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Exploring the Battle of the Forms in Action

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EXPLORING THE BATTLE OF THE FORMS IN ACTION

*Daniel Keating**

TABLE OF CONTENTS

INTRODUCTION	2679
I. THE CURRENT STATE OF THE BATTLE OF THE FORMS.....	2682
II. REFORMING SECTION 2-207.....	2687
1. <i>The Current Section 2-207 Is Too Technical, Arbitrary, and Uncertain in Its Outcomes</i>	2688
2. <i>The Default Terms to Which Section 2-207 Directs the Parties Are Too Favorable to the Buyer and May Not Be Terms That Either Side Would Have Chosen in an Arms-Length Bargain</i>	2689
3. <i>The Current Section 2-207 Encourages Parties to Draft Completely One-Sided Forms</i>	2690
III. METHODOLOGY	2691
IV. TESTING FACTUAL ASSUMPTIONS ABOUT SECTION 2-207...	2695
1. <i>The Battle-of-the-Forms Provision Is a Significant Issue for Companies That Buy and Sell Goods</i>	2696
A. <i>Contract Formation Practices That Eliminate the Battle</i>	2696
B. <i>Determining When a Fully Dickered Contract Is Warranted</i>	2697
C. <i>Frequency of Post-performance Disputes About Conflicting Terms</i>	2698
2. <i>When Companies Do Engage in the Battle of the Forms, They Do So Because It Is Efficient</i>	2699
3. <i>Parties Uniformly Draft Their Forms to Be as One-Sided as Possible in Their Favor</i>	2701
4. <i>Nobody Reads the Forms</i>	2703
V. SPECIFIC REFORM PROPOSALS.....	2704
1. <i>The Baird-Weisberg Model</i>	2705
2. <i>The Goldberg Model</i>	2710

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3. Approach of the Article 2 Revision Project	2711
VI. THE FUTURE OF THE BATTLE OF THE FORMS.....	2712
CONCLUSION.....	2714

INTRODUCTION

Like many commercial law professors, I have long been fascinated with the workings of the Uniform Commercial Code's section 2-207, the "battle of the forms" provision. There are two features of that section, one internal and one external, that make it such an intriguing statute to ponder. The internal source of fascination with section 2-207 is that it provides a classic model for teaching students about the intricacies of statutory construction. There is probably no other provision within U.C.C. Article 2 that provides more confusion to law students and more challenge to the instructor than does section 2-207. There is a little bit of everything in there: subsections that must be reconciled, Official Comments that must be reckoned with, and even an apparent drafter's error or two that turns what would already be a difficult statute into a nearly incomprehensible one.¹

As good a device as section 2-207 is for introducing students to difficult statutory construction problems, I suspect that the more intriguing aspect of the provision for law professors is the strange kind of contract that the section sanctions. In a sense, the classic battle-of-the-forms sale turns contract law on its head. This is a deal in which the two parties recklessly, if not knowingly, consummate a sale of goods without having settled on all of the terms. And while one could argue that every contract is incomplete at some level, what distinguishes the battle of the forms case is that these contracts are most often incomplete at very fundamental levels. Left unsettled are issues like warranties, remedies, and other matters that no one could pretend were beyond the contemplation of the parties at the time of formation. A second distinction between the battle-of-the-forms situation and the typical incomplete contract is that with the battle of the forms, each side has specifically proposed something for the open term so that we know exactly what both parties *wanted* for that term.

During the last few years, interest in section 2-207 has been especially strong in light of the Article 2 revision efforts that are finally

1. The two apparent drafting errors are found in subsections (1) and (2) of section 2-207. In section 2-207(1), the statute refers to a "written confirmation . . . [that] operates as an acceptance." U.C.C. § 2-207(1) (1999). Since a confirmation implies the existence of the contract that is being confirmed, it seems odd that the confirmation could serve as the acceptance. By definition, if there is a confirmation of a pre-existing contract, then there must have already been an offer and an acceptance. In section 2-207(2), we are told what to do with "additional terms" in an acceptance form. *Id.* at § 2-207(2). But Official Comment Three to section 2-207 begins by stating: "Whether or not additional or *different* terms will become part of the agreement depends upon the provisions of subsection (2)." *Id.* at § 2-207 cmt. 3 (emphasis added).

coming to a head.² Given nearly 40 years of experience with the current battle-of-the-forms provision, the Article 2 revision committee is now in a position to try to fix whatever is broken with that section and perhaps to usher in the new millennium with a kinder, gentler section 2-207. What has been largely missing, however, in the many writings about how to improve section 2-207 is an attempt to study how it actually operates in practice. Up until recently, there has been precious little empirical work done in the sales law area generally,³ but particularly so in the realm of the battle of the forms.⁴ Given that literally dozens of articles have been written about section 2-207,⁵ it is striking that virtually none of them endeavors to investigate, at even a cursory level, how the provision plays out in the field.⁶

2. In May of 1999, the American Law Institute ("ALI") passed the revised version of U.C.C. Article 2 that had been produced by a drafting committee headed by Reporters Richard Speidel and Linda Rusch. In July of 1999, however, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") decided to postpone voting on the draft approved by ALI for fear that not all states would choose to adopt it. Professors Speidel and Rusch both resigned their positions as a result of NCCUSL's decision to delay. See emails from Christopher Hoving to UCCLAW-L listserv (July 26 and 27, 1999) (on file with author). A newly constituted drafting committee chaired by Professor William Henning has produced a new draft revision of Article 2 that was released in November of 1999.

3. For some notable exceptions, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1; James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1 (1982).

4. But see Electronic Messaging Servs. Task Force, *The Commercial Use of Electronic Data Interchange — A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990); Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45 (1975).

5. A nonexhaustive sampling of the articles that have appeared during the last five years includes: Alex Devience, Jr., *The Renewed Search for the "Bargain in Fact" Under the UCC Section 2-207: Battle of the Forms, Part II*, 9 DEPAUL BUS. L.J. 349 (1997); Victor P. Goldberg, *The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule*, 76 OR. L. REV. 155 (1997); Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343 (1997); Alexander M. Meiklejohn, *Castles in the Air: Blanket Assent and the Revision of Article 2*, 51 WASH. & LEE L. REV. 599 (1994); Daniel T. Ostas & Frank P. Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, 73 DENV. U. L. REV. 403 (1996); Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065 (1994); Nicholas R. Weiskopf, *The Last Hurdle in the Ongoing Revision of Section 2-207 of the UCC: Defining What Constitutes Assent to Varying Terms*, 30 UCC L.J. 423 (1998); Phillip A. White, *A Few Comments About the Proposed Revisions to UCC Section 2-207: The Battle of the Forms Taken to the Limit of Reason*, 103 COM. L.J. 471 (1998).

6. The article by Professor Meiklejohn is something of an exception to this trend. While Meiklejohn does not attempt to conduct his own empirical study, he does focus on what little empirical evidence there is on the issue. Given the absence of any empirical evidence about the existence of a "blanket assent" practice, he concludes that the drafters of revised Article 2 should simply get rid of section 2-207 altogether and let U.C.C. § 2-204 handle the issue of nonmatching terms in a battle of the forms. See Meiklejohn, *supra* note 5, at 606-07.

The purpose of this Article is to report on a modest study that I undertook of how the battle-of-the-forms provision affects commercial behavior. In conducting these twenty-five recorded telephone interviews with representatives of companies that buy and sell goods, my purposes were threefold: first, to test the validity of several factual assumptions that underlie most of the scholarship in this area; second, to try to get a better sense of what reforms, if any, ought to be made to section 2-207; and third, to determine what effects, if any, the increasing use of technology in sales contract formation has had on the battle of the forms.

My series of interviews suggested a number of results that were surprising, at least to someone like myself whose knowledge of section 2-207 has been mainly schooled by the conventional wisdom contained in most law review articles on this subject. First, and perhaps most fundamentally, the classic battle-of-the-forms situation⁷ seems to be, for a variety of reasons, much less prevalent than one would guess from reading most academic literature in this area. Second, without any legal incentives to do so, some companies have shifted to drafting less one-sided forms, at least as to issues that are not seen as critical to their side's interests. Third, even where a battle of the forms occurs, a number of parties will actually read the terms on the other side's forms in certain fairly well-defined instances. Finally, technological advances in contract formation appear to be having less impact in reducing the significance of section 2-207 than are certain market shifts that have led to the formation of various mega-retailers who can pretty much set the rules for any of their purchase orders.

In terms of reform ideas, these interviews left me with the sense that probably all that is needed is a fairly modest simplification of section 2-207 along the lines of what the Article 2 revision process seems likely to yield anyway at this point.⁸ I did, however, solicit reactions from many of my subjects regarding two of the more creative and radical section 2-207 reform ideas that were proposed by academics.⁹ While both of those proposals found some support among the interviewees, the apparent consensus of those in the trenches is for a sec-

7. When I refer to "the battle-of-the-forms situation" or "engaging in the battle of forms," I don't mean to imply the existence of a dispute, but merely that forms were exchanged that had nonmatching terms.

8. In the November 1999 "Reporter's Interim Draft for Comment" of revised Article 2, the proposed section 2-207 is a simpler, more streamlined version of what we currently have. For a fuller description of the revised version of section 2-207, see *infra* Part V. Copies of the "Reporter's Interim Draft" may be obtained from this author, or from The National Conference of Commissioners on Uniform State Laws, 211 E. Ontario Street, Suite 1300, Chicago, Illinois 60611.

9. These two proposals are described in full in Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982), and Goldberg, *supra* note 5. The proposals are described briefly in Part V, *infra*.

tion 2-207 with fewer loopholes and a more immediate reliance on the U.C.C. gap-fillers to resolve any issues for which the two sides' forms have conflicting terms.

This Article proceeds in six parts. Part I considers the state of current section 2-207 law that governs the battle-of-the-forms cases. Part II focuses on what commentators perceive to be the key flaws in the current section 2-207. Part III describes the methodology I used in undertaking these interviews. Part IV reports my findings concerning four central factual assumptions that have been made in most scholarship about the battle of the forms. Part V reports the reactions of interview subjects to a few specific reform proposals for section 2-207. Part VI explores the effects that technology and certain nontechnology factors are likely to have on the future of the battle of the forms.

I. THE CURRENT STATE OF THE BATTLE OF THE FORMS

If you think of the battle of the forms as a game, it is much more analogous to tic-tac-toe than it is to chess. Just like in the game tic-tac-toe, it is difficult for either side to win the battle of the forms with clever drafting, at least if we define "winning" as making the other side be held to your nondickered terms. By the same token, it is easy with good drafting never to *lose* the battle of the forms, at least if "losing" equals letting your side get stuck with the other party's boilerplate terms.

