Revised U.C.C. Section 2-207: Analysis and Recommendations

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By Mark E. Roszkowski* and John D. Wladis**

INTRODUCTION

No Uniform Commercial Code (U.C.C.) Article 2 provision has generated more controversy, legal commentary, and litigation than section 2-207.1 Professor Grant Gilmore once called it a "miserable, bungled, patched-up job," and "arguably the greatest statutory mess of all time."2 Professor Charles Thatcher has deemed its revision a commercial and legal "imperative."3 Given these and other criticisms and denunciations, commercial lawyers and academics should welcome the opportunity presented by the U.C.C. Article 2 revision project finally to amend this troublesome provision. The goal, as developed infra, is two-fold: (i) to select a general approach; and (ii) to draft the language capable of successfully implementing that approach.

The Drafting Committee currently is considering two alternative proposals to revise section 2-207. Alternative A is a modest rewrite using the structure of existing section 2-207.4 Alternative B is a simpler approach, relying in part on the general formation principles of section 2-204.5

ALTERNATIVE A VERSUS ALTERNATIVE B—POLICY ANALYSIS

Perhaps the best way to determine which general approach is preferable is to examine each version in light of the revision criteria suggested by the

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1. All section citations are to the Uniform Commercial Code (U.C.C.) 1991 Official Text, unless otherwise indicated.


4. UNIFORM COMMERCIAL CODE REVISED ARTICLE 2 SALES pts. 1-6, at 15-17 (Sept. 10, 1993) [hereinafter REVISED ARTICLE 2].

5. Id. at 17-19. The reference to "other records" throughout Alternative B is intended to cover electronic communications such as electronic data interchange (EDI).
Article 2 Study Group. In its March 1, 1990 report (Preliminary Report)⁶ the Article 2 Study Group recommended revising section 2-207 along the following lines:

1. The revision should draw on and be consistent with the underlying policies of Article 2, Part 2, particularly section 2-204;⁷
2. The formula now contained in section 2-207(3) should be emphasized;⁸
3. The parties should have power to "contract out" of any revised section 2-207;⁹ and
4. Fortuities of timing in the use of standard forms should be irrelevant.¹⁰

These criteria should govern the revision of section 2-207. It is therefore clear that Alternative A of the Preliminary Report, which is based on the existing section 2-207, is unacceptable. Alternative A meets virtually none of the criteria suggested by the Study Group, because its emphasis on treatment of the forms as offers and acceptances assures that the result turns upon "fortuities of timing in the use of standard forms."¹¹ Professors White and Summers concluded, "[w]e see no way to apply 2-207 that does not in some cases give an unearned and unfair advantage to the person who happens to send the first, or in some cases the second, document."¹²

It is interesting to note that the existing section 2-207 is nominally intended to create a contract where none would exist under a strict application of the common-law "mirror image rule,"¹³ because the parties' exchanged writings contain varying terms. Yet, only a handful of the hundreds of section 2-207 cases actually litigate whether there was a contract. In most cases, a contract admittedly exists and the dispute involves the terms of that contract. Typically, the disputed terms are arbitration clauses, warranty disclaimers, consequential damage limitations, or other attempts by the seller to limit the buyer's remedies. The only reason formation becomes an issue is that existing section 2-207 treats the parties' boilerplate forms as offers and acceptances and resolves the dispute over

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⁷. Id. at 1055.
⁸. Id.
⁹. Id. at 1056.
¹⁰. Id.
¹¹. Id.
terms based on a post hoc characterization of the forms and analysis of the order in which the forms are sent. This approach reinforces the "battle of the forms" mentality in which each side's lawyer drafts its forms so that they will be construed as an offer or counter-offer rather than as an acceptance. The usual result is litigation.

