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Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207

Gregory M. Travalio*

Section 2-207 of the Uniform Commercial Code addresses the “Battle of the Forms.” In a typical commercial transaction, a seller may respond to a buyer’s offer by proposing additional or different terms and expressly conditioning its acceptance on the buyer’s assent to these terms. If the parties subsequently perform, despite the failure of the forms to match, a question arises as to the terms of the resulting contract. This Article examines both scholarly commentary and cases proposing alternative methods of applying section 2-207 to this scenario. The Article offers an alternative methodology that differentiates between standard counteroffers and conditional acceptances. The author maintains that the offeror’s acceptance of goods shipped by the offeree can serve only as an acceptance of a standard counteroffer. Performance by the offeror in the case of a conditional acceptance results in a contract, not on the terms of the conditional acceptance, but rather on the terms provided in section 2-207(3) of the Code. The author concludes that although his analysis is quite formalistic, it is consistent with the language of the Code and the history of section 2-207, and reasonably accommodates the Code’s goals of fairness, predictability, and efficiency.

INTRODUCTION

Perhaps no section of the Uniform Commercial Code generates more scholarly comment than section 2-207,¹ which

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I wish to thank my colleague, Al Clovis, for his extremely helpful remarks on earlier drafts of this Article. I dedicate this Article to my father.

1. Section 2-207 provides:
addresses the "Battle of the Forms." Despite this commentary and the numerous cases dealing with section 2-207, it remains shrouded in uncertainty. This Article collects recent cases and relates them to the various approaches to section 2-207 suggested in existing literature. More ambitiously, it seeks to demonstrate that these approaches are inadequate to resolve the problems for which the drafters designed section 2-207. Next, this Article offers an alternative methodology that does little or no violence to the language of the provision, provides for an economically efficient mar-

(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.


4. See infra notes 48-143 and accompanying text.
ketplace, and results in considerable predictability and certainty without unduly sacrificing flexibility and fairness. Finally, the Article critiques a proposal for a return to the pre-Code common law approach to offer and acceptance. The author maintains that the benefits of his proposed analysis outweigh those of a return to the "mirror image" rule.

I. SECTION 2-207—A SHORT HISTORY AND EXPLANATION

Under pre-Code common law, a response to an offer that varied the terms of the offer or added new terms did not constitute an acceptance. Rather, it acted as a counteroffer which the original offeror could either accept or reject. If the original offeror failed to respond or rejected the counteroffer, no contract resulted. However, if the offeror accepted the counteroffer either by an express affirmative response or, more commonly, by accepting goods shipped by the offeree, a contract was formed on the terms of the counteroffer.

This rule was satisfactory at a time when parties individually and carefully negotiated most transactions. Since parties were often aware of all of the terms contained in the correspondence, the rule was unlikely to frustrate their expectations. As commercial actors increased in size and complexity, however, the assumptions underlying the mirror image rule became increasingly unrealistic and its application occasionally frustrated the expectations of the parties. As a firm's size increased, the number of its

5. See infra notes 144-75 and accompanying text.
6. See infra notes 176-91 and accompanying text.
8. Theoretically, the parties could then walk away from the contract. See, e.g., Phoenix Iron & Steel Co. v. Wilcoff Co., 253 F. 165 (6th Cir. 1918); Batie v. Allison, 77 Iowa 313, 42 N.W. 306 (1889); Malis v. Knapp & Baxter, Inc., 196 A.D. 628, 188 N.Y.S. 5 (1921).
10. See, e.g., Vaughan's Seed Store, 123 N.J.L. 26, 7 A.2d 868 (1939); Malis, 196 A.D. 628, 188 N.Y.S. 5 (1921).

A recent article dealing with section 2-207 argues correctly, however, that the mirror image rule did not always operate with draconian results. See Baird & Weisberg, supra note 2, at 1233-37. As the article indicates, a substantial number of escape hatches were available to courts that were not inclined to strictly apply the rule. Id. Accordingly, courts often decided that an additional or different term in an acceptance merely suggested an addition to the contract which the original offeror was free to accept or reject. In such a case, the court would find an acceptance despite the variant terms. See, e.g., Butler v.
transactions, customers, and suppliers also increased. Clerks and shipping personnel with neither the authority to negotiate on behalf of their employers, nor the time and training to analyze correspondence in detail, often were responsible for routine transactions. Further, firms began using form documents to communicate offers and acceptances. In these forms, each party attempted to include terms appropriate to the transaction involved, and which operated in favor of the party sending the form. As the use of forms increased and the number of these terms of general application grew, the boilerplate of modern day purchase and acknowledgment forms was born. Persons in positions of authority and those who understood these terms simply ignored them. Parties only considered the "dickered"

Baird and Weisberg's statement that "in its rigid form, the mirror-image rule existed only in the treatises and hornbooks" is probably correct. Baird & Weisberg, supra note 2, at 1233 n.46. This author's research, however, indicates that Baird and Weisberg overstate the case when they conclude that the flaws of the mirror image rule were "largely academic." Id. at 1237. In fact, a substantial number of courts strictly applied the rule. See, e.g., Phoenix Iron & Steel, 253 F. 165 (6th Cir. 1918); Derrick v. Monette, 73 Ala. 75 (1882); Rugg v. Davis, 15 Ill. App. 647 (1885); Batie, 77 Iowa 313, 42 N.W. 306 (1889); Vaughan's Seed Store, 123 N.J.L. 26, 7 A.2d 868 (1939); Watts v. Thomas Carter & Sons, 207 A.D. 656, 202 N.Y.S. 852 (1924); Malis, 196 A.D. 628, 188 N.Y.S. 5 (1921). These cases and others also render suspect Baird and Weisberg's statement that Poel, 216 N.Y. 310, 110 N.E. 619 (1915), is "altogether exceptional in its rigid application of the mirror-image rule." Baird & Weisberg, supra note 2, at 1235 n.52.

Nevertheless, Baird and Weisberg make a valuable contribution by revealing that the application of the mirror image rule was more flexible than generally supposed. Given the disparate nature of the case law, it is probably useful to view the mirror image rule as often creating a presumption that the presence of additional or different terms in a purported acceptance creates a counteroffer. See, e.g., Derrick, 73 Ala. 75 (1982). Section 2-207 merely acts to reverse that presumption. For further discussion of Baird and Weisberg's article, see infra notes 176-89 and accompanying text.


12. See Barron & Dunfee, supra note 2, at 173.

13. The purchase order form used by the Janitrol Aero Division of the Midland-Ross Corporation, Columbus, Ohio, contains a prime example of the boilerplate of offer and acceptance forms. It has on its reverse side 19 paragraphs of very fine print labeled "Purchase Order Terms and Conditions." These paragraphs deal with terms concerning warranties, inspection, transportation and packing, patents and trademarks, insolvency of the seller, assignment of the contract, and choice of law. Other purchase order and acknowledgment forms collected by the author from local industries are remarkably similar to the one described above.
FORMAL APPROACH TO SECTION 2-207

terms—essential matters like description, price, and quantity—to be important. The practice of ignoring the boilerplate created no difficulty in the typical case where the seller sent conforming goods on time and the buyer promptly paid the price. When disputes arose, however, the mirror image rule could frustrate the justifiable expectations of the parties and occasionally produce grossly unfair results.

No binding contract existed upon the exchange of forms if the offeree’s acceptance or acknowledgment form contained terms that were contradictory or additional to those found on the offeror’s form. For example, if an offeror-buyer sought to withdraw prior to performance from what might otherwise be an economically disadvantageous transaction, it merely had to find a variation in the two forms, even though both parties previously assumed that a binding contract existed. When the parties performed despite the failure of the forms to match, one party might object to performance by the other party. Consequently, it often became necessary to determine those terms of the contract other than the dickered terms. For example, if a seller’s nonmatching acknowledgement had the effect of a counteroffer, the buyer’s acceptance of the goods usually had the surprising effect of an acceptance of the counteroffer. As a result, the offeree’s form established the terms of the contract. This arbitrary preference for the party (usually the original offeree) sending the last document (firing the “last shot”) before shipment and acceptance of the goods, incorporated terms into the contract that the original offeror, perhaps even the original offeree, did not expect to be part of the transaction.

Despite the risks inherent in a “form mode” of doing business, businessmen neither reverted to their prior practice of personal, high-level correspondence, nor began to read each other’s forms more carefully. Several reasons exist for this lack of change. First and most important, transacting by printed form was efficient. Firm size made it too costly to negotiate individually every term that might be relevant to a particular transaction. Moreover, increased business volume precluded firm management from becoming involved in each sale or purchase made by the

15. See, e.g., Vaughan’s Seed Store, 123 N.J.L. 26, 7 A.2d 868 (1939).
16. See infra text accompanying note 21.
17. See generally Taylor, supra note 2, at 423–26 (the form mode of transacting may increase the possibility of a contract that is actually contrary to the intent of the parties).
firm. Also, large sellers and buyers may have hundreds of customers or suppliers, each with their own form. The time and expense necessary to analyze each form individually and to negotiate over unfavorable terms was not justified because the terms were unlikely to be relevant in the vast majority of transactions. Finally, the use of forms enabled low-level personnel to process routine purchases and sales. Thus, the economic advantages of transacting business in the form mode far outweighed the risks.

In addition, businessmen were perhaps often unaware of the potential consequences of dealing in the form mode. In most situations, neither party would seek to withdraw prior to performance and nothing went wrong with the transaction during or after performance to make the undickered printed terms relevant. Even when the transaction posed problems, the parties probably resolved the differences in many cases without considering the formal contract terms.

Despite the efficiency advantages of dealing in the form mode, the application of the mirror image rule to this type of transaction caused significant difficulty in individual cases. The drafters of the Uniform Commercial Code recognized the reality and utility of conducting business in the form mode. In section 2-207, they sought to recognize this world of forms and avoid the unexpected and inequitable results sometimes produced by the mirror image rule.

In a typical high-volume commercial transaction, a buyer’s purchasing agent sends a purchase order form to a seller that specifies essentials such as the nature, quantity, and price of the buyer’s desired purchase. The purchase order is usually replete with probuyer boilerplate provisions dealing with warranties, shipment, and the like. The seller, through its sales agent, re-

19. There is some indication that the drafters of the Restatement (Second) of Contracts intended to incorporate the philosophy of § 2-207. Comment a to § 59 states that "a definite and seasonable 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." RESTATEMENT (SECOND) OF CONTRACTS § 59 comment a (1981). This language closely tracks the language of § 2-207, indicating that the drafters may have intended to modify the common law mirror image rule. The textual sections of the new Restatement do not clarify this intention, however, although they do not preclude such an interpretation. For an excellent discussion of the extent to which the new Restatement parallels U.C.C. § 2-207, see Murray, The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 CORNELL L. REV. 735, 744–761 (1982).
20. See supra note 13.
receives the purchase order form and notes the important—that is, dickered—terms. If these dickered terms are agreeable, the seller responds with its own form that acknowledges or accepts the buyer's order, thanks the buyer for its business, and contains proseller boilerplate. It is, of course, extremely unlikely that all of the terms on the two forms exactly correspond. In fact, beyond the most basic terms of the purchase order and acknowledgment form, neither the buyer nor the seller is usually familiar with the contents of its own form. Further, neither the principals nor their agents typically focus their attention on the nondickered terms of the other party's form. When a dispute concerning performance (or nonperformance) by either or both parties results in actual or threatened litigation, the parties must scrutinize the terms of their contract. The content of the respective forms then becomes crucial and section 2-207 must be applied.

The following examples give a rough idea of the operation of section 2-207. A buyer seeks widgets from a seller and sends the seller its purchase order. The reverse side of this form contains numerous provisions in addition to those governing price, quantity, and shipment. However, it contains no term dealing with the subject of arbitration. The seller receives the buyer's purchase order, agrees to the number of widgets and their price, and responds with an acknowledgment form to the buyer. The seller's form contains a provision providing for arbitration in the event of any disputes. After the seller ships the goods and the buyer accepts, a dispute arises and the buyer threatens litigation. In response, the seller points to the provision on its form and demands arbitration.

Under section 2-207, the seller's acknowledgment form operates as an acceptance because it is "[a] definite and seasonable expression of acceptance." The presence of the arbitration provision on the seller's form and the absence of one on the buyer's form does not alter this conclusion; section 2-207(1) states that a definite and seasonable expression of acceptance operates as an

21. See Non-Contractual Relations, supra note 11, at 59; Incipient Unconscionability, supra note 2, at 609.
22. See supra notes 12-17 and accompanying text.
23. U.C.C. § 2-207(1).
24. But see Roto-Lith Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962). In this infamous case, the court held that a disclaimer of warranties in a seller's acknowledgment form precluded the form from operating as an acceptance because it materially altered the terms of the purchase order. Id. at 498. The reasoning of the court was obviously contrary to the policy of § 2-207. To say that commentators widely criticize this case is a monumental understatement.
acceptance "even though it states terms additional to . . . those offered . . . ."\textsuperscript{25} Inasmuch as the forms agree on the basic dickeled terms and the seller otherwise appears willing to perform, a contract exists between the parties. Because both parties are merchants, the arbitration provision becomes part of the contract under section 2-207(2) unless: (1) the buyer's offer expressly limits acceptance to its own terms; (2) the provision \textit{materially} alters the contract; or (3) the buyer notified the seller of its objection to the arbitration provision.\textsuperscript{26}

In the present example, (1) and (3) are not applicable. Whether the arbitration provision becomes part of the contract depends upon its materiality. As courts in most jurisdictions would consider such a term material, it probably would not become part of the contract.\textsuperscript{27} Note, however, that if the arbitration provision is considered to be an immaterial addition to the contract, it would become part of the contract.\textsuperscript{28}

A variation of the example arises if the buyer's offer expressly limits acceptance to the terms of the offer.\textsuperscript{29} In that event, the additional term on the seller's form—the arbitration provision—does not become part of the contract since the buyer's offer does not mention arbitration.\textsuperscript{30} In this instance, the buyer successfully maintains control of its offer. While the Code does not explicitly require it, some commentators wisely suggest that language expressly restricting acceptance to the terms of the offer must meet the Code definition of conspicuousness to be effective.\textsuperscript{31}

\textsuperscript{25} U.C.C. § 2-207(1).
\textsuperscript{26} Id. § 2-207(2).
\textsuperscript{28} U.C.C. § 2-207(2)(b).
\textsuperscript{29} See id. § 2-207(1).
\textsuperscript{30} To hold credence, one must assume that the restrictive language in the buyer's offer permits the response to be an effective acceptance even though the offer contains an additional term. \textit{See infra} note 43.
\textsuperscript{31} \textit{See}, e.g., Barron and Dunfee, \textit{supra} note 2, at 191. "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." U.C.C. § 1-210(10). The position of these commentators is well taken and the history of the section supports it. \textit{See} ALI & NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, SUPP. NO. 1 TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS
II. The Scope of Subsection (3)

In the situations described above, section 2-207 operates with relative ease and efficiency. While certain problems exist, the application accomplishes the basic purpose of section 2-207—a binding contract exists when the parties reasonably expect it. The previous illustrations, however, assume that the offeree’s response constitutes a definite and seasonable expression of acceptance, thus forming a contract. On the other hand, if one cannot legitimately characterize the offeree’s response as an acceptance, it does not create a contract under 2-207(1).

