**U.C.C. § 2-207: Written Confirmations**

Welcome to this podcast on U.C.C. § 2-207 Written Confirmations brought to you by CALI. I am Professor Scott J. Burnham. This is the third in a series of podcasts about § 2-207 of the Uniform Commercial Code. The first podcast covered Formation of the Contract. The second covered Finding the Terms of the Contract. You might want to listen to those before undertaking this one.

The topic of this podcast is written confirmations under § 2-207 of the U.C.C., a section often referred to as the Battle of the Forms. 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.

The drafters of the Code realized that there are a number of ways in which parties form a contract. One, discussed in the first two podcasts, is that the offeror sends the other party a form containing its offer, and the offeree sends a return form in response. For instance, a buyer might send a purchase order to the seller and the seller sends an acknowledgment form in response. The second podcast discussed how we find the terms of the contract in that situation.

Another way the parties may form a contract is that they agree to the essential terms of the contract in an informal correspondence (like by email), a face-to-face meeting, or over the telephone. In order to elaborate on the terms they agreed to, and perhaps to satisfy company rules or the statute of frauds, one or both parties might send the other a confirmation of their agreement. The confirmation is likely to contain additional terms to supplement the terms of the earlier informal agreement, and if there are two confirmations, each is likely to contain terms that differ from those in the other confirmation. So just like with the situation when two forms are exchanged, there is a problem to determine which terms in the confirmations are part of the parties’ agreement.

Subsection (1) of § 2-207 states in part that “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.” Admittedly that language does not entirely make sense, because the confirmation does not operate as an acceptance – it is confirming a contract that is already made. Nevertheless, it makes sense to apply the statute to these confirmations and to figure out what to do with the additional and different terms under the statute.

For example, assume buyer and seller made a sale agreement by email and each sent a confirmation. The buyer’s confirmation was silent on inspection and the seller’s confirmation stated that the buyer must inspect the goods within 24 hours of receiving them to report any nonconformities. The seller’s inspection term would be an additional term. Under the analysis in subsection (2), this additional term would be regarded as a proposal for addition to the contract. Assuming both parties were merchants, it would be presumptively accepted unless one of the three exceptions set forth in subsection (2) apply: (a) advance objections; (b) material alterations; and (c) later objection.

Assume, on the other hand, the buyer’s confirmation said it had 60 days to inspect and seller’s confirmation said the buyer had 24 hours to inspect. These would be different terms, and the section does not address how to analyze different terms. Most jurisdictions would apply the “knockout rule” and both provisions would drop out. The court would then gap fill using the Code rule as a default rule, which as to inspection would be § 2-513, which allows the buyer a right of inspection “at any reasonable place and time.” Use of the knockout approach is supported by Official Comment 6, which says in part, “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 part of the contract.”

But what happens with confirmations when a merchant deals with a non-merchant? This issue came to a head in the 1990’s and it has proven to be divisive. Let’s look at *Hill v. Gateway*, a case from 1997, as an example. In those days you ordered your merchandise by phone rather than on the internet. Hill called Gateway and ordered a certain model computer. The parties agreed on a price and shipping terms and Gateway shipped the computer. It arrived with a lengthy document containing various terms and conditions friendly to the seller, including a limited warranty and an arbitration clause. When Hill made a claim, Gateway asserted he had to go to arbitration because of the terms Gateway sent with the computer. Are those terms part of the contract?

Judge Easterbrook, speaking for the 7th Circuit, said that § 2-207 did not apply in this case because there was only one form, and § 2-207 is used to reconcile conflicting forms. As to whether the terms sent with the computer were part of the agreement, he conceptualized what has become known as a “rolling contract.” According to this theory, the parties knew perfectly well that the terms they discussed on the phone did not constitute the entire contract and that more terms would be coming. The judge pointed out that this is the case with many contracts we enter, such as airline reservations, where you order your ticket and then get the terms and conditions later. So under this view, Gateway’s terms governed and Hill was out of luck.

But not all courts agreed with that analysis. In another case, *Klocek v. Gateway*, decided in 2000, the court applied § 2-207. Under this court’s view, the parties made a contract over the phone and Gateway then sent a confirmation of the transaction that contained additional terms. The court then analyzed the outcome under subsection (2). According to subsection (2), the additional terms are viewed as proposals that Gateway was making to Klocek. The statute states that between merchants, the additional terms become part of the contract. But the statute does not say what the rule is for terms proposed by a merchant to a non-merchant. Since it states that between merchants they are accepted automatically, it makes logical sense that between a merchant and a non-merchant they are not accepted automatically, but are rejected unless affirmatively accepted. Since the customer did not affirmatively accept them, they were rejected. Therefore, the terms the parties agreed to on the phone were supplemented not by Gateway’s confirmation, but by the default rules of the Code.

How did Gateway address the problem raised by *Klocek* and cases like it? Rather than rely on a confirmation to add terms to the agreement, it had to get the customer to agree to them at the time the contract was formed, so the sales agents read the entire contract to the customer over the phone!

The conflict between these two approaches has never been resolved. However, as a practical matter, the Battle of the Forms is dying out for transactions like this because instead of exchanging forms or making informal agreements that are confirmed, 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 it can negotiate for more favorable terms, but they will be incorporated in a single document so there is no issue as to whose terms will govern.

Let’s briefly review this podcast. At this point, you should be able to analyze the situation when both parties send a confirmation after the parties have formed a contract and the confirmations contain additional or different terms. If one party sends a confirmation, you should be able to explain the theory of the “rolling contract” under which the terms become part of the contract. You should be able to contrast this approach with the approach that applies § 2-207 to this situation, and explain what happens to the additional terms in the confirmation.

I hope you’ve enjoyed this podcast on UCC § 2-207 Confirmations.

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