**U.C.C. § 2-207 2: Finding the Terms of the Contract**

Welcome to this podcast on U.C.C. § 2-207 Finding the Terms of the Contract brought to you by CALI. I am Professor Scott J. Burnham. This is the second in a series of podcasts about § 2-207 of the Uniform Commercial Code, a section often referred to as the Battle of the Forms. The first podcast covered Formation of the Contract. It would probably be helpful to listen to that one before listening to this one. The third podcast covers Written Confirmations.

The topic of this podcast is finding the terms of the contract under U.C.C. § 2-207. Remember that Article 2 of the U.C.C. applies to transactions in goods, so this section only applies to the sale of goods, which is defined as things that are moveable. Section 2-207 is a complex part of the statute and I'm not going to do it justice in a short podcast. For further study, I recommend the White and Summers treatise on the Uniform Commercial Code.

It will be helpful for you to have a copy of § 2-207 in front of you for this discussion, but please don’t look at it if you are driving! One thing I want to do is distinguish between the areas where it is clear what the statute tells us to do and the areas where we have to speculate.

To solve a 2-207 problem, you have to first identify which party is the offeror and which is the offeree. The process of entering into a contract for the sale of goods can start with either party as offeror, but let’s suppose a buyer submits an offer on a preprinted purchase order form to a seller. The seller checks the essential terms of the buyer’s order form – by that I mean what are sometimes called the “dickered” terms that vary from one transaction to another – things like the description of the goods, the quantity, price, and shipping arrangements. The seller then mirrors those essential terms in its preprinted acknowledgment form, which it sends to the buyer. The seller ships the goods and the buyer pays for them. Everyone is happy until the goods break down. The buyer then points to the favorable warranty terms on the back of its order form. The seller points to the unfavorable warranty terms on the back of its acknowledgment form. Whose terms govern?

We are assuming here that the essential terms are the same in both contracts. We are also assuming that neither party has put language in the contract that makes acceptance conditional on acceptance of the additional or different terms. In either of those situations, as explained in the first podcast, the forms might not form a contract.

Subsection (1) of the statute tells us that the responding form is an acceptance “even though it states terms additional to or different from those offered.” Notice the dramatic change from the common law. Under the rule of § 2-207, if the response of the offeree contains additional or different terms, it is not a counter-offer, but an acceptance! We undoubtedly have consideration since the parties have agreed to sell certain goods for a certain price. And, if we have an offer and an acceptance and consideration, then the parties have formed a contract.

But that doesn’t make a lot of sense. We have two forms (a buyer’s and a seller’s) that result in a contract, but the terms on the forms are not the same. So, now we have to find which of those terms become the terms of the contract formed by the parties. Let’s first explain what the statute means by “additional” or “different” terms. The idea is that an *additional* term addresses a subject that is not mentioned in the offer, while a *different* term addresses a subject that is mentioned in the offer, but is different substantively. For example, if the offeror’s form is silent on choice of law, and the offeree’s form has a provision specifying New York law, that is an additional term. If the offeror’s form has a choice of law provision specifying Montana law and the offeree’s form has a provision specifying New York law, that is a different term.

Now we drop down into subsection (2) to find out whose term is going to govern when we have additional or different terms. Subsection (2) begins “the additional terms are to be construed as proposals.” Note that it doesn’t mention different terms. We will get back to different terms after we explore what happens to additional terms.

Subsection (2) says that the additional terms are proposals, so the offeree is in effect saying to the offeror, “I propose these additional terms to you.” A proposal is just that, a suggestion. The next sentence, though, says that *between merchants* (that is, when both parties are merchants) those proposed terms become part of the contract terms. Note, by the way, that nothing before this in § 2-207 made a distinction between merchants and non-merchants, so everything else must apply whether the parties are merchants or not. So if the offeror and offeree are both merchants, then those additional terms presumptively become part of the contract.