The fact that the offeree’s response does not create a contract does not necessarily mean that a contract does not exist. Section 2-206 of the Code permits acceptance of an offer for prompt or current shipment by either prompt shipment of the goods or a prompt promise to ship. This principle is inapplicable only if the offer unambiguously indicates a particular mode of acceptance. Thus, if a seller-offeree receives a purchase order for current shipment and ships the goods without further communication, the act of shipment is an acceptance of the offer contained in the purchase order. The offeree’s shipment of the goods constitutes an acceptance of the offer, even if it sends a written response which does not act as an acceptance under section 2-207(1), so long as shipment occurs prior to or contemporaneously with the sending of the response. In fact, acceptance by shipment

of the Uniform Commercial Code § 2-207(4)(a), at 6 (1955) [hereinafter cited as Supplement No. 1].

While it is true that the underlying premise of § 2-207 is that the party receiving the form only reads the dickered terms, if limiting language is pronounced there is at least a reasonable opportunity for it to attract the attention of the offeree. In addition, the definition of conspicuousness does not preclude placement of language limiting acceptance to the terms of the offer on a printed form. The fact that § 2-207 was drafted to address the battle of the forms, and yet still allows the offeror to so condition its offer, supports this analysis.

32. For example, does § 2-207 permit different as well as additional terms on a response to become part of the contract under § 2-207(2)? While § 2-207(1) permits a response which contains either additional or different terms to operate as an acceptance, § 2-207(2), permitting terms on the response to become part of the contract despite their absence on the offer document, mentions only additional terms. While much commentary exists on this question, this issue appears to have little practical impact despite the restriction imposed by § 2-207(2)(b). See, e.g., J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 27 (2d ed. 1980); Barton & Dunfee, supra note 2, at 186-88.

33. U.C.C. § 2-206(1)(b).

34. Generally, shipment occurs when the seller delivers the goods to the carrier, the parties make a proper contract for their shipment, and the seller notifies the buyer of the shipment. See U.C.C. § 2-504.
of the goods may occur even if the response is mailed prior to shipment, so long as shipment precedes receipt of the response by the offeror.35

Section 2-207 has limited application to a contract formed by shipment of the goods. Since a contract already exists on the offeror's terms as a result of shipment, the offeree's written response is merely a proposal to modify the terms of an existing contract. As such, its terms can only become part of the contract under 2-207(2). Under 2-207(1), it is unnecessary to decide whether the written response was a definite and reasonable expression of acceptance, a counteroffer, or something else.36 Courts sometimes become unnecessarily mired in this difficult question when section 2-206 could provide a convenient escape.37

35. A rejection or counteroffer is effective only upon its receipt by the offeror, whereas the acceptance occurs at the time of shipment. See 1 A. CORBIN, CORBIN ON CONTRACTS § 90 (1963). If the offeror receives the goods prior to its receipt of the counteroffer, the counteroffer clearly has no effect. However, the result is opaque if the offeror receives the counteroffer prior to its receipt of the goods but after their shipment. Corbin suggests that the counteroffer should only vitiate an already existing acceptance when the offeror materially changes its position in reliance upon the counteroffer or rejection. Id. This result occurs infrequently since the offeror often receives notice of shipment before it receives the counteroffer. See U.C.C. § 2-504. Yet, the Restatement (Second) of Contracts suggests that if a counteroffer arrives prior to documentary acceptance, the acceptance is only effective as a counteroffer. RESTATEMENT (SECOND) OF CONTRACTS § 40 (1981). Quaere: (1) If acceptance occurs by shipment under § 2-206, does it "arrive" for purposes of the Restatement when the goods arrive or when notice of shipment arrives? Presumably, deeming that the arrival of notice of shipment constitutes acceptance serves the policy of protecting the offeror; (2) If a late arriving acceptance constitutes a counteroffer under the Restatement, is it a counteroffer on the offeror's terms or on the terms contained in the earlier arriving counteroffer? Both the Restatement and Corbin suggest that the acceptance constitutes a counteroffer on the offeror's terms. Id.; 1 A. CORBIN, supra, at § 90. This may cause problems if the offeree's counteroffer indicated that it shipped the goods only on the terms of the counteroffer.

36. See infra note 38.


An interesting variation exists when an offeror and offeree have had prior dealings. Suppose that each time the offeree ships goods to the offeror, it includes an acknowledgment form containing terms different from those on the offeror's form. Under these circumstances, does shipment of the goods still form a contract on the offeror's terms even though the offeror has had numerous opportunities to become aware of the variant terms on the offeree's form?

Shipment of the goods can create a contract, but it is not a contract formed on the offeror's terms. Rather, the continual receipt of goods accompanied by a variant acknowledgment precludes the offeror's reasonable expectation that shipment of the goods indicates assent to the offeror's terms. This author would find the terms of the contract on the basis of § 2-207(3). The course of dealing between the parties indicates that neither is contracting with reference to the forms and neither should expect its terms to control. Thus, the contract has its foundation in the acts of the parties, rather than in their documents.
When no acceptance occurs prior to the offeror's receipt of the offeree's written response, it becomes necessary to determine the nature and legal effect of the response. Under traditional contract law, a response that is not an acceptance would probably be either a flat rejection or a counteroffer. Nothing indicates that the Code drafters intended section 2-207 to change this result. Section 2-207 does, however, avoid the presumption of counteroffer inherent in the mirror image rule where a response merely contains additional or different terms. Yet, there is no evidence that the drafters intended to eliminate entirely an offeree's ability to make a counteroffer, even when parties conduct a transaction through the exchange of printed forms.

Under some circumstances, the offeree's form might constitute a counteroffer. The offeror, as "master of the offer," can stipulate the manner in which the offeree can accept. Under the Code, if the offer does not unambiguously indicate otherwise, it invites "acceptance in any manner and by any medium reasonable in the circumstances." But if an offeror unambiguously indicates an exclusive manner or medium of acceptance, no acceptance results unless the offeree accepts in the stipulated manner. For example, the offeror can stipulate that acceptance be only by a writing that explicitly accepts all of the offeror's terms and adds no others. Alternatively, the offeror could require that the offeree

The terms on which the forms agree are part of the contract as are terms provided by the Code, usage of trade, course of dealing, and course of performance. See U.C.C. § 2-207(3); infra note 175.

38. An offeree might also respond in a way that is neither a rejection nor a counteroffer—it may merely indicate its interest in the offer to the offeror. This Article does not concern itself with this response as it rarely occurs in a transaction involving a battle of the forms.

39. In fact, there is evidence that the drafters revised the section specifically to preserve this ability. In the Code hearings conducted by the New York Law Revision Commission, Karl Llewellyn, the principal architect of the Code, stated the following about § 2-207: "[W]e were attempting to say, whether we got it said or not, that a document which said, 'This is an acceptance only if the additional terms we state are taken by you' is not a definite and seasonable expression of acceptance but is an expression of a counteroffer." STATE OF NEW YORK, 1 REPORT OF THE LAW REVISION COMM'N FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 181 [hereinafter cited as 1954 LAW REVISION COMMISSION REPORT].


41. U.C.C. § 2-206(1)(a).

42. See id. § 2-206 comment 1.

43. It is important to distinguish this situation from one in which an offer expressly limits acceptance to the terms of the offer. The latter situation is governed by § 2-207(2)(a).
sign and return the offeror's form without any additions or changes. If the offeree does not respond in the required manner, but does not flatly reject the offer, the response can act as a counteroffer.\footnote{An offer which expressly limits acceptance to the terms of the offer does not indicate a particular manner or medium of acceptance. Under U.C.C. § 2-206(1)(a), any reasonable manner or medium of acceptance is sufficient, and under § 2-207(1) an expression of acceptance concludes a contract even if it contains terms in addition to or different from those in the offeror's form. Because of the express limitation, such an acceptance results in a contract on the offeror's terms only, despite the additional or different terms on the offeree's form. Professors White and Summers recognize the distinction between the two situations which others often overlook. J. White & R. Summers, supra note 32, at 33.}

Even if the offeror does not stipulate a particular manner of acceptance, the offeree's response may still be a counteroffer and thus fail to create a contract. For example, a seller may respond to a buyer's order form by indicating that it cannot accept the order on the buyer's terms, but then proceed to offer different or additional terms. If rejection is by clear and unambiguous language, no contract results from the exchange of correspondence.\footnote{Nevertheless, scholars differ sharply about the result when the seller later ships the goods and the buyer accepts them without further communication between the parties. Compare Incipient Unconscionability, supra note 2, at 620–21 (§ 2-207 does not change the common law result that acceptance of goods constitutes acceptance of seller's counteroffer), with Barron & Dunfee, supra note 2, at 179 (§ 2-207(3) changes the pre-Code rule, and the contract consists of terms on which the offer and response agree, together with supplementary Code terms).}

The seller may also make acceptance expressly conditional on the buyer's assent to the additional or different terms. If so, no con-
tract exists under 2-207(1). Further, the mere fact that a form used in many transactions by the offeree contains the counteroffer should not, by itself, preclude the response from acting as a counteroffer.

Assume, for example, that a buyer orders 1000 widgets from a seller at $5.00 each. The seller responds with an acknowledgment form that accepts the dickered terms of the offer (price, quantity, delivery date) but contains additional terms and makes acceptance expressly conditional on the buyer's assent to those terms. Under section 2-207(1) no contract results, assuming that the court gives effect to the conditional assent language.

Suppose, however, that despite the failure of the writings to create a contract, the seller ships the goods and the buyer accepts and pays for them. Then, after delivery and payment, the buyer encounters difficulties relating to the quality of the goods. What are the warranty terms of the contract if the buyer's form contains broad warranty provisions, while the seller's form contains a disclaimer of warranties? Superficially, the answer appears simple; section 2-207(3) seems to address this contingency directly:

(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 provi-

46. A difficult question under § 2-207(1) is whether a response constituting a definite and seasonable expression of acceptance can also be expressly conditional on the offeror's assent to any different or additional terms. Section 2-207(1) states that "[a] definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." U.C.C. § 2-207 (1) (emphasis added). This language is subject to at least two different interpretations. The drafters may be merely illustrating one instance in which one cannot characterize an otherwise definite and seasonable expression of acceptance as such because it is expressly conditional. Alternatively, a definite and seasonable expression of acceptance containing the conditional language may remain a definite and seasonable expression of acceptance, but not "operate as an acceptance" to bind the parties legally. In other words, the drafters may have established a new category of response: the "conditional acceptance." This should be distinguished from a "nonacceptance" which is a response that is not a definite and seasonable expression of acceptance and does not contain language of conditional assent. See supra notes 38-46 and accompanying text.

Resolving this interpretational difficulty is important to a proper analysis of § 2-207(3). See infra text accompanying notes 164-68. The difference in interpretation, however, does not affect whether a contract exists upon an exchange of forms. Under both interpretations, the offeree's expressly conditional response does not "operate as an acceptance" and form a contract.
Applying subsection (3) to the example, the conflicting warranty terms drop out and the implied warranties of the Code govern the seller's responsibilities as to the quality of the goods.

A. Dean Murray's Position

Dean John Murray points out in two articles dealing with section 2-207 that the application of subsection (3) is not as simple as it first appears. In one article, Dean Murray poses the following hypothetical. Buyer sends a purchase order for 1000 widgets at $5.00 per widget. Seller responds in a writing which states:

"I must receive $7.00 each for my widgets, and I am willing to supply them on that basis. I realize that you need the widgets now and, therefore I am shipping them today. If you do not wish to pay $7.00 each for them, do not accept them when they arrive."

The widgets are then sent and accepted. Murray feels that the application of subsection (3) to determine the terms of the contract resulting from the conduct of the parties produces an absurd result. Applying subsection (3) to the hypothetical, the price term is neither $5.00 nor $7.00, but a reasonable price. Murray suggests that the better approach gives the seller the benefit of the last shot. The resulting contract should be on the seller's terms—the same result as under the common law.

Dean Murray's hypothetical, while somewhat unrealistic, is compelling. As he suggests, it seems absurd to believe that the drafters of section 2-207 intended subsection (3) to resolve this hypothetical. Yet this conclusion is not apparent from the language of subsection (3), which seems to apply equally to the Murray hypothetical and the warranty conflict example previously discussed.

