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The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2

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THE CONTRACT FORMATION SECTIONS OF THE PROPOSED REVISIONS TO U.C.C. ARTICLE 2

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I. INTRODUCTION

The more things change the more they remain the same.

—French proverb

THIS article reviews and compares changes and clarifications made by the proposed revisions to U.C.C. Article 2 with the Current Article 2 sections on contract formation.[1] These sections are numbered 2-203 to 2-210 in both Current Article 2 and the proposed Revision. The Revision follows the organization of the existing Article 2 provisions on contract formation and adds some new provisions on electronic contracting.[2] The electronic contracting provisions (R2-211-213) are not addressed in this article.

The Revision drafts of Articles 1 and 2 used in the preparation of this article are those dated November 2000 (November 2000 Drafts).[3] In this article, references to sections in the November 2000 Drafts are preceded by "R," such as R2-207, and references to Current Article 2 are preceded by "Current," such as Current 2-207.

The Revision takes a conservative approach to revising Article 2. Thus, it makes few major changes in the contract formation sections. The major changes it does make occur primarily in R2-207. As in Current Article 2, the Revision does not attempt to state the complete law of contract formation.[4] The focus remains on the bargain in fact of the parties, not on the contract as determined by strict application of technical legal rules. Each section of the contract formation provisions responds to a problem or series of related problems manifested in the case law. Typically, these problems arose from the application of technical legal rules to defeat the commercially reasonable expectations of a party. The Revision does not change the Current Article 2 solutions to most of these problems.

This article discusses each of the Revised sections from R2-203 through R2-210. The discussion of each section is divided into separate analyses of each subsection. These analyses generally note the derivation of the Revised subsection and the changes and clarifications effected in the Revised subsection. The analysis of R2-207 is lengthier than the other section analyses because the changes to that section are more fundamental and complex than the changes to the other Revised sections.

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1. The Revision of U.C.C. Article 2 is scheduled for final approval by its sponsoring organizations, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001.

2. *See* U.C.C. §§ 2-204(d), 211-13 (Proposed Revision Nov. 2000), *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Apr. 3, 2001).

3. Drafts of the proposed revisions to U.C.C. Articles 1 and 2 are available on the Internet. *See* NCCUSL, *Drafts of Uniform and Model Acts, at* http.www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Apr. 3, 2001) (providing these drafts under "drafts"). Each is described as the "November 2000 Draft."

4. For example, there is no mention in Article 2 of a consideration requirement or of infancy as preventing a contract.

The reader should also be aware of the Uniform Computer Information Transactions Act (UCITA).[5] This act contains contract formation provisions that are substantially different from those of Current and Revised Article 2. Although UCITA does not directly apply to the sale of goods, it contains a provision permitting the parties to "opt into" UCITA. Thus, the parties can have the contract formation provisions of UCITA (not Article 2) govern, if a material part of the transaction's subject matter includes computer information.[6] An analysis of the application of the UCITA contract formation provisions, however, is beyond the scope of this article.[7]

II. REVISED 2-203. SEALS INOPERATIVE

The boast of heraldry, the pomp of power,
And all that beauty, all that wealth e'er gave,
Awaits alike the inevitable hour:
The paths of glory lead but to the grave.

—Thomas Gray

Current 2-203 was not substantially changed in the Revision. This section has been amended to substitute "record"[8] for "writing," and thus make the section more friendly to electronic contracting.

This section was necessary because special rules applied to sealed instruments at common law. For example, a sealed instrument could be modified only by an agreement under seal, because a seal presumes consideration or dispenses with it; longer or special statutes of limitation apply to sealed instruments.[9] This section abrogates these special rules if the sealed instrument is a contract for sale or an offer to buy or sell goods.

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5. UCITA is a uniform act promulgated by NCCUSL in 1999. The text cited here is the 2000 Annual Draft; the Comments are the June 2000 Final Comments. *See* NCCUSL, *supra* note 3.

6. UCITA § 104, cmts. (2000). UCITA also applies to software embedded in goods. *See* UCITA § 103(b)(1).

7. To date, UCITA has been enacted in two jurisdictions: Virginia and Maryland. *See* UCITA, *Introductions & Adoptions of Uniform Acts*, *at* http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucita.htm (last visited Apr. 3, 2001). UCITA could apply, however, even beyond these jurisdictions, because it includes a provision validating choice of law clauses in contracts. *See* UCITA § 109(a).

8. "Record" is defined in the Revision. *See* U.C.C. § 2-103 (34) (Proposed Revision Nov. 2000). The definition is the same as that in section 9-102(69) of the Revised U.C.C., section 102(54) of UCITA, and section 2(13) of the Uniform Electronic Transactions Act (UETA).

9. *See* UNIFORM REVISED SALES ACT, Comments Sections 1-42, inclusive (Feb. 1948) [hereinafter 1948 Comments]; KARL N. LLEWELLYN PAPERS, Comment on Section 16 [2-4] *Seals Inoperative*, at 1, *microformed on* file J-X(2)(e) (Wm. Hein & Co. 1987).

III. REVISED 2-204. FORMATION IN GENERAL

The same philosophy is a good horse in the stable, but an arrant jade on a journey.

—Oliver Goldsmith

Despite its caption, R2-204 is not a comprehensive statement of contract formation rules. Its first three subsections are taken from Current 2-204 without substantial change. These subsections were designed to negate applications of the doctrines of offer and acceptance and indefiniteness that defeated the obvious intent of the parties to make a contract.[10] R2-204(d) is new; it covers contract formation by electronic agents.

A. R2-204(A) [MANNER OF FORMING CONTRACT]

R2-204(a) is Current 2-204(1) with two minor additions. First, the Revision adds the words "offer and acceptance." The Notes to the May 1, 1998, draft of Revised Article 2 characterize this addition as simply making explicit what Part 2 of Current Article 2 intended.[11] Second, the Revision also adds the reference to "interaction of electronic agents," probably to clarify that electronic contracting is a permissible method of contract formation.[12] This subsection states the obvious principle that conduct can show agreement. This statement was included in Current 2-204 because at common law some courts would ignore the parties' conduct and focus solely on the writings in determining whether a contract had been formed.[13]

B. R2-204(B) [CIRCUMSTANCES THAT DO NOT PREVENT CONTRACT FORMATION]

R2-204(b) is Current 2-204(2) without any change. It states that a contract can be formed despite the fact that the time of its making is undecided. According to Karl Llewellyn, the principal drafter of Current Article 2, this subsection was intended to avoid courts holding that there was no contract, despite the fact that deliveries had been made, because the court could not find a writing that qualified as an acceptance.[14]

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10. *Report and Second Draft: The Revised Uniform Sales Act, Introductory Comment on Alternative Sections 3 through 3-J* at 64-65 (Dec. 1941) [hereinafter 1941 Introductory Comment on Alternative Sections 3 through 3-J]; *reprinted in* 1 UNIFORM COMMERCIAL CODE DRAFTS 344-45 (E. Kelly, ed. 1984) [hereinafter U.C.C. Drafts].

11. U.C.C. § 2-204, n.1 (May 1, 1998 Draft) *at* http.//www.law.upenn.edu/bll/ulc/ulc_frame.htm.

12. *See* U.C.C. § 2-204(d), §§ 2-211—213 (Proposed Revision Nov. 2000) (regarding electronic contracting).

13. *Cf. 1941 Introductory Comment on Alternative Sections 3 through 3-J*, *supra* note 10, at 5-6 (discussing Alt. Section 3A (1)), *reprinted in* 1 U.C.C. DRAFTS, *supra* note 10 at 64-65.

14. *See* U.C.C. § 2-204 cmt. (West 1989); *see also* KARL N. LLEWELLYN PAPERS, Consideration in Committee of the Whole of the Revised Uniform Sales Act, 51-52 (1943), *microformed on* file J-V(2)(h) (Wm. Hein & Co. 1987) (discussing subsection 17(2)).

C. R2-204(c) [When Contract Does Not Fail for Indefiniteness]

R2-204(c) is Current 2-204(3) without substantial change. It states that a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.[15] In cases of incomplete agreement, mutual conduct evidencing a contract is commonly the best evidence that the parties intended a contract.[16] The Code gap-fillers usually will supply a reasonably certain basis for granting a remedy.[17]

D. R2-204(d) [Contract Formation Rules For Electronic Contracting]

R2-204(d) is new. It provides contract formation rules for electronic contracting, specifically contracts formed by interaction of electronic agents or by the interaction of an electronic agent and individual.[18]

IV. Revised 2-205. FIRM OFFERS

Who'll come a-waltzing Matilda with me?

—Banjo Patterson

R2-205 is Current 2-205 without substantial change. It has been revised to change "signed writing" to "authenticated record"[19] and "form" to "form record" so the section is more friendly to electronic commerce.

This section was included in Current Article 2 to square the common law rule on revocability of offers with commercial expectation. At common law, the offeror normally could revoke its offer before acceptance.[20] Even if the offer contained a promise not to revoke, the offer could be revoked, unless the promise not to revoke was supported by consideration or detrimental reliance by the offeree.[21] This section dispenses with the requirement of consideration or detrimental reliance and enforces a promise not to revoke if made by a merchant in an authenticated record. The offer remains irrevocable for the period of time stated in this section.

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15. *See* Uniform Revised Sales Act, *Comment on Section 17: Formation in General* at 117-18 (April 27, 1944); *reprinted in* 2 U.C.C. Drafts, *supra* note 10, 128, 129-30 (discussing subsection 17(3)).

16. *See* U.C.C. § 2-204 cmt. 3, para. 2 (Proposed Revision Nov. 2000).

17. *See id.*, para. 1.

18. The Uniform Electronic transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"), 15 U.S.C 7001 et seq. (2000) also govern electronic contracting. To the extent permitted by E-Sign, revised Article 2 supercedes E-Sign. *See* U.C.C. § 2-104(d) (Proposed Revision Nov. 2000). UETA is a uniform act promulgated by NCCUSL in 1999. The text of UETA is available at http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm.

19. "Authenticate" is defined in the Revision. *See* U.C.C. § 2-102(1) (Proposed Revision Nov. 2000). Similarly, "record" is also defined in the Revision. *See id.* § 2-102(34).

20. *See* E. Allan Farnsworth, Contracts 158 (3d ed. 1999) [hereinafter Farnsworth, Contracts]; Restatement (Second) of Contracts, § 42 cmt. a (1981).

21. Farnsworth, Contracts, *supra* note 20, at 180-81; Restatement (Second) of Contracts, § 42 cmt. a (1981).

V. REVISED 2-206. OFFER AND ACCEPTANCE

Technique without ideals is a menace;
ideals without technique is a mess.

—Karl N. Llewellyn

R2-206(a) and (b) are essentially unchanged from Current 2-206(1) and (2). Revised 2-206(c) is based on Current 2-207(1). This section is not intended to be a complete codification of offer and acceptance law. The purpose of Current 2-206 was to negate several uncommercial applications of the offer and acceptance doctrine. The applications negated are detailed under the relevant subsection discussions below.

A. R2-206(A)(1) [MANNER AND MEDIUM OF ACCEPTANCE]

R2-206(a)(1) is Current 2-206(1)(a) rephrased without substantial change. This subsection states that any manner or medium of acceptance reasonable under the circumstances is a proper manner or medium of acceptance. It is intended to displace technical rules of acceptance, such as requiring a telegraphed offer to be accepted by telegraph, in favor of rules based on commercial reasonableness.[22]

B. R2-206(A)(2) [MANNER OF ACCEPTANCE OF OFFER CALLING FOR PROMPT OR CURRENT SHIPMENT; ACCEPTANCE BY SHIPMENT OF NON-CONFORMING GOODS]

R2-206(a)(2) is Current 2-206(1)(b) rephrased without any change. The first half of the subsection states that an offer to buy goods for prompt or current shipment can be accepted either by a prompt promise to ship or by prompt shipment. At common law, courts tended to find that an offer permitted only a single manner of acceptance. This half of the subsection makes clear that either a return promise or performance is a permissible manner of acceptance for this kind of offer.[23]

The second half of this subsection, dealing with acceptance by shipment of non-conforming goods, is intended to eliminate the so-called "unilateral contract trick."[24] At common law, performance in response to an offer was not acceptance of the offer unless the performance conformed to the terms of the offer.[25] Consequently, the seller's shipment of goods that were unintentionally non-conforming would not be an acceptance; it would be a counter offer. Thus, when the buyer discovered the non-conformity, it would have no claim against the seller.[26] To avoid this undesirable result, the subsection provides that shipment of non-conforming goods is an acceptance of the buyer's offer, unless the seller seasonably

22. *See* U.C.C. § 2-206 cmt. 1 (Proposed Revision Nov. 2000).
23. *See id.* at § 2-206 cmt. 2.
24. 1 William Hawkland, U.C.C. SERIES 2-206:3 (1999).
25. *See id.*
26. *See id.*

notifies the buyer that the goods are offered only as an accommodation to the buyer.

C. R2-206(B) [WHEN NOTIFICATION OF ACCEPTANCE BY BEGINNING PERFORMANCE IS REQUIRED]

R2-206(b) is Current 2-206(2) without change. It indicates that beginning performance can be a reasonable mode of acceptance and requires that the offeror be notified of the acceptance within a reasonable time. If timely notification is not given, the offeror may treat the offer as having lapsed before acceptance.

D. R2-206(C) [EFFECT OF DEFINITE AND SEASONABLE EXPRESSION OF ACCEPTANCE CONTAINING TERMS ADDITIONAL TO OR DIFFERENT FROM THE OFFER]

R2-206(c) has been transferred from Current 2-207(1) with some changes. This transfer reflects the decision that R2-207 will cover only contract terms, not contract formation issues.[27] R2-206(c) determines whether a contract has been formed by a response that does not match the offer. This issue arises primarily (but not exclusively) in the "Battle of the Forms."[28] If a contract has been formed under R2-206(c), the terms of that contract are determined by R2-207.

R2-206(c) follows the phrasing of Current 2-207(1) by stating that a definite and seasonable expression of acceptance in a record operates as an acceptance, even if it contains terms additional to or different from the offer. R2-206(c) continues the policy of Current 2-207(1) by rejecting the common law mirror image rule.[29]

R2-206(c) omits the last clause of Current 2-207(1). That clause prevented a definite expression of acceptance from being an acceptance if it was "expressly made conditional on assent to the different or additional terms" in the acceptance.[30] Comment 5 to Revised 2-206 indicates this clause was omitted from the Revision because it was unnecessary.[31]

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27. U.C.C. § 2-207 cmt. 1 (Proposed Revision Nov. 2000).

28. For examples of non-form offer and acceptance contracts covered by Current 2-207, see the third paragraph of the second comment to R2-207 and the first comment to Current 2-207. *See also*, John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029, 1036-38 (1994).

29. U.C.C. § 2-206 cmt. 5 (Proposed Revision Nov. 2000). The mirror image rule required that a response match ("mirror") the offer to be an acceptance. *See, e.g.*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 30-31 (5th ed. 2000) [hereinafter WHITE & SUMMERS].

30. U.C.C. § 2-207 (1) (West 1989).

31. U.C.C. § 2-206 cmt. 5. Karl Llewellyn, the chief draftsman of Current Article 2, also believed that the clause was unnecessary. Explaining why the clause appeared in the comments, but not in the text of a prior draft of Current 2-207, he stated: "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 . . . ." *See* Karl N. Llewellyn, *Stenographic Report of Hearing on Article 2 of the Uniform Commercial Code Held at the House of the Association of the Bar of the City of New York*, (Feb, 15, 1954), *reprinted in* 1 N. Y. L. REV. COMM'N. REP. HEARINGS OF THE U.C.C. 116-17 (1954).

Thus, R2-206(c) continues the rule that a response to an offer is not a definite expression of acceptance if it is an expressly conditional acceptance.[32]

Two important questions will now be addressed: (1) What is a "definite expression of acceptance?" and (2) What language is necessary to make the acceptance conditional?

1. Definite Expression of Acceptance

What is a definite expression of acceptance under R2-206(c)? First, a response to an offer cannot be a definite expression of acceptance if the response is expressly conditioned on the offeror's assent to the terms in the response.[33] Second, the response need not match the offer to be a definite expression of acceptance. The text of R2-206(c) indicates that the response can be a definite expression of acceptance, even though it contains terms additional to or different from the offer.

How much variance from the offer is permissible for a response still to be a definite expression of acceptance? Revised Comment 5 makes this general observation: "Subsection (c) rejects the mirror image rule, but any responsive record must still be fairly regarded as an 'acceptance' and not as a proposal for such a different transaction that it should be construed to be a rejection of the offer."[34] The text and comments of R2-206 do not elaborate.