Unfortunately, the section doesn't tell us what happens when the exchange is *not* between merchants. I think we can logically imply that if between merchants the proposals presumptively become part of the contract, then between a merchant and a non-merchant they *don't* presumptively become part of the contract. That is, silence is not an acceptance – the proposed terms have to be affirmatively agreed to. That makes sense because merchants are held to know what they are doing so they presumptively accept the proposed terms while non-merchants have to do more to accept them. For example, a merchant responds to another merchant’s form with a form that adds a term stating “All disputes will be resolved by arbitration.” This proposed term is presumptively part of the contract. But if a merchant responds to a non-merchant’s form with a form that adds a term stating, “All disputes will be resolved by arbitration,” while the Code does not expressly address this situation, I think the most likely result is that the proposed term is not part of the contract unless the non-merchant does something to affirmatively accept it.

Okay, so between merchants the proposed additional terms in the offeree's form presumptively become part of the contract, but subsection (2) tells us there are three ways for the offeror to rebut the presumption and keep them from becoming part of the contract: (a) where the offer limits acceptance; (b) where the proposed terms are material alterations; and (c) where the offeror objects to the proposed terms on receipt of them.

The first exception in (a) is that the offer limits acceptance to the terms of the offer. This does not require language as strong as the language in subsection (1) after the comma – it does not have to say “we don't have a deal if you don't agree to my terms,” it just has to say “this offer is expressly limited to the terms of the offer.” So if the offeror put that language in the offer, then the additional terms proposed by the offeree are out.

With the exception in (c), the offeror has an opportunity to object to the additional terms at the time the form is received. That almost never happens because nobody reads the form at the time they get it. So most of the time, (c) doesn't happen.

If the offeror doesn’t put in the language under (a) and does not object under (c), the proposed terms might still fall away under the exception provided by (b). This provision states that a proposed term is automatically rejected if it materially alters the terms of the contract. So if the offeree proposes an additional term that will result in surprise or hardship to the offeror, it is out. Bottom line – it is only the additional terms that don’t make much difference that are in. If you are wondering which ones materially alter and which ones don't, take a look at Official Comments 4 and 5 to § 2-207. They will give you a sense of what should be found to materially alter and what should be found to not materially alter.

Notice what has happened here. At common law, the additional term in the acceptance would make it a counteroffer, but under the Code it is an acceptance. And, in spite of the additional terms in the acceptance, the offeror is still going to get its terms except for the ones that won’t make a big difference. That is quite a change from the common law.

Now comes the hardest part. Subsection (2) tells us what to do with additional terms in the offeree’s form, but it doesn't tell us what to do with different terms. So the courts have had to fill this gap in the statute, and they have come up with three different solutions. One rule is that the different terms are automatically out because they are considered to be objected to by the offeror, so the offeror gets its terms. Another view is that you treat different terms the same as additional terms and you conduct the same analysis we just went through – construe them as proposals and see if they are in or out. So the offeror gets its terms except for the ones that are not materially different. But the most popular view is the “knockout rule” under which both different terms are knocked out and we read in the default rules.

For example, let’s assume that the offer has a choice of law clause specifying Montana law. The acceptance has a choice of law clause specifying New York law. Under the first view, the offeror would get its term – Montana law. Under the second view, if the offeror had not objected and New York law does not materially differ from Montana law (and it probably doesn’t since both have enacted the UCC), then the offeree would likely get its term – New York law. And under the third view, the knockout rule, both parties’ choice of law terms would be thrown out and the forum would determine the applicable law according to its choice of law rules.

Remember that each state will decide to apply one of these rules. The knockout rule is the most popular even though it can lead to some absurd results. For example, there was a New York case where one form called for “arbitration in New York” and the other called for “arbitration in New Jersey.” The court said these were different terms, knocked them both out and read in the default rule – they would go to court to resolve the dispute.

As a practical matter, the Battle of the Forms in many types of transactions is dying out because instead of exchanging forms, parties today frequently form their agreements over the internet. If a buyer goes to a seller’s web site, the buyer will likely have to accept the terms offered on that web site. If it has any bargaining power, then the buyer can negotiate for more favorable terms, but they will be incorporated in a single document, eliminating the issue as to whose terms will govern.

Let’s briefly review this podcast. At this point, you should be able to identify which form comes from the offeror and which from the offeree. You should be able to identify the additional and different terms in the offeree’s form. You should be able to analyze whether an additional term is part of the contract under subsection (2). And if there is a different term, you should be able to explain the three rules that different jurisdictions use to determine the terms of the contract.

I hope you’ve enjoyed this podcast on UCC § 2-207 Finding the Terms of the Contract.

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