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Contract Formation and Modification Under Revised Article 2

Richard E. Speidel

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CONTRACT FORMATION AND MODIFICATION UNDER REVISED ARTICLE 2

RICHARD E. SPEIDEL*

I. INTRODUCTION

In 1990, the Permanent Editorial Board for the Uniform Commercial Code published the *Preliminary Report* of the PEB Study Group on Article 2 of the Uniform Commercial Code.¹ In this three-year project, the Study Group attempted to identify major problems of practical importance in Article 2 and to recommend possible revisions. The Study Group solicited comments from over three hundred interested persons and organizations and received over fifty responses. In March 1991, the Study Group submitted an Executive Summary to the PEB and unanimously recommended the revision of Article 2 and the appointment of a Drafting Committee by the National Conference of Commissioners of Uniform State Laws.² A Drafting Committee, to which I serve as Reporter, first met in December 1991. As of April 1994, the Committee has held seven meetings, each well attended by Commissioners and a diverse and increasingly interested group of representatives and observers.³ The first reading

* Beatrice Kuhn Professor of Law, Northwestern University School of Law. I serve as Reporter to the Drafting Committee of the National Conference of Commissioners on Uniform State Law which is charged with revising Article 2, Sales, of the Uniform Commercial Code. In this Article, I have tried to report without extensive elaboration some of the revisions to Article 2, Part 2 which have been approved in principle by the Drafting Committee as of December 21, 1993. Comments, criticisms, and suggestions are welcome, and should be mailed to me at Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, Illinois 60611.

1. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT (1990) [hereinafter PRELIMINARY REPORT]. The *Preliminary Report* has been reprinted under the title, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991) [hereinafter *Appraisal*]. The *Appraisal* also contains a critical evaluation of the *Preliminary Report* by a Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code.

2. For a copy of the Executive Summary, see *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869 (1991) [hereinafter *Executive Summary*].

3. In the early meetings of the Drafting Committee, the Reporter prepared an

of parts of the revised statute will occur at the annual meeting of the National Conference in August 1994. The Committee should complete the revision project by August 1996.⁴

In this Essay, I will give a progress report on the revision of Article 2, Part 2, dealing with the form, formation, and readjustment of contracts for the sale of goods. I will discuss the draft revision of December 21, 1993, which the Drafting Committee has approved in principle.⁵

II. PRELIMINARY THOUGHTS

A. *The Structure and Limited Scope of Article 2, Part 2*

1. *The Restatement Formula*

A formation dispute arises when one party withdraws from negotiations over a proposed exchange and claims that the negotiations have not created an enforceable contract. If this claim is correct, either party can withdraw for any reason without liability for breach. Except for limited cases of pre-contractual liability or where option contracts exist, if the negotiating parties have not crossed the formation line, they have a "safe harbor" within which they are free from contract.⁶ Understanding where the

issue agenda derived from the *Preliminary Report*, the Executive Summary, and other relevant material for each part of Article 2. The Committee discussed and sometimes debated these issues, either reached a consensus or took a vote, and gave drafting directions to the Reporter. The Committee completed this work in April 1993. As of January 1994, the Drafting Committee had discussed tentative revisions of Parts 1 through 6. The revision of Part 7 was considered at the March 1994 meeting.

4. In addition to the National Conference, the revision must work its way through the American Law Institute (ALI). The ALI Member's Consultative Group on Article 2, Sales, has had two meetings, the first in November 1990 on the *Preliminary Report* and the second in September 1993 on the proposed "hub and spoke" reorganization of Articles 2, 2A, and transfers in information technology. The Consultative Group will hold additional meetings, followed by a full-scale review of the completed revision by the members of the ALI and the Executive Council.

5. Copies of this draft are available from the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair Street, Suite 1700, Chicago, Illinois 60611, telephone (312) 915-0195.

6. The Code imposes a duty of good faith upon contract performance and enforcement. The duty does not extend to pre-contract negotiations. See U.C.C. § 1-203

line between freedom from contract and liability for breach is drawn is therefore important.⁷

The *Restatement (Second) of Contracts*⁸ organizing principle for contract formation is that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."⁹ Chapter 3 spins out elaborate rules on such topics as "manifestation of assent," the "making" and "acceptance" of offers, and the "duration of the offeree's power of acceptance."¹⁰ Chapter 4 then treats the "requirement of consideration" and alternative theories for contract liability based on reliance and restitution.¹¹ Where parties propose bargains, however, the *Restatement* formula is clear: Offer plus Acceptance plus Consideration equals Contract.¹²

2. *The Scope of Part 2*

Article 2 also deals with a bargain, the contract for sale of goods.¹³ The organizing principles for contract formation and modification in Part 2, however, are less complete than those in the *Restatement*. Whether a withdrawing party is within the "safe harbor" may depend upon the application of both Part 2 and the *Restatement* or common law rules.

(1990); see also Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990) (utilizing economic analysis of law and applied game theory to demonstrate that parties' attempts to maximize their returns most affect and control pre-contract negotiations).

7. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986) (providing an analysis of current theories of contractual obligations).

8. RESTATEMENT (SECOND) OF CONTRACTS vii (1979). The *Restatement (Second) of Contracts* was adopted in 1979, well after virtually every state had enacted Article 2. For discussion purposes, I will use the *Restatement (Second)* as a surrogate for the common law of contracts.

9. *Id.* § 17(1).

10. See *id.* §§ 18-70.

11. See *id.* §§ 71-109.

12. This formula has not changed much in 30 years. See generally Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964).

13. See U.C.C. § 2-106(1) (1990). The broad phrase "contract for sale" includes the exchange, whether present or future, of title to goods for a price. *Id.*

For example, the statute of frauds in section 2-201 is preemptive,¹⁴ but section 2-205, dealing with "firm offers," supplements rather than displaces consideration and reliance as grounds to create option contracts.¹⁵ Absent a "firm offer," Article 2 does not deal directly with the timing of option contract formation. Similarly, section 2-204 states general, flexible principles of contract formation that do not seem to depend upon the traditional requirements of consideration and offer and acceptance.¹⁶ But the concept of consideration is embedded in the requirement of agreement¹⁷ and offer and acceptance are still important ways to "show agreement" under section 2-204(1).¹⁸ Yet Part 2 does not define the word "offer" and although sections 2-206 and 2-207 elaborate on the method and manner of "acceptance," Part 2 says nothing about when an offer or an acceptance is effective or when an attempt to revoke an offer beats an attempt to accept one.¹⁹ Furthermore, section 2-209(1) provides that an "agreement modifying a contract . . . needs no consideration to be binding"²⁰ without stating what else, if anything, is required, and section 2-209(2) validates a "no oral modification" clause without specifying what types of waiver a party may invoke to delete it.²¹ Also missing in action is the concept of reliance as

14. See *id.* § 2-201(1).

15. See *id.* § 2-205; D.A. Elia Constr. Corp. v. Lyco, Inc., No. CIV-89-232E, 1991 WL 128733 (W.D.N.Y. July 11, 1991), *amendment denied*, No. CIV-89-232E, 1991 WL 224434 (W.D.N.Y. 1991), *aff'd*, 963 F.2d 1521 (2d Cir. 1992) (finding that promissory estoppel may hold a construction bid open); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4 (3d ed. 1988).

