

RECENT DEVELOPMENTS IN INDIANA COMMERCIAL LAW

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I. THE TANK OF UCC § 2-207 GETS CAUGHT IN THE INDIANA SAND¹

The leading writers on the Uniform Commercial Code have described section 2-207, the section that tries to deal with the so-called "battle of the forms," as a tank designed for the swamp and "sent to fight in the desert."² Another scholar described the section as "a miserable, bungled, patched-up job."³ One of the more prolific writers on section 2-207

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1. Indiana's version of UCC § 2-207 (1977) appears at IND. CODE § 26-1-2-207 (1993). The UCC, in its entirety, is located in IND. CODE § 26-1 (1993). Hereafter, citations to the various UCC sections will be to the generic section numbers of the current Official Draft unless the Indiana version differs in some material respect from the text of that draft.

UCC Section 2-207 states:

(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 [the Code].

2. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 at 29 (3d, Practitioner's ed. 1988) [hereinafter WHITE & SUMMERS].

White & Summers published single volume editions of their work on the UCC in 1972 and 1980. In 1988, their third edition took two forms, an abridged Student Edition in green binding and a more expansive, two-volume Practitioner's Edition in dark red binding (since expanded to several volumes). In some chapters, the Practitioner's Edition contains more extensive textual discussions and footnote citations than does the Student Edition and is supplemented periodically. *Id.* at Preface. In this Article, unless the edition is specified, citation to WHITE & SUMMERS will be to the Practitioner's Edition of 1988.

3. Letter from Grant Gilmore to Robert S. Summers, reproduced in RICHARD E. SPEIDEL ET AL., COMMERCIAL LAW 467 (4th ed. 1987). The section has also been described as "a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair," *Reaction Molding Tech., Inc. v. General Elec. Co.*, 585 F. Supp. 1097, 1104 (E.D. Pa. 1984), *modified*, 588 F. Supp. 1280 (E.D. Pa. 1984); and, a "murky bit of prose," *Southwest Eng'g Co. v. Martin Tractor Co.*, 473 P.2d 18, 25 (Kan. 1970). As stated by Professors Baird and Weisberg, "[M]ost commentators also agree that 2-207 is a statutory disaster whose every word invites problems in construction." Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of*

has characterized the state of the law as "chaos."⁴ He explained that section 2-207 was part of "the Article 2 revolution" aimed at determining the true intent of the parties in reaching their agreement as based on facts, not on technical rules, and on determining when, based on the parties' own understandings, they intended that their deal be considered closed.⁵ He later stated that much of the blame for the chaos "had to be laid at the feet of courts committed to vested notions of classical contract law and with virtually no understanding of the underlying philosophy of the radically new Article 2."⁶

Section 2-207 was designed to abolish the mechanical common law "mirror image" rule pursuant to which the response to an offer that varied from the terms of that offer in any respect constituted a counter-offer rather than an acceptance.⁷ The drafters were concerned with four basic situations: (1) an offer followed by a qualified acceptance that looks like an acceptance but contains terms additional to or different from those in the offer; (2) the form offer with its own pre-printed terms to which the offeree responds by using a pre-printed form on which the dickered or negotiated terms are correctly typed or written, but the response form also contains pre-printed boilerplate terms that add to or differ from the terms contained in the offer; (3) the confirmation of a prior oral agreement that adds terms to or differs from the terms of that prior agreement; and (4) the failure of the forms to create a contract but the parties nevertheless act as if there is a contract.⁸ The two key issues to be resolved by application of section 2-207 to these situations are: (1) whether a contract exists and (2) if so, what its terms are.

the Forms: A Reassessment of § 2-207, 68 VA. L. REV. 1217, 1224 (1982).

4. John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1308 (1986) [hereinafter Murray, *Chaos*]. Dean Murray has written extensively on this topic, e.g., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1464-81 (1994) [hereinafter Murray, *Romancing the Prism*]; *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986); *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981) [hereinafter Murray, *The Article 2 Prism*]; *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978); *Intention over Terms: An Exploration of U.C.C. Section 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969). The "chaos" of § 2-207 has resulted in extensive commentary by other scholars as well. See, e.g., Baird & Weisberg, *supra* note 3; Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991); Daniel A. Levin & Ellen B. Rupert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision be Adopted?*, 11 J.L. & COM. 175 (1992).

5. See Murray, *Chaos*, *supra* note 4, at 1311-12; Murray, *The Article 2 Prism*, *supra* note 4.

6. Murray, *Romancing the Prism*, *supra* note 4, at 1464. With respect to his and the efforts of others to explain the new philosophy of § 2-207, Dean Murray commented, "The courts just didn't get it and were never going to get it." *Id.*

7. See, e.g., *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 575 (Ind. Ct. App. 1978); SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE 3 U.C.C. Rep. Serv. (MB), § 3.02 [hereinafter SALES & BULK TRANSFERS]; 1 WHITE & SUMMERS, *supra* note 2, § 1-3 at 30; Richard E. Speidel, *Contract Formation and Modification under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1322 (1994).

8. See, e.g., UCC § 2-207, cmt. 1; Murray, *Chaos*, *supra* note 4, at 1307-08, 1315; John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029, 1035 (1994).