47. U.C.C. § 2-207(3).
49. Intention Over Terms, supra note 2, at 335–36.
50. Id. at 337.
51. Id.
52. See supra text accompanying note 47. In both situations, the conduct of the parties, not the writings, establishes a contract. The seller shipped goods which the writings did not require it to ship and the buyer accepted goods which the writings did not require it to accept. The establishment of a contract by the conduct of the parties, rather than by their writings, is the only literal requirement of subsection (3).

Dean Murray argues that when an offeree makes a clear counteroffer, subsection (3) should not apply because the conduct of both parties did not form the contract. Rather, the
Dean Murray's articles provide valuable insight into the practical limitations of subsection (3) often ignored by other commentators. In addition, they establish a means for determining whether an offeree made a counteroffer and the effect of subsequent performance by the parties if a counteroffer was made. In the course of this analysis, Dean Murray attempts to delineate the proper boundaries of subsection (3). The end result is a methodology that departs little from the common law and gives an exceedingly narrow scope to subsection (3). This sharply contrasts with the view of a number of recent commentators who interpret the Code to give subsection (3) a very broad scope.

Dean Murray's analysis begins with the premise that the "critical assumption underlying [section 2-207 is that] there are certain undickered terms to which reasonable parties to a contract pay no attention." It then agrees that section 2-207 should permit an offeree's response to operate as an acceptance even though it contains terms different from or additional to those on the offeror's form, so long as the response is a definite and seasonable expression of acceptance. As to whether the response constitutes this expression of acceptance, Murray's analysis suggests that one should determine the issue from the perspective of a reasonable offeror receiving the response. That is, would a reasonable offeror receiving the response believe that a deal has been closed, or would he understand that the offeree will only proceed if the offeror assents to the additional or different terms? In the former case, a contract occurs upon the exchange of forms, whereas in the latter case, one does not. Responses that are not acceptances are

offeree's written counteroffer and the offeror's conduct in accepting the goods formed the contract. Incipient Unconscionability, supra note 2, at 626. This interpretation ignores the fact that without the conduct of the offeree in shipping the goods there would have been no goods for the offeror to accept. Further, there is no reason to limit the scope of the term "conduct" to nonexpressive conduct. Thus, the sending of the counteroffer constitutes conduct by the offeree which, when combined with the conduct of the offeror, forms a contract.

53. See, e.g., Barron & Dunfee, supra note 2, at 194–99, 201. Barron and Dunfee conclude that subsection (3) should apply when the offeree does not give a definite and seasonable expression of acceptance and shipment and acceptance of the goods later occurs. In reaching this conclusion, they do not consider problems of the type suggested by Dean Murray's hypothetical.

54. See infra text accompanying notes 133–41.

55. See, e.g., Taylor, supra note 2, at 441–42, 447.

56. Incipient Unconscionability, supra note 2, at 605.

57. Intention Over Terms, supra note 2, at 235.

58. Incipient Unconscionability, supra note 2, at 613.

59. Id. at 612.
either flat rejections or counteroffers. 60

Up to this point, Dean Murray's analysis is thoroughly conventional. Next, he considers the question of an offeree's reply form that appears to be a definite and seasonable expression of acceptance but contains the conditional language of 2-207(1). Murray strenuously argues that the presence of such language does not alter the analysis: "[T]he question remains, does such an offeror reasonably understand that the reply intends to close the deal, or should he understand the reply as a counter-offer?" 61 Murray believes that the analysis does not change because an acceptance effectively conditioned on assent to different or additional terms is simply not an acceptance. The presence of conditional language is simply one of many possible factors which indicate that a reasonable offeror receiving the offeree's form would believe that the parties closed a deal. If a reasonable offeror would believe a contract exists despite the existence of such language, the provision is given no effect and the exchange of forms creates a contract on the offeror's terms. However, if the language is sufficient, either alone or in conjunction with other circumstances, to lead a reasonable offeror to believe that a deal was not closed, the exchange of forms does not produce a contract.

The final stage of Dean Murray's analysis represents the most radical departure from the cases and scholarly analysis. To Dean Murray, if a reasonable offeror would consider a reply to be a counteroffer, either because of the conditional language or for some other reason, it is a counteroffer. 62 More importantly, it is a counteroffer that, in the usual case, the offeror accepts by its acceptance of the goods shipped by the offeree. 63 According to established contract doctrine, parties generally can accept counteroffers

60. Id. According to Murray, a response also may be "ambiguous." In this situation, § 2-207(3) would apply. See infra text accompanying notes 133-43.

61. Incipient Unconscionability, supra note 2, at 613. This conclusion is based on Murray's interpretation of the § 2-207(1) proviso. He maintains that the use of the term "acceptance" in the proviso is an "unfortunate phraseology." Id. at 610. To Murray, the term "reply" would be more accurate, since a response with a conditional assent clause may or may not operate as an acceptance, depending on the interpretation of the reasonable offeror. An effective conditional assent clause is not an acceptance but a counteroffer. Id. This stage of Murray's analysis differs from the approach of most commentators. The majority would give effect to conditional assent language and find that the exchange of forms did not produce a contract, at least when such language is conspicuous. See infra text accompanying notes 68-82.

62. Incipient Unconscionability, supra note 2, at 620.

63. Id.
FORMAL APPROACH TO SECTION 2-207 by performance as well as expression. Dean Murray sees no basis in section 2-207 or its history for believing that the drafters intended to change this result. He would not consider section 2-207(3) relevant to the analysis.

Dean Murray concedes that the decided cases provide little support for his analysis. In addition, there is virtually no support in the voluminous commentary on section 2-207. The cases and commentary are unusually consistent in concluding that section 2-207(3) substantially alters the common law theory that acceptance of a counteroffer can occur by acceptance of the goods.

B. The Commentary

No major treatise on the Code accepts the position that an offeree's response that otherwise looks like a definite and seasonable expression of acceptance, but contains the conditional language of section 2-207(1), must act either as an acceptance or as a counteroffer that the offeror can accept by performance. Professors White and Summers would clearly allow section 2-207(3) to govern such a case. Professors Hawkland and Nordstrom would apparently reach the same result, at least in some cases. Professors Duesenber and King would only enforce a conditional assent clause if it were conspicuous by Code definition; however, if the parties performed and the clause was conspicuous, subsection (3) would determine the terms of the contract. Professor Anderson would also apply subsection (3) in these circumstances, as would Professor Farnsworth. Law review commentary proceeds along similar lines. For example, Professor E. Hunter Taylor broadly applies subsection (3). Taylor believes that if an offeree ex-

65. Incipient Unconscionability, supra note 2, at 620-21.
66. Id. at 621-45.
67. This is true at least in situations where the exchange of forms fails to create a contract due to the presence of a conditional assent clause in the offeree's form.
68. J. White & R. Summers, supra note 32, at 34.
70. 3 R. Duesenberg & L. King, Sales & Bulk Transfers Under the Uniform Commercial Code § 3.06[3], [4] (1982).
72. E. Farnsworth, supra note 11, at 163-65.
73. See Taylor, supra note 2, at 441-42, 447.
pressly conditions its acceptance on the offeror's assent to the additional or different terms and the conditional assent clause is not conspicuous, a court might justifiably reach one of two results. It might determine that the conditional nature of the acceptance was "so ineffectively communicated as to be unconscionable and thus, inoperative." Thus, it would operate as an acceptance binding the offeree to all of the offeror's terms except immaterial additional terms, and perhaps immaterial different terms. Taylor, however, believes that a court would more likely give effect to the conditional assent clause, thus precluding the formation of a contract upon the exchange of forms. If the parties perform, subsection (3) would govern the content of the contract. Clearly, this result is quite different from that which Dean Murray would reach.

Where the conditional language of the acceptance is conspicuous, Taylor again reaches a result at odds with Murray's analysis. If Murray finds the conspicuous nature of the term sufficient to preclude an acceptance, it immediately becomes a counteroffer subject to acceptance by performance; i.e., the seller has the benefit of the common law last shot doctrine. Professor Taylor, however, would be very hesitant to allow the offeree the benefit of the last shot doctrine under these circumstances. As a general matter, where a conditional assent clause prevents contract formation, Taylor would rely upon subsection (3) to determine the substantive contract terms on which the writings differed if the parties subsequently performed. Only if the offeree conditionally accepts other than by standard form might Taylor willingly view it as a counteroffer subject to acceptance by the offeror's acceptance of the goods.

In their analysis of section 2-207, Barron and Dunfee also explore the problem of conditional acceptances. They suggest that courts should only enforce conspicuous conditional assent clauses. If, however, a court enforces such a clause, "the best the offeree can hope for is a nonpreferential contract to be formed under subsection (3)," unless the parties have actually bargained

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74. *Id.* at 439.
75. See supra note 32.
76. Taylor, supra note 2, at 439.
77. *Intention Over Terms*, supra note 2, at 343.
78. Taylor, supra note 2, at 440-41.
79. Barron & Dunfee, supra note 2, at 182-84.
80. *Id.* at 184.
and resolve the disagreement in their forms. Barron and Dunfee, like Taylor, support a broad reading of subsection (3).

The bulk of student and practitioner commentary contains the same analysis. Again, a number of the notes and comments suggest that a conditional assent clause must be conspicuous to be effective. But once a court gives the clause effect, the analysis is strikingly uniform. When the conditional assent clause exists in the context of an exchange of forms, subsection (3) governs the substantive terms of the contract.

C. The Cases

Numerous cases address conditional assent clauses and the interpretation and application of section 2-207(3) to such clauses. The earlier decisions adopted an approach similar to that suggested by the bulk of the scholarly commentary. Consequently, these cases were the primary targets of Dean Murray's strong criticism.

The initial section 2-207 cases which followed the infamous case of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, did not present the issue of the scope of section 2-207(3) in the context of conditional assent clauses. In *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, a buyer sent a purchase order to a seller for a conveyor system. The seller responded by returning an executed acceptance copy of the purchase order along with a letter predating its acceptance upon certain changes in the purchase order. The changes included a different, less comprehensive warranty clause and a clause limiting seller's liability for lost profits and consequential damages. Shortly after receipt of the letter, the buyer's treasurer telephoned the seller's representative to request only a change in the terms of payment contained in the seller's letter. By return letter, the seller agreed to this change. The buyer requested no other modifications.

The conveyor system failed to operate properly and a lawsuit ensued. The scope of warranty liability was a primary issue in the case. In deciding which correspondence controlled this question, the Seventh Circuit concluded that the seller's letter was an ac-

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81. See, e.g., *New Rules*, supra note 2, at 212; *Nonconforming Acceptances*, supra note 2, at 548.
82. See, e.g., *First Shot*, supra note 2, at 386; *New Rules*, supra note 2, at 213.
83. 297 F.2d 497 (1st Cir. 1962); see supra note 24.
84. 404 F.2d 505 (7th Cir. 1968), cert. denied, 395 U.S. 921 (1969).
ceptance expressly conditioned on assent to its terms.\textsuperscript{85} This effectively precluded the purchase order form from controlling.\textsuperscript{86} The court found that the buyer had \textit{impliedly} assented to the warranty and remedy terms of the letter by its failure to object to them when it had explicitly objected to the payment terms.\textsuperscript{87} Consequently, the warranty terms of the seller's letter prevailed.

Since the buyer had assented to the seller's additional or different terms, the court found no reason to apply subsection (3). The court did suggest that subsection (3) would have been the appropriate vehicle for determining the warranty and remedy terms if there had been a simple exchange of the purchase order and letter, and no subsequent events other than shipment and acceptance of the conveyor.\textsuperscript{88} This dicta in \textit{Construction Aggregates} is consistent with the commentary discussed earlier.\textsuperscript{89} The decision prompted Dean Murray to question why an expression of assent implied from the offeror's language results in a contract on the offeree's terms, whereas implied assent by conduct, through acceptance of the goods, would apparently result in a contract with terms governed by subsection (3).\textsuperscript{90}

The 1972 Sixth Circuit decision in \textit{Dorton v. Collins & Aikman Corp.}\textsuperscript{91} also failed to provide a definitive interpretation of the scope of section 2-207(3). Although the printed acknowledgment

\textsuperscript{85.} \textit{Id.} at 509. This determination brought the acceptance within the ambit of the last clause of § 2-207(1).
\textsuperscript{86.} \textit{Id.}
\textsuperscript{87.} \textit{Id.} at 510.
\textsuperscript{88.} \textit{Id.} at 509.
\textsuperscript{89.} See supra notes 68–82 and accompanying text.
\textsuperscript{90.} \textit{Incipient Unconscionability}, supra note 2, at 625–26. "To require a language acceptance of the counter-offer in order to make the terms of the counter-offer operative is not supported by the language of the statute . . . [and] would be antithetical to the pervasive values of good faith, reasonable commercial understanding and conscionability." \textit{Id.} at 626. For a discussion of Dean Murray's objection to the court's decision in \textit{Construction Aggregates}, see infra notes 158–61 and accompanying text.

One should note how distant the case is from a simple battle of the forms and therefore, difficult to use in determining the proper scope of subsection (3) as it applies in a typical context. First, the seller's response was not by form but by letter. Some writers suggest that this alone makes the application of § 2-207 unnecessary. Taylor, supra note 2, at 440, notes that letters differ substantially from printed forms and do not fit within the typical battle of forms situation to which the drafters primarily intended § 2-207 to apply. Second, the parties did not simply perform but directly communicated after the exchange of the offer and conditional acceptance. Finally, at least some of this communication was between persons of authority in the respective companies, rather than between lower level shipping and receiving employees, as in the usual § 2-207 case. See Taylor, supra note 2, at 441. None of this, however, resolves the question posed by Murray.

