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Contracting under Amended 2-207 (Freedom from Contract Symposium)

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CONTRACTING UNDER AMENDED 2-207

JAMES J. WHITE*

INTRODUCTION

Amended Section 2-207 of the Uniform Commercial Code¹ (the Code) states new contract rules. I call these “contract rules” to avoid the labels of contract formation and contract interpretation. These new rules cure many of the problems presented by current Section 2-207² and remind courts that the purpose of Section 2-207 is to interpret a contract that has been made, not to see if a contract exists.

One is tempted to label current Section 2-207 as a contract formation provision—and to some extent that would be right—but most of this Section’s work has been in contract interpretation, not in contract formation. Put differently, the Section does not affirm the existence of a contract; rather it works where the parties’ behavior already shows a contract. Like a diligent German Shepherd, this Section searches among the verbal rubble for the terms of the contract.

I. TROUBLES WITH CURRENT SECTION 2-207

As Professor Gilmore made plain in his delightful letter to Bob Summers, the old Section has many deficiencies. Following is the correspondence of this letter, dated September 10, 1980:

Dear Professor Summers:

. . . .

I have most recently been reading over your admirable discussion of § 2-207. Let me say at the outset that I thoroughly approve of your decision to let the disagreement between you and White on the proper construction of that abominable section hang out instead of papering it over.

I do think that insufficient attention has been paid to the tangled drafting history of § 2-207. (I am not about to reveal

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1. U.C.C. § 2-207 (Proposed Final Draft 2003).

2. *Id.* § 2-207 (2003).

any “secret history”; I had nothing to do with the drafting of § 2-207 at any stage and I cannot remember having ever discussed it with Karl Llewellyn.) The point is that as late as the 1952 draft of the Code, § 2-207 consisted only of what are now subsections (1) and (2). Subsection (3) was added in response to criticisms of the New York Law Revision Commission (which were probably based on suggestions by John Honnold, who acted as a consultant on Article 2 for the Commission). The 1952 version of § 2-207 was bad enough (particularly in the (2)(b) reference to “material alteration”) but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster. To make matters worse, the 1952 Comment (which had presumably been drafted at a much earlier point by Llewellyn) was never adequately revised to take the new subsection (3) into account. (Beginning in 1949 or 1950, Llewellyn refused to have anything to do with the Article 2 Comments, which were thereafter periodically updated by an anonymous hack in the Philadelphia office of the American Law Institute. It might be interesting to check back through earlier drafts of the Code to see how the text and Comment of § 2-207 evolved through 1952.) The later (1966) revisions of the Comment, which you attributed to Braucher, were band-aid jobs.

My principal quarrel with your discussion of § 2-207—and all the other discussions I have read—is that you treat the section much too respectfully—as if it had had sprung, all of a piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and comment—to which various hands—Llewellyn, Honnold, Braucher and my anonymous hack—contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in light of what “the draftsman” “intended.” (I might note that, when subsection (3) was added, Llewellyn had ceased to have anything to do with the Code project.) One of the chores which we hire courts (and commentators) to perform is to clean up the messes which statutory draftsmen leave behind them. The proper approach to § 2-207, which is arguably the greatest statutory mess of all time, is to take it light-heartedly (or, as Professor Corbin used to say, cheerfully).

Which brings me to the “infamous” Rotolith case On the facts of the case with respect to the October shipment as Judge Aldrich stated them, I think it would have been outrageous to have saddled the seller with warranties, which (as the buyer knew) he had expressly (and quite reasonably) disclaimed. I grant you the opinion does considerable violence to the statutory language, even in the 1952 version Even so, I find it hard to conceive of a situation in which the commission of statutory mayhem was more justifiable or more necessary. Surely, when the legislature goes mad, the courts can (and should) restore us to sanity.

In the 1950’s I used to go around the country peddling the Code. On one occasion I had to explain Article 2 to a group of “corporate counsel” in California—they represented airplane manufacturers and similar great enterprises. When I finished with § 2-207, they were, so far as I could tell, appalled. They were not so much concerned with the obvious drafting ambiguities as they were with the (equally obvious) intent to bind contracts at the earliest possible point. They evidently preferred not to be bound (whether their clients were selling or buying) until all the formalities had been accomplished, the last i dotted, the last t crossed. Perhaps, as [Stewart] Macaulay has suggested, businessmen don’t really want binding contracts. Perhaps there was something to be said for the common law rules of offer and acceptance. At all events: Down with § 2-207.

Yours,
Grant Gilmore³

Current Section 2-207 suffers from six major ailments. First, the section was originally designed to deal with cases like *Poel v. Brunswick-Balke-Collender Co. of New York*.⁴ In *Poel*, one party sent his writing to the other party, and the other party responded by submitting his version of the writing.⁵ Despite the forms’ agreement on the basic terms of the contract, the offeror and offeree both escaped

3. Letter from Grant Gilmore, Professor, Vermont Law School, to Robert S. Summers, Professor, Cornell University Law School (Sept. 10, 1980) (on file with author).

4. 110 N.E. 619 (N.Y. 1915)

5. *Id.* at 621–22.

because the acceptance was not the mirror image of the offer.⁶ The last sentence in Section 2-207 solves that problem, though awkwardly.⁷ Under Section 2-207, if the forms conform to one another at least on the basics, then each party is bound even though the forms are not word-for-word.

Subsection 1 of 2-207 was troublesome only because cases like *Poel* rarely come before the courts. For the parties to a contract to present a true contract formation case, at least one party has to reconsider before performance and deny the existence of a contract. In modern American commercial contracting, this scenario seldom happens, or when it does, it seldom results in a lawsuit. Where the deal aborts before performance, the parties apparently look elsewhere; they rarely find it sensible to sue on a fully executory contract for the sale of goods. Therefore, Section 2-207 has seldom been called into service in aid of any party to a fully executory contract.

A second problem with Section 2-207 is that the Section and its comments give uncertain direction regarding the question of whether "additional or different" terms in the offer were in the contract.⁸ Some scholars—Summers is one—argue that subsections 1 and 2 merely restate and slightly modify the standard common law rule that would apply when an offeree accepted an offer but made additional *suggestions* for the contract.

Consider *Ardente v. Horan*,⁹ a case that inhabits many contracts casebooks. In that case, Ardente apparently accepted the Horans' offer to sell their house. In Ardente's acceptance letter, he stated that he was "concerned" about whether a dining room tapestry, the fireplace fixtures and certain other items would pass to him as the buyer of the Horans' fancy house in Newport, Rhode Island.¹⁰ To Ardente's disappointment, the court found that his response was not an acceptance with *suggestions* for additional terms, but that it constituted no acceptance at all.¹¹ Subsection 1 urges courts to regard responses like Ardente's in commercial settings as acceptances with proposals for other terms, not as counteroffers.¹²

Subsection 2 gives rules to decide whether the proposed additional terms contained in the acceptance are in the contract. Nothing, however, clarifies whether the terms in the offer that are not repeated in

6. *See id.* at 623.

7. *See* U.C.C. § 2-207(3).

8. *Id.* § 2-207(1) & cmts. 2-3.

9. 366 A.2d 162 (R.I. 1976).

10. *Id.* at 163 (internal quotations omitted).

11. *Id.* at 165-66. The Supreme Court of Rhode Island determined that Ardente's letter was "not consistent with an absolute acceptance accompanied by a request for a gratuitous benefit." *Id.* at 166.