The better solution is to eliminate the focus on the parties' forms in resolving formation issues. This also will prevent either party from attempting to enforce unbargained-for boilerplate terms inserted in its form. As Professors White and Summers have noted:

The law as to terms must be sophisticated enough to nullify the efforts of fine-print lawyers, it must be sufficiently reliance-oriented to protect the legitimate expectations of the parties, and it must be fair and even handed. It ought not to give one side the whole loaf, especially on nonnegotiated matters.15

Revised section 2-207 must end the battle of the forms by giving the parties U.C.C. gap fillers for terms they fail to agree upon. As one commentator noted:

It is submitted that the rule of section 2-207 was sufficient when it told the parties that they have a contract even though they have not agreed to each and every term of that contract. This position seems to be in accord with actual day-to-day practices. As to the additional provisions, the section went too far. It should have provided that the additional provisions are not part of the transaction. In the event of a dispute between the parties, the contract would then consist of those terms actually agreed upon (i.e., goods, price, delivery). Any gaps (i.e., warranties, remedies) would be supplied by the rules set forth in Article 2 and the cases interpreting those rules.

A revision of section 2-207, as proposed, hopefully would put an end to the battle of the forms. It might eliminate the necessity for conditional acceptance clauses on printed forms, and do away with the present widespread use of extensive printed provisions on the backs of purchase order and invoice forms. If a party desires its contract form to be the contract which governs the transaction, then that party should go to the trouble of having its form agreed to and executed by the other side. If that party is not willing to sacrifice the time and effort this requires, then it should be willing to abide by the rules of Article 2. It is neither reasonable to the parties, nor worthy of our legal system, that such great importance is attached to acts (i.e., when the printed form is delivered) to which the parties attach

15. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 26 (2d ed. 1980).
no significance and which would have no legal consequence but for section 2-207(2).  

The advantages of using gap fillers for unnegotiated terms are significant. As Professor Michael Herbert notes, using U.C.C. gap fillers in section 2-207 has significant benefits in both policy and application.  

First, treating the gap-filling provision as the baseline contract would obviously simplify the problem of determining the terms of an accretion contract. Second, the terms in the Code at least have the virtue of being generated by years of legal thought and legal experience. They have been given the blessing of nearly all the state legislatures and are reflective of many decades of legal scholarship. The terms in the boilerplate of buyers and sellers are, on the other hand, creations of attorneys who, if they are to serve their clients well, will "draft...to the edge of the possible." They are in no way reflective of any generalized social concern or any careful weighing of public policy. They are designed to give the side that paid for the drafting everything that can reasonably be squeezed from the other side.  

Because Alternative B embodies this approach, it should be embraced. Indeed, the Drafting Committee "expressed a strong preference for Alternative B," meaning in all likelihood, it will form the basis of revised section 2-207. Two issues need to be addressed, however, in implementing Alternative B: (i) the perceived problem with U.C.C. gap fillers; and (ii) the specific language of the current draft.  

**THE GAP-FILLER PROBLEM**  
The section 2-207 revision debate includes a collateral issue that clouds the basic issue and threatens meaningful revision of section 2-207. Simply stated, sellers may prefer the status quo because it allows them to use the battle of the forms to avoid the effect of Article 2 gap fillers, which they believe unreasonably favor buyers. The process was explained by one lawyer:

19. *REVISED ARTICLE 2, supra* note 4, at 15 (Reporter's Notes). This preference was reiterated at the Drafting Committee meeting held on October 1-3, 1993.
The reality of the battle of the forms today is that it can easily achieve a stalemate between buyer and seller. If buyer sends a form containing terms to seller, seller sends back a form with different terms, and the parties proceed with their sales transaction, the practical fact is that it will be difficult to predict what any given court will hold to be the terms of the transaction. The current 2-207 rules are confused, and the interpretation of those rules in the courts is even more confused. . . .

This confusion means that in order to prevail in a dispute after engaging in a battle of the forms, buyer or seller must be prepared to spend a great deal litigating the issue. Therefore the parties are stalemated, and they have incentive to compromise and settle.

This stalemate—which-leads-to-compromise provides relief to sellers from what they consider to be the unfair gap-filler terms in Article Two. Sellers in commercial transactions consider the gap-filler terms to be too generous to buyers. For instance, the warranty of merchantability (section 2-314) is, in the eyes of sellers, a very broad, subjective standard that juries can interpret to mean that buyer is entitled to relief if buyer is dissatisfied in virtually any way with the product. Further, the gap-filler terms include very generous remedies for buyers, including a right to consequential damages (sections 2-714 and 2-715).

