

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. The doctrine of indefiniteness under the common law is further explored in a different module.

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*.

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 offeror’s “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." 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).