The phrase "definite expression of acceptance" originated in Current 2-207(1). Its use in R2-206(c) suggests that the authorities construing this phrase in Current 2-207 can continue to provide guidance under the Revision. Case law and commentary under Current 2-207 establish guidelines for determining when a response to an offer is a definite expression of acceptance. These guidelines indicate that correspondence between the *non-form* terms in both the offer and the response is important while correspondence between the *form* clauses is not important. Thus, a response that matches the non-form terms in the offer can be a definite expression of acceptance, even though the response contains form clauses that add to or conflict with form clauses in the offer.[35] Second, a response that matches the non-form terms in the offer can be a definite expression of acceptance, even though the response is a pre-printed form that was not drafted to be an acceptance.[36] Third, a response can still be a definite expression of acceptance even if it contains minor non-form

32. *See* U.C.C. 2-207 cmt. 1 (Proposed Revision Nov. 2000). A conditional acceptance is not an acceptance; it is a counter offer. *See, e.g.,* WHITE & SUMMERS, *supra* note 29, at 39.

33. *See infra* note 38 and accompanying text.

34. U.C.C. § 2-206 cmt. 5 (Proposed Revision Nov. 2000).

35. *See, e.g.,* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1165-66 (6th Cir. 1972); C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F. 2d 1228, 1234-35 (7th Cir. 1977) (citing Dorton, 453 F.2d at 1166, 1168). *Cf.* U.C.C. § 2-207 cmt. 1. *See* WHITE & SUMMERS, *supra* note 29, at 33; Wladis, *supra* note 28, at 1046.

36. Courts construing Current 2-207(1) sometimes find purchase order forms drafted as offers to be definite expressions of acceptance. *See, e.g.,* Diatom, Inc. v. Pennwalt Corp.,

terms that add to those in the offer.[37] Lastly, a response containing terms that conflict with non-form terms in the offer is not normally a definite expression of acceptance.[38] The general observation quoted above in Revised Comment 5 does not contradict any of these guidelines.

2. *The Expressly Conditional Definite Expression of Acceptance*

Under Current 2-207(1), a definite expression of acceptance containing terms additional to or different from the offer forms a contract, "unless acceptance is expressly made conditional on assent to the additional or different terms" in the acceptance.[39] This "unless" clause has been omitted from the Revision because it is unnecessary.[40] Thus, a response that contains such conditional language would not be a definite expression of acceptance under R2-206(c). Given that some courts have construed responding forms drafted as offers to be definite expressions of acceptance,[41] it is crucial that proper conditional language be included in any form to prevent a response intended as a counter offer from being construed as an acceptance.[42]

What language is sufficient to make a record expressly conditional? Under Current 2-207, courts usually require the language of the record to express clearly an unwillingness to proceed with the transaction, absent an agreement to the terms in the record.[43] Language that tracks the "unless" clause of Current 2-207(1) is sufficient[44] (but not required)[45] to make the acceptance expressly conditional. Language indicating that an acceptance is "subject to" the terms in the acceptance should not be used, because this phrasing usually has been found not to satisfy the expressly

741 F.2d. 1569 (10th Cir. 1984); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979).

37. U.C.C. § 2-207 cmt. 1 (West 1989); *cf.* U.C.C. § 2-207 cmt. 2, para. 3 (Proposed Revision Nov. 2000). Typically these minor terms will specify particulars of performance. *See* Wladis, *supra* note 28, at 1036-38.

38. *See, e.g.,* Lambert v. Kysar, 983 F.2d 1110, 1115 (1st Cir. 1993); Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582 (Utah Ct. App. 1992). Courts sometimes overlook this requirement. *See, e.g.,* St. Paul Structural Steel Co. v. A.B.I. Contracting, Inc., 364 N.W.2d 83 (N.D. 1985) (holding that acceptance changed price retainage term); Southern Idaho Pipe and Steel Co. v. Cal-Cut Pipe and Supply, Inc., 567 P.2d 1246 (Ida. 1977) (holding that acceptance changed delivery date).

39. U.C.C. § 2-207(1) (West 1989).

40. U.C.C. § 2-206 cmt. 5 (Proposed Revision Nov. 2000).

41. *See* Diatom, Inc. v. Pennwalt Corp., 741 F.2d. 1569 (10th Cir. 1984); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979).

42. *See, e.g.,* Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184, 185-86, 189 (1st Cir. 1997) (holding that acknowledgement form stating "counteroffer" is confirmation of order, not counteroffer and holding the form to be conditional).

43. *See, e.g.,* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 101 (3rd Cir. 1991); Ralph Schrader, Inc. v. Diamond Int'l Corp., 833 F.2d 1210 (6th Cir. 1987); Diatom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984).

44. *See* WHITE & SUMMERS, *supra* note 29, at 39; *see also* Lee R. Russ, Annotation, *What Constitutes Acceptance "Expressly Made Conditional" Converting It to Rejection and Counteroffer under Section 2-207(1)*, 22 A.L.R. 4th 939 § 2(a) (1983).

45. *See, e.g.,* White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1191 (8th Cir. 1999), Step-Saver, 939 F.2d 91; Ralph Schrader, 833 F.2d at 1215, n.4.

conditional requirement.[46]

By omitting specific language dealing with expressly conditional responses, the Revision creates some uncertainty, because it removes the forms drafters' safe harbor of tracking the Current 2-207(1) "unless" clause in their forms. Under the Revision, courts might find language that tracks the omitted Current 2-207 "unless" clause to be insufficient to indicate that a party is unwilling to proceed with the transaction absent an agreement to its terms. Conversely, the lack of specific statutory language might cause courts to be more flexible in finding a wider variety of phrases to be effective conditional language.

VI. REVISED 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION

Anyone who isn't confused really doesn't understand the situation.

—Edward R. Murrow

A. INTRODUCTION

R2-207 states the terms of a contract covered by Revised Article 2. The section consists of six parts. The first three parts, R2-207(i)–(iii), indicate when the section applies. The last three parts, R2-207(1)–(3), indicate the terms of the contract. R2-207 is based on Current 2-207, but makes some significant changes.

Current 2-207 dealt with the effect of different or additional terms in an acceptance or confirmation.[47] A confusing body of pre-Code case law developed concerning the exchange of non-matching correspondence when the parties subsequently acted as if they had a contract.[48] The problem of non-matching correspondence grew more pressing as business began to be conducted increasingly by the exchange of pre-printed forms.[49] This process became known as the battle of the forms. The parties exchanging forms would usually agree on the handwritten or typed terms (filled-in terms) on the forms, such as description of the goods, quantity, and price. Because each party's form also contained pre-

46. *See, e.g.*, Luria Bros. & Co. v. Pielet Bros. Scrap Iron and Metal, Inc., 600 F.2d 103, 113, n.12 (7th Cir. 1979); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924, 926-27 (9th Cir. 1979); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972).

47. Current 2-207 is one of the more heavily litigated sections of Current Article 2. It has generated hundreds of reported cases. *See* U.C.C. CASE DIGEST 2207 (West 1997).

48. *See* Karl N. Llewellyn, *Memorandum Replying to the Report & Memorandum of Task Force 1 of the Special Comm. of the Commerce & Indus. Ass'n of N.Y. on the U.C.C.* (August 16, 1954), *reprinted in* 1 N.Y. L. REV. COMM'N REP. HEARINGS OF THE U.C.C. 106, 119-20 (describing the confused state of law concerning written confirmations); Karl N. Llewellyn, *Stenographic Report of Hearing on Article 2 of the U.C.C.* (Feb. 15, 1954), *reprinted in* 1 N.Y. L. REV. COMM'N REP. HEARINGS OF THE U.C.C. 119 (1954) (alluding to the "completely confused body of present case law" on qualified or conditional acceptance).

49. *See* Karl N. Llewellyn, *Stenographic Report of Hearing on the U.C.C.* (May 3, 1954), *reprinted in* 2 N.Y. L. REV. COMM'N REP. HEARING OF THE U.C.C. 19-23 (1954) (describing the battle of the forms).

printed clauses (form clauses) favoring the party who drafted the form, the pre-printed terms would not match.[50] Typically, the parties would proceed to perform without resolving the discrepancies in the pre-printed terms.[51] If disputes developed later over those terms, courts often (but not always) would apply the "Last Shot Rule."[52] This usually resulted in the buyer being held to have assented to the seller's terms by accepting the goods.

Current and Revised 2-207 are designed in part to regulate the battle of the forms. Current 2-207 rejected theories such as the last shot rule that resulted in one side winning the battle of the forms. Instead, it opted for a "neutrality principle," under which neither side's form prevails.[53] Revised 2-207 continues this neutrality principle. Thus, under Current and Revised 2-207, the terms of a contract resulting from the battle of the forms consist primarily of the terms mutually agreed upon (typically the filled-in terms on the forms) and terms supplied by Article 2.[54] The justification for this neutrality principle presumably is that form clauses are often unread and undiscussed, and variances between the forms are ignored by the parties as performance of the contract begins.[55]

Revised 2-207 also continues the tripartite framework of contract formation methods in Current 2-207. When variant writings are exchanged, a contract might be formed by one of three methods. First, an informal agreement might precede the sending of non-matching written confirmations of the agreement ("Confirmation").[56] This method applies when the parties have made an informal agreement (for example, by telephone)[57] and subsequently one or both parties confirms the agreement in a writing that contains terms not discussed.[58] The second method of contract formation is described variously as "Offer and Acceptance"[59] and as "Definite Expression of Acceptance."[60] This method applies when there is no prior informal agreement and the exchange of non-matching writings produces a contract. Under this method, a contract results when a writing that responds to an offer is an unconditional definite expression

50. *See* U.C.C. § 2-207 cmt. 1 (West 1989).

51. *See id.*

52. *See* John L. Gedid, *A Background to Variance Problems Under the U.C.C.: Toward a Contextual Approach,* 22 DUQ. L. REV. 595, 612-32 (1984).

53. *See, e.g.,* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986).

54. U.C.C. § 2-207(3), cmt. 6 (West 1989); U.C.C. § 2-207(1)—(3) (Proposed Revision Nov. 2000).

55. *See* 1948 Comments, *supra* note 9; *General Comment on Part II: Formation and Construction,* 14-15, 17, *reprinted in* A.B.A. Task Force, *An Appraisal of the March 1, 1990, Preliminary Report of the U.C.C. Article 2 Study Group*, 16 DEL. J. CORP. L. 981 at 1251, app. a (1991) [hereinafter General Comment]; *see, e.g.*, Am. Ins. Co. v. El Paso Pipe & Supply Co., 978 F.2d 1185, 1190 (10th Cir. 1992).

56. U.C.C. § 2-207(1) (West 1989); U.C.C. § 2-207(iii) (Proposed Revision Nov. 2000).

57. *See* Llewellyn Memorandum, *supra* note 48, at 119.

58. *See* U.C.C. § 2-207(1) cmt. 1 (West 1989); U.C.C. § 2-207(iii) (Proposed Revision Nov. 2000).

59. U.C.C. § 2-207(ii) (Proposed Revision Nov. 2000).

60. U.C.C. § 2-207(1) (West 1989); U.C.C. § 2-206(c) (Proposed Revision Nov. 2000).

of acceptance, despite containing terms that do not match the offer.[61] The third method of contract formation occurs when a contract is inferred from the mutual conduct of seller and buyer ("Mutual Conduct Contract").[62] This method applies chiefly when no contract has been formed before or by the exchange of writings, yet the seller has delivered and the buyer has accepted the goods.[63]

The remainder of this section analyzes the provisions of R2-207. The analysis is organized as follows: (1) an overview of the major changes and clarifications made by R2-207; (2) a description of contract terms under R2-207; (3) a description of the differences in contract terms under Current and Revised 2-207; and (4) advice for navigating the battle of the forms.

B. Overview of Major Changes and Clarifications Made by R2-207

1. *R2-207 Deals Only With Contract Terms, Not Contract Formation*

Current 2-207 covers both contract formation and the terms of a contract formed under that section. R2-207 deals only with the terms of the contract. The Revision moves the contract formation rules of Current 2-207 into the contract formation sections of the Revision (R2-204 and 206) with no substantial change in those rules.[64]

2. *R2-207 States the Terms of Any Contract Formed Under Revised U.C.C. Article 2, Not* Just A Contract Involving Non-Matching Writings

R2-207 covers any contract formed under Revised Article 2.[65] Current 2-207 covers only contracts when there are different or additional terms in an acceptance or confirmation.[66] R2-207 thus casts a wider net than Current 2-207.

3. *What Are the Terms of the Contract?*

The Revision can result in substantially different contract terms than Current 2-207. First, under R2-207 the terms of the contract are the same regardless of how the contract was formed. The terms of a contract could differ under Current 2-207, depending on which method of contract formation applied and who sent the first form. The justification for this change in the Revision is to eliminate any strategic advantage to sending

61. *See* U.C.C. 2-207(1) cmt. 1 (West 1989); U.C.C. § 2-207(ii) (Proposed Revision Nov. 2000). *See infra* note 39 and accompanying text (discussing when a response is an unconditional definite expression of acceptance).

62. U.C.C. § 2-207(3) (West 1989); U.C.C. § 2-207(i) (Proposed Revision Nov. 2000).

63. *See* U.C.C. § 2-207(3) cmt. 1 (West 1989).

64. U.C.C. §§ 2-204—206, § 2-207 cmt. 1 (Proposed Revision Nov. 2000).

65. *Id.*

66. U.C.C. § 2-207 cmt. 1 (West 1989).

the first or last form.[67] The most significant difference resulting from this change is in the terms of a contract made by an exchange of forms. The Revision adopts the "Knock Out Rule," so that conflicting terms in the offer and the definite expression of acceptance knock each other out and the contract is formed on the matching terms in each form.

A second source of different terms is a change in the procedure used to determine whether a party has agreed to the other's terms. The Revision states that terms enter the contract if both parties agree to them.[68] Comment 2 to R2-207 provides guidelines indicating when a party does and does not agree to the other side's terms. These provisions differ significantly from Current 2-207(2) and Current Comments 3 and 6. The primary difference is that courts have more discretion under the Revision to include or exclude terms.[69] Other differences in terms arising from these changes are discussed below.[70]

4. *Neutrality Principle Does Not Apply If Buyer Accepts Goods Without Sending A Record*

Under R2-207, the neutrality principle does not apply in certain situations when the buyer has not used a record. For example, a buyer might order goods by telephone. The seller proceeds to ship the goods together with its terms, and the buyer accepts the goods.[71] The comments to R2-207 indicate that, if no contract was made before the buyer accepts the goods and the buyer did not send a record, the buyer will normally be deemed to have agreed to the seller's terms when the buyer accepts the goods.[72] This result is consistent with normal offer and acceptance law as well as the court's holding in *Hill v. Gateway 2000, Inc.*[73] It will adversely affect consumers and other buyers who do not use their own forms.[74]

5. *Contract Terms Otherwise Included by R2-207 Are Subject to the Parol Evidence Rule*

R2-207 states that the contract terms stipulated in R2-207 are subject to R2-202 (the "Parol Evidence Rule"). This reference, which did not appear in Current 2-207, was undoubtedly necessitated by the broadening of R2-207 to cover all contracts of sale, not just contracts associated with the exchange of non-matching records. The exchange of non-matching records rarely involves parol evidence issues because there is usually no one record that is a final expression of the parties' agreement. Under the broadened scope of R2-207, such a final expression could well exist. The

67. *Cf.* U.C.C. § 2-207 cmt. 1 (Proposed Revision Nov. 2000).
68. *See id.* at 2-207(2).
69. *See id.* at 2-207 cmt. 2.
70. *See* discussion *infra* Parts VI.D.
71. The Revised Comment gives the less common example of the buyer making an offer in a record. The seller then ships without enclosing any record of its own.
72. U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000).
73. 105 F.3d 1147 (7th Cir. 1997).
74. *See* discussion *infra* Part VI.C.2, note 113 (discussing this issue further).

reference to R2-202 means that parol evidence of terms that would normally be part of the contract under R2-207(2) could be excluded by the parol evidence rule.

C. CONTRACT TERMS UNDER R2-207

R2-207(1)–(3) list three types of terms that are part of any contract formed under Revised Article 2. These types are: (1) terms that appear in the records of both parties; (2) terms, whether in a record or not, to which both parties agree; and (3) terms supplied or incorporated under any U.C.C. provision.[75] This section of the article identifies the source and analyzes the content of each type of term.