In practice, sellers rarely agree explicitly to give commercial buyers warranties like the warranty of merchantability and remedies like consequential damages. More commonly, a seller will agree only that if its product fails due to a defect of materials or workmanship, the seller will repair or replace the product. Sellers disclaim other warranties and remedies.

It is unrealistic to say that if a seller dislikes the gap-filler terms of Article Two it should refuse to sell unless its buyer will explicitly agree to seller's terms. Explicit agreement requires negotiation, and negotiation is time-consuming and expensive. . . .

I believe that if the chaos of the battle of the forms is eliminated, then the unfairness of the gap-filler terms should be eliminated too. . . .

The point that gap fillers are unfair to sellers is debatable. Many commentators disagree with this point. For example, Professor Murray asserts that the gap fillers reflect the normative assumptions of Article 2.21 He explains:

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20. Letter from Benjamin Wright to Article 2 Drafting Committee (Feb. 7, 1993).
It is anything but novel to suggest that broad assumptions like good faith and conscionability pervade Article 2. Perceiving the more specific normative assumptions, however, is unusual. They are so obvious that they tend to be ignored. The normal contract or deal under Article 2 includes express and implied warranties and all judicial remedies to protect the fundamental expectation interest of the parties. In effect, Article 2 provides the normal, standardized agreement between the parties.

Absence contrary trade usage or prior course of dealing, which both necessarily affect the factual bargain of the parties, the normal deal between merchants must be based on the assumptions of Article 2—express and implied warranties, buyer and seller remedies, statute of limitations, reasonable time, place, and the manner of performance, and other normative assumptions. The resulting contract is the normal factual bargain.22

In sum, it is not altogether clear that U.C.C. gap fillers are unfair to sellers. Even if they are, the appropriate response is to amend the gap-filler provisions, not the contract formation provisions of section 2-207. "Covert tools are never reliable tools."23 Sellers should not be permitted, by surreptitious manipulation of section 2-207, to obtain contract terms that cannot be obtained either through statutory amendment of U.C.C. gap-filler provisions or by negotiation with the buyer. If warranty, remedy, and arbitration terms are so important to sellers, then those terms can and must be negotiated with buyers. As previously noted, if the seller "is not willing to sacrifice the time and effort that this requires, then he should be willing to abide by the rules of Article 2."24

THE SPECIFIC LANGUAGE OF PROPOSED SECTION 2-207, ALTERNATIVE B

Because of its potential to end the battle of the forms, Alternative B to section 2-207 is clearly the best approach. There are, however, comments and concerns over specific statutory language.

PROPOSED SUBSECTION (a)

Proposed subsection (a) provides: "If writings and other records of the parties to an agreement contain varying terms, there may be a contract if

22. *Id.* at 1373-74, 1377.
the requirements of sections 2-204 and 2-206 are satisfied." The reference to section 2-204 is to section 2-204(b) which provides: "If the parties so intend, an agreement is sufficient to make a contract for sale even if the moment of its making is not determined, one or more terms are left open or to be agreed, or the writings or records of the parties contain varying terms." The reference to section 2-206 is to section 2-206(a)(1) which provides: "an offer to make a contract must be construed as inviting acceptance in any manner and in any medium reasonable under the circumstances, including an expression of assent to the offer which contains varying terms."

Proposed section 2-207(a) derives from existing section 2-207(1), but with two significant changes: (i) contract formation questions have been split off from the question of what are the contract terms and transferred to sections 2-204 and 2-206; and (ii) confirmatory memoranda are no longer referenced.

