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## Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers

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# Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers<sup>†</sup>

Kristin Johnson Hazelwood\*

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I didn't read all of the shrink wrap license agreement on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion.<sup>1</sup>

### I. Introduction

In September of 1995, Rich and Enza Hill ordered a computer system from Gateway 2000, Inc. (Gateway).<sup>2</sup> When the Hills received the computer system, a "Standard Terms and Conditions Agreement" (Agreement) and a "Three Year Limited Warranty" (Warranty) accompanied the system.<sup>3</sup> The Agreement contained a limited liability clause and a dispute resolution clause that required the parties to settle any dispute or controversy arising out of the agreement through arbitration.<sup>4</sup> Furthermore, the Agreement provided that its terms would govern the contract between the Hills and Gateway unless the Hills returned the computer system to Gateway within thirty days.<sup>5</sup> The Hills, however, had not seen the Agreement or the Warranty before they ordered the computer, nor had they received any notice from Gateway that these documents would accompany the computer.<sup>6</sup>

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1. Stephen Y. Chow, *Contracting in Cyberspace: The Triumph of Forms?*, 41 BOSTON B.J. 16, 16 (1997) (quoting John Adams's "Dilbert" in THE BOSTON GLOBE, January 14, 1997).

2. Hill v. Gateway 2000, Inc., No. 96-C-4086, 1996 WL 650631, at \*1 (N.D. Ill. Nov. 7, 1996), *rev'd*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 118 S. Ct. 47 (1997).

3. *Id.* at \*2.

4. *Id.*

5. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir.), *cert. denied*, 118 S. Ct. 47 (1997).

6. Hill, 1996 WL 650631, at \*2.

After experiencing a series of problems with their computer system, the Hills sued Gateway.<sup>7</sup> They alleged breach of contract and sought a declaratory judgment that the arbitration, warranty, and liability clauses were unenforceable.<sup>8</sup> In considering whether the dispute resolution clause barred the Hills from pursuing their claim against Gateway in federal court, the United States Court of Appeals for the Seventh Circuit determined that the Hills' failure to return the computer within thirty days constituted an acceptance of Gateway's offer to sell the computer.<sup>9</sup> Therefore, because the Hills did not return the computer system, the dispute resolution clause required the Hills to settle their dispute through arbitration and not in court.<sup>10</sup>

*Hill v. Gateway 2000, Inc.*<sup>11</sup> reveals the Seventh Circuit's liberal approach to contract formation.<sup>12</sup> In particular, *Hill* illustrates the Seventh Circuit's willingness to enforce the terms of any contract involving the sale of goods regardless of whether both parties knew the terms of the contract at the point of sale.<sup>13</sup> This Note analyzes the Seventh Circuit's approach to accept-or-

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7. *Id.*

8. *Id.* at \*1. In addition to alleging breach of contract and seeking a declaratory judgment, the Hills sued Gateway for violations of the Uniform Commercial Code (UCC), the Magnuson-Moss Warranty Act, the Racketeer Influenced and Corrupt Organization Act, the Illinois Consumer Fraud Act, and the South Dakota Consumer Fraud Act. *Id.*

9. *See Hill*, 105 F.3d at 1150 ("By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.").

10. *See id.* at 1151 (remanding case to district court with instructions to compel arbitration).

11. 105 F.3d 1147 (7th Cir. 1997).

12. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.) (enforcing arbitration clause that seller included in shipping box because buyer did not return product within specified time period), *cert. denied*, 118 S. Ct. 47 (1997). In *Hill*, the court considered whether the Hills' failure to return their Gateway computer system within 30 days constituted an acceptance of the terms contained in the box that the seller used to ship the computer. *Id.* at 1148. Because of a series of problems with their Gateway computer system, Rich and Enza Hill sued Gateway. *Id.* Gateway sought to enforce the arbitration clause that it had included in the terms that it shipped to the Hills with their computer system. *Id.* The *Hill* court found that the Seventh Circuit's decision in *ProCD, Inc. v. Zeidenberg* applied to the dispute because both *Hill* and *ProCD* involved accept-or-return offers and because the UCC governed both disputes. *Id.* at 1148-49. The *Hill* court stated that *ProCD* "holds that the terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product." *Id.* at 1148 (construing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)). The *Hill* court rejected the Hills' attempts to limit the scope of *ProCD*, and it emphasized the practical considerations that support the use of accept-or-return offers. *Id.* at 1149-50. Finally, the *Hill* court remanded the case to the district court with instructions to compel the Hills to arbitrate their dispute. *Id.* at 1150.

