

Offer and Acceptance under the UCC

Article 2 of the Uniform Commercial Code—adopted in every state except Louisiana—supplements and replaces the common law in a number of important ways. Perhaps no change is as memorable or infamous as UCC § 2-207. But this provision is not the only one in the UCC that changes the common law doctrines application to contract formation.

Before discussing what the UCC changes, it is important to understand that there is much that Article 2 does not change. The UCC, for example, does not have a different definition for offers, relying on the background common-law rule. Offers looking solely for acceptance by performance follow the common-law practice of creating an option when an offeree commences performance. But there are a handful of provisions that make changes, ranging from a slight difference in tone to a completely different regime.

A. UCC § 2-204 (Formation in General)

UCC § 2-204, subtitled “Formation in General,” is more akin to a collection of principles than an overall framework. Subsection (1) states that a contract transacting in goods “may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” UCC § 2-204(1). This idea is a somewhat anodyne one and does not contradict common-law doctrine. Subsection (2) further refines this concept, noting that “[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.” UCC § 2-204(2). This provision can become something of a refuge for confused law students, who may throw up their hands when asked to parse a complicated set of interactions to find an offer and an acceptance. Keep in mind, however, that this is very much an exception to the general rule even with respect to the UCC, and in most cases that moment of contractual creation can be determined. Finally, subsection (3) mirrors Restatement (Second) § 33, providing that a contract can be found even though one or more terms are left open. However, the parties must have intended to make a contract, and there must be “a reasonably certain basis for giving an appropriate remedy.” UCC § 2-204(3). Traditionally, most courts tend to think indefiniteness is more likely to block formation on the common law side than under the UCC. We have a module on this issue to explore it in more detail.

B. UCC § 2-206 (Offer and Acceptance in Formation of Contract)

The changes introduced by UCC § 2-206 are more meaningful in their effect. Again we find a set of three separate doctrines bundled into one section, but these are arguably more related,

as they all related to acceptances. To start with the last provision, subsection UCC § 2-206(2) encourages notice by offerees who provide acceptance by performance, as “an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.”

The first two provisions in § 2-206 are what we might call “sticky” default rules, as they are default rules that are harder to displace. The statute specifies that UCC §§ 2-206(1)(a) & 2-206(1)(b) apply “[u]nless otherwise unambiguously indicated by the language or circumstances.” That use of “unambiguously” means that courts will look for clarity when determining whether the provisions apply. UCC § 2-206(1)(a) expands the available means and media for acceptance by saying that an offer will be construed to allow acceptances to be communicated “in any manner and by any medium reasonable in the circumstances.” This provision overrides the traditional common law that the acceptance must take the same form as the offer. UCC § 2-206(1)(b) deals with acceptance by performance, in that offers asking for prompt or current shipment are to be construed as allowing acceptance “either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.” Note the end of this provision. Even nonconforming goods can constitute an acceptance, marking a sharp break from the mirror image rule. However, there is an exception—a safe harbor for an offeree who wants to present nonconforming goods as a possible alternative/counteroffer. Section 2-206(1)(b) states that “a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.”

The case below speaks more about the nonconforming goods provision within § 2-206(1)(b), as well as the exception to this requirement when goods are provided as an accommodation.

Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories

724 F. Supp. 605 (Southern District of Indiana 1989)

MCKINNEY, District Judge.

I. Factual and Procedural Background

Defendant Lederle Laboratories is a pharmaceutical manufacturer and distributor that makes a number of drugs, including the DTP [Diphtheria, Tetanus, & Pertussis] vaccine. Plaintiff Corinthian Pharmaceutical is a distributor of drugs that purchases supplies from manufacturers such as Lederle Labs and then resells the product to physicians and other

providers. One of the products that Corinthian buys and distributes with some regularity is the DTP vaccine.

In 1984, Corinthian and Lederle became entangled in litigation when Corinthian ordered more than 6,000 vials of DTP and Lederle refused to fill the order. That lawsuit was settled by written agreement whereby Lederle agreed to sell a specified amount of vaccine to Corinthian at specified times. Lederle fully performed under the 1984 settlement agreement, and that prior dispute is not at issue. One of the conditions of the settlement was that Corinthian “may order additional vials of [vaccine] from Lederle at the market price and under the terms and conditions of sale in effect as of the date of the order.”

After that litigation was settled Lederle continued to manufacture and sell the vaccine, and Corinthian continued to buy it from Lederle and other sources. Lederle periodically issued a price list to its customers for all of its products. Each price list stated that all orders were subject to acceptance by Lederle at its home office, and indicated that the prices shown “were in effect at the time of publication but are submitted without offer and are subject to change without notice.” The price list further stated that changes in price “take immediate effect and unfilled current orders and back orders will be invoiced at the price in effect at the time shipment is made.”

From 1985 through early 1986, Corinthian made a number of purchases of the vaccine from Lederle Labs. During this period of time, the largest single order ever placed by Corinthian with Lederle was for 100 vials. When Lederle Labs filled an order it sent an invoice to Corinthian. The one page, double-sided invoice contained the specifics of the transaction on the front, along with form statement at the bottom that the transaction “is governed by seller's standard terms and conditions of sale set forth on back hereof, notwithstanding any provisions submitted by buyer. Acceptance of the order is expressly conditioned on buyer's assent to seller's terms and conditions.”

On the back of the seller's form, the above language was repeated, with the addition that the “[s]eller specifically rejects any different or additional terms and conditions and neither seller's performance nor receipt of payment shall constitute an acceptance of them.” The reverse side also stated that prices are subject to change without notice at any time prior to shipment, and that the seller would not be liable for failure to perform the contract if the materials reasonably available to the seller were less than the needs of the buyer. The President of Corinthian admits

seeing such conditions before and having knowledge of their presence on the back of the invoices, and Corinthian stipulates that all Lederle's invoices have this same language.

During this period of time, product liability lawsuits concerning DTP increased, and insurance became more difficult to procure. As a result, Lederle decided in early 1986 to self-insure against such risks. In order to cover the costs of self-insurance, Lederle concluded that a substantial increase in the price of the vaccine would be necessary.

In order to communicate the price change to its own sales people, Lederle's Price Manager prepared "PRICE LETTER NO. E-48." This document was dated May 19, 1986, and indicated that effective May 20, 1986, the price of the DTP vaccine would be raised from \$51.00 to \$171.00 per vial. Price letters such as these were routinely sent to Lederle's sales force, but did not go to customers. Corinthian Pharmaceutical did not know of the existence of this internal price letter until a Lederle representative presented it to Corinthian several weeks after May 20, 1986.

Additionally, Lederle Labs also wrote a letter dated May 20, 1986, to its customers announcing the price increase and explaining the liability and insurance problems that brought about the change. Corinthian somehow gained knowledge of this letter on May 19, 1986, the date before the price increase was to take effect. In response to the knowledge of the impending price increase, Corinthian immediately ordered 1000 vials of DTP vaccine from Lederle. Corinthian placed its order on May 19, 1986, by calling Lederle's "Telgo" system. The Telgo system is a telephone computer ordering system that allows customers to place orders over the phone by communicating with a computer. After Corinthian placed its order with the Telgo system, the computer gave Corinthian a tracking number for its order. On the same date, Corinthian sent Lederle two written confirmations of its order. On each form Corinthian stated that this "order is to receive the \$64.32 per vial price."

On June 3, 1986, Lederle sent invoice 1771 to Corinthian for 50 vials of DTP vaccine priced at \$64.32 per vial. The invoice contained the standard Lederle conditions noted above. The 50 vials were sent to Corinthian and were accepted. At the same time, Lederle sent its customers, including Corinthian, a letter regarding DTP vaccine pricing and orders. This letter stated that the "enclosed represents a partial shipment of the order for DTP vaccine, which you placed with Lederle on May 19, 1986." The letter stated that under Lederle's standard terms and conditions of sale the normal policy would be to invoice the order at the price when shipment was made. However, in light of the magnitude of the price increase, Lederle had decided to make an exception to its terms and conditions and ship a portion of the order at the lower

price. The letter further stated that the balance would be priced at \$171.00, and that shipment would be made during the week of June 16. The letter closed, “If for any reason you wish to cancel the balance of your order, please contact [us] ... on or before June 13.”

Based on these facts, plaintiff Corinthian Pharmaceutical brings this action seeking specific performance for the 950 vials of DTP vaccine that Lederle Labs chose not to deliver. In support of its summary judgment motion, Lederle urges a number of alternative grounds for disposing of this claim, including that no contract for the sale of 1000 vials was formed, that if one was formed, it was governed by Lederle's terms and conditions, and that the 50 vials sent to Corinthian were merely an accommodation. Before reaching these issues, the relevant summary judgment standards must be set forth.

III. Discussion

. . . The fundamental question is whether Lederle Labs agreed to sell Corinthian Pharmaceuticals 1,000 vials of DTP vaccine at \$64.32 per vial. As shown below, the undisputed material facts mandate the conclusion as a matter of law that no such agreement was ever formed.

