract." U.C.C. § 2-201 (1990).

ify that a confirmation inconsistent with the terms of the agreed contract does not negate contractual intent.²³¹ This principle may be important when the parties have reached an oral agreement with only a few of the terms having been discussed and the details left to fall into place later. Of course, the Code supports the enforceability of such skeletal contracts, allowing the parties to leave terms for future agreement or to be supplied by one of them or by implication from law.²³² Nevertheless, enforceability of such contracts under the Code depends upon finding the parties' effective legal intentions to enter a contract despite their having left one or more terms unresolved.²³³ When a court considers whether such a skeletal agreement has been made, the parties' later behavior may influence the court's decision about the parties' intentions at the time of making the putative contract. Their intentions at the time of the later conduct are irrelevant unless they have agreed to a rescission, modification or waiver.

When one or both of the parties confirm by way of preprinted forms, it is critical that the law recognize that inconsistencies between forms or between any form and the agreed-upon terms of the contract are inevitable and by themselves are of little or no significance in evaluating either party's later contention that he did not intend to be bound by a contract. The inclusion of confirmations under section 2-207(1) thus appropriately refutes the otherwise arguable evidentiary value of the preprinted form's additional or different terms; such terms, merely of themselves, do not justify the conclusion that no contractual intent was present at the time of the putative oral agreement. This prohibits a party from basing his escape from contract solely upon the argument that there are inconsistencies in the confirmatory forms, or between a form and the purported contract. Something more is necessary to support sufficiently the contention that the requisite contractual intention was lacking. For example, a difference between the contended terms of the agreement and a filled-in term of the form might be influential in a court's finding that no contract was intended.

2. Confirmations Under Section 2-207(2): The Knock-Out Rule

Because, neither being an offeror, the parties stand on an equal footing with regard to the terms in the confirmation forms, the principles articulated in section 2-207 produce a different, but consistent result from that obtaining when the forms are used for contract formation. Additional terms in *each* of the confirmations are treated as proposals for modification.²³⁴ *Each* party's additional terms may automatically become part of the contract if both parties are merchants, so long as none of the exceptions to the merchant rule of subsection (2) applies.

When any term differs from one already agreed to in the original contract, it is "different"²³⁵ and is not automatically included in the contract, even be-

231. See R. DUESENBERG & L. KING, *supra* note 2, § 3.06, at 3-90 to 3-91.

232. Most provisions implying additional terms are found in Part 3 of Article 2.

233. U.C.C. § 2-204 (1990).

234. See R. DUESENBERG & L. KING, *supra* note 2, § 3.06, at 3-91.

235. See *supra* notes 183-208 and accompanying text.

tween merchants, but can become an effective modification upon assent by the other.²³⁶ Even a confirming party's "additional" term may not be included if the other's term conflicts with it. Official comment 6 to section 2-207 quite sensibly provides that when terms in the two confirmations differ from each other, each party is presumed to have objected to the other's term and both terms are cancelled.²³⁷

This knock-out effect is peculiar to confirmations. It is important to note the reasons behind it, indicating that it must not obtain when the forms are the operative offer and acceptance. When exchanging confirmations, both parties must be treated equally. Neither has the power an offeror would have to insist upon his own terms, but each has the power to prevent the other's additional terms from being incorporated in the contract. This result is not due to any innovation in section 2-207, but is mandated by the long-established relationship between the parties following a legally effective agreement to make a contract. On the other hand, when the forms are used to make a contract the parties are not on the equal footing of confirming parties. An offeror sets the terms; the offeree simply assents. Nothing in comment 6 indicates that different terms in an *acceptance* have any knock-out effect as to an offeror's terms.

IV. CONCLUSION

The key to section 2-207 is that it reveals the common nature of the offeror's invitation to the offeree in the peculiar context of the use of a preprinted form by at least one of the parties. Recognizing that it would be unusual for dissimilarities in such forms to defeat the parties' contractual intent, the statute facilitates a finding of contract whenever there is "a definite and seasonable expression of acceptance," even though the fine print in the forms does not match. Thus, the test for contract is likely to be directed primarily to the filled-in portions of the forms. Not even preprinted language tracking the "proviso" clause at the end of section 2-207(1) ordinarily should defeat the conclusion that a contract has been made when forms are used.