16. See U.C.C. § 2-204 (1990).

17. The U.C.C. defines "agreement" as the "bargain of the parties in fact." *Id.* § 1-201(3). Although the U.C.C. does not define "bargain," § 3 of the *Restatement* defines the term as an "agreement to exchange promises or to exchange a promise for a performance or to exchange performances." RESTATEMENT (SECOND) OF CONTRACTS § 3 (1979). Because the exchange of goods for a price invariably will be "bargained for" within § 71(2) of the *Restatement*, sales within Article 2 will have consideration.

18. See *Lambert v. Kysar*, 983 F.2d 1110, 1114-16 (1st Cir. 1993).

19. But see U.C.C. § 2-206(1)(a) (1990), which provides that in most cases "an offer to make a contract shall be construed as inviting acceptance . . . by any medium reasonable in the circumstances." Arguably, this means that if a party sends an acceptance by a reasonable medium, the Code will consider the offer accepted at the time sent.

20. *Id.* § 2-209(1).

21. *Id.* § 2-209(2).

an alternative to or a component of the bargain theory of liability.²²

Some provisions in Part 2 do not deal with contract formation or modification at all²³ and at least one provision dealing with contract formation is not in Part 2.²⁴ Thus, section 2-202 deals with what terms are part of an integrated written contract,²⁵ section 2-208 assesses the effect of a course of performance under a contract,²⁶ and section 2-210 deals with efforts to assign rights and delegate duties arising under an otherwise enforceable contract.²⁷ A section that could have been included in Part 2 but was not is section 2-302, which provides a defense against the enforcement of an unconscionable contract or clause.

In sum, Article 2, Part 2 is an innovative but incomplete statement of the bargain theory of contract formation and modification for the law of sales. As a code in the common law tradition, however, it depends upon the common law principles that it does not otherwise displace to fill in the gaps.²⁸ These common law principles now find coherent expression in the *Restatement (Second) of Contracts*, upon which the courts frequently rely.²⁹ Over time, this marriage of convenience between Article

22. For a criticism of this omission, see Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C. and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988).

23. See, e.g., U.C.C. § 2-210 (1990) (Delegation of Performance; Assignment of Rights).

24. See *id.* § 2-302 (Unconscionable Contract or Clause).

25. *Id.* § 2-202. To respond to the growing use of electronic contracting in sales and other commercial transactions, it has been proposed that the word "writing," defined in U.C.C. § 1-201(46), be replaced by the word "record," defined as a "durable symbolic representation of information in objectively perceivable form or susceptible to reduction to objectively perceivable form." This definition includes transactions reduced to writing and transactions using only electronically based communications and information storage. See Patricia B. Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607, 612-16 (1993).

26. U.C.C. § 2-208 (1990).

27. *Id.* § 2-210.

28. See *id.* § 1-103; Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966).

29. See, e.g., *Lambert v. Kysar*, 983 F.2d 1110, 1114-15 (1st Cir. 1993) (relying on *Restatement* §§ 24 & 59); *Manchester Pipeline Corp. v. Peoples Natural Gas Co.*, 862 F.2d 1439, 1443-45 (10th Cir. 1988) (relying on §§ 26 & 27); *Corinthian Pharmaceutical Sys., Inc. v. Lederle Labs.*, 724 F. Supp. 605, 609 (S.D. Ind. 1989) (relying on § 24); *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 419-20 (Mo. Ct. App. 1989)

2 and the "time-tested principles of common law"³⁰ appears to have worked rather well.

B. The Current Focus of the Revision

In this Article, I will discuss the current revisions to the sections most closely connected with contract formation and modification in commercial sales, namely sections 2-201, 2-204, 2-205, 2-206, 2-207, and 2-209. First, however, I will provide a bit of background.

1. The Influence of Transaction Types on the Principles of Formation and Modification

The type or form of the sales transaction will influence both the likelihood that disputes over contract formation and modification will develop and the principles necessary to resolve those disputes that do arise. For example, formation disputes are less likely to arise when one party drafts the agreement and presents it to the other on a take-it-or-leave-it basis or when the parties, after negotiation, reduce the agreement to a final writing and sign it. Similarly, if the parties, contemplating electronic contracting, enter into a trading partner agreement and thereafter buy and sell by computer, disputes over formation or modification should be infrequent. Thus, where the form and method of contracting structure the process by which the parties reach an agreement, principles based upon the *Restatement* formula should be adequate to resolve any disputes.

On the other hand, the less structured the sales transaction is, the more likely a formation or modification dispute will arise. In some transactions, the parties will agree on key terms of the deal but exchange unread standard forms that vary the agreed terms. In others, the parties may have a continuing bargaining relationship that features some oral agreement, some writings, and some mutual conduct. In still others, the parties may nego-

(relying on §§ 24 & 59); *City Univ. of New York v. Finalco, Inc.*, 514 N.Y.S.2d 244, 246 (App. Div. 1987) (relying on § 27).

30. *Computer Network, Ltd. v. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 673 (Mo. Ct. App. 1988).

tiate in stages toward a contemplated agreement or appear to conclude a long-term contract but leave important terms open or subject to further discussions.³¹ If one party withdraws from the relationship, the formation issues can be quite messy,³² and rigid formulas are often ineffective in resolving these issues. When negotiations are less structured, disputes arising from their breakdown require more flexible principles of formation and modification.

2. *Preserving the Policies and Displacement of Part 2*

In revising Article 2, Part 2, the Drafting Committee has preserved the original approach to contract formation and modification attributable to Karl N. Llewellyn.³³ Under this approach, creating an enforceable contract is easier rather than harder. This approach minimizes formality, but when necessary, expands rather than limits the opportunity to contract.³⁴ The emphasis is upon flexible standards, mutual conduct, and the intention of the parties. Thus, "conduct by both parties which recognizes the existence of a contract" prevails even when the parties have not satisfied the offer-acceptance formula,³⁵ and the parties' intention to "make a contract" prevails even though

31. See generally E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987) (concluding that present contract law is adequate to deal with today's complex bargaining processes); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992) (identifying necessary conditions for judicial involvement in completing contracts and arguing that relational contracts rarely satisfy those conditions); Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789 (1993) (discussing the need for changes in Article 2 to address the problems of relational contracts, including contracts with open terms, reserved discretion, and multistage bargaining).

32. For examples of messy transactions, see *SNACI, S.R.L. v. Illinois Found. Seeds, Inc.*, 830 F.2d 90, 91-94 (7th Cir. 1987); *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117 (5th Cir. 1985); *Nebraska Builders Prods. Co. v. Industrial Erectors, Inc.*, 478 N.W.2d 257, 264-65 (Neb. 1992).

33. See RICHARD E. SPEIDEL ET AL., *SALES AND SECURED TRANSACTIONS: TEACHING MATERIALS* 477-99 (5th ed. 1993); Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543 (1993) (extolling the virtue of Llewellyn's drafting method).

34. See, e.g., U.C.C. § 2-205 (1990) (validating a "firm" offer in proper form even absent consideration or reliance).

35. *Id.* § 2-204(1)-(2).

“one or more terms are left open.”³⁶ Further, section 2-206 explicitly expands the manner and medium by which a party can accept an offer,³⁷ section 2-207 reverses the common law presumption that if the terms of an acceptance do not match the terms of the offer, no contract is formed,³⁸ and section 2-209(1) provides that an “agreement modifying a contract within this Article needs no consideration to be binding.”³⁹ Part 2’s use of a broad definition of “agreement,”⁴⁰ rather than the *Restatement’s* foundation word “promise,”⁴¹ and the fact that it does not explicitly require consideration to enforce a contract for sale or its modification further reinforces Article 2’s expanded concept of contract.⁴²

In addition to preserving this expanded concept of contract formation, the Drafting Committee maintained the existing displacement line between Code and common law formation principles. The Committee did not embrace more elaborate models of contract formation, such as those found in the *Restatement (Second) of Contracts* and the Convention for the International Sale of Goods (CISG).⁴³ Article 2, Part 2 did not incorporate the popular reliance interest. Thus, in some cases, line drawing between Code law and common law through the application of section 1-

36. *Id.* § 2-204(3).