In order to appreciate how section 2-207 currently operates, one must first understand both the business situation that it was designed to address and the common law approach to the problem that section 2-207 was intended to replace. Suppose that a buyer and a seller sit down and negotiate a contract for the sale of a sophisticated machine. If the two parties put all of the terms of their contract in writing and both sign a single document embodying those terms, section 2-207 will have nothing to say about the situation. There would be no issue in that case about whether and when the contract was formed — since both sides signed a written contract — and there would be no question about terms, since the contract covers all of the key terms (or at least those that the parties could think of in advance of the sale).

Now suppose instead that these same two parties involved in the sale of a machine did not sit down and sign a negotiated contract with terms and conditions. Instead the buyer simply sent a purchase order to the seller that contained the model, price, and the needed delivery date of the machine on the front, with nonimmediate terms such as warranties and remedies in boilerplate on the back. The seller, in turn, responded to the buyer's purchase order with an acknowledgment form that reiterated the buyer's performance terms on the front but contained completely different nonimmediate terms in boilerplate on the back. Neither party read the back of the other party's form,

though both parties did confirm the specifics of the front. The seller then shipped the goods and the buyer paid for them. Later the machine malfunctioned and caused significant damage to the buyer's business, damages that were indeed well beyond what the machine cost the buyer.

In this latter case, we are faced with questions both about formation — whether and when — and about whose nonimmediate terms will control. On the formation question, almost anyone would agree that there was a valid contract at some point. After all, the buyer and seller *acted* as if there were a contract by, at a minimum, shipping and paying for the machine, respectively. The “when” of formation is trickier, though: should formation be found to have occurred at the time the seller sent its acknowledgment form to the buyer, or not until each party performed some act that indicated its belief that there was a sales contract?

The “terms” question is messier still. Buyer's and seller's forms simply do not agree on the issue of warranties and remedies; there was clearly no “meeting of the minds” there. Should we go with buyer's terms, since buyer made the offer and offerors are said to be the masters of their own offers? Should we go with seller's terms, since seller sent the second form of the two forms involved and thus perhaps believed that buyer was impliedly assenting to the changes that were contained in seller's form? Or should we enforce neither the buyer's nor the seller's terms, but instead some terms gleaned from a third-party source?

The dilemma that the law must face with this classic battle-of-the-forms scenario, as Professors Douglas Baird and Robert Weisberg have pointed out, is that on the one hand, there is simply no way that these questions can be answered with reference to the two parties' “bargain in fact” — they simply did not have one as to these nonimmediate terms.¹⁰ On the other hand, the law has to pick *something* on the issue of which warranties and which remedies will govern: either the buyer's terms, the seller's, or someone else's. The law just cannot punt on this one.

Prior to the enactment of the U.C.C., the common law followed what became known as the “mirror image” and “last shot” doctrines, the former governing formation and the latter dictating terms.¹¹ What the mirror-image rule says is that when an offer is made, a purported acceptance whose terms are not the “mirror image” of the offer will not count as an acceptance but instead will be treated as a counter-offer. Thus, in the above example, the seller's acknowledgment form would not serve as an acceptance to the buyer's offer to purchase the

10. Baird & Weisberg, *supra* note 9, at 1219-20.

11. See DANIEL KEATING, *SALES: A SYSTEMS APPROACH* 48 (1998).

machine since the nonimmediate terms on the two forms were not the mirror images of each other. The seller's acknowledgment form would serve instead as a counteroffer, and the buyer's act of paying for the goods would count as an acceptance of the seller's counteroffer.

This is where the "last shot" doctrine comes into play. Because a purported acceptance such as the seller's is treated as a counteroffer that is then accepted by the buyer's performance, the seller's terms will govern by virtue of its having fired the "last shot." Thus, under the common law approach, the contract would be formed upon the buyer's payment, and the seller would get the benefit of its presumably more limited warranties and remedies when the machine malfunctioned in the buyer's hands.

The common law approach clearly had its critics. A typical complaint about the mirror-image rule, for example, is that it would allow a party to renege on what was likely intended to be a binding deal, as long as the party did so prior to any performance on its part.¹² As Professors Baird and Weisberg point out, this criticism was probably overplayed:¹³ first, this wasn't likely to be a significant risk in practice, since most of the problems with exchange-of-forms deals came after the goods had been delivered and something went wrong with the goods; and second, in the rare case of a party seeking to renege on a forms contract prior to its performance, courts could and arguably did stretch the mirror-image doctrine to find that there was indeed agreement between the forms if they sensed an opportunistic breacher.

A separate source of complaint about the common law approach was the arbitrariness and the all-or-nothing nature of the last-shot doctrine.¹⁴ Why, after all, should one party's boilerplate terms control in their entirety by the relative happenstance of that party's having sent the last form in the exchange? Given that there was never a bargain-in-fact on those terms in the first place, it seemed unfair to these critics to adopt a winner-take-all approach rather than to require some kind of compromise.

The enactment of section 2-207 of the U.C.C. responded to both of these concerns. On the formation issue, section 2-207(1) makes it clear that the mere existence of additional or different terms in a writing that otherwise purports to be an acceptance will not prevent that writing from operating as an acceptance.¹⁵ Thus, subsection (1) of section 2-207 marked the end to the common law's mirror-image rule.

12. See Baird & Weisberg, *supra* note 9, at 1223 ("Commentators assume that the mirror-image rule cannot resolve the problem of the welsher satisfactorily.").

13. See *id.* at 1233-37.

14. See *id.* at 1232 (referring to the rule's "principal vice: arbitrary and formalistic decisions").

15. The precise text of section 2-207(1) is as follows: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates

Even under section 2-207(1), however, not every purported acceptance with nonmatching terms will count as a valid acceptance. First, the acceptance must still qualify as a “definite and seasonable expression of acceptance” according to the language of the statute. Thus, for example, the acceptance still must be sent within a reasonable time following the offer. Further, there must be some point at which the terms in the purported acceptance so diverge from the terms of the offer that you do not really have an acceptance at all.¹⁶ If the buyer offers to buy apples and the seller accepts the buyer’s offer for the seller to sell oranges, the seller’s “acceptance” should not create a contract. An acceptance to sell oranges is not a “definite and seasonable expression of acceptance” to the buyer’s offer to buy apples.

The second way in which a purported acceptance with nonmatching terms will not operate as an acceptance is if the offeree uses the magic language of section 2-207(1) and makes it clear that its acceptance of the offer “is expressly made conditional on [the offeror’s] assent to the additional or different terms [contained in the acceptance].” When that language or something very close to it is used, then there is no contract formation until the offeror gives its specific assent to the offeree’s additional or different terms. Performance alone by the offeror should not count as such assent to the new terms, or else we are simply back to the last-shot doctrine.

Whereas section 2-207(1) more or less reverses the mirror-image rule of the common law, section 2-207(2) changes the last-shot doctrine. If a contract is formed by the exchange of writings under section 2-207(1), then section 2-207(2) tells us what the contract’s terms are. Between merchants, any additional terms in the acceptance document will become part of the contract unless those terms materially alter the offer, or unless the offeror has specifically indicated either in its offer or after receiving the acceptance that the offer is limited to its terms. When the acceptance includes different rather than additional terms and the contract is between merchants, most courts follow the knockout rule, which ignores the conflicting terms and looks instead to the U.C.C. gap-fillers for those terms.¹⁷

Section 2-207(3), the last subsection of section 2-207, covers the case in which the parties exchange forms but the forms themselves do not make a contract, either because the terms are too divergent or be-

as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.” U.C.C. § 2-207(1).

16. In order for the purported acceptance to be valid as such, Professors White and Summers would require at a minimum that the acceptance is in agreement with the offer “as to price, quality, quantity, [and] delivery terms.” JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 1-3, at 33 (5th ed. 2000).

17. See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (10th Cir. 1984) (applying the “knockout rule”).

cause the acceptance was expressly made conditional on the offeror's assent to the different or additional terms and no assent was forthcoming. In that case, if the two sides proceed to perform anyway, then the conduct of the two parties serves to establish the existence of the contract. The terms that govern such a conduct-formed contract are "those terms on which the writings of the parties agree, together with [the U.C.C. gap-fillers]."¹⁸

When section 2-207 was first enacted nearly forty years ago, any commercial lawyer who stepped back for a minute and assessed the practical impact of the new section vis-à-vis the common law would quickly come to a number of conclusions. First, whether you represent the offeror or the offeree, you can (and arguably should) include magic language in your form that will greatly limit the likelihood that you will get stuck with the other side's boilerplate terms. If you are the offeror, you can specifically limit the terms of your offer to the terms that are included therein, and while you are at it, you can object in advance to any additional or different terms that the offeree might include in its purported acceptance of your offer. If you are the offeree, you can mimic the language of section 2-207(1) and expressly condition your acceptance on the offeror's assent to any additional or different terms that you have included in your acceptance.

By using the magic language, you put yourself in a position where the worst place you can end up regarding the boilerplate terms, should you choose to perform, is with the U.C.C. gap-fillers. But that brings you to your second conclusion: this whole new approach, compared to the common law, raises the stakes on the U.C.C. gap-fillers, so you had better know what they are in order to determine whether you are truly comfortable with them. If you represent buyers, this is probably not a bad place to be since the U.C.C. gap-fillers include fairly broad warranty and remedy provisions, including the implied warranty of merchantability¹⁹ and generous consequential damages.²⁰

The third practical conclusion that a thoughtful commercial lawyer would reach about the U.C.C.'s approach to the battle of the forms is that there is simply no way for either side to ensure victory in this fight, at least if victory is defined as getting the other side to be bound by your boilerplate terms rather than theirs. You can, of course, try to ensure victory by refusing to perform your side of the contract until the other side signs on to the terms in your form. At that point, though, you would end up with a real negotiated contract and it would no longer be a true battle of the forms.

18. U.C.C. § 2-207(3).

19. *See id.* at § 2-314.

20. *See id.* at § 2-715(2).

If the third conclusion is the bad news — that there is no sure recipe for success in this battle — then the fourth conclusion is the good news: neither side is ultimately forced to play by the other side's terms in this battle. In other words, both sides have the ability to opt out of the rules of section 2-207 completely, either by insisting on a fully negotiated contract signed by both sides, or by seller refusing to ship the goods or by buyer refusing to pay for the goods. The bad news about this good news, though, is that not playing the game has its own costs. Perhaps this is a sale that you really want to make, albeit not on the buyer's terms. Or perhaps you feel that it would be too expensive, given the fairly small size of the deal or the limited risk involved, to sit down and negotiate about nonimmediate terms that are unlikely to matter in the end anyway.