A. Lederle Labs Never Agreed to Sell 1,000 Vials at the Lower Price:

The starting point in this analysis is where did the first offer originate. An offer is “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” . . . The only possible conclusion in this case is that Corinthian's “order” of May 19, 1986, for 1,000 vials at \$64.32 was the first offer. Nothing that the seller had done prior to this point can be interpreted as an offer.

First, the price lists distributed by Lederle to its customers did not constitute offers. It is well settled that quotations are mere invitations to make an offer, Greenberg, U.C.C. Article 2 § 5.2 at 51; Corbin on Contracts §§ 26, 28 (1982), particularly where, as here, the price lists

specifically stated that prices were subject to change without notice and that all orders were subject to acceptance by Lederle. ***

Second, neither Lederle's internal price memorandum nor its letter to customers dated May 20, 1986, can be construed as an offer to sell 1,000 vials at the lower price. There is no evidence that Lederle intended Corinthian to receive the internal price memorandum, nor is there anything in the record to support the conclusion that the May 20, 1986, letter was an offer to sell 1,000 vials to Corinthian at the lower price. If anything, the evidence shows that Corinthian was not supposed to receive this letter until after the price increase had taken place. Moreover, the letter, just like the price lists, was a mere quotation (i.e., an invitation to submit an offer) sent to all customers. As such, it did not bestow on Corinthian nor other customers the power to form a binding contract for the sale of one thousand, or, for that matter, one million vials of vaccine.

Thus, as a matter of law, the first offer was made by Corinthian when it phoned in and subsequently confirmed its order for 1,000 vials at the lower price. The next question, then, is whether Lederle ever accepted that offer.

Under the Code, an acceptance need not be the mirror-image of the offer. U.C.C. § 2-207. However, the offeree must still do some act that manifests the intention to accept the offer and make a contract. Under § 2-206, an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. The first question regarding acceptance, therefore, is whether Lederle accepted the offer prior to sending the 50 vials of vaccine.

The record is clear that Lederle did not communicate or do any act prior to shipping the 50 vials that could support the finding of an acceptance. When Corinthian placed its order, it merely received a tracking number from the Telgo computer. Such an automated, ministerial act cannot constitute an acceptance. . . . Thus, there was no acceptance of Corinthian's offer prior to the delivery of 50 vials.

The next question, then, is what is to be made of the shipment of 50 vials and the accompanying letter. Section 2-206(b) of the Code speaks to this issue:

[A]n 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, *but such*

a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

§ 2–206 (emphasis added). Thus, under the Code a seller accepts the offer by shipping goods, whether they are conforming or not, but if the seller ships non-conforming goods and seasonably notifies the buyer that the shipment is a mere accommodation, then the seller has not, in fact, accepted the buyer's offer.

In this case, the offer made by Corinthian was for 1,000 vials at \$64.32. In response, Lederle Labs shipped only 50 vials at \$64.32 per vial, and wrote Corinthian indicating that the balance of the order would be priced at \$171.00 per vial and would be shipped during the week of June 16. The letter further indicated that the buyer could cancel its order by calling Lederle Labs. Clearly, Lederle's shipment was non-conforming, for it was for only 1/20th of the quantity desired by the buyer. *** The narrow issue, then, is whether Lederle's response to the offer was a shipment of non-conforming goods not constituting an acceptance because it was offered only as an accommodation under § 2–206.

An accommodation is an arrangement or engagement made as a favor to another. Black's Law Dictionary (5th ed. 1979). The term implies no consideration. *Id.* In this case, then, even taking all inferences favorably for the buyer, the only possible conclusion is that Lederle Labs' shipment of 50 vials was offered merely as an accommodation; that is to say, Lederle had no obligation to make the partial shipment, and did so only as a favor to the buyer. The accommodation letter, which Corinthian is sure it received, clearly stated that the 50 vials were being sent at the lower price as an exception to Lederle's general policy, and that the balance of the offer would be invoiced at the higher price. The letter further indicated that Lederle's proposal to ship the balance of the order at the higher price could be rejected by the buyer. Moreover, the standard terms of Lederle's invoice stated that acceptance of the order was expressly conditioned upon buyer's assent to the seller's terms.

Under these undisputed facts, § 2–206(1)(b) was satisfied. Where, as here, the notification is properly made, the shipment of nonconforming goods is treated as a counteroffer just as at common law, and the buyer may accept or reject the counteroffer under normal contract rules.

Thus, the end result of this analysis is that Lederle Lab's price quotations were mere invitations to make an offer, that by placing its order Corinthian made an offer to buy 1,000 vials at the low price, that by shipping 50 vials at the low price Lederle's response was non-conforming, but the non-conforming response was a mere accommodation and thus constituted a

counteroffer. Accordingly, there being no genuine issues of material fact on these issues and the law being in favor of the seller, summary judgment must be granted for Lederle Labs.

For all these reasons, the defendant's motion for summary judgment is granted.

Notes and Questions

1. The court mentioned the settlement between Corinthian and Lederle but does not explore how that context might have affected the expectations of the parties. What was the subject matter of the settlement? What specific restrictions did it place on Lederle?
2. Consider the following hypothetical: Wooden Toy Trucks Co. (WTTC) makes and sells wooden toy trucks to toy retailers. Sara's Toy Shop (STS) purchases wooden trucks for sale in its store. On July 1, STS sends an invoice to WTTC, using the WTTC order form, for 100 blue wooden toy trucks at the price of \$6.00 apiece. A week later, WTTC sends 100 red wooden toy trucks to STS. Have the parties formed a contract? If so, what are the terms?

C. UCC § 2-207 (Additional Terms in Acceptance or Confirmation)

The “Battle of the Forms”

The most substantial deviation from common-law contract formation principles comes from UCC § 2-207. As one professor has characterized it: “There is probably no other provision within U.C.C. Article 2 that provides more confusion to law students and more challenge to the instructor than does section 2-207.” Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 Mich. L. Rev. 2678, 2679 (2000). It is easy to become caught up in the statute's complexity without understanding the purpose of the section and the intent behind the design.

Under the common law approach to acceptances, any deviation from the terms of the offer will turn an acceptance into a counteroffer. This approach makes sense: in order to have a deal, the parties must agree on the terms. In practice, however, the last shot rule can lead to a “battle of the forms” where the last form wins. How does this work? Let's say the seller sends out a circular listing prices and goods in the nature of an advertisement or price quote. The buyer then sends to the seller a purchase order listing the quantity and type of goods and their listed price, along with other boilerplate language that the buyer's lawyers have inserted to

protect the buyer. Agreeing to the deal, the seller sends back the quantity and type of goods, but also includes a separate form with a set of new terms written by *its* attorneys to protect the seller. Because these terms are different, they would represent a counteroffer under the common law, which the buyer would then either countermand with another form or, more likely, ignore and complete performance, thereby accepting the seller's terms in full.

The UCC and its drafters did not like this result. They did not like to contemplate a potentially infinite set of responsive forms, nor did they like that sellers would generally “win” the battle in practice by sending a form with the goods that purported to control the transaction. At the same time, the UCC drafters had to acknowledge that contracts are voluntary agreements between two parties, and neither party should be tricked or dragooned into a binding deal. So how to manage the interaction to prevent sellers from dictating terms while not overriding either party's agency?

UCC § 2-207 attacks the mirror-image rule and abrogates it in certain circumstances. Section 2-207(1) begins the statute as follows: “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.” There are essentially two notable new rules in this first part:

- Something that looks like an acceptance but includes some additional or different terms nevertheless counts as an acceptance under this provision.
- However, this exception to the mirror image rule does not include responses that are conditional on the acceptance of the additional terms.

How does this work in practice? First, § 2-207 assumes that an offer has been made – there can be no “definite and seasonable expression of acceptance” without an offer. Second, in response to the offer, there are essentially four possible types of responses:

- A traditional counteroffer, where a key element of the transaction—the price, the quantity of the goods, or the type/quality of the goods—is changed. Common-law rules apply to this.
- A traditional acceptance which is a mirror image of the offer. Common-law rules also apply to this.
- A definite and seasonable expression of acceptance that includes different or additional terms but is not conditional. Under § 2-207(1), this counts as an acceptance and creates

a contract. But what to do with the additional terms? We will get to that later in the section.

- A definite and seasonable expression of acceptance that includes different or additional terms and is conditional on the acceptance of these terms in the contract. Some courts and commentators have likened this type of response to a traditional counteroffer, but it is not—it has its own special rules under UCC § 2-207(1) & (3).

The distinction between conditional and nonconditional “definite and seasonable expressions of acceptance,” and the ramifications of these conditional option, are explored in the case below.

Textile Unlimited, Inc. v. A..BMH and Company, Inc.

240 F.3d 781 (9th Cir. 2001)

THOMAS, Circuit Judge.

In this appeal, we consider, inter alia, the proper venue for a suit to enjoin an arbitration. Under the circumstances presented by this case, we conclude that the Federal Arbitration Act does not require venue in the contractually-designated arbitration locale.