37. *See id.* § 2-206 cmt. 1.

38. *Id.* § 2-207(1). Section 2-207 provides that a party may accept an offer by a “definite and seasonable” acceptance, even though the acceptance contains additional or different terms that vary from the offer. *Id.* *But cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 58-59 (1979) (preserving the common law “mirror image” rule).

39. U.C.C. § 2-209(1) (1990).

40. *Id.* § 1-201(3). Section 1-201(3) defines “agreement” as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in [U.C.C. § 1-205 and U.C.C. § 2-208].” *Id.*

41. *See* Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992).

42. *See* WHITE & SUMMERS, *supra* note 15, § 1-2.

43. U.N. Convention on Contracts for the International Sale of Goods, Final Act, Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, 19 I.L.M. 668, art. 14-24 [hereinafter CISG]; *see* John E. Murray, *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11 (1988). The Convention became effective in the United States on January 1, 1988. John Honnold, *The Sales Convention: Background, Status, Application*, 8 J.L. & COM. 1, 5 (1988).

103 and sound Code methodology remains necessary. If the dispute involves the common law, differences between common law and Code policies must be resolved by the courts.

3. *The Hub and Spoke Proposal*

Why preserve the line between Code law and the common law of contract formation and modification? One answer is based on the judgment that the *Restatement* formula is adequate for the structured sales contract and that Part 2's flexible approach responds well to the less structured agreement. From the perspective of form and structure, Code law and common law complement each other. Conflicts can be resolved by responding to the type of transaction involved and resorting to equitable principles when needed.

Another, more pessimistic, answer is that no one is sure exactly how to draw that line. Unless the need for codification is clear when it arises, line drawing is more or less hit or miss. This uncertainty, among other things, may explain the current interest in the so-called "hub and spoke" approach to revising Article 2.

Under the "hub and spoke" concept, revised Article 2 would encompass three transactions involving the transfer of interests in personal property. The first is the sale of goods, which Article 2 now governs,⁴⁴ the second is the lease of goods, which Article 2A now governs,⁴⁵ and the third is the transfer of intangibles, such as data, technology, and other intellectual property.⁴⁶ The objective of this approach is to state principles common to all transactions in the "hub" and to state principles unique to each transaction in the "spoke."

Contract formation principles are likely candidates for the "hub," but lines must still be drawn. For example, three questions need to be asked and answered in the "hub and spoke"

44. U.C.C. § 2-102 (1990).

45. *Id.* § 2A-102.

46. And, more generally, service contracts. See Raymond T. Nimmer, *Service Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725 (1993) (calling for a revision of Article 2 that would include transfers of intangibles and service contracts).

game. First, which common law formation principles applicable to *all* exchange transactions are appropriate for sales, leases, and intangible transfers and, therefore, need not be codified at all? In other words, when can one rely exclusively on the common law or the *Restatement* formula in resolving formation issues? Second, which formation principles are unique to sales, leases, and intangible transfers but not to other exchange transactions? These principles, when identified, need to be included in the "hub." Third, which principles are unique to one or more, but not all, of the three transactions and need to be put in a "spoke?"

The answers to these daunting questions are far from clear. All require more information about the frequency and types of transactions than presently available. Take the "battle of the forms," for example. Should U.C.C. section 2-207 be in the "hub" or the sales "spoke?" The answer depends upon whether U.C.C. section 2-207 is also appropriate for leases of goods and transfers of intangibles, and the question of appropriateness further depends in part upon a judgment about the dominant form and structure of the transaction (how likely is it that standard forms will be exchanged and not read?) and the capacity of the parties engaged in the agreement process (what is the risk of unfair surprise?).

Article 2A does not have a provision comparable to section 2-207. Presumably, such a provision is unnecessary because most lessors highly structure leases of goods, thereby reducing the risk of a "battle of forms." Another implicit judgment is that either the parties should be responsible for reading and evaluating the forms or that the general provision on unconscionable contracts can neutralize the risk of unfair surprise.⁴⁷ All of

47. U.C.C. § 2A-108 (1990). Revised Article 2 will contain, in all probability, more provisions regulating the consumer transaction. The current Article 2 has special rules for merchants but treats everyone else more or less the same. *See, e.g., id.* §§ 2-201(2), 2-205, 2-207, 2-209. The questions currently under consideration with respect to the consumer are: (1) which consumer issues need more direct regulation; (2) what form that regulation should take, declaring a specific clause inoperative or insuring that the individual has adequate information and choice; and (3) what remedies should be available to the consumer. A related question is whether small businesses that do not fall under the strict definition of "consumer" should receive special protection. Because a prime candidate for abuse is the standard form, non-

these issues remain open to debate, including whether U.C.C. section 2-207 should apply to transfers of intangible property.

Against this background, the remainder of this Article will discuss the current status of contract formation and modification under the December 1993 draft of revised Article 2, Part 2.

III. SPECIFIC PROVISIONS

A. *Statute of Frauds: Section 2-201*

Failure to satisfy the statute of frauds is a defense to an otherwise enforceable contract or modification.⁴⁸ The statute of frauds requires a signed "sufficient" writing by the party against whom enforcement is sought, unless one of the stated exceptions applies.⁴⁹ The PEB Study Group recommended that the statute of frauds either be repealed or revised.⁵⁰ The Drafting Committee decided to repeal the statute, thus bringing Article 2 into line with the British Sale of Goods Act⁵¹ and the CISG.⁵² Repeal of the statute of frauds also frees from application of the statute (1) a sales contract or modification "not capable of performance within one year of its making" and (2) modifications that otherwise would be within its provisions.⁵³

negotiated contract prepared by one party, a potential solution to some problems wherever such forms are used is to draft a new section dealing with form contracts.

48. *Id.* § 2-201(1).

49. Section 2-201(1) imposes the basic requirement of a signed "sufficient" writing. *Id.* § 2-201(1). Between merchants, if a party receiving a written confirmation of the contract fails to object within a stated time limit, the contract meets the writing requirement. *Id.* § 2-201(2). The statute provides three exceptions: (1) "specially manufactured" goods; (2) admission that a contract was made in "pleading, testimony or otherwise in court;" and (3) part performance. *Id.* § 2-201(3). The courts are divided on whether "promissory estoppel" is a nonstatutory exception. See WHITE & SUMMERS, *supra* note 15, § 2-5.

50. See *Appraisal*, *supra* note 1, at 1035; *Executive Summary*, *supra* note 2, at 1874.

51. See Sale of Goods Act, 1979, § 4 (Eng.). The Sale of Goods Act contains no statute of frauds and provides that "a contract of sale may be made in writing . . . , or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties." *Id.* § 4(1).

52. See CISG, *supra* note 43, art. 11 ("A contract of sale need not be concluded in or evidenced by writing . . .").

53. The Committee also proposes repeal of U.C.C. § 2-209(3).

A major assumption, derived from litigated cases in which courts permitted the defense even though the parties clearly made some contract,⁵⁴ is that the statute of frauds creates more problems than it solves. Other assumptions are that the modern fact finding process can distinguish adequately between real and perjured claims⁵⁵ and that repeal of the statute will not discourage the healthy habit of reducing agreements to writing. Finally, repeal of the statute could facilitate the growth of computer contracting by eliminating the need to find a signed writing in the electronic jungle.

