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

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

The topic of this podcast is formation 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’re 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?

A good place to start is with the common law to get a sense of what the rules were that the drafters of the Code intended to change. The common law rule is the “mirror image” rule -- in order for a response to an offer to be an acceptance, the response must exactly match the terms of the offer. If it doesn’t, then it is not an acceptance, but, rather, a rejection and counteroffer. It doesn’t matter that the differences are in the preprinted terms, sometimes called the “boilerplate,” that neither party reads. So at common law, in our hypothetical, the seller’s response with the different warranty term would not be an acceptance.

From there we move on to the common law “last shot” rule. If the terms in the response from the offeree differ from the terms in the offer, then the response is a counteroffer. If the offeror acts on that counteroffer, such as by accepting goods and paying for them, then there is a contract formed on the terms of the counteroffer. So at common law, the party who fired the last shot generally got its terms. In our hypothetical, if the buyer was the offeror and the seller shipped the goods with different terms that the buyer accepted without objection, then the seller’s terms would become the terms of the contract.

This outcome was troubling to the drafters of the Code, since traditionally the offeror was the master of the offer, but just by submitting different terms that the original offeror acted on, the offeree got all of its terms. Of course, the offeror could read the offeree’s form, note the differences, and negotiate for its terms. But that is not an efficient way to do business when most of the time there will be no problem. The drafters of the Code were realistic. They set about to make rules that would work in an environment where neither party read the other’s boilerplate terms. One of the goals was to restore the offeror as “master of the offer.”

Section 2-207 is justifiably criticized because it has a number of ambiguities and a number of times it creates two alternatives, but states a rule only for one of the alternatives. So courts have had to fill in a lot of gaps and have done so with a great deal of inconsistency. But if we keep in mind its underlying purposes, we can make some sense of it.

The first rule of statutory interpretation is to read the statute. Since the third podcast in this series discusses confirmations under § 2-207, I will omit the language that refers to confirmations. Omitting that language, subsection (1) begins by telling us that “a definite and seasonable expression of acceptance … which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered.” What does this mean?

Let’s apply it to a hypothetical. Assume buyer’s purchase order offered to buy “10 widgets for $5,000” and seller’s acknowledgement form stated a sale of “10 widgets for $10,000.” One view is that there has been an acceptance with a different term that would be analyzed under subsection (2), but that view has not gained much traction. Another view is that the seller’s form is not an “expression of acceptance” because of the difference in the essential term. Under this view, § 2-207 would not apply and under the common law, the seller’s form would be a counteroffer. If not acted upon, there would be no contract, but if acted upon, it would create a sale on the seller’s terms, with a price of $1,000 per widget.

The more common view is that even though the seller’s form is not an acceptance, we would still use § 2-207 to analyze contract formation. We get there by dropping down into subsection (3), which tells us that “*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.” The writings don't establish a contract because there is not an acceptance when the essential terms differ. But if the seller shipped the goods and the buyer accepted them, that would be the type of conduct envisioned by subsection (3) that forms a contract.

Subsection (3) goes on to tell us that we find the contract in the terms on which the writings of the parties agree, and where they don't agree, the conflicting terms fall out and we replace them with the default rules under the Code. So here, the conflicting price term would fall out and we have a contract without a price. In that case, price would probably be filled in as a reasonable price under § 2-205, which is usually the market price, which could be more or less than $1,000 per widget. Note that this outcome may differ from the view that sees the seller’s form as a counteroffer, for in that case the price is established by the seller’s counteroffer.

In practice, this situation does not come up too often. While the parties may not read everything on the form of the other, the parties usually do at least verify that the dickered terms are the same, so this situation is unlikely to come up. Most of the time, the problem that arises is not with the essential terms, which are likely to be the same on both forms, but with the boilerplate or non-negotiated terms that are printed on the forms that are likely not to be the same. So let’s see what happens in that case.

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 those forms are not the same. So, now we have to find which of those terms becomes the terms of the contract formed by the parties. To see how the section solves that problem, you will have to go to the second § 2-207 podcast, which covers Finding the Terms of the Contract.

But before we go there, we have to deal with an exception to the rule under subsection (1) that the conflicting forms create a contract. The language after the comma in subsection (1) says that the conflicting form is an acceptance “unless acceptance is expressly made conditional on assent to the additional or different terms.” So, if one party puts in its form language that says that acceptance is expressly made conditional on assent to the additional or different terms, then there is not acceptance, and, if there is not acceptance, then there is not a contract formed under subsection (1).

There is a great deal of litigation about how express the language has to be to satisfy the requirement of § 2-207(1) after the comma. I agree with the cases that say the condition has to be just as the language says – expressed. It's got to be very strong language that says more than “I really want my terms” – it has to say in effect that “we don't have a contract if you don’t agree to my terms.” If this language is used and the buyer saw that language in the seller’s form, the buyer could then reply, “Whoa – I’m not going to agree to that. Since we don’t have a contract, let’s just call the whole thing off.”

Unfortunately, what usually happens is that the party receiving the form doesn't bother to read the language that says that acceptance is expressly made conditional any more than they read other boilerplate, so the seller just ships the goods and the buyer pays for them. So now the seller has shipped goods and the buyer has paid for them under writings that do not form a contract under subsection (1) due to the expressly made conditional language.

What happens then? The answer is found by dropping down into subsection (3), which tells us that “*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.” The writings don't establish a contract because one of them made acceptance expressly conditional on their terms, but the conduct of shipping and paying for goods is exactly the type of conduct envisioned by subsection (3) in order to form a contract.

So if the conditional language is used, and we don't have a contract on the basis of the writings of the parties under subsection (1) but we do have a contract on the basis of their conduct under subsection (3), then where do we find the terms of the contract? Subsection (3) tells us that we find it in the terms on which the writings of the parties agree, and where they don't agree, the conflicting terms fall out and we replace them with the default rules under the Code. This is one thing that is clear in the section.

For example, in the hypothetical with the buyer having a warranty on the goods in its terms and the seller having a warranty disclaimer or limited warranty in its terms, if a contract is formed by conduct, then both the buyer’s warranty terms and the seller’s warranty terms would fall out. We would then gap fill using the Code’s warranty terms, which tend to favor the buyer. The irony is that if a seller uses the expressly made conditional language in its form to prevent formation of a contract not on its terms, but the parties sell and buy goods anyway, the seller ends up not getting its terms. Instead, the seller ends up getting the default rules of the U.C.C. So watch out before deciding to put that language in a contract.

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 website, the buyer will likely have to accept the terms offered on that website. 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 when forms have different essential terms and explain the different theories for resolving that situation. You should be able to identify language that makes acceptance expressly conditional, and where that language is found and the parties create a contract by conduct, you should be able to determine what the terms of the contract are under subsection (3).

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

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