12. *See* U.C.C. § 2-207(1).

the acceptance or those that are contradicted by terms in the acceptance are in the contract. Following common law, Summers would say, by hypothesis, that every acceptance takes every term in the offer. Thus, Summers would say that all of the offeror's terms are in the contract and the only issue left deals with the fireplace fixtures and other items. These are the offeree's proposals for addition, and they are to be treated under Section 2-207(2). If one looks at Section 2-207 through the glasses of a common law scholar who is primarily interested in holding a welsher in, then that outcome makes sense. This view grants more power to the offeror than to the offeree, and it facilitates contract formation by throwing some of the offeree's terms overboard.

But if one is less respectful of the common law—where acceptances dutifully march behind offers—and more sympathetic to modern commercial practice (where phone calls and e-mails go back and forth and documents are labeled as purchase orders or confirmations, not as offers and acceptances), then it makes less sense to give the upper hand to the person whose document happened to be sent first. So the barbarians—myself and some others—read Section 2-207 to allow the acceptance or confirmation not only to make a contract but also to *knock terms out* of the offer when the acceptance contains contradictory terms even though the parties perform. Being either more ignorant or less respectful of the common law than Summers, most courts have adopted the latter interpretation of Section 2-207 that is now known as the “knockout rule.”¹³

A third difficulty is that Section 2-207(1) refers to “additional or different” terms,¹⁴ but 2-207(2) refers only to “additional” terms.¹⁵ One might have read that distinction to affirm Summers's common-law approach described above, namely to allow certain terms that appeared only in the acceptance or confirmation to get into the contract but never to allow one to knockout a “different” term, a term that by hypothesis was found in the offer. But what terms are “different”? If the buyer's offer carried an implied term, such as the implied warranty of merchantability, but had no express warranty, then was a disclaimer in the acceptance “different” because it negated an implied term or merely “additional” since there was no express warranty in the offer?¹⁶

13. See, e.g., *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, 189 (1st Cir. 1997); *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1178 (7th Cir. 1994) (predicting that Illinois courts would adopt the knockout rule); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984); *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F. Supp. 2d 643, 653–54 (E.D. Pa. 2002) (collecting cases); *Superior Boiler Works, Inc. v. R.J. Sanders, Inc.*, 711 A.2d 628, 635 (R.I. 1998).

14. U.C.C. § 2-207(1).

15. *Id.* § 2-207(2).

16. See *Northrop*, 29 F.3d at 1175 (internal quotations omitted) (commenting that the most sensible approach in these cases may equate “different” and “additional”

A fourth difficulty with Section 2-207 was that subsection 3 explained what was in the contract and what was not, but only where the "writings of the parties [did] not otherwise establish a contract."¹⁷ On its terms, subsection 3 would not allow one to supplement the express terms of the contract by implied terms, such as the warranty of merchantability, where a contract had been formed by the writings and not merely *recognized* by the parties' behavior. Courts have had little difficulty with this barrier.¹⁸

Fifth, Section 2-207 gives courts too little maneuvering room for examination of the parties' conduct to find the terms on which they have agreed. Put differently, the contracts that come to the courts for interpretation are more varied and far more eccentric than one could ever imagine. For example, what if the parties exchange conflicting forms and then each later agrees to the conflicting term on the other's form? What about where one party had repeatedly included an arbitration clause in his form, but the other had performed in silence? Surely the second party knew that the first party wanted arbitration, yet the first party had never stopped performance to insist on the agreement to arbitrate. Does the first party's dogged insistence overcome the second party's persistent silence? And what about the many cases where one party, either orally or by nonverbal behavior, seems to acquiesce to a term of the other party?¹⁹ This Section needs room for the courts to accommodate all of this behavior.

The final difficulty arises from the first, as Section 2-207 is partly a contract formation provision (for example, does this behavior make a contract?), and partly a contract interpretation provision (for example, what are the terms of this contract that the parties' verbal and nonverbal behavior recognizes?). Subsection 1 deals with contract formation, but the other two subsections deal with interpretation.²⁰ Would it be clearer if those separate functions were separated?

terms despite the express language of Section 2-207). Note also that the Massachusetts statute inserts "or different" following "additional" in subsection 2. MASS. GEN. LAWS ch. 106, § 2-207(2) (2004).

17. U.C.C. § 2-207(3).

18. *See, e.g.,* Bosway Tube & Steel Corp. v. McKay Mach. Co., 237 N.W.2d 488, 489-90 (Mich. Ct. App. 1975) (applying Section 2-207(3) to include implied warranty despite the presence of a contract on the forms).

19. *See, e.g.,* Constr. Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 509-10 (7th Cir. 1968) (holding that buyer accepted the terms of seller's counteroffer where buyer sought a change only in the payment terms of the counter offer and raised no objection to seller's other modifications of the original offer).

20. *See* U.C.C. § 2-207(1)-(3).

II. AMENDED SECTION 2-207

The proposed amendments to Section 2-207 reads in full as follows:

Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of this Act.²¹

It is easy to see the footprints of the Section's former troubles in amended Section 2-207. First, contract formation is banished, to the extent possible, to Section 2-206²² and elsewhere. Second, there is no virtue in coming forward first and no necessary precedence in having one's document labeled the offer, because the second record has the same power as the first. Third, amended Section 2-207 does not impose any condition like the condition in current Section 2-207(3) that requires that the contract not be formed by the writings.²³ Fourth, the amended Section is free of much of the complexity that is found in the old Section and that carried over into the early drafts of revised Article 2.²⁴

21. *Id.* § 2-207 (Proposed Final Draft 2003).

22. Amended Section 2-206(3) reads: "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." *Id.* § 2-206(3).

23. *Compare id.* § 2-207, with *id.* § 2-207(3) (2003).

24. *Id.* For example, the February 1999 proposed revision of Section 2-207 reads:

- (a) This section is subject to Section[s] 2-105 and 2-206.
- (b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms additional to or different from the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the terms of the contract include:
 - (1) terms in the records of the parties to the extent that the records agree;
 - (2) terms, whether or not in a record, to which the parties have otherwise agreed;
 - (3) terms in a record supplied by a party to which the other party has expressly agreed; and

Finally, subsection b of Section 2-207 explicitly invites courts to regard terms to which the parties have otherwise “agreed” as part of the contract.²⁵ This subsection gives courts latitude to find agreement in the verbal and nonverbal behavior of the parties, even when the term to which they have agreed is not included in the records that either party has sent, and even when the agreed-to term is contradicted by the other’s form. I predict that this judicial interpretation of parties’ conduct will be the battlefield under amended Section 2-207. If my

(4) terms supplied or incorporated under any provision of [the Uniform Commercial Code].

(c) If a party confirms a contract by a record received by the other party that contains terms that vary [add to or differ from] the previous agreement, the terms of the contract include:

(1) terms in the confirmations of the parties, to the extent that they agree;

(2) terms in a confirming record that vary [add to or differ from] the previous agreement to which the other party has expressly agreed; and

(3) terms supplied or incorporated under any provision of this article.

(d) If a contract for sale is formed in any manner and thereafter the seller in a record proposes terms to the buyer that vary [add to or differ from] terms previously agreed, the following rules apply:

(1) If the seller could have disclosed the varying terms to the buyer in a commercially reasonable manner at the time of contract formation and failed to do so, the terms do not become part of the contract unless expressly agreed to by the buyer;

(2) If the seller could not have disclosed the varying terms to the buyer in a commercially reasonable manner, the seller shall by conspicuous language in a record notify the buyer at the time of contract formation that additional or different terms will be proposed.