One consequence of repeal is that a quantity term not found in a signed writing is enforceable if the party seeking enforcement proves that the agreement otherwise exists.⁵⁶ However, no default rule supplies a "reasonable" quantity term if the parties have failed to agree. Thus, if the parties have intended to conclude a contract, but the plaintiff cannot prove what quantity they agreed upon, the contract fails for indefiniteness.⁵⁷

Another consequence involves oral agreements followed by a written confirmation. If the oral agreement is otherwise enforceable as a contract, the written confirmation adds nothing to the formation analysis; it is not needed to satisfy the statute of frauds.⁵⁸ The writing, however, might be an offer if the oral

54. A particularly egregious example is *Lige Dickson Co. v. Union Oil Co.*, 635 P.2d 103 (Wash. 1981). *But see Nebraska Builders Prods. Co. v. Industrial Erectors, Inc.*, 478 N.W.2d 257 (Neb. 1992) (finding admission of contract).

55. Based on this argument, the Drafting Committee rejected an alternative proposal that would have provided that parties seeking to prove the existence and terms of an oral contract must prove them by clear and convincing evidence rather than by a preponderance of the evidence. *See Appraisal, supra* note 1, at 1038-39. The Committee rejected a similar proposal for parties seeking to prove terms agreed in negotiations but not contained in the final writing under § 2-202. The ABA Task Force could not agree on whether repeal of the statute of frauds was appropriate. *See Appraisal, supra* note 1, at 1039. This uncertainty also appears in *WHITE & SUMMERS, supra* note 15, § 2-8.

56. U.C.C. § 2-201(1) limits enforcement to the "quantity of goods shown in such writing" and U.C.C. § 2-201(3)(b) limits enforcement when a contract is admitted in court to the "quantity of goods admitted."

57. *See* U.C.C. § 2-204(3) (1990). Freed from the restrictions of § 2-201(1), a prior course of dealing or usage of trade may now provide sources of agreement on quantity. *See Century Ready-Mix Co. v. Lower & Co.*, 770 P.2d 692, 696-97 (Wyo. 1989) (allowing evidence of usage of trade to supplement the terms of the agreement).

58. *See* U.C.C. § 2-201(2) (1990) (stating when a writing in confirmation of an

agreement did not constitute a contract or might be an offer to modify if there was a contract and the writing contained varying terms.⁵⁹

B. Firm Offers: Section 2-205

An option contract is an enforceable promise to hold an offer open for a period of time.⁶⁰ The option may be enforceable because it is supported by consideration or because it induced substantial reliance.⁶¹ A "firm" offer under section 2-205 is an offer irrevocable by statute when made by a merchant and if the required formalities are met.⁶²

The Study Group made no recommendation to revise section 2-205,⁶³ noting only that the comments should clarify that written firm offers are in addition to rather than in lieu of options created by consideration or reliance.⁶⁴ The Drafting Committee, however, concluded that the risk of unfair surprise created where a "term of assurance" is found "on a form supplied by the offeree" should be neutralized by requiring that the term be "conspicuous" rather than "separately signed by the offeror."⁶⁵ The Drafting Committee assumed that because firm offers appear primarily in commercial sales, the conspicuous requirement was sufficient to alert prospective offerees to form terms sup-

otherwise unenforceable contract satisfies the statute).

59. U.C.C. § 2-207(1) now provides that 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 . . . agreed upon." The phrase "those . . . agreed upon" presumably refers to an oral agreement that is either *not* enforceable as a contract because of the statute of frauds or dependent upon a final reduction to writing. If the statute of frauds is repealed and the oral agreement is otherwise enforceable, the written confirmation with varying terms cannot be an "acceptance" of the previously agreed terms. Rather, it should be treated as either a repudiation of or an offer to modify the contract. *See Miller v. Newsweek, Inc.*, 660 F. Supp. 85.2, 855-58 (D. Del. 1987) (holding a confirmation to be an offer to modify).

60. *See* RESTATEMENT (SECOND) OF CONTRACTS § 25 (1979).

61. *Id.* § 87.

62. *See* U.C.C. § 2-205 (1990).

63. *Appraisal*, *supra* note 1, at 1051. Very little litigation involves § 2-205. According to the Uniform Commercial Code Reporting Service, only five reported decisions have cited U.C.C. § 2-205 since 1985. *See* [UCC Sections 2-201 to 2-210] UCC Case Dig. (Callaghan) ¶ 2205 (Supp. 1993).

64. *See Appraisal*, *supra* note 1, at 1051-52.

65. U.C.C. § 2-205 (Discussion Draft Dec. 21, 1993).

plied by the offeree. The Committee thought the "separate" signing requirement was unduly cumbersome and subject to abuse.⁶⁶

C. Formation in General: Section 2-204

Although in general the Drafting Committee approved the formation principles in section 2-204, the Committee revised it somewhat in the interest of clarity and completeness.

The *Restatement's* formula, Offer plus Acceptance plus Consideration equals Contract,⁶⁷ is implicit in section 2-204(1), which provides that a "contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."⁶⁸ The key word is "agreement," defined as the "*bargain . . . in fact*" of the parties.⁶⁹ In Article 2, "bargain" suggests both the presence of consideration⁷⁰ and that an agreed exchange of goods for a price has been manifested, either by an offer and acceptance⁷¹ or conduct by both parties "recogniz[ing] the existence of . . . a contract."⁷²

The Drafting Committee, however, has revised former section 2-204(2)⁷³ to read:

If the parties so intend, an agreement is sufficient to make a contract for sale even if the moment of the making of the

66. In addition, the Drafting Committee decided to retain the three month time limit on the duration of a firm offer where no time was stated expressly. *Id.* The Committee deemed this statutory limitation on duration appropriate where the firm offer was enforceable because of form rather than because the other party paid for it.

67. *See supra* notes 8-12 and accompanying text.

68. U.C.C. § 2-204(1) (1990).

69. *Id.* § 1-201(3) (emphasis added).

70. In the *Restatement (Second) of Contracts*, "bargain" is defined as an "agreement to exchange promises or to exchange a promise for a performance or to exchange performances." RESTATEMENT (SECOND) OF CONTRACTS § 3 (1979). "Consideration" is defined as something "bargained for." *Id.* § 71(1).

71. *See, e.g.,* Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1444-45 (10th Cir. 1988) (finding an offer and acceptance through an exchange of documents despite a lack of mutual conduct recognizing the existence of a contract).

72. U.C.C. § 2-204(1) (1990).

73. The revised section is § 2-204(b).

agreement is not determined, one or more terms are left open or to be agreed, or the writings or records of the parties contain varying terms as defined in Section 2-207(a).⁷⁴

This preserves the intention test from former section 2-204(3) and identifies three “even if” circumstances that might otherwise preclude contract formation under the *Restatement* formula. The first circumstance was found in former section 2-204(2), the second was found in former section 2-204(3), and the third, making an explicit reference to revised section 2-207, is new.

Building on this, former section 2-204(3)⁷⁵ now reads:

If a contract for sale is made and one or more terms in the agreement are left open, the contract does not fail for indefiniteness if there is a reasonably certain basis for giving an appropriate remedy.⁷⁶

Again, this formulation recognizes that the parties may intend to conclude a bargain even though some material terms are left open, but makes enforcement depend upon the content of the “gap filler” rules found in Article 2, Part 3. The revised section recognizes also that one party can prevent contract formation by indicating that unless the parties reach some further agreement, no deal will exist.