\textsuperscript{91.} 453 F.2d 1161 (6th Cir. 1972).
forms sent in response to oral offers stated that "[t]he acceptance of your order is subject to all of the terms and conditions on the reverse side," the court held that the offeree did not expressly condition its acceptance on the offeror's assent to the additional or different terms on the acknowledgment forms. Therefore, the responses operated as an acceptance, creating a contract under 2-207(1). The court then applied section 2-207(2) to determine if the additional or different terms became part of the contract. Like the Seventh Circuit in *Construction Aggregates*, the Sixth Circuit suggested in dicta that it would have been appropriate to apply subsection (3) to determine the terms of the contract if the offeree had expressly conditioned acceptance on the assent of the offeror. Again, Dean Murray voiced his strenuous objection to this suggestion.

Except for a New York trial court decision which reached a result consistent with the dicta in *Construction Aggregates* and *Dorton*, the cases shed little light on the issue of the scope of section 2-207(3) in the context of a conditional acceptance until 1977, when the Seventh Circuit decided *C. Itoh & Co. (America) v. Jordan International Co.* *Itoh* involved a classic battle of the forms with none of the complications of *Construction Aggregates* and *Dorton*. Moreover, the court could not avoid the issue of the application of section 2-207(3) where the offeree's response was a conditional acceptance.

*Itoh* (the buyer) submitted a purchase order for steel coils to Jordan (the seller). The seller responded with an acknowledgment form containing on its face a provision stating: "Seller's acceptance is, however, expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify Seller at once." The acknowledgment form contained a provision for arbitration on its reverse side. The buyer neither expressly assented nor objected to any terms on the seller's form. After delivery and acceptance, the coils were discovered to be defective. The buyer brought suit and

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92. *Id.* at 1164.
93. *Id.* at 1168.
94. *Id.* at 1169 n.6.
95. *Incipient Unconscionability*, supra note 2, at 634.
97. 552 F.2d 1228 (7th Cir. 1977).
98. *Id.* at 1230.
the seller sought a stay pending arbitration, as required by its clause.

The court concluded that the language in the acknowledgment form was an acceptance expressly conditioned on the offeror's assent to the additional or different terms on the acknowledgment. As a result, the acknowledgment form operated as a counteroffer. Contrary to common law, however, the acceptance of the goods did not constitute an acceptance of the counteroffer. Rather, since the exchange of forms did not create a contract, the court held that section 2-207(3) operated to create one as the parties' conduct recognized the existence of a contract. As required by subsection (3), the terms of the contract were those on which the writings agreed, together with the terms supplied by the Code.

Itoh is consistent with the suggestions of Construction Aggregates and Dorton. In an analysis of the effects of its holding, the court concluded that its interpretation resulted in no unfairness to either party. This interpretation also permits the offeree to make an informed and reasoned response to an offeror's order. In short, it provides both fairness and predictability. Significantly, Dean Murray hardly questioned the opinion on either of these grounds.

Since Itoh and the publication of Dean Murray's articles in

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99. Id. at 1235.
100. Id. at 1236.
101. No analysis differs more from Dean Murray's than the one advocated in Itoh. Consequently, he strongly criticizes Itoh as the "denouement" of the misguided approach suggested by dicta in Construction Aggregates and Dorton. Incipient Unconscionability, supra note 2, at 635–39. According to Murray, the court did not consider whether Itoh actually read and understood, or should have read and understood, the conditional nature of the acceptance. It also failed to discuss why the conditional language was sufficient to make the response a counteroffer. Also absent was a discussion of why Itoh's performance was not a reasonable mode of accepting the alleged counteroffer. Murray feels that a discussion of these issues is necessary for a proper analysis. Id. at 638.
102. 552 F.2d at 1237–38. The court reasoned that a seller's use the conditional language of § 2-207(1) preserves its ability to walk away from the transaction if the buyer does not expressly assent to its terms. The seller's response to the offer is ambiguous if it ships the goods without such express assent. The court stated that it should not reward the seller for injecting ambiguity into the transaction by incorporating its additional terms into the contract. If the terms are crucial, the seller should defer shipment until the parties can reach a final agreement. Id.

While this reasoning is generally sound, the court did not explain why the response form and shipment of the goods together created an ambiguous response. Dean Murray's hypothetical certainly suggests that a seller who responds with a counteroffer but soon thereafter ships the goods does not always respond ambiguously. See supra notes 49–51 and accompanying text. Also, the court never considered why the express assent of the offeror was necessary for acceptance of the counteroffer. Neither the text of § 2-207 nor the common law imposes this requirement. See supra note 9 and accompanying text.
1969 and 1978, courts have decided 2-207 cases in a manner consistent with *Itoh*. Uniroyal, Inc. v. Chambers Gasket & Mfg.* is a case very similar to *Itoh*, illustrating the same mode of analysis. The buyer (Chambers) mailed a purchase order to the seller (Uniroyal) for material to make gaskets. The seller returned an acknowledgment form stating: "‘OUR ACCEPTANCE OF THE ORDER IS CONDITIONAL ON THE BUYER’S ACCEPTANCE OF THE CONDITIONS OF SALE PRINTED ON THE REVERSE SIDE HEREOF. IF BUYER DOES NOT ACCEPT THESE CONDITIONS OF SALE, HE SHALL NOTIFY SELLER IN WRITING WITHIN SEVEN (7) DAYS AFTER RECEIPT OF THIS ACKNOWLEDGMENT.’" The reverse side of the form contained a warranty disclaimer. The buyer neither expressly assented nor objected to the seller's acknowledgment. The material proved to be defective. Chambers was sued by its buyer and sought indemnification from Uniroyal for breach of warranty.

The court found that the acknowledgment form constituted an acceptance which was expressly conditional on the buyer's assent to the additional terms.* Thus, the exchange of forms did not create a contract. Since the record revealed no manifestation of the buyer's assent to the terms on the seller's form, only the performance of both parties could create a contract.* The court held that the seller's shipment of the goods and the buyer's acceptance constituted sufficient performance to establish a contract, with the terms being those agreed upon by the parties and those supplied by the Code, as mandated by section 2-207(3).*

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104. *Id.* at 510, 380 N.E.2d at 573.
105. *Id.* at 516, 380 N.E.2d at 577.
106. *Id.* at 518, 380 N.E.2d at 578.
107. *Id.*

In two recent cases, an Illinois appellate court applied an analysis consistent with *Itoh* and *Uniroyal*. However, the decisions carry diminished precedential force because both concluded that subsection (3) determines the terms of a contract when shipment and acceptance of goods follows a conditional acceptance, either in dicta or as an alternative holding. See *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 347-48, 408 N.E.2d 1041, 1048 (1980) (alternative holding); *Tecumseh Int'l Corp. v. City of Springfield*, 70 Ill. App. 3d 101, 105, 388 N.E.2d 460, 463 (1979) (dicta). *Album Graphics* is a particularly interesting illustration of how these cases differ from Dean Murray's analysis. In that case, plaintiff had ordered glue from defendant. Defendant sent the glue accompanied by invoices which disclaimed implied warranties and included the following language: "If the buyer does not accept our products on these terms, they are to be returned at once, unopened." 87 Ill. App. 3d at 341, 408 N.E.2d at 1044. Plaintiff used the glue, which turned out to be defective, and then sued for breach of express and implied warranties.
Similarly, in the recent case of *Leonard Pevar Co. v. Evans Products Co.*, the court concluded that subsection (3) governed the terms of the contract and, effect to a conditional assent clause in the seller's form. In this case, the buyer had sent a purchase order form for plywood which contained no language concerning warranties. The seller responded with an acknowledgment form disclaiming the implied warranties of merchantability and fitness, and severely limiting the buyer's remedies for breach of any express warranty. The acknowledgment form also contained language making acceptance expressly conditional on the buyer's assent to the terms contained in the form. Nonetheless, the seller shipped the plywood and the buyer accepted it. The plywood later proved to be defective and the buyer brought an action for breach of express and implied warranties. The seller defended based on the disclaimer in its acknowledgment form, arguing that the conditional assent language created a counteroffer which the buyer had accepted by its acceptance of the goods.

The court agreed that the exchange of forms did not produce a

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The appellate court accepted the trial court's finding that the invoice language was conspicuous by Code definition. *Id.* at 343, 408 N.E.2d at 1045. The court concluded that if no oral contract preceded the exchange of writings, the terms on the invoice "arguably" made acceptance expressly conditional on acceptance of the new terms and operated as a counteroffer. Then, if the parties went on to perform, thereby recognizing the existence of a contract, a contract would be formed with terms supplied under § 2-207(3). *Id.* at 347-48, 408 N.E.2d at 1048. The Code would include an implied warranty of merchantability as a supplementary term under § 2-314(1).

The case has some significant similarities to Dean Murray's hypothetical. *See supra* text accompanying note 49. In both situations, the seller responded to an offer by shipping goods and with a writing which provided additional or different terms. The seller specifically indicated that if the buyer did not agree to these terms, it should return the goods. Finally, the buyer accepted the goods in both situations. Dean Murray considers the application of subsection (3) to this fact pattern "absurd." *See supra* text accompanying note 50. Yet that is precisely what the court did in *Album Graphics*.

Admittedly, significant differences exist between Dean Murray's hypothetical and *Album Graphics*. In Murray's hypothetical, the new terms were sent by letter, rather than in an invoice accompanying the goods. For a discussion of the significance of this distinction, see Taylor, *supra* note 2, at 440. In *Album Graphics*, the court noted that the form's disclaimer was in small print. While these facts may justify different results in the two situations, one cannot ignore the crucial aspect of the court's analysis: the assumption that the invoice constituted a counteroffer. Once this assumption is made, the problem presented is essentially the same as Dean Murray's hypothetical—either the acceptance of the goods constitutes acceptance of the terms of the offeree's counteroffer, or subsection (3) governs the terms of the resulting contract. Although the assumption may have been erroneous, once it was made reconciliation of the approaches of the *Album Graphics* court and Dean Murray became impossible.

109. *Id.* at 723-24.
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contract,\textsuperscript{110} since the seller expressly conditioned its acceptance on the buyer's assent to the additional or different terms on its form.\textsuperscript{111} However, it rejected the argument that acceptance of the goods constituted acceptance of the counteroffer, stating:

The drafters of the Code, however, intended to change the common law in an attempt to conform contract law to modern day business transactions. They believed that businessmen rarely read the terms on the back of standardized forms and that the common law, therefore, unduly rewarded the party who sent the last form prior to the shipping of the goods. The Code disfavors any attempt by one party to unilaterally impose conditions that would create hardship on another party. Thus, before a counteroffer is accepted, the counter-offeree must \textit{expressly} assent to the new terms.\textsuperscript{112}

Instead, the court utilized subsection (3) to find the terms of the contract.\textsuperscript{113}

\textbf{D. Murray Revisited}

This author is unaware of any decided cases in which a court has adopted an analysis similar to Dean Murray's. Yet Murray's analysis and arguments are significant and interesting. Virtually no commentary, save perhaps one article,\textsuperscript{114} addresses the troublesome questions he raises. Murray is correct in his view that commentators and courts proceed on the basis of assumptions about 2-207 which they rarely acknowledge and virtually never support or defend. The examples in Murray's articles certainly indicate that one can interpret the language of section 2-207(3) to reach indefensible results.\textsuperscript{115} Dean Murray's approach also presents some very substantial problems which probably explain the failure of courts and other Code experts to accept it.

Dean Murray's method of applying 2-207 has some decided

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 729. The court indicated that the parties may have formed an oral contract prior to the exchange of forms.
\item \textsuperscript{111} The court gave effect to the conditional assent clause despite the fact that it was "on the reverse side of the acknowledgment and in boilerplate fashion." \textit{Id.} at 723. It neither discussed whether a reasonable offeror would have seen the language (the keystone of Murray's analysis), nor indicated concern over the apparent inconspicuousness of the clause when it decided that the language resulted in a counteroffer. If the decision in \textit{Itoh} raised Dean Murray's hackles, one can only imagine the effect of \textit{Leonard Pevar}.
\item \textsuperscript{112} \textit{Id.} at 728--29 (emphasis added).
\item \textsuperscript{113} \textit{Id.} at 730. For a recent case which apparently produced similar results, see Jostens, Inc. v. National Computer Sys., 318 N.W.2d 691 (Minn. 1982).
\item \textsuperscript{114} Taylor, \textit{supra} note 2. Since Professor Taylor's article preceded Murray's second article, he does not respond to all of Murray's arguments and concerns.
\item \textsuperscript{115} \textit{See supra} text accompanying notes 48--52.
\end{itemize}
advantages over the approaches suggested by other commentators and applied in the cases. It presents a principled means of resolving cases involving more than the mere exchange of printed forms which others assume section 2-207(3) does not govern, but which seem to clearly fall within its language. Furthermore, Murray bases his solution on section 2-207. Those who use approaches other than 2-207(3) offer the somewhat lame and generally unsupported excuse that section 2-207 may not govern nonform transactions.

Dean Murray’s approach is symmetrical and uncomplicated to apply. Its touchstone is a single, uncomplicated factual inquiry, from which all else flows with compelling logic. The difficult questions that those choosing the Itoh approach must confront disappear with the application of Murray’s method. For example, it is unnecessary to determine whether the transaction is a form transaction, or whether a “conditional acceptance” has a different effect than a “nonacceptance.” Dean Murray’s view is thus preferable solely on the basis of its simplicity.

Murray’s approach is a less significant departure from traditional contract doctrine than the positions taken by the courts and commentators. Although his interpretation of 2-207 accounts for the change in the common law mirror image rule, as the drafters intended, it does not alter the common law beyond the face of the provision itself. He finds “no legislative history or language in the section or comments to 2-207 which suggests” that 2-207 changed the law affecting true counteroffers. On the other hand, the varying approaches taken by other commentators substantially erode the well established common law rule that a party can accept a counteroffer, like any other offer, by performance as well as expression. In fact, some seem virtually to eliminate the rule by applying subsection (3) when the offeree’s response is a nonacceptance as well as when it is a conditional acceptance.