Textile Unlimited, Inc. (“Textile”) claims that A..BMH and Company, Inc. (“A.. BMH”) is, in the parlance of the industry, spinning a yarn by contending that the two companies had agreed to settle contract disputes by binding arbitration in Georgia. A..BMH counters that Textile is warping the facts.

Over the course of ten months of this tangled affair, Textile bought goods from A..BMH in approximately thirty-eight transactions. Each followed a similar pattern. Textile would send a purchase order to a broker in California containing the date, item number, item description, quantity ordered, and price. A..BMH would respond with an invoice, followed by shipment of the yarn and an order acknowledgment. Both the invoice and the order acknowledgment contained a twist: additional terms tucked into the back of the invoice and the face of the acknowledgment, terms that had not adorned Textile's purchase order. Specifically, the A..BMH documents provided:

Terms. All sales of yarn by A..BMH & Co., Inc. (“Seller”) are governed by the terms and conditions below. Seller's willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale. If you do not accept these terms, you must notify Seller in writing within 24 hours of receiving Seller's Order Confirmation. If you accept delivery of Seller's yarn, you will be deemed to have

accepted these Terms of Sale in full. You expressly agree that these Terms of Sale supersede any different terms and conditions contained in your purchase order or in any other agreement.

Arbitration. All disputes arising in connection with this agreement shall be settled in Atlanta, Georgia by binding arbitration conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator will not be permitted to award punitive damages with respect to any dispute. Judgment upon the award rendered may be entered, and enforcement sought, in any court having jurisdiction. The total costs of arbitration, including attorneys' fees, will be paid by the losing party.

Governing Law and Venue. This transaction shall be governed by and construed in accordance with the laws of the State of Georgia. If any court action is brought to enforce the provisions of this agreement, venue shall lie exclusively in the Superior Court of Fulton County, Georgia. You expressly consent to personal jurisdiction in the Superior Court of Fulton County, Georgia, and waive the right to bring action in any other state or federal court.

Textile did not request any alterations. However, after receiving a shipment in September 1998, Textile refused to pay, alleging that the yarn was defective. A..BMH submitted the matter to arbitration in Atlanta, Georgia. The American Arbitration Association ("AAA") notified both parties on January 10, 2000, that it had received the arbitration request. Textile did not object to the arbitration within the time provided by AAA rules. Textile eventually protested, contending that the arbitration clause had not been woven into the contract. Textile also argued that the objection period should have been lengthened because the initial notice had been sent to an attorney no longer with its law firm. Textile reserved the right to challenge the jurisdiction of the AAA, and indicated that nothing in the letter should be deemed a waiver.

With arbitration looming, Textile filed an action on April 10, 2000 in the United States District Court for the Central District of California to enjoin the arbitration. Unruffled, the AAA Arbitrator found on May 5, 2000 that the case was arbitrable. On June 26, 2000, Textile moved for a stay of the arbitration pending in Georgia. On July 17, 2000, the district court preliminarily enjoined both the pending arbitration and A..BMH from any further action regarding arbitration of the dispute in question. A..BMH timely appealed the district court's order.

The district court did not abuse its discretion in granting the preliminary injunction. * * *

The district court found that Textile would suffer irreparable harm if the arbitration were not stayed, that the balance of hardships tipped in Textile's favor and that it was in the public interest to stay arbitration. These findings were not clearly erroneous, and A..BMH does not contest them on appeal.

Thus, to obtain a preliminary injunction, Textile needed only to show that serious questions were raised. The district court determined that not only were serious questions raised, but that Textile had shown a probability of success on the merits. The district court did not err in that assessment.

Section 2207 of the California Commercial Code [UCC § 2-207] controls contract interpretation when the parties have exchanged conflicting forms. See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443-44 (9th Cir.1986) (holding that a corresponding section of the Oregon U.C.C. statute applies in such circumstances). It provides:

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

Under § 2207(1), an acceptance will operate to create a contract even if additional or different terms are stated unless the acceptance is expressly conditioned on assent to the new terms. If

a contract is created under § 2207(1), then § 2207(2) defines the terms of the contract. *** However, if the acceptance is expressly conditioned on the offeror's assent to the new terms, the acceptance operates as a counteroffer. If the counteroffer is accepted, a contract exists and the additional terms become part of the contract. *Diamond Fruit Growers*, 794 F.2d at 1443. To qualify as an acceptance under § 2207(1), an offeror must “give specific and unequivocal assent” to the supplemental terms. *Id.* at 1445. If the new provisos are not accepted, then no contract is formed. However, even when the parties' written expressions do not establish a binding agreement under § 2207(1), a contract may arise based upon their subsequent conduct pursuant to § 2207(3). *Id.*

A..BMH argues that a contract including the arbitration clause was formed pursuant to § 2207(1) because the fine print provided that Textile was “deemed to have accepted these terms in full” if Textile did not respond in 24 hours. This contention is foreclosed by *Diamond Fruit Growers*, because Textile did not “give specific and unequivocal assent” to the supplemental conditions. Thus, a contract containing the new terms that A.. BMH attempted to pin on Textile was not formed under § 2207(1).

Part of the *Diamond Fruit Growers*' rationale was to avoid a rule which would allow one party to obtain “all of its terms simply because it fired the last shot in the exchange of forms.” *Id.* at 1444. In short, modern commercial transactions conducted under the U.C.C. are not a game of tag or musical chairs. Rather, if the parties exchange incompatible forms, “all of the terms on which the parties' forms do not agree drop out, and the U.C.C. supplies the missing terms.” *Id.*

A..BMH also claims that a contract formed under § 2207(1) because its acceptance was not expressly made conditional on Textile's assent to the additional or different terms. Thus, A..BMH reasons, a contract was formed under § 2207(1) and we must turn to § 2207(2) to ascertain the contract terms. However, A..BMH's assertion is belied by the plain words of its documents which provide that “Seller's willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale.” Thus, A..BMH's claim is unavailing.

Because no contract was formed under § 2207(1), our interpretation of the agreement must be guided by § 2207(3) which examines the conduct of the parties to determine whether a contract for sale has been established and the terms thereof. The parties do not dispute that through their actions, they formed a contract under § 2207(3).

The terms of an agreement formed pursuant to § 2207(3) are those terms upon which the parties expressly agreed, coupled with the standard “gap-filler” provisions of Article Two. The U.C.C. does not contain a “gap-filler” provision providing for arbitration. * * *

Under § 2207(3), the disputed additional items on which the parties do not agree simply “drop out” and are trimmed from the contract. *Diamond Fruit Growers*, 794 F.2d at 1445. Thus, the supplemental terms proposed by A..BMH, including the arbitration clause, do not festoon the contract between the parties.

Finally, contrary to A..BMH's assertions, Textile did not waive its objection to arbitration by failing to object within the time period specified in the arbitration rules. Because Textile never entered into an arbitration agreement, the district court correctly found that Textile did not forgo its right to contest the arbitration by neglecting to timely object. Textile cannot be said to have relinquished a right under a set of rules to which it never agreed.

Notes and Questions

1. In its original communications, A..BMH seemed to assume that by making its responses conditional, it could control the transaction's terms. Why did the court not find that A..BMH's conditional responses to result in the inclusion of the conditional terms? Was this the intent of the drafters of UCC § 2-207?
2. What would your advice to A..BMH be for their next round of contracts with Textile Unlimited if they in fact did not want to contract without including the arbitration and governing law and venue terms?
3. Under what circumstances will courts determine that a “definite and seasonable expression of acceptance” is conditional? Courts have displayed a reluctance to find expressions of acceptance to be conditional without the inclusion of words like “conditional” or “conditioned upon,” as in *Textile Unlimited*.
4. In *DTE Energy Techs., Inc. v. Briggs Elec., Inc.*, No. 06-12347, 2007 WL 674321, at *6–7 (E.D. Mich. Feb. 28, 2007), the seller responded to the buyer's offer with a standard form that included the following language:

Entire Agreement. These Standard Terms and Conditions of Sale . . . set forth and forms the entire understanding between . . . (“Seller”) and Buyer with respect to the products described in the Sale Agreement. All

prior other and collateral agreements, representations, warranties, promises and conditions relating to the subject matter of this Agreement are superseded by this Agreement. No additions to or variations from these Terms and Conditions shall be binding unless in a writing executed by Seller's President or one of Seller's Vice Presidents and Buyer. If Buyer's purchase order is referenced, it is solely for inclusion of a purchase order number and none of the terms and conditions of any purchase order or other Buyer document shall apply.

The court held that this language was not an “express rejection” of the buyer’s purchase order and thus not conditional under § 2-207(1). The court stated: “The provision Plaintiff contends is an express rejection does not contemplate the buyer's assent to the additional or different terms. Rather, it makes any additional or different terms binding with or without the buyer's assent. Because the Order Acknowledgment was not expressly conditional on Defendant's assent to the additional terms, ‘[t]he additional terms are to be construed as proposals for addition to the contract.’” MICH. COMP. LAWS § 440.2207(2).”