In sum, revised section 2-204(a) states the “manner” in which a contract for sale may be made, revised section 2-204(b) confirms that the parties can intend to contract even though the agreement process includes apparent gaps or uncertainties, and revised section 2-204(c) provides a test to save contracts with open terms from indefiniteness. These revisions preserve, with more clarity, the policy toward contract formation found in the

74. U.C.C. § 2-204(b) (Discussion Draft Dec. 21, 1993).

75. The revised section is § 2-204(c).

76. U.C.C. § 2-204(c) (Discussion Draft Dec. 21, 1993).

original section 2-204.⁷⁷ Section 2-204(b) also adds a link to section 2-207, the importance of which is discussed below.

D. Offer and Acceptance in Formation of Contract: Section 2-206

Section 2-206, like section 2-205, assumes that a party has made an offer to buy or sell and deals with the method and medium by which the other party may accept that offer.⁷⁸ The terms of the offer or other circumstances may indicate unambiguously the particular method or medium of acceptance. In the absence of clear limitations, however, section 2-206 provides a broad basis for acceptance.⁷⁹ Offers are construed as "inviting acceptance in any manner and by any medium reasonable in the circumstances."⁸⁰ An "order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods,"⁸¹ and the beginning of a requested performance may be a "reasonable

77. Under the U.C.C., not all agreements are contracts but all contracts are agreements. See U.C.C. § 1-201(11) (1990). Former U.C.C. § 2-204 tended to mask the critical policy question of why a particular agreement should be enforced as a contract for sale. Subsection (1) dealt with the "manner" in which the contract could be made; subsection (2) dealt with the effect on contract formation when the "moment" of the making of an agreement was undetermined; and subsection (3) suggested, improperly it would seem, that the test when terms are left open is whether the parties "intended to make a contract." See *Appraisal*, *supra* note 1, at 1050-51. Nevertheless, the core policy was that if the parties assent in any objective manner to a bargain and that neither party intended that further agreement be reached before performance could commence, the agreement was a contract and did not fail for indefiniteness if there was a "reasonably certain basis for giving an appropriate remedy." U.C.C. § 2-204(3) (1990). The revised U.C.C. § 2-204 preserves this core policy.

78. See U.C.C. § 2-206 (1990).

79. See *id.* § 2-206(1).

80. *Id.* § 2-206(1)(a).

81. *Id.* § 2-206(1)(b); see also *Corinthian Pharmaceutical Sys., Inc., v. Lederle Labs.*, 724 F. Supp. 605, 609-11 (S.D. Ind. 1989) (varying quantity shipped without notice that the shipment is an accommodation has the effect of accepting offer); Charles M. Thatcher, *Acceptance or Non-Acceptance by Seller's Prompt Shipment of Ordered Goods on "Non-Conforming Terms:" The Unprovided-for Cases*, 57 U. CIN. L. REV. 205 (1988) (suggesting a revision to § 2-206 to handle cases where the seller ships conforming goods on terms that do not conform to the buyer's terms).

mode of acceptance."⁸² Section 2-206 preserves the potential for a greater number of contracts.

The Drafting Committee has made only one revision to section 2-206. Revised section 2-206(a)(1) provides: "(a) Unless otherwise unambiguously indicated by the language or circumstances: (1) an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances, including an expression of assent that contains varying terms as defined in Section 2-207(a)."⁸³ This addition, like the addition to section 2-204(b), implements the Drafting Committee's decision in the "battle of the forms" to separate questions of contract formation from those involving the terms of the contract. Sections 2-204 and 2-206 answer the former questions and revised section 2-207 answers the latter.

E. When Varying Terms Are Part of the Contract: Section 2-207

1. The Problems and Former Section 2-207's Imperfect Solution

Section 2-207 is one of the most complex and frequently discussed⁸⁴ and litigated provisions⁸⁵ in Article 2. It responds to the fact that some transactions include both negotiated or "dickered" terms and standard form terms which one party prepared and which the parties exchange and routinely ignore. As a

82. U.C.C. § 2-206(2) (1990).

83. U.C.C. § 2-206(a)(1) (Discussion Draft Dec. 21, 1993).

84. See JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 50 (3d ed. 1990); WHITE & SUMMERS, *supra* note 15, § 1-3; see also Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991); John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986); John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COMM. 337 (1986); Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815 (1992). For international implications, see Arthur T. von Mehren, *The "Battle of the Forms": A Comparative View*, 38 AM. J. COMP. LAW 265 (1990).

85. Volumes 1 to 20 of the Uniform Commercial Code Reporting Service Second Series show that 97 judicial decisions cited U.C.C. § 2-207. See [UCC Sections 2-201 to 2-210] UCC Case Dig. (Callaghan) ¶ 2207 (Supp. 1993). In the same time period, the courts cited either § 2-204 or § 2-206 only 57 times, and 28 of those decisions also involved § 2-207. See *id.* ¶¶ 2204, 2206.

matter of practice, if not efficiency, the parties rarely read or discuss the standard forms even though they contain terms that vary from those actually agreed upon. In fact, many of these standard form terms, such as warranty disclaimers, excluders of consequential damages, and arbitration clauses, materially vary both the agreed-upon deal and the standard provisions or "default" rules of Article 2. This variation provides incentives for the self-interested drafter to include the "boilerplate" in the contract without explicit agreement by the other party.

The reality of varying terms in the standard forms and the opportunity for strategic behavior posed two recurring questions, both of which section 2-207 attempted to solve.

a. Was a Contract Formed at All?

The first of these questions is when, if ever, a contract is formed in the "battle of the forms." This question addresses the formation issue.

The common law "mirror image" rule operated to prevent a contract by offer and acceptance when the terms in the standard acceptance form varied from that of the offer, but recognized that a contract could be inferred from mutual conduct by the parties.⁸⁶ Thus, if Buyer made an offer to buy and Seller sent an acknowledgment agreeing to some of Buyer's terms but including terms additional to or different from those proposed, no contract was created; the acknowledgment was a counteroffer.⁸⁷ If, however, Seller also shipped and Buyer accepted the goods, a contract was created. Buyer's conduct of taking the goods without objecting to Seller's varying terms was deemed to accept the counteroffer with all of its terms.⁸⁸

Former section 2-207(1) reversed the mirror image rule by stating that a "definite . . . expression of acceptance . . . operates

86. RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979).

87. *Id.* § 59.

88. This result was found in the infamous case of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), which achieved a common law result by ignoring the language of U.C.C. § 2-207. *See id.* at 499-500. For additional discussion of the common law rule and its perverse effects, see *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1335-36 (7th Cir. 1991); *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 321-24 (N.M. 1993).

as an acceptance even though it states terms additional to or different from those offered . . . , unless acceptance is expressly made conditional on assent to the additional or different terms.”⁸⁹ Former section 2-207(3) then reinforced the mutual conduct inference by providing that “[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.”⁹⁰ Thus, the scope for contract formation in “battle of the forms” disputes was expanded, even though the language of section 2-207 did not distinguish between “additional” and “different” terms contained in standard forms and those contained elsewhere.⁹¹

b. If a Contract Was Formed, What Are Its Terms?

The second and more important question was this: If a contract was formed under subsection (1) or subsection (3), when, if ever, did the additional or different terms become part of the agreement? The inclusion question was important because the inclusion of the terms in unread or ignored standard forms because of one party’s apparent assent could result in unfair surprise. The route to an answer depended on whether the contract was formed under subsection (1) or subsection (3). Even if the court was on the correct route to a solution, much confusion and uncertainty lay ahead.