The last conclusion that our astute commercial lawyer would draw after studying section 2-207 is that this is a section that leaves a lot of uncertainty about a lot of things — things like whether an acceptance really does count as “definite and seasonable,” whether an additional term in an acceptance is a “material alteration” of the offer's terms, or what happens if the U.C.C. does not have a specific gap-filler for the issue on which the terms conflict. Some commentators have assailed the uncertainty of the current section 2-207 as one of its most unattractive features.²¹

Most of the action in the reported cases concerning section 2-207 arises following performance by the two parties and concerns terms rather than contract formation.²² When there is a fight about formation in a reported case, it is typically only a precursor to a dispute over terms. That is because the questions of when a contract was formed and what are its terms are inextricably linked in section 2-207. If a contract was formed by the exchange of writings under section 2-207(1), then the terms are determined under section 2-207(2), which may or may not call into play the U.C.C. gap-fillers. If, on the other hand, there was no contract formed by the writings under section 2-207(1) but the parties performed anyway, then the terms will necessarily be determined under section 2-207(3), which will always look to the U.C.C. gap-fillers except when the two forms already agree on the term in question.

II. REFORMING SECTION 2-207

Of the many dozens of articles that have been written about the battle-of-the-forms statute, the one thing that just about all of the authors agree with is that section 2-207 could be improved. Beyond

21. See, e.g., Ostas & Darr, *supra* note 5, at 412-13.

22. See, e.g., *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184 (1st Cir. 1997). See generally WHITE & SUMMERS, *supra* note 16, at 29-48.

that point of agreement, commentators have offered a variety of visions as to what the ideal battle-of-the-forms provision would look like. Before delving into some of the specific proposals that have been put forth, it would probably be worthwhile to consider the various ways in which commercial law scholars believe that the current section 2-207 is broken. It seems to me that there are at least three common themes that run through the laments about the state of section 2-207.

1. *The Current Section 2-207 Is Too Technical, Arbitrary, and Uncertain in Its Outcomes*

This complaint combines a number of related themes concerning the general user *unfriendliness* of the current battle-of-the-forms statute. One author in this area, Professor John Murray, observes that the outcome of battle-of-the-forms contests should not come down to such niceties as which form is the offer and which is the acceptance, particularly since in his experience the parties involved never think of their forms as “offers” and “acceptances” in any event.²³ Another pair of commentators opine that the last-shot doctrine of the common law has essentially been replaced by an equally technical and arbitrary “first-shot” doctrine under section 2-207.²⁴ Along the same lines, Professor Sandy Meiklejohn points out that one fundamental flaw in the existing section 2-207 is that it creates at least the possibility that one party might get stuck with the other side’s boilerplate terms despite any actual or implied consent by the party that would be bound by the other side’s form.²⁵

Beyond the arbitrary outcomes suggested above, there is the separate but related matter of uncertainty of outcome. If neither side really knows how its respective rights are allocated in a battle of the forms, that arguably increases transactions costs both at the front end and at the back end in the event of litigation. Professors Daniel Ostas and Frank Darr note how the current section 2-207’s uncertainty of outcome increases transaction costs at both stages: at the front end, the uncertainty of outcome gives parties a perverse incentive to read fine print on the other side’s form that they might otherwise be able to ignore if there were greater certainty about the battle-of-the-forms outcome;²⁶ on the back end, the uncertainty of how courts will come out on a battle-of-the-forms case increases costs because it encourages parties to litigate rather than to settle.²⁷

23. John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337, 351 (1986).

24. See Roszkowski & Wladis, *supra* note 5, at 1071.

25. See Meiklejohn, *supra* note 5, at 606-07.

26. See Ostas & Darr, *supra* note 5, at 412-13.

27. See *id.* at 414.

2. *The Default Terms to Which Section 2-207 Directs the Parties Are Too Favorable to the Buyer and May Not Be Terms That Either Side Would Have Chosen in an Arms-Length Bargain*

This point is as much a complaint about the nature of the U.C.C. gap-fillers in general as it is about section 2-207 in particular. Nevertheless, the machinery of section 2-207 is clearly designed to send battle-of-the-forms stalemates to “any supplementary terms incorporated under any other provisions of this Act.”²⁸ Critics have at least two problems with that outcome. The first is that the U.C.C. gap-fillers give the purchaser an unfair advantage. The second is that the gap-fillers, while nice in the abstract, really do not work particularly well for any given deal.

Fairly early in the Article 2 revision process, a practicing lawyer wrote to members of the drafting committee that if they were going to clear up the uncertainties in the current section 2-207 and thereby push more cases directly to the gap-fillers, then they really ought to fix the gap-fillers so that they did not favor the buyer so much.²⁹ This lawyer added that it was no answer to his criticism to say that the seller could always refuse to sell if it truly required its own terms as to things like warranties and remedies. The problem with that approach, the lawyer said, is that it puts the burden on the seller to spend its money to try to negotiate every deal away from what would end up being the default terms.³⁰

An even more fundamental concern with the default mechanism of the current battle of the forms is not that it favors buyers, but rather that it yields terms that may be in neither party's interest. Professors Baird and Weisberg observe that with certain quality issues such as warranties, the buyer rather than the seller may be the cheaper risk-avoider.³¹ If that is the case, then it is inefficient for the seller to provide a broad warranty (at a higher cost to buyer) instead of simply selling the product more cheaply with no warranty.³² Yet under the current battle-of-the-forms regime, the U.C.C.'s gap-filler on warranty provides broad implied warranties. This in turn encourages wasteful negotiations between buyer and seller that are conducted solely to bargain around an inefficient gap-filler.³³

Professor Victor Goldberg provides another example of what he believes to be a U.C.C. gap-filler that neither party would choose if

28. U.C.C. § 2-207(3).

29. See Roszkowski & Wladis, *supra* note 5, at 1069.

30. See *id.*

31. Baird & Weisberg, *supra* note 9, at 1250-51.

32. See *id.*

33. See *id.*

the parties had negotiated about it: the availability of consequential damages.³⁴ Professor Stewart Macaulay's empirical work lends some support to this notion in that he found that industrial sellers did not typically offer buyers consequential damages, at least not voluntarily.³⁵ My own interviews also suggest a sense in both buyers and sellers that unlimited consequential damages for a product that itself does not cost the buyer that much is, in the absence of some clear fault on the seller's part, somehow inappropriate.³⁶ Indeed, "consequential damages" was singled out as probably the single "boilerplate term" that the companies in my study are the most likely to negotiate about.

3. *The Current Section 2-207 Encourages Parties to Draft Completely One-Sided Forms*

One commentator speculates that the reason sellers include one-sided terms in their forms is that under the existing section 2-207, those sellers believe that their terms will (or at least may) ultimately control.³⁷ This author suggests that the battle-of-the-forms provision ought to be revised to make it clear that in any case where the two parties' terms disagree, the court will simply provide the U.C.C. gap-fillers.³⁸ Similarly, Professor Goldberg writes that very few of the section 2-207 reform efforts and commentary have adequately focused on how to shift the incentives of the parties to take into account the interests of the other side when drafting their forms.³⁹ One notable exception to this oversight is the proposal by Professors Baird and Weisberg; Professor Goldberg has different criticisms of that proposal.⁴⁰

34. See Goldberg, *supra* note 5, at 157.

35. See Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 818.

36. See, e.g., Interview No. 4 (transcript at 4-5) (on file with author) (suggesting that as a buyer, you would typically give up access to consequential damages fairly readily if the seller bothered to object about them).

37. See Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327, 377 (1983).

38. See *id.*

39. See Goldberg, *supra* note 5, at 156.

40. See *id.* at 164 (asking rhetorically that if Baird and Weisberg are correct in their theory that parties will make their forms more balanced from the start as a way to anticipate a minority of objectors, then why, under the currently existing knockout rule, haven't a subset of sellers policed the one-sidedness of buyers' forms and caused the buyers to make their forms more mutually beneficial?).

III. METHODOLOGY

Although recently there have been a number of important studies that focus on the sales practices of discrete industries,⁴¹ on the whole there have been very few studies that touch on contract formation issues in general and on U.C.C. section 2-207 in particular. In perhaps the most famous interview-based study of the sales system, Professor Macaulay conducted a wide-ranging series of interviews with representatives from forty-three companies and six law firms nearly forty years ago.⁴² Professor Macaulay's study highlighted the significance of noncontractual relations in business and revealed that business people are generally not driven much, if at all, by the legal implications of the decisions that they make. Perhaps most relevant to contract formation, Professor Macaulay found that written contracts are very rarely enforced in practice and that parties are much more likely to resort to nonlegal sanctions to deter would-be breachers.⁴³

In a study conducted nearly three decades after Professor Macaulay's landmark project, Professor Russell Weintraub had corporate general counsel fill out a written survey concerning the law's effect on contract practices.⁴⁴ Professor Weintraub reiterated the conclusions of Professor Macaulay's study concerning the primacy of business over legal considerations in the day-to-day affairs of commerce, but added a key caveat: "[T]he law should not be contrary to practices that the community perceives as normal and desirable."⁴⁵ Thus, Professor Weintraub discovered in his study that there is a significant difference between saying that the law does not control business practice and saying that the law has no effect on business practice. His key point was that even though business behavior is driven on a surface level by business rather than legal considerations, the law nevertheless plays a subtle and important role in the process.

Somewhat ironically, the most direct study on the battle of the forms was conducted in a jurisdiction that still follows the common law last-shot doctrine. In a 1975 article, British Professors Hugh Beale and Tony Dugdale reported on a series of interviews they conducted with representatives from 19 engineering manufacturers in England.⁴⁶ The Beale and Dugdale article has been cited in some American law

41. The two articles by Professor Bernstein, *supra* note 3, for example, focus on the practices of the grain industry and the diamond industry.

42. See Macaulay, *supra* note 3, at 55.

43. See *id.* at 61-62.

44. See Weintraub, *supra* note 3.

45. *Id.* at 5.