Another example of this determination between conditional and nonconditional, as well as an exploration of the ramifications of a nonconditional expression of acceptance with different terms, can be found below.

Gardner Zemke Company v. Dunham Bush, Inc.

850 P.2d 319 (Supreme Court of New Mexico 1993)

FRANCHINI, Justice.

This case involves a contract for the sale of goods and accordingly the governing law is the Uniform Commercial Code—Sales, as adopted in New Mexico. NMSA 1978, §§ 55–2–101 to –2–725 (Orig.Pamp. & Cum.Supp.1992) (Article 2). In the course of our discussion, we will also refer to pertinent general definitions and principles of construction found in NMSA 1978, Sections 55–1–101 to –1–209 (Orig.Pamp. & Cum.Supp.1992). Section 55–2–103(4). The case presents us with our first opportunity to consider a classic “battle of the forms” scenario arising under Section 55–2–207. Appellant Gardner Zemke challenges the trial court’s judgment that a Customer’s Acknowledgment (Acknowledgment) sent by appellee manufacturer Dunham Bush, in response to a Gardner Zemke Purchase Order (Order), operated as a counteroffer, thereby providing controlling warranty terms under the contract

formed by the parties. We find merit in appellants' argument and remand for the trial court's reconsideration.

I.

Acting as the general contractor on a [U.S.] Department of Energy (DOE) project, Gardner Zemke issued its Order to Dunham Bush for air-conditioning equipment, known as chillers, to be used in connection with the project. The Order contained a one-year manufacturer's warranty provision and the requirement that the chillers comply with specifications attached to the Order. Dunham Bush responded with its preprinted Acknowledgment containing extensive warranty disclaimers, a statement that the terms of the Acknowledgment controlled the parties' agreement, and a provision deeming silence to be acquiescence to the terms of the Acknowledgment.

The parties did not address the discrepancies in the forms exchanged and proceeded with the transaction. Dunham Bush delivered the chillers, and Gardner Zemke paid for them. Gardner Zemke alleges that the chillers provided did not comply with their specifications and that they incurred additional costs to install the nonconforming goods. Approximately five or six months after start-up of the chillers, a DOE representative notified Gardner Zemke of problems with two of the chillers. In a series of letters, Gardner Zemke requested on-site warranty repairs. Through its manufacturer's representative, Dunham Bush offered to send its mechanic to the job site to inspect the chillers and absorb the cost of the service call only if problems discovered were within any component parts it provided. Further, Dunham Bush required that prior to the service call a purchase order be issued from the DOE, to be executed by Dunham Bush for payment for their services in the event their mechanic discovered problems not caused by manufacturing defects. Gardner Zemke rejected the proposal on the basis that the DOE had a warranty still in effect for the goods and would not issue a separate purchase order for warranty repairs.

Ultimately, the DOE hired an independent contractor to repair the two chillers. The DOE paid \$24,245.00 for the repairs and withheld \$20,000.00 from its contract with Gardner Zemke.¹ This breach of contract action then ensued, with Gardner Zemke alleging failure by Dunham Bush to provide equipment in accordance with the project plans and specifications and failure to provide warranty service.

II.

On cross-motions for summary judgment, the trial court granted partial summary judgment in favor of Dunham Bush, ruling that its Acknowledgment was a counteroffer to the Gardner Zemke Order and that the Acknowledgment's warranty limitations and disclaimers were controlling. Gardner Zemke filed an application for interlocutory appeal from the partial summary judgment in this Court, which was denied. A bench trial was held in December 1991, and the trial court again ruled the Acknowledgment was a counteroffer which Gardner Zemke accepted by silence and that under the warranty provisions of the Acknowledgment, Gardner Zemke was not entitled to damages.

On appeal, Gardner Zemke raises two issues: (1) the trial court erred as a matter of law in ruling that the Acknowledgment was a counteroffer; and (2) Gardner Zemke proved breach of contract and contract warranty, breach of code warranties, and damages.

III.

Karl N. Llewellyn, the principal draftsman of Article 2, described it as “[t]he heart of the Code.” Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U.Fla.L.Rev. 367, 378 (1957). Section 2–207 is characterized by commentators as a “crucial section of Article 2” and an “iconoclastic Code section.” Bender’s Uniform Commercial Code Service (Vol. 3, Richard W. Duesenberg & Lawrence P. King, *Sales & Bulk Transfers Under The Uniform Commercial Code*) § 3.01 at 3–2 (1992). Recognizing its innovative purpose and complex structure Duesenberg and King further observe Section 2–207 “is one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory.” *Id.* § 3.02 at 3–13.

Section 55–2–207 provides:

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

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct 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. 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 [this chapter].

Relying on Section 2–207(1), Gardner Zemke argues that the trial court erred in concluding that the Dunham Bush Acknowledgment was a counteroffer rather than an acceptance. Gardner Zemke asserts that even though the Acknowledgment contained terms different from or in addition to the terms of their Order, it did not make acceptance expressly conditional on assent to the different or additional terms and therefore should operate as an acceptance rather than a counteroffer.

At common law, the “mirror image” rule applied to the formation of contracts, and the terms of the acceptance had to exactly imitate or “mirror” the terms of the offer. *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th Cir.1979). If the accepting terms were different from or additional to those in the offer, the result was a counteroffer, not an acceptance. *Id.*; see also *Silva v. Noble*, 85 N.M. 677, 678–79, 515 P.2d 1281, 1282–83 (1973). Thus, from a common law perspective, the trial court’s conclusion that the Dunham Bush Acknowledgment was a counteroffer was correct.

However, the drafters of the Code “intended to change the common law in an attempt to conform contract law to modern day business transactions.” *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 551 (D.Del.1981). As Professors White and Summers explain:

The rigidity of the common law rule ignored the modern realities of commerce. Where preprinted forms are used to structure deals, they rarely mirror each other, yet the parties usually assume they have a binding contract and act accordingly. Section 2–207 rejects the common law mirror image rule and converts many common law counteroffers into acceptances under 2–207(1).

James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 1–3 at 29–30 (3d ed. 1988) (footnotes omitted).

On its face, Section 2–207(1) provides that a document responding to an offer and purporting to be an acceptance will be an acceptance, despite the presence of additional and different terms. Where merchants exchange preprinted forms and the essential contract terms agree, a contract is formed under Section 2–207(1). Duesenberg & King, § 3.04 at 3–47 to –49. A responding document will fall outside of the provisions of Section 2–207(1) and convey a counteroffer, only when its terms differ radically from the offer, or when “acceptance is expressly made conditional on assent to the additional or different terms”—whether a contract is formed under Section 2–207(1) here turns on the meaning given this phrase.

Dunham Bush argues that the language in its Acknowledgment makes acceptance expressly conditional on assent to the additional or different terms set forth in the Acknowledgment. The face of the Acknowledgment states:

IT IS UNDERSTOOD THAT OUR ACCEPTANCE OF THIS ORDER IS
SUBJECT TO THE TERMS AND CONDITIONS ENUMERATED ON
THE REVERSE SIDE HEREOF, IT BEING STRICTLY UNDERSTOOD
THAT THESE TERMS AND CONDITIONS BECOME A PART OF THIS
ORDER AND THE ACKNOWLEDGMENT THEREOF.

The following was among the terms and conditions on the reverse side of the Acknowledgment.

Failure of the Buyer to object in writing within five (5) days of receipt thereof to Terms of Sale contained in the Seller’s acceptance and/or acknowledgment, or other communications, shall be deemed an acceptance of such Terms of Sale by Buyer.

In support of its contention that the above language falls within the “expressly conditional” provision of Section 2–207, Dunham Bush urges that we adopt the view taken by the First Circuit in *Roto–Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir.1962). There, Roto–Lith sent an order for goods to Bartlett, which responded with an acknowledgment containing warranty disclaimers, a statement that the acknowledgment reflected the terms of the sale, and a provision that if the terms were unacceptable Roto–Lith should notify Bartlett at once. *Id.* at 498–99. Roto–Lith did not protest the terms of the acknowledgment and accepted and paid for the goods. The court held the Bartlett acknowledgment was a counteroffer that became binding on Roto–Lith with its acceptance of the goods, reasoning that “a response which states a condition materially altering the obligation solely to the disadvantage of the offeror” falls within the “expressly conditional” language of 2–207(1). *Id.* at 500.

Dunham Bush suggests that this Court has demonstrated alliance with the principles of Roto–Lith in *Fratello v. Socorro Electric Cooperative, Inc.*, 107 N.M. 378, 758 P.2d 792 (1988). *Fratello* involved the terms of a settlement agreement in which one party sent the other party a proposed stipulated order containing an additional term. In the context of the common law, we cited Roto–Lith in support of the proposition that the additional term made the proposed stipulation a counteroffer. *Fratello*, 107 N.M. at 381, 758 P.2d at 795.

