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THE JUDICIAL VISION OF CONTRACT—THE "CONSTRUCTED CIRCLE OF ASSENT" AND PRINTED TERMS

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The perennial dilemma of modern contract law is the effect to be accorded standardized terms, the printed "boilerplate" terms that appear in the overwhelming majority of contracts and are typically ignored.[1] The dilemma has been exacerbated by recent decisions addressing the operative effect of standardized terms that appear after the contract has been formed. The confusion emanating from such "terms-later" cases has made even the chronology of contract-making uncertain.[2]

A section of the Uniform Commercial Code was designed to determine whether standardized terms in only one party's form preclude the creation of a contract or should be included in the judicial construct that becomes the official "contract."[3] The section has never been effectively assimilated with traditional doctrines of contract law. While section 2-207 is hardly simple, criticisms of the statutory language fail to recognize that much of its tortured existence has been judicially manufactured. Courts have recognized that the purpose of section 2-207 was "to avoid the rigidity of common law theory of contracts that requires acceptance to be a mirror

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1. Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(e)*, 82 WASH. L. REV. 227, 228–29 (2007); Michael I. Myerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1263 (1993). "Standard form contracts have been in use for over two centuries, and the question of the proper construction of these contracts has haunted contract law ever since." Myerson, *supra*. "[N]otwithstanding the voluminous treatment of standard form contracts in the literature, there is no uniform line of thought regarding the appropriate treatment of such contracts." Barnes, *supra*.

2. Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012). "The conventional chronology of contract-making has become unsettled over recent years by courts' increasing acceptance of this so-called 'terms-later' contracting." *Id.*

3. *See* U.C.C. § 2-207 (2013). While the section may apply to negotiated terms, virtually all of the case law involves boilerplate terms.

image of the offer" since such a concept was "outdated" and "tended to frustrate business purposes."[4] Yet,

> the section resulting from so noble a purpose is uniformly misunderstood and criticized for its obscurity. Referred to as a "murky bit of prose," and "like the amphibious tank that was originally designed to fight in the swamps, but was ultimately sent to fight in the desert," § 2-207 is a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.[5]

Like other significant changes in Article 2 contract law, section 2-207 was designed to produce an analysis in common law fashion, but the anticipated case law to elaborate its purpose and adumbrate its details did not evolve. The actual progeny became snarled in technical confusion that was diametrically opposed to the anti-technical philosophy of the Code.[6] It remains an outlier as the pervasive confusion surrounding it for more than six decades continues. Attempted legislative changes have failed and no such change is currently foreseeable. Only a new judicial vision of the purpose, interpretation, and application of this section can exorcize the "lurking demon."

A new vision requires a focused understanding of the section's underlying purpose and its comparison with the purpose of traditional contract doctrines that courts pursue in determining the existence of a contract and its terms. Because traditional contract doctrines are so well known, their underlying purpose is often ignored or misunderstood. It is important to begin with a review of that purpose.

CONTRACT: A CONSTRUCTED CIRCLE OF ASSENT USING TRADITIONAL DOCTRINES

While courts continue to insist that their paramount objective in resolving contract disputes is to carry out the intention of the parties,[7] it has long been an open secret that the search for the true intention of the parties

4. Reaction Molding Tech. v. Gen. Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa. 1984).

5. *Id.*

6. Article 2 of the Uniform Commercial Code is anything but a classical Code. It is a group of statutory sections designed to overcome the technical barriers of classical contract law, empowering courts to discover contracts and their contents if the objective evidence indicates that reasonable parties under all of the circumstances would assume they had made such contracts.

7. *See, e.g.*, Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 460 (1st Cir. 2013) (noting "the paramount importance of the parties' intentions in resolving contracts disputes"); *see also* Alliance Metals, Inc. v. Hinley Indus., Inc., 222 F.3d 895, 901 (11th Cir. 2000) ("In construing a contract, the intention of the parties is paramount . . ."); Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006) ("When interpreting a contract, the role of a court is to effectuate the parties' intent.").

is quixotic. Litigation to determine the existence and terms of any contract will produce a judicial construct recognized as the "contract" of the parties. The process begins with evidence of an alleged agreement that will be subjected to numerous judicial sieves to determine which manifestations of assent the court deems "operative." If a "contract" is discovered, it is a construct, a judicially conceived circle of assent, displaying what the court deems to be an objectively reasonable agreement between objectively reasonable parties colored by policy dimensions that reflect judicial favors and frowns. The distilled construct is the only agreement enforceable at law, regardless of the intention of the parties that will remain unknowable.

Official recognition that a contract has nothing to do with the intention of the parties is often explained by the obvious recognition that courts cannot read minds,[8] which prompted the early, but grudging recognition of the "objective" test that requires judges to focus on the parties' "objective manifestations."[9] This fundamental qualification, however, is rarely accompanied by an express recognition that inquiries into the meaning and effect of objective manifestations are conducted by judges with eclectic linguistic and experiential backgrounds that necessarily color their subjective lenses through which the evidence of agreement is examined and concluded.[10] Assertions of "reasonable" judicial interpretations and constructions contain a biting innuendo that "reasonable" is necessarily in the eye of the beholder. The interpretation of language to determine what it "is" cannot totally avoid the interpreter's view of what it "ought" to be. The fallacy of logical positivism is exposed in the fact that the "is" and the "ought" are not completely severable.

Beyond the well-known "objective" prerequisite, many other traditional judicial sieves share the same purpose of purifying the constructed operative agreement that will be christened the "contract." Absent a judicially determined ambiguity and plausible alternate objective manifestations, interpretation issues are determined by the court alone.

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8. Mellon Bank, N. A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1009 (3d Cir. 1980).

> It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power . . . . [I]n order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent.

Id.

9. The cases are legion that reaffirm the objective test. A recent illustration is Wells Fargo Bus. Credit v. Hindman, 734 F.3d 657, 667 (7th Cir. 2013) ("Objective manifestations of assent, rather than subjective intentions, are controlling.").

10. *See Mellon Bank*, 619 F.2d at 1010–11 (illustrating a rare recognition of this critical factor).

These questions of "fact" become questions of "law."[11] Construction of the manifestations that courts deem operative is necessarily for the court alone.[12] However, the early sense of an ultimate construction may unwittingly color the judicial interpretation process.

Courts insist that the principal source of interpretation is found in the parties' language.[13] However, such rubric has too often induced a judge to conclude the language is so plain and clear on its face that it does not admit interpretation. Arthur Corbin's crushing response should have eliminated any such suggestion long ago. Such a judge "has of necessity already given the words an interpretation—the one that is to him plain and clear; and in making the statement[,] he is asserting that any different interpretation is 'perverted' and untrue."[14] The Corbin thrust, however, has not been totally successful. While there has been progress in thwarting the indefensible "plain meaning" mode of interpretation, its restatement is not uncommon. Even courts appearing to recognize its inherent contradiction continue to find it difficult to abandon, notwithstanding historic criticisms from judicial icons.[15]

Evidence extrinsic to the parties' contract language may be introduced in the interpretation process if the language is "ambiguous," but the court alone will determine ambiguity.[16] Contract language is not

11. Parsons v. Bristol Dev. Co., 62 Cal.2d 861, 865 (Cal. 1965) (explaining that Chief Justice Roger Traynor candidly recognized that interpretation is a question of fact, but insisted that it is a judicial function); RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. d (1981) (preserving such questions for judicial review may be said to contribute to stability and predictability, particularly with respect to the interpretation of terms in standardized forms).

12. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (discussing the distinction between interpretation, a question of fact reviewed under a clearly erroneous standard, and construction of the legal effect of contract terms, is not always honored in practice); *see also* Ram Constr. Co. v. Am. States Ins. Co., 749 F.2d 1049, 1052–53 (3d Cir.1984).

13. *See, e.g.*, Atmosphere Hospitality Mgmt., LLC v. Shiba Invs., Inc., 2013 U.S. Dist. LEXIS 179145, at *17 (D.S.D. Dec. 18, 2013) ("When interpreting a contract, the language the parties used in the contract is determinative of their intention.").

14. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161, 171–72 (1965).

15. Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 94 (3d Cir. 2001) (suggesting that "when a court is faced with a contract containing facially unambiguous language, it seems that Pennsylvania law both requires that the court interpret the language without using extrinsic evidence, *and* allows the court to bring in extrinsic evidence to prove latent ambiguity."); *see* Towne v. Eisner, 245 U.S. 418, 425 (1918). The admonition of Justice Holmes, more than a century old, is sometimes forgotten: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Eisner*, 245 U.S. at 425.

16. *See, e.g.*, Olympus Ins. Co. v. AON Benfield, Inc., 711 F.3d 894, 898 (8th Cir. 2013) (applying Minnesota law)

> When interpreting a contract, the court's primary goal "is to ascertain and enforce the intent of the parties." If the contract is memorialized in a written instrument, the

ambiguous "just because both parties say so, nor is a contract ambiguous simply because the parties offer different interpretations of its language . . . [r]ather, whether a contract is ambiguous is, again, a question of law[,]"[17] i.e., only the court will decide the initial question of ambiguity which is, itself, an interpretation. The operative interpretation of the language that will be allowed to enter the constructed circle of assent may manifest the intention of the court rather than either of the parties who will be bound by the terms of the "contract" discovered by the court.

Even where the language of an agreement presents no troubling issue concerning its meaning, its interpretation may be subject to an overriding policy. Numerous illustrations include the general presumption that language is promissory rather than conditional since the characterization of language as creating a condition can cause a forfeiture which the law traditionally "abhors." A classic example occurs where a contract may appear to condition a payment by a general contractor to a subcontractor on the owner's payment to the contractor for work already performed by the subcontractor. Courts will strain to interpret language in such an agreement as merely stating a time for payment rather than transferring the risk of an owner's nonpayment to the subcontractor that would result in a forfeiture.[18] Karl Llewellyn would recognize this illustration of courts using "covert tools" to achieve a just result.[19]

> written contract serves as the best evidence of the parties' intent, and the court determines that intent "from the plain language of the instrument itself." We give contract language its plain and ordinary meaning, reading it in the context of the instrument as a whole and viewing each part of the contract in light of the others . . . . Contract language is ambiguous if it is "reasonably susceptible to more than one interpretation" . . . . If the court determines that a contract is ambiguous its interpretation then becomes a question of fact for the jury . . .

Id. (citations omitted).

17. Curia v. Nelson, 587 F.3d 824, 829 (7th Cir. 2009) (citations omitted).

18. *See* Main Elec., Ltd. v. Printz Servs. Corp., 980 P.2d 522, 524 (Colo. 1999). Where a contract stated that the subcontractor would be paid "'provided that like payment shall have been made by Owner to Contractor[,]'" the court held the clause to be a "pay-when-paid" provision rather than a "pay-if-paid" clause. *Id.* The court emphasized its abhorrence of forfeitures as well as the general preference of finding language to be promissory rather than conditional since a condition precedent can have a draconian effect and allow forfeitures. *Id.*

19. K. N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 Harv. L. Rev. 700, 702–03 (1939). To avoid egregious provisions, courts would often find the language insufficiently clear. *Id.* Karl Llewellyn characterized this and similar devices as the use of "covert tools" that are unreliable. *Id.* His remedy was the unconscionability provision, section 2-302 of the Uniform Commercial Code, which, more than sixty years later, has yet to admit of a generally accepted definition. *Id.*

The specific duties of each party under the contract will depend upon the court's interpretation. Having determined the duties, the court will then decide whether the contractual duties it has recognized have not been performed or sufficiently performed to constitute a breach. Whether the breach is "material," thereby discharging the other party from any further duty, or immaterial is, again, a judicial determination based on the court's view of the expectations of an objective reasonable party under all of the surrounding circumstances.[20]

Another generally accepted common law guide requires contract manifestations to be interpreted and construed in accordance with public policy as evidenced by statutes and regulations,[21] but the common law itself has its favors and frowns. Beyond strained interpretations to avoid forfeitures, the historically favorable view of charities illustrates a generous analysis concerning the enforceability of charitable subscription promises by discovering ways to validate such promises where traditional validation devices are not clear.[22] The generally accepted view that contract rights should be freely assignable leads to strict constructions of anti-assignment clauses, construing language as a mere promise not to assign that only creates a duty not to assign but does not preclude the power to assign. The assignment will be effective and the breach of the duty not to assign will typically produce nothing more than nominal damages. The policy of holding parties liable for negligent conduct makes indemnity provisions susceptible to strict constructions that will be unenforceable in some jurisdictions absent the use of certain "magic words."[23]

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20. United States v. Castaneda, 162 F.3d 832, 838 n. 31 (5th Cir. 1998) ("[S]ubstantial performance is performance without a material breach, and a material breach results in performance that is not substantial."). *See generally* RESTATEMENT (FIRST) OF CONTRACTS § 275 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981). Both the First and Second Restatements of Contracts recognize guidelines in determining whether a breach is material. The first guideline in both suggests the essential test. Section 275(a) of the First Restatement seeks to determine "[t]he extent to which the injured party will obtain the substantial benefit which he reasonably could have anticipated[.]" RESTATEMENT (FIRST) OF CONTRACTS § 275. Section 241(a) of the Second Restatement replicates that thought: "[T]he extent to which the injured party will be deprived of the benefit which he reasonably expected[.]" RESTATEMENT (SECOND) OF CONTRACTS § 241. While the remaining five guidelines in the First Restatement and four in the Second Restatement are important, the essential inquiry is whether substantial performance has occurred or is more than likely to occur. The doctrine of substantial performance is determined by the criteria of material breach.

21. *See* JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 99 (5th ed. 2011) [hereinafter MURRAY].

22. Allegheny College v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 175 (N.Y. 1927). Courts have been solicitous to support charitable subscriptions even though they may not be "squared with the doctrine of consideration in all its ancient rigor." *Id.*

23. *See, e.g.*, Powell v. Am. Health Fitness Ctr., 694 N.E. 2d 757, 760 (Ind. Ct. App. 1998);

While "a poor bargain may not be made good by judicial construction or recasting of the contract,"[24] courts will reallocate normal contractual risks where a supervening event creates a severe hardship on a promisor who the court determines could not have reasonably foreseen the event.[25] A unilateral mistake will be excused where the court determines that the non-mistaken party knew or reasonably should have known of the other party's mistake at the time of formation if performance of the mistaken contract would constitute a material change in the foreseeable allocation of risks.[26] Even where the mistake is neither known nor ought to be known by the other party, it can be excused. Where a computation error induces a mistaken offer that would convert the expectation of a profit into a substantial loss, the duty of the mistaken party is deemed voidable though the other party neither was, nor should have been, aware of the mistake.[27]

If a court finds a breach of contract, the losses sustained by an aggrieved party are limited by a construct of what a reasonable party would have foreseen under all of the circumstances at the time the contract was made.[28] Other remedial limitations include the requirement of proving damages with reasonable certainty and determining whether the aggrieved party was reasonable in taking steps to mitigate losses.[29] Again, "reasonable" is in the eye of the judicial beholder.

Statutes may simply preclude objective manifestations of agreement from entering the constructed circle of assent. Reliable oral evidence of a type of contract within the Statute of Frauds will not enter the circle simply because it is not evidenced by a sufficient "record."[30] Notwithstanding pervasive criticism, a retrievable, perceivable record is required to gain the official imprimatur that will allow expressions of agreement to enter the judicially constructed circle.[31] The categories of contracts that must meet

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Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987) (requiring the use of the term "negligence").

24. *See* 185 Lexington Holding Co. v. Holman, 189 N.Y.S.2d 269, 270 (N.Y. Sup. Ct. 1959).

25. *See* U.C.C. § 2-615 (2012). The doctrines of impossibility or impracticability of performance as well as frustration can excuse performance. *Id.*

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 153(b) (1981).