A recent decision involving Indiana law has added to the chaos because of its approach to section 2-207 and its reliance on an earlier, seriously flawed Indiana decision. That latter decision itself relied on the most criticized of all section 2-207 decisions. The cases are, respectively, *Kittle v. Newell Coach Corp.*,⁹ *Continental Grain Co. v. Followell*,¹⁰ and *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*¹¹ The actual results with respect to liability for breach of contract in the *Kittle* and *Followell* cases may be justifiable, but the means by which those results were achieved will surely cause further confusion with respect to the application of section 2-207.

The Code's philosophy is that the issues of whether a contract exists, and, if so, what its terms are, depend entirely on the actual intention of the parties. Accordingly, section 2-207 cases are fact-sensitive. Proper analysis of those cases requires a somewhat extended discussion of their particular facts. The two Indiana cases, *Kittle* and *Followell*, are no different.

Kittle did not involve an exchange of pre-printed forms. The offer and subsequent dealings were contained in letters between the parties. The buyer offered to buy a motor coach on terms calling for twenty percent with the order, seventy-five percent of the balance on delivery, and the remainder of the balance after thirty days.¹² The seller's letter of response stated that the offer was acceptable but added a "clarification" that called for a non-interest bearing, thirty-day promissory note for the remainder of the balance on delivery of the motor coach. The seller could then discount the note at its bank.¹³ The buyer did not sign the copy sent by the seller but did send a reply that he

9. 830 F. Supp. 1209 (S.D. Ind. 1993).

10. 475 N.E.2d 318 (Ind. Ct. App. 1985).

11. 297 F.2d 497 (1st Cir. 1962).

12. The buyer's offer letter stated:

"I will pay 20% with my order; or \$62,378; and I will pay 75% of the remainder; or \$197,134 plus sales tax of \$8,750 upon delivery and acceptance; and I will pay the balance; or \$62,379 on the 30th day following delivery and my acceptance for a sale price total of \$311,811 plus \$8,750 of Indiana Sales Tax."

830 F. Supp. at 1210.

13. The seller's response, dated May 21, 1991, stated, inter alia:

The proposal contained in your letter of May 16, 1991 is acceptable to Newell Coach. I would like to offer the following clarifications:

....

- With the exception of the above clarifications regarding sales tax collection, the payment terms you offer are accepted. We will confirm the balance due at delivery, \$62,379, using a note which will bear no interest for 30 days, secured by the coach. I will discount the note to my bank who has already approved the transaction without requiring any additional documentation, financial statements, etc. from you.

We will proceed with the coach modifications immediately. Unless we run into some unforeseen delay in receiving materials, the delivery date target between June 20 and June 28 is reasonable.

All things said and done, we are pleased to go forward with this transaction with you. . . . Your offer is acceptable because of current market conditions and our desire to maintain market share in a very competitive market, plus the personal desire to capture you and Ron as customers.

Please confirm your acceptance by signing below and transmitting a copy back to me. Unless you

would "just pay as [he] stated earlier" and would give the deposit check to the seller in person.¹⁴ The seller sent a response via fax indicating that personal delivery of the deposit check was "fine."¹⁵ Additional correspondence between the parties themselves as well as with the seller's bank concerned the financing of the purchase price, the use of the note for the payment of the balance due, and ultimately, the return of three cartons of clothing and linens sent by the buyer for placement in the coach prior to delivery.¹⁶ Because the buyer refused to execute the note, the seller refused to deliver the coach. The buyer then sued to recover his deposit, interest, and contractual and punitive damages.¹⁷ On motions by both parties for summary judgment, the court held that no contract existed and that the buyer was entitled to the return of his deposit.¹⁸

Analyzing *Kittle* properly requires an examination of its approach to section 2-207 and that of the *Followell* case on which it relied, both of which this author believes were flawed. In the course of doing so, it will also be helpful to explain how the courts should have proceeded in both cases.

At the very outset of its analysis of the section 2-207 problem, the *Kittle* court declared, "Without question, [the seller] made a 'definite and seasonable expression of acceptance' in his reply letter to [the buyer]'s offer. Thus, the only issue is whether [the

prefer the use [of] a wire transfer, I suggest [that] the deposit be sent to us by regular mail, a company check or personal check being perfectly satisfactory of course."

Deposition Ex. 66, Fax from Karl Blade, President, Newell Coach Corp. to James L. Kittle, Sr. (May 21, 1991). Copies of the exhibits were obtained from the record on file in Cause No. IP-91-915 C with the Clerk of the U.S. District Court for the Southern District of Indiana and are on file with the author.

14. The buyer's response, dated May 22, 1991, with a postscript dated May 23, sent via fax, stated, *inter alia*:

[I]n responding to your letter I believe we mutually understand both the "tax issue" you raised *and* the final payment methodology. [The next portions related to the interior decoration of the coach.]

....

[A]s agreed I am enclosing my check for \$62,378 as my deposit; and, at this point, I believe I will just pay as I stated earlier. However Coopers and Lybrand, my accounting firm, seem to believe I should be looking for "interest charge [offs]" inasmuch as I have none at this time . . . therefore, let's leave this "open" 'til I make the decision.

. . . 'til Sunday then I am,

The post-script stated: "Karl . . . this being Thursday I am holding my check and will give it to you personally on Sunday." Deposition Ex. 25, Fax from James L. Kittle, Sr. to Karl Blade, President, Newell Coach Co. (May 23, 1991). *See supra* note 13.

15. The deposition exhibit quoted in *supra* note 14 indicates on its face that the seller responded by faxing a copy of the buyer's fax with some notations next to the decorative requests, the word "fine" next to the buyer's post-script about the check, and the addition, "See you Sunday, Karl."