Referring contract formation questions to sections 2-204 and 2-206 puts the emphasis squarely where it ought to be: Did the parties in fact make an agreement? The principles of offer and acceptance are merely an aid to that determination. Normally there will be no agreement without matching offer and acceptance. Where forms are exchanged, however, it is quite common for parties to agree on certain matters such as price, quantity, delivery, and credit terms, and then to proceed as if they had a deal despite their exchange of nonmatching forms. Before the promulgation of the U.C.C., courts often construed the seller's form as an offer or counter-offer and the buyer's conduct in accepting and paying for the goods as an acceptance of that offer (the "last shot" rule). This resulted in a contract on the seller's terms, including the seller's boilerplate. Under present section 2-207(1), courts have sometimes construed as an acceptance a form sent in response to another form, even when the responding form contained boilerplate at variance with the boilerplate of the earlier form. This often results in a contract on the first form's terms, including its boilerplate (the "first shot" rule). Both the last shot and the first shot rules are unfair. They stick one side with all of the other side's boilerplate. Proposed section 2-207(a) should produce more fair results by focusing on the fact of agreement, deemphasizing offer and acceptance principles, and divorcing contract formation from the question of what are the contract's terms. It focuses attention on the agreement in fact and leaves to other subdivisions the issue of what are the terms of the agreement.

Although the result achieved by proposed subsection (a) is correct, the language could be improved in several respects:

25. Revised Article 2, supra note 4, at 18.
26. Id. at 12.
27. Id. at 13.
29. See, e.g., Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984).
1. The general references in sections 2-204 and 2-206 for contract formation issues may not provide sufficient guidance to courts which must determine when the battle of the forms results in an agreement in fact. Somewhere, either in the text or in the comments, guidance on contract formation is needed. Such guidance should provide that mutual conduct recognizing the agreement after the exchange of nonmatching forms is the primary basis for finding an agreement in fact. Absent such mutual conduct, mutual expressions of assent are necessary. Generally, this requires an offer and a response that states it is an acceptance. Such a response can contain minor additional (but not different)ickered terms and still constitute an acceptance. It also can contain form clauses that are in addition to or different from the terms in the offer. Either party can include appropriate language in the offer or the acceptance that prevents a contract, but such language will not prevent agreement in fact by later mutual conduct. For example, "This offer expressly limits acceptance to the terms of the offer," would be sufficient language to prevent an offer from becoming a contract unless its terms are met, while a phrase such as, "This acceptance is conditioned on assent to any additional or different terms contained in this acceptance," would likewise prevent an acceptance from becoming a contract. Absent sufficiently matching offer and acceptance or mutual conduct, normally there is no contract.30

There is a pressing need for such guidance. It is true that most section 2-207 litigation concerns disputes over the terms of a contract where both sides concede that a contract exists. Nevertheless, contract formation issues are never completely separate from issues dealing with the terms of the contract. So long as various rules of contract formation lead to significant differences in the terms of the resulting contracts, parties will continue to argue contract formation rules as a surrogate for the real dispute, which is not the existence of a contract, but its terms. If the inconsistencies of present section 2-207 litigation are to be avoided, revised sections 2-204 and 2-206 must provide clearer guidance concerning when the various rules of contract formation apply. This is particularly important when a new rule of contract formation is being devised. If exchanges of forms produce contracts on joint terms, it behooves the drafters to indicate clearly when this rule applies and when it does not. Thus the need for guidance in sections 2-204 and 2-206.

30. For an example of circumstances in which a contract could be found, see Restatement (Second) of Contracts § 69(1)(c) cmt. d (1981).
At the very least proposed section 2-206(a)(1) should be limited to varying form terms.\textsuperscript{31}

2. The revisions should avoid introducing the new concept of varying terms. The current "additional to or different from" language is already fairly descriptive of the terms involved.\textsuperscript{32}

3. Deleting reference to a written confirmation is appropriate for subsection (a). In the case of a written confirmation there is already an agreement. Exchange of nonmatching confirmations should not undo the earlier agreement. It needs to be made clear in subsections (b) and (c), however, that these provisions apply to the exchange of nonmatching written confirmations.

**PROPOSED SUBSECTION (c)**

Proposed subsection (c)\textsuperscript{33} is basically existing subsection 2-207(3) with some needed clarifications. The essential premise of this subsection is that the contract terms consist of those terms jointly agreed to, plus U.C.C. gap fillers for nonnegotiated terms. Although this general approach is correct, the subsections should be reordered in descending order, with terms that are agreed to jointly as the beginning point and supplementary terms supplied by the U.C.C. as the ending point.