(A) If the seller gives conspicuous notice, the buyer may either accept the proposed terms by any method reasonable under the circumstances or reject the proposed terms and return the goods.

(B) If the seller fails to give conspicuous notice, the proposed terms do not become part of the contract unless expressly agreed to by the buyer.

(3) Upon returning goods to the seller, the buyer has a right to:

(A) a refund; and

(B) reimbursement of any reasonable expenses incurred related to the return and in compliance with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods.

(f) In this section, an express agreement to terms cannot be based upon there [sic] mere retention or use of goods.

Id. § 2-207 (Proposed Revision of U.C.C. Art. 2-Sales 1999).

25. *Id.* § 2-207(b)(2) (Proposed Final Draft 2003).

guess is right, then it is not quite fair to say that amended Section 2-207 is only about interpretation and not about the contract formation, because courts will also be answering formation questions when they decide whether the parties have *agreed* to a term.

Even though amended Section 2-207 simplifies the law and even if it cures some of the problems of current Section 2-207, we should not be too quick to applaud. The amended Section has not been enacted in any state. It is still to be tested against the iron rule of statutory drafting: tomorrow's hard questions are never the same as yesterday's. But why not speculate on some of the questions that might come before the amended Section and on its response to those questions.

A. *Mine and Mine Only*

Many purchase order and confirmation forms now in use have variations on mine and mine-only terms.²⁶ These terms state that a person can form a contract with the master of the form only if the person agrees to all of the terms on the proffered form and proposes neither additional terms nor any that contradict the terms in the form. In current Section 2-207 the mine-only term mostly has the effect of forestalling a contract on the forms and of throwing the parties into subsection 3.²⁷ Therefore, usually the contract is composed of the terms that are the same on both forms and of terms implied by law.²⁸

Amended Section 2-207 is the same in that mine-only terms will be quite beside the point except in unusual cases.²⁹ In the usual case—where the parties perform even though they have exchanged documents that contain conflicting and additional terms—their behavior will make the contract under Section 2-206.³⁰ Under amended Section 2-207, the

26. For example, in *Boise Cascade Corp. v. Etsco, Ltd.*, the seller's offer contained the following language: "ACCEPTANCE: Seller's acceptance is expressly made conditional on Buyer's assent to Seller's terms and conditions as set forth herein"; and the buyer's acceptance read:

ACCEPTANCE: Acceptance of this Purchase Order, whether by written acknowledgment or by performance by Seller, shall be upon the terms and conditions hereof; no other terms or conditions shall be binding on Buyer unless written approval thereof specifically referring to such other terms and conditions shall have been given to Seller.

39 U.C.C. Rep. Serv. (CBC) 410, 412, No. 83-1052 FR, 1984 WL 178957 (D. Or. 1984).

27. See U.C.C. § 2-207.

28. See *Boise*, 39 U.C.C. Rep. Serv. at 414, 1984 WL 178957 ("The effect of the fact that both offer and acceptance expressly state that any contract formed must contain their terms and no others is that no contract was formed by the writings of the parties. . . . Thus [Section 2-207(3)] is effective and controls the present case." (citations omitted)).

29. See U.C.C. § 2-207.

30. See *id.* § 2-206.

contract is composed of the terms that appear on both records together with terms implied under Article 2.³¹

A mine-only term is likely to affect the parties' rights only when one party aborts the contracting process before his behavior amounts to the nonverbal recognition of a contract. In that case, under either amended Section 2-206 or under the same language in current Section 2-207, the mine-only term will cause the form that bears the term to be a counteroffer, not an acceptance.³² If that is so, then no contract will have been formed and the master of that document will not have been bound. So, amended Section 2-207 and the transfer of part of current Section 2-207 to amended Section 2-206 are unlikely to change the law.

B. Form Hierarchy

To say that all forms are equal—no matter what they say and no matter what they are—overstates the case. Consider a negotiation that is started by a buyer's request for quotation ("RFQ") to several potential suppliers. Assume that the RFQ states elaborate specifications, precisely recites the times for performance, and contemplates responses from multiple sellers. Even where the contract is concluded by the winning supplier sending its form, the parties probably accord a higher status to the terms in the RFQ than to those in any form that either party might exchange thereafter.³³ If the terms in the RFQ have not been explicitly negotiated away, then I suspect that the parties would regard those as binding on both parties because the RFQ is a noble among the commoners, purchase orders and acknowledgments. If I am right, then it might be appropriate under subsection b of Section 2-207 for a court to conclude that the RFQ's terms prevail even in the face of contradictory terms in the other forms.

C. Oral Intervention

Sometimes the initial oral exchange is not the last. In some cases, one party will make an oral objection to a term on the other's form.³⁴ If the other agrees to the first party's oral request, then there is an agreement sufficient for subsection b³⁵ but subject to the parol evidence

31. See *id.* § 2-207.

32. Compare *id.* § 2-206, with *id.* § 2-207 (2003).

33. But see, e.g., *William M. Hendrickson, Inc. v. Nat'l R.R. Passenger Corp.*, 47 U.C.C. Rep. Serv. 2d (CBC) 1284, 1296-97, No. 00-CV-3711, 2002 WL 398641, at *9 (E.D. Pa. 2002) (giving no greater weight to terms in the RFQ).

34. See, e.g., *Westinghouse Elec. Corp. v. Nielsons, Inc.*, 647 F. Supp. 896, 898-99 (D. Colo. 1986) (sustaining oral objection to seller's limitation of liability term).

35. See U.C.C. § 2-207(b) (Proposed Final Draft 2003).

rule.³⁶ That rule would bar this new oral agreement only if the exchange that preceded the oral request had resulted in a contract (one of the few places where one must note the moment of contracting under the amended Section), and if the “confirmatory memoranda of the parties agree” or the terms are “otherwise set forth in a writing intended by the parties as a final expression of their agreement.”³⁷ Typically, the confirmatory memoranda will not agree; one is seeking oral agreement from the other precisely because the forms do not agree.³⁸

Of course, if one party objects to the other’s oral proposal, then there is no agreement at that moment. Under this situation, courts will be faced with the newly complicated task of interpreting the parties’ performance in light of this intermediate and often indeterminate oral exchange. Where the oral exchange results in agreement without any writing, that agreement should be part of the deal. The parol evidence rule will seldom bar enforcement, nor should Section 2-209 on modification do so.³⁹ Often the oral intervention will occur before a contract has been made—even if the parties are on a trajectory to make a contract through a combination of oral agreements, exchange of forms, and performance. In that case, the oral exchange is merely further negotiation and not the modification of an existing contract.

But even if one concludes that the parties’ earlier behavior had made a binding contract, can subsection b be read to recognize this new oral agreement as part of that contract embryo without regard to Section 2-209? Section 2-207 is built on the hypothesis that it is seldom congruent with commercial expectations in the form contract setting to ask when the contract was made. Even if the parties make an oral contract at day one, terms on which their forms agree that might have been exchanged on days twenty and forty are a part of the contract

36. *Id.* § 2-202.

37. *Id.* Section 2-202 reads in full:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of performance, course of dealing, or usage of trade (Section 1-303); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id.