16. Miscellaneous Deposition Exhibits, Correspondence (and notations apparently returned by fax) (June 5, June 21, June 27, July 2, July 2, July 3, July 5, and July 5) [hereinafter Miscellaneous Deposition Exhibits]. *See supra* note 13.

17. 830 F. Supp. at 1211.

18. *Id.* at 1210.

seller]’s acceptance was conditional on [the buyer]’s assent to additional terms.”¹⁹ It is here that the court, by following the map drawn in *Followell*, got lost in the desert and trapped in the sand.

Relying on the language of *Followell*, the *Kittle* court reasoned that the seller’s “clarification” changed a material term of the buyer’s offer, thereby making the seller’s acceptance “expressly conditional” on the buyer’s assent. This brought the response within the “unless clause” or proviso of section 2-207(1), thereby precluding the creation of a contract without that assent.²⁰ The problem is that *Followell* was seriously flawed both in its approach to the philosophy of section 2-207 and in its application of section 2-207 to the facts before it. Moreover, on its facts, *Followell* was inapplicable to *Kittle*.

In *Continental Grain Co. v. Followell*,²¹ a telephone conversation between the farmer-seller (“Followell”) and the grain company-buyer (“Continental”) in March 1983, resulted in a detailed oral agreement for the sale of corn and soybeans to Continental. One term of the agreement called for delivery in the fall at Continental’s elevator in Evansville, Indiana.²² Shortly thereafter, Continental sent two pre-printed forms entitled “Purchaser Confirmation,” each of which was completed so as to confirm on the front all of the terms of the oral agreement—specifically the Evansville delivery—and contained the pre-printed language, “Subject to the terms and conditions on back hereof.” On the reverse side were eleven pre-printed clauses, the most important of which said “6. Buyer reserves right to change destination of shipments. . . . 9. The terms expressed herein are the entire contract between the parties. No modification or amendment of the contract shall be valid or binding unless agreed to by both parties and confirmed in writing by either to the other.”²³ Followell immediately objected to clause six and requested an amendment specifying Evansville delivery. Continental’s representative agreed, but Continental, early in April, merely sent duplicates of the first documents with no change. Several telephone conversations about the delivery point followed. Only after a dramatic rise in the prices of corn and soybeans later that summer did Continental comply with Followell’s request and confirm an Evansville delivery term.²⁴ Followell never delivered the corn and soybeans, and Continental sued.²⁵ The trial court concluded that there was no contract between the parties, and the court of appeals affirmed.²⁶

19. *Id.* at 1211.

20. *Id.* at 1212.

21. 475 N.E.2d 318 (Ind. Ct. App. 1985).

22. The court opened its “STATEMENT OF THE FACTS:”

Followell, a Brown County farmer who had not previously dealt in grain futures, initiated a telephone call to an employee of Continental on March 14, 1983, which resulted in an oral agreement whereby he agreed to sell Continental 3000 bushels of corn at \$2.81 per bushel, and 2000 bushels of soy beans at \$6.01 per bushel, to be delivered September, October and November, 1983, at Continental’s elevator in Evansville, Indiana.

Id. at 319 (emphasis added).

23. *Id.* at 320.

24. *Id.*

25. *Id.*

26. *Id.* at 324.

The initial problem with the *Followell* court's opinion is that it confused two situations to which section 2-207 applies: (1) offers followed by responses that contain terms additional to or different from those in the offer, and (2) oral agreements followed by written confirmations that contain terms additional to or different from those to which the parties previously agreed orally. Although the court declared specifically that an oral agreement preceded Continental's confirmation form, its analysis was based on the premise that the facts involved an offer followed by a response that contained a differing term.²⁷ The case should have been analyzed solely as one involving an oral agreement followed by a written confirmation that contained a term different from those on which the parties had already agreed.

In the course of its opinion, the court quoted extensively from the White and Summers' discussion of section 2-207.²⁸ However, the court completely ignored the authors' fifth example: "Cases in which there is a prior oral agreement."²⁹ Commenting about one case in particular, White and Summers stated, "The court [in that case] correctly held that 2-207(1) does not permit confirmations to be expressly conditional on assent to additional or different terms. A party should not be able to break an oral contract through a confirmation."³⁰ Instead, the additional or different terms in confirmations of prior oral agreements are "run through [sections] 2-207(1) and (2)," and, if they differ materially from the oral agreement or one party objects to them, they do not become part of that agreement.³¹

Since the decision in *Followell*, White and Summers have suggested that if the form purportedly confirming a prior oral agreement actually continues the negotiation of a dickered term, the confirmation form "may not qualify as an acceptance under 2-207(1)."³² But neither they nor section 2-207(1) itself states what happens to the prior oral agreement if, under their analysis, the confirmation does not qualify as an acceptance. Does it make any difference with respect to the content or effectiveness of the prior oral agreement? Unless White and Summers are suggesting that the confirmation is evidence that no prior oral agreement actually existed, their comment is difficult to understand at best. The only reason a written confirmation may be necessary is to satisfy the Statute of Frauds found in section 2-201. However, it is not needed as an "acceptance" because a contract, albeit oral, already exists.³³ Murray suggests that a confirmation of an already existing oral agreement is treated as an acceptance under section 2-207(1) so that any terms in the confirmation that differ from or add to those of the oral agreement will be treated in the same manner as additional or different terms in acceptances pursuant to

27. *Id.* at 319, 321-24.