27. *See* Elsinore Union Elementary School Dist. v. Kastorff, 353 P.2d 713, 717 (Cal. 1960) (providing the basis for illustration 1 to RESTATEMENT (SECOND) § 153(a), which provides such relief where the enforcement of the contract would be "unconscionable").

28. *See* U.C.C. § 2-715 (2012); Hadley v. Baxendale, [1854] 9 Eng. Rep. 341. The foreseeability limitation in contract damages was created in the English case of Hadley v. Baxendale, which has become a fundamental rubric of American contract law. It has been codified in U.C.C. § 2-715.

29. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. d.

30. "Record" includes traditional writings and electronic records.

31. Uniform Electronic Transactions Act § 2(13) (1999) (defining "record" as,"[I]nformation

this requirement were chosen in 1677 and they continue,[32] but criticism of the statute unleashed the creative ability of many courts to narrow its more irrational provisions.[33]

An alleged contract term will not enter the constructed circle if it precedes what a court deems to be a partially or fully "integrated" writing evidencing the parties' agreement. The term, "integrated," has no redeeming analytical virtue.[34] Whether the writing is "integrated," like everything else in contract law, is said to be determined by the "intention of the parties" which is also devoid of analytical assistance. How does a court decide whether the parties "intended" their writing to be final (partially integrated) as to some terms or fully integrated (complete and exclusive) as to all terms? Issues involving what is called the "parol evidence rule" (which has nothing to do with "parol" or "evidence")[35] have been called questions of "law" because juries cannot be trusted to decide the question of fact. In particular, jurors may fail to recognize the superior reliability of an unchanged final writing when compared with evidence of even a consistent agreement, oral or written, preceding the writing.

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that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.").

32. *See, e.g.*, U.C.C. §§ 2-201(2)–(3) (2012). Additional categories have been added to various state statutes of frauds. Some alternate satisfaction devices have also been added to modern statutes.

33. *See* C. R. Klewin, Inc. v. Flagship Props., Inc., 600 A.2d 772, 774–75 (Conn. 1991) (discussing the "puzzlement" of the one-year provision of the statute of frauds in the opinion by Chief Justice Peters).

34. 48 A.L.I. Pro. 446 (1971); *see also* U.C.C § 2-202 (2012); RESTATEMENT (SECOND) OF CONTRACTS § 213. The Reporter for the RESTATEMENT (SECOND) recognized that the term "integrated" was not very useful, but could discover no better term. 48 A.L.I. Pro. 446 (1971). The Uniform Commercial Code version of the parol evidence rule, § 2-202, wisely avoids the use of the term "integration." U.C.C § 2-202 Rather, it distinguishes "final" from "complete and exclusive" writings. *Id.* Moreover, it focuses on the finality or completeness of the writing, while the RESTATEMENT (SECOND) § 213 refers to integrated "agreements." RESTATEMENT (SECOND) OF CONTRACTS § 213.

35. Interpretation begins with the ordinary meaning of terms though technical meanings in certain contexts will be preferred. The ordinary definition of "parol" is "oral." Since the parol evidence rule precludes prior oral or written evidence of an agreement where the parties intend their writing to be final, complete and exclusive, the "parol" characterization is misleading. Moreover, as many courts have stated, it is not a rule of evidence; it is a rule of substantive law since it is simply the application of the usual rule that the final manifestation of agreement prevails over prior manifestations if the parties intend their final statement to prevail. The substantive rule would apply to a final agreement that it is oral or written, but the so-called parol evidence rule applies only where the final agreement is evidenced by an "intended" final or complete and exclusive writing. The rule is designed to protect and preserve the final writing against variations based on prior agreements that, if oral, are necessarily the product of less reliable memories.

If a court concludes that reasonable parties, situated as were the parties before the court, would have included such a prior agreement in their writing, the evidence will be inadmissible.[36] To apply this test, the judge, alone, receives evidence of the alleged prior agreement and compares it with the writing. If the evidence is deemed admissible, only then will the jury be allowed to decide whether the agreement occurred. Sitting without a jury, the judge must still receive the evidence provisionally to make the comparison. If she deems the evidence inadmissible under the rule, she must not allow it to be part of her final determination, i.e., she must think in a fashion bordering on schizophrenia.

Whether one or more alleged terms of a contract will enter the constructed circle of assent depends on whether the additional agreement occurred before or after the writing. Evidence of a term that is precluded by the rule because the agreement was made before the writing was executed could be made admissible by a repeated iteration of the same evidence after the writing was executed. The parties may also begin to perform their contract in a way that differs from the express terms of the writing. If such performance is received without objection, it can qualify as evidence of their course of performance, which is not only the strongest evidence of the meaning of any term in their writing, but may constitute a waiver of express terms.[37] Such a manifestation of conduct, therefore, is not precluded by the parol evidence rule. Neither is evidence of trade usage or course of dealing precluded under the Uniform Commercial Code though such evidence precedes the writing.[38] Any of these manifestations of intention are determined by the court.

To emphasize the "integrated" character of a writing, contract drafters will typically include merger ("integration" or "zipper") clauses expressing the parties' intention that the writing (record) encompasses their entire agreement. Such a clause, however, may not be given that effect if it is a printed merger clause as part of the "boilerplate" in a party's standard form.[39] Courts tend to be skeptical of printed clauses that may have a harmful effect on the other party to the contract. As Stewart MacCaulay

36. U.C.C. § 2-202 cmt. 3 (2012). The test is modified to require that reasonable parties "would certainly" have included such evidence in the writing. *Id.* Thus, more evidence is admissible under the modified test since, to preclude its admission, it must have "certainly" been the kind of agreement that parties would have made apart from the writing.

37. U.C.C. § 1-303(f) (2012).

38. U.C.C. § 2-202(a); U.C.C. § 2-202 cmt 2.. A typical merger clause will not preclude evidence of trade usage or course of dealing which are viewed as terms of the original contract unless "carefully negated." U.C.C. § 2-202 cmt. 2.

39. *See* MURRAY, *supra* note 21, at § 85 n. 87 (citing cases therein). Courts may refuse to provide conclusive effect to pre-printed merger clauses. *Id.*

suggests, "[b]usiness practice largely undercuts time-is-of-the-essence clauses in printed form contracts because everyone knows that usually the precise time of delivery is not of the essence."[40]

Judicial skepticism concerning printed merger or time-of-the-essence clauses is not based on any statutory requirement. They are simply illustrations of "reasonable" judicial determinations that certain manifestations are not to be accorded the same operative effect as negotiated terms in the constructed circle of assent that defines the terms of the contract. Karl Llewellyn was keenly aware of such efforts. In favor of the results, but, again, concerned that the process was "covert,"[41] he sought transparency and fairness in the process through two radical sections of his new contract law in Article 2 of the Uniform Commercial Code.[42]

Denouement. Numerous additions could be added to this sketch of how courts discover the "contract" of the parties using traditional tools that existed before the Uniform Commercial Code. It is not intended to be critical. It is simply a realistic appraisal of how judges bend and even ignore traditional doctrine to pursue and create a circle of assent that is officially deemed the "contract" of the parties. Traditional contract doctrines and their rules are effected in the common law tradition with an aura of practical reasonableness. They are pliable and sometimes ignored because the court often seeks a construct in accordance with the court's vision of what is reasonable under all of the surrounding circumstances as to whether a contract exists, its terms and remedies for its breach. While any system can be enhanced, it is important to admit that our system is imperfect, but no more imperfect than any other. While cases involving judicial application of such traditional doctrines display practical reasonableness in the search for the contract and its terms, the judicial demeanor changes radically in the application of section 2-207 of the Uniform Commercial Code.

40. Stewart MacCaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. L. REV. 775, 796 (2000) (citing Bead Chain Mfg. Co. v. Saxton Prods., Inc., 439 A.2d 314, 317 (Conn. 1981)); *see* Pederson v. McGuire, 333 N.W.2d 823 (S.D. 1983); RESTATEMENT (SECOND) OF CONTRACTS §242(c) cmt. d, illus. 9 (1981).