38. *See Providence & Worcester R.R. Co. v. Sargent & Greenleaf, Inc.*, 802 F. Supp. 680, 689 (D.R.I. 1992) (noting that parties’ forms are seldom intended to be fully integrated agreements).

39. *See U.C.C. §§ 2-202, 2-209* (2003).

under amended Section 2-207(a).⁴⁰ Should we apply similar reasoning under subsection b to the oral agreements that follow agreements made by exchange of forms or by earlier oral exchanges?⁴¹

D. Oral Agreement Followed By One or More Forms

Invariably commercial contracting parties communicate with one another face-to-face, by telephone, or by e-mail before they conclude a contract. Sometimes there will be no contract until the exchange of forms, sometimes there will be no contract until later than that. In some cases, however, a contract will be reached orally before any forms are exchanged or orally in the middle of the exchange of forms.

Assume an oral agreement⁴² that is followed by a mutual exchange of forms and performance. The contract includes the terms agreed upon orally together with any terms that appear in both forms and any terms supplied by Article 2.

What if a term in one of the forms contradicts a term in the oral agreement? Tough. By hypothesis the parties have an oral agreement to a particular term. A later contradiction of that term by one party would not in itself be an "agreement" under Section 2-207(b) and so would not remove the term that both had agreed upon orally.⁴³ By hypothesis, this term is in only one form. This term does not enter through subsection a and it cannot be a gap filler that finds hope in subsection c because a contrary term has already been agreed upon.⁴⁴

And what if the term in the oral agreement is a gap filler such as the implied warranty of merchantability? Assume that the buyer's confirmation has no specific express warranty language (except to the extent that the agreed product description would be a warranty) and that the seller's form has a disclaimer of warranty. Without more, the disclaimer is not in the contract because it is neither agreed upon under subsection b nor in both records for subsection a.⁴⁵

40. *Id.* § 2-207(a) (Proposed Final Draft 2003).

41. *See id.* § 2-207(b). Even if one concluded that any oral agreement would have to pass through Section 2-209, the oral agreement's only stumbling block would be the statute of frauds, and that might be satisfied by subsequent performance.

42. Assume also that later forms or performance will satisfy the statute of frauds.

43. *See id.*

44. *See id.* § 2-207(a), (c).

45. *See id.* § 2-207(a)-(b).

E. Oral Discussion Without Agreement Followed by One or More Forms

The preceding case is different where the parties do not reach agreement in their oral interchange. In that case, documents from the parties need only be compared and the contract contain the terms from both forms—under subsection a and gap fillers from subsection c.⁴⁶

Where both parties are to send forms, we should be slow to find agreement to another's form by performance. *A priori*, I would not expect my counterpart's initial performance to be an agreement to my terms when I know that he will be sending his own form, and the same for him. One of the plausible purposes of sending a form is to forestall any inference of agreement to the other's boilerplate; I may not get my terms by sending my form, but at least I cleanse my performance of the inference that I have accepted his terms by beginning to work.

Where only one party follows up an oral agreement, I think the outcome is the same. However, the passive party's inaction opens his performance to an enlarged risk. A court might construe his behavior to be an agreement to the other party's form.⁴⁷

F. Performance After the Exchange of One or More Forms

Performance after an incomplete or fragmentary exchange seldom has a clear, objective meaning about agreement to another's terms. Sometimes performance shows agreement to another's terms, but more often it only means that the negotiated terms are satisfactory, not that the party intends to accept all of your lawyer's boilerplate. In an era of just-in-time schedules, low inventories, and emphasis on lean and quick operating, it is bad policy to punish a quick and early performer by requiring that he adhere to his counterpart's terms simply because he was more diligent than another party might have been.

One can think of cases where the seller's making and sending goods to the buyer should be construed to be acceptance of all of the terms on the buyer's purchase order. Surely that type of performance signals the seller's agreement to the negotiated terms, such as price, quantity, specifications, and delivery and payment terms. It would often be fair to construe this type of performance as an agreement to other boilerplate

46. See *id.* § 2-207(a), (c).

47. See, e.g., *Trafalgar Square, Ltd. v. Reeves Bros., Inc.*, 35 A.2d 194, 196-97 (N.Y. App. Div. 1970) (holding that terms on a form become part of the oral contract if no objection is made). *But see* *Lemmer v. IDS Prop., Inc.*, 304 N.W.2d 864, 871 (Minn. 1980) (holding that terms on a form modifying the oral agreement did *not* become part of the contract).

terms such as those on risk of loss, warranty, and responsibility for damages or cure.

Here the courts will earn their keep. Section 2-207 invites courts to interpret the parties' behavior in light of the expectations, needs, and practices in the games that they play. The inferences to be drawn from a seller's hedging on a contract for the sale of \$100 million of electricity may be different from those inferences to be drawn from a buyer procuring a loan to buy \$10 million of fertilizer. Both of those instances give rise to different inferences than from a tier-one automobile supplier's shipment of coil springs to General Motors.

III. IF YOU TIE YOUR SHOELACES

One of the ways that clever lawyers have tried to escape the reach of Section 2-207 is to assert that the other party's behavior is an acceptance of all of the terms on the first party's form. For example, a form might say that any action—even in preparation for performance—will be an acceptance of the offeror's terms.⁴⁸ In an act of splendid chutzpah (or unforgivable ignorance), the drafters of the Uniform Computer Information Transactions Act (UCITA) ruled that one has “manifest[ed] assent” (agreed to something) if he “intentionally engages in conduct . . . with reason to know that the other party . . . may infer from the conduct that the person assents to the . . . term.”⁴⁹ Suppose that your form asserts that my intentional tying my shoelaces tomorrow morning will constitute assenting to all of your terms. Since I cannot tie my shoelaces unintentionally and since I have no valet, I'm stuck. Not so?

In the infamous *ProCD, Inc. v. Zeidenberg* decision, the U.S. Court of Appeals for the Seventh Circuit suggested the same when it

48. For cases that deem commencement of performance to be an acceptance of terms, see *CECG, Inc. v. Magic Software Enterprises, Inc.*, No. 02-1036, 2002 WL 31248483, at *4 (3d Cir. 2002); *Dresser Industries, Inc. v. Gradall Co.*, 702 F. Supp. 726, 733-34 (E.D. Wis. 1988); *Com-Corp Industries, Inc. v. H&H Machine Tool Co. of Iowa*, No. 69318, 1996 WL 631100, at *3 (Ohio Ct. App. 1996); and *Hendrickson*, 47 U.C.C. Rep. Serv. 2d at 1296-97, 2002 WL 398641, at *9.

49. U.C.I.T.A. § 112(a)(2) (2002). Section 112(a) of UCITA reads:

(a) [How person manifests assent.] A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) authenticates the record or term with intent to adopt or accept it; or

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

Id. § 112(a).

stated that Zeidenberg was stuck with the terms on the box because the offeror was “the master of his offer.”⁵⁰ The statement is correct, but the application is wrong. To say that the offeror is the “master of his offer” means only that he may rule out certain things as acceptance. That is, he can limit the universe of things that will be regarded as acceptances, not that he can expand *acceptance* beyond the universe that a reasonable person in the offeree’s shoes would believe to be acceptance.

ProCD is not far-fetched. Two years ago one of my students brought me a clear plastic sleeve in which she had received the power cord to her computer. On its face was the message: “By opening this plastic sleeve, you agree to all of the terms of the seller’s contract and license.”