1. R2-207(1): Terms in the Records of Both Parties

According to R2-207(1), the terms of the contract include "terms that appear in the records of both parties."[76] This subsection is derived without substantial change from Current 2-207(3) and Comment 6 to Current 2-207. The rationale is obvious: if both records contain the same term, it is evident that the parties have mutually agreed to that term. Therefore, this subsection will include in the contract the filled-in terms on the forms to the extent those terms agree. Revised Comment 2 indicates that immaterial variances in two terms do not prevent those parts of the terms that agree from entering the contract.[77]

2. R2-207(2): Terms to Which Both Parties Agree

R2-207(2) provides that the contract terms include "terms, whether in a record or not, to which both parties agree" (the "Agrees to the Terms" Test).[78] This provision is new. Current 2-207(2) required an express agreement[79] or, in some instances, assent by silence before one party's term could enter the contract. R2-207(2) essentially substitutes the "agrees to the terms" test for these provisions of Current 2-207. The Revision makes this substitution to give courts greater discretion to include or exclude terms.[80] Greater discretion, however, comes at the cost of predictability. To minimize this cost, the drafters of the Revised Comments included guidelines on when an agreement to terms exists under R2-207(2).[81]

What are the similarities and differences in terms to be included in the contract under Current 2-207 and Revised 2-207(2)? An express agreement to a term makes that term part of the contract under both Current

75. *See* U.C.C. §§ 2-207(1)-(3) (Proposed Revision Nov. 2000).
76. *Id.* § 2-207(1).
77. *Id.* § 2-207 cmt. 2, para. 4 (referencing arbitration clauses).
78. *Id.* § 2-207(2).
79. U.C.C. § 2-207 cmt. 3 (West 1989).
80. U.C.C. § 2-207 cmt. 2 (Proposed Revision Nov. 2000).
81. *Id.*

and R2-207.[82] Similarly, assent manifested by conduct indicating acceptance of a particular term is also effective to make the term part of the contract under both Current and R2-207.[83] Finally, usage of trade, course of dealing and course of performance can supply terms under both Current and Revised Article 2.[84]

Assent by silence or by performance appears to be treated differently under Current and Revised 2-207. This is a vitally important issue and one that will be frequently litigated. When forms are used there is usually no verbal or written assent or conduct regarding particular terms. The recipient of the form will simply proceed to perform. Whether that performance constitutes an agreement to the form will determine whether the terms in the form or the neutrality principle governs.

Current 2-207(2) governs assent to terms by silence. It applies when a contract has been formed and one or both parties propose additional terms for inclusion in the contract. In contracts between merchants, this provision makes the proposed additional[85] terms part of the contract if they do not materially alter[86] the contract and they are not objected to by the other party. Thus, assent is presumed from silence if the proposed terms do not materially alter the contract.[87] If the proposed terms materially alter the contract, express assent to them is required.[88] Therefore, this "materially alters" test delineates when assent to proposed additional terms is presumed by silence and when it is not.

The "materially alters" test is premised on two factual assumptions. First, form clauses are usually not read, even by merchants.[89] Second,

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82. *Compare* U.C.C. § 2-207 cmt. 3 (West 1989) *with* U.C.C. § 2-207 cmt. 2, para. 3 (Proposed Revision Nov. 2000).

83. *Compare* U.C.C. § 2-207 cmt. 2, para. 4 (Proposed Revision Nov. 2000) *with* Waukesha Foundry, Inc. v. Indus. Eng'g, Inc., 91 F.3d 1002, 1009 (7th Cir. 1996) (holding that failure to claim consequential damages in prior deals indicates assent to term excluding such damages in current deal); Advance Concrete Forms, Inc. v. McCann Const. Specialties Co., 916 F.2d 412, 415-16 (7th Cir. 1990) (continuing to place orders after objection to term has been rebuffed indicates assent to term); *but see* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444-45 (9th Cir. 1986).

84. *Compare* U.C.C. § 2-201(3) (West 1989) *with* U.C.C. § 1-201(3) (Proposed Revision Nov. 2000) and *id.* 2-207, cmts, 2 and 4.

85. The drafters' intent was that different (as opposed to additional) terms in a confirmation or acceptance could never become part of the contract under the special merchants rule of Current 2-207(2). The conflicting term in the contract or offer was deemed to be an objection to the different term in the confirmation or acceptance. Consequently, Current 2-207(2)(c) would always be satisfied as do the different term. Thus, the different term could never enter the contract under Current 2-207(2). *See* William B. Davenport, *To Paraphrase Mark Twain, The Claim of a Printer's Error in UCC Section 2-207 is Greatly Exaggerated*, 28 UCC L.J. 231 (1996); *see also* Wladis, *supra* note 28, at 1050.

86. Current Comment 4 to section 2-207(2) states that a term materially alters the contract if it "results in surprise or hardship if incorporated without express awareness by the other party." U.C.C. § 2-207(2) (West 1989). Current Comments 4 and 5 give examples of common form clauses that do or do not materially alter the contract. *See id.* § 2-207, cmts. 4, 5.

87. *See id.* § 2-207 cmt. 6.

88. *See id.* § 2-207 cmt. 3.

89. *See* 1948 Comments, *supra* note 9, *General Comment on Part II: Formation and Construction*, at 14-15, 17 *reprinted in* A.B.A. Task Force, *An Appraisal of the March 1,*

some form clauses are reasonable while other form clauses are unreasonably one-sided.[90] The purpose of this test was to permit the unread reasonable clauses (form and non-form) to enter the contract by silence,[91] while protecting against inadvertent assent by silence to unread one-sided form clauses.[92] This test applied not only to contracts formed under Current 2-207(1), but also to contracts arising from the battle of the forms under Current 2-207(3).[93]

The "materially alters" test was intended to provide guidance in place of the confused and unpredictable pre-Code case law dealing with form clauses.[94] This test has been relatively successful in introducing order into the case law. Although courts differ on the treatment of some clauses,[95] the guidance provided by Current Comments 4 and 5 has generally produced reasonable consensus in the case law on what terms "materially alter."

a. "Agrees to the Terms" Test

R2-207(2) replaces these provisions with an "agrees to the terms" test. The Revision makes this change to give "the court greater discretion to include or exclude certain terms than original Section 2-207 did."[96] Presumably, the basis for finding agreement to terms under R2-207(2) is assent to the terms manifested by words or conduct.[97]

Revised Comment 2 provides four guidelines for determining when performance constitutes an agreement to the other party's terms under R2-207(2). These guidelines will now be briefly summarized and then each guideline will be discussed in detail. Basically if a party has sent its own record, that party's' performance is not agreement to terms in the

1990, Preliminary Report of the U.C.C. Article 2 Study Group, 16 DEL. J. CORP. L. 981, 1251 app. a (1991) [hereinafter General Comment]; *see, e.g., Am. Ins. Co. v. El Paso Pipe & Supply Co.*, 978 F.2d 1185, 1190 (10th Cir. 1992). The empirical evidence appears to support the assumption that forms often are not read. *See* D. Keating, *Exploring the Battle of Forms in Action*, 98 MICH. L. REV. 2678 at 2703-04 (2001); J. Murray, *The Chaos of the 'Battle of the Forms': Solutions*, 39 VAND. L. REV. 1307, 1317-18, n. 47 (1986); S. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59-62 (1963).

90. *See* General Comment, *supra* note 89, at 17.

91. *See* U.C.C. § 2-207 cmt. 6 (West 1989); 1948 Comments, *supra* note 9, § 20, at 2-3, 5 ("The provision of this section that silence leads to the incorporation of reasonable additional terms into the contract . . . ."); General Comment, *supra* note 89, at 16-17.

92. General Comment, *supra* note 89, at 17; 1948 Comments, *supra* note 9, § 20, at 2-3.

93. *See, e.g.*, Jom, Inc. v. Adell Plastics, Inc., 151 F.3d 15, 23 (1st Cir. 1998); Wladis, *supra* note 28, at 1048. Courts sometimes assume that contract terms under Current 2-207(3) do not include Current 2-207(2). *See, e.g.*, P.S.C. Nitrogen Fertilizer, L.P. v. The Christy Refractories, L.L.C., 225 F.3d 974 (8th Cir. 2000).

94. Llewellyn 1954 Memorandum, *supra* note 48, at 119-20.

95. *See, e.g.*, Coastal Indus., Inc. v. Automatic Steam Prods. Corp., 654 F.2d 375 (5th Cir. 1981); Schulze & Burch Biscuit Co. v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987) (demonstrating the courts' inconsistent treatment of arbitration clauses); Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758 (10th Cir. 1983); Kathenes v. Quick Check Food Stores, 596 F. Supp. 713 (D.N.J. 1984) (demonstrating the courts' inconsistent treatment of remedy limitation clauses).

96. U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).

97. *Cf. id.* § 2-207 cmt. 2.

other party's record, unless course of performance, course of dealing or trade usage treat the other party's terms as part of the agreement.[98] If a party has not sent its own record, and no contract has been formed before its performance, the performing party will be deemed to have agreed to the other party's terms.[99] If a contract had been formed before receipt of the other party's terms, performance is not agreement to the other party's terms.[100]

The guidelines thus draw two distinctions. First, when was the contract formed relative to receipt of the terms. Second, did the performing party send its own record to the other party. If an initial agreement has been made and terms follow, the second guideline indicates that performance by the receipt of the terms should not normally be construed as its agreement to those terms.[101] Course of performance, course of dealing or trade usage can, however, cause the terms received to be part of the agreement under the fourth guideline.[102]

If there had been no initial agreement before the terms were received, the guidelines make a distinction based on whether the recipient of the terms sent its own record. If the recipient did send its own record, the first guideline indicates that the recipient's performance should not normally be regarded as its assent to any terms it received from the other side, unless course of performance, course of dealing or trade usage makes the terms part of the agreement.[103] If the recipient did not send its own record, the third guideline indicates that performance by the recipient after receiving the other side's terms should normally be treated as its agreement to those terms.[104]

i. First Revised Guideline: No Agreement to Terms By Performance When Both Sides Send Records

The first guideline of Revised Comment 2 states that "a party who sends a record . . . with additional or different terms should not be regarded as having agreed to any of the other's additional or different terms by performance."[105] This guideline protects any party who sends a record against being held to have agreed to the other party's terms merely by performing. In effect, a party's record is treated as an assent to the terms contained in it and no others. This guideline presumably covers the battle of the forms, and it affirms the neutrality principle: neither party's terms control. This is the same result as under Current 2-207(3). Note that under this revised guideline, additional terms in the other party's record are excluded from the contract even if an objection is not

98. *Id.* § 2-207, cmt. 2, paras. 1, 4, cmt. 3.
99. *Id.* § 2-207, cmt. 2, para. 2.
100. *Id.* § 2-207, cmt. 2, para. 1.
101. *Id.*
102. *Id.* § 2-207, cmt. 2, para. 4, cmt. 3.
103. *Id.* § 2-207, cmt. 2, para. 2, 4, cmt. 3.
104. *Id.* § 2-207, cmt. 2, para. 2.
105. U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000).

made. This is a change from Current 2-207, which included additional reasonable terms in the contract if no objection was made.[106]

The fourth guideline indicates that trade practice, course of dealing or course of performance might treat performance as an agreement to the other party's terms even though the performing party sent its own record.[107]

ii. Second Revised Guideline: No Agreement By Performance to Terms Received After Original Agreement Is Made

The second guideline of Revised Comment 2 provides that "performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms in the other's record unless that record is part of the original agreement."[108]

This guideline presumably protects a party who performs after receiving a written confirmation of a prior informal agreement. The performance is not an agreement to any of the terms in the confirmation that were not part of the original agreement. This guideline is somewhat different from Current 2-207, under which reasonable additional terms in a confirmation could become part of the agreement unless an objection was made. Note that the fourth guideline indicates that performance could be an agreement to the terms in the confirmation if trade usage, course of dealing or course of performance so indicates.

The second guideline indicates that performance is not an agreement to terms in a record "unless the record is part of the original agreement."[109] This phrase indicates that a party's terms bind the other side if the terms are part of the original agreement. Thus, for example, if terms are part of the original agreement by a course of dealing, or because they were agreed to when the original agreement was made, they are binding under R2-207.

iii. Third Revised Guideline: Performance is Agreement to Terms If No Contract Before Performance and Performing Party Does Not Send a Record

The third guideline in Revised Comment 2 states:

> The rule [that performance is not agreement to terms] would be different where no agreement precedes the performance and only one party sends a record. If, for example, a buyer sends a purchase order, there is no oral or other agreement and the seller delivers in response to the purchase order but does not send its own acknowledgement or acceptance, the seller should normally be treated as

106. U.C.C. § 2-207(2) (West 1989); *see supra* note 91 and accompanying text.

107. U.C.C. § 2-207 cmt. 2, para. 4, cmt. 3 (Proposed Revision Nov. 2000). *See infra* note 118 and accompanying text.

108. U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).

109. *Id.* § 2-207 cmt. 2, para. 1.

having agreed to the terms of the purchase order.[110]

This guideline gives the example of a seller who ships goods without sending its own form. A more likely scenario has the buyer as the performing party who does not send a record. Often the buyer will place an order for goods by telephone. The seller does not accept the offer on the telephone. Instead it proposes a counter offer by shipping the goods and enclosing its form with the shipment. The buyer then accepts the goods without sending its own record or otherwise objecting to the seller's terms. Has the buyer assented to the terms in the seller's form? Courts are divided on whether Current 2-207(3) governs this fact pattern. Some courts apply this subsection, so that the buyer's acceptance of the goods is not assent to the seller's terms.[111] Other courts decline to apply Current 2-207(3), holding the buyer's acceptance of the goods to be assent to the seller's terms.[112]

The third guideline adopts the view that the buyer's acceptance of the goods is an agreement to the seller's terms.[113] This view disregards the fact that forms usually are not read beyond the filled- in terms.[114] It is, however, consistent with the common law rule that acceptance of goods tendered with an offer constitutes an acceptance of the terms of the offer.[115] It is also the view adopted in the *Hill v. Gateway 2000, Inc.*[116] It should be noted, however, that this view is not based on the layered contract approach, on which the Revision purports to be neutral.[117]

The third guideline does not follow the neutrality principle. The terms of the party who used a record prevail. As a result, consumer buyers will normally be bound to the seller's form clauses, subject to a showing that the clauses are unconscionable. Other buyers who do not send purchase orders or confirmations may find themselves similarly bound despite the fact that they are no more likely than someone who sends a writing to have read the other party's form. To avoid being bound under this guideline, a buyer should always send a record.

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110. U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision 1989).

111. *See* C. Itoh & Co. (America) v. Jordan Int'l Co., 552 F.2d 1228, 1236 (7th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168-69, n.6 (6th Cir. 1972) (applying Current 2-207 to a mutual conduct contract following an oral order and the seller's written response); Album Graphics, Inc. v. Beatrice Foods Co., 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980); USEMCO, Inc. v. Marbro Co., Inc., 483 A.2d 88, 92 (Md. Spec. App. 1984).

112. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

113. *See* U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000).

114. *See supra* note 89 and accompanying text.

115. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1981).

116. 105 F.3d 1147 (7th Cir. 1997).

117. See U.C.C. § 2-207 cmt. 4 (Proposed Revision Nov. 2000).

iv. Fourth Revised Guideline: Trade Usage, Course of Dealing and Course of Performance Can Add Terms to Contract

Revised Comments 2 and 3 address the effect of course of performance, course of dealing and trade usage on a party's agreement to terms.[118] These comments modify the guidelines discussed above. Thus, a course of performance, course of dealing or trade usage can make a term in one party's record part of the agreement even though the record is not received until after an agreement has been made, and even though both parties have used records.

Revised Comment 2 states in pertinent part:

> It is impossible that trade practice in a particular trade or course of dealing between the contracting parties might treat the offeree's performance as acceptance of the offeror's terms even when the offeree sent its own record; conversely trade practice or course of dealing might bind the offeror to terms in the offeree's form when the expectation in the trade or in the course of dealing so directs.[119]

Revised Comment 3 states:

> An "agreement" may include terms from a course of performance, a course of dealing or trade usage. See section 1-201. If the members of a trade or if the contracting parties expect to be bound by a term that appears in the record of only one contracting party, that term is part of the agreement. However, repeated use of a particular term or repeated failure to object to a term on another's record is not normally sufficient in itself to establish a course of performance, a course of dealing or trade usage.[120]

These comments make three main points. The first point is that terms in the record of one party that correspond to a course of performance, course of dealing or trade usage are part of the parties' agreement. Under both Current and Revised Article 2 these usages are part of the parties' agreement unless specifically negated during negotiations.[121] The second sentence of Revised Comment 3 explains why one party's terms can become part of the agreement via trade usage, course of dealing or course of performance—the parties expect to be bound by these usages.[122]

The second point made by the Revised Comments is that repeated sending of a record or repeated failure to object to a record does not normally establish a course of performance, course of dealing or trade

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118. U.C.C. § 1-303(a) (Proposed Revision Nov. 2000) (definition of "course of Performance"). *Id.* § 1-3-3(b) (definition of "course of dealing"). *Id.* § 1-3-3(c) (definition of "usage of trade").