41. *See supra* note 19.

42. *See* U.C.C § 2-207, 2-302 (2012). The two radical sections were 2-207 (the "battle of the forms") and 2-302 (unconscionability).

"INTENTION OF THE PARTIES" AND THE "BATTLE OF THE FORMS"

The infamous section 2-207 is often viewed as radical because it effected a change in a sacred common law rule. It emphasized manifestations of agreement that reasonable parties would view as contracts notwithstanding the presence of different or additional terms in one of the expressions that otherwise signaled agreement.[43] The common law evil to be avoided was clear. The procrustean "mirror image" rule precluded the recognition of a contract since any different or additional term would make an acceptance of an offer conditional. The old rule was designed to protect an offeror from bargains never made. A conditional acceptance could not possibly be an acceptance at common law. The remaining common law category for such a response to an offer was "counteroffer."[44] Characterizing a response to an offer as a counteroffer simply because it contains an unimportant boilerplate term, however, also undermined the reasonable expectations of the offeror whom the rule was designed to protect. After receiving a response that appeared as an acceptance but was a technical counteroffer because it contained one or more ignored boilerplate terms, if the offeror proceeded to perform by accepting the offeree's performance, the offeror was bound to the offeree's terms and a contract the offeror never made.

Pursuant to Llewellyn's ineluctable pursuit of the "real" contract of the parties, several sections of Article 2 of the Code assume a posture that was denied by the robotic application of classical contract concepts. The "efficiency" of the printed standard form provided the ultimate rationale for its preservation and implementation, which made the presumption that contract boilerplate was read and understood implacable.[45] Section 2-207,

43. U.C.C § 2-207 (2012).

> "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

Id.

44. The "matching acceptance" rule converted what would appear to be a definite expression of acceptance into a counteroffer leading to the evil called the "last shot" principle. The statutory solution was U.C.C. section 2-207. Pre-Code law made the counter-offer supreme. The different or additional term created a counteroffer that destroyed the terms of the offer. Buyers were said to have accepted the terms of the counteroffer by accepting the goods. The underlying assumption that the buyer made a conscious decision to surrender all of the protection afforded to buyers under the statute by accepting the sellers' disclaimers and exclusions of those protections was absurd.

45. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts and*

however, assumes that the appearance of an additional or different term in a response to an offer should not necessarily be understood to manifest an offeree's intention to make a counteroffer as classical contract doctrine required. Instead, a "definite expression of acceptance" constitutes an acceptance notwithstanding its inclusion of different or additional terms.[46]

Unfortunately, courts have not dwelled on this important opening phrase in section 2-207. A "definite expression of acceptance" must be "definite" to the party to whom it is addressed. Thus, if a reasonable offeror would regard a response to an offer as a definite expression of acceptance, Llewellyn believed it should constitute an acceptance, notwithstanding the technical requirement of a matching acceptance where the only non-matching term in the response was unimportant, undickered and generally ignored. In this light, the section is hardly radical. Ordinary contract law recognizes that an equivocal acceptance is effective as an acceptance if the offeror reasonably understands it as an acceptance.[47] Section 2-207 is predicated on the empirically verifiable assumption that standardized boilerplate terms are typically ignored by parties who intend their exchange of printed forms to manifest their intention to be contractually bound notwithstanding some differences in their respective boilerplate.[48] As the most daring example of the pervasive Article 2 focus to reflect more accurately the "agreement" of reasonable parties—their more probable "bargain-in-fact,"[49] or "true understanding"[50]—the section appears much more radical than it was intended to be.

In keeping with conventional contract doctrine, the section did not *reject* the matching acceptance ("mirror image") rule. Where the different or additional term in a response to an offer is a "dickered" term—a negotiated term or a term to which parties typically pay attention such as price, subject matter, or quantity—it is a counteroffer under the historic

Unconscionability, 70 U. CHI. L. REV. 1203 (2003) (providing a comprehensive analysis).

46. U.C.C § 2-207.

47. RESTATEMENT (SECOND) OF CONTRACTS § 57 (1981).

48. For well over a decade, I had the opportunity to provide programs for thousands of purchasing managers who made the contracts for their respective corporations. I never encountered a single purchasing manager who understood the boilerplate in his or her own purchase order much less any of the boilerplate in acknowledgment forms sent by suppliers. Typically, they did not even see the acknowledgment. It was clear beyond peradventure that both buyers and sellers of goods and services simply ignored the boilerplate.

49. U.C.C. § 1-201(b)(3) (2012) (defining "agreement" as "the bargain of the parties in fact").

50. U.C.C. § 2-202 cmt. 2 (2012) (stating that evidence of course of dealing, usage of trade and course of performance is made admissible even in a contract evidenced by a completely integrated writing "in order that the true understanding of the parties as to the agreement may be reached.").

common law matching acceptance rule to which section 2-207 has no application.[51] Thus, again, the quintessential change effected by section 2-207 is hardly "radical." It is a species of the broader judicial suspicion that standardized printed terms do not deserve the necessary level of trust and effect to be included in the courts' constructed circle of assent.[52]

Karl Llewellyn intended section 2-207(2) to allow "minor additional terms to enter the contract."[53] Thus, if the additional term is unimportant, even in its printed form it passes through the judicial sieve and becomes part of the contract. The distinction between "important" and "unimportant" terms did not require a new and extensive judicial analysis. While the famous Llewellyn explanation concerning "blanket assent" is hardly workable without a definition of "indecent,"[54] a very familiar standard was dictated by the statutory language which he created. The additional term could not become an operative term of the constructed contract where the risk of "materially" different or additional terms would be imposed on the offeror.[55] In keeping with the basic common law principle that the offeror is "master of the offer," the new section allowed an offeror to avoid any additional term, material or immaterial, by

51. Matrix Int'l Textiles v. Jolie Intimates, Inc., 801 N.Y.S.2d 236 (N.Y. Civ. Ct. 2005) (citing Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc, 366 F. Supp 1, 8 (SDNY 1973).

> Although "what constitutes a 'definite and seasonable expression of acceptance' is somewhat cloudy under the Code[,]" "if the return document diverges significantly as to a dickered term, it cannot be a 2-207(1) acceptance." The "dickered terms" are those that are unique to each transaction such as price, quality, quantity, or delivery terms as compared to the "usual unbargained terms on the reverse side [of a form] concerning remedies, arbitration, and the like."

Id.; WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE 46 (2000)).

52. *See* Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012). Neither does internet boilerplate deserve the same level of trust. Indeed, courts recognize that emails and their content are often ignored. *Id.*

53. *State of NY Law Revision Commission Hearings on the Uniform Commercial Code*, 1954 Leg. Sess. 55 (N.Y. 1954).

54. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

Id.

55. U.C.C. §2-207(2).(2012) "Between merchants such terms become part of the contract unless . . . they materially alter [the terms of the offer.]" *Id.* An offeror could preclude any additional term, material or immaterial, through a statement in the offer expressly conditioning any acceptance to the strict terms of the offer (§ 2-207(2)(a)), or, upon receiving an acceptance with additional terms, sending a notice of objection to the offeree (§ 2-207(2)(c)). *Id.*

expressly conditioning acceptance on strict conformity to the terms of the offer,[56] or notice of objection to any such term in a response to the offer.[57] Failure to do so raises the materiality issue. Courts, however, had long experience in dealing with issues of material breach.