I will not discuss in detail the strengths and weaknesses of section 2-207’s solution to the inclusion question. Suffice it to say that the apparent objective of section 2-207 was to exclude standard form terms from the contract, however formed, unless the parties had expressly agreed to these terms.⁹² In short, section 2-207, as a particularized application of the general unconscionability doctrine, was designed to fight unfair surprise through the misuse of standard forms in commercial transac-

89. U.C.C. § 2-207(1) (1990).

90. *Id.* § 2-207(3); see also *id.* § 2-204(1).

91. Some courts, however, have made the distinction and given more weight to terms in typed letters than to those in standard forms. See *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 200 (Tex. Ct. App. 1992).

92. U.C.C. § 2-207 cmt. 3 (1990).

tions.⁹³ But the route to this result was tortuous, and nothing gave clear guidance on when, if ever, the terms could be included without unfair surprise.

For example, suppose that the seller's response to the buyer's offer was a "definite" acceptance creating a contract under section 2-207(1). The standard form contained an "additional" term excluding consequential damages. Section 2-207(2) treated the term as a proposal for an addition to the contract and it initially did not become part of the contract in transactions *not* between merchants.⁹⁴ If the transaction was between merchants, however, the additional term became part of the contract, with three exceptions. One exception, that the additional term "materially alter" the offer, is satisfied here, so the clause excluding consequential damages would *not* be part of the agreement.⁹⁵ But the text of section 2-207 did not say when the material proposal for addition could become part of the contract, leaving the answer to the comments.⁹⁶ Moreover, section 2-207(2) did not deal with the question of "different"⁹⁷ terms or when the offeror's standard form terms, if any, became part of the contract. These omissions, along with others, have created an exceptional volume of litigation and scholarly commentary.⁹⁸

To illustrate the problem further, suppose that no contract was formed under section 2-207(1), but the seller shipped the goods and the buyer accepted them. Here, conduct by both parties recognizes the existence of a contract. A court should apply section 2-207(3) to determine the terms of the contract, but no explicit statutory direction exists to do so. If section 2-207(3) is

93. As Judge Posner stated, you cannot avoid a material additional or different term simply because it would result in hardship. *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336 (7th Cir. 1991). But you can avoid it if it was incorporated into the contract without "express awareness." *Id.* Under this analysis, the question is whether one party is unreasonably surprised by the inclusion. If so, "hardship is a consequence, not a criterion." *Id.*

94. U.C.C. § 2-207(2) (1990).

95. *Id.* § 2-207(2)(b).

96. *See id.* § 2-207 cmt. 5.

97. A leading case, *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (10th Cir. 1984), held (not without difficulty) that the different terms were not part of the agreement, leaving the parties with the Article 2 "default" rules. *Id.* at 1578-80; accord *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 325-27 (N.M. 1993).

98. *See supra* notes 84-85.

applied, the standard form consequential damage exclusion, initially at least, would not be part of the agreement: "In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [this Act]."⁹⁹ Section 2-207(3), however, leaves unstated when, if ever, terms excluded because the writings do not agree can be included subsequently. Presumably, they are included only when the parties have agreed to them expressly, thereby neutralizing the risk of unfair surprise.¹⁰⁰

2. *The Proposed Solution in Revised Sections 2-204, 2-206, and 2-207*

a. *Possible Solution Routes*

For better or worse, the Drafting Committee assumed that enough transactions existed in which parties exchanged unread standard forms with varying terms to generate a continuing risk of unfair surprise. The Study Group, the Drafting Committee, and almost everyone else concluded that former section 2-207's solution to when, if ever, a contract was formed and when form terms should be included in the agreement was unsatisfactory.¹⁰¹ The challenge was to develop a better solution.

Three main routes lead to a possible solution. The first retains both the formation and inclusion questions within the scope of an expanded and clarified section 2-207. This revision, although still complex, clearly would answer or resolve the recurring problems of interpretation that former section 2-207 produces.¹⁰²

The second alternative moves the formation issues to sections 2-204 and 2-206, repeals former section 2-207, and leaves the

99. *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 486 (6th Cir. 1989).

100. *See id.* at 485-89.

101. *See Appraisal, supra* note 1, at 1054-67; *Executive Summary, supra* note 2, at 1874.

102. Earlier drafts of revised § 2-207 contained an Alternative A, which followed this route. *See* U.C.C. § 2-207 (Discussion Draft Feb. 17, 1993). However, the Drafting Committee, at its October 1993 meeting, directed that Alternative A be deleted from subsequent drafts. *See* U.C.C. § 2-207 (Discussion Draft Dec. 21, 1993).

unfair surprise risk to general principles of unconscionability, augmented, perhaps, by a new subsection dealing specifically with the perils of standard form contracting. This route rejects the assumption that the "battle of the forms" requires a particularized solution and is consistent with the approach taken in the *Restatement (Second) of Contracts*, Article 2A of the U.C.C., and the CISG.¹⁰³

The third solution moves the formation issues to sections 2-204 and 2-206 and revises section 2-207 to deal exclusively with inclusion issues. In short, if a contract with varying terms is formed under section 2-204 or 2-206, revised section 2-207 exclusively answers the question of whether the varying terms are included in the contract. The Drafting Committee chose this route.¹⁰⁴

b. *The Current Draft*

The current draft implements the third solution and unfolds in the following manner. First, the current draft substitutes the phrase "varying terms" for "additional or different" terms and limits "varying terms" to "those terms prepared by one party and contained in a standard form writing or record."¹⁰⁵ "Varying" refers to the bargain proposed or agreed to, not the "gap fillers" of Article 2 and includes both minor and material variations. Varying terms not contained in standard forms are left for general principles of inclusion and exclusion. The low risk of unfair surprise when assenting to other terms does not justify special treatment.¹⁰⁶

Second, revised sections 2-204 and 2-206 determine whether an agreement containing varying terms forms a contract. The Committee has revised those sections to recognize the varying

103. See Christine Moccia, Note, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms,"* 13 FORDHAM INT'L L.J. 649 (1990) (discussing how the CISG handles international "battle of the forms" problems).

104. U.C.C. § 2-207(a) (Discussion Draft Dec. 21, 1993).

105. *Id.*

106. See *Lambert v. Kysar*, 983 F.2d 1110, 1115 (1st Cir. 1993) (holding § 2-207 inapplicable in cases where a party has changed a term such as quantity rather than modified or supplemented the other party's boilerplate language).

terms issue explicitly. Thus, revised section 2-204(a) states that if the parties so intend, an agreement is sufficient to make a contract even though the "writings or records of the parties contain varying terms as defined in Section 2-207(a)."¹⁰⁷ Similarly, revised section 2-206(a)(1) states that "unless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances, including an expression of assent that contains varying terms as defined in section 2-207(a)."¹⁰⁸ These standards will not eliminate litigation over whether parties formed a contract despite varying terms, and in some cases none will be. But if a contract is formed, the method or timing of formation will not influence whether the varying terms become part of the contract under revised section 2-207(c).