28. *Id.* at 322-23. The edition of WHITE & SUMMERS to which the court referred and from which it quoted is JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980) [hereinafter WHITE & SUMMERS, 1980]. See the discussion of WHITE & SUMMERS, *supra* note 2.

29. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 26, 35-37.

30. *Id.* at 36 n.28 (referring to *American Parts Co. v. American Arbitration Ass'n.*, 154 N.W.2d 5 (Mich. Ct. App. 1967); *accord*, *Leonard Pevar Co. v. Evans Prod. Co.*, 524 F. Supp. 546 (D. Del. 1981)).

31. See UCC § 2-207(2)(a),(b); WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 35.

32. WHITE & SUMMERS, *supra* note 2, § 1-3 n.71. The language quoted is followed by "Cf. *Continental Grain Co. v. Followell.*" *Id.*

33. See 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-207:05 (1992).

section 2-207(2).³⁴ This interpretation is consistent with White and Summers' observation that terms in confirmations are "run through" section 2-207(2), as noted *supra*.³⁵

In *Followell*, the court of appeals expressly found that the parties had reached a prior, detailed, oral agreement.³⁶ The confirmation form sent by Continental did not indicate that the parties were still dickering because the clause in question was pre-printed in a list of clauses on the back of the form. The only dickering resulted when Followell himself read the back of the form and objected.³⁷ At this point, the court should have ruled that a prior oral agreement called for delivery at Evansville and that the differing term in Continental's confirmation could not change the destination point without Followell's agreement. Even if treated as if it were an additional term, clause six of Continental's terms did not form part of their contract because one party objected to it pursuant to section 2-207(2)(a), or because it was a material alteration of the already-existing agreement of the parties pursuant to section 2-207(2)(b).³⁸

Continental's position that Followell had breached this contract by failing to deliver, however, would still have been tenuous at best. The court could have found that Continental was acting in bad faith when it continued to string Followell along until after a sudden price increase.³⁹ Alternatively, it could have found that Continental had failed to provide reasonable assurances of performance after being requested to do so, thereby repudiating the contract.⁴⁰ In either case, Followell's duty of performance would have been excused and the ultimate result the same, *i.e.*, that Followell was not in breach and therefore not liable to Continental.

Had *Followell* been analyzed in this way, it would not have been relevant to *Kittle* because there was no prior oral agreement in *Kittle*. Rather than follow what seems to be the appropriate analytical path, the *Followell* court said that section 2-207(1) "applies to written confirmations of oral contracts" and that "where confirmation differs materially, no contract is formed."⁴¹ It then proceeded to treat the case as if it involved an offer followed by a response that contained a term materially different from a term in that offer. In this part of the court's analysis, the second basic flaw appeared and ultimately misled the *Kittle* court.

The *Followell* court stated,

Here, the confirmation diverged so materially in item 6, which reserved Continental's right to change the place of destination, that if exercised by

34. JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 50 at 170 (3d ed. 1990).

35. See the discussion in the text accompanying *supra* note 31.

36. 475 N.E.2d at 319.

37. *Id.* at 320.

38. That the alteration was material can be found in Followell's objection, "[I]f I sign this, you can send me to Memphis, Tennessee or anywhere else you want me to go at my expense." *Id.* at 320.

39. See UCC § 1-203. The court intimated that Continental was not bargaining in good faith when it observed that Continental delayed from March 14 to July 29 before guaranteeing Evansville as the delivery destination and that it did not do so until after negotiations had ceased and prices had dramatically risen. 475 N.E.2d at 320.

40. See UCC § 2-609.

41. 475 N.E.2d at 322.

Continental, it could be ruinous to Followell. Item 6, accompanied by item 9, the insistence that Continental's terms and no others would be accepted, makes the acceptance expressly conditional, and thus no [section] 2-207(1) acceptance occurred.⁴²

The court misread "item 9" as making acceptance expressly conditional. "Item 9" is a traditionally worded "no-oral-modification" clause designed to meet the requirements of section 2-209(2) and to require that all subsequent changes in the contract be in writing.⁴³ As noted *infra*, it was not the kind of clause necessary to make the acceptance "expressly conditional."

The substantial majority of courts and scholars dealing with the issue of whether a particular clause in a response to an offer makes acceptance expressly conditional have concluded that the language must make absolutely clear to the offeror that no contract exists without the offeror's assent to the offeree's additional or different terms. This result is frequently achieved by tracking the language of section 2-207(1)'s proviso.⁴⁴ Anything less will not suffice. "Item 9" falls far short of this requirement, as does the statement at the bottom of the first page of Continental's confirmation, "Subject to the terms and conditions on the back hereof."⁴⁵

The next problem with the *Followell* decision is that, as the *Kittle* court correctly read it, the *Followell* court concluded that the different delivery term was so material an alteration of the agreement of the parties that it made the acceptance expressly conditional within the proviso of section 2-207(1).⁴⁶ In doing so, the *Followell* court relied on *Roto-Lith, Ltd. v. F.P. Bartlett Co.*,⁴⁷ a case almost universally criticized for its total misinterpretation and misapplication of section 2-207.⁴⁸

42. *Id.* at 324.

43. Section 2-209(2) states: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . ." Official Comment 3 thereto explains, "Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by a signed writing." Cf. Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509 (1994).

44. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 101-02 (3rd Cir. 1991); *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571 (Ind. App. 1978); *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 339 S.E.2d 527, 530 (S.C. Ct. App. 1986); Murray, *Chaos*, *supra* note 4, at 1325, 1333, 1335.