Llewellyn assumed that courts would pursue the distinction in their usual fashion by allowing only "immaterial" terms to enter the circle while precluding "material" terms.[58] The determination of materiality in either breach of contract or substantial performance situations is invariably based on the application of the criteria in the First and Second Restatements of Contracts.[59] There was no intention to invent a new, different, or radical analysis. A Comment to section 2-207 states the issue clearly: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party."[60]

This very familiar analysis has been ignored by courts and replaced by statements that seek to determine whether the additional term constitutes "unfair surprise" or "hardship"[61] as if these terms had some unique analytical import. "Unfair surprise" is nothing more than a requirement that a term is objectively unexpected, consistent with the basic determination of materiality under the Restatements of Contracts. Similarly, "hardship" is a factor, hardly conclusive, to be considered in determining the materiality of a breach of contract under the Restatements.[62] Courts find the unfair surprise or hardship analysis wanting. Beyond the lack of any intrinsic value, such a test is dysfunctional. As one court suggests, "hardship" is the result of a material alteration; it is not a criterion.[63]

When the Seventh Circuit had to determine whether a clause limiting

56. U.C.C. § 2-207(2)(a).

57. U.C.C. § 2-207(2)(c).

58. *State of NY Law Revision Commission Hearings on the Uniform Commercial Code*, 1954 Leg. Sess. 55 (N.Y. 1954). "What terms will be construed as 'materially' altering the contract is indeed a question for the courts' determination." *Id.*

59. RESTATEMENT (FIRST) OF CONTRACTS § 275 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

60. U.C.C. § 2-207 cmt. 3.

61. *Id.* at cmt. 4 (suggesting a test of "material alteration" as one involving unfair "surprise or hardship.").

62. RESTATEMENT (FIRST) OF CONTRACTS §275(d); RESTATEMENT (SECOND) OF CONTRACTS §241(c) (stating the extent to which the breaching party will suffer forfeiture).

63. *See* Bayway Ref. Co. v. Oxygenated Mktg. & Trading A. G., 215 F.3d 219, 226 (2d Cir. 2000).

a remedy to the purchase price of the product should be included as an operative term in the constructed circle of assent, it discovered conflicting precedent in the applicable state case law. It concluded that the clause was immaterial, largely on the basis of a phrase in the last sentence of a Comment to section 2-207 which lists illustrations of immaterial additional terms including "limiting remedy in a reasonable manner."[64] On this basis alone, the court determined that an additional term limiting a buyer's remedy to the purchase price was "immaterial" and became part of the constructed circle of assent.[65]

Limiting a buyer's remedy to a return of the purchase price protects only the restitution interest. The buyer's expectation interest protected by several U.C.C. remedies is abolished.[66] If subjected to a basic materiality test under the Restatement (Second) of Contracts,[67] such a change would hardly be deemed "unimportant"—an immaterial breach. It would clearly constitute a substantial change in the bargain of the parties. To characterize such a substitute remedy as "limiting remedy in a reasonable manner" simply because it appears in a boilerplate term in a seller's form is an abdication of judicial responsibility. The absurdity is clear in the uniform view that a disclaimer of implied warranty is a "material" alteration, but all expectation interest remedies for breach of that important warranty can be excised by a boilerplate exclusion making the warranty an empty shell. Parties are certainly free to agree to such a stark limitation,[68] but the fact that it is allowed does not mean that a court should conclude that such an agreement has occurred because the term is inconspicuously inserted in a pile of boilerplate.

Sellers may object that such an interpretation could lead to a vast expansion of their liability since buyers' U.C.C. remedies expressly permit the recovery of consequential damages. Consequential damages, however, must meet a *Hadley v. Baxendale*[69] standard under the U.C.C.[70] Moreover,

64. S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co., 302 F.3d 667, 674 (7th Cir. 2002); *see also* U.C.C. § 2-207 cmts. 4–5. Comment 5 which includes an illustration of an "immaterial" additional term: "a clause limiting the right of rejection for defects which fall within the customary trade tolerance for acceptance 'with adjustment' or *otherwise limiting remedy in a reasonable manner.*" U.C.C. § 2-207 cmt. 5 (emphasis added). Comment 4 contains illustrations of "materially altering" terms. U.C.C. § 2-207 cmt. 4. Neither Comment is exhaustive.

65. *S. Ill. Riverboat Casino Cruises*, 302 F.3d at 676.

66. U.C.C. § 2-712, § 2-713, § 2-716. The familiar buyer's expectation remedies include "cover" (§ 2-712), contract price or market price damages–hypothetical cover (§ 2-713), and specific performance (§ 2-716).

67. RESTATEMENT (SECOND) OF CONTRACTS § 235.

68. U.C.C. § 2-719(1)(a) (2012). U.C.C. § 2-719(1)(a) recognizes such agreements. *Id.*

69. Hadley v. Baxendale, [1854] 9 Eng. Rep. 341, 355–56.

there are analogous judicial limitations that could be imposed on buyers' recovery of consequential damages. For example, where a substitute remedy has failed of its essential purpose, the prevailing "independent" view allows an exclusion of such damages to stand unless the exclusion is unconscionable. It would be just as simple to find clauses excluding consequential damages as generally enforceable unless the clause is deemed to be unconscionable.[71]

Whether an additional term requiring arbitration of any dispute is a material alteration of an offer should not be a difficult issue. Precluding the adjudication of a dispute in a court of law with a jury by allowing an arbitrator to make an essentially unreviewable decision[72] is clearly a substantial change in the bargain of reasonable parties. Using the "surprise" analysis, however, a court may be convinced that its absence should make the otherwise materially altering term admissible pursuant to trade usage or course of dealing, which are manifestations of the "agreement" under the U.C.C.[73]

"Usage of trade" requires evidence that a particular practice is so regularly observed in a given trade or industry that it will be observed with respect to the transaction in question.[74] In *Atl. Textiles v. Avondale, Inc.*, a district court holding that an arbitration clause in a confirmation of an oral contract was a material alteration that was precluded from becoming part of the contract was overturned because the trade usage in the textile industry that disputes would be adjudicated through arbitration was so clearly recognized that arbitration was a term of the original agreement from the

70. U.C.C. § 2-715 (2012); *see, e.g.*, Native Alaskan Reclamation & Pest Control, Inc. v. United Bank Alaska, 685 P.2d 1211, 1219 (Alaska 1984); Higgins v. Arizona Sav. & Loan Ass'n, 365 P.2d 476, 482 (Ariz. 1961); . U.C.C. section 2-715(2)(a) defines consequential damages as "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had *reason to know*. . . ." U.C.C. § 2-715 (emphasis added). Courts agree that this is the *Hadley v. Baxendale* standard. *Native Alaskan Reclamation & Pest Control, Inc.*, 685 P.2d at 1219; *Higgins*, 365 P.2d at 482.

71. *See* Razor v. Hundai Motor Am., 854 N.E.2d 607, 616 – 617 (Ill. 2006). Where a substitute remedy fails of its essential purpose under section 2-719(2), a buyer is entitled to enforce the buyer's remedies as listed in section 2-711. Whether the failure of the substitute remedy allows not only direct but consequential damages to be recovered, however, produced two views. The so-called "dependent" view would allow such recovery, but the "independent" view maintained the exclusion of consequential damages unless they were unconscionable, based on the treatment of such damages in section 2-719(3). The "independent" view has become the dominant view because courts deemed it the "better reasoned" approach. Razor v. Hundai Motor Am., 854 N.E.2d 607, 616 – 617 (Ill. 2006).

72. An attempt to vacate an arbitrator's award, even if the award evidences a mistake of law, will typically fail.

73. *See* U.C.C. § 1-201(b)(3) (2012).

74. U.C.C. § 1-303(c) (2012).

inception.[75] Thus, the circuit court quite correctly held that it was not an "additional term." Section 2-207 did not apply because there was no "additional" term.[76]

Another court, however, found that a printed clause allowing arbitration should be given effect in the constructed circle of assent because it had appeared in the boilerplate of nine confirmations of prior transactions.[77] As evidence of the parties course of dealing, therefore, the court concluded that it could not have "unfairly surprised" the other party in the tenth transaction.[78] Evidence of course of dealing is admissible as part of a contract unless it is carefully negated, but "course of dealing" is defined as "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing *a common basis of understanding* for interpreting their expressions and other conduct."[79] The fact that a party has repeatedly sent its standard form containing a boilerplate arbitration provision which has been repeatedly ignored, never discussed or acted upon hardly constitutes a "common basis of understanding" that it will apply in future transactions. Fortunately, several other courts have so stated.[80] It is, however, the court's preoccupation with a vague "unfair surprise" test and a willingness to treat boilerplate at the same level of negotiated terms that may lead to such absurd results.[81]

In *Packgen v. Berry Plastics Corp.*,[82] an invoice was deemed to be a confirmation of the parties' contract that was formed when the seller shipped the goods.[83] A term in the confirmation reduced the normal four-year statute of limitations to one year as expressly permitted under Article

75. Atl. Textiles v. Avondale, Inc., 505 F.3d 274, 277–78 (4th Cir. 2007).

76. *Id.* at 279.