We have never adopted Roto–Lith in the context of the Code and decline to do so now. While ostensibly interpreting Section 2–207(1), the First Circuit’s analysis imposes the common law doctrine of offer and acceptance on language designed to avoid the common law result. Roto–Lith has been almost uniformly criticized by the courts and commentators as an aberration in Article 2 jurisprudence. *Leonard Pevar Co.*, 524 F.Supp. at 551 (and cases cited therein); *Duesenberg & King*, § 3.05[1] at 3–61 to –62; *White & Summers*, § 1–3 at 36–37.

Mindful of the purpose of Section 2–207 and the spirit of Article 2, we find the better approach suggested in *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir.1972). In *Dorton*, the Sixth Circuit considered terms in acknowledgment forms sent by Collins & Aikman similar to the terms in the Dunham Bush Acknowledgment. The Collins & Aikman acknowledgments provided that acceptance of orders was subject to the terms and conditions of their form, together with at least seven methods in which a buyer might acquiesce to their terms, including receipt and retention of their form for ten days without objection. *Id.* at 1167–68.

Concentrating its analysis on the concept of the offeror’s “assent,” the Court reasoned that it was not enough to make acceptance expressly conditional on additional or different terms; instead, the expressly conditional nature of the acceptance must be predicated on the offeror’s “assent” to those terms. *Id.* at 1168. The Court concluded that the “expressly conditional” provision of Section 2–207(1) “was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms therein.” *Id.* This approach has been widely accepted. *Diatom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1576–77 (10th Cir.1984); *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 588 F.Supp. 1280, 1288 (E.D.Pa.1984); *Idaho Power Co.*, 596 F.2d at 926–27.

We agree with the court in *Dorton* that the inquiry focuses on whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offerors “assent” to additional or different terms. An exchange of forms containing identical dickered terms, such as the identity, price, and quantity of goods, and

conflicting undickered boilerplate provisions, such as warranty terms and a provision making the bargain subject to the terms and conditions of the offeree's document, however worded, will not propel the transaction into the "expressly conditional" language of Section 2-207(1) and confer the status of counteroffer on the responsive document.

While Dorton articulates a laudable rule, it fails to provide a means for the determination of when a responsive document becomes a counteroffer. We adopt the rule in Dorton and add that whether an acceptance is made expressly conditional on assent to different or additional terms is dependent on the commercial context of the transaction. Official Comment 2 to Section 55-2-207 suggests that "[u]nder this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."² While the comment applies broadly and envisions recognition of contracts formed under a variety of circumstances, it guides us to application of the concept of "commercial understanding" to the question of formation. See 2 William D. Hawkland, Uniform Commercial Code Series § 2-207:02 at 160 (1992) ("The basic question is whether, in commercial understanding, the proposed deal has been closed.").

Discerning whether "commercial understanding" dictates the existence of a contract requires consideration of the objective manifestations of the parties' understanding of the bargain. It requires consideration of the parties' activities and interaction during the making of the bargain; and when available, relevant evidence of course of performance, Section 55-2-208; and course of dealing and usage of the trade, Section 55-1-205. The question guiding the inquiry should be whether the offeror could reasonably believe that in the context of the commercial setting in which the parties were acting, a contract had been formed. This determination requires a very fact specific inquiry. See John E. Murray, Jr., *Section 2-207 Of The Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. Pitt. L. Rev. 597, 632-34 (1978) (discussing Dorton and identifying the commercial understanding of the reasonable buyer as the "critical inquiry").

Our analysis does not yield an iron clad rule conducive to perfunctory application. However, it does remain true to the spirit of Article 2, as it calls the trial court to consider the commercial setting of each transaction and the reasonable expectations and beliefs of the parties acting in that setting. *Id.* at 600; § 55-1-102(2)(b) (stating one purpose of the act is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties").

The trial court's treatment of this issue did not encompass the scope of the inquiry we envision. We will not attempt to make the factual determination necessary to characterize this transaction on the record before us. Not satisfied that the trial court adequately considered all of the relevant factors in determining that the Dunham Bush Acknowledgment functioned as a counteroffer, we remand for reconsideration of the question.

In the event the trial court concludes that the Dunham Bush Acknowledgment constituted an acceptance, it will face the question of which terms will control in the exchange of forms. In the interest of judicial economy, and because this determination is a question of law, we proceed with our analysis.

IV.

The Gardner Zemke Order provides that the “[m]anufacturer shall replace or repair all parts found to be defective during initial year of use at no additional cost.” Because the Order does not include any warranty terms, Article 2 express and implied warranties arise by operation of law. Section 55–2–313 (express warranties), § 55–2–314 (implied warranty of merchantability), § 55–2–315 (implied warranty of fitness for a particular purpose). The Dunham Bush Acknowledgment contains the following warranty terms.

WARRANTY: We agree that the apparatus manufactured by the Seller will be free from defects in material and workmanship for a period of one year under normal use and service and when properly installed: and our obligation under this agreement is limited solely to repair or replacement at our option, at our factories, of any part or parts thereof which shall within one year from date of original installation or 18 months from date of shipment from factory to the original purchaser, whichever date may first occur be returned to us with transportation charges prepaid which our examination shall disclose to our satisfaction to have been defective. THIS AGREEMENT TO REPAIR OR REPLACE DEFECTIVE PARTS IS EXPRESSLY IN LIEU OF AND IS HEREBY DISCLAIMER OF ALL OTHER EXPRESS WARRANTIES, AND IS IN LIEU OF AND IN DISCLAIMER AND EXCLUSION OF ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ALL OTHER IMPLIED WARRANTIES, IN LAW OR EQUITY, AND OF ALL OTHER OBLIGATIONS OR LIABILITIES ON OUR PART. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION

HEREOF.... Our obligation to repair or replace shall not apply to any apparatus which shall have been repaired or altered outside our factory in any way....

The one proposition on which most courts and commentators agree at this point in the construction of the statute is that Section 2–207(3) applies only if a contract is not found under Section 2–207(1). Dorton, 453 F.2d at 1166; Duesenberg & King, § 3.03[1] at 3–40; 2 Hawkland, § 2–207:04 at 178–79; White & Summers, § 1–3 at 35. However, there are courts that disagree even with this proposition. See *Westinghouse Elec. Corp. v. Nielsons, Inc.*, 647 F. Supp. 896 (D.Colo.1986) (dealing with different terms, finding a contract under 2–207(1) and proceeding to apply 2–207(2) and 2–207(3)).

The language of the statute makes it clear that “additional” terms are subject to the provisions of Section 2–207(2). However, a continuing controversy rages among courts and commentators concerning the treatment of “different” terms in a Section 2–207 analysis. While Section 2–207(1) refers to both “additional or different” terms, Section 2–207(2) refers only to “additional” terms. The omission of the word “different” from Section 55–2–207(2) gives rise to the questions of whether “different” terms are to be dealt with under the provisions of Section 2–207(2), and if not, how they are to be treated. That the terms in the Acknowledgment are “different” rather than “additional” guides the remainder of our inquiry and requires that we join the fray. Initially, we briefly survey the critical and judicial approaches to the problem posed by “different” terms.

One view is that, in spite of the omission, “different” terms are to be analyzed under Section 2–207(2). 2 Hawkland, § 2–207:03 at 168. The foundation for this position is found in Comment 3, which provides “[w]hether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2).” Armed with this statement in Comment 3, proponents point to the ambiguity in the distinction between “different” and “additional” terms and argue that the distinction serves no clear purpose. *Steiner v. Mobile Oil Corp.*, 20 Cal.3d 90, 141 Cal. Rptr. 157, 165–66 n. 5, 569 P.2d 751, 759–60 n. 5 (1977); *Boese–Hilburn Co. v. Dean Machinery Co.*, 616 S.W.2d 520, 527 (Mo.Ct.App.1981). Following this rationale in this case, and relying on the observation in Comment 4 that a clause negating implied warranties would “materially alter” the contract, the Dunham Bush warranty terms would not become a part of the contract, and the Gardner Zemke warranty provision, together with the Article 2 warranties would control. § 55–2–207(2)(b).

Another approach is suggested by Duesenberg and King who comment that the ambiguity found in the treatment of “different” and “additional” terms is more judicially created than statutorily supported. While conceding that Comment 3 “contributes to the confusion,” they

also admonish that “the Official Comments do not happen to be the statute.” Duesenberg & King, § 3.05 at 3–52. Observing that “the drafters knew what they were doing, and that they did not sloppily fail to include the term ‘different’ when drafting subsection (2),” Duesenberg and King postulate that a “different” term in a responsive document operating as an acceptance can never become a part of the parties’ contract under the plain language of the statute. *Id.* § 3.03[1] at 3–38.