Such terms should not transform behavior that would not normally be an acceptance into an acceptance, and, in general, they have not.⁵¹ If one limits UCITA Section 112(a) to the conventional case where a buyer clicks “I Agree,” the rule is a tautology. In that case, the click would be regarded by all reasonable people as an agreement just as the oral expression of the same words would mean agreement. So, in my opinion, one can safely tie his shoelaces without fear of making an unfavorable contract. Conceivably there are cases near the border where such a term might push an act over the line and make something an acceptance that would otherwise fail, but I cannot identify any such cases. If Section 112 of the UCITA reaches to your shoelaces, then the law is an ass.

A. *Terms in an Invoice With the Goods*

Does the seller save himself by including some terms on an invoice that is delivered with the goods long after both believed the contract had been concluded? I am not sure. This situation is a commercial variation of the issue that I discuss in the next Section.⁵² As I point out below, the courts and drafters have long wrestled with the legal standing of terms delivered with the product, and no one has yet won two out of three falls. It might make a difference if the parties had dealt with one

50. 86 F.3d 1447, 1452 (7th Cir. 1996) (“A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.”).

51. See, e.g., *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 392 (Civ. Ct. 2001) (“[I]f the defendant, as a term and condition of filing a claim, required the consumer to sing ‘O Sole Mio’ in Yiddish while standing on his or her head in Macy’s window, only Mandy Patinkin would qualify to object to the receipt of defective equipment. This cannot be so.”).

52. Compare *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding that terms in the box are not part of contract), with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (enforcing the terms inside the box).

another before and if the buyer knew that the seller's terms would come with the products. There is nothing in amended Section 2-103(1)(m), which defines "record,"⁵³ or in amended Section 2-207(a) that keeps an invoice from being a record that could satisfy subsection a.⁵⁴ But there is some drafting history and there is Section 2-207, comment five.⁵⁵ The comment and the history show that the drafters were uneasy about terms delivered with the goods and that they were uncertain about the right outcome.⁵⁶

Can we distinguish the invoice with the goods from language on or inside the box such as cases involving Gateway and ProCD? It is hard to distinguish but perhaps possible. If, as I suggest above, terms on a record that come after the parties have reached an oral agreement become part of the contract under Section 2-207(a) without regard to Section 2-209—that is, if the same terms are on the other's form—then the invoice terms should become part of the contract too.⁵⁷ If the buyer has proposed the same terms, then he can hardly complain. On the other hand, because there was only one form in the *Gateway* cases and *ProCD*, the sellers in those cases must claim an *agreement* under Section 2-207(b), not just that there are matching forms under Section 2-207(a).

B. Terms On or In the Box

Section 2-207 has done most of its work in industrial contracting. Most of Section 2-207 cases are between industrial manufacturers and industrial buyers; the latter intend to resell or to use the products in their own manufacturing process. A separate contracting practice between consumer and nonconsumer end users and manufacturers has persisted even longer than the industrial contracting process. Even though the consumer and industrial practices present similar contract issues, the two practices have marched in parallel with little reference to each other on similar issues. *ProCD*, the case that put Madison, Wisconsin on the contract map, has changed that. The courts, drafters of amended Article 2, and particularly the commentators have now awakened to the common issues in the parallel tracks and to the need to reconcile the cases in the industrial forum with those in the consumer forum.

53. U.C.C. § 2-103(1)(m) ("Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." (internal quotations omitted)).

54. *Id.* § 2-207(a).

55. *Id.* § 2-207 cmt. 5.

56. *Id.*

57. *See id.* §§ 2-207(a), 2-209.

Manufacturers of retail goods have long attached contract statements to or included contract documents with new goods. Early examples were warnings, disclaimers, or limitation of remedies on sacks of seed or containers of fertilizer.⁵⁸ As this Article is written, nearly all boxed appliances and other boxed electronic hardware sold new at retail include contract documents. Some terms in the box favor the buyer: the limited express warranty, promises to repair or replace, and the promise of a help-line for computer hardware. Some terms favor the seller: limitations of remedy, restrictions on forum, arbitration clauses, and reductions in the limitations period.⁵⁹

Licensors and sellers of software try to protect their intellectual property interests by terms inside or on the box or on the software itself. They hope to make the transaction a license and not a sale to avoid the first sale doctrine. Where the market is segmented—some parties will pay more and others will pay less for the same product—sellers badly want to keep the buyers in the less expensive market from committing arbitrage (that is sellers hope to prevent purchasers in cheap markets from reselling into the dear market).

The first, and still the most prominent case is *ProCD*. At issue in *ProCD* was Zeidenberg's attempt at arbitrage. Plaintiff ProCD compiled more than 3000 telephone directories into a computer

58. See, e.g., *Mullis v. Speight Seed Farms, Inc.*, 505 S.E.2d 818, 821–22 (Ga. Ct. App. 1998) (refusing to enforce a disclaimer and limitation of warranty on seed). In *Mullis v. Speight Seed Farms, Inc.*, the disclaimer read:

NOTICE TO PURCHASER: [Seller] warrants that, at the time of delivery, the seeds in this container conform to the label description as required under state and federal laws. [Seller] makes no other warranties whether written, oral, statutory, express or implied, including but not limited to warranty of merchantability, fitness for a particular purpose, or otherwise, that would extend beyond such descriptions contained herein. In any event, [seller's] liability for breach of any warranty with respect to such seeds shall be limited to the purchase price. Purchaser assumes the risk for results obtained from use of such seeds, including but not limited to the condition under which the seeds are planted, germinated, or grown.

Id. at 819. In *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, the disclaimer on the bag read:

Subject to the limitation of liability herein set forth, we warrant that seeds or bulbs sold are as described on the container, within recognized tolerances. Our liability on this warranty is limited in amount to the purchase price of the seeds or bulbs. In no way shall we be liable for the crop.

454 S.W.2d 307, 308 (Ark. 1970) (refusing to enforce limitation of remedies located on a tomato seed bag).

59. Manufacturers of retail goods sold to consumers rarely disclaim the implied warranty of merchantability. In almost all cases, manufacturers furnish to consumers some form of express warranty of the goods. Thus, any attempt to disclaim the implied warranty of merchantability would violate the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. See Pub. L. No. 93-637, tit. I, §§ 101–112, 88 Stat. 2183–92 (codified at 15 U.S.C. §§ 2301–2312 (2000)).

database, at a cost of more than \$10 million, and sold it as "SelectPhone" on CD-ROM.⁶⁰ The database contained a wealth of information including nine-digit zip codes and census industrial codes, and permitted users, often businesses, to search the database according to preferred criteria.⁶¹ ProCD engaged in price discrimination, selling its database to the general public for personal use at a low price (approximately \$150 for the set of five discs) while selling information to the trade for a higher price.⁶² ProCD attempted to control arbitrage by notifying consumers on the box that they were bound by the terms of the enclosed license.⁶³ This license was encoded on the CD-ROM disks, printed in the manual, and appeared on a user's screen every time the software was used.⁶⁴ The license purported to limit consumer use of the application program and listings to noncommercial purposes.