119. *Id.* § 2-207, cmt. 2, para. 4. The Revised Comment uses the term "trade practice." This phrase probably means "usage of trade," ad defined in, *id.* § 1-205(2).

120. *Id.* cmt. 3.

121. U.C.C. § 1-201(3) (West 1989; U.C.C. § 1-201(3) (Proposed Revision Nov. 2000). Cf. U.C.C. § 2-202, cmt. 2 (West 1989); U.C.C. § 2-202, cmt. 2 (Proposed Revision Nov. 2000).

122. U.C.C. § 2-207, cmt. 3 (Proposed Revision Nov. 2000); U.C.C. § 1-205(2) (West 1989). Cf. *Id.* § 2-202, cmt. 2.

usage of the kind that makes the record's terms part of the agreement.[123] This view reflects the weight of authority under Current 2-207.[124] Thus, for example, if a seller sent the same form in five previous transactions and the buyer did not object to any of the forms, this pattern does not, by itself, establish a course of dealing that the seller's terms prevail.[125] If, however, a party has engaged in particular conduct that shows agreement to a specific term in the other party's record, this conduct establishes a course of dealing for subsequent transactions.[126]

The third point is that trade usage or course of dealing could treat a party's performance as agreement to the other party's terms even if the performing party has sent its own record. According to Revised Comment 2 performance is treated as agreement to the other party's terms when this is "the expectation in the trade or in the course of dealing."[127] Thus, for example, when a form contains terms generally acceptable in a trade, such as a broker's note, it is expected that performance is acceptance of the terms in that form.

An issue under this third point is whether one agrees to the other party's terms by performing if those terms are commonly found in forms used by one side in the particular trade. For example, sellers' forms invariably contain a remedy limitation clause. Does the buyer agree to that clause under Revised Comment 2 by performing, even if the buyer has sent its own record? Probably not. The fact that certain terms are commonly included in sellers' forms normally does not constitute a usage of trade without evidence that those terms are usually accepted by buyers.[128] A change in this rule would be very significant since it would tip

123. U.C.C. § 2-207, cmt. 3 (Proposed 2000 Revision).

124. *See, e.g.*, PSC Nitrogen Fertilizer, L.P. v. The Christy Refractories, L.L.C., 225 F.3d 974 (8th Cir. 2000); *In re* CFLC, Inc., 166 F.3d 1012 (9th Cir. 1999); Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 103-04 (3d Cir. 1991); Diamond Fruit Growers, Inc. v. Krack Corp., 794 F. 2d 1440, 1445 (9th Cir. 1986); Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E. 2d 1154 (N.Y. 1979). *See* White & Summers, *supra* n. 29 111 at n.2. *Contra see, e.g.*, Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F. 2d 1333, 1336-37 (7th Cir. 1987). Some courts make the terms not objected to part of the contract only if no unreasonable hardship results. Trans-Aire Int'l, Inc. v. Northern Adhesive Co., Inc., 882 F. 2d 1254 (7th Cir. 1989) (dictum). This latter approach is based on the "materially alters" test of Current 2-207(2). With the removal of that test from the Revision this approach no longer has a statutory basis.

125. Note, however, that if the buyer sent no record and no contract had been made before its performance, the buyer normally would be deemed to have agreed to the seller's terms by performing, regardless of the existence of a course of dealing. *See* U.C.C. § 2-207, cmt. 2, para. 2 (Proposed Revision Nov. 2000).

126. *See, e.g.*, Waukesha Foundry, Inc. v. Industrial Eng'g, Inc., 91 F. 3d 1002, 1009 (7th Cir. 1996) (failure to claim consequential damages in prior deals indicates assent to term excluding such damages in current deal); Advance Concrete Forms, Inc., v. McCann Const. Specialties Co., 916 F. 2d 412, 415-16 (7th Cir. 1990) (continuing to place orders after objection to term has been rebuffed indicates assent to term), *but see* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444-45 (9th Cir. 1986) (contra). For an example of trade usage binding a party to a term in the other party's form, see Bayway Refining Co. v. Oxygenated Marketing and Trading A.G., 215 F. 3d 219, 225 (2d Cir. 2000).

127. U.C.C. § 2-207, cmt. 2, para. 4 (Proposed Revision Nov. 2000).

128. *See* Cosden Oil & Chemical Co., v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064, 1075 (5th Cir. 1984). *Cf.* Bayway Refining Co. v. Oxygenated Marketing & Trading

the battle of forms in favor of the sellers. If the drafters of the Revision had intended such a major change one would have expected the change to be more clearly indicated.

b. Issues That Transcend the Revised Guidelines

This section discusses issues that arise under more than one of the Revised Comments' guidelines. It covers: (1) the effect of an objection to terms; (2) the effect of replacing the "materially alters" test with the "agrees to the terms" test; and (3) the scope of the layered contract approach under the Revision.

i. Effect of An Objection to Terms

Neither the text nor the comments of R2-207 discuss the effect of an objection to the other side's terms. Under Current 2-207(2), an objection prevents terms from being part of the contract. Consequently, most forms contain clauses that object to any terms not contained in the form. What is the effect of these clauses under the Revision? Presumably, an objection to a term indicates that the objecting party does not agree to the term under R2-207(2). It could be argued, however, that the objection is waived by later performance or that a court may use its discretion to include a clause despite the objection. Revised Comment 2 does not specifically address these arguments. It does, however, indicate that one who performs after sending its own record normally does not agree to the other's terms.[129] Thus, an objection likely precludes an agreement. Current 2-207(2), however, is clearer on the effect of an objection.

ii. Substitution of "Agrees to the Terms" Test for "Materially Alters" Test

R2-207 discards the "materially alters" test of Current 2-207(2) and the forty-odd years of case law developed under it. That test focuses on the content of the term. It permits unread reasonable clauses to enter the contract by silence, while protecting against inadvertent assent by silence to unread one-sided form clauses.[130] The Revision substitutes guidelines that focus not on the term's content, but on whether a party has sent a record.

These Revised guidelines may make it more difficult for reasonable additional clauses to enter the contract if the other party does not object to them. Consider, for example, the fate of a clause charging interest on overdue balances under Current and Revised 2-207. Assume the parties

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A.G., 215 F. 3d 219, at 225 (2d Cir. 2000) (evidence that buyers always paid excise tax in accordance with sellers' terms). *But see* Figgie Intern., Inc. v. Destilera Serralles, Inc., 190 F. 3d 252, 256 (4th Cir. 1999) (uncontested affidavit that sellers always limit liability sufficient to establish trade usage); M.A. Mortensen Co., Inc. v. Timberline Software Corp., 998 P. 2d 305, 314 (Wash. 2000) (uncontradicted evidence of "unquestioned use of such license agreements throughout the software industry" can establish trade usage).

129. *See* U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).

130. *See supra* notes 87-88 and accompanying text.

make a contract on the telephone. The seller then sends the goods with an invoice containing the interest clause. The buyer takes the goods and does not object to the clause. Under Current 2-207(2), the clause does not materially alter the contract.[131] Thus, it becomes part of the contract. Whether the interest clause would become part of the contract under R2-207 is less clear. Has the buyer agreed to the clause by performance under R2-207(2)? The second guideline indicates the buyer's performance is not an agreement to the seller's terms.[132] Perhaps the clause would be part of the contract under trade usage, course of dealing or course of performance.[133] Alternatively, perhaps a court could use its discretion to add the interest clause to the contract.[134] Unlike Current 2-207(2), the revised guidelines do not focus on the content of a term in deciding whether performance constitutes agreement to that term. Experience suggests that a term's content is an important factor governing whether the term will be included in the contract. If courts cannot consider this factor explicitly, they will do so implicitly. This will often result in warping of legal rules,[135] and predictability suffers. Making the issue turn ultimately on the court's discretion, as do the revised guidelines, does not improve predictability. On balance, the "materially alters" test (together with the illustrative types of clauses given in Current Comments 4 and 5) appears to provide a more predictable basis than the Revision for including reasonable additional form clauses in the contract when there is performance without objection.

iii. Scope of the Layered Contract Approach

Revised Comment 4 explains the relation of R2-207 to the layered contract approach. That comment states:

> The section omits any specific treatment of terms on or in the container in which the goods are delivered. Revised Article 2 takes no position on the question whether a court should follow the reasoning in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to such cases; the "rolling contract" is not made until acceptance of the seller's terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and 'shrink wrap' terms or those in the container become part of the contract only if they comply with provisions like Section 2-207).[136]

We have seen that R2-207 embraces the neutrality principle: neither side's terms control.[137] Consonant with that principle, the guidelines of

131. U.C.C. § 2-207 cmt. 5 (West 1989).
132. *See* U.C.C. § 2-207 cmt. 2, para. 2.
133. *See id.* § 2-207 cmt. 2, para. 4. .
134. *See* U.C.C. § 2-207 cmt. 2, para. 5 (Proposed Revision Nov. 2000).
135. *See, e.g.*, U.C.C. § 2-302 cmt. 1 (Proposed Revision Nov. 2000).
136. *See id.* § 2-207 cmt. 4.
137. *See* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986).

Revised Comment 2 indicate that performance is, in most instance, not agreement to the other party's terms.[138] If, however, the layered contract[139] (also known as the "rolling contract") approach applies, the buyer agrees to the seller's terms by keeping the goods delivered to it. Under this approach, if the buyer has reason to know that the seller will enclose its terms with the goods, the buyer's retention of the goods is treated as assent to the seller's terms.[140] Thus, the layered contract approach and the neutrality principle are at war—they lead to diametrically opposed results. Both of these theories existed under Current Article 2,[141] and this has created a good deal of uncertainty. Hence the separate discussion of this important issue.

Several Revised Article 2 Drafting Committees struggled to produce a satisfactory provision describing when the layered contract approach applies.[142] Their efforts foundered, resulting in Revised Comment 4, which reflects a decision to take no position on this issue.[143]

What is the dividing line between these two theories under the Revision? When does the layered contract approach apply, and when does the neutrality principle apply? The Revised Comment 2 guidelines indicate the key distinctions are: (1) when is the contract formed, and (2) did the buyer send its own record. In sum, if the contract is formed before the buyer receives the goods and the seller's terms, the neutrality princi-

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138. *See supra* note 98 and accompanying text (discussing Revised Comment 2's guidelines).

139. *See, e.g.,* M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000); UCITA § 202 cmt. 4 (2000).

140. *See, e.g.,* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305, 313; Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998). The cases base this theory on Current 2-204.

141. Under Current 2-207, if the seller's form is treated as an acceptance or confirmation, the additional and different terms in the seller's form are treated as proposals for modification. The buyer's retention of the goods is generally not treated as assent to the seller's form clauses. *See infra* note 147. Current 2-207 was not unsympathetic to the "layered contract" approach. It contained a version of this approach in Current 2-207(2). Between merchants, terms proposed after the contract had been formed became part of the contract if the proposed terms did not materially alter the contract and the buyer failed to object to them. This merchant rule:

> rests on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of [this] section almost every person in business would, therefore, be deemed to be 'a merchant'. . . since the practices involved in the transaction are non-specialized business practices such as answering mail.

U.C.C. § 2-104 cmt. 2 (West 1989). *But see Hill*, 105 F.3d at 1150 (dictum); *Mortenson*, 998 P.2d at 312, n.9 (concluding that the respective buyers in *ProCD* and *Mortenson* were not merchants under Current 2-207, which conflicts with this comment).

142. The original drafting committee, with Professor Richard Speidel as Reporter (the "Speidel Drafting Committee"), functioned from 1992 until 1999. A new drafting committee, with Professor Henry Gabriel as Reporter (the "Gabriel Drafting Committee"), has functioned since Fall 1999. *See March 2000 Draft of Revision of U.C.C. Article 2* § 2-207(b) cmts. 3–5 (Gabriel Drafting Committee); *March 1, 1999 Draft of Revision of U.C.C. Article 2* § 2-207(d) cmt. 5 (Speidel Drafting Committee) *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Apr. 3, 2001) (providing several unsuccessful drafts of a provision regarding the layered contract approach).

143. *See* U.C.C. § 2-207 cmt. 4 (Proposed Revision Nov. 2000).

ple governs.[144] If the contract is formed after the buyer receives the goods and the seller's terms, the layered contract approach applies,[145] unless the buyer sends its own record.[146]

The guidelines generally follow existing law. First, the guidelines indicate that performance after a contract has been made is not normally an agreement to the other party's terms received after the contract has been made.[147] This guideline is consistent with Current 2-207[148] and the case law developed under that provision.[149] When a contract has been formed before the seller sends its terms, those terms are treated as proposals to modify the contract.[150] There is good reason to be reluctant to find that the buyer has agreed to the proposed modification merely by performing. The buyer's conduct in keeping the goods more likely indicates performance under the original contract, rather than an agreement to the (usually) one-sided form clauses contained in the seller's proposed modification. The layered contract cases do not directly disagree with this result; rather, they find that no contract had been formed until the buyer performed.[151]

Next the guidelines indicate that if no contract has been formed before the buyer performs its performance normally constitutes an agreement to the seller's terms if the buyer did not send a record.[152] This result is consistent with the layered contract approach.[153] In this case, that result merely reflects the common law rule of offer and acceptance: the seller makes an offer by tendering the goods with its terms. When the buyer

144. *See id.* § 2-207 cmt. 2, para. 1; *see also supra* note 108 and accompanying text (discussing the second guideline).

145. *See* U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000); *see also supra* note 110 and accompanying text (discussing the third guideline).

146. *See* U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000); *see also supra* note 105 and accompanying text (discussing the first guideline).

147. *See* U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).

148. U.C.C. § 2-207 cmts. 1, 6 (West 1989).

149. *See, e.g.,* Advance Concrete Forms, Inc. v. McCann Constr. Specialties Co., 916 F.2d 412 (7th Cir. 1990); Trans-Aire Int'l, Inc. v. N. Adhesive Co., 882 F.2d 1254 (7th Cir. 1989); Supak and Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135 (4th Cir. 1979). *Cf.* Schulze & Burch Biscuit Co. v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987) (applying Current 2-207 whether contract formed orally or by acknowledgment acting as acceptance); Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758, 764-65 (10th Cir. 1983) (holding that an invoice qualifies as acceptance or written confirmation; court applies Current 2-207); Coastal Indus., Inc. v. Automatic Steam Prods. Corp., 654 F.2d 375, 378, n.4 (5th Cir. 1981) (declining to rule on when contract formed because, in any case, Current 2-207 applies); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) (holding that seller's acknowledgment could be acceptance or confirmation and applying Current 2-207 in both cases); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993) (holding that seller accepted by agreeing to ship or shipping goods and applying Current 2-207).

150. *Cf.* U.C.C. § 2-207(iii) cmt. 1 (Proposed Revision Nov. 2000). This point was clearer under Current 2-207(2).

151. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1147 (7th Cir. 1996); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

152. *See* U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000).

153. *See, e.g.,* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

accepts the goods, it accepts the terms of the offer.[154]

However, if the buyer has sent a record, its performance is not an agreement to the seller's terms.[155] This guideline thus protects the buyer in the battle of the forms. It is consistent with Current 2-207,[156] and with most of the layered contract case law.[157]

So far, so good. Unfortunately, layered contract case law undercuts both of the distinction made by the Revised Comment 2 guidelines. As for the first distinction—the timing of contract formation—the layered contract cases typically employ an unorthodox application of contract formation rules to delay the formation of a contract until after the buyer has received the goods and the seller's terms. In determining when a contract has been formed, courts should apply the general contract law of offer and acceptance, except as modified by Article 2.[158] The layered contract cases often contain facts that could easily indicate the existence of an initial contract before the goods were shipped, yet these cases usually fail to discuss whether the parties' words or deeds formed a contract before the buyer received the goods. Two layered contract cases that illustrate this reasoning are *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*[159] and *Hill v. Gateway 2000, Inc.*[160]

First, consider the Washington Supreme Court's application of the layered contract approach in *MA Mortenson Co., Inc. v. Timberline Software Corp.*[161] In that case, the buyer's purchase order for software was signed by the seller's agent. Later the software arrived with the seller's shrink wrap license. The buyer proceeded to use the software and suffered a $2 million loss caused by a bug in the software. The buyer sued, and the seller defended by asserting a clause in its license that limited its liability. The buyer argued that the signed purchase order had created a contract and the seller's license proposed additional terms that

154. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 69(2) (1981). Current 2-207 case law, however, is divided on this point. For cases applying Current 2-207 see C. Itoh & Co. (America), Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1236 (7th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168-69, n.6 (6th Cir. 1972) (applying Current 2-207 to mutual conduct contract following an oral order and the seller's written response); Album Graphics, Inc. v. Beatrice Foods Co., 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980); USEMCO, Inc. v. Marbro Co., Inc., 483 A.2d 88, 92 (Md. Spec. App. 1984). For cases declining to apply Current 2-207, *see supra* note 151.