77. *See, e.g.*, Schulze & Burch Biscuit Co. v. Tree Top, Inc., 831 F.2d 709, 715 (7th Cir. 1987).

78. *Id.*

79. U.C.C. § 1-303(b) (emphasis added).

80. *See, e.g.*, Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991); *see also* Welsh v. Tex-Mach., Inc., No. 08-cv-11401-DPW, 2009 U.S. Dist. LEXIS 81363, at *25–26 (D. Mass. Aug. 28, 2009).

81. If evidence is sufficient to constitute course of dealing, it is part of the agreement (unless "carefully negated") and is deemed to have been within the constructed circle of assent from the moment of formation. The course of dealing evidence obviously eliminates any notion of "unfair surprise," but the issue is whether the mere repeated sending of ignored boilerplate constitutes "course of dealing" as defined in the statute. Section 2-207 should have no application to this issue.

82. Packgen v. Berry Plastics Corp., No. 2:12-cv-00080-JAW, 2013 U.S. Dist. LEXIS 135568 (D. Me. Sept. 23, 2013).

83. *Id.* at *37–38, 40–41. The court quite properly found the contract formed upon "shipment" via section 2-206(1)(b). *Id.* at *37–38.

2.[84] The seller sought summary judgment on the footing that case law precedent made its one-year limitation per se reasonable, and it therefore became a term of the contract precluding the plaintiff's claim. The precedent was based on the language of the statute that allows the parties to reduce the statute of limitations "to not less than one year."[85] It included the "unreasonable surprise" and "hardship" elements which the precedent stated were based on the parties' course of dealing, the number of printed forms they exchanged, the conspicuousness of the term, and industry custom.[86] If, however, parties have established a course of dealing or there is trade usage of such terms, they are terms of the contract, unless "carefully negated."[87] Such contract terms are not subject to section 2-207. Again, the prior exchange of unread, totally ignored boilerplate should be viewed for what it is: a worthless indication of the parties' reasonable "intention."

While it is not unreasonable for parties to *agree* to such a reduction, the question remains whether a party has "agreed" simply because there is such a boilerplate clause in a seller's form—whether an invoice-confirmation arriving after the contract is formed or even in an acceptance of the offer. Is a term "immaterial" simply because the Code allows the parties to agree to such a term? The reduction to one year is the maximum reduction allowable under the statute.[88] If a reduction to one year is always reasonable, any reduction is necessarily reasonable, except reductions to less than a year that would be a blatant violation of the statute. To suggest that the analysis limps is a euphemism.

The instant court carefully analyzed the precedent that suggested an "immaterial" characterization, but then focused on language in Comments to section 2-207 illustrating clauses that do and do not materially alter the contract.[89] "[A] clause requiring that complaints be made in a time materially shorter than customary or reasonable" is an example of material alteration.[90] "[A] clause fixing a reasonable time for complaints within customary limits"[91] would not materially alter the contract. Noting that "customary" and "reasonable" are separate requirements, the court quite

84. U.C.C. § 2-725(1) (2012).

85. *Id.*

86. Dermalogix Partners, Inc. v. Corwood Labs., Inc., No. 99-149-P-C, 2000 U.S. Dist. LEXIS 8009, at *12 (D. Me. Mar. 14, 2000).

87. U.C.C. § 2-202 cmt. 2 (2012).

88. U.C.C. § 2-725(1).

89. Packgen v. Berry Plastics Corp., No. 2:12-cv-00080-JAW, 2013 U.S. Dist. LEXIS 135568, at *38–43 (Me. Sept. 23, 2013).

90. U.C.C. § 2-207 cmt. 4 (2012).

91. U.C.C. § 2-207 cmt. 5.

properly found that "a determination as to reasonableness alone is not sufficient to conclude whether there was no material alteration as a matter of law."[92] Finding a material question of fact as to whether such a reduction was "customary," the court denied the motion for summary judgment.

The court's analysis rejected the notion that just because a clause is deemed "reasonable" it is per se immaterial and becomes part of the contract.[93] The court focused on whether such a clause should be part of the "agreement," the "contract" the court is bound to construct. It justified its analysis by distinguishing "reasonable" from "customary," thereby focusing on whether such a term should be part of the contract through trade usage or course of dealing. Such an analysis is uncommon in the section 2-207 case law.

The Counteroffer Riddle. Against the advice of Karl Llewellyn, the New York Law Revision Commission insisted that language be added to the original draft of section 2-207(1) which became the well-known proviso allowing an offeree to make a counteroffer by expressly conditioning acceptance on the offeror's assent to the offeree's terms "unless acceptance is expressly made conditional on assent to the additional or different terms."[94] The language is hardly a model of clarity since an "acceptance" made conditional is not an "acceptance." Llewellyn foresaw the possibility of confusion by adding that language to the section instead of leaving something like it in a Comment.

The current conventional wisdom interpreting it emanated from the Sixth Circuit[95] which heralded a string of cases requiring contract counteroffer language under section 2-207 to be sufficiently similar to the statutory language. Thereafter, section 2-207 counteroffers would be expressed in the "magic words" of the statute. To assure a counteroffer, drafters would wisely choose this judicially designated safe harbor. The

92. *Packgen,* 2013 U.S. Dist. LEXIS 135568, at *56–57.

93. *Id.* at *59–60.

94. U.C.C. § 2-207(1). Llewellyn viewed such additional language as unnecessary since a conditional acceptance could not possibly be a "definite and seasonable expression of acceptance" as required under section 2-207(1). *Id.* Similar language had appeared in a Comment to the earlier draft. Llewellyn argued that it should be left in the Comment.

95. Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1164–1168 (6th Cir. 1972). Making an acceptance "subject to" the additional terms in the acceptance was held to be insufficient to make a counteroffer. *Id.* at 1168. Focusing on the statutory language, the court insisted that the language emphasize that the additional terms were expressly conditioned on the "buyer's assent" to the additional terms. *Id.* Thus, a safe harbor approach would emulate the statute, e.g., "' [t]his acceptance is expressly conditioned on buyer's assent to any different or additional terms contained in this acceptance.'"

Seventh Circuit, however, recognized that the statutory language was "ambiguous."[96] While it felt compelled to treat the magic words as a counteroffer, it also noted that a reasonable offeror may not understand it as a counteroffer.

Having determined the language to be confusing to the offeror, the court could have refused to recognize it as sufficient to create an effective counteroffer. That analysis, however, would require overturning precedent that created the safe harbor. Retaining such a clause as a counteroffer, however, encounters another obstacle. A counteroffer rejects the terms of the offer and forms no contract. If the seller-offeree then ships the goods though no contract had been formed, the offeror-buyer's acceptance of the goods[97] is an acceptance of the counteroffer terms and the seller's terms prevail. Every seller could place such ambiguous counteroffer language in a response to a buyer's offer and reclaim the "last shot" principle that section 2-207 was designed to avoid. To protect the buyer-offeror, the court insisted that such a safe harbor counteroffer requires an express acceptance rather than a common law implied acceptance manifested by the buyer's acceptance of the goods.[98]

The holding is quite justifiable with respect to such an ambiguous formula counteroffer since a contrary result would undermine the whole purpose of section 2-207. Where, however, a counteroffer is abundantly clear, there was no original intention to preclude the possibility of a common law conduct acceptance.[99] Yet, subsequent cases did not distinguish ambiguous formula counteroffers from unambiguous counteroffers.[100] Though there is no evidence of any intention to depart from the common law concept of a conduct acceptance of *clear and unambiguous* counteroffers, it becomes impossible to make a counteroffer which can be accepted by conduct since conduct acceptances of either type of counteroffer are deemed inoperative under section 2-207.[101] Instead of

96. C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1238 (7th Cir. 1977) ("Since the seller injected ambiguity into the transaction by inserting the 'expressly conditional' clause in his form, he, and not the buyer, should bear the consequence of that ambiguity under Subsection (3).").