Latitude is recognized as well in the implicit invitation to the offeree to provide new and reasonable terms where the offeror has made no inconsistent provision. This suggests that the offeree's "different" terms have no place in subsection (2)'s automatic inclusion rule. The offeree should not be disappointed, however. Because the use of a form allows an offeror who wishes to do so to cover the waterfront, his silence is recognized to signify willingness that the offeree provide even very important *additional* terms. Consequently, very few additional terms in the acceptance should be refused automatic inclusion in the contract on grounds that they constitute "material alterations" under section 2-207(2)(b).

Section 2-207's purpose is to restore the common-law balance of offeror and

236. Performance alone would not justify the conclusion that such assent had been given; because performance is required by the contract, it represents nothing more than compliance with the contract's terms.

237. See J. WHITE & R. SUMMERS, *supra* note 2, at 45-46.

offeree, enabling a court to assess the parties' probable intentions without the impediment of the old mirror-image rule when forms are used. Admittedly, section 2-207's drafting is confusing. Nevertheless, if the statute is applied as a vehicle to achieve the familiar common-law goals, rather than as a standard for achieving a radical shift in term-setting power, it can function admirably.

V. A ROADMAP TO SECTION 2-207

- I. Scope of section 2-207: Section 2-207 not applicable if no form is used or if the disputed term was the subject of precontract negotiation.
- II. Confirmatory Forms: Section 2-207 applies as follows if the parties agreed to a contract before sending the form(s):
 - A. Nothing in the forms undermines the conclusion that a contract has been made.
 - B. Either party's additional terms in a form used as confirmation qualify for automatic inclusion if they meet the requirements of section 2-207(2).
 - C. If a term in either party's form is inconsistent with the contract previously made, the term does not apply.
 - D. If the forms are inconsistent with each other, the "knock-out rule" of Comment 6 applies, disqualifying both parties' inconsistent terms for automatic inclusion.
- III. Offer/Acceptance Forms: Section 2-207 applies as follows if the parties have *not* agreed to a contract before sending the forms:
 - A. Determine whether the offeree's form constitutes a "definite and seasonable expression of acceptance." If so, it is an effective acceptance under section 2-207(1).
 - B. Inconsistency in the filled-in terms usually makes the offeree's form a counter offer. On the other hand, inconsistency in the preprinted portion of the form, even in important terms, rarely undermines its function as an acceptance.
 - C. A "proviso" (conditional-on-assent clause) in the offeree's form should not make the form a counter offer unless the original offeror certainly should have been aware of its import.
 - D. A "proviso" in the offeree's form ordinarily has no effect at all if the offeree ships contemporaneously.
 - E. A conspicuous "proviso" that is likely, though not certain, to be recognized and understood by the offeror may create enough doubt to deprive the form of effect either as acceptance or as common-law counter offer. In such a case, Section 2-207(3) applies to recognize a contract if the parties' conduct indicates agreement.
 - F. Where there is an acceptance under section 2-207(1), section 2-207(2) may allow the offeree to supply some terms of the contract.
 - G. Nothing in section 2-207(2) undermines the applicability of the offeror's express terms.

- H. An offeree's term is characterized as "different" or "additional" by comparison to the offer's *express* terms.
- I. Under section 2-207(2), the offeree's inconsistent (different) terms never become part of the contract without the offeror's assent. Performance by the offeror does not constitute such assent. No "knock-out rule" applies here. Subsection (2) does not provide any automatic inclusion rule for different terms, despite Comment 3.
- J. Under section 2-207(2), if both parties are merchants and the term does not materially alter the contract, the offeree's additional (consistent) term is included automatically in the contract, unless the offeror precludes inclusion by the terms of the offer or by objecting.
- K. Where preprinted forms are used, few offeree's additional terms should be deemed "material alterations." Hence, most of the offeree's additional terms should come in under the rule of subsection (2). The test for exclusion should center on unfair surprise to the offeror.