The reasoning supporting this position is that once an offeror addresses a subject it implicitly objects to variance of that subject by the offeree, thereby preventing the “different” term from becoming a part of the contract by prior objection and obviating the need to refer to “different” terms in Section 55–2–207(2). *Id.* § 3.05[1] at 3–77; *Air Prods. & Chems. Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 206 N.W.2d 414, 423–25 (1973). Professor Summers lends support to this position. White & Summers, § 1–3 at 34. Although indulging a different analysis, following this view in the case before us creates a result identical to that flowing from application of the provisions of Section 2–207(2) as discussed above—the Dunham Bush warranty provisions fall out, and the stated Gardner Zemke and Article 2 warranty provisions apply.

Yet a third analysis arises from Comment 6, which in pertinent part states:

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in Subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act, including Subsection (2).

The import of Comment 6 is that “different” terms cancel each other out and that existing applicable code provisions stand in their place. The obvious flaws in Comment 6 are the use of the words “confirming forms,” suggesting the Comment applies only to variant confirmation forms and not variant offer and acceptance forms, and the reference to Subsection 55–2–207(2)—arguably dealing only with “additional” terms—in the context of “different” terms. Of course, Duesenberg and King remind us that Comment 6 “is only a comment, and a poorly drawn one at that.” Duesenberg & King, § 3.05[1] at 3–79.

The analysis arising from Comment 6, however, has found acceptance in numerous jurisdictions including the Tenth Circuit. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578–79

(10th Cir.1984). Following a discussion similar to the one we have just indulged, the court found this the preferable approach. *Id.* at 1579; accord *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 503–04, 567 P.2d 1246, 1254–55 (1977), appeal dismissed and cert. denied, 434 U.S. 1056, 98 S.Ct. 1225, 55 L.Ed.2d 757 (1978). Professor White also finds merit in this analysis. White & Summers, § 1–3 at 33–35. Application of this approach here cancels out the parties’ conflicting warranty terms and allows the warranty provisions of Article 2 to control.

We are unable to find comfort or refuge in concluding that any one of the three paths drawn through the contours of Section 2–207 is more consistent with or true to the language of the statute. We do find that the analysis relying on Comment 6 is the most consistent with the purpose and spirit of the Code in general and Article 2 in particular. We are mindful that the overriding goal of Article 2 is to discern the bargain struck by the contracting parties. However, there are times where the conduct of the parties makes realizing that goal impossible. In such cases, we find guidance in the Code’s commitment to fairness, Section 55–1–102(3); good faith, Sections 55–1–203 & –2–103(1)(b); and conscionable conduct, Section 55–2–302.

While Section 2–207 was designed to avoid the common law result that gave the advantage to the party sending the last form, we cannot conclude that the statute was intended to shift that advantage to the party sending the first form. Such a result will generally follow from the first two analyses discussed. We adopt the third analysis as the most even-handed resolution of a difficult problem. We are also aware that under this analysis even though the conflicting terms cancel out, the Code may provide a term similar to one rejected. We agree with Professor White that “[a]t least a term so supplied has the merit of being a term that the draftsmen considered fair.” White & Summers, § 1–3 at 35.

Due to our disposition of this case, we do not address the second issue raised by Gardner Zemke. On remand, should the trial court conclude a contract was formed under Section 2–207(1), the conflicting warranty provisions in the parties’ forms will cancel out, and the warranty provisions of Article 2 will control.

IT IS SO ORDERED.

Notes and Questions

1. Proposals made as part of a nonconditional seasonable expression of acceptance are considered under UCC § 2-207(2) for inclusion in the contract. (Note, as well, that this

applies to proposals made through written confirmations after a contract has already been concluded.) Section 2-207(2) states that such proposals are included unless any of these three apply: “(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.” When would a proposed term “materially alter” the deal? Courts have generally found this to be a question of fact, determined on a case-by-case basis. See *Leonard Pevar Co. v. Evans Prod. Co.*, 524 F. Supp. 546, 550 (D. Del. 1981) (“[T]he question of a material alteration rests upon the facts of each case.”). Commentary to § 2-207 provides some guidelines: clauses may “materially alter” the contract if they “so result in surprise or hardship if incorporated without express awareness by the other party,” (Comment 4) whereas there’s no material alteration if they “involve no element of unreasonable surprise.” (Comment 5).

2. Most cases discussing § 2-207 focus on the difference between conditional expressions of acceptance and nonconditional expressions of acceptance. However, there is still the possibility for a traditional common-law counteroffer that is not an “expression of acceptance.” These counteroffers propose a change to a key element of the transaction—the price of the goods, the quantity of the goods, or the type or quality of the goods. It would be a mistake to force a set of interactions into the § 2-207 box when the parties differ on one of these key terms. As the court stated in *Laforce, Inc. v. Pioneer Gen. Contractors, Inc.*, No. 299848, 2011 WL 4467762, at *5 (Mich. Ct. App. Sept. 27, 2011):

LaForce argues in its brief on appeal that the “effect of [UCC §] 2-207 is to eliminate the common law ‘mirror-image rule.’” But section 2-207 did not completely eliminate the rule; it merely “altered” it Moreover, the federal and state courts that have considered this issue have held that the common law “mirror-image” rule must be applied with respect to “dickered terms.” Where a response to an offer changes the description of the price or any other dickered term in the offer, courts have held that such a response is a counteroffer, clearly indicating that section 2-207 has no application to such facts.

See also Herm Hughes & Sons v. Quintek, 834 P.2d 582 (Utah Ct.App.1992), (“Given the materiality of the payment terms to this contract, Quintek's bid proposal and Hughes's supplier's agreement fail to evidence a ‘meeting of the minds’ sufficient to establish a

contract.”); *Gage Prods. Co. v. Henkel Corp.*, 393 F3d 629, 637–638 (CA 6, 2004) (buyer’s purchase orders with changed prices are not acceptances of the seller’s prices, but instead counter-offers that the seller accepted when it shipped its products to the buyer and sent invoices at prices that matched the purchase orders’ prices).

UCC § 2-207 and Consumer (Rolling) Contracts

Should anything about UCC § 2-207 and the “Battle of the Forms” change when the agreement is between a business and its consumer? Consider the cases below:

ProCD, Inc. v. Zeidenberg

86 F.3d 1447 (7th Cir. 1996)

EASTERBROOK, Circuit Judge.

Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not [because] they are not contracts because the licenses are inside the box rather than printed on the outside.... 908 F. Supp. 640 (W.D. Wis. 1996). [W]e disagree with the district judge’s conclusion.... Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). See Paul J. Heald, *The Vices of Originality*, 1991 Sup.Ct. Rev. 143, 160–68. ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means “compact disc—read only memory.” The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap,” and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license,” but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program

that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than \$10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately \$150 for the set of five discs) while selling information to the trade for a higher price....

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over \$150. The ensuing reduction in sales would harm consumers who value the information at, say, \$200. They get consumer surplus of \$50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase. 908 F. Supp. at 654.

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between “contracts” and “licenses” ... is a subject for another day. See *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an “offer,” which the customer “accepts” by paying the asking price and leaving the store with the goods. *Peeters v. State*, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a

contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).... Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not

only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2–201, and other citations are easy to derive.) One of the court's reasons—that by proposing as part of the draft Article 2B a new UCC § 2–2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F. Supp. at 655–56—depends on a faulty inference. To propose a change in a law's *text* is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction—although businesses seem to feel less uncertainty than do scholars, for only

three cases (other than ours) touch on the subject, and none directly addresses it. See *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268–70 (5th Cir. 1988); *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F.Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. Step-Saver is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails.... Our case has only one form; UCC § 2–207 is irrelevant. *Vault* holds that Louisiana’s special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is § 2–204(1): “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.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer’s net gains.

Section 2–606, which defines “acceptance of goods”, reinforces this understanding. A buyer accepts goods under § 2–606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2–602(1). ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2–606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see *Gillen v. Atalanta Systems, Inc.*, 997 F.2d 280, 284 n. 1 (7th Cir. 1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be “conspicuous.” UCC § 2–316(2), incorporating UCC § 1–201(10). Promises to make firm offers, or to negate oral modifications, must be “separately signed.” UCC §§ 2–205, 2–209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case—for that matter, any case in any state—holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for \$100 rather than \$150—although any of these changes would be welcomed by the customer, if all other things were held constant—so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of “the product” than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir.1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers’ favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off....

Reversed and Remanded.

Notes and Questions

1. Why does the court in ProCD conclude that § 2-207 does not apply? Is that the correct outcome?
2. Is the silence of Zeidenberg, the buyer, in the face of ProCD’s licenses, sufficient to accept the disclosed terms? If not, what is the basis for concluding that he assented to the terms.
3. The type of formation recognized in ProCD – where the deferred terms found inside the package are reviewed and the terms are accepted via use – is sometimes referred to

as a “rolling contract.” One argument in favor of enforcing rolling contracts like the licenses at issue in ProCD is that although customers are unlikely to read them, if customers nonetheless expect rolling terms and are presented with an opportunity to read and contemplate them before finally accepting them— ideally “in the quiet of their own homes” – then those terms should be enforced. *See* Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 756 (2002).