There are numerous advantages and arguments which support

116. For an example of this type of situation, see supra text accompanying note 49.
117. See, e.g., J. WHITE & R. SUMMERS, supra note 32, at 36–37; Taylor, supra note 2, at 440–41.
118. See supra note 46.
119. That is, it permits a response which contains terms additional to or different from those in the offer to operate as an acceptance. See supra text accompanying note 57.
120. Incipient Unconscionability, supra note 2, at 620–21.
121. See, e.g., Barron & Dunfee, supra note 2, at 184. “Yet, even if the offeree is successful in making a counter-proposal, the best the offeree can hope for is a nonpreferential contract to be formed under subsection (3) . . . .” Id.
Dean Murray's approach. Yet despite the powerful articulation of Murray's thesis, this author remains unconvinced that his methodology represents the proper approach to section 2-207 for many important reasons. Dean Murray's approach largely ignores the business reality that prompted the drafting of section 2-207. The drafters desired the Code and section 2-207 to reflect current business practices. One prevalent practice is the transaction of business by printed forms. Scholarly commentary articulates the advantages of form or standardized single-document contracts which are probably more applicable to contracts formed by separate offer and acceptance documents.

Standardized purchase and acknowledgment forms possess several economic advantages. They drastically reduce the costs of negotiating and drafting a separate agreement for every transaction. The ability to reduce such costs is particularly important to large firms engaged in many transactions with numerous parties. Minimally, the standard form enables the sender to specify a particular position on a problem. More importantly, the use of standard forms permits at least one of the parties, usually the offeree at common law, to insert collateral terms in an agreement at low cost, to which the other party would not object if the terms were the subject of actual negotiation. Under any reasonable reading of section 2-207, offerors are given a similar capacity. The use of forms also permits large, multicutomer firms to use lower level staff to conduct routine business. At a relatively low cost, these employees can be taught standard procedures for ordering or processing orders for materials and services. Perhaps the strongest proof of the economic advantages of form transactions is that prior to the adoption of section 2-207, reliance upon form orders

122. U.C.C. § 1-102(2)(b); see Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 623 (1975); Report of Committee on the Proposed Commercial Code, 6 BUS. LAW. 119, 126 (1951); Taylor, supra note 2, at 420.

123. See, e.g., Non-Contractual Relations, supra note 11, at 55, 58.


125. At common law, shipment and acceptance of goods following an offeree's response which contained additional terms would likely result in a contract on the offeree's terms. See supra note 9 and accompanying text. Section 2-207 provides that a definite and seasonable expression of acceptance containing additional or different terms results in an acceptance of the terms contained on the offeror's form. If the offeror successfully limits acceptance to the terms of the offer, even immaterial terms do not become part of the contract. The Code thus increases the likelihood that a contract may be formed on the offeror's terms.
by offerors apparently increased as firm size increased. This occurred despite the existence of the last shot doctrine which favored offerees. Dean Murray's approach neither recognizes this business reality nor accommodates the efficiencies which result from the use of forms. His approach would inquire in every case whether a reasonable offeror would believe that the offeree intends to close the deal by its response. If so, the response concludes the deal on the offeror's terms, subject to the possible addition of nonmaterial terms appearing on the offeree's form. Murray believes that this affects the intention of the parties. Yet an acknowledgment which a reasonable offeror believes closes the deal does not necessarily indicate the offeree's intent to accept all of the offeror's terms. The offeree simply may have chosen a form method, such as a conditional assent clause, to object to the offeror's nondickered terms, rather than objection on a costly, term-by-term basis. This is especially true when an offeree must process hundreds of different offer forms, each with its own fine print. Nevertheless, because in most cases it makes no difference whose form controls, the offeree's form and its subsequent conduct in shipping the goods indicate a willingness to proceed in the face of uncertainty. This willingness to proceed, however, should not militate against the offeree. The offeror, by its acceptance of the goods, displays a similar willingness to proceed despite the receipt of a form which it must know usually contains some terms additional to or different from the terms on its form. Like the offeree, however, it does not intend to be bound by the terms on the offeree's form.  


127. The fact that neither party intends to be bound by the terms on the other's form does not justify a conclusion that the parties did not intend to make a contract when they exchanged forms. Baird and Weisberg suggest that it is impossible to determine whether the parties intended to contract despite the difference in fine print terms, since the premise of section 2-207 is that parties are not aware that the forms contain conflicting terms. Baird & Weisberg, supra note 2, at 1237-40. This analysis is questionable for two reasons. First, most commercial actors are aware that the forms they send do not match the forms they receive. In fact, given the nature of modern day purchase and acknowledgment forms, it is highly unlikely that the boilerplate on the buyer's form would exactly match that contained on the seller's acknowledgment form. Therefore, it is unlikely that buyers and sellers would believe otherwise. See Non-Contractual Relations, supra note 11, at 60; Use and Non-Use of Contracts, supra note 11, at 24; supra note 13. Second, the relevant inquiry should be whether the parties intended to be bound, knowing that they were unaware of the terms on the other's form—not whether they would have intended to be bound had they been aware of the discrepancy in the fine print terms on the forms. Cf. U.C.C. § 2-
As noted by Professor Taylor, Murray’s approach proceeds as if one of the two documents fully represents the true intent of the parties, when neither document actually represents their intent (either subjective or objective). In today’s business environment, especially when dealing with large firms, each party knows that its form’s nondickered terms differ from those on most of the forms it receives. Moreover, each party is aware that its form contains a formal objection to the terms on the other party’s form. Dean Murray’s approach, however, tends to produce both a clear winner and a clear loser, even though both parties completed the transaction with almost certain knowledge that the forms did not agree. If the offeree’s response appears enough like a true counteroffer, all of the terms on its form become part of the contract under the last shot approach of traditional contract law. But if the response looks like an acceptance, a contract exists on the offeror’s terms, with the possibility of nonmaterial additions from the offeree’s form. This winner-takes-all approach seems inappropriate when the parties typically pay little attention to the boilerplate on either form and consequently do not expect their boilerplate to become part of the contract.

In addition, Murray appears to suggest that an appropriate finding of a clear counteroffer requires a nonform response. If this follows, then section 2-207 substantially erodes any economic advantages to the offeree of communicating and transacting in the form mode. An offeree that receives a large number of order forms from offerors should not have to make a phone call or send a telegram to avoid the potentially one-sided terms of the offeror’s form. In fact, offerees will not respond in this manner simply because it is too costly and time consuming to examine each form in minute detail and then object in a nonroutine manner, in the unlikely event that problems may result. An offeree should have the ability to respond in a manner that preserves its ability to avoid being bound by one-sided fine print terms on the offeror’s form, without delaying the transaction or incurring extra costs.

If, on the other hand, merely printing a conditional assent clause on a form is sufficient to constitute a clear counteroffer, the problem changes. One cannot expect an offeror, which may receive many different acknowledgment forms from many different

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204(3) (if parties intend to be bound, contract does not fail simply because they leave one or more terms open).
128. See Taylor, supra note 2, at 443-44.
129. Incipient Unconscionability, supra note 2, at 627-28.
offerees, to examine each form in detail to determine if a conditional assent clause exists, or if it objects to and is unwilling to proceed because of some provision on the offeree's form. Dean Murray recognizes this objection and it is one of his strongest criticisms of the decided cases. Yet a failure to accord some degree of effect to printed conditional assent clauses is a failure to recognize the essential similarity between the positions of the offeror and offeree. Both need an efficient, economical means to avoid being bound by unexpected, one-sided, or oppressive terms supplied by the other party; one which permits most transactions to proceed on the basis of disagreeing forms, yet avoids unfair surprise if a dispute arises later. The granting of the full status of a common law counteroffer to a form response containing a conditional assent clause precludes the offeror from achieving this objective. Not giving effect to a conditional assent clause denies the same advantage to the offeree. Thus, a rule which embodies either of these principles is inconsistent with the efficiencies of the form mode of contracting and contrary to the intention of the parties.

Ultimately, Dean Murray does not suggest a rule which never gives effect to a printed conditional assent clause or which always gives printed conditional assent clauses the effect of common law counteroffers. Rather, he returns to his basic test:

If the reply is a printed form which contains some language suggesting insistence on different or additional terms in the reply, courts are confronted with a determination of how that language would be understood by a reasonable offeror. . . .

As to each offeror who receives such a reply, the question remains, does such an offeror reasonably understand that the reply intends to close the deal, or should he understand the reply as a counter-offer?130

As suggested above, the simplicity of the inquiry is somewhat misleading. An offeror in today's business climate often knows, or should know, that the offeree's form is different from its form and that the offeree's form contains collateral terms which are favorable to the offeree and language which attempts to make its terms controlling. Nevertheless, the offeree's form indicates on its face a willingness to ship the goods and the offeror usually pays attention to nothing else. To say that an offeror in this position might reasonably believe that the parties closed a deal and that the offeree will ship the goods, is quite different from saying that, despite knowledge of the probable contents of the offeree's form,

130. Id. at 612–13; see supra text accompanying notes 61–62.
the offeror reasonably believes they closed a deal *on its* (the offeror's) terms. Yet this is precisely what occurs under Dean Murray's analysis if the offeree's form indicates that the parties closed a deal.

Further, the factual nature of the inquiry presents almost insurmountable problems of uncertainty which Dean Murray vaguely recognizes but makes little attempt to deal with. Business people often care less about the content of the legal rule than about having reliable knowledge of its implications. Since much of the Code and contract law is private law within the control of the parties, the ability to understand the law and predict results based on that understanding is crucially important. Yet Murray's analysis appears to be the antithesis of the desired certainty. To avoid inefficiencies and potential unfairness, Murray does not make the effect of an expressly conditional acceptance contingent upon whether the acceptance occurs on a printed form, although this might provide some degree of predictability. Even if the conditional assent clause is on a printed form, his central inquiry remains intact: would a reasonable offeree believe that the parties closed a deal? Murray describes this as a "difficult factual inquiry." He insists that the court assume the position of the reasonable offeror to determine whether the reply is a counteroffer or an acceptance. Since the inquiry is a factual one, however, the question is not one for the court at all. It is more likely that a jury will decide the question, as in negligence cases and others involving a reasonable person standard. To a large extent, this will preclude the development of a body of law which may help to predict results in future cases. An offeree who attempts to use its form to preclude any oppressive terms on the offeror's form will be forced either to forego the certainty that is so important or sacrifice efficiency by responding in a nonform mode which clearly indicates that its response is not an acceptance. Even then, the result is far from guaranteed.

Finally, Dean Murray's analysis gives an uncertain and questionable scope to section 2-207(3). Murray limits the application of section 2-207(3) to situations in which the writings are ambigu-

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131. One reason for this lack of concern is that unless the rule bestows inalienable rights upon one party, the parties can often bargain around it. In addition, if the law makes certain legal results contingent upon external circumstances within the control of the parties, they can control the results by controlling the circumstances.

132. *Incipient Unconscionability*, supra note 2, at 649.
ous, and the parties have performed despite the ambiguity.\textsuperscript{133} Although he provides some general discussions of where ambiguity might exist in the writings,\textsuperscript{134} he leaves the precise meaning of the term largely unexplored in the context of form contracts.

In one respect, ambiguity exists out of necessity in most situations involving section 2-207. After all, an offeree has responded to an offer with something other than a flat rejection or simple acceptance. Its response adds new or different terms to the offer and in all probability attempts to establish a contract on its terms. The offeree (usually the seller) often ships the goods despite the lack of congruity between the papers exchanged, and \textit{without word from the offeror}. The offeror, on the other hand, accepts the goods without ever resolving the problem which every experienced commercial actor should be aware of: the form it received does not match the one sent.

Of course, the offeree \textit{could} make it clear that its response is a counteroffer, and that it shipped the goods as an accommodation, but only on its terms. Further, the offeree \textit{could} plainly state that acceptance of the goods constitutes an acceptance of its terms only. In addition, the offeree \textit{could} accomplish this in a mode which insures that the offeror reads and understands it. This is unlikely to occur, however, for efficiency reasons. More realistically, the offeree probably responds by sending a form which superficially indicates that a deal has been struck. It also likely contains different printed terms from those on the offeror's form and language indicating the effect of acceptance of the goods, but it is unlikely that the form highlights either point. Finally, the offeree's form probably contains language limiting any resulting contract to its terms. This provision is also printed and the person processing the transaction will probably neither read nor understand it.

Nevertheless, the language of conditional acceptance may be considered "conspicuous" by Code definition.\textsuperscript{135} In addition, the offeror knows or should know that the offeree's form differs from

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 649–50.
\item \textsuperscript{134} \textit{Id.} Dean Murray also provides a short discussion and example of the application of subsection (3) in his \textit{Fordham Law Review} article, but this discussion is ultimately not very helpful. In fact, the example he uses to illustrate the proper application seems somewhat inconsistent with his entire approach to § 2-207. \textit{See Intention Over Terms}, supra note 2, at 377–38.
\item \textsuperscript{135} \textit{See supra} note 31 and accompanying text. While it is usually difficult to determine from the facts of the case whether a conditional assent clause was conspicuous, the facts of two recent cases suggest that the conditional assent language was conspicuous by Code
\end{itemize}
its own form and may even contain language which limits the contract to its terms. Nonetheless, the offeror accepts the goods. One could realistically describe this entire sequence of events as ambiguous. This factual pattern appears, with slight modifications, in numerous cases. If Dean Murray were to concede that it is ambiguous and therefore properly the domain of section 2-207(3), perhaps criticism of his approach misdirected. However, he probably would be unwilling to make this concession, as his thesis would lose much of its force. If Murray would apply section 2-207(3) rather than his analysis to this fact pattern, a classic battle of the forms, he would not be far from those he criticizes.