**Proposed Subsection (c)(1)**

Proposed subsection (c)(1) provides that a contract formed under proposed section 2-207(a) contains terms supplied by subsection (b). Subsection (b) states the test to determine when a varying term contained in one party's writing becomes part of the contract.\textsuperscript{34} Generally, such a term is included if the term's proponent proves that the other party either expressly agreed to it, or from the circumstances, knew or had reason to know of the term and failed to object to it.\textsuperscript{35} This approach creates several problems, which are discussed infra.\textsuperscript{36} Here, simply note that Professor Roszkowski would delete proposed subsection (b) entirely.

**Proposed Subsection (c)(2)**

Proposed subsection (c)(2) includes terms on which the writings or records agree. While this is correct, these terms should be subordinated to those in fact agreed upon. This should be done by adding a new subsection (c)(1). The new subsection would state the basic rule that the contract

\textsuperscript{31} See Revised Article 2, supra note 4, at 13.
\textsuperscript{32} See U.C.C. § 2-207(1).
\textsuperscript{33} Revised Article 2, supra note 4, at 18.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} See infra text accompanying note 43.
includes terms to which the parties in fact agreed through language or other conduct.  

Subsection (c)(3)

Proposed subsection (c)(3) includes terms to which the parties have otherwise agreed. It is unclear what this subsection means. It should be clarified. Otherwise agreed may include either express or implied assent to terms, or both. If it means merely express assent, it is the same as suggested subsection (c)(1). If it includes implied assent to terms, then without some limitations, it comes perilously close to reinstating the common-law last shot rule. Does a buyer who accepts goods after receiving the seller's form otherwise agree to its terms? Presumably this is not the intent of the subsection. Perhaps the subsection is intended to cover implied assent by one who, with knowledge (or reason to know) of the other's terms, acts as if there is an agreement. If so, it seems to cover substantially the same area as proposed subsection (b). Perhaps some other meaning is intended. In any event the meaning should be clarified.

Subsection (c)(4)

Proposed subsection (c)(4) provides that U.C.C. gap fillers supply terms that are not provided by the parties under the standards announced in subsections (c)(1) through (c)(3). This approach is applauded; it is the heart of any successful revision of section 2-207. That is, parties should get U.C.C. gap fillers for terms they fail to agree upon. This rule combats the battle of the forms, because neither party now can force inclusion of a contract term based upon fortuities in the timing of sending boilerplate forms.

The statute, however, should make explicit two important sources of U.C.C. gap fillers that may be overlooked by courts. First, the statute should emphasize that course of performance, course of dealing, and usage of trade are to be used as an important source of contract terms or to explain or supplement express terms. Secondly, revised section 2-207

37. See Roszkowski, supra note 16, at 155-56, 158-59. The "other conduct" phrasing is not intended to resurrect the "last shot" rule. When the buyer accepts the goods in a typical battle of the forms situation, it is not manifesting agreement to the seller's terms. Something more, such as knowledge of the terms at the time of acceptance, is necessary before the buyer's acceptance of the goods can constitute agreement in fact to the terms.
38. Revised Article 2, supra note 4, at 18.
39. See supra text accompanying notes 34-36.
40. See infra text accompanying notes 44-46.
41. Revised Article 2, supra note 4, at 18.
should make clear that estoppel principles, which enter the U.C.C. through section 1-103, may be used to determine the terms of a contract.\textsuperscript{42}

\textbf{PROPOSED SUBSECTION (c) AND THE COUNTER-OFFER PUZZLE}

Both proposed subsection (c) and existing section 2-207(3) are designed to unseat the last shot rule. The buyer has not accepted the seller’s boilerplate terms merely because it accepted and paid for goods accompanied by the seller’s form. The reason for this is that the seller’s boilerplate is unread; thus a reasonable person would not interpret the buyer’s conduct as manifesting assent to that boilerplate. As a result, the seller’s shipment of the goods is not treated as a counter-offer.