155. *See* U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).

156. U.C.C. § 2-207(3) (West 1989) (providing that retention of the goods is not assent to the seller's terms). *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 101, n.34 (3d Cir. 1991).

157. The layered contract cases do, save one, not purport to apply to the battle of the forms. *See ProCD*, 86 F.3d at 1452 (distinguishing *Step-Saver* on the grounds that it was a battle of the forms case); *but see* M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000) (applying the layered contract approach so the seller's terms prevail, even though the seller signed the buyer's purchase order).

158. *See* U.C.C. § 1-103 (West 1989).

159. 998 P.2d 305 (Wash. 2000).

160. 105 F.3d 1147 (7th Cir. 1997). This case is cited in Revised Comment 3.

161. 998 P.2d 305 (Wash. 2000).

did not become part of the contract under Current 2-207.[162] The seller conceded that the signed purchase order was an agreement.[163] Nevertheless, the court declined to apply Current 2-207.[164] Rather, the court found a layered contract under Current 2-204 and held that the buyer's use of the software constituted consent to the license terms.[165] The court apparently concluded that a contract was not formed until the buyer used the software.[166] The court's opinion fails to explain why the signed purchase order was not a contract for the purpose of applying Current 2-207.[167]

The Seventh Circuit's reasoning in *Hill v. Gateway 2000, Inc.*[168] is similarly incomplete. In that case, the buyer ordered a computer system via a telephone call to the seller's sales representative. The seller proceeded to fax a confirmation to the buyer. The seller then charged the buyer's credit card and shipped the computer. The computer box contained numerous documents, including a four page form, which recited that the buyer accepted the terms in the form if it kept the computer for more than the 30 days.[169] The form also contained an arbitration clause. The buyer did not return the computer. Later it commenced a class action suit, and the seller moved to compel arbitration. The district court declined to compel arbitration, concluding that insufficient evidence had been adduced to find an agreement to arbitrate.[170]

The Seventh Circuit reversed and ordered arbitration. Applying its earlier decision in *ProCD, Inc. v. Zeidenberg,*[171] the Seventh Circuit construed the seller's shipment of the computer with the enclosed terms to be an offer to either accept the terms or return the computer. The court held that the buyer accepted this offer by keeping the computer beyond the 30 day period.[172] Thus, the court held that the buyer accepted the seller's terms, including the arbitration clause.[173] The court concluded

162. The buyer argued that the license terms were proposals for addition to the contract under Current 2-207(2), which did not become part of the contract because they materially altered it. *See Mortenson*, 998 P.2d at 311-12.

163. *See* M.A. Mortenson Co., Inc. v. Timberline Software Corp., 970 P.2d 803, 808 (Wash Ct. App. 1999).

164. *See* M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305, 312 (Wash. 2000).

165. *See id.* at 313.

166. The court indicated it chose to apply Current 2-204 rather than Current 2-207 because "this is a case about contract formation, not contract alteration." *Id.* at 312.

167. The court concluded that the purchase order was not a fully integrated contract for parol evidence purposes. *See id.* at 311. This conclusion is not inconsistent with the signed purchase order constituting an agreement under Current 2-207.

168. 105 F.3d 1147 (7th Cir. 1997).

169. The document also contained a clause giving the buyer the right to return the computer within 30 days of delivery and receive a refund of the purchase price, less the shipping costs to and from the buyer. The total shipping costs to and from the buyer would have been at least $200. This estimate of cost is based on the author's purchase of a Gateway computer approximately six months before Hills' purchase.

170. *See id.* at 1147.

171. 86 F.3d 1447 (7th Cir. 1996).

172. *Hill*, 105 F.3d at 1150.

173. *See id.*

that Current 2-207 was inapplicable because only one form had been used.[174]

The Seventh Circuit's opinion fails to discuss why a contract was not formed during the telephone call.[175] Moreover, there is no discussion of why the seller's conduct in shipping the computer was not an acceptance.[176] This latter omission is particularly puzzling, because, not only did the buyer argue this theory in its brief,[177] but the seller's own documents seem to have treated the seller as accepting the buyer's offer.[178]

The curious fashion in which these cases treat the timing of contract formation makes it difficult to predict when a court will apply the layered contract approach and when it will apply the neutrality principle of R-2-207.

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174. *Id.* (citing ProCD, 86 F.3d at 1452). The *ProCD* court was referring to the fact that only one side (the seller) had used a form. *See ProCD, 86 F.3d* at 1452. The statements in *Hill* and *ProCD* that Current 2-207 does not apply to one form cases do not necessarily conflict with the indication in Comment 1 to Current 2-207 that this section applies to cases in which only one party sends a form that confirms a prior agreement. In neither *Hill* nor *ProCD* did the court find the form to have been a confirmation of a prior agreement; rather these cases found the form to be an offer to make an agreement. Thus, when it made its statement about the inapplicability of Current 2-207, the Seventh Circuit was not necessarily concerned with one form confirmation situations. Further, limiting the statements in *Hill* and *ProCD* to the findings in those cases avoids reading these cases so that they conflict with other cases, including several previous Seventh Circuit opinions. *See supra* note 149 (citing opinions that apply Current 2-207 to one form confirmation situations).

175. It is possible that the buyer and seller could have made a contract on the telephone. Ultimately, it depends on what was said during the telephone call.

176. Case law indicates that shipment can constitute acceptance. *See, e.g.,* Townsend Props., Inc. v. Z.N., Inc., 25 U.C.C. Rep. Serv.2d 1099 (D. Md. 1994) (finding a shipment to constitute acceptance of offer); Arizona Retail Sys, Inc. v. Software Link, Inc., 831 F. Supp. 759, 765 (D. Ariz. 1993) (holding that a seller accepted by agreeing to ship or by shipping goods); Klocek v. Gateway 2000, Inc., 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) (holding that a seller accepted by agreeing to ship or by shipping goods). *Cf.* U.C.C. § 2-206(a)(2) (Proposed Revision Nov. 2000) (holding that an offer for a current shipment may be accepted by the shipment of goods).

177. *See* Appellee's Brief at 13-14, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (No. 96-3294).

178. It appears from the seller's documents that the seller treated the buyer as having made an offer, and the seller intended to accept that offer by shipping the goods. For example, the seller's standard invoice form, which is sent with the goods, states that the goods have been "sold to" the buyer. (Copy of Gateway standard invoice on file with author.) Paragraph 5 of the seller's Standard Terms and Conditions indicates that the shipment date is determined by the later of the seller's "acceptance of buyer's offer," or buyer's compliance with payment arrangements. Appellee's Brief, n.177, at A-15. Under Paragraph 6, title to the goods passes to the buyer on delivery. *Id.* at A-15. The fact that the seller's documents lack language of acceptance would not prevent them from being an acceptance. Courts often find forms lacking such language to be definite expressions of acceptance. *See supra* note 36. Further, nothing in the seller's Standard Terms and Conditions indicates that the seller's acceptance is expressly conditioned on the buyer's assent to the terms in that form. Thus, it appears the seller's documents constituted an unconditional, definite expression of acceptance that formed a contract under Current 2-207(1). Under this view, the additional terms in the seller's documents would have been proposals for addition to the contract under Current 2-207(2). Since the buyer was a consumer, the special merchants rule of that subsection would not have applied. Consequently, express assent to the seller's terms would have been required. *See* U.C.C. § 2-207 cmt. 3 (West 1989).

As for the second distinction made by the Revised Comment guidelines—whether the buyer has sent a record—most of the layered contract cases do not undercut this distinction. They concede that the layered contract approach does not apply to a battle of forms.[179] The *Mortenson* case,[180] however, extends the layered contract approach to a battle of forms, resulting in the seller winning the battle. This case thus raises the issue whether a seller can win the battle of forms by the simple expedient of enclosing its terms with the goods.

Revised Comment 4 states that R2-207 omits specific treatment of terms enclose with the goods. Does this lacuna mean that courts are free to apply the layered contract approach to a battle of forms? Probably not. The Revised Comments contain several indications that R2-207 is intended to cover the battle of forms.[181] Indeed the weight of the layered contract case law, which is reflected in the *Hill* case[182] cited in Comment 4, is that Current 2-207, not the layered contract approach, governs the battle of forms. To interpret Revised Comment 4 as meaning that R2-207 does not govern a battle of forms when the seller encloses its terms with the goods would work a major change in the law. It would mean, as a practical matter, that most battle of forms would be governed, not by R2-207, which was designed to provide standards for ascertaining the terms of sales contracts, but by law for which Revised Article 2 provides no specific coverage. If the drafters had intended to omit most battle of forms cases from R2-207 they would likely have stated this intent more clearly.

On balance, it seems that R2-207 is intended to govern the battle of forms. The layered contract approach (should a court choose to adopt it) could apply to a transaction in which the buy does not send a form, the seller encloses its terms with the goods, and a contract has not been formed until the buyer accepts the goods.

3. *R2-207(3): Terms Supplied by the U.C.C.*

R2-207(3) includes in the contract "terms supplied or incorporated under any provisions of [the Uniform Commercial Code]."[183] This subsection is derived from Current 2-207(3) and Comment 6 without substantial change. It states the well-recognized principle of Current and Revised Article 2 that a court may fill gaps in the parties' express agreement with terms contained in Article 2.[184] These supplementary terms include terms established by course of dealing and usage of trade[185] as

179. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447, 1452 (7th Cir. 1996).
180. M.A. Mortenson Co. v. Timberline Softward Corp., 998 P. 2d 305 (Wash 2000).
181. Revised Comment 1 so indicates. Also the first guideline in Revised Comment 2 describes what is essentially a battle of forms and indicates that R2-207 governs. *See* U.C.C. § 2-207, cmt. 2, para. 1.
182. Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997).
183. U.C.C. § 2-207(3) (Proposed Revision Nov. 2000).
184. *See* WHITE & SUMMERS, *supra* note 29, at 19.
185. *See, e.g.*, Dresser Indus., Inc. v. Gradall Co., 965 F.2d 1442, 1451 (7th Cir. 1992). *See* U.C.C. § 1-205 (West 1989); U.C.C. §§ 1-303(a), (c) (Proposed Revision Nov. 2000)

well as the Article 2 standard "gap-filler" terms.[186] These standard gap-filler terms sometimes favor the buyer. For example, the gap-fillers give the buyer a merchantability warranty and the right to recover consequential damages.[187]

D. Comparison of Contract Terms Under Current and Revised 2-207

This segment compares contract terms under the Revision and Current 2-207 when a contract is formed under each of the three methods of contract formation described in Current 2-207 and Revised 2-207(i)–(iii): (1) mutual conduct; (2) unconditional definite expression of acceptance; and (3) written confirmation of prior informal agreement.[188]

1. R2-207(i) [Contract Formed by Mutual Conduct]

The Revision basically follows Current 2-207(3) on contracts formed by mutual conduct. The Revision, however, may result in a contract with terms different than those under Current 2-207(3). The difference stems from the fact that R2-207(2) substitutes an "agrees to the terms" test for Current 2-207(2). The Revision also indicates that the neutrality principle does not apply when no contract has been formed before performance and a performing party has not used a record.

R2-207(i) states that R2-207 governs contracts formed when "conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract."[189] This language is drawn from Current 2-207(3) without substantial change. Both R2-207 and Current 2-207(3) apply when the parties' records do not evidence a contract, but the parties, nevertheless, act as if they have made a contract. For example, when the seller ships and the buyer accepts the goods.[190] These provisions are designed to resolve the battle of the forms.[191] Both provisions enshrine the neutrality principle: neither party's form controls.[192]

Under Current 2-207 and R2-207, the terms of a contract formed by mutual conduct include: (1) terms that appear in the records of both par-

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(providing definitions of "course of performance" and "usage of trade"). Terms established by course of dealing and usage of trade are part of the parties' "agreement." *See* U.C.C. § 1-201(3) (West 1989); U.C.C. § 1-201(b)(3) (Proposed Revision Nov. 2000).

186. *See generally* White & Summers, *supra* note 29, at 116 (concerning the "gap-filler" concept).

187. U.C.C. §§ 2-314(a); 2-715(b) (Proposed Revision Nov. 2000).

188. *See supra* text accompanying note 56.

189. U.C.C. § 2-207(i) (Proposed Revision Nov. 2000).

190. *See id.*; *see also* U.C.C. § 2-207(3) (West 1989); *cf.* U.C.C. § 2-207 cmt. 7 (West 1989) ("In many cases, as where goods shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made . . . . The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.").

191. *See* Wladis, *supra* note 28, at 1047.

192. *See* U.C.C. §§ 2-207(1)–(3) (Proposed Revision Nov. 2000); U.C.C. § 2-207(3) (West 1989).

ties;[193] and (2) terms incorporated by the U.C.C.[194] R2-207(2) adds a reference to terms to which both parties agree that does not appear in the statement of contract terms in Current 2-207(3). This is not a change from Current 2-207(3) when there is express assent to a term;[195] nor is it a change when assent has been manifested by conduct indicating that a particular term is part of the contract.[196] As for assent to terms by silence or mere performance, the added reference may work a change from Current 2-207(3). By substituting the "agrees to terms" test of R2-207(2) for Current 2-207(2), the Revision may make it more difficult for reasonable terms to enter the contract by silence.[197] This point is discussed in detail elsewhere in this article.[198]

The Revision clarifies a point on which case law was divided under Current 2-207. When a contract has not yet been formed, a buyer who accepts goods with the seller's terms accepts those terms if it does not send its own record to the seller.[199]

2. *R2-207(ii) [Contract Formed by Offer and Acceptance]*

R2-207(ii) includes the definite expression of acceptance method of contract formation in Current 2-207(1).[200] R2-207 clarifies the terms of a contract formed by a definite expression of acceptance containing terms that do not match the offer.[201] It also adopts the neutrality principle. As a result, the offeror is not the master of its offer under the Revision, unless the offer specifically says so.

R2-207(ii) states that R2-207 applies when "a contract is formed by an

193. *Compare* U.C.C. § 2-207(1) (Proposed Revision Nov. 2000) *with* U.C.C. § 2-207 cmt. 6 (West 1989).

194. *Compare* U.C.C. § 2-207(3) (Proposed Revision Nov. 2000) *with* U.C.C. § 2-207 cmt. 6 (West 1989).

195. *Compare* U.C.C. § 2-207(2) cmt. 2, para. 3 (Proposed Revision Nov. 2000) *with* U.C.C. § 2-207 cmt. 3 (West 1989).

196. *Compare* U.C.C. § 2-207 cmt. 2, para. 4 (Proposed Revision Nov. 2000) *with* Waukesha Foundry, Inc. v. Indus. Eng'g, Inc., 91 F.3d 1002, 1009 (7th Cir. 1996) (holding that failure to claim consequential damages in prior deals indicates assent to term excluding such damages in current deal); Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329, 1334-35 (7th Cir. 1985) (holding that action taken consistent with a term indicates assent to the term); Constr. Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 510 (7th Cir. 1968) (objecting to only some form clauses indicates assent to others); Advance Concrete Forms, Inc. v. McCann Constr. Specialties Co., 916 F.2d 412, 416 (7th Cir. 1990) (continuing to place orders after objection to term has been rebuffed indicates assent to term). *But see* Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444-45 (9th Cir. 1986) (holding that continuing to order goods after objection to term has been rebuffed does not make term part of contract).

197. Some cases hold that Current 2-207(2) is a source of supplemental terms under Current 2-207(3). *See, e.g.*, Jom, Inc. v. Adell Plastics, Inc., 151 F.3d 15, 23 (1st Cir. 1998). This was also the intent of the drafters of Current 2-207. *See* Wladis, *supra* note 28, at 1048.

198. *See supra* text accompanying notes 131-35.

199. *See* U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000). *See also supra* text accompanying note 110 (discussing this point in detail).