Presumably, considerable ambiguity would remain in the transaction if the conditional assent language was not conspicuous or did not track the language of 2-207(1). Dean Murray would be compelled virtually to concede his entire argument if he were to characterize this modified fact pattern as ambiguous. This is so because other commentators and perhaps the courts would also not apply subsection (3) in the even more extreme situation where a party has responded in a nonform manner and the counteroffer nature of the response is clear. Dean Murray further complicates the uncertainty problem by injecting a third category of response into the factual inquiry. Under this analysis, the reasonable offeror either interprets the offeree's response as a definite and seasonable expression of acceptance, a counteroffer, or an ambiguous response. Murray never states at what point a counteroffer is transformed into an ambiguous response, and an ambiguous response into an acceptance. Presumably, this is a question for the factfinder, but such an approach offers businessmen little future guidance. Further, adding a third type of re-


136. See 2 1954 LAW REVISION COMMISSION REPORT, supra note 39, at 1235; supra note 127.

137. This is likely to be the case if the offeror is aware that its own form contains such a provision.

138. See cases discussed supra in notes 96–113 and accompanying text.

139. Some cases suggest these requirements. See, e.g., Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972).

140. See J. WHITE & R. SUMMERS, supra note 32, at 36–37; Taylor, supra note 2, at 440-41; cf. E. FARNsworth, supra note 11, at 165.

response increases the likelihood of unpredictable results because more cases likely will be marginal.

Dean Murray does give one example of what he considers an ambiguous reply: where the response "may appear to be a counter-offer but it may still leave doubt as to whether an operative acceptance can be found through the acceptance of goods by the offeror." Murray apparently envisions a situation where it is unclear whether accepting the goods is a reasonable means of accepting the counteroffer. This is an almost impossible situation, considering the common law and particularly section 2-206 of the Code. At common law, courts almost always deemed the acceptance of shipped goods to be an appropriate means of accepting an offeree's counteroffer. In fact, this is the genesis of the problems caused by the last shot doctrine. Therefore, it is difficult to imagine what form this ambiguity might take, apart from something so unrealistic as a flat statement by the offeree that the offeror's acceptance of the goods may or may not constitute an acceptance of the offeree's terms. In addition, section 2-206(1)(b) states that unless unambiguously indicated otherwise, "an order or other offer to buy goods . . . shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt [shipment of the goods] . . . ." While section 2-206 does not deal with a seller's counteroffer, the policy behind the section indicates that acceptance of the goods constitutes an acceptance of an offer to sell, unless unambiguously indicated otherwise. Such an indication, however, by definition, removes the ambiguity that initially created a potential subsection (3) case for Dean Murray.

III. Section 2-207(3) and the Merits of Formalism

The Code history does not indicate that the drafters designed subsection (3) to deal solely with ambiguous responses. In fact, significant evidence exists that the drafters intended a much broader and different scope. This section explores the history of section 2-207 in detail. It also offers an analysis of section 2-207 which avoids some of Dean Murray's objections to the decided cases and remedies some of the disadvantages of his approach. This analysis is not necessarily the one intended by the drafters of section 2-207. As one scholar has noted, the history of section 2-207 is such that ascribing any intent to the drafters is bound to be

142. Incipient Unconscionability, supra note 2, at 649.
143. U.C.C. § 2-206(1)(b).
A futile exercise. The suggested approach is, however, certainly not inconsistent with either the language or the history of section 2-207. Furthermore, if adopted, it may lead to reasonable and principled decisions in most cases.

A. The Suggested Approach

A proper approach to section 2-207 and the appropriate application of section 2-207(3) requires a dual inquiry, rather than the single inquiry suggested by Dean Murray. The initial question is whether the offeree's response is a definite and seasonable expression of acceptance. A proper analysis must include this inquiry—section 2-207 demands it. The answer to this question depends on whether a reasonable offeror would clearly recognize the response as a rejection or a counteroffer, rather than an acceptance. Further, if the response is a counteroffer, a reasonable offeror must clearly recognize that any shipment of goods following the response is merely an accommodation, and that acceptance of the goods constitutes acceptance of the counteroffer.

This test differs from Dean Murray's in that the offeree must meet a higher standard to make a successful counteroffer that can be accepted by the offeror's acceptance of the goods. Anything less than a clear indication by the offeree that it has not accepted the offer is a definite and seasonable expression of acceptance. This approach considers an ambiguous response to be a definite and seasonable expression of acceptance. Since the offeree injected the ambiguity into the transaction by its response, it should bear the consequences. While no standard will eliminate all uncertainty, placing the burden on the offeree to insure that a reasonable offeror would clearly recognize its response as a counteroffer increases the degree of predictability. If an offeree intends to make a real counteroffer and almost concurrently ships

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145. To some extent, requiring the offeror to recognize clearly that acceptance of the goods constitutes acceptance of the counteroffer may be overkill. It seems justified, however, in the context of the battle of the forms. While this reverses the common law presumption that acceptance of the goods is normally a proper mode of acceptance, one must remember that the offeree fully controls its response. If the offeree truly believes that a term absent from the offer is essential to the contract, it can easily make it clear to the offeror that acceptance of the goods will constitute an acceptance of that term. Under the analysis suggested herein, unless the response clearly provides that it is a counteroffer and that acceptance of the goods will constitute an acceptance of all the offeree's terms, there is a definite and seasonable expression of acceptance under § 2-207(1).
the goods, it will probably leave the form mode of transacting. In fact, as a rule of thumb, satisfying the test suggested herein requires the offeree to direct a letter, telegram, or telephone response (rather than a form) to a person in the offeror's firm with authority to negotiate the terms of the contract. This reflects Dean Murray's example and confirms the appropriateness of his conclusion that subsection (3) should not control in such a situation.

This initial inquiry does not resolve one of the central difficulties with Dean Murray's analysis: how can an offeree efficiently protect itself from potentially one-sided or unexpected terms in the offeror's form? The answer is to allow the offeree to make a counteroffer in a form, but in a different manner than that suggested above. This is not, however, a counteroffer that the offeror can accept by acceptance of the goods. Rather, the offeree can only eliminate additional or different terms on the offeror's form by including a conditional assent clause in an otherwise definite and seasonable expression of acceptance.

By expressly conditioning its acceptance, the offeree can effectively preclude the formation of a contract based on certain terms on the offeror's form. If the goods are then shipped and accepted, however, the terms on the offeree's form do not govern the transaction. Rather, subsection (3) appropriately determines the substantive terms of the contract.

The essence of this approach is to distinguish counteroffers that can be accepted by the offeror's acceptance of the goods from

146. See supra text accompanying note 45.
147. This is merely a rule of thumb because, as Murray and others note, long term business relationships and word processing make it difficult to distinguish a form from a nonform. See Baird & Weisberg, supra note 2, at 1225-26 n.17; Incipient Unconscionability, supra note 2, at 639.
148. This does not suggest, however, that shipment and acceptance of the goods is the only way that the parties can recognize the existence of a contract by conduct. Shipment and acceptance of the goods, however, is the manner suggested in the comments to § 2-207. U.C.C. § 2-207 comment 7. While 2-207(3) requires conduct by both parties recognizing the existence of a contract, communication between the parties prior to shipment or acceptance often evidences recognition by both parties that a contract exists. For example, this could occur when the contract requires the seller to provide goods manufactured to the buyer's specifications. The courts' recognition of this should minimize the situations in which a party can renege on the grounds that the writings do not establish a contract, and thereby cause substantial injury to the other party. Normally, cases in which a party reneges before the conduct of both parties recognizes the existence of a contract occur in routine transactions in which the buyer can purchase elsewhere or the seller can resell the goods to avoid injury. In addition, this situation most often occurs early in the transacting process, reducing the likelihood of substantial injury.
those that cannot. The analysis involves two simple steps. The first step is to determine whether the offeree’s response is a definite and seasonable expression of acceptance. Again, the interpretation of a reasonable offeror is controlling. If the response is a clear counteroffer which indicates that acceptance of the goods by the offeror constitutes assent to all the terms of the counteroffer, then the latter terms govern the transaction if the goods are shipped and accepted. If the response is a definite and seasonable expression of acceptance, however, the second step is to determine whether the offeree expressly conditioned acceptance on assent to its terms. For the acceptance to be expressly conditional, it must contain language which tracks the conditional assent language of 2-207(1) and be conspicuous by Code definition. Otherwise, it constitutes an acceptance of the offeror’s terms, with the possibility of additional nonmaterial terms becoming part of the contract under section 2-207(2).

Requiring adherence to the statutory conditional acceptance language will produce certainty and efficiency. The offeree can print this language on a form just as easily and economically as other conditional language. Also, employing the statutory language will ensure that the exchange of forms does not create a contract. The offeror can easily train low-level personnel to locate the statutory language and establish routine procedures to handle forms that arrive containing this language. The offeror’s personnel need not concern themselves with reading and understanding all the fine print on every offeree’s form, unless such conditional assent language exists. Even then, such language can be safely ignored unless the offeror can be assured that material additions or changes to its offer proposed by the offeree’s form will not become part of a contract later formed by the parties’ performance.

An operative conditional assent clause must also be conspicuous by Code definition. Again, this will provide certainty without increasing the offeree’s costs. Although some commentators suggest that an offeror might not notice a conditional assent clause even if it is conspicuous by Code definition,149 conspicuousness at least enhances the offeror’s ability to spot the term and train low-level personnel to respond to it.

B. The Merits of Formalism

It is true that the proposed approach is quite formalistic. In

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149. See Barron & Dunfee, supra note 2, at 184; Taylor, supra note 2, at 440.
fact, reliance upon form is one of Dean Murray’s primary objections to the decided cases. This concern is particularly serious because of the Code’s bias against formalism and its emphasis on commercial reality. Why should courts interpret and apply section 2-207 in a manner contrary to the general thrust of the Code? The reliance on form is justified only when its advantages are unusually great or its dangers unusually small in a particular context. The battle of the forms presents such a context.

Generally, formalism enhances the predictability of the law. Predictability may be more important in commercial law than in other contexts. Predictability of legal results allows business people to plan more efficiently their affairs and reduces litigation costs to society. Nonetheless, a salient problem is that formal rules often achieve greater predictability at the expense of justice in the resolution of individual cases. For example, if an offeree satisfies the formal requirement of a conspicuous conditional assent clause, the exchange of forms does not form a contract, despite the fact that the offeror, unaware of the existence or the legal effect of the clause, assumed that a contract existed. Also, one might consider it unfair to allow the offeree to renege later simply because it complied with the formality of the conditional assent clause.

The fairness problem, however, is arguably insignificant in the context of section 2-207. Formalism does not necessarily lead to unfair results even if strictly applied. This is most often true when people can easily understand and follow the formal requirements and readily and economically attain awareness of them. When all or most of these criteria are present, the failure to follow the formality does not engender much sympathy. Indeed, the failure to consider the formality when planning one’s affairs, or the failure to learn about the formality, may approximate negligence and justify the harsh consequences. The nature and effect of a conditional assent clause is easy to understand, as it operates with certainty

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150. Incipient Unconscionability, supra note 2, at 637–38.
151. See Baird & Weisberg, supra note 2, at 1221-22; Danzig, supra note 122, at 621, 626–27.
152. See supra text accompanying and following note 124.
153. For an excellent discussion of the nature of formal rules and discretionary standards in the context of § 2-207, see Baird & Weisberg, supra note 2, at 1227–31.
and simplicity. It is easy to explain to a businessman that a conditional assent clause precludes contract formation and that the offeree can await the assent of the offeror or perform and have the gaps in the forms filled by the Code. Meeting the formal requirements is not expensive—the cost of printing a conditional assent clause on a form is hardly a significant expense. Finally, most business people appear to have the economic means to become informed about the required formalities and their effect, and comply with them.

In addition, the approach suggested in this Article places only limited reliance on formality. The essential issue of whether an offeree definitely and seasonably accepted an offer remains governed by a standard rather than a formal rule. This Article only suggests a formal rule to permit an offeree efficiently to preclude harsh terms on the offeror's form from becoming part of a resulting contract, while permitting the offeror efficiently to recognize the offeree's conditional assent.

The proposed formality poses far less potential for harsh results than the old mirror image rule. Unlike the latter rule, the suggested approach will never result in the offeree's imposing all of its terms, unless the offeror expressly assents to those terms or accepts the goods under circumstances which clearly imply that assent. In addition, the decided cases already suggest much of the formality inherent in this interpretation of section 2-207. For example, the Dorton case and others strongly suggest that language of conditional assent should closely track the language of section 2-207(1). Further, the cases almost uniformly treat the formal language of conditional assent in a manner similar to the one suggested here.

One should not uncritically assume that the Code drafters' justifiable reluctance to adopt formal rules is appropriate in the context of section 2-207. The drafters sometimes explicitly adopted a formal rule—witness section 2-316(2). It is very important to recognize that a formal interpretation of section 2-207 enables a court to insert reasonable terms when the parties do not express a mutual intent. In this respect, section 2-207 differs from other Code sections where the drafters avoided formal rules to accomplish the

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156. See supra notes 97–113 and accompanying text.
same result. \textsuperscript{157} Thus, this author's interpretation of section 2-207(3) does not ignore the Code drafters' generally felicitous desire to adopt a flexible approach oriented to business reality.

C. Support in the Code's Language and the History of Section 2-207

The suggested approach establishes, in essence, two kinds of counteroffers—one that can be accepted by acceptance of the goods and another that cannot. While this is a somewhat novel approach to section 2-207, \textsuperscript{158} the results of the decided cases clearly support it. The cases only lack the analytical foundation and justifications this Article seeks to provide. Furthermore, the Code's language and the history of section 2-207 support the proposed interpretation.