Third, revised section 2-207(c) deals with varying terms included in any contract formed under sections 2-204 and 2-206.¹⁰⁹ Although the Drafting Committee has not made a final decision on the content of this subsection, the current draft reveals the probable approach to the question of inclusion:

(c) Varying terms contained in the writings and other records of the parties do not become part of the contract unless the party claiming inclusion proves that the party against whom they operate (i) expressly agreed to such terms, or (ii) assented to such terms and had notice of them from trade usage, prior course of deal or performance. Except between merchants, the burden of proof under this subsection is satisfied by clear and convincing evidence.¹¹⁰

The objective here is to exclude all varying terms to which a party apparently has assented by conduct or otherwise unless the party claiming inclusion can neutralize the risk of unfair surprise. That party's burden of proof turns on whether the transaction is between merchants.¹¹¹

107. U.C.C. § 2-207(a) (Discussion Draft Dec. 21, 1993).

108. *Id.* § 2-206(a)(1).

109. *Id.* § 2-207(c).

110. *Id.*

111. This change reverses the burden of proof required under the current U.C.C. §

Obviously, there is no unfair surprise if a commercial party or a consumer has "expressly agreed" to varying terms. But when, under subsection (c)(ii), does a party assent to such terms with "notice?"¹¹² When the party assenting knows or has reason to know of the varying terms because of trade usage, a prior course of dealing, or a course of performance,¹¹³ unfair surprise is not an issue, and the courts should give effect to the party's objective manifestation of assent.¹¹⁴

Fourth, revised section 2-207(d) contains a catalogue of terms included when a contract with varying terms is formed.¹¹⁵ These terms include (1) those upon which the writings or records agree, (2) varying terms included under subsection (c), (3) those to which the parties have otherwise agreed, and (4) any supplementary terms incorporated under "any other provisions of this Act."¹¹⁶

2-207, in which the party opposing inclusion has the burden of proving that the additional term should not be included. *See Comark Merchandising, Inc. v. Highland Group, Inc.*, 932 F.2d 1196, 1201-02 (7th Cir. 1991).

112. *See* U.C.C. § 1-201(42) (1990).

113. *See id.* § 1-201(3).

114. *See Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987), which held that an additional term did not "materially" alter an offer under U.C.C. § 2-207(2) absent unfair surprise and that an arbitration clause in the seller's confirmation did not unfairly surprise the buyer when the arbitration clause was found in nine previous transactions between the parties. *Id.* at 711-15. In short, in this transaction between merchants the buyer had notice based upon a prior course of dealing that the arbitration clause was probably in the tenth confirmation form and was not unfairly or unreasonably surprised. *See id.*; *accord* *Dixie Aluminum Prods. Co. v. Mitsubishi Int'l Corp.*, 785 F. Supp. 157, 160 (N.D. Ga. 1992). Subsequently, the Seventh Circuit recognized that repeated use of the same forms between the parties might not give the other party reason to know of them. *See Trans-Aire Int'l, Inc. v. Northern Adhesive Co.*, 882 F.2d 1254, 1262 n.9 (7th Cir. 1989). The Third Circuit refused to include form terms repeatedly present in prior transactions unless some prior action between the parties indicated that the party seeking inclusion did not intend to proceed unless they were included. *See Step-Saver Data Sys. v. Wyse Technology*, 939 F.2d 91, 102-03 (3d Cir. 1991).

115. U.C.C. § 2-207(d) (Discussion Draft Dec. 21, 1993).

116. *Id.* Under U.C.C. § 1-201(42) (1990), "[t]erm" means that portion of an agreement which relates to a particular matter. "Terms" may be agreed when implied from course of dealing, usage of trade, or course of performance. *Id.* § 1-201(3). Also, terms may be supplied by the "gap fillers" in Article 2, Part 3. Revised § 2-207(2) develops broad sources for terms of the agreement in § 2-207 and other disputes. *See Dresser Indus. v. Gradall Co.*, 965 F.2d 1442, 1451 (7th Cir. 1992) (holding that terms under § 2-207(3) include any terms arising under the U.C.C., including those

In sum, the proposed revisions of sections 2-204, 2-206, and 2-207 offer a simpler and more focused approach to the issues of formation and inclusion posed by the "battle of the forms." The Drafting Committee concluded that this route was clearly a better solution than the current version of section 2-207, but whether it is the best solution remains to be seen. The proof of the pudding is whether the revision leaves the right issues to be litigated in the courts and provides a disincentive to those who would play "first shot" and "last shot" games with their standard forms.¹¹⁷ More importantly, the blanket exclusion of varying terms unless the contract satisfies the conditions of revised section 2-207(c) should provide an incentive for those who wish to include terms important to their self-interest to insure that the other party is aware of these terms and agrees to them. The proposed changes place a premium on negotiation and informed consent rather than upon strategic behavior.

c. A Test Case

The facts of an important case, *Step-Saver Data Systems v. Wyse Technology*,¹¹⁸ illustrate the application of revised section 2-207. After tests, Buyer selected software that Seller developed for use in an integrated computer system.¹¹⁹ Buyer then marketed the software to doctors and lawyers.¹²⁰ Over an eight month period, Buyer purchased and resold a total of 142 copies of the software.¹²¹ Buyer first would obtain a commitment from Seller over the telephone to ship twenty units.¹²² Buyer then would send a purchase order stating the items to be purchased,

derived from trade usage, course of dealing, or course of performance).

117. The phrase "first shot" means that terms in the offeror's standard form are included when the offeree accepts the offer. See Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1246-47 (1982). The phrase "last shot" means that terms in the offeree's standard form are included when the offeree makes a counteroffer and the offeror subsequently assents without objection. *Step-Saver*, 939 F.2d at 99. Neither strategy will work under revised § 2-207(c).

118. 939 F.2d 91 (3d Cir. 1991).

119. *Id.* at 94.

120. *Id.*

121. *Id.* at 95-96.

122. *Id.*

their price, and shipping and payment terms, and Seller would ship the software with an invoice repeating the purchase terms.¹²³ The software box top, however, contained a license agreement that in some detail disclaimed all express and implied warranties, limited the remedy for breach to the return of any defective disks, and provided:

Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from date of purchase and your money will be refunded to you by that person.¹²⁴

In each case, Buyer opened the package, apparently ignored the license,¹²⁵ and did not return the software.¹²⁶ Later, Buyer alleged that the software program was defective and Seller argued, among other things, that Buyer was bound by the box top license which disclaimed warranties and limited remedies.¹²⁷

Under revised section 2-207(a), the box top license constitutes "varying terms." Under revised sections 2-204 and 2-206, a contract could be formed at either of two points.¹²⁸ The earlier point occurred when Seller shipped the software with varying terms in response to Buyer's written purchase order¹²⁹ and the later occurred when Buyer accepted the software upon delivery. Either way, the parties formed a contract. The critical question, therefore, is whether the varying terms in the form of a box top license became part of that contract under revised section 2-207(c).

Note that the varying terms contain both substantive provisions and an attempt to impose acceptance of the terms unless

123. *Id.* at 96.

124. *Id.* at 97.

125. It is not clear from the opinion whether the license was in conspicuous type or Buyer actually read it.

126. *Id.* at 97-98.

127. *Id.* at 98.

128. U.C.C. §§ 2-204, 2-206 (Discussion Draft Dec. 21, 1993).

129. An even earlier possibility was at the conclusion of the telephone conversation. This possibility, however, seems unlikely on the facts.

Buyer objects.¹³⁰ Under revised section 2-207(c), neither becomes part of the contract unless Seller proves that Buyer expressly agreed to them or assented (by performing without objection) with notice of them derived from, among other things, a prior course of dealing.¹³¹ Because no evidence suggests that Buyer “expressly” agreed to the terms of the license, the critical question is whether Buyer knew or had reason to know of them from the prior course of dealing and still failed to object. If so, the box top license becomes part of the contract because Buyer is not unreasonably or unfairly surprised.