97. *See* U.C.C. § 2-606 (2012). Acceptance of goods is not mere receipt. *Id.*

98. *C. Itoh & Co.*, 552 F.2d at 1238.

99. STATEMENT OF KARL LLEWELLYN, 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 117 (1954) ("We were attempting to say, whether we got it said or not, that a document which said, 'This is an acceptance only if the additional terms we state are taken by you' is not a definite and seasonable expression of acceptance but is an expression of a counteroffer.").

100. *See, e.g.*, PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C., 225 F.3d 974, 980 (8th Cir. 2000) (relying, *inter alia*, on *C. Itoh & Co.*, 552 F.2d at 1236 n. 8).

101. *See* U.C.C. § 2-207(3) (2012). Where an unambiguous counteroffer is made by a seller who then ships the goods with a clear manifestation of intent to be bound only by the counteroffer

interpreting expressions of agreement in words or conduct as they would be interpreted in other contexts, once section 2-207 is invoked, courts feel compelled to resort to mechanical rules that are much more technical than the common law rules that Llewellyn so desperately sought to extinguish.

To pursue the noble purpose of section 2-207, instead of focusing on whether language is sufficiently similar to the statutory proviso, courts should make the kind of determinations they are quite capable of making, i.e., whether the language of a response to an offer should have been reasonably understood as an acceptance of the offer notwithstanding additional boilerplate terms or should have been understood by a reasonable offeror as a counteroffer under all of the surrounding circumstances. Under that test, a formula counteroffer may be found to be ineffective. Such a focus is clearly within the scope of an ordinary judicial interpretation. Indeed, the current concern over whether a party's language is sufficiently similar to the ambiguous statutory language should be deemed irrelevant. Moreover, a conduct acceptance of a clear counteroffer should be recognized.

"*Terms Later.*" One of the defining purposes of section 2-207 was to deal with additional terms that appear after the contract is made:

> [W]here an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying terms so far as agreed upon and adding terms not discussed.[102]

Thus, the statute applies to "[a] definite and seasonable expression of acceptance *or a written confirmation*" which confirmation "operates as an acceptance even though it states terms additional to or different from those offered or agreed upon[.]"[103] The statute recognizes that a confirmation is not an acceptance, but *operates* as if it were an acceptance. It will be analyzed in the same fashion as if it were an acceptance of the offer since the issue of additional terms often appears in this fashion. It expressly applies to a single confirmation—"*a* written confirmation." The Comment notes that "one or both parties" may send a confirmation. It is not necessary to have two "battling" confirmations, notwithstanding judicial

language, the buyer's acceptance of the goods will form a contract under section 2-207(3)—a contract by conduct—which incorporates only matching terms from the parties otherwise inoperative exchanged forms and cancels nonmatching terms. *Id.* Any resulting gaps are filled with U.C.C. default terms. *Id.*

102. U.C.C. § 2-207 cmt. 1.

103. U.C.C. § 2-207(1) (emphasis added).

proclamations to the contrary.[104] An invoice or other document containing such terms from a seller of goods may accompany the shipment of the goods or may be sent after shipment. Like a true acceptance of an offer, if it contains different or additional boilerplate terms, it is treated as an "operative" acceptance.[105]

There is nothing baffling about this analysis of the statute and its purpose with respect to confirmations. Yet, the most recent debacle involving section 2-207 cannot be more extreme because it would eliminate its application in one of the two central scenarios that justify its existence. Notwithstanding innumerable situations involving the arrival of printed standardized terms after a contract has been made, the case law determining whether they will be allowed to enter the constructed circle of assent has become uncertain.[106] While there is universal agreement that the statutory language, Comment language, and precedent are clear in this regard, in two controversial decisions the Seventh Circuit limited section 2-207 to situations involving two "battling" forms.[107]

If an offer is made by telephone and the seller accepts the offer either during the call or by shipping the goods, the contract is clearly formed.[108] A confirmation in the form of an invoice or other document may then be shipped with the goods or sent after the goods have been delivered. In general, the case law recognizes that either section 2-207 applies to any "additional" terms in such confirmations by treating such terms as if they were in an acceptance of the offer, or it does not apply because the contract has already been formed by shipment and any additional terms are inoperative as mere surplusage.[109]

The Seventh Circuit analysis, however, adopts neither view. Its unique approach is often called the "rolling" or "layered" contract analysis under which no contract is formed even upon shipment of the goods. The "offer and acceptance" section of the Code, section 2-206, would find an acceptance no later than "shipment" of the goods.[110] The court not only fails to explain why section 2-206 does not apply. It does not mention

104. *See infra* text accompanying notes 107–114.

105. U.C.C. § 2-207(1). Such a confirmation is not an authentic acceptance; it "operates as an acceptance."

106. *See* Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012).

107. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

108. U.C.C. § 2-206(1)(b) (2012) (recognizing acceptance by shipment, unless otherwise unambiguously precluded by language or circumstances).

109. For a comprehensive analysis, *see* John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35 (2012).

110. U.C.C. § 2-206(1)(b).

section 2-206 since any mention of that section would undermine its new theory of contract formation when later terms are delivered.[111] The "rolling" theory states that a contract is formed only when the buyer has received the additional "later" terms of which he was previously unaware, and, within the time set forth in such terms, decides not to object to them. The buyer's silence constitutes acceptance of this offer—an expansion of the common law silence as acceptance. How the seller became an offeror when the buyer called to order the goods is also a matter of fiat which is inexplicable and confusing to other courts.[112]

There are many reasons why the rolling theory lacks any redeeming virtue,[113] but the statement that the single confirmation concept is not included within the scope of section 2-207 when it is clearly one of the principal reasons for the existence of section 2-207 should not stand. Among other nefarious results, if a merchant buyer ordered goods by telephone and the subsequently delivered confirmation included the usual seller's favorite terms disclaiming implied warranties, limiting a remedy to a maximum of the purchase price, choosing a forum and applicable law as well as an arbitration clause, with a promise to return the purchase price if the buyer objected to the terms, absent section 2-207, the buyer's silence would accept all of these terms, material or immaterial. If, however, the buyer had placed the same order in a purchase order form, section 2-207 would apply because there are two forms.

It is not only important to reject the narrowing of section 2-207 to "battling forms." It is equally important to clarify the application of section 2-207 to any "terms later" situation. Whether terms are in some form of a record that accompanies the goods or arrives later, the record should be reasonably understood as a confirmation subject to Article 2 of the U.C.C.[114] In either situation, they are attempting to "confirm" a contract

111. *ProCD, Inc.*, 86 F.3d at 1452; U.C.C. §§ 2-204, 2-206, 2-209. The court relies on section 2-204 which it treats as an alternative to other sections. *ProCD, Inc.*, 86 F.3d at 1452. Section 2-204 deals with "Formation in General" under Article 2. Section 2-206 deals with "Offer and Acceptance in Formation of Contract." Captions are part of the enacted statute. Section 2-206 cannot be eliminated by a court. Neither can section 2-209, dealing with modifications of contracts, another section that required analysis under the facts of the two Seventh Circuit cases.

112. *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000).

113. *See* Murray, *supra* note 109. It is important to note that the Seventh Circuit has produced many splendid opinions in the area of contract law, including some offered by the opinion writer in both cases creating the new theory. While the rolling contract theory is a clear departure from that high standard, even Homer nods.