There are instances, however, in which one should treat the seller’s shipment of goods as a counter-offer. Suppose a buyer is aware of a term in the seller’s form (e.g., a limitation of remedy clause) and objects to it. The seller refuses to change the term, and the buyer continues to order goods from the seller. Most courts will hold the buyer to the seller’s term,\textsuperscript{43} and there is simple justice in this result. When the buyer is aware that goods are tendered subject to known terms, it should not be able to take the goods and avoid those terms.

The resolution of this fact pattern under proposed subsection (c), however, is not clear. Assuming a contract under proposed subsection (a), the buyer’s objection and lack of express assent would preclude the terms entering the contract under proposed subsection (b). The only plausible argument for including the seller’s term is that the buyer otherwise agreed to the term under proposed subsection (c)(3) when it ordered goods knowing that the seller insisted on the term. This result, however, is far from clear and the text of subsection (c)(3) should be revised.

\textbf{SUBSECTION (b)}

Proposed subsection (b)\textsuperscript{44} is derived from existing section 2-207(2). Karl Llewellyn, the main drafter of Article 2, designed that section to permit

\textsuperscript{42} Estoppel principles can be used to resolve difficult cases such as Steiner v. Mobil Oil Corp., 569 P.2d 751 (Cal. 1971). In that case, Mobil Oil, during negotiations, led Steiner to believe that a term would not be included in their contract, but later without notice supplied a boilerplate form including the term. In this case, the relying party should be relegated neither to a \textsuperscript{U.C.C.} gap filler nor be bound by the boilerplate term. Rather, he or she should be entitled to the term that the other is estopped to deny. Section 2-207 should make this clear. For discussions of \textit{Steiner}, see Roszkowski, \textit{supra} note 16, at 160-62; Herbert, \textit{supra} note 17, at 466-70.

\textsuperscript{43} For cases, see David Frisch & John D. Wladis, \textit{General Provisions, Sales, Bulk Transfers and Documents of Title,} 47 \textit{Bus. Law.} 1517, 1522 n.37, 1524 n.48. See also 1 \textit{Arthur L. Corbin, Corbin on Contracts} § 75, at 319-21 n.39 (1962); cf. \textit{Restatement (Second) of Contracts} § 69(2) (1981).

\textsuperscript{44} \textit{Revised Article 2, supra} note 4, at 18.
some form clauses to enter the contract without express assent.\textsuperscript{45} His point was that some form clauses are reasonable and that these reasonable form clauses should enter the contract unless the other side objected to them.\textsuperscript{46} Proposed subsection (b) seems to continue this premise.

Professor Roszkowski would delete this provision, because he believes that it causes more trouble than it is worth. Professor Wladis would keep it with some changes and clarifications. These views are discussed in turn.

\textit{Deleting Subsection (b)}

First, and most important, subsection (b) fails properly to focus on the situations section 2-207 must address, and reaches out to resolve issues that section 2-207 need not address. Section 2-207 must determine the terms of a contract in two situations. First, the parties, through phone calls, face-to-face conversations, or business correspondence, reach an agreement to buy or sell goods. At some point, the parties also exchange preprinted boilerplate purchase orders, acknowledgments, or confirmation forms. This exchange may or may not be part of the formation process. Some of the boilerplate does not match either because terms governing the same issue conflict or a term is contained on one form but not the other. A dispute arises, resolution of which depends upon the content of the term addressed in the different or additional boilerplate. Second, the parties reach an oral agreement which one or both parties follow up with a written confirmation stating terms in addition to or different from those agreed upon. Again, a dispute arises, resolution of which depends upon whether or not the additional or different term in the confirmation becomes part of the contract. Note that in section 2-207 cases, the writings involved are not integrations and usually are not signed or read by the person against whom they operate. Further, the only term section 2-207 need be concerned with is the term that causes the dispute. It need not be designed to determine which other terms, contained in the parties' boilerplate or elsewhere, become part of the contract.

In contrast, section 2-207 need not address the following issue: the legal effect of one party (often a consumer) signing the standardized form contract (an adhesion contract) prepared by the other. In this case, the issue is to what extent the signing (adhering) party is bound to unbargained for terms buried in the fine print of the standardized form. In this case, unlike section 2-207, the writing is intended as an integration and is signed by the party against whom it operates. In this context, the unbargained for terms presumptively become part of the contract under the contract-law doctrine of duty to read.\textsuperscript{47} Huge branches of contract-law, most notably

\textsuperscript{45} See John D. Wladis, \textit{U.C.C. Section 2-207: The Drafting History}, supra p. 1039.