Section 2-206 provides that an offer to make a contract is to be construed as inviting acceptance in any manner and by any medium \textit{reasonable under the circumstances}. While the section speaks in terms of offers, it seems equally applicable to counteroffers. Through negative implication and common sense, means which do not reasonably communicate acceptance under the circumstances do not operate as acceptances.

Section 2-206 permits the distinction between the two types of counteroffers suggested in this Article. If the counteroffer is not a definite and seasonable expression of acceptance, acceptance of the goods by the original offeror seals the contract on the offeree's terms. Acceptance of the goods is clearly a reasonable mode of acceptance under these circumstances. If the offeree's response is

\textsuperscript{157} See U.C.C. §§ 1–203 (obligation of good faith); 2-302 (unconscionable contract); 2-305 (open price term); 2-609 (adequate assurance of performance).

\textsuperscript{158} Commentators suggest that a response which is not a definite and seasonable expression of acceptance may merit different treatment than an acceptance which the offeror makes conditional on the offeree's assent to the additional terms. They have, however, either concluded that such a distinction is meritless or failed to develop the idea significantly. See E. Farnsworth, supra note 11, at 165; Barron & Dunfee, supra note 2, at 194–97. Professor Farnsworth comments:

The offeree who wishes a contract on his own terms might flatly reject the offer and make a counteroffer of his own. By not making any "expression of acceptance" under subsection (1), he has arguably avoided UCC 2-207 altogether and so is not bound by subsection (3). Subsequent performance by the original offeror ought in that case to be taken as an acceptance of all the terms of the offeree's counteroffer.

E. Farnsworth, supra note 11, at 165. Professor Farnsworth concludes that subsection (3) governs when the offeree responds with an acceptance expressly conditional on assent to the additional or different terms. Id. at 163–65. Without further discussion, he suggests a similar analysis to the one suggested by this author.
not clearly a counteroffer, but contains a conspicuous conditional assent clause, acceptance of the goods establishes a contract, although not on the offeree's terms. In this case, accepting the goods is not a reasonable mode of acceptance of the counteroffer. Rather, a contract results because the conduct of the parties recognizes the existence of a contract. Under subsection (3), the terms of the contract are those on which the writings agree, plus supplementary terms provided by the Code.

This analysis has a foundation in the history of the Code, although it may not reflect the drafters' intended interpretation. The history of section 2-207 often indicates that the drafters intended it to deal primarily with transactions based on an exchange of forms, rather than transactions which take place outside a form context. For instance, when section 2-207 underwent substantial modification in 1954, the drafters gave the following reason for the modification:

*In order to make the battle of the forms rule work* in a business sense, there first has to be a distinction drawn between offers which contain form clauses and those which do not, and, secondly, the conflict of forms must be arranged in a business-like way when the parties are clearly engaged in a deal even though the form situation has not yet been clearly ironed out.

In addition, the transcripts of the New York Law Revision Commission's hearings on the U.C.C. contain continual discussion of the operation of section 2-207 in the context of an exchange of printed forms, as contrasted with the type of example posited by Dean Murray. These comments provide a substantial historical basis for believing that the drafters designed section 2-207 with form transactions in mind. Thus, a reasonable basis exists for a general requirement which both the commentators and the present analysis suggest as a rule of thumb: an offeree must make a

159. This situation is somewhat analogous to the rule that an offeree generally cannot accept an offer by silence, even if it states that silence constitutes acceptance. Silence of the offeree is not a reasonable mode of acceptance since the offeror should recognize that silence may indicate something other than acceptance of the offered terms. See 1 A. CORBIN, *supra* note 35, at 306, 310. Similarly, the acceptance of goods may not reasonably indicate to a counterofferee that the original offeror accepted all of the terms of its response form when that response form is only a counteroffer, rather than an acceptance, because of the presence of a conditional assent clause. That is, the counterofferee should be reasonably aware that the original offeror probably has not read every fine print term on the response, and therefore should not be able to infer assent to the terms from acceptance of the goods.


162. It is suggested as a rule of thumb rather than a strict rule since an offeree may
counteroffer in a mode other than by return of a printed form for it to be subject to acceptance by an offeror's acceptance of the goods.

The 1954 supplement to the Code contains provisions which illuminate and support the suggested analysis. Section 2-207 of the 1954 supplement provides:

(4) When a written offer is accompanied by form clauses prepared by the offeror, a definite and seasonable expression of acceptance operates as an acceptance even though it contains form clauses additional to or at variance with those of the offer, unless either
(a) the offer conspicuously makes its acceptance conditional on the offeree's agreement to any specified one of its form clauses or to all of them; or
(b) the expression of acceptance conspicuously makes its own operation conditional on the offeror's agreement to any specified one of its form clauses or to all of them.

(5) Even though by reason of such conspicuous conditions as are described in subsection (4) a contract fails by reason of such exchange of writings, yet conduct by both parties which recognizes the existence of an agreement about the subject-matter is sufficient to establish the fact of agreement. In such case the terms of the particular agreement consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under either the next subsection or any other provisions of this Act.

The conditional nature of a conditional acceptance must be conspicuous to be given effect under this version, otherwise it simply operates as an acceptance. Unless the requirement of conspicuousness was intentionally deleted to make nonconspicuous acceptances effective, the Code history supports such a requirement. Further, it seems unlikely that current section 2-207's lack of an explicit requirement of conspicuousness indicates an intention that such a requirement not exist. More importantly, the 1954 supplement's counterpart to current subsection (3) applies only to contracts that fail because of the presence of a conspicuous conditional clause, and does not apply to all cases where an exchange of writings fails to establish a contract. This indicates

make a counteroffer on a printed form which may be accepted by acceptance of the goods, provided that the offeree would clearly recognize it as an acceptance. Cf. supra note 147.

Professor Taylor relied upon this prior draft of § 2-207 to support an even broader reading of subsection (3) than this Article suggests. See Taylor, supra note 2, at 444.

Supplement No. 1, supra note 31, § 2-207(4)-(5), at 6 (emphasis added).

E.g., when a response is a clear counteroffer for which acceptance of the goods constitutes a reasonable mode of acceptance.
that the drafters intended subsection (5) of the supplement to apply to a response that otherwise looks like an acceptance rather than a counteroffer, but contains conspicuous language of conditional assent. The present 2-207(3) should be given this interpretation.

The present version of section 2-207 differs substantially from the 1954 supplement draft. Therefore, it is possible that the language and operation of the supplement is of little relevance to an interpretation of section 2-207 today. One should not interpret the changes in this manner for the following reasons. First, when the drafters revised the text of section 2-207 to substantially its present form in 1956, the reason for the revision was "to express more clearly what was intended."\(^\text{166}\) Professor Taylor probably correctly states that it is at least a fair conclusion that the intended meaning of the 1954 version carries over into the current version.\(^\text{167}\) Second, Professor Pasley’s analysis for the New York Law Revision Commission indicates that "[s]ubsection (3) of the [present version] reintroduces subsection (5) of the Supplement No. 1 version of Section 2-207, with the omission of the introductory language."\(^\text{168}\) While Professor Pasley’s analysis is not definitive, it was advanced at approximately the time of the revision and gives no indication that the revision intended to change the purpose and operation of the section. Third, the syntax of the earlier version and the present version of section 2-207 indicates that nonacceptances and conditional acceptances are two different things. Section 2-207(1) indicates that a definite and seasonable expression of acceptance operates as an acceptance unless the offeree makes acceptance expressly conditional on assent to the additional or different terms present in its form. Thus, the phraseology of section 2-207 indicates that a response can be a definite and seasonable expression of acceptance, and simultaneously be expressly conditional.

Dean Murray calls the term "acceptance" in the subsection (1) proviso "misused" and "unfortunate" since it intends to describe a counteroffer.\(^\text{169}\) Dean Murray overstates the case. Based upon the section’s historical development, the use of the term "acceptance"

167. Taylor, supra note 2, at 444-45.
169. Incipient Unconscionability, supra note 2, at 610. See supra note 61.
at least makes some sense, even if it does not provide great clarity or accord with traditional contract doctrine. Contrary to Dean Murray’s analysis, a conditional acceptance does not describe any counteroffer. It describes a particular kind of counteroffer—a response that otherwise looks like an acceptance, but contains the conditional language suggested by the Code. Indeed, the present section 2-207 suggests that it contemplates two different kinds of counteroffers, and the history of the Code indicates that its drafters meant subsection (3) to apply only to the kind containing the language of conditional assent.

This history does not provide conclusive support for this Article’s approach. It does, however, provide some support and a response to those who might suggest that this analysis essentially creates a new 2-207 which has little to do with the present text. It is noteworthy that other commentators¹⁷⁰ and some cases¹⁷¹ suggest that 2-207 contemplates two separate categories of response. It must be conceded, however, that the language and history of section 2-207 reasonably admit of interpretations which differ from the one suggested herein. Therefore, the ultimate justification for the approach must be functional.

D. Accommodating Fairness, Predictability, and Efficiency

This Article’s approach is one that substantially accommodates the principles of fairness, predictability, and efficiency. The approach promotes efficiency by permitting continuation of the efficient form mode of operation without creating potentially harsh and unexpected consequences for either party. It permits an offeree to prevent efficiently any terms appearing on the offeror’s form from operating in a harsh, oppressive, or unexpected manner.¹⁷² To do so, the offeree must sacrifice the additional or different terms on its form that may be oppressive to or not expected by the offeror, unless the latter expressly assents to those terms. The offeree can, of course, demand such assent before performing. In certain instances, it can simply choose not to contract by the use of

¹⁷⁰ See, e.g., Barron & Dunfee, supra note 2, at 177–78.
¹⁷² The offeree probably will not be subjected to any unexpected or oppressive terms because subsection (3) provides that the Code supply terms when the parties’ forms do not agree; it is unlikely that such terms will be unexpected or oppressive.
printed forms. The offeree will then not be bound by terms to which it has not agreed. Alternatively, the offeree may choose to make all or a portion of its sales in the form mode, but with a conspicuous conditional assent clause. It can thus ensure that oppressive or unexpected terms in the offeror's form will not become part of the contract. In addition, the offeree will know that the substantive terms of any contract resulting from the parties' performance will be those upon which the parties agreed and those supplied by the Code (presumably fair to both offeror and offeree). The offeree will also have the efficiency advantages of operating in a form mode, but not the advantage of any terms in its form neither contained in the offeror's form nor supplied by the Code. It will risk, however, that the offeror will reject the goods, which leaves the offeree with no contractual basis for recovery. In short, the offeree can make an informed choice of a method of doing business, knowing that regardless of the method chosen it will operate in a reasonably certain world.

Conversely, this approach protects the original offeror, who does not read in its entirety every form that appears to be a definite and seasonable expression of acceptance, from the potentially unfair and surprising results of the last shot doctrine. The offeror may continue to operate in the form mode without fear of a hindsight determination that it failed to recognize reasonably the counteroffer nature of a conditional acceptance and thus accepted a counteroffer by performance. In addition, the certainty and simplicity of the suggested approach facilitates an offeror's ability to employ low-level personnel to survey forms received from offerees and extract conditional acceptances for special treatment. If the offeror truly wishes to obtain those terms on its form which are neither contained in the offeree's form nor supplied by the Code, it must actively negotiate them.

Requiring the offerees of the world to use the magic words of section 2-207(1) is not unfair, as other sections of the Code require magic words in other circumstances.\textsuperscript{173} Section 2-316(2) contains a similar formal requirement which mandates that a seller mention the word "merchantability" to disclaim the implied warranty of merchantability.\textsuperscript{174} One must remember that the battle of the forms often occurs in a relatively sophisticated business environ-

\textsuperscript{173} See C. Itoh & Co. (America) v. Jordan Int'l Co., 552 F.2d 1228, 1235 (7th Cir. 1977).

\textsuperscript{174} U.C.C. § 2-316(2). The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act also establishes very specific requirements that must appear on most
ment among actors with the means to consult counsel. Indeed, the advice of counsel probably contributed greatly to the existence and complexity of the battle of the forms. Therefore, it is unlikely that many offerees transacting in a form mode will be unaware of the magic words which are essential to create an expressly conditional acceptance invoking subsection (3).

Similarly, the stringent requirements for creating true counteroffers, where acceptance of the goods operates as an acceptance of the counteroffer, result in no unfairness to offerees. The offeree totally controls its response to an offer. If it has a sincere interest in obtaining terms so unusual or one-sided that neither the offeror’s form nor the Code would supply them, the terms should become the subject of active negotiation between responsible officers of the parties. They should not become part of the contract because a judge or jury, in hindsight, found that a reasonable offeror should have understood the response to be a counteroffer which it accepted by acceptance of the goods. The ease and speed of modern communication renders it unlikely that a departure from the form mode will interfere with timely delivery of the goods. Therefore, the offeree rarely will have to ship the goods before it can negotiate a desired term.

The approach is also fair to offerors. The test for a counteroffer acceptable by performance is sufficiently stringent that an offeror will rarely find that it unknowingly accepted terms appearing on an offeree’s response merely by accepting the goods. The offeror will also not encounter substantial disadvantage if it continues to deal routinely with apparently routine responses from offerees. The presence in a response of magic words necessary to avoid a contract on the basis of an exchange of writings invokes subsection (3). The offeror then receives the substantial protection of all the Code rights and remedies normally expected. Finally, under section 2-207(3), the contract contains those terms expected by the parties because of usage of trade, course of dealing, or course of performance.175


175. The commentators are uniform in suggesting that usage of trade, course of dealing, and course of performance can supply contractual terms under § 2-207(3). See, e.g., I W. Hawkland, supra note 69, at 108–10; Barron & Dunfee, supra note 2, at 198; Incipient Unconscionability, supra note 2, at 623.