45. *Followell*, 475 N.E.2d at 319. See, e.g., *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 113 n.12 (7th Cir. 1979); *Dorton*, 453 F.2d at 1164.

46. *Followell*, 475 N.E.2d at 324.

47. 297 F.2d 497 (1st Cir. 1962).

48. See, e.g., *Luria Bros. & Co.*, 600 F.2d at 113; *C. Itoh & Co. (America)*, 552 F.2d at 1235 n.5; *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 323 (N.M. 1993) (*Roto-Lith* is an "aberration in Article 2 jurisprudence"); *Uniroyal, Inc.*, 380 N.E.2d 571; Murray, *Chaos*, *supra* note 4, at 1330-31 ("*Roto-Lith* was the product of a court so obsessed with the classical analytical framework that it arrived at a conclusion and a rationale diametrically opposed to the statutory language.>").

Roto-Lith consisted of two basic parts: First, the court concluded that the presence of a pre-printed warranty disclaimer clause in the seller's acceptance form that materially altered the proposed contract "solely to the disadvantage of the offeror" made that acceptance expressly conditional within the proviso of section 2-207(1), thereby making the form a counter-offer to which the buyer never expressly agreed.⁴⁹ Second, the court ruled that the buyer's receipt, acceptance, and use of the goods constituted an acceptance of that counter-offer and of the warranty disclaimer found in it.⁵⁰ Both parts of *Roto-Lith* have been discredited by substantially all courts and scholars.

White and Summers, on whom the *Followell* court relied so heavily, described *Roto-Lith* as

the infamous case . . . where the First Circuit held that any responding document "which states a condition materially altering the obligation solely to the disadvantage of the offeror"—here, a disclaimer—was expressly conditional and thus did not operate as an acceptance. We would reject that argument also, for it is inconsistent with our interpretation of the word "acceptance" in 2-207(1) and contrary to the [drafters'] policy stated above to whittle down the counteroffer rule and form contracts more readily than under the common law. Further, Comment 4 to 2-207 refers to disclaimers as "material" alterations under 2-207(2)(b), a reference that would be redundant if disclaimers always made an offer expressly conditional under 2-207(1).⁵¹

The *Followell* court confused the two parts of section 2-207(1) when it said that the proviso "must be construed as imposing a limitation upon how much an acceptance can differ and still be considered an acceptance at all."⁵² In applying that section, the first inquiry should be whether the response constitutes a "seasonable expression of acceptance," which is the subject of the first part of the section. If it does, then it "operates as an acceptance." The issue in answering this question is whether the parties have indeed closed their deal or are still negotiating.⁵³ If the conclusion is that the parties intended to close the deal and that the offeree's response would ordinarily be an acceptance within the section despite the presence of additional or different terms, the next inquiry should be whether the offeree has indicated unequivocally that no deal exists

49. *Roto-Lith*, 297 F.2d at 500.

50. *Id.*

51. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 28. *Accord*, *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 101 (3rd Cir. 1991).

52. *Followell*, 475 N.E.2d at 322.

53. As stated by Duesenberg & King,

In every case, the "critical question to ask is, has the offeree expressed the notion that the deal is closed? If the offeree expressed the notion that the deal is closed, it is closed even though he has made some counterproposals to the original proposition. In each case a determination must be made to ascertain whether the counterproposals militate against a finding of an expression of a closed deal; but if the expression of a closed deal is found, both parties are bound by the contract, even though the offeree has stated terms materially different from those offered."

SALES & BULK TRANSFERS, *supra* note 7, § 3-04 at 3-7 (quoting WILLIAM D. HAWKLAND, 7 ILL. S.B.A. COMMERCE, BANKING & BANKRUPTCY NEWSLETTER 5 (1962)).

unless the offeror assents to all of the offeree's terms, as discussed *supra*.⁵⁴ If no clause in the offeree's response satisfies the strict requirements of the proviso, a contract has been formed despite the presence of additional or different terms in the response that constitute material differences from the terms in the offer. What happens to those additional or different terms is then to be determined by application of section 2-207(2).

The *Followell* court quoted again from White and Summers: "If the return document diverges significantly as to a dickered term, it cannot be a 2-207(1) acceptance."⁵⁵ It then continued with the authors' examples of forms that conflict as to price or delivery terms, with the offer stating one price and the acceptance stating another, or the offer stating "as is—where is" and the acceptance "F.O.B. our truck your plant loaded."⁵⁶ Earlier in their text, however, White and Summers stated: "It is easier to hold that a purported acceptance that includes a different delivery date (specifically written in) cannot operate as an acceptance than to hold that a different printed arbitration clause cannot."⁵⁷ This analysis focuses on whether the response is an expression of acceptance because the parties have completed their bargaining, not on whether the acceptance has been made expressly conditional.