Zeidenberg decided to ignore the license after he bought three consumer packages of SelectPhone in 1994 from a retail outlet in Madison, Wisconsin.⁶⁵ He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone database.⁶⁶ ProCD filed suit seeking an injunction against further dissemination that exceeds the rights specified in the license—identical in each of the three packages that Zeidenberg had purchased.⁶⁷ The district court held the licenses ineffectual because the licensing terms did not appear on the outside of the packages.⁶⁸ The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase.⁶⁹ The district court held that Zeidenberg was not bound by the terms in the box because he had not seen them before the contract had been made.⁷⁰

The Seventh Circuit reversed, finding that Zeidenberg was bound by the license terms and applied Article 2⁷¹ (but not Section 2-207 specifically). The court of appeals drew an analogy to cases such as

60. 86 F.3d at 1449.

61. *Id.*

62. *Id.*

63. *Id.* at 1450.

64. *Id.* As noted at the conference, the relevant language was buried deep within the manual in small font.

65. *Id.*

66. *Id.* While the Seventh Circuit stated otherwise, Zeidenberg denies that he charged for use of the data once he had posted it on his site.

67. *Id.*

68. *Id.*

69. *Id.*; 908 F.Supp. 640, 654–55 (W.D. Wis. 1996).

70. 86 F.3d at 1451–53.

71. *Id.*

*Carnival Cruise Lines, Inc. v. Shute*⁷² where the U.S. Supreme Court found that the buyer of a cruise ticket was bound by a choice of law clause even though she had not seen the clause until long after the contract had been made.⁷³

Whatever the merit of the outcome in *ProCD*—Zeidenberg was surely a naughty fellow who should have his hands slapped—Judge Frank Easterbrook’s consideration of the Article 2 issues was sloppy. First, Easterbrook applied Article 2 without considering whether the contract for the use of a database was a “transaction in goods” and so within the scope of Article 2.⁷⁴ Second, he dismissed Section 2-207 in one sentence: “[o]ur case has only one form; UCC § 2-207 is irrelevant.”⁷⁵ Easterbrook’s statement is wrong; nothing in Section 2-207, its comments, or case law limits this Section to cases with more than one form.⁷⁶ Indeed, the second sentence in comment one states a hypothetical case with only one form.⁷⁷

A series of cases involving Gateway’s arbitration clause—which is contained in the computer box—have agreed with *ProCD*,⁷⁸ but one case, *Klocek v. Gateway, Inc.*, goes the other way. In *Klocek*, Judge Vratil applied the Kansas equivalent of Section 2-207 and found that the buyer’s “act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms.”⁷⁹

Before we turn to amended Section 2-207’s treatment of terms in the box, we should give the Seventh Circuit its due. Easterbrook’s discussion of the economics of retail contracting and of the virtue of

72. 499 U.S. 585 (1991).

73. See generally *id.*

74. One can argue that the contract in *ProCD* is not for goods and that it is governed by the common law rather than by Article 2. See U.C.C. § 2-102. In *Hill v. Gateway 2000*, Easterbrook is saved from repeating this error, for that case dealt with a contract for the sale of goods, namely a computer. 105 F.3d at 1148.

75. *ProCD*, 86 F.3d at 1452.

76. See U.C.C. § 2-207 (2003).

77. Comment 1 to Section 2-207 states:

This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.

Id. § 2-207 cmt. 1.

78. See, e.g., *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at *1 (Del. Ch. 2000) (involving an arbitration provision shipped with the computer); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 570 (App. Div. 1998) (involving a warranty disclaimer included inside the computer packaging); *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d (CBC) 1060, 1062, 1997 WL 823611 (N.Y. Sup. Ct. 1997) (involving a warranty disclaimer included the inside computer packaging).

79. 104 F. Supp. at 1341.

giving sellers easy ways to discriminate in price among sets of potential buyers deserves more respect than does his careless dismissal of Section 2-207.⁸⁰ When Easterbrook argues that society is well served by law that makes contracting inexpensive and easy,⁸¹ he is right. For a nickel or a dime, almost all of us would give up our right to resell software and would agree to arbitrate. If that is so, then it hardly makes sense to charge our seller a dollar in contracting costs to make that deal with us. Still, the contract law and our conventional understanding deserve some respect; there must be reasons why we persist in looking for *agreement* and why courts routinely reject some behavior as inadequate to show agreement.

But these issues are not new. Consider how the drafters of Article 2, now and earlier, have dealt with them. Fifty years ago, Llewellyn recognized the challenge to standard contract rules that were presented by terms that are attached to or delivered with the goods. He made only a half-hearted stab at the problem in comment seven to Section 2-313:

The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order.⁸²

In urging that the “sole question is whether the language . . . [is] fairly to be regarded as part of the contract,” Llewellyn sounds like amended Section 2-207.⁸³ Of course, Llewellyn was addressing the limited issue of express warranties under Section 2-313 where the problem is complicated by the requirement that an express warranty be “part of the basis of the bargain.”⁸⁴

In the Article 2 amendment process, the drafting committee dealt with these issues twice. First, the committee adopted Section 2-313A.⁸⁵ Second, the committee considered and abandoned a subsection in Section 2-207 that specifically addressed to terms inside or on the box. The poverty of our imagination is shown by the fact that no one on the drafting committee appears ever to have noticed that the proposed

80. See *ProCD*, 86 F.3d at 1449–52.

81. See *id.* at 1451.

82. U.C.C. § 2-313 cmt. 7.

83. Compare *id.*, with *id.* § 2-207 (Proposed Final Draft 2003).

84. *Id.* § 2-313(1)(a) (2003).

85. *Id.* § 2-313A (Proposed Final Draft 2003).

subsection to Section 2-207 and Section 2-313A addressed the same question.

Section 2-313A is a comprehensive codification of only a piece of the law on express warranties in the box. Section 2-313A reads as follows:

Obligation To Remote Purchaser Created By Record Packaged With Or Accompanying Goods.

(1) In this section:

(a) "Immediate buyer" means a buyer that enters into a contract with the seller.

(b) "Remote purchaser" means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

(2) This section applies only to new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution.

(3) If in a record packaged with or accompanying the goods the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

(a) the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation; and

(b) the seller will perform the remedial promise.

(5) The following rules apply to the remedies for breach of an obligation created under this section:

(a) The seller may modify or limit the remedies available to the remote purchaser if the modification or limitation is furnished to the remote purchaser no later than the time of purchase or if the modification or limitation is contained in the record that contains the affirmation of fact, promise or description.

(b) Subject to a modification or limitation of remedy, a seller in breach is liable for incidental or consequential damages under Section 2-715, but not for lost profits.

(c) The remote purchaser may recover as

damages for breach of a seller's obligation arising under subsection (2) the loss resulting in the ordinary course of events as determined in any reasonable manner.

(6) An obligation that is not a remedial promise is breached if the goods did not conform to the affirmation of fact, promise or description creating the obligation when the goods left the seller's control.⁸⁶

If Gateway sells through Circuit City to a consumer, then Gateway's warranty inside the box to the consumer (remote purchaser) is binding and Gateway's arbitration clause and other limitation of remedies are binding on the consumer under Section 2-313A(5)(a).⁸⁷ So far so good.

What becomes of the same consumer's rights as a third-party beneficiary of Gateway's warranty to Circuit City? Neither those warranties nor any limitation on damages for breach of them is addressed in Section 2-313A.⁸⁸ Nothing in Section 2-313A affects the consumer's rights under the applicable alternative of Section 2-318's privity rules.⁸⁹ Any right to sue as a third-party beneficiary and any bar to such suit for lack of privity remains unchanged.