200. U.C.C. § 2-207(ii) (Proposed Revision Nov. 2000).

201. *Id.* § 2-207(1)—(3).

offer and acceptance."[202] This language is derived from the "definite and seasonable expression of acceptance" language in Current 2-207(1).[203] The Revision is phrased more broadly than Current 2-207(1), because R2-207 covers all contracts formed by offer and acceptance, not just contracts formed by an acceptance with terms varying from those in the offer. There is no doubt, however, that R2-207 covers contracts formed by offers and unconditional definite expressions of acceptance under R2-206(c).

Current 2-207 is silent on the terms of a contract formed by a definite expression of acceptance.[204] This silence has resulted in divided case law on what terms are included in such contracts. Most courts have applied the knock out rule: the conflicting terms in the offer and the acceptance cancel each other out so neither conflicting term enters the contract; other courts have held that the terms in the offer control.[205] The Revision resolves this split by adopting the knock out rule and its neutrality principle: neither the terms of the offer, nor the terms of the acceptance control. The contract is formed on the jointly agreed upon terms, plus those terms incorporated by the U.C.C.[206] The justification for applying the neutrality principle is to avoid any strategic advantage to sending the first or last record.[207]

R2-207 also changes the treatment of additional terms—terms appearing in only one of the forms. Additional terms that appear in the offer or the acceptance are not part of the contract under the Revision, unless the other party agrees to them.[208] Cases under Current 2-207 automatically include any of the offer's additional terms in the contract.[209] Further, Current 2-207(2) permits additional terms in the acceptance to become

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202. *Id.* § 2-207(ii).

203. The definite expression of the acceptance contract formation rule of Current 2-207(1) has been moved to R2-206(c). *See supra* text accompanying note 27.

204. The drafters of Current 2-207 probably intended the terms of the offer to control. The fact that Current 2-207 does not state the terms of a contract formed by a definite expression of acceptance indicates that the drafters intended the normal contract rule to apply: an offeree who accepts an offer is bound by the terms of the offer. Support for this interpretation can be found in two early articles discussing Current 2-207. That section had been criticized on the ground that, under Current 2-207, the offeror was no longer master of its offer. In defense of Current 2-207, the author of each article asserted that a definite expression of acceptance formed a contract on the terms of the offer. *See* William D. Hawkland, *In Re Articles 1, 2, and 6*, 28 TEMPLE L. Q. 512, 521 (1955); William B. Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75, 79-80 (1963). Both authors later became members of the Article 2 subcommittee that devised the 1966 amendments to the Current 2-207 comments.

205. *See, e.g.,* Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994) (discussing divided case law).

206. Under R2-207, "the terms of the contract . . . are: (1) terms that appear in the records of both parties; (2) terms, whether in a record or not, to which both parties agree; and (3) terms supplied or incorporated under any provision of [the U.C.C.]" *See* U.C.C. S§ 2-207(1)-(3) (Proposed Revision Nov. 2000).

207. *See id.* § 2-207 cmt. 1.

208. *See id.* § 2-207(2).

209. *See, e.g.,* Mead Corp. v. McNally-Pittsburg Mfg. Corp., 654 F.2d 1197, 1199-2000 (6th Cir. 1981); Idaho Power v. Westinghouse Elec. Corp., 596 F.2d 924, 926 (9th Cir. 1979).

part of the contract by silence. This provision has been replaced with the "agrees to the terms" test of R2-207(2). This substitution makes it more difficult for reasonable terms to become part of the contract when the other side does not object to those terms.[210]

Note that under the Revision, the offeror is not the master of its offer unless it says so. If the response to an offer is an unconditional, definite expression of acceptance, a contract is formed under R2-206(c). Under R2-207, the terms in the acceptance knock out conflicting terms in the offer.[211] As a practical matter, the offeror's risk here is confined to conflicting form clauses, because a response containing clauses that conflict with non-form clauses in the offer would likely not be a definite expression of acceptance.[212]

The offeror can avoid this risk by including in the offer a clause stating that assent to all of the terms in the offer is required before a contract is formed.[213] This clause will prevent the formation of a contract by a response that does not match the offer. Note, however, that if the parties proceed to perform after exchanging non-matching records, this clause will not prevent a contract from being formed by mutual conduct.[214]

3. *R2-207(iii) [Written Confirmation of Prior Informal Agreement]*

R2-207(iii) basically follows Current 2-207(1) on written confirmations. However, the substitution of the "agrees to the terms" test for Current 2-207(2) may mean that the resulting terms of a confirmed contract under the Revision are different than under Current 2-207.

R2-207(iii) indicates that R2-207 governs when "a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed."[215] The written confirmation method of contract formation under both Current 2-207 and R2-207 presumes the parties have made an informal agreement, such as by telephone, which one or both parties then confirm in writing.[216] Neither Current 2-207 nor R2-207 state rules for determining when the parties have made an informal agreement prior to the confirmation. Those rules are found in Current 2-204 and 2-206, as supplemented by the common law contract rules of offer and acceptance.[217]

R2-207(iii) makes several changes and clarifications to Current 2-207(1) in describing the written confirmation situation, none of which appear to be significant. First, by omitting a reference to expressly conditional language, R2-207(iii) clarifies that such language in a confirmation

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210. *See supra* text accompanying note 131-35.
211. *See supra* text accompanying note 205.
212. *See supra* text accompanying note 38.
213. *See* U.C.C. § 2-207 cmt. 2, para. 1 (Proposed Revision Nov. 2000).
214. *See id.*
215. *Id.* § 2-207(iii).
216. U.C.C. § 2-207 cmt. 1 (West 1989). Often the confirmation is sent to ensure that the agreement satisfies the statute of frauds.
217. *Id.* § 1-103; *see also* U.C.C. §§ 2-204—206 (Proposed Revision Nov. 2000).

is ineffective—it does not undo the earlier informal agreement. This result is consistent with the case law under Current 2-207.[218] Second, the text of R2-207(iii) omits the requirement of Current 2-207(1) that the confirmation be "sent within a reasonable time."[219] The Revision gives no reason for this omission.

Under Current 2-207 and R2-207, the terms of an informal contract confirmed in writing include: (1) terms that appear in the confirmations of both parties;[220] and (2) terms incorporated under the U.C.C.[221] The only significant difference between Current 2-207 and R2-207 on the terms of a confirmed contract is that R2-207(2) substitutes an "agrees to the terms" test for Current 2-207(2). This substitution makes it more difficult for reasonable terms to become part of the contract when the other side does not object to those terms.

Revised Comment 1 draws a distinction between confirmations under R2-207 and modifications under R2-209.[222] This comment is potentially misleading. It is true that courts sometimes distinguish between "proposals for addition" under Current 2-207 and "proposals for modification" under Current 2-209.[223] Under the Revision, a confirmation containing terms additional to the original agreement is still a proposal to modify the original agreement, to which the other party may or may not agree. If the proposal is agreed to, the additional terms become part of the contract under R2-207(2). R2-209 does not conflict with any of this; the two sections work in tandem. R2-209 presumes an agreed modification and regulates legal impediments to the enforcement of the agreed modification.[224] Thus, there is no inherent conflict between these sections and no need to distinguish between confirmations under R2-207 and modifications under R2-209.

Even under Current Article 2, there is no inherent conflict and no need to distinguish Current 2-207 confirmations from Current 2-209 modifications. The "proposals for addition to the contract" referred to in Current 2-207(2) are proposals for modification.[225] This subsection permits assent

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218. *See, e.g.,* Am. Parts Co., Inc. v. Am. Arbitration Ass'n, 154 N.W.2d 5, 13 n.7 (Mich. Ct. App. 1967); St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc., 687 F. Supp. 820, 826 (S.D.N.Y. 1988). The drafters' intent was that the expressly conditional clause in Current 2-207(1) not apply to written confirmations. *See* Wladis, *supra* note 28, at 1038-39.

219. *Compare* U.C.C. § 2-207(1) (West 1989) *with* § 2-207(iii) (Proposed Revision Nov. 2000).).

220. *Compare* U.C.C. § 2-207 cmt. 6 (West 1989), *with* U.C.C. § 2-207(1) (Proposed Revision Nov. 2000).

221. *Compare* U.C.C. § 2-207 cmt. 1 (West 1989) *with* U.C.C. § 2-207(3) (Proposed Revision Nov. 2000).

222. U.C.C. § 2-207 cmt. 1 (Proposed Revision Nov. 2000) ("As with original Section 2-207, courts will have to distinguish between 'confirmations' that are addressed in Section 2-207 and 'modifications' that are addressed in Section 2-209.").

223. *See, e.g.,* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 98 (3d Cir. 1991).

224. *See infra* text accompanying note 243 (discussing R2-209)

225. The drafters of Current Article 2 repeatedly described a "proposal for addition" under Current 2-207(2) as a "proposal for modification." *Minutes of Massachusetts Legislative Subcommittee Meeting*, 65-66 (1952), *microformed on* the KARL N. LLEWELLYN PAPERS, file J-XIV(1)(j) (Wm. Hein & Co. 1987) (describing Current 2-207, Llewellyn says

by silence to modification proposals. Such assent does not, however, conflict with Current 2-209, since nothing in this section addresses how assent to a modification must be manifested. A proposed modification assented to by silence under Current 2-207(2) is not immune from the formal requirements imposed by Current 2-209. In truth, however, a modification assented to by silence under Current 2-207(2) will rarely be barred by these formal requirements.[226] Thus, there is almost never any need to distinguish confirmations from modifications under Current Article 2.

E. ADVICE FOR NAVIGATING THE BATTLE OF THE FORMS UNDER R2-207

1. Get A Signed Agreement

The best way to ensure that you get the terms you want is to have the other party sign an agreement containing those terms. For routine, everyday deals this is probably not feasible. You should consider negotiating umbrella agreements with your repeat customers. If you accept orders through a web site, consider structuring the site so that someone placing an order sees a screen containing your standard terms and must click on an "I Accept" button at the bottom of this screen to place an order.

2. What to Do When It's Not Feasible to Get A Signed Agreement

It is often not feasible to get a signed agreement. In that case, you should understand that the battle of the forms cannot be won by simply sending your own form or sending the last form if both parties play the battle of the forms game properly. Revised 2-207, like Current 2-207, adopts a neutrality principal—the battle of the forms is resolved on terms jointly agreed plus the Code gap fillers.[227]

If you are the buyer, this result is not necessarily undesirable. Some of the gap fillers favor the buyer. For example, the buyer gets a warranty of merchantability and full damage remedies, including consequential damages, under the Code gap fillers.[228]

It is also possible that a court could apply the layered contract approach, resulting in the buyer being held to have accepted the seller's terms by keeping the goods.[229]

"additional clauses are to be dealt with as proposals for modification"). See Robert Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 199 (1966).

226. The formal requirements of Current 2-209 will rarely cause problems when a modification has been assented to by silence under Current 2-207(2). NOM clauses must be in a signed agreement to be enforceable. *See* U.C.C. § 2-209(2) (West 1989). Signed agreements, however, seldom exist in transactions governed by Current 2-207. The statute of frauds will usually be satisfied under Current 2-201(2) by the confirmation plus silence that constitutes assent to terms under Current 2-207(2).

227. *See supra* text accompanying notes 253-55.

228. *See* U.C.C. §§ 2-314; 2-711; 2-715(b)(2) (Proposed Revision Nov. 2000).

229. *See supra* text accompanying note 139. One court has applied the layered contract approach to a battle of forms when both buyer and seller signed a purchase order. *See Mortenson*, 998 P.2d at 312.

Absent a signed agreement, to win the battle of the forms you must argue that the other party agreed to your terms under R2-207(2).[230]

With these general considerations in mind, the following specific advice is offered for use when it is not feasible to get a signed agreement.

a. Use A Form

You should always use a form in the contracting process. A party who does not use a form runs several risks. First, a court might conclude that the party who did not use a form agreed to the other side's terms under R2-207(2).[231] Second, a buyer who does not use a form or other record increases the risk that the layered contract approach could be followed, resulting in the buyer being bound to the seller's terms, if the buyer keeps the goods.[232]

b. Include Conditional Assent Language in the Form

Any form should include language stating that the form sender does not assent to a contract unless the other side agrees to the terms in the form. This language is necessary for two reasons. First, if the form is construed to be an offer and does not contain this conditional assent language, the Revision permits the offeree to accept the offer on terms other than those contained in the offer.[233] By including conditional assent language in the offer, a response that does not match the offer is not an acceptance.[234]

Second, under Current 2-207, courts often have construed a form drafted as an offer to be a definite expression of acceptance with the consequence that a contract was formed by an exchange of forms.[235] Thus, the offeror could lose control of the contracting process. Nothing in the Revision purports to change this. If, however, the form includes conditional assent language, it could not be construed as an acceptance closing a contract.

What conditional assent language should be used? Conditional assent language has been very narrowly construed under Current 2-207(1).[236] Courts could continue this approach under the Revision. Thus, the language should very clearly state that the form sender does not assent to a contract unless the recipient agrees to all of the terms in the form.

230. *See supra* text accompanying note 79.

231. *See* U.C.C. § 2-207 cmt. 2, para. 2 (Proposed Revision Nov. 2000).

232. Most of the layered contract approach cases concede that Current 2-207 applies to the battle of the forms. *See, e.g., ProCD*, 86 F.3d at 1452 (distinguishing Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991), on the grounds that it was a battle of the forms case); *but see* M.A. Mortenson Co. Timberline Software Corp., 998 P.2d 305, 313 (Wash. 2000) (applying the layered contract approach so the seller's terms prevail in a battle of forms, even though the seller signed the buyer's purchase order).

233. *See supra* text accompanying notes 206-12.

234. *Cf.* U.C.C. § 2-206 cmt. 5 (Proposed Revision Nov. 2000).

235. *See supra* note 36 and accompanying text.

236. *See supra* notes 43-46 and accompanying text.

Though not required, the language should be on the front of the form and be conspicuous to give the language added weight.

Note that while conditional assent language is useful in preventing the initial formation of a contract by the exchange of non-matching forms, it does not prevent the parties' later conduct from forming a contract. Thus, even if the forms contain the recommended conditional assent language, were the seller to ship and the buyer to accept the goods, a contract would be formed by the parties' mutual conduct under R2-204(a).

c. Include Language Objecting to Any Terms Not Contained in the Form

Language in a form that objects to any terms not contained in it minimizes the possibility of a court finding that the form sender agreed to the other party's terms under R2-207(2) or as a course of dealing. Such language might also be a factor in a court's decision not to follow the layered contract approach. To add weight, this language should be on the front of the form and be conspicuous.

Note that, under the Revision, conditional assent language, as opposed to language objecting to terms not in the form, might not be sufficient to constitute an objection to terms if a contract is subsequently formed. Comment 1 to R2-207 indicates that such language only affects contract formation, but has no effect on the operation of R2-207 once a contract has been formed.

VII. REVISED 2-208. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION

The laws of conscience, which we pretend to be derived from nature, proceed from custom.

—Montaigne

R2-208 is Current 2-208 without any change. This section describes "course of performance" and its relation to "course of dealing"[237] and "usage of trade."[238] These three usages are valuable sources for establishing the content of the contract under both Current and Revised Article 2. They can be used to add terms to a contract[239] and give meaning to a contract term.[240] Course of performance can also show a waiver or modification of any term in the contract that is inconsistent with the

237. *See* U.C.C. § 1-205(1) (West 1989) (providing a definition).

238. *See id.* § 1-205(2) (providing a definition).

239. *See id.* §§ 1-205(3), 2-202(a) cmt. 2; *see also* U.C.C. § 2-202(a)(1) (Proposed Revision Nov. 2000). R2-207, Comment 3 indicates that repeated use of a term or repeated failure to object to a term normally is not itself sufficient to establish a course of performance, course of dealing or trade usage. *See supra* notes 123-26 and accompanying text.

240. *See* U.C.C. §§ 1-205(3), 2-202(a) cmt. 2; 2-208(1) (West 1989); *see also* U.C.C. §§ 2-202(a)(1); 2-208(a) (Proposed Revision Nov. 2000). *See, e.g.*, White & Summers, *supra* note 29, at 111-16 (discussing these concepts further).

course of performance.[241]

The proposed revision to Article 1 would move this section to R1-303(a) with minor changes of phrasing.[242]

VIII. REVISED 2-209. MODIFICATION, RESCISSION, AND WAIVER

Nothing is permanent except change.

—Heraclitus

The Revision makes no substantive changes to Current 2-209. This section contains rules that remove technical legal impediments to the enforcement of commercially reasonable contract modifications while protecting against false claims of modification.[243] Current 2-209 has been criticized as being unclear.[244] Though the Revision makes no substantive changes in the text, the Revised Comments provide guidance on several of the significant issues in the case law. The discussions below use the drafting history of the Current subsections as an aid to understanding each subsection.