Continuing with the analysis of *Followell* as an offer-acceptance case, the problem with the facts is that it appears that all dickering had ended when Continental typed the Evansville delivery point specified in Followell's offer on the face of the confirmation form. The terms pre-printed on the back apparently had no part in the parties' negotiations or dickering. The mere fact that the dispute related to a term that is ordinarily a dickered term should not have ended the court's analysis as it did. Because the delivery term can be called a dickered term—the change was undickered boilerplate—the court should have more deeply examined the true intent of both parties. Followell was objecting, but the real question should have been whether, by using the boilerplate form, Continental was still dickering or merely had used an available form without any attention to its pre-printed boilerplate. A reasonable conclusion could be, and this author believes, that Continental had completed its bargaining when it filled in the confirmation form and that a contract was formed pursuant to section 2-207(1) notwithstanding the presence of item six on the reverse side of that form. From an extensive examination of the drafting history of section 2-207, one writer has concluded that very different terms in boilerplate do not prevent a printed form response from constituting an expression of acceptance.⁵⁸ If a contract was formed, whether item six thereafter became part of the contract under section 2-207(2) constituted a separate issue that should have been dealt with, as discussed *supra*,⁵⁹ and likely did not become part of the contract. In any event, it appears that a contract existed between the parties. Whether Followell was excused from performing, as the court found, was a separate issue, also as discussed *supra*.⁶⁰

54. See *supra* notes 44-45 and accompanying text.

55. *Followell*, 475 N.E.2d at 322 (quoting WHITE & SUMMERS, 1980, *supra* note 28, § 1-3 at 37).

56. *Id.*

57. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 28.

58. See Wladis, *Drafting History*, *supra* note 8, at 1046.

59. See *supra* notes 36-38 and accompanying text.

60. See *supra* notes 39-40 and accompanying text.

Returning to *Kittle*, it is this author's opinion that, in view of the problems with *Followell*, not the least of which are the application of offer-acceptance analysis to a confirmation-of-prior-oral-agreement case and the presence of boilerplate provisions not found in *Kittle*, the *Kittle* court should not have relied on it as controlling. The seller in *Kittle* stated that the buyer's offer was "acceptable," that "the payment terms . . . [were] accepted" "with the exception of the above clarifications," and that "[the buyer's] offer [was] acceptable because of current market conditions."⁶¹ The court concluded, "*Without question*, [the seller] made a 'definite and seasonable expression of acceptance' in his reply letter to [the buyer's] offer."⁶² The seller's response did not state that it was expressly conditional nor did it clearly indicate that the seller would not proceed with the deal except on the seller's own terms. Therefore, the proviso of section 2-207(1) was not activated, and a contract could have resulted. If so, the different payment term should have been examined under section 2-207(2), and if, as the court indicated, the requirement of a promissory note was a material alteration,⁶³ it would not become part of the contract. Similarly, the buyer's reply that he would "just pay as [] stated earlier" was an objection to the seller's term, thereby precluding it from becoming part of the contract.⁶⁴ When the seller refused to deliver, he breached that contract.

Furthermore, the philosophy underlying the Uniform Commercial Code does not require that the parties agree to all material terms at the time the contract comes into existence. If the parties intend to reach agreement, a contract may exist despite the absence of one or more terms, which are for later agreement.⁶⁵ Thus, the court should also have examined closely whether the parties had formed a contract for the sale of the coach but left for later agreement the determination of how the payment of the final portion of the price would be made. In the event of a failure to agree, the Uniform Commercial Code would fill in any gaps.

Had the court approached section 2-207 as it should have, it would have determined initially whether or not the first response of the seller was indeed an expression of acceptance that closed the deal and resulted in a contract, or was a continuation of negotiations over the payment terms, thereby precluding the making of a contract at that point. The seller's response could have been classified as either "an acceptance which requests or suggests a modification of the contract" or "a 'grumbling assent' [that] has been described as an acceptance that expresses dissatisfaction at some terms 'but stops

61. 830 F. Supp. at 1210.

62. *Id.* at 1211 (emphasis added).

63. *See id.* at 1212. One may question whether the demand for a non-interest bearing 30-day promissory note was in fact materially different from the buyer's promise to pay the balance due at the end of 30 days. Since the bank to which the note would be negotiated was intimately involved in the transaction, it would not be a holder in due course. Consequently, the buyer's defenses in the event of problems with the coach would still have been available to him, which is why he wanted the 30 day deferral of final payment. Had problems occurred, in all likelihood he could have successfully refused to pay the balance whether the payment was to be made to the seller or to the bank. However, that discussion is for another day.

64. *See* § 2-207(2)(a).

65. Section 2-203(3) states: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

short of dissent.”⁶⁶ In either case there would have been a “seasonable expression of acceptance” that operated as an acceptance, and a contract would have resulted. If so, the promissory note request would then be subject to analysis under section 2-207(2) as noted above.⁶⁷

The examination of *Kittle* should not stop here. If the court could conclude (as it did) that no contract was formed when the seller responded to the buyer’s offer, the court should have examined all of the remaining dealings and communications between the parties. Any of these could have indicated that the parties had finally reached agreement. If the court then concluded that the parties were still negotiating and that no contract resulted from the exchange of all of the writings, the actual conduct of the parties should have been examined pursuant to section 2-207(3).

Section 2-207(3) states that “[c]onduct 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.”⁶⁸ As the court noted in *Dorton v. Collins & Aikman Corp.*,⁶⁹

When no contract is recognized under Subsection 2-207(1) . . . the entire transaction aborts at this point. If, however, the subsequent conduct of the parties—particularly, performance by both parties under what they apparently believe to be a contract—recognizes the existence of a contract, under Subsection 2-207(3), such conduct by both parties is sufficient to establish a contract, notwithstanding the fact that no contract would have been recognized on the basis of their writings alone.⁷⁰

66. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2-20 at 99 (3d ed. 1987); accord ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 84 (One vol. ed. 1952). With respect to the former type of acceptance, CALAMARI & PERILLO describe *Martindell v. Fiduciary Council, Inc.*, 26 A.2d 171 (N.J. Eq. 1942), *aff’d* 30 A.2d 281 (N.J. Eq. 1943), as illustrative:

In that case A gave B an option to purchase 27 shares of certain stock. Within the time specified in the option, the optionee wrote as follows: “I hereby exercise my option. I have deposited the purchase price with the Colorado National Bank to be delivered to you upon transfer of the stock. If you do not accept such procedure, I demand that you designate the time and place for the same.” The court held that there was an acceptance and that the language relating to how the purchase price would be paid did not give rise to a counter-offer because it merely suggested a way to perform the contract and the acceptance was otherwise unconditional.