If Gateway sells directly to the consumer, then no part of Section 2-313A applies and the parties are back under Section 2-313 and cases interpreting Section 2-313.⁹⁰ Ironically, a consumer who buys directly from Gateway may not be bound by Gateway's arbitration term under *Klocek*, yet if the same person buys from a retailer, then he will be bound by the arbitration clause because of Section 2-313A. So our attempt to codify even this small part of law on terms in the box has not distinguished us.

In 2000, long after Section 2-313A had been installed and agreed upon, the drafting committee considered a subsection in Section 2-207 that would have dealt with all terms in the box.⁹¹ The subsection reads as follows:

86. *Id.*

87. *Id.* § 2-313A(5)(a).

88. *See id.* § 2-313A.

89. *See Id.* § 2-318 (2003).

90. *Compare id.* § 2-313A (Proposed Final Draft 2003), *with id.* § 2-313 (2003).

91. I confess that it never occurred to me when we were considering the subsection to Section 2-207 that we should look back at Section 2-313A. We treated Section 2-313A as put to bed—after a big fight with sellers and advertisers several years before—and, to my recollection, no one suggested that the two sections might be stepping on one another's toes.

(b) Terms to which the buyer has not otherwise agreed that are delivered to the buyer with the goods become part of the contract, subject to 2-202, only if:

- (1) the buyer does not within [twenty] [thirty] days of their receipt object to the terms and offer to return the goods at the seller's expense,
- (2) the terms do not contradict the terms of the parties' agreement, and
- (3) taken as a whole, the terms do not materially alter the contract to the detriment of the buyer.⁹²

The subsection was accompanied by a preliminary comment that stated that the usual terms in the box—even if they limited the buyer's remedies—would not materially alter the contract to the detriment of the buyer if they contained an express warranty and a promise of consumer help.⁹³ Note that the word “agreement” defined in Section 1-201(3)⁹⁴ and included in amended Section 2-207(b)(2) of the proposed subsection does not include gap fillers provided by Article 2; so a limitation of remedies would not *contradict* an *agreement* that, by law, included the remedies provided by part 7 of Article 2. Such implied terms would be a part of the *contract* but not part of the *agreement*.

I thought the proposal gave the sellers what they needed without opening the buyers to onerous terms. For example, an arbitration clause with a \$4000 filing fee would materially alter the terms to the buyer's detriment, but arbitration without such a fee would not. Eccentric, finicky buyers could have protected themselves by returning the product. Because eccentrics are scarce, the cost to Gateway of a duty to accept returns would have been inconsequential.

I was wrong. The buyers—represented by Gail Hillebrand from Consumers Union—were tempted but feared that the commercial sellers would agree to include the subsection in the drafts approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and then take subsection 2 away in the legislatures.⁹⁵ The sellers—represented by Bob Rader, counsel for Gateway—also opposed. So the committee rejected the subsection four to three. Of course, we will never know the true position of the buyers or sellers or of their agents because their positions are revealed, if ever,

92. *Id.* § 2-207(b) (Proposed Revision of U.C.C. Art. 2-Sales 1999).

93. *See id.* § 2-207 cmt. 3.

94. *See id.* § 2-102(3) (2003).

95. In a couple of states, such as North Dakota, secured creditors did not conform to the expectations of consumer debtors when Article 9 was being considered. Local bankers' organizations apparently did not regard themselves bound by deals that had been struck during the negotiation of the uniform version of revised Article 9. Hillebrand was apparently spooked by that experience.

only after a provision has been adopted. Each side might have believed that it would prevail in court. If that was their belief, then one side is wrong.

The subsection was replaced by comment 5 that reads:

The section omits any specific treatment of terms on or in the container in which the goods are delivered. This Article takes no position on whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to these 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) [and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000)] (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 such as are contained in Section 2-207).⁹⁶

This comment leaves courts free to apply Section 2-207 or to decline to do so. It frees buyers to argue that their cases are within Section 2-207 and sellers to argue that the same cases are outside of Section 2-207.

Does amended Section 2-207 apply to cases like those involving Gateway? I think this Section does apply. Easterbrook was never right about cases with only one form, and his position would be even further from the truth under amended Section 2-207. The first four lines of amended Section 2-207 are comprehensive; they apply to all Article 2 contracts:

Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are⁹⁷

The difficulty is that the parties think that they are making a binding deal at the time of the first, and often the only, conversation. They are not like industrial buyers and sellers who anticipate negotiations and, perhaps, multiple exchanges of documents. So it

96. *Id.* § 2-207 cmt. 5 (Proposed Final Draft 2003).

97. *Id.* § 2-207.

seems to me that the seller must either incorporate the terms in the box into the telephone or e-mail contract or somehow make his term in the box into a modification.

Consider *Hill* under amended Section 2-207. Since the arbitration clause appears only in Gateway's record,⁹⁸ it does not become part of the contract under subsection a.⁹⁹ If there is only one record, then the clause does not meet subsection a for the want of a second record. If there are two records, then the clause fails because it will not appear in the buyer's record.

The arbitration clause would make it into the contract under subsection b if the parties agree. Comment three invites a court's consideration of the parties' verbal and nonverbal behavior: "There is a variety of verbal and nonverbal behavior that may suggest agreement to another's record. This Section leaves the interpretation of that behavior to the discretion of the courts."¹⁰⁰

What behavior might do? If Gateway's agent got the buyer to agree to the terms in the box as a part of the parties' telephone or e-mail exchange at the time of contracting, then that might suffice to form a contract.¹⁰¹ If the buyer agreed that the contract would not be binding until after the delivery—keeping the contracting process open—then that might work also.

An e-mail agreement after the initial contract discussion, but before delivery, might work if the seller conditioned its delivery on the buyer's e-mail agreement to the terms.¹⁰² Of course, technically, that e-mail might be a breach of the existing contract, but if the buyer accedes, the resulting e-mail would be an effective modification even if one party thought a deal had already been struck. E-mail satisfies the amended statute of frauds.¹⁰³ Because consideration is not needed for modifications under Section 2-209¹⁰⁴ and because the seller's good faith would arise from its legitimate need for the terms, e-mail would work.

The seller is farther out on a limb if it must rely on a click-through agreement or a sign on the box. For the reasons stated above, the seller should not be permitted to make an act that no rational buyer would

98. See 105 F.3d at 1148.

99. See U.C.C. § 2-207(a).

100. See *id.* § 2-207 cmt. 3.

101. See *id.*

102. See *id.*

103. By substituting "record" for writing, the amendments recognize e-mail as sufficient for fulfilling Section 2-201 requirements. See *id.* § 2-202 (Proposed Amendment 2002). Even without the amended language, the e-mails work under the Uniform Electronic Transactions Act. See U.E.T.A. § 2(13); see also 15 U.S.C. § 7006(4), (9).

104. U.C.C. § 2-209 (2003).

regard as an acceptance into one sufficient form—for example, a clause on the box stating “opening this means you agree to Gateway’s terms”.

The buyer will have a different objection to the click-through agreement. The buyer will understand that his click on the “I agree” clause is a proper acceptance of the seller’s terms, but now the seller’s offer is coercive. The buyer has received and spent all evening setting up his computer, and he is sitting in his study in International Falls, Minnesota, in his underwear with a beer when he has to decide whether to agree to the new terms or go out in the negative-thirty-degree temperature and return the computer. This offer is more objectionable than a predelivery e-mail because it is coercive.