4. Randy Barnett proposes the following hypothetical about late-arriving terms. “Suppose I say to my dearest friend, Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.’ Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later?” Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 636 (2002).
5. Courts sometimes refer to terms inside a sealed box as “shrinkwrap” terms (because the customer must tear the shrinkwrap on the package to get at them). As we saw in the module on acceptance, terms that are presented on a website via a clickable box are called “clickwrap” terms. Judge Easterbrook didn’t use the term, but he described the delivery of the clickwrap terms: “the license [splashed] on the screen” beyond which the software would not let Zeidenberg “proceed without indicating acceptance.”
6. Tess Wilkinson-Ryan conducted an experiment where respondents were presented with terms that disfavored customers in one of three scenarios: 1) a standard contract where terms were presented prior to purchase; 2) a rolling contract situation where terms in a separate document were incorporated by reference into a hotel Guest Binder or a rental car agency’s “Welcome” folder; 3) the terms were in an unreferenced Guest Binder in each hotel room or on the rental agency’s website. Respondents treated rolling contracts terms as equally fair and enforceable with standard contract terms and concluded that the customer effectively received the same notice in the standard and rolling contract contexts. But a separate study asking respondents to compare a standard and rolling contract in a gym membership context rated the standard contract as far better for customers than the rolling contract.

Do these results suggest that rolling contract terms should generally be enforced as written?

7. Draft language of the Restatement of the Law of Consumer Contracts § 2(b) (2017), states that:

When a standard contract term is available for review only after the consumer signifies assent to the transaction, the standard contract term is adopted as part of the consumer contract if

- (1) the consumer receives reasonable notice regarding the existence of the standard contract term before signifying assent to the transaction, and
- (2) the consumer has a reasonable opportunity to terminate the transaction after the standard contract term is made available for review, and does not exercise that power.

Illustration 19 to § 2 provides an example transaction:

A consumer visits a store to purchase a product. Upon payment at the cash register, the consumer is handed a receipt conspicuously referencing additional terms and noting that these additional terms can be obtained at the customer-service desk. If the service desk is accessible without undue delay or hardship, and if the store allows a consumer to terminate the transaction after receiving the additional terms, then they are adopted under subsection (b). If, however, the additional terms are not readily available upon the consumer's request, or if the consumer is not allowed to terminate the transaction after payment, the additional terms are not adopted as part of the consumer contract.

In light of this provision, would you conclude that Zeidenberg received "conspicuous" notice of the additional terms?

Hill v. Gateway 2000, Inc.

105 F.3d 1147 (7th Cir. 1997)

EASTERBROOK, Circuit J.

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "[t]he present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right. 9 U.S.C. § 16(a)(1)(A).

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L. Ed. 2d 902 (1996), holds that this provision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *Chicago Pacific Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir. 1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L. Ed. 2d 622 (1991), enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. ProCD and Carnival Cruise Lines exemplify the many commercial transactions in which people pay for products with terms to follow; ProCD discusses others. 86 F.3d at 1451–52. The district court concluded in ProCD that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id.* at 1452. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its

software. ProCD relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; ProCD therefore applies to this dispute.

Plaintiffs ask us to limit ProCD to software, but where's the sense in that? ProCD is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came with an operating system, without which it was useful only as a boat anchor. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996). Gateway also included many application programs. So the Hills' effort to limit ProCD to software would not avail them factually, even if it were sound legally—which it is not.

For their second sally, the Hills contend that ProCD should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the formation of the contract rather than its performance, and factually because both contracts were incompletely performed. ProCD did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in ProCD was no more executory than the one here: Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of

contractual terms, then the time ended in ProCD before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of future performance that some consumers value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that ProCD is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless ...". Plaintiffs tell us that ProCD came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in ProCD, which concluded that, when there is only one form, "sec. 2-207 is irrelevant." 86 F.3d at 1452. The question in ProCD was not whether terms were added to a contract after its formation, but how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. ProCD answers "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of ProCD. A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction", § 2-104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the

aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson–Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

... The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

Klocek v. Gateway, Inc.

104 F. Supp. 2d 1332 (District of Kansas 2000)

VRATIL, District Judge.

William S. Klocek brings suit against Gateway, Inc. ... on claims arising from purchases of a Gateway computer For reasons stated below, the Court overrules Gateway's motion to dismiss....

Plaintiff brings individual and class action claims against Gateway, alleging that it induced him and other consumers to purchase computers and special support packages by making false promises of technical support. *Complaint*, ¶¶ 3 and 4. Individually, plaintiff also claims breach of contract and breach of warranty, in that Gateway breached certain warranties that its computer would be compatible with standard peripherals and standard internet services. *Complaint*, ¶¶ 2, 5, and 6.

Gateway asserts that plaintiff must arbitrate his claims under Gateway's Standard Terms and Conditions Agreement ("Standard Terms"). Whenever it sells a computer, Gateway includes a copy of the Standard Terms in the box which contains the computer battery power cables and instruction manuals. At the top of the first page, the Standard Terms include the following notice:

NOTE TO THE CUSTOMER:

This document contains Gateway 2000's Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.

The notice is in emphasized type and is located inside a printed box which sets it apart from other provisions of the document. The Standard Terms are four pages long and contain 16 numbered paragraphs. Paragraph 10 provides the following arbitration clause:

DISPUTE RESOLUTION. Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.

Gateway urges the Court to dismiss plaintiff's claims under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA ensures that written arbitration agreements in maritime transactions and transactions involving interstate commerce are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Federal policy favors arbitration agreements and requires that we "rigorously enforce" them. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L. Ed. 2d 185 (1987) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L. Ed. 2d 158 (1985)); *Moses*, 460 U.S. at 24, 103 S. Ct. 927. "[A]ny doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses*, 460 U.S. at 24–25, 103 S. Ct. 927.

FAA Section 3 states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.... [T]he Court concludes that dismissal is appropriate if plaintiff’s claims are arbitrable....

Before granting a stay or dismissing a case pending arbitration, the Court must determine that the parties have a written agreement to arbitrate. See 9 U.S.C. §§ 3 and 4; *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir.1997). When deciding whether the parties have agreed to arbitrate, the Court applies ordinary state law principles that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The existence of an arbitration agreement “is simply a matter of contract between the parties; [arbitration] is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *Avedon*, 126 F.3d at 1283 (quoting *Kaplan*, 514 U.S. at 943–945, 115 S. Ct. 1920). If the parties dispute making an arbitration agreement, a jury trial on the existence of an agreement is warranted if the record reveals genuine issues of material fact regarding the parties’ agreement. See *Avedon*, 126 F.3d at 1283.

[In considering whether Kansas or Missouri law is applicable, the Court] discerns no material difference between the applicable substantive law in Kansas and Missouri...

The Uniform Commercial Code (“UCC”) governs the parties’ transaction under both Kansas and Missouri law....

State courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties’ agreement. Authority from other courts is split. Compare *Step-Saver*, 939 F.2d 91 (printed terms on computer software package not part of agreement); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D.Ariz. 1993) (license agreement

shipped with computer software not part of agreement); and *U.S. Surgical Corp. v. Orris, Inc.*, 5 F.Supp.2d 1201 (D.Kan. 1998) (single use restriction on product package not binding agreement); with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997) (arbitration provision shipped with computer binding on buyer); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) (shrinkwrap license binding on buyer);⁶ and *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash.2d 568, 998 P.2d 305 (2000) (following *Hill* and *ProCD* on license agreement supplied with software). It appears that at least in part, the cases turn on whether the court finds that the parties formed their contract before or after the vendor communicated its terms to the purchaser. Compare *Step-Saver*, 939 F.2d at 98 (parties' conduct in shipping, receiving and paying for product demonstrates existence of contract; box top license constitutes proposal for additional terms under § 2–207 which requires express agreement by purchaser); *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest by shipping goods to buyer; license agreement constitutes proposal to modify agreement under § 2–209 which requires express assent by buyer); and *Orris*, 5 F. Supp. 2d at 1206 (sales contract concluded when vendor received consumer orders; single-use language on product's label was proposed modification under § 2–209 which requires express assent by purchaser); with *ProCD*, 86 F.3d at 1452 (under § 2–204 vendor, as master of offer, may propose limitations on kind of conduct that constitutes acceptance; § 2–207 does not apply in case with only one form); *Hill*, 105 F.3d at 1148–49 (same); and *Mortenson*, 998 P.2d at 311–314 (where vendor and purchaser utilized license agreement in prior course of dealing, shrinkwrap license agreement constituted issue of contract formation under § 2–204, not contract alteration under § 2–207).

Gateway urges the Court to follow the Seventh Circuit decision in *Hill*. That case involved the shipment of a Gateway computer with terms similar to the Standard Terms in this case, except that Gateway gave the customer 30 days—instead of 5 days—to return the computer. In enforcing the arbitration clause, the Seventh Circuit relied on its decision in *ProCD*, where it enforced a software license which was contained inside a product box. See *Hill*, 105 F.3d at 1148–50. In *ProCD*, the Seventh Circuit noted that the exchange of money frequently precedes the communication of detailed terms in a commercial transaction. See *ProCD*, 86 F.3d at 1451. Citing UCC § 2–204, the court reasoned that by including the license with the software, the

vendor proposed a contract that the buyer could accept by using the software after having an opportunity to read the license.⁸ *ProCD*, 86 F.3d at 1452. Specifically, the court stated:

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.