\textsuperscript{46} Frisch & Wladis, \textit{supra} note 43, at 1524 n.48.

\textsuperscript{47} I E. Allan Farnsworth, \textit{Farnsworth on Contracts} § 4.26, at 481 n.10 (1990).
the unconscionability doctrine\textsuperscript{48} and the reasonable expectations doctrine,\textsuperscript{49} determine when this presumption ought not to apply, usually against consumers.

The problem with proposed subsection (b) is that, like existing section 2-207, it fails to recognize this distinction. It therefore erroneously elevates the parties' forms to the status of integrations. As a result, legal conclusions continue to turn upon the unbargained for and unread boilerplate content of preprinted forms and upon whether a given recipient "knew or had reason to know" of a term contained therein and "failed to object" to it.\textsuperscript{50} Under this approach, it is clear that the battle of the forms will continue unabated.

It is also clear that proposed subsection (b) seldom will govern a litigated case. Varying terms that are "expressly agreed to" by the other party are not likely to cause disputes. If they do, that party has little reason to complain and the court will have no difficulty ascertaining the governing rule. Proposed subsection (b) also supplies terms if the court finds that the party "knew or had reason to know of the varying terms from the circumstances and failed to object to them."\textsuperscript{51} The undefined concept of varying terms includes the additional or different terms addressed by current law.\textsuperscript{52} If the terms are truly different (the same issue addressed in a different manner on each party's form), proposed subsection (b) would not apply. As under current law,\textsuperscript{53} each party is deemed to object to a term in the other's form that differs from a term in its own form. Thus, proposed subsection (b) would be limited to disputes over additional terms, terms stated in one form on which the other is silent.

In sum, in determining the terms of a contract formed under section 2-207, the initial inquiry must be to establish the parties' bargain in fact from whatever source derived: phone calls, business meetings and other face-to-face exchanges, business letters, and to a lesser extent preprinted forms. That is, the terms should be those to which the parties in their language or other conduct in fact agreed. In determining the parties' agreement in fact, the party asserting the existence of a term should be required to prove, as under proposed subsection (b), that the other party knew or should have known that the term was part of the contract. Proof of reason to know will be based in part on conspicuousness, course of dealing, and trade usage.

\textsuperscript{48} U.C.C. § 2-302; Restatement (Second) of Contracts § 208 (1981).
\textsuperscript{49} Restatement (Second) of Contracts § 211 (1981).
\textsuperscript{50} Revised Article 2, supra note 4, at 18.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 14-15 (Reporter's Notes).
\textsuperscript{53} See Wladis, supra note 45, at 1039.
Retaining Subsection (b) with Clarification

Proposed subsection (b) provides a mechanism for courts to add reasonable terms to the contract. Professor Wladis believes this is needed for several reasons. First, some reasonable form clauses address subjects not covered by U.C.C. gap fillers, for example, interest on overdue payments. Second, reasonable form clauses can make specific the often general standards supplied by trade usage and U.C.C. gap fillers. For example, section 2-607(3)(a) provides that a buyer must notify the seller of breach "within a reasonable time after he discovers or should have discovered any breach." 54 A form clause allowing sixty days for complaints, if that is reasonable, gives specificity to the reasonable time requirement of section 2-607(3)(a). Most of the examples given in the Official Comments to section 2-207 are of this type. 55 Third, courts have underutilized concepts such as trade usage. 56 Proposed subsection (b) provides a mechanism for a court to include a term that approximates trade usage, even though the extent of trade usage may be somewhat uncertain.

Assuming that proposed subsection (b) is retained, the following comments and concerns should be addressed.

1. Proposed subsection (b) covers varying terms. Varying includes both different and additional terms. 57 This is a change from existing section 2-207(b) which excludes different terms on the theory that each term is an objection to the other. 58 The fate of different terms under proposed subsection (b), however, is unclear. Do the terms constitute mutual objections so that neither term is included under proposed subsection (b)?