46. See Beale & Dugdale, *supra* note 4. England still uses the common law approach to the battle of the forms. See *Butler Mach. Tool Co. v. Ex-Cell-O Corp.* (Eng.), [1979] 1 W.L.R. 401 (C.A. 1977).

review articles on battle of the forms as suggesting that, contrary to commonly accepted assumptions, at least some parties do read the forms that the other side sends and do have some appreciation for their legal significance.⁴⁷

Finally, Professor Murray, who has probably written as much and has been as influential as any academic in the section 2-207 debate, has made reference in some of his work to having spoken with over 5000 purchasing agents over the course of a decade.⁴⁸ Although there is not a lot of detail in Professor Murray's writings concerning the nature and scope of these conversations, he does report that he has never found a single purchasing manager who actually read the terms on the other side's form and that most purchasing managers could not even explain what the terms meant on their own forms much less on the other side's.⁴⁹

My own study began with me reading every article I could find that was published during the last twenty years that focused on section 2-207 and the battle of the forms. As I read these articles, the two features that I was most interested in were: first, what factual assumptions the various authors were making concerning the behavior of the parties that were involved in the battle of the forms; and second, what the authors believed was wrong with section 2-207 as it was currently drafted. My aim was to come up with a list of questions that would probe the factual assumptions being made by scholars in the area and that would also attempt to discern whether the problems in section 2-207 identified by scholars were also of concern to those in practice. Based on this literature review, I came up with an initial series of questions to ask subjects. I later refined this series of questions with the help of two academics⁵⁰ who have both done some empirical work in commercial law.

In deciding which companies to approach and which individuals to interview at each company, I had the benefit of having conducted a series of thirteen interviews three years ago in preparation for writing a sales casebook.⁵¹ Although my previous interviews had touched briefly on section 2-207 questions, contract formation was just one of

47. See, e.g., Baird & Weisberg, *supra* note 9, at 1254 n.87.

48. See John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1317-18 n.47 (1986) [hereinafter Murray, *Chaos*]; John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 778 n.207 (1982).

49. Murray, *Chaos*, *supra* note 48, at 1317 n.47.

50. The two professors who reviewed an earlier draft of the questions were Professors James J. White and Ronald J. Mann from the University of Michigan Law School.

51. The results of those interviews are reported both in KEATING, *supra* note 11; and in Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99 (1997).

several issues that I had explored in conversations that were fairly broad in their coverage of sales law but not particularly detailed in any one area. In my interviews three years ago, I ended up speaking with three categories of individuals: business people, in-house corporate counsel, and outside counsel that represented companies. What I discovered from that small sample is that the most useful interviews seemed to be with in-house counsel, who are perhaps in the best position to straddle the line between legal and business concerns. The other advantage of interviewing in-house counsel with a battle-of-the-forms project is that in most companies large enough to have their own lawyers, these lawyers almost invariably are the ones who draft the forms and who oversee the exchange-of-forms operation.

While they clearly understand the law, in-house counsel seem also to appreciate the inner workings of the company that employs them and how, if at all, the law affects those workings. Business people clearly bring a unique perspective to bear as well, but their answers often lack the richness I found in the dual perspectives of the in-house counsel. The problem with the outside counsel of a company is that, except in unusual cases, they tend not to have their pulse on the way things actually work inside the company that they represent.

I ended up with a sample of both large and small companies, though more large than small, with the majority being large manufacturers of goods with at least \$1 billion in sales each year. These companies buy and sell a variety of different goods, including food products, paint, cars, electronic equipment, medical supplies, and various consumer goods. One reason that the sample was biased toward large companies is that I suspected these companies would be more likely to have thought about battle-of-the-forms problems if for no other reason than the sheer volume of sales that they conduct. St. Louis is the most common location for the headquarters of the companies with which I spoke, although the majority of the companies are not based in St. Louis. Of the companies I interviewed, ten are both a purchaser and a vendor in battle-of-the-forms contexts, eleven are exclusively or primarily a purchaser, and four are exclusively or primarily a vendor.

Of the twenty-five companies I interviewed, seventeen were represented in the interviews by in-house counsel that specialize in contracting practices, six were represented by business people who handle sales contracts, and two by outside counsel.⁵² I actually interviewed

52. The way in which I identified a person to be interviewed was to find a contact at some companies that I knew bought and/or sold goods. A few of these initial contacts were acquaintances; others were alumni from the law school where I teach. I felt that it was important that my initial contact people have some connection to me so that they would be willing to take the time to locate for me the person within their company who dealt most frequently with exchange-of-form sales contracts. Furthermore, I thought that my having a connection to someone in the company would make it more likely that the interview subject would ultimately agree to take the time to speak with me. Once I could identify the battle-

thirty-two people, since at four of the companies I simultaneously interviewed two or more people by speaker phone. The smaller companies tended to be represented in the interviews by business people, since those companies generally did not even have in-house counsel. The two outside counsel I spoke with were both in special circumstances: one has long acted as a de facto in-house counsel for a smaller company; the other represents an entire trade association of credit managers who deal with battle-of-the-forms situations.

The interviews varied in length from about twenty to fifty minutes, with the average being about thirty minutes.⁵³ Not all of the subjects were in a position to answer all of my questions, and some of the questions simply did not apply to certain of the respondents. For example, at least some of the companies have gotten to the point where they simply never engage, at least to their knowledge, in a battle of the forms. For representatives of those companies, I could not ask my otherwise standard question, "Why would you knowingly engage in the battle of the forms rather than simply resolving all of the boilerplate terms in advance?"

There are a number of ways that one might study how battle-of-the-forms law works in practice. First, one could do actual raw data collection by studying the written records of companies⁵⁴ or even their behavior. Second, one could send out a written survey much like Professor Weintraub did in his study of general counsels' attitudes toward the law's effect on business.⁵⁵ The third approach, and the one chosen here, is oral interviews. Like the other two approaches, the interview approach has its advantages and disadvantages.

The greatest advantage that I find with the interview approach is the ability to ask follow-up questions. Sometimes you discover with certain subjects that you are simply asking the wrong question; with a written survey, it is harder to pick up on that. In order to achieve this advantage to the interview approach, however, you generally cannot afford to delegate the task of interviewing to a research assistant. I

of-the-forms expert within a company, I would call that person, explain the purpose of my study, and ask to arrange a later recorded phone interview with him or her.

Because the interviews were being recorded and because I wanted subjects to be as candid as possible, I gave all of the interviewees the option of remaining anonymous for purposes of attribution. Most subjects chose to be anonymous, usually for fear that they might unwittingly reveal company strategy or perhaps dirty laundry concerning how they conduct their business. Some just did not want to go through whatever channels they would need to in order to get their company to agree to be identified.

53. Full transcripts of all the interviews are available from the author (with identities redacted where requested by the subject).

54. An excellent example of such raw data collection can be found in this symposium issue with Ronald J. Mann's article, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494 (2000).

55. See Weintraub, *supra* note 3.

view the inability to delegate as an advantage of its own, in that the researcher is personally getting the flavor of each and every interview. Another key advantage to the interview approach is that it is much more manageable to conduct a study that is at least enlightening, if not statistically significant. Because each interview can be so deep, you can learn a fair amount without the need for hundreds or even dozens of subjects.

The same features of the interview approach that are its strengths can also be a source of drawbacks. Because the researcher is asking follow-up questions, no two interviews are necessarily going to be the same and it is hard to control for the subconscious (or conscious) biases of the interviewer toward finding a certain conclusion. And because each individual interview is time-consuming, you are less likely to be dealing in sample sizes that will prove to be statistically significant. Thus, sample bias is more likely to loom large with the interview approach because the number sampled will typically be small. Finally, because of the free-ranging nature of the interview approach, it would be more difficult to quantify data and run numbers even if you had a larger sample size.

Given that there are literally thousands of companies in this country that buy and sell goods, anything that I learned from speaking with twenty-five such companies can, of course, only be suggestive. There may well be confounding variables such as industry or geography or company size that would be impossible for me to discern with such a small sample size. Regarding sample bias, I will repeat here the lament first uttered by Stewart Macaulay concerning the difficulty of trying to screen your sample selection in the absence of much existing research in the area: “[T]o a great extent, existing knowledge has been inadequate to permit more rigorous procedures — as yet one cannot formulate many precise questions to be asked a systematically selected sample of ‘right people.’”⁵⁶

IV. TESTING FACTUAL ASSUMPTIONS ABOUT SECTION 2-207

If one takes the time to read some of the voluminous literature that exists concerning the battle of the forms, it quickly becomes clear that most of the commentators are making certain factual assumptions about the way section 2-207 plays out in practice. Some of these assumptions are specifically stated by the authors; others are implicit in what the authors are writing. Below I list four very common assumptions that I found in my reading of the literature, and in each case I compare what I found in my interviews with the conventional wisdom.

56. Macaulay, *supra* note 3, at 56.

1. *The Battle-of-the-Forms Provision Is a Significant Issue for Companies That Buy and Sell Goods*

This assumption is not stated in the literature as such, but it is nevertheless apparent in most of the articles on the subject if you read between the lines. The sheer number of articles on section 2-207 alone suggests that a lot of scholars view the battle of the forms as significant enough to share their wisdom with the world. When the revision efforts began for Article 2 of the U.C.C., section 2-207 was at the top of many critics' list as one of the provisions that were most in need of significant reform.⁵⁷

My first clue that section 2-207 wasn't nearly as important in practice as I thought came when I began trying to set up the interviews for this Article. Whenever I would contact the general counsel's office at a company, my goal was always to find the one person in the department who had the most experience dealing with battle-of-the-forms issues. What I quickly discovered was that even at the largest companies — Fortune 50 companies, in some instances — the most expert lawyer in that subject had precious little experience with section 2-207.

When I note here my surprise at the lack of prominence of section 2-207 in practice, I am not simply referring to a re-discovery of the more generalized Macaulay-esque "law in action" reality that says no particular statute or contract dramatically affects commercial behavior. Rather, I am referring to a more specific finding concerning the significance of the battle of the forms in particular.

A. *Contract Formation Practices That Eliminate the Battle*

What I found is that nearly half of the twenty-five companies that I interviewed were either never or virtually never in a position even to engage in a battle of the forms at all, due to the nature of their contract formation practices. Of those companies that sometimes allow themselves into a battle-of-the-forms scenario, virtually all of them said that post-sale disputes that depended on conflicting forms were extremely rare and that litigation on the subject was rarer still.⁵⁸

When companies choose to opt out of the battle of the forms, whether consciously or subconsciously, they do so in a variety of different ways: 1) A couple of respondents indicated that the vendors in

57. In the May 1, 1999 Proposed Final Draft of revised Article 2 that was approved by the American Law Institute, section 2-207 was one of eight parts of Article 2 that was identified by the drafters as having been the subject of "the most important changes in Revised Article 2." *Uniform Commercial Code Revised Article 2: Sales*, reporter's memorandum at xxiv (Proposed Final Draft May 1, 1999) (draft available upon request from the author).