ProCD, 86 F.3d at 1452.

The *Hill* court followed the *ProCD* analysis, noting that “[p]ractical considerations support allowing vendors to enclose the full legal terms with their products.” *Hill*, 105 F.3d at 1149.⁹

The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*. In each case the Seventh Circuit concluded without support that UCC § 2–207 was irrelevant because the cases involved only one written form. See *ProCD*, 86 F.3d at 1452 (citing no authority); *Hill*, 105 F.3d at 1150 (citing *ProCD*). This conclusion is not supported by the statute or by Kansas or Missouri law. Disputes under § 2–207 often arise in the context of a “battle of forms,” see, e.g., *Diatom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984), but nothing in its language precludes application in a case which involves only one form. The statute provides:

Additional terms in acceptance or confirmation.

⁸ Section 2–204 provides: “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 contract.” K.S.A. § 84–2–204; V.A.M.S. § 400.2–204.

⁹ Legal commentators have criticized the reasoning of the Seventh Circuit in this regard. See, e.g., Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, Fla. Bar J., Nov. 1997, at 8, 10–12 (outcome in *Gateway* is questionable on federal statutory, common law and constitutional grounds and as a matter of contract law and is unwise as a matter of policy because it unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., *Survey: Uniform Commercial Code*, 53 Bus. Law. 1461, 1465–66 (Seventh Circuit finding that UCC § 2–207 did not apply is inconsistent with official comment); Batya Goodman, *Honey, I Shrink–Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract*, 21 Cardozo L.Rev. 319, 344–352 (Seventh Circuit failed to consider principles of adhesion contracts); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers’ Informed Consent to Arbitration Clauses in Form Contracts*, 32 Colum. J.L. & Soc. Probs. 275, 296–299 (judiciary (in multiple decisions, including *Hill*) has ignored issue of consumer consent to an arbitration clause). Nonetheless, several courts have followed the Seventh Circuit decisions in *Hill* and *ProCD*. See, e.g., *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash. 2d 568, 998 P.2d 305 (license agreement supplied with software); *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, Case No. 98C–09–064–RRC (Del.Super. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging); *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369, Case No. 16913 (Del. Ch. March 16, 2000) (arbitration provision shipped with computer); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (same); *Lery v. Gateway 2000, Inc.*, 1997 WL 823611, 33 UCC Rep. Serv.2d 1060 (N.Y. Sup. Oct. 31, 1997) (same).

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

(2) The additional terms are to be construed as proposals for addition to the contract [if the contract is not between merchants]....

K.S.A. § 84-2-207; V.A.M.S. § 400.2-207. By its terms, § 2-207 applies to an acceptance or written confirmation. It states nothing which requires another form before the provision becomes effective. In fact, the official comment to the section specifically provides that §§ 2-207(1) and (2) apply “where an agreement has been reached orally ... and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed.” Official Comment 1 of UCC § 2-207. Kansas and Missouri courts have followed this analysis. See *Southwest Engineering Co. v. Martin Tractor Co.*, 205 Kan. 684, 695, 473 P.2d 18, 26 (1970) (stating in dicta that § 2-207 applies where open offer is accepted by expression of acceptance in writing or where oral agreement is later confirmed in writing); *Central Bag Co. v. W. Scott and Co.*, 647 S.W.2d 828, 830 (Mo.App.1983) (§§ 2-207(1) and (2) govern cases where one or both parties send written confirmation after oral contract). Thus, the Court concludes that Kansas and Missouri courts would apply § 2-207 to the facts in this case. Accord *Avedon*, 126 F.3d at 1283 (parties agree that § 2-207 controls whether arbitration clause in sales confirmation is part of contract).

In addition, the Seventh Circuit provided no explanation for its conclusion that “the vendor is the master of the offer.” See *ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149 (citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. See *Brown Mach., Div. of John Brown, Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989) (as general rule orders are considered offers to purchase); *Rich Prods. Corp. v. Kemutec Inc.*, 66 F.Supp.2d 937, 956 (E.D. Wis. 1999) (generally price quotation is invitation to make offer and purchase order is offer). While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that

Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff)....¹¹

Under § 2–207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms. K.S.A. § 84–2–207(1); V.A.M.S. § 400.2–207(1). “[T]he conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract.” *Brown Machine*, 770 S.W.2d at 420.¹² Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms. Moreover, the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms. See, e.g., *Arizona Retail*, 831 F. Supp. at 765 (conditional acceptance analysis rarely appropriate where contract formed by performance but goods arrive with conditions attached); *Leighton Indus., Inc. v. Callier Steel Pipe & Tube, Inc.*, 1991 WL 18413, *6, Case No. 89–C–8235 (N.D.Ill.

¹¹ UCC § 2–206(b) provides that “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 ...” The official comment states that “[e]ither shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment.” UCC § 2–206, Official Comment 2.

¹² Courts are split on the standard for a conditional acceptance under § 2–207. See *Daitom*, 741 F.2d at 1576 (finding that Pennsylvania would most likely adopt “better” view that offeree must explicitly communicate unwillingness to proceed with transaction unless additional terms in response are accepted by offeror). On one extreme of the spectrum, courts hold that the offeree's response stating a materially different term solely to the disadvantage of the offeror constitutes a conditional acceptance. See *Daitom*, 741 F.2d at 1569 (citing *Roto–Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)). At the other end of the spectrum, courts hold that the conditional nature of the acceptance should be so clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed without the additional or different terms. See *Daitom*, 741 F.2d at 1569 (citing *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972)). The middle approach requires that the response predicate acceptance on clarification, addition or modification. See *Daitom*, 741 F.2d at 1569 (citing *Construction Aggregates Corp. v. Hewitt–Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968)). The First Circuit has since overruled its decision in *Roto–Lith*, see *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, and the Court finds that neither Kansas nor Missouri would apply the standard set forth therein. See *Boese–Hilburn Co. v. Dean Machinery Co.*, 616 S.W.2d 520, (Mo. App. 1981) (rejecting *Roto–Lith* standard); *Owens–Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 538 (D. Kan. 1982) (acceptance is not counteroffer under Kansas law unless it is made conditional on assent to additional or different terms (citing *Roto–Lith* as comparison)); *Daitom*, 741 F.2d at 1569 (finding that *Dorton* is “better” view). Because Gateway does not satisfy the standard for conditional acceptance under either of the remaining standards (*Dorton* or *Construction Aggregates*), the Court does not decide which of the remaining two standards would apply in Kansas and/or Missouri.

Feb. 6, 1991) (applying Missouri law) (preprinted forms insufficient to notify offeror of conditional nature of acceptance, particularly where form arrives after delivery of goods).

Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them. See K.S.A. § 84-2-207, Kansas Comment 2 (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees). Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.¹⁴ See *Step-Saver*, 939 F.2d at 99 (during negotiations leading to purchase, vendor never mentioned box-top license or obtained buyer's express assent thereto). The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. Accord *Brown Machine*, 770 S.W.2d at 421 (express assent cannot be presumed by silence or mere failure to object). Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss.

IT IS THEREFORE ORDERED that the *Motion to Dismiss* (Doc. # 6) which defendant Gateway filed November 22, 1999 be and hereby is **OVERRULED**.

Notes and Questions

1. Judge Easterbrook sees *Hill* as consistent with the idea that parties might reasonably prefer to organize their transactions so that they receive the product first and consider the terms later at their leisure. Judge Vratil in *Klocek* sees this organization as

¹⁴ The Court is mindful of the practical considerations which are involved in commercial transactions, but it is not unreasonable for a vendor to clearly communicate to a buyer—at the time of sale—either the complete terms of the sale or the fact that the vendor will propose additional terms as a condition of sale, if that be the case.

inconsistent with UCC § 2-207. Which approach is more faithful to the statutory text of § 2-207? Which approach is better for sellers? Which is better for consumers? Why?

2. Judge Easterbrook's rulings on enforceable boilerplate in *Hill* have not been universally beloved. One recent article lamented them as "influential and profoundly flawed decisions" that "illustrate how far courts will go to permit commercial actors to control the contracting dynamic as between businesses and consumers." Leah A. Plunkett & Michael S. Lewis, *Education Contracts of Adhesion in the Covid-19 Pandemic*, 2021 U. ILL. L. REV. ONLINE 1, 17 (2021). The authors favorably compare the following case, *Kanders v. Uber*, as one that "resist[s] the pull of these decisions and reaffirm[s] the doctrine of assent in consumer contracts." Can you defend *Hill*?
3. If, as Judge Vratil indicates, "the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms," would keeping the computer for longer (say, 30 days) demonstrate assent? Is this case distinguishable from cases where courts find silence and retention of seller's goods constitutes assent to a contract?