What about the second purchase? If the buyer buys twice from the same seller, does his acknowledgement of the terms from the first sale bind him as to the second transaction? I am not sure whether the buyer is bound. Knowing that other party’s form insists on something occurring is normally not enough to bind me if his behavior does not back up his form. Remember the industrial seller whose form always demands arbitration but who always performs in the face of the buyer’s silence? There, we require the seller to come forward and insist on an express agreement to his arbitration term if we are to find an “agreement.”¹⁰⁵ But maybe this is different. Unlike the industrial buyer, who will express himself with his own form and thus implicitly reject the seller’s terms that are not included on his form, our Gateway buyer makes no explicit or implicit expression of discontent with the seller’s terms.¹⁰⁶

What about *ProCD*? Amended Article 2 might treat *ProCD* differently than it treats *Hill*. First, it is probable that amended Article 2 does not apply to *ProCD*.¹⁰⁷ Even if the data are delivered on a disk that is a good, the contract is for the data and the disk is merely the temporary carrier because the disk can be discarded once the data are on the buyer’s hard drive. The medium that holds data is less important than a book where the medium is the permanent residence of the data.

105. *Compare* *Sethness-Greenleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995) (enforcing payment terms that appeared in over 200 invoices from seller but not in buyer’s forms in an Easterbrook opinion), *with* *Avedon Engineering, Inc. v. Seatex*, 112 F. Supp. 2d 1090, 1091, 1095–96 (D. Colo. 2000) (holding that a unilaterally inserted arbitration clause did not materially alter the agreement and so became part of the contract where the terms were clear and legible, the form with the clause was routinely used in parties’ course of dealing, the buyer had at least three chances to read the clause, and the custom in the textile industry was to include arbitration terms in all contracts).

106. *Compare* *ProCD*, 86 F.3d at 1452–54, *with* *ProCD*, 908 F. Supp. at 644–55.

107. *See* U.C.C. § 2-207 (Proposed Final Draft 2003).

Amended Section 2-103 and its attending comment support that view.¹⁰⁸ If Article 2 does not reach *ProCD*, then Easterbrook can play all he wants with the common law without doing any harm to Article 2.¹⁰⁹

Even if one applies amended Section 2-207 to *ProCD*, the result might be different than the *Hill* result. Under amended Section 2-207 a court could conclude that the purchase of a box with a warning on the outside about terms on the inside is an agreement to those terms under Section 2-207(b).¹¹⁰ Unlike *Hill*, this buyer is holding the terms in his hand when he makes the contract to buy. So here, the seller avoids the doctrinal conundrum from *Hill*; namely, that normal rules of contracting would find that a contract existed long before the seller's terms show up at his home. Particularly if the box in the buyer's hand warns of the terms inside, then one might conclude here that the buyer's payment shows his agreement to those terms.

I am still uncertain. Elsewhere, I have wondered whether the outcome in *Hill* and *ProCD* is not the best one even if it disregards conventional contract doctrine.¹¹¹ My colleague Professor Omri Ben-Shahar also argues that the cost of conventional contract rituals are too

108. Amended Section 2-103(1)(k) reads:

"Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, or choses in action.

Id. § 2-103(1)(k). The relevant comment further states:

The definition of "goods" in this article has been amended to exclude information not associated with goods. Thus, this article does not directly apply to an electronic transfer of information, such as the transaction involved in *Specht v. Netscape*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). However, transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not. For example, the sale of "smart goods" such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs. On the other hand, an architect's provision of architectural plans on a computer disk would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article may apply to a transaction including information, nothing in this article alters, creates, or diminishes intellectual property rights.

Id. § 2-103 cmt.

109. One might even apply UCITA by analogy.

110. See *Id.* § 2-207(b).

111. See James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1706 n.21, 1721 (2000).

high in these cases where almost all buyers expect and would freely agree to the terms later found in the box. Ben-Shahar would say that my insistence on a scripted warning in the telephone contract or on an e-mail with the terms is excessive fealty to anachronistic contract practices. Ben-Shahar would force the buyer to seek out the terms on the Internet and make him bear the cost of not doing so. In cases like *Hill*—where far more than ninety percent of the buyers are indifferent to the terms and will gladly rely on the market to provide reasonably fair terms—the *ProCD* outcome and Ben Shahar's argument are appealing. So why not adopt that position?

I see several reasons for not adopting this approach. First, we still cling to the fiction that printed forms become contracts upon the parties' agreement. Even though few buyers are willing to read these forms, we treat the buyers as *contractually* bound to the form's terms; we have not yet converted this obligation to tort or identified it as a form of statutory liability that is not based on an agreement. Our hesitance to convert printed-form liability to something other than contract makes me uneasy about completely abandoning the contract rituals. Before we make such a conversion, we should think about the practical and theoretical problems and about the appropriate scope of such a conversion.

Second, there are eccentrics who read forms¹¹² and who might refuse to agree. We should make a place in the system for them. We might send them to a website to read the terms, but not every seller has a website and not every telephone buyer has a computer with Internet access. We might let them return the product, but for reasons considered above that too has faults.

Third, sometimes the boilerplate language includes terms that would be objectionable to a substantial number of buyers. For example, the arbitration term in *Brower v. Gateway 2000, Inc.*¹¹³ was held unconscionable because of its expense.¹¹⁴ Given the proper hesitance of courts to find terms unconscionable, we dare not rely on courts' use of the doctrine of unconscionability to police these contracts. The careful buyer should get the opportunity to turn down the offered contract upon the appearance of those terms.

Finally, as I have suggested elsewhere,¹¹⁵ it is hard to swallow that the Ford Motor Company gets the help of Section 2-207 in escaping the grasp of a seller's form, but that the consumer buyer gets no such help. I am certain that a large majority of industrial parties read the

112. At the *Freedom From Contract* Symposium, I asked the members of the audience, numbering about seventy-five, whether any of them ever read their rental car agreements. One hand went up—Zeidenberg's.

113. 676 N.Y.S.2d 569 (App. Div. 1998).

114. *Id.* at 571.

115. See White, *supra* note 111, at 1721.

boilerplate language of the other party's form only after a dispute has arisen, yet Section 2-207, both new and old, often saves them from the unwanted terms on another's form.

The day may come when the forms with certain goods are so routine and so widely expected that a buyer should be bound whether he has been warned or not, but I do not think that that day is now.

IV. CONCLUSION

If amended Section 2-207 is adopted, law professors will have the pleasure of twenty years of debate. Judges will have fresh intellectual victuals and even contract students will have something new to chew on. I am certain that the new Section will cure many of ills of the old, but I am also sure that new and unforeseen issues await it. I have hope for the new Section for two reasons. First, this Section explicitly invites the courts to find *agreements* in the verbal rubble that the parties leave behind. Second, it makes clear the purpose of this tool—to interpret a contract that has been made, not to see if a contract has been made. I hope that all of you join me in anticipating new Section 2-207's collision with contract life.¹¹⁶

116. Of course, humor that must be explained is not humorous, but let me explain the monkey joke (the humor was buried so deeply that at least three of my bright professor colleagues needed elaborate explanation—even though they feigned laughter at the time to avoid embarrassment). You see the monkey draws the wrong inference from his painful experience with the cue ball. He infers that all food at this particular bar is suspect and may be difficult to pass. A smarter and more civilized monkey would have concluded that refraining from swallowing cue balls would sufficiently protect him from a recurrence.