§ 7-5 Section 2-207's "battle of the forms": An introduction to an acceptance that varies the terms of the offer

In today's world contracts for the sale of goods are often formed by people who have never met face to face. These people are usually employed by corporations, which may have multiple departments in various cities. Consider the following example. An order for goods is negotiated between a salesperson and an engineer. On the seller's side of the transaction the actual purchase order is received over the telephone by a clerk in another city, confirmed by an order confirmation form sent by an administrative assistant, invoiced through the accounting department, and shipped from the factory in another state with a bill of lading. On the buyer's side, a set of specifications might be issued by the home office, followed by negotiations between an engineer and a salesperson, which results in a telephone order from the purchasing department, the telephone order may or may not be followed by a written purchase order, and ultimately a check is sent in payment for the goods. Each of the documents issued by the seller or buyer may contain language that purports to determine or affect the contract between the parties. Some, or all, of these documents might not be sent by or addressed to the persons who negotiated the contract. At some time before, during, or after this flurry of paper work is exchanged, the goods may be shipped by the seller and accepted or rejected by the buyer. Or, the goods may not be shipped at all. It is then the problem of the lawyers (or the courts) to determine whether a contract has been formed and, if one has been formed, to determine the rights and obligations of the parties under the contract.

The problem with enforcing the terms contained in the preprinted forms sent by the various parties is that many of these terms are generally not discussed in the negotiations that lead up to the contract. In fact, the representative of a party may not even be aware of the terms contained in his own forms. The terms in these preprinted forms (or even the chronological order in which would normally be sent)[45] are generally ignored in commercial transactions so long as no dispute arises between the parties.[46] However, when a dispute arises, each party can be expected to argue that the terms in its forms determine the rights of the parties.

In drafting a Code provision to resolve such disputes the drafters of the Uniform Commercial Code were faced with an important decision. Giving too much weight to the terms in preprinted forms might result in unfair surprise to one party. Giving too much credence to which form was sent first

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[45] In Southeastern Adhesives Company v. Funder America, Inc., 89 N.C. App. 438, 366 S.E.2d 505 (1988), the course of dealing between the parties was such that the "purchase order" was issued after the goods had been received and accepted by the buyer.

[46] WHITE & SUMMERS, *supra* note 2, § 1-3 at 7.

might contradict the intent of the parties. However, not giving sufficient weight to the terms in the preprinted forms or the order in which the forms were sent would deny parties the ability to protect themselves through an exchange of forms. Section 2-207 was intended by the Uniform Commercial Code to resolve all questions arising out of what is now known as the "battle of the forms." Section 2-207 states in part that:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
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> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the term of the offer;
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> (b) they materially alter it; or
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> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Considering the myriad of possible fact patterns that could arise out of the battle of the forms, section 2-207 is remarkably brief. When one attempts to apply section 2-207 to the specific facts of a particular case one may also find that section 2-207 is remarkably ambiguous. This section has been described as "a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair."[47]

[7-5-1]— Interpretation of section 2-207: The majority view

Section 2-207 has generated a great deal of scholarly debate. Fortunately, it is not necessary for these writers to match wits with the numerous worthy scholars who have offered diverse, well-reasoned opinions as to how this section should be construed. Notwithstanding the scholarly debate, a majority view has emerged from the courts that have interpreted this section. Because the fundamental rule in interpreting the UCC is that its provisions should be interpreted so as to create a uniform law among the states,[48] these writes side with the majority view.

The majority view is based on certain assumptions about contracts that arise out of a battle of the forms:

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[47] Reaction Molding Tech, Inc. v. General Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa.), *modified,* 588 F. Supp. 1280 (E.D. Pa. 1984).

[48] N.C. GEN. STAT. § 25-1-202(2)(C) (1999). As a result of revisions to Article 1 of the UCC made effective October 1, 2006, the language of former section 1–102(2)(c) was re-codified as General Statutes section 25–1–103(a)(3).

1. The terms that were actually the subject of negotiations between the parties should receive the maximum level of enforcement by a court.

2. The terms in the forms that were not the subject of negotiations between the parties may not have been of concern to the parties until a dispute arose. Therefore, a court should enforce such provisions with caution.[49]

3. The order in which forms are actually sent by the parties may be a matter of happenstance and should not be given undue weight by a court.[50]

The interpretation of section 2-207 adopted by a majority of the courts generally leads to predictable results. First, an oral or written "acceptance" of an offer can be effective even though it contains terms that are different from or in addition to the terms in the offer.[51] Second, after a contract has been formed, a party may send a written "confirmation" which contains additional or different terms. Terms in an acceptance or confirmation which are "different" drop out.[52] Between merchants,[53] additional terms contained in an acceptance or confirmation are treated as proposals for addition to the contract. Such terms become a part of the contract if they do not materially alter the contract and if the other party does not object to them within a reasonable time.[54] Unfortunately the ease with which this general rule may be stated belies the complicated factual questions which must be resolved in

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[49] Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984) (observing that § 2-207 seems to be drafted with a recognition of the reality that merchants seldom review exchanged forms with the scrutiny of lawyers).

[50] *Id.* (noting that § 2-207 was drafted to reform the infamous "last shot" doctrine that enshrined the fortuitous positions of senders of forms and accorded undue advantages based on such fortuitous positions); WHITE & SUMMERS, *supra* note 2, § 1-3 at 10 ("When the parties send their forms blindly and blindly file the forms they receive, it makes little sense to give one an advantage over the other with respect to unbargained terms simply because one mailed the form first.").

[51] General Time Corp. v. Eye Encounter, Inc., 50 N.C. App. 467, 274 S.E.2d 391 (1981) (affirming denial of motion to dismiss for lack of personal jurisdiction; court ruled that telex message sent to nonresident buyer, stating "Consider this telex a confirmation of your telex of 9-30-77. We agree with all terms included in your telex with the exception of the warranty." constituted a "definite and seasonable expression of acceptance" under the Code, notwithstanding variance in warranty terms).

[52] WHITE & SUMMERS, *supra* note 2, § 1-3 at 10-15.

[53] If one of the parties is not a merchant, section 2-207(2) does not apply. The UCC does not state how additional terms in a confirmation are treated in contracts involving non-merchants. Presumably, additional terms cannot be added to a contract involving a non-merchant by merely sending a written confirmation.

[54] WHITE & SUMMERS, *supra* note 2, § 1-3 at 16-19.

order to apply these rules to specific disputes.

(Text continued on page 487)