2. The "reason to know" test seems to be an improvement over the existing "materially alters" test. The new test, however, will require elaboration in the Official Comments. Apparently mere receipt of a form does not give the recipient reason to know of the form clauses therein. Beyond this, much is uncertain under the new test. What if the form were received previously in another deal or at the start of negotiations? Does the receipt of the same form in a later deal or in closing the negotiations give the recipient reason to know of the form clauses, because it earlier received the same form? What if the recipient has similar clauses in its own forms, does it have reason to know? For example, assume that a buyer, when it resells, has a limitation of remedy clause in its forms. Does it, therefore, have reason to know that when it buys goods, its

54. U.C.C. § 2-607(3)(a).
55. See, e.g., U.C.C. § 2-207 Official Comment 5.
56. Preliminary Report, supra note 6, at 1018-19 (conclusions of both the Article 2 Study Group and A.B.A. Task Force).
57. Revised Article 2, supra note 4, at 20-21 (Reporter's Notes 4).
58. Farnsworth, supra note 47, § 3.21.
seller’s form contains a similar clause? Does it make any difference in the foregoing cases if the recipient signs and returns the other’s form? The new comments should clarify these questions.

**SUBSECTION (d)**

Under existing section 2-207 merchants and non-merchants alike must establish relevant facts by a preponderance of the evidence. Under proposed subsection (d), in deals that are not between merchants (primarily consumer transactions), the proponent must prove its case by "clear and convincing evidence." No reason is given for this increase in the burden of proof. Several of the issues that arise under section 2-207 are no different from those arising outside of section 2-207. Why, for example, if there is evidence of express assent to a term, must a merchant suing a consumer prove that assent by clear and convincing evidence? Further, does the raised burden of proof apply to the contract formation issue? That issue is determined by sections 2-204 and 2-206, but is referenced in proposed section 2-207(a). Is this reference intended to subject that issue also to the increased burden of proof?

**CONCLUSION**

Revision of section 2-207 must have the primary goal of ending the battle of the forms. Despite the concerns raised in this Article, Alternative B of the current section 2-207 draft represents an important step in this direction. The Alternative B approach, if accepted, may change the way buyers and sellers of goods do business, forcing them to negotiate over terms now relegated to the boilerplate of preprinted forms. Forms may become simpler, shorter, and more standardized within industries. In addition many firms may negotiate umbrella agreements with their major suppliers and customers covering the terms usually found in boilerplate. These are laudable and long overdue developments for "[a]ny contracts lawyer must know that most of the typical printed form is unnecessary or unfair." Corporate counsel must stop drafting ever more confusing busi-

59. U.C.C. § 2-207.
60. **Revised Article 2**, supra note 4, at 18-19.
61. Id. at 19.
62. There is evidence that such negotiation is occurring. For example, Stephen A. Litchfield, chief commercial counsel for Square D Co., stated that he negotiated consequential damage limitations in several important contracts. Telephone conversation with Professor Mark E. Roszkowski (Oct. 6, 1993).
63. Thomas J. McCarthy, corporate counsel for E.I. du Pont de Nemours & Co., stated that his firm negotiated umbrella agreements with more than 100 suppliers. Once the umbrella agreement is in place, individual transactions are handled through simple one page contract supplements. Telephone conversation with Professor Mark E. Roszkowski (Oct. 8, 1993).
64. Murray, supra note 21, at 1384.
ness forms, which require wasteful and expensive litigation to interpret, and which often force courts to prefer contract terms drafted "to the edge of the possible"\textsuperscript{65} over U.C.C. gap fillers. The Alternative B approach promises to achieve these goals and permit "the contract law of Article 2 [to] eschew technical constraints and formalism to emphasize the best approximation of the 'true understanding' of the parties."\textsuperscript{66}

\textsuperscript{65} N.Y. L. REVISION COMMISSION REPORT, supra note 18, at 177.

\textsuperscript{66} Murray, supra note 21, at 1384 (quoting U.C.C. § 2-202 Official Comment 2).