CALAMARI & PERILLO, *supra* § 2-20 at 99 n.91.

67. According to Professor Wladis, the drafting history indicates Karl Llewellyn’s early position that in non-form offer and acceptance situations, *i.e.*, where pre-printed forms are not used by the parties, if the offeree’s response states both an acceptance and a term different from, rather than in addition to, a term in the offer, no contract exists. Wladis, *Drafting History*, *supra* note 8, at 1037. However, the language of § 2-207(1) as ultimately adopted does not appear to make this distinction or support this result.

68. *See supra* note 1.

69. 453 F.2d 1161 (6th Cir. 1972).

70. *Id.* at 1166. Accord, *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 552 (D.Del. 1981); see, *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978).

What conduct would be sufficient to recognize the existence of a contract is essentially a fact issue. Section 2-204(1), to which the official comment to section 2-207 refers,⁷¹ states, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes existence of such a contract." The official comment thereto adds that "appropriate conduct by the parties may be sufficient to establish an agreement."⁷² Although the conduct of the parties in the majority of cases applying section 2-207(3) reached the point where the seller had shipped goods and there was a breakdown in the transaction thereafter,⁷³ actual shipment is not required.⁷⁴ The issue is: Notwithstanding the non-existence of a contract, did the parties nevertheless behave as if a contract did exist?

There is evidence from which the court could have concluded that the parties did act as if a contract existed in *Kittle*. The court should have reviewed that evidence and should have reached some conclusion based thereon. The buyer's reply to the seller's response raised a number of issues about interior decoration and stated that he would personally deliver the deposit check, which he apparently did.⁷⁵ The court observed that the seller interpreted the buyer's reply and check "as an acceptance of its clarifications,"⁷⁶ but the court did not state whether the seller was correct. The buyer's reply stated in response to the seller's clarification that the buyer would "just pay as [he had] stated earlier,"⁷⁷ thus rejecting the seller's clarification. Thereafter, further discussions about decorative changes to the interior of the motor home and discussions between the buyer and the seller's bank ensued.⁷⁸ The seller never returned the buyer's deposit check but apparently continued to prepare the motor home for delivery to the buyer by making the requested interior changes. The buyer sent clothing and linens to the seller for placement in the motor home.⁷⁹ Thus, at the point when the seller refused to deliver the motor home unless the buyer signed the promissory note, both parties had apparently continued to act as if a contract existed between them. Whether their conduct was sufficient to satisfy section 2-207(3) remained for the court to determine, a determination the court never made.

The end result in *Kittle*—that no contract existed and that the buyer was entitled to the return of his deposit—might have been correct. Then again, if the appropriate

71. Section 2-207 cmt. 7.

72. Section 2-204 cmt.

73. See, e.g., *Gumz v. Starke County Farm Bureau Coop. Ass'n*, 395 N.E.2d 257 (Ind. 1979), *adopting in part* *Gumz v. Starke County Farm Bureau Coop. Ass'n*, 383 N.E.2d 1061 (Ind. Ct. App. 1978); *Uniroyal, Inc.*, 380 N.E.2d 571.

74. See, e.g., *United States Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061, 1067 n.8 (8th Cir. 1977) (seller refused to ship); *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 585 F. Supp. 1097 (E.D. Pa. 1984) (buyer sent deposit check; seller prepared for production); *Cargill, Inc. v. Wilson*, 532 P.2d 988 (Mont. 1975) (seller received offer, made no objection; later received and objected to check as advance payment, but refused to deliver).

75. Deposition Exhibit 25, Fax from James L. Kittle, Sr. to Karl Blade, President, Newell Coach Co. (May 23, 1991). See *supra* note 13.

76. *Kittle*, 830 F. Supp. at 1211.

77. *Id.*

78. Miscellaneous Deposition Exhibits, *supra* note 16.

79. Miscellaneous Deposition Exhibits, *supra* note 16.

analytical steps had been followed, it might not have been. The real problem with the decision is that the path taken to reach its result may well misdirect future litigators and courts into the engulfing sands of section 2-207. It should be further noted that the sands of section 2-207 may be swept away by the revision of Article Two, which has been underway for several years under the auspices of the National Conference of Commissioners on Uniform State Laws.⁸⁰ However, several years, at least, may pass before any revision occurs. Meanwhile, beware of the sand.

II. NEW UCC ARTICLE 3 RESOLVES AN UNFAITHFUL EMPLOYEE PROBLEM AND CLARIFIES A CONVERSION PROBLEM⁸¹

Former section 3-405 of the UCC provided that if an employee of the drawer of a check supplied the drawer with the name of the payee *with the intention that the payee have no interest in the check*, anyone could endorse the check in the name of the payee and that endorsement would be effective, *i.e.*, would not be treated as a forgery. Thus, in *Hartford Insurance Co. v. Union Federal Savings Bank*,⁸² a panel of the court of appeals was divided on whether the requisite intention had been demonstrated so as to support summary judgment in favor of the bank defendants in a conversion action brought by the drawer's fidelity insurer.