58. One question that I did not ask my subjects that, in hindsight, I clearly should have was how the frequency of battle-of-the-forms disputes compared with the frequency of other sales contract disputes that were not related to the battle of the forms.

their deals will virtually never send an acknowledgment form or, if they do, it merely acknowledges that the sales agreement was reached but does not include any terms beyond the ones that were already negotiated;⁵⁹ 2) The Director of Purchasing for a medium-sized plastics manufacturer indicated that he always negotiates all terms with the seller prior to sending the purchase order and that the purchase order includes those pre-negotiated terms;⁶⁰ 3) For some of the larger companies, practically the only sales that they will conduct are with long-term customers who agree in advance to sign a master agreement that includes all terms and conditions that will govern any future orders;⁶¹ 4) One large computer manufacturer requires that any purchaser must sign in advance a form prepared by that manufacturer that outlines all of the terms and conditions that will govern future purchases;⁶² 5) Some companies require that the credit application that a purchaser must sign in order to be eligible for credit also include the purchaser's assent in advance to all of the vendor's terms and conditions;⁶³ 6) A couple of large retail purchasers send to any prospective vendor a "vendor's handbook" that describes the purchaser's terms and conditions on which it will do business with the vendor, and the vendor must agree to those terms before selling to the purchaser;⁶⁴ and 7) With some, though not most, Electronic Data Interchange ("EDI") arrangements, the EDI Trading Partner Agreement, that both sides sign at the front end of the relationship, will also include all terms and conditions of future sales.⁶⁵

B. *Determining When a Fully Dickered Contract Is Warranted*

Even companies that have not eliminated completely the possibility of a battle of the forms nevertheless have to determine when a particular sales contract is significant enough to warrant a fully dickered contract signed by both sides. On this question, most companies interviewed did not have specific dollar-size or other well-defined parameters by which to measure whether a certain deal was worth creating its own fully negotiated contract. Because there were typically

59. See Interview No. 2 (transcript at 6) (on file with author); Interview No. 5 (transcript at 5) (on file with author); Interview No. 24 (transcript at 5) (on file with author).

60. See Interview No. 15 (transcript at 2-3) (on file with author).

61. See Interview No. 3 (transcript at 4-5) (on file with author); Interview No. 14 (transcript at 3-5) (on file with author); Interview No. 17 (transcript at 7) (on file with author).

62. See Interview No. 23 (transcript at 4) (on file with author).

63. See Interview No. 16 (transcript at 2) (on file with author).

64. See Interview No. 20 (transcript at 2) (on file with author); Interview No. 25 (transcript at 2-3) (on file with author).

65. See Interview No. 13 (transcript at 6) (on file with author); Interview No. 21 (transcript at 3-4) (on file with author); Interview No. 22 (transcript at 4-5) (on file with author).

no set thresholds, companies tended to take an ad hoc approach that considered various factors that would weigh in favor of doing a truly integrated contract: the overall size of the deal, the likelihood that a particular buyer-seller relationship would end up being long term, the reputation of the company on the other side, and any risk that was perceived to be unusual. For example, one company would never allow itself into a battle-of-the-forms scenario with a non-U.S. company, because the U.C.C. might not apply to the transaction.⁶⁶ Another company indicated that any time the other side objected to boilerplate language in its form, the company would simply negotiate a real contract rather than fight about the terms in one side's form.⁶⁷

C. *Frequency of Post-performance Disputes About Conflicting Terms*

Even where companies enter into a battle of the forms, they rarely find themselves in a position where the differences in the nonimmediate terms matter. The most common reason suggested for the infrequency of after-the-fact disputes about conflicting forms is that in most cases the value of the relationship to both parties will exceed whatever amount is in controversy.⁶⁸ The Vice-President of Finance for a medium-sized furniture manufacturer explained that his company might see about three such disputes in a year.⁶⁹ Even those few disputes, he said, almost always get worked out, with a focus on whether either side was at fault and what would be fair, and with an eye toward continuing the business relationship if at all possible.⁷⁰ The in-house counsel for a major department store retailer gave this succinct reason for why after-the-fact form disputes don't typically amount to much: "We're more interested in being in the retail business . . . [than] in the litigation business of trying to collect money."⁷¹

Respondents suggested two situations when a battle-of-the-forms dispute might actually come to litigation. The first is when potentially massive consequential damages are at stake that could prove more significant than even the value of the ongoing relationship to each party.⁷² The second is when the overall relationship between the

66. See Interview No. 10 (transcript at 7) (on file with author). The U.N. Convention on Contracts of the Sale of Goods ("CISG") uses a version of the last-shot and mirror-image rules. CISG arts. 18-19, 19 I.S.M. 668, 675-76 (1980).

67. See Interview No. 3 (transcript at 4) (on file with author).

68. For a thorough treatment of the dynamics of settlement, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

69. See Interview No. 11 (transcript at 4) (on file with author).

70. See *id.*

71. Interview No. 25 (transcript at 6) (on file with author).

72. See Interview No. 19 (transcript at 5-6) (on file with author).

buyer and the seller has somehow soured and one of the parties is just looking to pick a fight. As the in-house counsel for a major office products manufacturer put it, when the battle of the forms becomes a litigable issue, it is usually a sign that the “deal[] [has] just gone bad.”⁷³ A lawyer who works extensively with vendors’ credit managers suggested that in some cases in which a purchaser cannot or will not pay a debt for goods delivered, the purchaser will raise some type of battle-of-the-forms issue as a defense to payment.⁷⁴

2. *When Companies Do Engage in the Battle of the Forms, They Do So Because It Is Efficient*

One question that an outsider to the battle of the forms might rightly ask is, why would you knowingly perform a contract where you haven’t first agreed with the other side on all of the significant terms? Most of the academic literature on section 2-207 seems to assume either explicitly or implicitly that the reason companies engage in a battle of the forms is that it makes sense according to the following cost-benefit analysis: At least for some sales contracts, the costs of reviewing and then negotiating about nonimmediate terms are simply not worth the benefit, given the low likelihood of a future dispute about these terms and the relatively low cost of losing such a dispute if there is one.⁷⁵

The overwhelming majority of company representatives with whom I spoke would agree with the academics on this one. The in-house counsel for a major consumer appliance manufacturer justified her company’s engaging in the battle of the forms this way: “It’s efficiency, and it’s an ability to get business done.”⁷⁶ Several respondents

73. Interview No. 17 (transcript at 8) (on file with author).

74. See Interview No. 16 (transcript at 6) (on file with author).

75. See Robert E. Scott, *Rethinking the Uniformity Norm in Commercial Law: Optimal Institutional Design for Regulating Incomplete Contracts* 16-17 (Univ. of Va. Sch. of Law, Legal Studies Working Paper Series 1999), available at <<http://papers.ssrn.com/paper.taf?abstractid=169276>> (positing that one reason why contracting parties create incomplete contracts is that the cost of bargaining about all contingencies exceeds the benefits); Morris G. Shanker, *Are You Losing the Battle of Sales Forms?*, 5 CORP. COUNS. Q. 36, 50-51 (1989) (suggesting that lawyers should advise clients to decide which sales contracts are significant enough that it is worth the time to sit down and work out the details, but the client needs to decide which deals would be encompassed by such an approach); Robert M. Rosh, Note, *Demilitarizing the Battle of the Forms: A Peace Proposal*, 1990 COLUM. BUS. L. REV. 553, 562-563 (arguing that the battle of the forms may well be economically efficient, as corporations seem to have concluded, given the relatively few number of disputes that arise later); James J. White, *Autistic Contracts*, at 3-4 (1999) (unpublished manuscript on file with author) (contending that parties probably rationally conclude that sales contracts with less than ideal terms are better than no contracts at all and are also better than ideal contracts that include a high cost for negotiating, particularly since the number of contracts can be large, the number of problem contracts can be small, and the size of each resultant problem tends not to be huge).

76. Interview No. 10 (transcript at 12) (on file with author).

emphasized that even if there was some sort of dispute later on, the resolution of that dispute would end up depending more upon the quality of the particular relationship than upon what either form said. As the lawyer for a paper products manufacturer put it, "[A] couple of golf games can get a lot solved."⁷⁷

In the efficiency equation that sometimes dictates a battle of the forms, there are a number of costs that are saved by engaging in the battle. First, there is the overall cost of people's time that it would take to negotiate all of the nonimmediate terms of the contract.⁷⁸ A second time-related cost that is saved by the battle of the forms is the cost of delay.⁷⁹ Sometimes the circumstances will dictate that a particular sale needs to be a rush order, and the back-and-forth of a full negotiation would be virtually impossible to pull off in that setting.

A third cost avoided by engaging in a battle of the forms is perhaps psychological. At the front end of a deal, why would a business person want to raise such nasty prospects as future disputes over nonconforming goods?⁸⁰ Most young couples engaged to be married don't choose to negotiate pre-nuptial agreements, yet the odds of a breakdown there are a lot greater than the odds of a product going bad with any particular sale. And while buyers and sellers aren't exactly "love birds" like our hypothetical newlyweds, virtually all of the respondents I spoke with emphasized at one point or another the vast importance of a strong working relationship between the two sides in long-term supply contracts.

Some of the in-house lawyers that were interviewed pointed to the different perspectives of lawyers and business people as one reason why nonmatching forms are sometimes allowed to serve as contracts.⁸¹ Whereas the lawyers tend to be more risk averse, the business people who are on the front lines of these deals have very little reason to want to compare nonimmediate terms on the forms and bring them to the attention of the lawyers. Furthermore, there is the reality that these business people are not generally reading the forms anyway.

A couple of the in-house lawyers whose companies are primarily purchasers also mentioned that part of their comfort level with engaging in the battle of the forms stems from the generally favorable

77. Interview No. 6 (transcript at 12) (on file with author).

78. See Interview No. 4 (transcript at 7) (on file with author); Interview No. 11 (transcript at 5) (on file with author); Interview No. 12 (transcript at 6) (on file with author).

79. See Interview No. 10 (transcript at 6) (on file with author); Interview No. 18 (transcript at 4) (on file with author); Interview No. 22 (transcript at 8) (on file with author).

80. See Interview No. 12 (transcript at 6) (on file with author).

81. See Interview No. 6 (transcript at 6) (on file with author); Interview No. 7 (transcript at 8-9) (on file with author); Interview No. 16 (transcript at 4) (on file with author).

treatment that the U.C.C. gap-fillers accord to buyers.⁸² As discussed above in Part I, although no party can assure that its terms will prevail in the battle of the forms, it is fairly easy to draft your forms to assure that you at least end up with the gap-fillers. For purchasers, that means access to the broad implied warranties and to all available remedies, including consequential damages.