The terms of a contract under § 2-207 are “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). Two relevant provisions of the Code are §§ 1-201(3)
IV. THE FORMAL APPROACH OF BAIRD AND WEISBERG

A recent article by Professors Baird and Weisberg advocates a return to the mirror image rule in the context of the battle of the forms. Like this Article, it concludes that the resolution of the battle of the forms is peculiarly amenable to a more formal approach than the one presently accepted. This author believes that Professors Baird and Weisberg, in supporting a return to the mirror image rule, place too much reliance upon unwarranted and largely unsupported hypotheses which are contrary to the entire set of factual assumptions underlying section 2-207. Furthermore, acceptance of this Article's approach renders a return to the mirror image rule entirely unnecessary to resolve the problems which Baird and Weisberg attempt to cure.

Baird and Weisberg advocate a return to the mirror image rule primarily because the "off the rack" Code terms supplied under section 2-207(3) are not suitable for some transactions; i.e., they are not the most efficient terms for particular transactions. They argue that a return to the mirror image rule will accomplish this result at a cost which does not outweigh the increased efficiency of the terms. Simplified, their argument maintains that the mirror image rule will cause offerors to read the fine print on

and 1-201(11), which define "agreement" and "contract," respectively. Section 1-201(3) defines agreement as including terms implied from usage of trade, course of dealing, and course of performance. The definition of contract in § 1-201(11) includes the parties' agreement. Thus, since § 2-207(3) recognizes a contract formed by the parties' conduct, usage of trade, course of dealing, and course of performance would necessarily be a part of it. See Taylor, supra note 2, at 432.

A recent case suggests that course of dealing, usage of trade, and course of performance cannot become part of the contract under § 2-207(3), but that only the "gap-filler" provisions of Article Two (primarily found in Part 3) can provide supplementary terms. C. Itoh & Co. (America) v. Jordan Int'l Co., 552 F.2d 1228, 1237 (7th Cir. 1977). This suggestion seems blatantly incorrect. Assuming neither form mentions the subject matter of usage of trade or course of dealing, it seems absurd to suggest that such matters cannot be integrated into the contract. The question whether course of dealing or trade usage should fill contractual gaps is not predicated upon the manner in which the contract is formed when the parties express no intention regarding a particular subject. If one party's form contains a term which is contrary to course of dealing or usage of trade, it should not preclude reliance upon usage of trade or course of dealing to control the relevant subject matter. A party should not be able to frustrate the other party's expectations by a fine print term on a form. For cases suggesting that course of dealing, usage of trade, and course of performance may be relevant under § 2-207(3), see Scott Brass, Inc. v. C & C Metal Prods. Corp., 473 F. Supp. 1124, 1130 (D.R.I. 1979); In re Barney Schogel, Inc., 12 Bankr. 697, 703 (Bankr. S.D.N.Y. 1981).

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177. Id. at 1223, 1249–51.
178. Id. at 1251–61.
responses received from offerees, since they are aware that these terms might become part of the contract if ignored. Knowing that offerors will read the fine print on their forms, offerees will not include one-sided terms for fear of losing the offeror's business. As a result, the terms actually included on the offerees' forms will generally be fair and acceptable to offerors. Suitable terms will become part of the contract without a significant increase in negotiation costs.

The assumptions underlying this creative and plausible argument present a number of problems. Baird and Weisberg argue that modern buyers (usually the offerors in the battle of the forms) are typically aware of the most important fine print terms on sellers' forms. Consequently, the fear that a return to the last shot approach will result in the offeror's being bound to terms of which it was unaware is probably exaggerated. If it is true that buyers generally are aware of sellers' fine print, however, a return to the mirror image rule appears to be unnecessary. As Baird and Weisberg acknowledge, all buyers need not read sellers' forms to prompt sellers to avoid one-sided terms, but only a sufficient number of those that are aware of the seller's fine print. If a significant number of these buyers already exist, sellers' forms may be as mutually advantageous as they are likely to become, if one accepts Baird and Weisberg's assumption that sellers are afraid of losing buyers' business because of one-sided fine print on their forms. Adopting a rule that encourages more buyers to read sellers' forms will only increase costs without any concurrent benefit because these mutually advantageous terms already exist on sellers' forms.

It is possible that while modern buyers are generally aware of the terms on sellers' forms, this does not provide an incentive to sellers to avoid one-sided fine print terms. The argument is that although buyers are aware of sellers' fine print, they also know that under present case law this fine print usually does not become part of a resulting contract. Consequently, they are not prompted to take their business elsewhere. Further, sellers are usually aware of the buyers' reasoning, and thus have no incentive to avoid one-sided terms for fear of losing business. The problem with this line of reasoning is that if sellers are aware that their

179. Id. at 1253-54.
180. Id. at 1254, 1257.
181. Baird and Weisberg accept this conclusion regarding the present state of the law. See id. at 1245-48. This author concurs and supports this conclusion.
one-sided fine print cannot become part of the contract, they have no incentive to include the terms. Printing one-sided terms is simply a fruitless exercise which only produces unjustified costs and the possible alienation of some buyers. If Baird and Weisberg’s belief that buyers are typically aware of one-sided terms on sellers’ forms is correct, then sellers already have the incentive not to include such terms.

It may be that encouraging *even more* buyers to read forms by returning to the mirror image rule will result in fewer sellers using one-sided terms, or less one-sided terms. Whether the efficiency savings of this marginal increase would be sufficient to overcome the additional costs is certainly problematic. Baird and Weisberg do not address this issue.

Baird and Weisberg may also be incorrect in believing that buyers today are typically aware of the fine print terms on sellers’ forms. First, the empirical evidence presented in support of the assertion is very sketchy and inconclusive. Baird and Weisberg recognize that their supporting authority, the Beale and Dugdale article, used a very limited sample and dealt with British, rather than American, business practices. In addition, the applicable law in England at the time of the study was the mirror image rule rather than a rule like section 2-207. Consequently, the Beale and Dugdale article has extremely limited value for assessing the actual practices of American businessmen.

Second, the entire factual basis of section 2-207 was that businessmen do not read the fine print on other parties’ forms. The legislative history of and the comments to section 2-207 reflect this assumption, first made when the mirror image rule was still theoretically viable. It is unlikely that the assumption would remain unchallenged if it were not substantially true. Therefore, it appears unlikely that modern buyers are typically aware of fine print

182. The actual practices, knowledge, and beliefs of businessmen in the context of the battle of forms are an exceptionally fertile ground for research. A few preliminary articles tend to support very different conclusions. Compare Beale & Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 Brit. J. of L. & Soc’y 45, 50 (1975) (businessmen are often aware of fine print terms in the forms of those with whom they deal), with Non-Contractual Relations, supra note 11, at 60 (businessmen often transact without knowledge of fine print terms).

183. Baird & Weisberg, supra note 2, at 1254 n.87.


185. Most scholars in the area seem to accept this assumption. *See, e.g.*, E. Farnsworth, supra note 11, at 158–59; R. Nordstrom, supra note 69, at 92–93; J. White & R. Summers, supra note 32, at 24; Incipient Unconscionability, supra note 2, at 605–06.
on sellers’ forms. It is also at least questionable whether a return
to the mirror image rule will cause businessmen to read the fine
print on the other party’s form since the assumption underlying 2-
207 and the timing of its adoption seem to indicate that they ne-
glected to do so when the rule was previously in force.186

Baird and Weisberg also suggest that strict enforcement of the
mirror image rule will provide the incentive lacking under the ear-
lier flexible enforcement.187 Regardless of the way courts actually
applied the mirror image rule prior to the adoption of the Code,
substantial evidence exists that many people, including commer-
cial experts of the time, thought that the courts strictly applied the
rule.188 In fact, Baird and Weisberg are unique in their belief that
the courts did not apply the rule in a draconian fashion. Thus, this
argument is also dubious.

Even assuming that a return to the mirror image rule will
cause buyers to examine the fine print on sellers’ forms more
closely, it is doubtful that this will cause sellers to make the terms
of their forms more mutually advantageous. The purchase order
and acknowledgment forms collected at random by this author
contain numerous self-interested provisions. For example, the
warranty provisions in the purchase order forms are at least as
expansive as the warranty and remedy provisions supplied by the
Code. Conversely, the warranty and remedy provisions in the
sellers’ forms uniformly provide more limited coverage than the
Code. This sample does not conclusively predict the content of
forms upon a return to the mirror image rule. It does indicate,
however, that if Baird and Weisberg correctly state that buyers
presently read sellers’ forms, a return to the mirror image rule
may not cause sellers to alter their forms drastically. The latter
statement would be false only if businessmen are generally aware
of current court decisions which largely abrogate the mirror image
rule and apply section 2-207(3). As stated previously, if busines-

186. See Baird & Weisberg, supra note 2, at 1258–59. Baird and Weisberg question the
courts’ willingness to apply the mirror image rule strictly and advocate a statutory substi-
tute for § 2-207. Id. at 1259–61. The substitute is a legend designed to make it obvious
that the response was a counteroffer and the buyer's acceptance of the goods is an accept-
ance of the counteroffer. Id. at 1260–61. The interpretation of § 2-207 advocated here
renders a substitute statute unnecessary. If the legend was such that it “attracted the atten-
tion of all who gave the form even a cursory glance,” id. at 1260, it would not be a definite
and seasonable expression of acceptance, and the mirror image rule would apply.


188. See, e.g., 1 A. CORBIN, supra note 35, at § 86; 1 S. WILLISTON, WILLISTON ON
CONTRACTS § 77 (3d ed. 1957). This notion persists today. See, e.g., J. WHITE & R. SUM-
MERS, supra note 32, at 25; Incipient Unconscionability, supra note 2, at 608–09.
men do have this awareness, sellers already have no incentive to put self-interested provisions (different from Code "off the rack" terms) in their forms as they should recognize that the terms will not become part of the contract.

This last point strikes at the heart of Baird and Weisberg's analysis. If businessmen (especially sellers) are presently aware of courts' liberal utilization of section 2-207(3), little incentive exists to use heavily self-interested forms. A return to the mirror image rule actually would seem to provide increased incentive for sellers to make their forms more self-interested, as a seller might hope to sneak a self-interested provision past an unwary buyer who neglects to read the seller's form in detail. Baird and Weisberg advance the counterargument that sellers' fear of losing buyers' business would prevent this practice under the mirror image rule. This position seems unrealistic and the empirical evidence clearly does not support it. It seems intuitively more correct to think that this risk is slight. Breaking off negotiations with one seller and finding another is itself costly, and a buyer considering such a move must consider the likely possibility that the second seller will have the same objectionable term in its form. Even assuming the buyer reads the seller's form and incurs that cost, it is unlikely to be willing to incur the additional cost and risk of taking its business elsewhere. Rather, it is more likely either to accept the seller's terms or actively negotiate an objectionable term.

If businessmen are not generally aware of courts' liberal application of 2-207(3), sellers probably include self-interested terms because they (or their lawyers) think that the terms might become part of the contract. This would be the result under the mirror image rule. This author believes that simply informing buyers and sellers of the courts' intention to provide "off the rack" Code terms when the parties provide conflicting self-interested terms is a much better way to create the incentive for removing the terms than a return to the mirror image rule.

Finally, the primary purpose of Baird and Weisberg's thesis is to increase the efficiency of the terms in a contract resulting from a battle of the forms. They offer no evidence, apart from some speculation and a hypothetical,189 that Code "off the rack" terms are not generally efficient. At least they are less costly than scrutinizing the forms and negotiating those terms which might result from an application of the mirror image rule.

189. Baird & Weisberg, supra note 2, at 1249-51.
The approach advocated by Baird and Weisberg is both speculative and unnecessary and it is built on a series of counterintuitive and largely unsupported assumptions. It questions, without substantiation, the very factual foundation accepted by the drafters of the Code and section 2-207. In the final analysis, it advocates an approach that would, at best, do no more than simply inform today's businessmen of the present state of the law.

V. CONCLUSION

The approach suggested by this Article largely fulfills the goals of efficiency, predictability, and fairness. It is as consistent with the ephemeral intent of the drafters as any other suggested approach. The cases decided to date are generally not inconsistent with it, and when viewed in their entirety, solidly support it.

This Article's approach makes certain intuitively plausible assumptions. It assumes that businessmen will continue to transact in a form mode, even when it involves substantial risks. Recent history certainly supports this assumption, otherwise the drafters would not have included section 2-207 in the Code. The analysis is premised on the importance to business professionals of a high degree of predictability in the law. Unlike Dean Murray, this author does not believe that achieving a high degree of predictability in this context requires a significant sacrifice of other values. The parties to transactions involving the battle of the forms are not unsophisticated consumers who are unlikely to understand a crafty lawyer's use of legalese to accomplish a result that is neither fair nor expected. Both sides of the transaction normally involve people or firms that can and do obtain legal counsel. In the absence of this sophistication, courts can invoke other provisions of the Code to supersede the operation of 2-207 and reach a fair result.\textsuperscript{190}

The advocated approach is consistent with one of the primary purposes of the U.C.C.: to encompass and sanction the actual reasonable practices of business professionals in the marketplace.\textsuperscript{191} To a degree, it permits and encourages the continued utilization of efficient form transactions, while decreasing the potential for unfairness and surprise. It grants neither party an unfair advantage and retains the essentially felicitous rule that an offeror or offeree that clearly expresses itself remains in control of the legal effect.

\textsuperscript{190} See, e.g., U.C.C. §§ 1-203, 2-302, 2-719(3).
\textsuperscript{191} See U.C.C. § 1-102(2)(b); Danzig, supra note 122, at 626.
The analysis is not without problems, as it inevitably must fail to resolve equitably some marginal cases. Perhaps this is unavoidable, especially when it addresses a provision which Professor Gilmore called "a miserable, bungled, patched-up job." Nonetheless, the author believes that the Code can function fairly and efficiently in the large majority of cases.

192. Gilmore Letter, supra note 144.