Section 2-207(c) as revised is not entirely consistent with Judge Wisdom’s interpretation of existing section 2-207 in *Step-Saver*. The opinion, which held that the box top license was not included, develops a layered approach to the unfair surprise issue. Buyer may know or have reason to know that varying terms are present but be unfairly surprised to learn that Seller intends to include these terms in the contract. First, the court seemed to assume that the parties probably know what the other’s form contains and that both proceed with the transaction “even if they know that the terms of their form [will] not be enforced.”¹³² Given this business reality, the court, like revised section 2-207(c), would, at a minimum, require Buyer’s express assent to the varying terms before inclusion. Second, Seller cannot condition the contract upon Buyer’s assent to the terms unless Seller demonstrates “an unwillingness to proceed with the transaction unless the additional or different terms are included in the contract.”¹³³ A form provision in a box top license will not suffice. Finally, in cases where the same varying terms appear in prior dealings, the fact that Buyer had notice of them is not enough. This situation says only that Seller desires that the contract include the terms and that Buyer probably is not surprised to know this. To incorporate the terms in the next

130. See *Step-Saver*, 939 F.2d at 96-97.

131. If the transaction is between merchants, a preponderance of the evidence satisfies the burden of proof, otherwise the evidence must be clear and convincing. U.C.C. § 2-207(d) (Discussion Draft Dec. 21, 1993).

132. *Step-Saver*, 939 F.2d at 99.

133. *Id.* at 102.

transaction, some prior "action with respect to the issue"¹³⁴ must have addressed those terms. Buyer must know, from that prior action, that Seller is serious about including the terms.¹³⁵ Only then will Buyer have the notice that avoids unfair surprise.¹³⁶

If this reasoning is sound, the inclusion test in revised section 2-207(c) should be limited to "express assent." If Seller is unwilling or unable to obtain a negotiated agreement including varying terms, Buyer may ignore them.

F. Modification, Rescission, and Waiver: Section 2-209

Section 2-209(1) provides that an "agreement modifying a contract within this Article needs no consideration to be binding,"¹³⁷ and comment 2 states that a modification "must meet the test of good faith imposed by this Act."¹³⁸ Section 1-203 imposes an obligation of good faith on the "performance or enforcement" of a contract or duty.¹³⁹ Because modification of a contract does not fit clearly under "performance or enforcement," revised section 2-209(a) provides that a "good-faith agreement modifying a contract under this Article is binding without consideration."¹⁴⁰ The Drafting Committee has yet to agree on a revised definition of good faith for the U.C.C. or Article 2.¹⁴¹ The relationship between the duty of good faith and the law of duress remains subject to development by the courts.

The repeal of the statute of frauds ends concerns about whether the "contract as modified" is within the statute of frauds.¹⁴² The Committee, therefore, has deleted former section 2-209(3). The Drafting Committee, however, concluded that commercial parties at least should have power to create a statute of frauds

134. *Id.* at 103.

135. *Id.* at 104.

136. *Id.*

137. U.C.C. § 2-209(1) (1990).

138. *Id.* § 2-209 cmt. 2.

139. *Id.* § 1-203.

140. U.C.C. § 2-209(a) (Discussion Draft Dec. 21, 1993). The PEB Study Group recommended this change. *Appraisal*, *supra* note 1, at 1068.

141. For some possible definitions, see Speidel, *supra* note 31, at 795-98.

142. U.C.C. § 2-209(3) (1990).

for modifications by contract, provided that they clearly stated the conditions for a subsequent waiver of that term. Revised section 2-209(b), therefore, provides that "between merchants a signed agreement that excludes modification or rescission except by a signed writing or record may not be otherwise modified or rescinded."¹⁴³ This "no oral modification" (NOM) clause, however, is subject to revised section 2-209(c), which provides that a party may not assert a NOM clause valid under subsection (b) "if that party's language or conduct in effecting a modification or rescission is inconsistent with the such term and induces the other party to change its position reasonably and in good faith."¹⁴⁴

To illustrate, suppose a written contract under which the seller is to deliver in installments includes a NOM clause. Both parties are merchants, but the buyer insisted on inclusion of the clause. Later, the parties orally agree to modify the contract delivery schedule and the seller performs according to that oral agreement. The buyer could have insisted that the modification be in writing but did not. Assuming that the oral modification is enforceable under revised section 2-209(a), the NOM clause is not enforceable against the seller under revised section 2-209(c) because of what might be called a "reliance" waiver. In effect, the buyer is estopped from invoking the NOM clause for a past performance by the seller under the oral modification. The same result would follow if the buyer had stated "I will not insist upon the NOM clause in the future" and the seller reasonably had relied upon this statement in good faith. In either case, the NOM clause does not apply because of reliance waiver, and the oral modification is enforceable.¹⁴⁵

Revised section 2-209(d) addresses the issue of waiver as a modification or rescission in other cases.¹⁴⁶ Except for the al-

143. U.C.C. § 2-209(b) (Discussion Draft Dec. 21, 1993).

144. *Id.* § 2-209(c).

145. This revision is consistent with the majority opinion in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1286-89 (7th Cir. 1986). For relevant commentary, see Douglas K. Newell, *Cleaning up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487 (1990-1991); John E. Murray, Jr., *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1 (1987).

146. See U.C.C. § 2-209(d) (Discussion Draft Dec. 21, 1993).

leged waiver of an executory portion of the contract, for which reasonable reliance in good faith is required, the definition of waiver is left to the courts to interpret under the common law. To illustrate, suppose that the buyer is entitled to notice from the seller before the goods are shipped and that this is an express condition to the buyer's duty to accept the goods. After several installments the seller ships the goods without notice, but the buyer accepts them anyway. By its conduct, the buyer has elected to waive the condition and cannot object later to its failure. On the other hand, if the buyer stated to the seller "you don't have to give notice for future deliveries," there would be power to reinstate the notice condition under revised section 2-209(d) "unless the other party has changed its position in good faith, reasonable reliance on the waiver."¹⁴⁷

IV. CONCLUSION

At this stage in the revision of Article 2, Part 2, one can detect some probable outcomes, some sources of controversy, and an area of uncertainty.

The probable outcomes protect the expanded conception of contract formation and modification of the original Article 2 and preserve the current line drawn between Code and common law. Following this course, the purpose of proposed revisions in sections 2-204, 2-205, 2-206, and 2-209 is improved clarity and style rather than substance. Issues that the revised statute does not displace will be resolved under the "time-tested" bargain oriented principles of the common law.

The sources of controversy include the recommended repeal of the statute of frauds and the revision of section 2-207. The former removes a formal requirement to contract enforcement and the latter focuses on the problem of unfair surprise in the "battle of the forms." Disagreements in this area, therefore, will be of a different order and kind. Nevertheless, alternative solutions should be kept in mind. For example, if the statute of frauds is repealed, why not develop new controls where parties seek to prove agreements not contained in a writing or records? Why not

147. *Id.*

require proof by clear and convincing evidence? Similarly, instead of revising section 2-207, why not replace it with a provision dealing with standard form contracting that is broad enough to cover every case of formation and modification involving commercial and consumer parties?

The area of uncertainty is the proposed "hub and spoke" restructuring of Article 2. Should it be implemented and, if so, what will be the impact on the revision of the sales provisions in general and the contract formation and modification principles in particular? One can perceive only dimly the complexities involved in moving from a common law to a civil law code, deciding what goes in the "hub" and what goes in a "spoke," and confronting transactions that transfer information technology

The ancient curse clearly had Reporters in mind: May we live in interesting times.