3. *Parties Uniformly Draft Their Forms to Be as One-Sided as Possible in Their Favor*

This commonly held assumption in the literature certainly has an intuitive appeal to it.⁸³ After all, why not try to get all that you can for your side on the boilerplate terms, particularly if the other side is not paying that much attention to them anyway? Certainly this assumption did prove true for most of the companies that I interviewed. On the other hand, this approach was far from universal, and there were a few respondents who described their company's conscious effort to draft their forms in a more balanced fashion from the start. In the end, I could delineate three categories of approaches that companies took to this issue: 1) draft the forms as one-sidedly as possible for the company's benefit; 2) try to protect the company's interests on issues that matter to the company, but don't needlessly overreach or include terms that are oppressive to the other side; and 3) draft a form from the start that is very balanced and reasonable and that your company would be comfortable with if it were on the other side.

Those who took the first approach generally justified it on the grounds that this was probably what the other side was going to do, so it was as much a defensive move as anything else. As the in-house lawyer for a consumer appliance manufacturer explained, her company's purchase orders were not meant to be neutral in any sense because the company wanted to make sure that it at least knocked out all of the vendor's one-sided terms on their forms.⁸⁴

Those companies espousing the second approach recognize the need to protect their interests but also appreciate the potential cost of being overbearing to the other side. The in-house counsel for a manufacturer of office products claimed that his company's forms tended to

82. See Interview No. 13 (transcript at 7) (on file with author); Interview No. 25 (transcript at 8) (on file with author).

83. See Goldberg, *supra* note 5, at 162 n.27 (indicating that virtually everyone agrees that the employees who deal with these forms don't take the time to read what's on them, which gives both sides an incentive to make their forms as one-sided as possible); Meiklejohn, *supra* note 5, at 627 (reporting that in his reading of the extensive literature on section 2-207 most of the models for reform assume that the parties use one-sided boilerplate terms in their forms).

84. See Interview No. 10 (transcript at 2) (on file with author).

be more balanced and reasonable than most.⁸⁵ The one instance where his company takes a hard line on the forms, this lawyer said, is where it is selling a smaller part that will be part of a larger product. In that case, the company will insist on a limitation of liability that is appropriate to the relatively small benefit that it is getting out of the sale.⁸⁶

A third approach is represented by three large companies that claim their forms are unusually balanced from the start.⁸⁷ Within this category, a couple of respondents indicated that their companies had recently undergone a major shift of policy on how to draft their forms. The in-house counsel for an aircraft manufacturer explained how his company had decided to shift from very one-sided terms in its form to much more balanced and reasonable terms. The reason for the shift in policy was efficiency, namely that the new approach saves the company time "arguing over things that you are going to end up losing anyway in negotiations."⁸⁸ The in-house counsel for a computer manufacturer described how a few years ago his company changed its forms to those that are more balanced than they are one-sided, with the goal that the forms be put in plain English that a ninth grader can read. The same lawyer described how his company once ended up in a deal in which its own form was used as a starting point for the other side, and there were actually very few terms that he felt he needed to change to protect his company.⁸⁹

What is interesting about this final group of large companies is that all three of them have a more or less take-it-or-leave-it approach to their forms. Thus, the battle of the forms ends up being not very relevant to a company such as these three that has the leverage to insist on the other side signing its form. More significantly, because a large company like this suspects that the other side is likely to read the form (given that it will be asked to sign it), there is perhaps a greater tendency to draft the form in a way that compromises on issues that are nonessential to the drafter. Given the small number of companies in this category, this finding is only suggestive but would be an interesting subject to focus on in a later study.

85. See Interview No. 17 (transcript at 5) (on file with author).

86. See *id.*

87. See Interview No. 8 (transcript at 2) (on file with author); Interview No. 20 (transcript at 2) (on file with author); Interview No. 23 (transcript at 2) (on file with author). Certainly one could question the veracity of such self-serving statements concerning the "balance" of one's own forms. On the other hand, as noted above in the text, most respondents admitted that their forms were in fact fairly one-sided.

88. Interview No. 8 (transcript at 3) (on file with author).

89. See Interview No. 23 (transcript at 2) (on file with author).

4. *Nobody Reads the Forms*

Perhaps a more precise way to articulate this very prevalent assumption in the section 2-207 literature is that nobody reads the boilerplate or nonimmediate terms on the forms. While clearly there is a lot of truth to this assumption, my interviews suggest that there are at least some levels of nuance to the issue. Because the nonreading of forms seems to be such a central and universal assumption in the literature,⁹⁰ I approached the issue in my interviews with three discrete but related questions: 1) What proportion of your vendors or purchasers do you think actually read all or most of the boilerplate terms on your form?; 2) How commonly does the other side object to a term or terms in your form, and if they do, which terms are usually at issue?; and 3) When you receive the other side's form, to what extent does someone in your company read the terms on the form?

About half of the respondents believed that the other side either never or rarely read the forms that their companies sent to them. On the other hand, about half of the company representatives indicated their belief that at least some of the companies on the other side were reading their forms, depending on a variety of factors. Several subjects indicated that the other side would read their form at least at the outset if they were a new customer, and particularly if a long-term supply relationship were contemplated.⁹¹ One respondent opined that large companies are more likely to have someone reading the forms than are small companies.⁹² Another company representative indicated a belief that in his dealings, more purchasers than vendors on the other side react to his company's forms;⁹³ conversely, a different subject suggested that vendors are more likely than purchasers to read her company's forms.⁹⁴

Probably the surest indication that the other side is reading your company's form is when they object to some term within it. The consensus on this question was that it rarely happens, and when it does, it is much more likely to be with a large-dollar purchaser or a large-

90. See, e.g., Meiklejohn, *supra* note 5, at 627 (noting that an assumption of most reform models for section 2-207 is that neither side's sales personnel read the forms as to boilerplate terms); Murray, *Chaos*, *supra* note 48, at 1317-18 (reporting his experience with "more than 5,000 purchasing agents" that convinced him that these agents never read the forms of sellers); Travalio, *supra* note 37, at 375-76 (expressing doubt that buyers really either read or are aware of the one-sided fine print on sellers' forms). But see Baird & Weisberg, *supra* note 9, at 1251-52 (suggesting that at least some parties will read the forms).

91. See Interview No. 11 (transcript at 2) (on file with author); Interview No. 12 (transcript at 3) (on file with author); Interview No. 17 (transcript at 6) (on file with author); Interview No. 24 (transcript at 2) (on file with author).

92. See Interview No. 8 (transcript at 3) (on file with author).

93. See Interview No. 12 (transcript at 3-4) (on file with author).

94. See Interview No. 3 (transcript at 2) (on file with author).

dollar vendor.⁹⁵ When there is an objection to a term on a form, my study suggests that the objection tends to focus on warranties or remedies, especially consequential damages.⁹⁶ At the point when an objection is registered, the procedure at most companies with which I spoke is for the business side and the legal side to work together to determine both the importance of the provision at issue from a legal standpoint and the economic significance of preserving this particular deal.⁹⁷

Most respondents admitted that their own company's employees never or rarely read what was on the other side's form beyond the dickered terms of the deal. Some subjects, however, said that the answer sometimes depends on certain factors. More than one in-house lawyer indicated their belief that if they have taught their business people anything, it is never to actually sign the other side's form without first reading it and consulting the law department.⁹⁸ A couple of subjects indicated that someone in their company would read the terms and conditions on the other side's form where it was a particularly large deal that for some reason still did not warrant a fully integrated contract.⁹⁹ Finally, a couple of subjects said that whether the other side's form was read would depend in part on which employee received it, with lower-level employees being much less likely to read the boilerplate than higher-level employees.¹⁰⁰

V. SPECIFIC REFORM PROPOSALS

As alluded to earlier, lawyers and academics have articulated a number of different reform proposals to clean up the current battle-of-the-forms statute. For purposes of my interviews, I have focused on three of those proposals. The first two were suggested by prominent academics and are appealing to me because they are so radically different from most of the other proposals which are out there. The third proposal is a sort of thumbnail sketch of where the Article 2 revision process seems destined to end up; that proposal has also been greatly

95. See, e.g., Interview No. 3 (transcript at 3) (on file with author); Interview No. 8 (transcript at 5) (on file with author).

96. See Interview No. 4 (transcript at 5) (on file with author); Interview No. 12 (transcript at 4) (on file with author); Interview No. 13 (transcript at page 3) (on file with author); and Interview No. 24 (transcript at 3) (on file with author).

97. See, e.g., Interview No. 13 (transcript at 3-4) (on file with author); and Interview No. 16 (transcript at 5) (on file with author).

98. See Interview No. 7 (transcript at 4) (on file with author); Interview No. 17 (transcript at 9) (on file with author); Interview No. 19 (transcript at 7) (on file with author).

99. See Interview No. 12 (transcript at 5) (on file with author); Interview No. 18 (transcript at 4) (on file with author).

100. See Interview No. 22 (transcript at 7-8) (on file with author); Interview No. 25 (transcript at 7) (on file with author).

influenced by a number of similar proposals that have been articulated by such academics as Professor Murray.

Given the small size of my sample, I would be hard-pressed to generalize even about the factual patterns that I found. There are still additional reasons beyond sample size to question the value of the reactions from my subjects to the specific reform proposals that follow. First, there is likely to be a status-quo bias among those in the field.¹⁰¹ Second, there is less reason to think that those practicing in the field are in a better position than academics to predict the effects of a change in the law, even if they are clearly in a better position to report on the facts of their own company's existing practices. Nevertheless, I asked subjects about these reform proposals to see if perhaps there were nonobvious factors at work that the proposals had not considered.

1. *The Baird-Weisberg Model*

After seeing the Baird-Weisberg proposal, one might accuse these two academics of going "retro" on us. Essentially, Professors Baird and Weisberg suggest that we actually would be better off with a return to the common law "mirror image" and "last shot" doctrines.¹⁰² While at first glance such a proposal might not sound that interesting, the arguments that the two authors make for their proposal are clearly thought-provoking and arguably compelling.

Professors Baird and Weisberg begin by taking issue with most commentators' aversion to the formalist approach that is represented by the mirror-image rule. The two authors point out that critics of the common law approach have probably overestimated the extent to which that approach would sanction opportunistic behavior.¹⁰³ The fear has been that the common law approach would allow parties to use slight differences in boilerplate terms to back out of contracts where there truly has been a meeting of the minds. The authors argue that courts can handle the problem of the reneging party within the existing framework of the mirror-image rule by construing the "mirror image" concept either broadly or narrowly, depending on the court's sense of whether a party is simply using the rule to be opportunistic.¹⁰⁴

Professors Baird and Weisberg also anticipate the criticism that the last-shot doctrine may in practice favor the seller, who tends to fire the last shot in the typical battle-of-the-forms case. Their response is that

101. On the general tendency to overrate legal risks, see Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375 (1997).