114. United Nations Convention on Contracts for the International Sale of Goods, Art. 19, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668. If the United Nations Convention on Contracts for the International Sale of Goods (CISG) applied in lieu of the U.C.C. or other domestic law,

and, if they contain additional terms, they should be subject to section 2-207.

"Additional" and "Different" Terms–The "Knockout" View. Section 2-207(1) allows a definite acceptance to form a contract notwithstanding different or additional terms.[115] What is to be done with the additional or different terms? While section 2-207(2) was designed to deal with such terms, it expressly deals only with "additional" terms with no mention of "different" terms there or elsewhere in the entire U.C.C. Although a Comment refers to both "additional" or "different" terms under section 2-207(2),[116] the prevailing view based on a suggestion by Professor James White is that the absence of "different" is to be viewed an intentional omission by the drafters. Thus, we are to believe that the drafters deliberately created a mystery. Only a partial solution has been suggested and adopted.

Where the parties' forms contain *expressly* different terms, courts generally agree that they cancel each other under what has been christened the "knockout" view. Where, however, an express term in one form contradicts an implied term in the other form, it is deemed not to be a "different" term. Rather, section 2-207(2) is said to apply to such situations which necessarily characterizes the term as "additional" rather than "different." Thus, where a buyer's purchase order includes the implied warranty of merchantability and the seller's form disclaims the implied warranty of merchantability, the announced ukase is that the disclaimer is not a "different" term; it is an "additional" term because we want section 2-207(2) to apply to that situation as contrasted with a situation in which the forms contain expressly different terms.

Certain applications of the "knockout" rule are perfectly clear. If an offer includes an arbitration clause and an otherwise definite expression of acceptance includes a clause requiring adjudication in a court of law, such expressly conflicting terms cancel each other. The same rule, however, may lead to curious results. A seller's quotation was deemed to be an offer to supply a certain type of cable.[117] The quotation boilerplate contained an

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the additional or different terms in the response to the offer would constitute a counteroffer. Essentially, CISG requires a matching acceptance and virtually any different or additional term will create a counteroffer. *Id.* Presumably, where a buyer accepts goods after having received a counteroffer, there is a contract on the seller's terms.

115. U.C.C. § 2-207 (2012).

116. U.C.C. § 2-207 cmt. 3.

117. Memphis-Shelby County Airport Auth. v. Ill. Valley Paving Co., No. 01-3041 B, 2006 U.S. Dist. LEXIS 79970, at *16 (W.D. Tenn. Nov. 1, 2006).

express exclusion of implied warranties and consequential damages.[118] The buyer responded with its purchase order form that included express warranty and indemnity clauses the court deemed "nearly opposite" from the seller's express clauses.[119] The court viewed the seller's quotation as an offer and the buyer's purchase order as the acceptance. It applied the "knockout" rule that cancelled the "different" clauses in both forms. The gaps were filled with U.C.C. terms that favor the buyer including implied warranties, remedies and consequential damages.[120] Thus, (speaking of the "intention of the parties"), the seller was held to a bargain it had no apparent intention of making.

Another illustration of the confusion created by the "knockout" rule involved an offer that expressly limited acceptance to the terms of the offer as permitted under section 2-207(2)(a). Under that statutory safe harbor, any "additional" term, material or immaterial in an otherwise definite expression of acceptance, would be barred from entering the constructed circle of assent.[121] It was designed to assure an offeror that he would not be bound by any terms except those in the offer.[122] Where a buyer included such a clause in its purchase order, the seller's response included a cancellation clause allowing the seller to collect an amount not exceeding the purchase price if the order was cancelled.[123] The parties' agreed that their exchange of forms created a contract.[124] The buyer claimed that the cancellation clause was an "additional" term that was precluded by the buyer's section 2-207(2)(a) clause expressly limiting acceptance to the terms of the offer.[125] The court, however, agreed with the seller that the cancellation clause was a "different" term.[126] The buyer's clause was inserted pursuant to section 2-207(2)(a), and since the terms were "different," rather than "additional," the entire subsection (2), including the section 2-207(2)(a) safe harbor clause did not apply.[127] The cancellation clause became part of the contract despite the buyer's express negation of any such term in the judicial construction of that "contract."[128]

118. *Id.* at *17.
119. *Id.*
120. *Id.* at *22.
121. *See* U.C.C. § 2-207(2)(a) (2012).
122. *See* U.C.C. § 2-207 cmt. 3.
123. Tyco Elecs. Corp. v. Milwaukee Elec. Tool Corp., No. 1:10-cv-01807, 2012 U.S. Dist. LEXIS 145212, at *3 (M.D. Pa. Oct. 9, 2012).
124. *Id.* at *8–9.
125. *Id.* at *9–10.
126. *Id.* at *10.
127. *Id.* at *10–11.
128. *Id.* at *13. After eliminating the buyer's clause limiting acceptance to the terms of the offer and the seller's cancellation clause, the court reinstated the cancellation clause as a term of

The "knockout" view is not only confusing; it can and has led to mechanical results that defy explanation. Beyond the fact that attempting to characterize terms as "different" or "additional" may border on the metaphysical in certain situations,[129] including "additional" or "different" terms in section 2-207(2), is certainly keeping with the original statutory intention. Whether a particular boilerplate term is "different" or "additional," its existence in the constructed circle of assent should be based on its materiality.

Section 2-207(2) only applies where there is an acceptance of an offer under section 2-207(1) that contains different or additional terms.[130] Thus, a response to an offer that includes a recognized counteroffer would eliminate the application of section 2-207(2). Similarly, if parties insist on exchanging boilerplate terms in forms that state no intention to be bound by terms other than those in their respective forms, no contract should be recognized. Where parties proceed to perform as if a contract exists (shipment and acceptance of the goods), the belatedly added section 2-207(3) would recognize a "contract by conduct" that would include the matching dickered terms of their otherwise ineffective exchanged forms.

CONCLUSION

In the creation of new legal patterns to reflect a modern commercial society, Karl Llewellyn found approaches by statute to be dubious and awkward. Article 2 of the Uniform Commercial Code is anything but a classical code. It is a common law statute that empowers courts to permit the "continued expansion of commercial practices through custom, usage and agreement of the parties."[131] Section 2-207 is simply one of the sections designed to unleash a case law development that was prohibitively difficult or impossible to achieve under archaic common law rules.

No statute can exhaustively list the various possibilities of ignored boilerplate provisions that drafters are capable of creating in attempts to protect clients from the last scintilla of potential loss. The essential concept underlying section 2-207 is the same concept that allows courts to construct effective and fair circles of assent in other contracts. Where parties include material risk-shifting clauses in their boilerplate, courts should have the same suspicions about these clauses as a printed time-of-the-essence or merger clause. They should be willing to pursue and apply the same

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the contract through evidence of the parties' course of dealing. *Id.*

129. Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1175 (7th Cir. 1994).

130. *See* U.C.C. § 2-207 (2012).

131. U.C.C. § 1-103(a)(2) (2012).

approach of practical reasonableness they are relatively comfortable in applying in other contexts.

The keystone of such an analysis in contracts for the sale of goods is the fundamental standard of merchantability, which has been preserved as inviolate from boilerplate disclaimers. It is conceded to be a "material" term. Allowing the elimination of all remedies through the substitution of returning the purchase price, however, converts the merchantability standard into an illusion. Limiting a statute of limitations to one year converts all implied warranties into one-year warranties. Sellers of goods may be legitimately concerned that the risk of consequential damages is excessive. While parties must be free to expressly undertake whatever contract risks they deem appropriate within the bound of legality and public policy, nothing in Article 2 precludes a new judicial vision of the implied terms of a bargain through the use of traditional tools. Karl Llewellyn created section 2-207 to allow courts to pursue such a vision, unhampered by technical constraints. The case law is clear and convincing evidence that the current state of this fundamental part of contract formation law threatens the very value of law settlement. There is no justification for its continuation. It is time for courts to slay the lurking demon.