A. R2-209(A) [GOOD FAITH, NOT CONSIDERATION, IS REQUIRED FOR LEGALLY ENFORCEABLE MODIFICATIONS]

R2-209(a) is Current 2-209(1) without substantive change. It states the doctrine that an agreement modifying a contract needs no consideration to be binding.[245] This doctrine was devised to avoid the common law pre-existing duty rule.[246] Under this rule, a modification that benefited only one party was often held to be unenforceable for lack of consideration.[247] Sometimes, however, the modification was held to be enforceable on a variety of theories not always consistent with the pre-existing duty rule.[248] The result was a muddle. This subsection eliminates that muddle by removing the consideration requirement for modifications.

Modifications, however, must be made in good faith to be enforceable.[249] This requirement is intended to make commercially reasonable

241. *See* U.C.C. § 2-208(3) (West 1989); U.C.C. § 2-208(c) (Proposed Revision Nov. 2000).

242. U.C.C. § 1-303(a) (Proposed Revision Nov. 2000).

243. *See id.* § 2-209 cmts. 1, 3.

244. *See, e.g.*, Douglas K. Newell, *Cleaning Up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487 (1990).

245. *See* U.C.C. § 2-209(a) (Proposed Revision Nov. 2000).

246. *See* Informal Appendix to REVISED UNIFORM SALES ACT, Third Draft 1943, Tentative sketch of Material for Comments, Section 25 at 12, *microformed on* KARL N. LLEWELLYN PAPERS, file J-V(2)(d) (Wm. Hein & Co. 1987) [hereinafter Informal Appendix] (providing a tentative sketch of material for comments) ("Subsection 1 [Current 2-209(1)] modifies the existing law on pre-existing duties defeating consideration, in the interest of recognizing the informal modifications so frequently made, especially under installment contracts.").

247. *See, e.g.*, FARNSWORTH, CONTRACTS, *supra* note 20, at 276-78.

248. *See id.* at 278-80.

249. *See* U.C.C. § 1-203 (West 1989); U.C.C. § 2-209 cmt. 2 (Proposed Revision Nov. 2000).

modifications enforceable while denying enforcement of extorted modifications.[250] Revised Comment 2 largely replicates Current Comment 2 on this issue. The Revised Comment specifically approves of the reasoning in *Roth Steel Products v. Sharon Steel Corporation*,[251] which examines when modifications have been made in good or bad faith. The revised comment also specifically negates the argument that a modification is not subject to the good faith requirement because it is not "performance or enforcement" of the contract.[252]

B. R2-209(B) [EFFECTIVENESS OF "NO ORAL MODIFICATION" (NOM) CONTRACT CLAUSES]

R2-209(b) is Current 2-209(3) made more friendly to electronic commerce by substituting the concept of "authenticated record" for "signed writing."[253] There are no changes of substance. R2-209(b) states that "an authenticated record which excludes modification or rescission except by an authenticated record [a "No Oral Modification" or "NOM" clause] cannot be otherwise modified or rescinded."[254] This provision provides "protection against false allegations of informal modifications."[255] NOM clauses are needed to minimize such false allegations because the parol evidence rule does not apply to proof of an alleged oral modification of a written contract,[256] and the statute of frauds may not require all of the modified terms to be in writing.[257]

At common law, NOM clauses were essentially worthless.[258] Courts often rendered these clauses ineffective by holding that the mere making of an informal modification deleted the NOM clause from the original contract, thus permitting oral proof of the terms of the alleged informal modification.[259] This subsection negates those holdings.[260] The potential for injustice inherent in the enforcement of these NOM clauses is minimized by R2-209(d) and (e) on waiver, and limitations on retraction of waiver.[261]

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250. *See* U.C.C. § 2-209 cmt. 2, para. 2 (Proposed Revision Nov. 2000) (providing a discourse on good faith and bad faith modifications); *see also* FARNSWORTH, CONTRACTS, *supra* note 20, at 283-83; WHITE & SUMMERS, *supra* note 29, at 57-60.

251. 705 F.2d 134, 145-46 (6th Cir. 1983).

252. U.C.C. § 2-209 cmt. 2 (Proposed Revision Nov. 2000).

253. *Id.* § 2-209(b).

254. *Id.*

255. *Id.* § 2-209 cmt. 3.

256. *See, e.g.*, FARNSWORTH, CONTRACTS, *supra* note 20, at 438, n.50; note 449, n.1; *see also* WHITE & SUMMERS, *supra* note 29, at 91-92.

257. *See infra* text accompanying note 268.

258. *Cf. Transcript of Discussion on the U.C.C.; Joint Meeting of the A.L.I. and the N.C.C.U.S.L.*, 304 (1950) *microformed on* KARL N. LLEWELLYN PAPERS, file J-XII(1)(i) (Wm. Hein & Co. 1987) (discussing pre-Code law, Llewelyn says NOM clause "is a nugatory clause in most states"); *see also* 1 Samuel Williston, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 139, n.2 (rev. ed. 1948).

259. *See* FARNSWORTH, CONTRACTS, *supra* note 20, at 449-50.

260. *See* U.C.C. § 2-209 cmt. 3 (West 1989) (disapproving explicitly of the decision in Green v. Doniger, 90 N.E.2d 56 (N.Y. 1949)).

261. U.C.C. § 2-209(d), (e) (Proposed Revision Nov. 2000).

The subsection also requires separate authentication of a NOM clause by a non-merchant, if the clause is contained in a form supplied by a merchant. Thus, a consumer is not bound by a NOM clause in a merchant seller's form, so informal modifications that do not implicate the statute of frauds are enforceable, unless the consumer separately authenticates the NOM clause.

C. R2-209(c) [Informal Modifications and the Statute of Frauds]

R2-209(c) is Current 2-209(3) with non-substantive changes. The purpose of this subsection is to protect against false allegations of modifications.[262] How the statute of frauds applies to modifications under Current 2-209(3) is unclear.[263] The Revision does not attempt to clarify this issue. The portion of Comment 3 to R2-209 that discusses this subsection simply repeats the substance of Comment 3 to Current 2-209 on this topic.

R2-209(c) states that the statute of frauds "must be satisfied if the contract as modified is subject to its provisions."[264] This language appears to mean that the modification, plus the unmodified portion of the original contract, are to be treated as a new contract. This new contract must satisfy the statute of frauds if it is within the statute.[265] That is, if it is a contract for the sale of goods for the price of $5000 or more.[266] The modification may satisfy the statute of frauds in a variety of ways, one of which is an authenticated record.[267] A key issue is whether this authenticated record must contain all of the modified terms, or only those modified terms required to be in the writing by R2-201(a), such as a quantity term. Under Current 2-209 and 2-201, the majority of courts require all of the modified terms to be in a signed writing.[268]

The drafters' intent in Current Article 2 seems to have been to require some written evidence of the modification, but not a writing that contained all of the modified terms. The drafters apparently intended to require that the alleged modification be evidenced by a signed writing, since their purpose in Current 2-209(3) was to guard against false allegations of modification.[269] Further, Current 2-201(1) requires that the signed writing at least "afford a basis for believing that the offered oral

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262. *Id.* § 2-209 cmt. 3.

263. *See* White & Summers, *supra* note 29, at 54; *see also* Mark E. Roszkowski, *Contract Modification and the Statute of Frauds: Making Sense of Section 2-209 of the Uniform Commercial Code*, 36 Ala. L. Rev. 51, 52-53 (1984).

264. U.C.C. § 2-209(c) (Proposed Revision Nov. 2000).

265. *Accord* Restatement (First) of Contracts § 223 (1932); Restatement (Second) of Contracts § 149(1) cmt. a (1981).

266. The Revision increases the threshold amount for application of the statute of frauds from $500 to $5,000. *See* U.C.C. § 2-201(a) (Proposed Revision Nov. 2000).

267. *See id.*

268. *See, e.g.*, Zemco Mfg., Inc., v. Navistar Int'l Transp. Corp., 186 F.3d 815, 819-20 (7th Cir. 1999) (citing authorities on both sides of the issue).

269. U.C.C. § 2-209 cmt. 3 (West 1989); U.C.C. § 2-209 (Proposed Revision Nov. 2000).

evidence rests on a real transaction."[270] Since the disputed transaction is the alleged modification, it follows that the signed writing must at least indicate that a modification was made.[271] The Current Comments and their early drafts support this interpretation.[272]

The drafters, however, apparently did not intend to require that the writing contain all of the modified terms.[273] The writing must indicate that a modification has been made and it must contain a quantity term, if that term has been modified. The writing, however, can omit other modified terms and still satisfy the statute of frauds. For example, under this approach, a claimed modification of delivery dates would presumably be provable by oral testimony if the party to be charged had sent a signed letter referring only to "the modified contract," even though the letter did not contain any of the modified dates. The same letter would not suffice to permit oral testimony of an alleged quantity modification.

Whatever may be the content of the writing required to satisfy the statute of frauds for a modification, the waiver provisions of R2-209(d) and (e) minimize the potential for injustice inherent in the enforcement of this formal requirement.

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270. U.C.C. § 2-201 cmt. 1 (West 1989) ("All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."). Current 2-201(1) requires that the signed writing be "sufficient to indicate that a contract for sale has been made . . . ." *Id.* § 201(1).

271. It has been argued that an alleged modification of terms that does not change the quantity term need not be in writing under Current 2-201(1). This argument is partially correct. The only contract term Current 2-201(1) requires to be stated in writing is the quantity term. *See Zemco*, 186 F.3d at 819 (discussing the minority rule). However, Current 2-201(1) also requires the writing to evidence that the disputed transaction—the alleged modification—did occur. R2-201 retains this requirement.

272. *See* U.C.C. § 2-209 cmt. 3 (West 1989) ("'Modification' for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more *since such modification must be shown by at least an authenticated memo.*") (emphasis added). *See* 1948 Comments, *supra* note 9, Comment on Section 14 [2-6] *Formal Requirements: Statute of Frauds* (1948), *microformed on* KARL N. LLEWELLYN PAPERS, file J-X(2)(e) (Wm. Hein & Co. 1987).

> The changes embodied in the present section are concerned materially with the matters involved in . . . [Current 2-209] on modification . . . . The dominant objectives of this section are twofold: . . . . Second, and equally important as these matters have developed, neither are allegations of change in regard to the unperformed terms of such a contract to be admitted to a jury's consideration without the same guarantee of their soundness.

Formal Requirements: Statute of Frauds § 14 [2-6] at 1, 2 (1948), *microformed on* KARL N. LLEWELLYN PAPERS, file J-X(2)(e) (Wm. Hein & Co. 1987).

> These older provisions gave little protection against perjury, particularly in the case of fraudulent allegations of oral modifications of installment contracts. In such cases the acceptance or delivery of one installment was sufficient to open the door to parol testimony as to an alleged oral modification of a contract continuing far into the future . . . . Under this Act, on the other hand, *the requirement of a note or memorandum is not eliminated by any part performance except with respect to the part actually performed.*

Id. at 11-12 (emphasis added).

273. *See* 1948 Comments, *supra* note 9, § 24 [2-15] Modification and Waiver (contrasting the content of writings needed to satisfy the NOM clause and the statute of frauds: "Such a [NOM] clause requires more than a memo within [the statute of frauds]. It requires an adequate expression of the terms of the modification . . . .")

D. R2-209(D) [WAIVER OF NOM CLAUSES AND STATUTE OF FRAUDS]

R2-209(d) is Current 2-209(4) without substantive change. It states that "an attempt at modification or rescission" that does not satisfy the requirements of a NOM clause or of the statute of frauds can operate as a waiver.[274] An "attempt at modification" apparently means a modification that would have been effective but for its failure to satisfy the formal requirements of a NOM clause or the statute of frauds.[275] This provision was included in Current 2-209 to protect against the danger of injustice when a modification fails to satisfy formal requirements.[276] The provision makes two points. First, it establishes that a modification that is unenforceable because it does not satisfy formal requirements is not entirely without effect.[277] Second, it clarifies that the unenforceable modification can be effective as a waiver.[278] Presumably, this means, at a minimum, that terms in the original contract that are inconsistent with the terms in the unenforceable modification are deleted from the contract, which is the normal effect of a waiver.[279]

Can an attempt at modification that operates as a waiver add a term to the original contract or substitute a new term for the waived term? Under Current 2-209(4), courts often permit this.[280] It could be argued that the attempt at informal modification waives any formal requirements so the informal modification becomes effective to substitute or add new terms to the original contract. Revised Comment 4 appears to adopt this view. This comment indicates that the formal requirement of an authenticated record may be waived to enforce a new obligation to pay for extra work not included in the original contract.[281] The comment also states that the waiver may be express—such as by telling the other party that a written change order is unnecessary—or implied from a party's conduct

274. U.C.C. § 2-209(d) (Proposed Revision Nov. 2000).

275. Informal Appendix, *supra* note 246, at 12 (discussing section 25 [Current 2-209]: "[S]ubsections 4 and 5 take care of the danger of injustice when a true modification fails to satisfy any formal requirements.").

276. *See id.*

277. *Cf.* U.C.C. § 2-209 cmt. 4 (Proposed Revision Nov. 2000) ("Subsection (d) is intended, despite the provisions of subsections (b) and (c), to prevent statutory or contractual provisions precluding effective modification except by an authenticated record from limiting in other respects the legal effect of the parties' actual later conduct.").

278. *See id.* § 2-209(d).

279. *Cf.* Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1286-87 (7th Cir. 1986).

280. *See* Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 16 (1968); J.W. Goodliffe & Son v. Odzer, 423 A.2d 1032, 1034-35 (Pa. Super. Ct. 1980). *Cf. Wisconsin Knife Works*, 781 F.2d at 1286 (rejecting the distinction between the removal of a term from the original contract and the substitution of a new term for the purposes of application of Current 2-209(4)). *See, e.g.*, Exxon Corp. v. Crosby-Mississippi Res., Ltd., 40 F.3d 1474, 1492 (5th Cir. 1995); Moncrief v. Williston Basin Interstate Pipeline Co., 880 F. Supp. 1495, 1520-21 (D. Wyo. 1995); West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154, 156 (M.D. Ala. 1974) (using waiver to increase or decrease the contract price); *see also* Moldex, Inc. v. Ogden Eng'g Corp., 652 F. Supp. 584, 589-90 (D. Conn. 1987) (enforcing a post sale express warranty).

281. *See* U.C.C. § 2-209 cmt. 4, para. 2 (Proposed Revision Nov. 2000).

in requesting a modification.[282] It is not necessary that the words or conduct constituting the waiver specifically address the NOM clause.[283]

Why should an informal modification that fails to satisfy formal requirements have any effect at all? One reason is to minimize the potential for injustice inherent in the enforcement of formal requirements. Experience suggests that parties to contracts often make informal modification agreements that do not comply with either their NOM clauses or with the statute of frauds. If one side has reasonably relied upon the informal modification to its material detriment, it would be unfair to permit the other side to avoid the modification by asserting the NOM clause or the statute of frauds. Thus, R2-209(d) permits the NOM clause and the statute of frauds to be waived by the parties' informal modification.[284] Under R2-209(e), a material change of position in reliance on the waiver—such as beginning to perform an informal modification—bars a retraction of the waiver.[285]

E. R2-209(E) [WHEN WAIVER MAY BE RETRACTED]

R2-209(e) is Current 2-209(5) without substantive change. It states that a waiver of an executory portion of the contract may be retracted, unless the retraction would be unjust because one of the parties has materially changed its position in reliance on the waiver.[286] This subsection accomplishes two purposes. First, it minimizes the possibility of injustice when a party relies on an unenforceable informal modification. Second, this provision prevents a waiver from becoming irrevocable absent reliance on the waiver.[287] The cost of failing to satisfy formal requirements is that the future effect of an informal modification can be undone and the original contract reinstated on due notice, unless the reinstatement would be unjust.[288]

According to Revised Comment 5, this subsection is not intended to disturb the doctrine of election waiver.[289] This Comment also states that the subsection covers both waivers of NOM clauses and the statute of frauds under R2-209(d)[290] as well as waivers of other executory rights under the contract.[291]

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282. *See id.*

283. *See id.* (disapproving the contrary holding in C.I.T. Corp. v. Jonnet, 3 U.C.C. Rep. Serv. (CBC) 321 (Pa. C.P. 1965), *aff'd*, 214 A.2d 620 (Pa. 1965)).

284. *See* U.C.C. § 2-209 cmt. 4, para. 2 (Proposed Revision Nov. 2000).