102. See Baird & Weisberg, *supra* note 9.

103. See *id.* at 1223.

104. See *id.* at 1231-37.

it is not necessarily unfair to have a rule that favors one side or the other, as long as the rule is clear from the beginning and both parties know it.¹⁰⁵ Under those circumstances, the party that is unhappy with the default form can simply bargain around the terms that it does not like.

The key benefit of the common law rule to the battle of the forms, according to the Baird-Weisberg theory, is that it doesn't force parties to use default terms such as the U.C.C. gap-fillers that may not be well-suited to either party's interest. Instead, the mirror-image rule gives both parties an incentive to craft their forms in ways that reflect the reality of their industry or the marketplace more generally.¹⁰⁶

Professors Baird and Weisberg argue that because at least some parties will read the forms, the mirror-image rule encourages parties to draft provisions that advance the mutual interests of buyer and seller.¹⁰⁷ If a party persists in writing one-sided terms on its form, it will risk losing business since the other side is more likely to read a form that it knows it might be bound by. The two authors stress that effectively it only takes a minority of parties reading their forms to encourage the form drafters not to be unfairly one-sided.¹⁰⁸ The problem with a regime like section 2-207, in which U.C.C. gap-fillers are more likely to control, is that parties have less of an incentive to read forms since the terms on those forms probably won't bind them anyway. Drafting parties, in turn, will have less reason to draft forms with any thought of the other side's interests in mind.¹⁰⁹

The Baird-Weisberg model is premised on two key factual assumptions about the behavior of parties in battle-of-the-forms scenarios: 1) That at least some parties will read the other side's forms closely; and 2) That parties will change terms on their forms if less than a majority of those receiving the forms object to those terms. The interviews that I conducted suggest that the two authors are probably right on both counts; nevertheless, their general proposal was not especially popular with the subjects whom I asked.

Concerning their first assumption, as indicated earlier in this Article, at least some parties already read the other side's forms for at least certain kinds of deals.¹¹⁰ And remember, too, that the reading of forms that already occurs is in a regime in which it is less likely that the recipient of the form will end up being bound by the form's terms. Were the mirror-image rule to become the prevailing law, then still

105. *See id.* at 1249 n.80.

106. *See id.* at 1223.

107. *See id.* at 1251-52.

108. *See id.* at 1253-54.

109. *See id.* at 1255-56.

110. *See supra* notes 90-100 and accompanying text.

more parties ought to be reading the other side's forms, given the increased likelihood that a party would end up being bound by terms on the other side's form. Several respondents in my interviews indicated that they believed this would be the case.¹¹¹

As to the second assumption, I posed that question directly to at least some of the subjects I interviewed: "Would an objection to a given term by one or more vendors or purchasers cause you to change your form as to that term for all vendors or purchasers?" A minority of those responding said that they would not change their form, but most who answered the question said that they would likely change their form if the objection were fairly frequent and the term were not critically important to their side.¹¹² As an in-house lawyer for a major food-product manufacturer explained, if a term that was commonly objected to were not that important to your side, it would be more efficient simply to change it in your form than to have to negotiate it frequently.¹¹³ Some terms, though, this lawyer said, would not be changed based on frequent objections by the other side because they are just too important to the company that drafted the form.¹¹⁴

A few of the respondents indicated that they had already changed their forms to anticipate objections on issues that aren't that significant to them.¹¹⁵ The new approach, according to an in-house lawyer for an aircraft manufacturer, is to consider terms that are frequently objected to which aren't that valuable to the company and just to change them on the forms in advance so as to save a lot of time.¹¹⁶

As noted earlier, what is most striking about this small group of large companies is that all of them have the leverage to require a take-it-or-leave-it approach to their forms. In a sense, these three companies are directly testing the Baird-Weisberg hypothesis: the other side knows in advance that if it wants to deal with the large company, it will be stuck with the terms on the large company's form; the recipient of the form thus has a greater incentive to read the terms on the form; and, in turn, the drafter of the form finds it more efficient to draft terms that are more balanced from the start than to waste time negoti-

111. See, e.g., Interview No. 19 (transcript at 9) ("I think we would probably have to start looking at vendors' forms" if a mirror-image regime were in place.) (on file with author); Interview No. 21 (transcript at 6) (predicting that there would be much more focus on the agreements in advance in a mirror-image system) (on file with author).

112. See, e.g., Interview No. 17 (transcript at 7) ("I think it's fair to say that . . . we would revisit something if we got lots of flack about it.") (on file with author).

113. See Interview No. 19 (transcript at 5) (on file with author).

114. See *id.*

115. See Interview No. 8 (transcript at page 2) (on file with author); Interview No. 20 (transcript at page 2) (on file with author); and Interview No. 23 (transcript at page 2) (on file with author).

116. See Interview No. 8 (transcript at 3) (on file with author).

ating about terms that are not that important to the large company that is drafting the form.

Despite the fact that the factual assumptions underlying the Baird-Weisberg proposal were generally supported by the results of my interviews, the proposal itself received less than enthusiastic reactions from the subjects to whom it was posed. Part of it may be due to a general aversion to the costs of change or an overrating of the risks of change.¹¹⁷ Part of this may be due to the fact that the respondents were given a bare-bones sketch of the proposal without the accompanying articulation of why the proposal would be an improvement over what we have now. My own reaction to the proposal, for example, changed considerably between when I first heard it and when I read carefully the article that explains its rationale.

All of this is not to say that the Baird-Weisberg proposal did not have its fans among those with whom I spoke. One respondent liked the certainty of this approach compared to what we have now in section 2-207.¹¹⁸ Another subject speculated that whoever's form controlled under the Baird-Weisberg approach could not draft its form in too one-sided a fashion or it would backfire. According to this subject, even if the vendor's form were the last shot, the vendor would still have an incentive not to overreach. In drafting its form, the vendor would need to consider that when the purchaser saw the vendor's form, the vendor who drafted a one-sided form would risk "screw[ing] up their future relationship . . . [it] might be wonderful from a legal standpoint [to make a one-sided form] but it's suicide from a business standpoint."¹¹⁹

The objections to the Baird-Weisberg proposal took various forms. Some subjects suggested that this proposal would likely force the parties into negotiations about boilerplate terms that would be time-consuming and ultimately not worth it.¹²⁰ One respondent opined, "It would be a more definite world, but from our perspective a more time-consuming and expensive world."¹²¹ Another subject said that this proposal wouldn't work well for large companies, because you can't sit down and negotiate every deal, and every vendor is likely to have a different form.¹²²

117. See generally Langevoort & Rasmussen, *supra* note 101.

118. See Interview No. 22 (transcript at 9) (on file with author).

119. Interview No. 17 (transcript at 13) (on file with author).

120. See Interview No. 8 (transcript at 10) (on file with author); Interview No. 10 (transcript at 9-10) (on file with author); Interview No. 11 (transcript at 5) (on file with author); Interview No. 18 (transcript at 7-8) (on file with author); Interview No. 19 (transcript at 9) (on file with author).

121. Interview No. 8 (transcript at 10) (on file with author).

122. See Interview No. 10 (transcript at 9-10) (on file with author).

Another group of respondents believed that the Baird-Weisberg proposal would probably cause parties to insist that the other side sign their form, and that ultimately this approach would simply end up testing which side had the most leverage.¹²³ One subject didn't like the proposal because he felt it would give too much leverage to whoever's form would prevail in its entirety; this same subject believed the proposal would force lots of negotiations with the end result that a company would use several different forms depending on the leverage of the other side.¹²⁴

Although one respondent liked the certainty of the Baird-Weisberg approach, a few other subjects mentioned that they actually preferred the uncertainty of the current law. The former General Counsel of a major chemical manufacturer indicated his belief from practice that the uncertainty of the current battle of the forms actually helps solve disputes when they arise, because neither side is sure that they're going to win.¹²⁵ One of the subjects who is a business person rather than a lawyer argued that "the confusion [of the current approach] in some ways is almost good because it provides just enough doubt in the mind of someone that they say, 'Do I really want to go through this or should I get my focus back on what our core business is here?'"¹²⁶

My own view of the Baird-Weisberg proposal is that it would probably work out better in practice than most of the skeptics from my pool of subjects believed. Clearly there would be an initial cost of transition as parties engaged in whatever negotiations and changing of their forms that they felt was warranted by the new rule. When everyone settled into the new system, my guess is that you would see forms that were not as one-sided as under the current system. So I think that the rule would probably yield the benefit of fewer contracts in which the nonimmediate terms were the often sub-optimal U.C.C. default terms.

My only question is whether the cost of such a switch in rules would be worth the benefit. That is a question whose answer requires further study. My sense from the very limited sample that I was working with is that the current costs of sub-optimal default terms generated by the present section 2-207 are not that great. Put another way, the sub-optimal default terms of the U.C.C. may indeed be out there now, but they don't seem to matter that much in the vast majority of cases, maybe in part because so many firms have already opted

123. See Interview No. 9 (transcript at 11) (on file with author); Interview No. 12 (transcript at 10) (on file with author); Interview No. 13 (transcript at 7-8) (on file with author); Interview No. 16 (transcript at 7) (on file with author).

124. See Interview No. 12 (transcript at 10) (on file with author).

125. See Interview No. 4 (transcript at 9) (on file with author).

126. Interview No. 11 (transcript at 6) (on file with author).

out of the battle of the forms anyway. On the other hand, there may be costs to these default terms within the present system that exist but are simply not evident to either me or the subjects with whom I spoke.

2. *The Goldberg Model*

The approach to the battle of the forms espoused by Professor Goldberg is fairly straightforward.¹²⁷ Under the “best shot” rule, as he calls it, a court faced with a battle-of-the-forms issue would be required to choose whichever of the two forms is fairer, or closer to the center. That form would then govern the transaction in its entirety. Just like with final-offer arbitration, after which this approach is modeled, each side would arguably have an incentive to draft its form with the other side’s interests in mind.¹²⁸

The problem with both the mirror-image rule and the knockout rule, according to Professor Goldberg, is that buyers and sellers who know that their form will prevail might be willing to risk losing business by making their forms extremely one-sided. This would be the case if they believe that few parties will read the forms anyway and that there will be significant benefit in having their form govern with the majority of the parties that will not bother to read the form.¹²⁹

In the opinion of those individuals I interviewed, the Goldberg model fared slightly better than the Baird-Weisberg approach, but not by much. There were several subjects who thought that the proposal would indeed achieve its desired objective of causing parties to draft more evenhandedly from the start. “I think that’s a phenomenal idea because I am a big fan of final offer arbitration,” said one lawyer who represents several companies and credit managers.¹³⁰ One respondent liked the fact that in response to this proposal, you could change your form just once and thereafter would not need to negotiate forms constantly.¹³¹ Another subject, though, questioned whether a judge could really compare the relative “fairness” of, say, a very detailed purchase order with a bare-bones acknowledgment form that hardly contained any terms.¹³²

The biggest objection to the “best shot” rule was a general discomfort with the notion of a judge who is not intimately familiar with a deal having to make an either/or choice between two forms, particularly when the dispute is typically focused on a single issue or two.