In *Hartford*, a dishonest employee, who was authorized to submit check requests to her employer's accounting department, submitted check requests for payment to existing clients of her employer. When the accounting department sent the checks back to the employee for disbursement to the named payees, she forged the endorsements of the named payees and obtained the funds represented by the checks. The employer's employee fidelity insurance company paid the employer's claim and, standing in the shoes of the employer, brought conversion actions against the banks "that processed the checks."⁸³

80. See Symposium, *Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 49 BUS. LAW. 1019 (1994); Symposium, *The Revision of Article 2 of the Uniform Commercial Code*, 35 WM. & MARY L. REV. 1297 (1994). Gerald R. Bepko, Chancellor of Indiana University and member of the faculty at Indiana University School of Law—Indianapolis, is a member of the revision committee.

81. In 1992, the Indiana General Assembly adopted a new Article 3 of the UCC and substantially revised Article 4, which took effect July 1, 1994. Former Article 3 appeared at IND. CODE § 26-1-3 (1993). New Article 3 appears at IND. CODE § 26-1-3.1 (1993 & Supp. 1994). See Pub. L. No. 222-1993 § 5, 1993 Ind. Legis. Serv. 2364 (West); see generally Harold Greenberg, *The Law of Negotiable Instruments and Bank Collections Undergoes Major Changes: Indiana Replaces Article 3 and Updates Article 4 of the Uniform Commercial Code*, 27 IND. L. REV. 789 (1994). Hereafter, sections of former Article 3 will be cited using the generic form UCC § 3-xxx. Sections of new Article 3 will be cited UCC § 3.1-xxx.

82. 641 N.E.2d 32 (Ind. Ct. App. 1994).

83. *Id.* at 33. Because the facts occurred and the cause of action was filed prior to the effective date of new Article 3, § 3-419 applied although it was not cited nor discussed by the court. The new provision on conversion is § 3.1-420. As discussed in text at *infra* notes 89-90, there is some question as to whether the insurance company, acting for the drawer, had a cause of action against the banks for conversion.

Relying on two non-Indiana cases,⁸⁴ the plaintiff argued that section 3-405 does not apply when the checks are drawn to bona fide creditors who have submitted invoices on the theory that it is they who supply their names, not the faithless employee.⁸⁵ The court distinguished those cases because the plaintiff did not designate any evidence whatever to support the claim that the named payees were bona fide creditors who submitted invoices or requested payment. The court concluded, therefore, that since the language of the statute encompasses both real and fictitious payees when the employee intends them to have no interest in the checks, summary judgment was appropriate.⁸⁶ Judge Barteau, in her dissent, stated that issues of fact to be resolved included whether or not the employee had the requisite intent when she supplied the names.⁸⁷

One problem that arose from the language of former section 3-405 and is evidenced by the opinions in *Hartford* is that where real, as opposed to fictitious, payees were involved, whether the forged endorsements were nonetheless effective could turn on the precise moment at which the faithless employee decided to appropriate the checks. If she had decided to take the checks before she submitted the names of the payees, the endorsements would be effective notwithstanding the forgeries. If she did not decide to take the checks until after they were signed, the forged endorsements would not be effective.

New section 3.1-405 places the loss resulting from the conduct of dishonest employees who have "responsibility" with respect to checks directly on the employer. If an employer entrusts an employee with responsibility for checks, that employee's fraudulent endorsement is effective. "Responsibility" includes the duty "to supply information determining the names . . . of payees" and "to control the disposition of instruments to be issued in the name of the employer."⁸⁸ Whether the employee forms her intent to take the checks before or after they are issued is irrelevant. The disagreement in *Hartford* is now moot.

An issue not mentioned in the court's opinion and apparently not raised in the trial court is whether the insurance company, standing in the shoes of the drawer of the checks, had a cause of action for conversion in the first instance. Under former section 3-419, courts were divided on whether the drawer had a conversion action because the drawer, technically, never owned the obligation represented by the check. The obligation and the check itself were the property of the payee.⁸⁹

Section 3.1-420 of new Article Three plainly states that an action in conversion may not be brought either by the issuer of the check or a payee who did not receive delivery.⁹⁰ In *Hartford*, whether applying the old or new version of Article Three, the appropriate action would have been an action by the employer who drew the checks against the

84. See *Snug Harbor Realty Co. v. First Nat'l Bank*, 253 A.2d 581 (N.J. Super. Ct. 1969), and *Danje Fabrics Div. v. Morgan Guaranty Trust Co.*, 409 N.Y.S.2d 565 (N.Y. App. Div. 1978).

85. *Hartford Ins. Co.*, 641 N.E.2d at 35.

86. *Id.*

87. *Id.*

88. UCC § 3.1-405(a)(3)(iv), (v).

89. See UCC § 3.1-420, cmt. 1; *Stone & Webster Eng'g Corp. v. First Nat'l Bank*, 184 N.E.2d 358 (Mass. 1962).

90. UCC § 3.1-420(a).

drawee bank for the recredit of checks paid contrary to the drawer's instructions, *i.e.*, over forged endorsements. The drawee bank would then be able to defend itself with probable success under section 3-405 and with almost certain success under section 3.1-405 on the basis that the endorsements were effective and that the checks, therefore, had been properly paid notwithstanding the technical forgeries.