285. *Id.* § 2-209(e) cmt. 4.

286. *Id.* § 2-209(e).

287. Informal Appendix, *supra* note 246, at 12 (discussing section 25 [Current 2-209]: "[S]ubsection 5 prevents the law of waiver from turning into a law of modification.").

288. 1948 Comments, *supra* note 9, § 24 [2-15] Modification and Waiver, at 7 ("[T]o require a formality for a modification is of necessity to allow retraction of a waiver with reference to the future, subject always to the qualification of reasonable notice and other avoidance of injustice as provided in Subsection (5).").

289. U.C.C. § 2-209 cmt. 5 (Proposed Revision 2000); *see, e.g.*, John J. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS 445-54 (2d ed. 1977) (discussing election waiver).

290. U.C.C. § 2-209 cmt. 4, para. 1 (Proposed Revision Nov. 2000).

291. *Id.* § 2-209 cmt. 5.

The decision to enforce alleged informal modifications, not as modifications but as waivers that can be retracted absent injustice, was a practical decision. Waivers can be retracted unilaterally.[292] Modifications cannot; they require mutual consent before they can be revoked.[293] By treating informal modifications as waivers subject to retraction unless injustice would result, Current 2-209 and R2-209 chart a middle ground. They avoid an inflexible all or nothing approach that would treat the informal modification either as completely effective and irrevocable, or as completely ineffective. Thus, revised subsections (d) and (e) protect against false claims of modification unsupported by reliance,[294] while preventing past favors granted from hardening into a right for the future.[295] Consequently, the flexible character of commercial contracts is supported and encouraged.[296]

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292. *See, e.g.,* Calamari and Perillo, *supra* note 289, at 445.

293. *Id.* Modifications are, themselves, agreements that require mutual assent to be effective. *See id.* at n.12. R2-209(a) refers to a modification as "[a]n agreement modifying a contract." U.C.C. § 2-209(a) (Proposed Revision Nov. 2000). Revised Comment 3, following Current Comment 3, describes "modification" as a "change by mutual consent." U.C.C. § 2-209(a) cmt. 3 (Proposed Revision Nov. 2000); *see* U.C.C. § 2-209(a) cmt. 3 (West 1989).

294. Perjurers are unlikely to incur costs in purported reliance on a non-existent modification. *See Wis. Knife Works*, 781 F.2d at 1287.

295. *Cf.* General Comment, *supra* note 55, at 1268.

> The question is immediately raised as to whether such conduct represents a *favor*, through a unilateral waiver of a term, or a *right* implicit in the contract and being recognized in the course of performance. Good faith forbids that favors should be turned into unalterable rights and certainty demands that fair doubts should be resolved in favor of explicit terms.

Id. at 1267-68.

> Where practical construction of a flexible commercial contract results in a *departure* from the literal language of the original agreement which has been shaped and changed by the course of the parties' performance or by a single crucial act of one party. . . .the original agreement can be recurred to and the performance required can be tightened up upon due notice. When there is doubt as to the meaning and effect of the parties' actions in the course of performance, this Act favors that interpretation which stresses the concept of a *waiver of a term* under [Current 2-208]. For [Current 2-209] further provides that unless reliance on such a waiver makes its retraction unjust, it is open to retraction with regard to all executory portions of the contract. Good faith action and expectation are thus protected while flexibility is preserved, not only in the direction of leeway of performance (by action and acquiescence) but also in the direction of tightening up (by due notice given).

Id. at 1271-72.

296. *See id.* at 1268.

> Actually most commercial obligations have a flexible character which our legal vocabulary has had some trouble in grasping but which has always been reflected in the spirit of the better commercial cases. They represent a going relationship not rigidly defined at the moment of contracting but changing in shape and structure in the process of performance or of getting ready to perform or to fit supervening circumstances. The available legal concepts tend to flow into one another: the use of the circumstances and the parties' actions to interpret the terms; the exercise of an option within an agreed range; waiver in any of its aspects and even modification of a term.

Id.; *see also* U.C.C. § 2-208 cmt. 3 (West 1989).

IX. REVISED 2-210. ASSIGNMENT OF RIGHTS; DELEGATION OF PERFORMANCE

He who binds to himself a joy
does the winged life destroy;
but he who kisses a joy as it flies
lives in eternity's sunrise.

—William Blake

R2-210 states rules governing the assignment of rights and the delegation of duties under contracts of sale. There are no substantial changes from the provisions of Current 2-210. The Revision, however, reorganizes these provisions and adds some new provisions. Revised subsection (a) covers assignment; revised subsection (b) covers delegation; and revised subsections (c) and (d) are rules of construction for contract clauses that assign or prohibit the assignment of the contract in general terms. R2-210 "is not intended to be a complete statement of assignment and delegation law; it is limited to clarifying some issues doubtful under the case law."[297] Issues that are not covered in R2-210 are left to the common law.[298]

A. R2-210(A): ASSIGNMENT OF RIGHTS

1. R 2-210(a)(1) [Assignments: When Rights May Be Assigned]

R2-210(a)(1) states when contract rights may be assigned. This subsection is essentially the text of Current 2-210(2) with added references to subsection (a)(2) and section 9-406. These references cite to new provisions that clarify the circumstances in which sellers or buyers may assign their rights on sale contracts as collateral in secured transactions.

R2-210(a)(1) provides that "contract rights are freely assignable, unless otherwise agreed, or unless the assignment of rights would materially increase the burden or risk to the other party to the original contract."[299]

a. Effect of Contract Clauses that Prohibit Assignment

Contract clauses that prohibit assignment are permissible; however, R2-210(a)(1) renders such clauses unenforceable in three instances. First, a damage claim is assignable despite a clause prohibiting assignment.[300] Second, any right earned by the assignor's due performance of the whole contract may be assigned despite a clause prohibiting assignment.[301] Suppose the rights assigned have not yet been earned by performance of the whole contract? If the rights assigned are covered by R9-409(d),[302] a

297. U.C.C. § 2-210 cmt. 6 (Proposed Revision Nov. 2000).
298. *See* U.C.C. § 1-103 (West 1989).
299. U.C.C. § 2-210(a)(1) (Proposed Revision Nov. 2000).
300. *See id.*
301. *See id.*
302. References to Revised Article 9 sections are preceded by "R." Revised Article 9 will become effective in many states on July 1, 2001. Similarly, references to current Arti-

clause prohibiting their assignment might be ineffective.[303] If the rights are not covered by R9-409(d), nothing in R2-210 invalidates a clause prohibiting the assignment. However, since R2-210 does not purport to be a "complete statement of the law of assignments,"[304] one should look to the common law.[305]

Third, a clause prohibiting assignment might be rendered unenforceable by R9-406(d).[306] The purpose of this subsection is to protect the value of contract rights by permitting their assignment as collateral despite a clause barring assignment.[307] R9-406(d) applies when: (1) the seller or the buyer assigns its rights on the sale contract as collateral in a secured transaction, and (2) the assigned rights are classified as an account,[308] chattel paper,[309] payment intangible,[310] or promissory note[311] under Revised Article 9. For these kinds of secured transactions, R9-406(d) invalidates a clause prohibiting assignment—thereby validating the use of contract rights as collateral—unless the secured transaction is an outright sale of a promissory note or a payment intangible,[312] or unless a consumer protection statute validates the clause prohibiting assignment.[313]

What is the effect of an assignment that violates a clause prohibiting assignment when the clause is ineffective under one of the three instances just discussed? If the anti-assignment clause is made ineffective by R9-406(d), Comment 5 to this section states that the assignment is effective and no one has any remedies for violation of the clause.[314] If the anti-assignment clause is made ineffective by R2-210(a)(1), Comment 2 to R2-

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cle 9 sections are preceded by "Current." *See infra* text accompanying notes 306-13 (discussing the scope of R9-406(d)).

303. *See infra* text accompanying note 314.

304. U.C.C. § 2-210 cmt. 6 (Proposed Revision Nov. 2000).

305. *See* U.C.C. § 1-103 (West 1989).

306. *See* U.C.C. § 2-210(a)(1) (Proposed Revision Nov. 2000) ("except as otherwise provided in Section 9-406").

307. R9-406(d) continues the policy of Current 9-318(4). *See* § 9-406 cmt. 5 (Proposed Revision Nov. 2000); *see also* U.C.C. § 9-318 cmt. 4 (West 1989) (stating the current policy eloquently).

308. U.C.C. § 9-102(2) (Proposed Revision Nov. 2000) (providing a definition of "Account"). For example, if the seller uses its right to the price as collateral, that right is an "account," if the right to the price is not itself secured.

309. *Id.* § 9-102(11) (providing a definition of "Chattel Paper"). For example, if the seller uses its right to the price as collateral, that right is a "chattel paper," if the right to the price is itself secured by the goods sold.

310. *Id.* § 9-102(65) (providing a definition of "Payment Intangible"). For example, in a contract for the sale of patented goods, the seller might be entitled to licensing or royalty payments. If the seller were to use its right to these payments as collateral, the rights would be "payment intangibles."

311. *Id.* § 9-102(65) (providing a definition of "Promissory Note"); *see also id.* § 9-102(47) (providing a definition of "Instrument'). For example, if the seller uses its right to the price as collateral, that right is a "promissory note," if the right is evidenced by a negotiable note signed by the buyer.

312. Such outright sales are deemed secured transactions. *See id.* § 9-109(a)(3). R9-406(d), however, does not apply to them. U.C.C. § 9-406(e) (Proposed Revision Nov. 2000).

313. *Id.* § 9-409(h).

314. *Id.* § 9-406 cmt. 5.

210 states that the assignment is effective, but that the other party to the original contract might recover damages for breach of the clause.[315] This comment states that the assignment might also create grounds for insecurity, thus permitting the other party to the original contract to demand adequate assurance of performance from the assignor under R2-609.[316]

b. Assignments That Adversely Affect the Other Party

R2-210(a)(1) states that contract rights may not be assigned if "the assignment would materially change the duty of the other party, increase materially the burden or risk imposed on that party by the contract, or impair materially that party's chance of obtaining return performance."[317] This standard is inherited from Current 2-210(2). Comment 2 to R2-210 states that this standard will rarely be satisfied, but provides two examples of when it might be fulfilled.[318] R2-210(a)(2) clarifies the application of this standard to security interests. It states that a seller may grant a security interest in its contract rights without breaching this standard, but that enforcement of the security interest could breach this standard.[319]

2. R2-210(a)(2) [Assignments: When Creation, Perfection, or Enforcement of Security Interest in Seller's Interest in the Contract Materially Increases Buyer's Risk]

R2-210(a)(2) is new. It derives from U.C.C. 2A-303(3) and a conforming amendment to Current 2-210, which is part of the Revision of U.C.C. Article 9. It clarifies the seller's ability to use its contract rights as collateral in a secured transaction. Contract rights are an important source of financing for the seller, yet the buyer could be adversely affected by such financing. Thus, this subsection strikes a balance that permits the seller to use its rights in the sale contract as collateral as long as the buyer is not materially adversely affected by enforcement of the secured creditor's rights in the collateral.

R2-210(a)(2) states that the creation, perfection, or enforcement of a security interest in the seller's interest in the contract is not *per se* an assignment that triggers the materially adverse change provision of R2-210(a)(1).[320] Thus, the seller can finance its interest in the contract without fear of triggering this provision. Any enforcement of the security interest that results in the delegation of a material performance of the seller, however, is an adverse material change to the buyer under R2-210(a)(1).[321]

315. *Id.* § 2-210(a)(1) cmt. 2 (citing U.C.C. § 2A-303 (West 1989)).
316. U.C.C. § 2-210 cmt. 2 (Proposed Revision Nov. 2000).
317. *Id.* § 2-210(a)(1).
318. *Id.* § 2-210 cmt. 2.
319. *Id.* § 2-210(a)(2).
320. *Id.*
321. *Id.*

What are the consequences of a security interest enforcement that results in a material adverse change to the buyer? R2-210(a)(2) states that the perfection and enforcement of the security interest remain effective.[322] The buyer may, however, recover damages caused by the delegation or may seek other appropriate relief, including cancellation of the contract or an injunction against enforcement of the security interest.[323] If an assignment that results in a materially adverse delegation under this subsection also falls under R9-406(f)—such as if the rights assigned constitute accounts or chattel paper—the buyer's rights to damages or an injunction under R2-210(a)(2) might be extinguished by R9-406(f)(2).[324]

B. R2-210(B): DELEGATION OF DUTIES

1. *R2-210(b)(1) [Delegation: When Duties May Be Delegated. Effect of Delegation on Delegator's Duty to Perform]*

R2-210(b)(1) is Current 2-210(1) with slight, non-substantive re-phrasing. It explains when duties to perform under the contract may be delegated and the effect of a delegation on the delegator's duty to perform the contract.

According to this subsection, a duty may be delegated, unless otherwise agreed, or unless the other party has a substantial interest in having the original promisor perform the duty.

Delegation does not relieve the delegator of either its duty to perform or its liability for breach if the duty is not duly performed. Comment 4 to R2-210 indicates that if the person entitled to performance agrees to substitute the delegatee for the delegator (a novation agreement), the delegator is relieved of its duty to perform.

2. *R2-210(b)(2) [Delegation: Liability of Delegatee for Non-Performance of Delegated Duty]*

R2-210(b)(2) is the last clause of the first sentence and the second sentence of Current 2-210(4) without substantive change. It covers the delegate's liability if the delegated duty is not duly performed. According to this subsection, the acceptance of a delegation of duties by one to whom duties have been delegated (the delegatee) constitutes a promise by the delegatee to perform the delegated duties.[325] The provision also states that this promise may be enforced either by the delegator, or by the other party to the original contract.

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322. U.C.C. § 2-210(a)(2) (Proposed Revision Nov. 2000).

323. *Id.*

324. *Id.* § 2-102(e) indicating that Revised Article 2 provisions yield to provisions of other Articles in case of conflict.

325. Comment 4 to R2-210 characterizes the delegatee's promise as a third party beneficiary contract. U.C.C. § 2-210, cmt. 4 (Proposed Revision Nov. 2000). The person to whom the delegated duty is owed under the original contract is the third party beneficiary. *See id.*

3. *R2-210(b)(3) [Delegation: Any Delegation Creates Reasonable Grounds for Insecurity]*

R2-210(b)(3) is Current 2-210(5) with a slight change. It states that any delegation of duties creates reasonable grounds for insecurity in the party to whom the delegated duty is owed. That party may, without prejudicing its rights against the delegator, demand adequate assurance of performance under R2-609 from the person to whom the duties have been delegated (the delegatee). Thus, a demand for assurances made upon the delegatee would not constitute a novation or otherwise relieve the delegator of liability. If adequate assurance is not forthcoming, the delegator is deemed to have repudiated the contract.[326]

4. *R2-210(b)(4) [Contract Term Prohibiting Delegation Bars Effective Delegation]*

R2-210(b)(4) is new. It states that a contract term prohibiting delegation is enforceable and that an attempted delegation violating this term is not effective. Presumably, the effect of this subsection is that a party who has included an anti-delegation clause in its contract need not accept performance of the contract by anyone except the person who was to perform originally.

C. R2-210 (C) & (D): RULES OF CONSTRUCTION

1. *R2-210(c) [Construction of Clause Assigning "the Contract" or "All My Rights Under the Contract"]*

R2-210(c) is the first sentence of Current 2-210(4), without the last clause. There is no substantive change, as the missing clause has been moved to R2-210(b)(2). R2-210(c) states a rule of construction; as such the subsection provides that it yields to the parties' intent, as manifested by their language or the circumstances. Under this rule of construction, a clause assigning rights in general terms, such as an assignment of "the contract" or of "all my rights under the contract," is to be construed as both an assignment of rights and a delegation of the assignor's contract duties.[327] If the assignment, however, is for security only—such as when the seller assigns its contract rights as collateral in a secured transaction—the assignment is not construed to include delegation of the assignor's duties.

2. *R2-210(d) [Clause Prohibiting Assignment of "the Contract" Bars Only Delegation of Performance]*

R2-210(d) is Current 2-210(3) without change. This provision is another rule of construction that yields to the parties' manifested actual intent. Under this rule of construction, a clause prohibiting an assignment

326. *See id.* § 2-609(d).
327. *Id.* § 2-210(c).

of "the contract" bars only delegation of the assignor's performance. The implication of this provision is that such language does not bar an assignment of rights under the contract. Thus, this provision reflects the normal commercial expectation that rights under a contract for the sale of goods are freely assignable, unless the contract clearly prohibits an assignment of those rights.

Comment


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