127. See Goldberg, *supra* note 5.

128. See *id.* at 166.

129. See *id.* at 165.

130. Interview No. 16 (transcript at 8) (on file with author).

131. See Interview No. 7 (transcript at 9-10) (on file with author).

132. See Interview No. 13 (transcript at 8) (on file with author).

One in-house counsel said, "I personally would never want a judge deciding what was fair in my business."¹³³ Another company lawyer said, "I'd hate to have some outside party make my deal for me."¹³⁴ Yet a third lawyer that worked in-house argued that the proposal "[k]ind of takes contract law, and throws it out the window, doesn't it?"¹³⁵

Interestingly, some of the same lawyers who are comfortable with the uncertainty of current section 2-207 and Article 2's default provisions get nervous at the thought of an unknown judge picking one side's form or the other's. The "best shot" proposal "might cause somebody a pause for thinking [at the time they are drafting their form]," said one in-house lawyer, "but it's a roll of the dice."¹³⁶ The either/or nature of the "best shot" rule particularly troubled one company's lawyer: "I'd rather have the [decisionmaker] say, 'Okay, I'll make a decision and it will be a decision that's fair to both parties,' if you get to that point."¹³⁷

3. *Approach of the Article 2 Revision Project*

Although final approval of revised Article 2 was postponed this summer by the National Conference of Commissioners on Uniform State Laws, further work on this project is unlikely to affect significantly the approach that is being taken to revising section 2-207.¹³⁸ The key goals of that approach seem to be twofold: 1) to de-couple the issues of formation and terms, so that revised section 2-207 will deal solely with the terms of a contract rather than with the timing and existence of its formation; and 2) to simplify the mechanics of section 2-207 so that the question of terms is simply whether the terms on the two forms match, and if they don't, having the U.C.C. gap-fillers apply in the absence of clear assent by one side to the other's nonmatching terms. Under this simplified approach, we would no longer need to ask: which form was the offer and which was the acceptance; whether a term was additional or different; whether an additional term constituted a material alteration; or any of the other factual and legal questions that make it difficult to determine under the current section 2-207 just when the gap-fillers kick in.

133. Interview No. 8 (transcript at 12) (on file with author).

134. Interview No. 22 (transcript at 9) (on file with author).

135. Interview No. 19 (transcript at 10) (on file with author).

136. Interview No. 10 (transcript at 10) (on file with author).

137. Interview No. 12 (transcript at 10) (on file with author).

138. For example, the Reporter's Note to section 2-207 in the November 1999 Article 2 Revision Draft (on file with the author) says at page 26, "The approach taken here is consistent with the approach taken in the July draft, but a number of changes have been made for the sake of clarity." U.C.C. § 2-207 reporter's note 26 (Reporter's Interim Draft Nov. 1999) (on file with author).

Among the group of individuals that I interviewed, the approach of the Article 2 revision project was the clear favorite. Said one general counsel: "I think that would be the consensus of most of the people who have my job."¹³⁹ Most subjects felt that this approach made the most sense, although one respondent who favored this approach still wished that somehow the Code drafters could also convey the gap-fillers more succinctly and in plain English.¹⁴⁰ A couple of respondents thought that the revision project's approach would end up being little different than what we have now, given that it is easy enough in the current regime for everyone to draft his or her forms so as to create a knockout situation anyway.¹⁴¹

A few subjects did not prefer the revision project's approach, one because he thought it would create too much certainty¹⁴² and another because he thought it would create too much *uncertainty*.¹⁴³ Yet a third subject thought that the apparent certainty created by this proposed revision would be illusory, since it is often hard to say when the terms on two forms agree.¹⁴⁴ This same lawyer further argued that a push toward greater use of the gap-fillers is not necessarily a good thing given that they are so favorable to the buyer.¹⁴⁵

VI. THE FUTURE OF THE BATTLE OF THE FORMS

When we think about the future, we think of the "paperless" society, and to some extent that is already beginning to occur in sales-of-goods transactions. With respect to the battle of the forms, though, I think it would be a mistake to think that even a paper-less society will solve the underlying cause for why we have such battles in the first place. If buyers and sellers would rather not spend the time and effort negotiating nonimmediate contract terms in a papered society, whether for reasons of efficiency or psychology or otherwise, then doing business in an "e-world" may not change things that much. Clearly there will be cost savings of some kind in a world of electronic commerce, but most of these savings will not directly reduce the costs of negotiating about nonimmediate terms.

My interviews suggest that there are at least four developments in the sales of goods arena that may affect the way that sales transactions

139. Interview No. 9 (transcript at 12) (on file with author).

140. See Interview No. 11 (transcript at 7) (on file with author).

141. See Interview No. 13 (transcript at 9) (on file with author); Interview No. 21 (transcript at 7-8) (on file with author).

142. See Interview No. 8 (transcript at 13-14) (on file with author).

143. See Interview No. 16 (transcript at 8) (on file with author).

144. See Interview No. 17 (transcript at 14) (on file with author).

145. See *id.*

are conducted in the future. The first two of these four are technology-based, but ironically it is the latter two, *non*-technology developments that may have the greatest effect on the future of the battle of the forms.

The first development is the increasing use by companies of Electronic Data Interchange ("EDI") in making their purchase orders. With EDI, a purchasing company sends its purchase order to the vendor via electronic mail according to a prearranged format between the buyer and the seller.¹⁴⁶ Most, but not all, of the companies I interviewed are now either using or receiving an increasing percentage of their purchase orders through EDI. Even though the use of EDI requires that both buyer and seller sign in advance an EDI Trading Partner Agreement, most companies do not also use that occasion to work out the general terms and conditions of the sale beyond the issues surrounding the electronic mode of communication. As one lawyer explained, since it is generally the Information Services people that are setting up the EDI arrangement, "they just want a form that deals with their issue."¹⁴⁷

Some purchasers will try to use the occasion of an EDI arrangement to get the vendor to agree to its terms and conditions with each EDI order: it's the "click here and you agree . . ." syndrome. For most purchasers, the attempt doesn't succeed. The in-house lawyer for a large manufacturer explained that his company is seeing much more EDI both as a purchaser and as a vendor.¹⁴⁸ That same lawyer reported that his company's purchasers try to get the company to sign on to an EDI Trading Partner Agreement that includes the purchaser's terms and conditions, and that his company as purchaser tries to do the same with its vendors. He conceded that in neither case is the vendor generally accepting the terms and conditions beyond those governing the electronic transmission of orders.¹⁴⁹

Another electronically based innovation is purchasing not through an EDI order but instead over the Internet with a personal password that gets you into the vendor's inventory system to do direct ordering.¹⁵⁰ Even these particularized "e-business sites" do not typically solve the battle of the forms, however, because once again the only real change is with the mode of communication. How to compromise the nonimmediate terms of the sale remains a separate and thorny issue.

146. See generally Electronic Messaging Servs. Task Force, *supra* note 4.

147. Interview No. 8 (transcript at 9) (on file with author).

148. See Interview No. 17 (transcript at 2-3, 9-11) (on file with author).

149. See *id.*

150. See Interview No. 10 (transcript at 8) (on file with author); Interview No. 14 (transcript at 5) (on file with author); Interview No. 23 (transcript at 7-8) (on file with author).

The one trend that is likely to have the greatest effect on the battle of the forms is a market trend, namely the consolidation of major retailers into a smaller number of larger entities. A number of the respondents indicated that as major retailers become larger and have more leverage, they are using their leverage in the sales-contracting process to insist that any vendor who wishes to do business with them must first sign on to all of the terms of their purchase orders.¹⁵¹ The lawyer for an office products manufacturer described this trend and noted that his company is large enough that it can insist on at least negotiating nonimmediate terms and conditions with the retail purchasers.¹⁵² He wondered, however, whether smaller companies will have the same ability as his company does in insisting that the big retailers sit down and compromise on some of their terms.¹⁵³

The last trend mentioned in the interviews was the effect of a global market. The in-house lawyer for a consumer appliance manufacturer said that her company will not allow a battle-of-the-forms situation to develop whenever it is dealing with a non-U.S. vendor. The reason, she said, is that her company is much more comfortable being under the U.C.C. than it would be under the CISG.¹⁵⁴

CONCLUSION

Having spent many hours on the phone in interviews that enabled me to see only the tip of a very large iceberg, I am left not with radical suggestions for change but instead with a few modest observations. First, the wheels of commerce seem to have adjusted fairly well to whatever complications section 2-207 has introduced into the machinery. On the whole, the individuals I spoke with don't bother to worry all that much about the battle-of-the-forms statute, and despite that (or perhaps because of it) the statute doesn't seem to end up hurting them much in return.

Second, regarding reform efforts, I finished this project with a greater comfort level as to the direction that the Article 2 revision project seems to be headed: a modest simplification, more reliance on U.C.C. gap-fillers, but ultimately nothing that radical. The sense I got of where my interview subjects stood on the revision efforts was: if it ain't broke that much, then don't try to fix it that much. As suggested earlier, that sentiment may be more an indication of a general aver-

151. See Interview No. 3 (transcript at 7-8) (on file with author); Interview No. 17 (transcript at 9) (on file with author); Interview No. 21 (transcript at 3) (on file with author).

152. See Interview No. 17 (transcript at 9) (on file with author).

153. See *id.*

154. See Interview No. 10 (transcript at 7) (on file with author).

sion to change than of a studied conclusion that the current approach to section 2-207 is truly optimal.

Finally, if there was one common thread that ran through all of the interviews I conducted, it was a plea not to create laws that get in the way of how businesses do their thing. As one business person with whom I spoke put it: “American business has gotten to the point where the focus on eliminating any sort of bureaucracy is the push . . . and I think anything that puts a step in between that [should be avoided].”¹⁵⁵

155. Interview No. 11 (transcript at 5) (on file with author).