13. *See id.* at 1149 (refusing to limit enforceability of accept-or-return offers to particular types of transactions).

return offers<sup>14</sup> and considers whether the approach is consistent with the policies of the Uniform Commercial Code (UCC). Part II surveys the current UCC approach to contract formation.<sup>15</sup> Specifically, Part II identifies the policies underlying the UCC and outlines the traditional interpretations of its contract formation provisions. Part III discusses the development of the Seventh Circuit's approach to accept-or-return offers in *ProCD, Inc. v. Zeidenberg*<sup>16</sup> and the expansion of that analysis in *Hill*.<sup>17</sup> Part III argues that the Seventh Circuit's approach to accept-or-return offers misapplies and misinterprets the UCC, favors the seller of goods, and enforces terms that unfairly surprise the buyer.<sup>18</sup> Part IV examines the May 1998 draft of the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) and the American Law Institute's (A.L.I.) proposed revisions to Article 2 of the UCC and argues that the provisions do not eliminate the bias toward sellers or the unfair surprise of accept-or-return offers.<sup>19</sup> Part IV also analyzes the Article 2 drafting committee's tentative solution to accept-or-return offers and argues that the proposed solution would remedy the bias and the unfair surprise inherent in the Seventh Circuit's approach.<sup>20</sup> Finally, Part V concludes that courts should not adopt the Seventh Circuit's approach to accept-or-return

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14. See *id.* at 1150 (describing accept-or-return offer). An accept-or-return offer is an offer in which the seller proposes that the parties will not form their contract until after the buyer has the opportunity to inspect and to reject the item and the terms. *Id.*

15. See *infra* Part II (explaining current UCC's approach to contract formation).

16. 86 F.3d 1447 (7th Cir. 1996).

17. See *infra* Part III (discussing *ProCD, Inc. v. Zeidenberg* and *Hill*). In *ProCD*, the Seventh Circuit determined that shrinkwrap licenses are enforceable. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). The *ProCD* court considered whether a license that the seller of computer software enclosed with the directory and the application program it marketed was enforceable. *Id.* at 1450. *ProCD* sought to enforce the terms of the license agreement it enclosed with its software against a purchaser of the software who offered access to the directory to third parties via the Internet. *Id.* The *ProCD* court determined that the inclusion of the license on the inside of the box, rather than on the outside, did not render the license unenforceable. *Id.* at 1451. First, payment of money precedes full disclosure of the terms of the agreement in many transactions. *Id.* Second, the UCC permits parties to form contracts in ways other than at the time of sale. *Id.* at 1452-53. The *ProCD* court found that *ProCD* had proposed a contract that the purchaser could accept by using the product after having the opportunity to review the terms of the license agreement and, moreover, that the purchaser had accepted the contract by using the product. *Id.* at 1452. Furthermore, the *ProCD* court found that federal copyright law did not preempt the enforcement of the license. *Id.* at 1455. Therefore, the *ProCD* court enforced the terms of *ProCD*'s license. *Id.* at 1449.

18. See *infra* Part III (discussing Seventh Circuit's misguided approach to contract formation).

19. See *infra* Part IV (discussing proposed revisions to Article 2).

20. See *infra* notes 295-310 and accompanying text (concluding that drafting committee should approve statutory solution to problem of accept-or-return offers).

offers.<sup>21</sup> Part V suggests instead that the N.C.C.U.S.L. and the A.L.I. should adopt proposed Sections 2-105(b) and 2-204(e) of the May 1998 draft of the proposed revisions to address the bias and the unfair surprise of accept-or-return offers.<sup>22</sup> Additionally, Part V recommends that state legislatures, when evaluating whether to enact revised Article 2, consider the bias and the unfair surprise of accept-or-return offers and adopt a specific statutory solution similar to proposed Sections 2-105(b) and 2-204(e) to address the problem.<sup>23</sup>

## II. Uniform Commercial Code Contract Formation Concepts

### A. Pre-Code Principles of Contract Formation

At common law, parties form a contract by objectively<sup>24</sup> expressing their mutual assent to enter into a binding agreement.<sup>25</sup> In particular, parties manifest their assent to contract through the process of offer and acceptance.<sup>26</sup> The common-law process of offer and acceptance consists in large part of a series of formal rules.<sup>27</sup> The mirror-image rule and the last-shot doctrine, for example, illustrate the mechanical nature of the common-law approach.<sup>28</sup>

The mirror-image rule provides that the acceptance of an offer must match the terms of the offer exactly and that any variation constitutes a rejection of the offer and a proposal of a counteroffer.<sup>29</sup> However, if the

21. See *infra* Part V (arguing that courts should not adopt Seventh Circuit's approach to contract formation).

22. See *infra* Part V (contending that Article 2 drafting committee should adopt specific statutory provision to address bias and unfair surprise of accept-or-return offers).

23. See *infra* Part V (recommending that state legislatures adopt statutory solution similar to proposed Sections 2-105(b) and 2-204(e)).

24. See *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.").

25. See JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 29, at 51-52 (3d ed. 1990) (explaining that parties must express their mutual assent to form contract).

26. See *id.* § 29, at 52-53 (stating that parties usually express their mutual assent through offer and acceptance).

27. See 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.13, at 250-52 (2d ed. 1998) (discussing common-law requirements for valid acceptance).

28. See Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815, 820 (1991-92) (observing that pre-Code application of mirror-image rule and last-shot doctrine was "mechanical, rigid, and harsh").

29. See *Learning Works, Inc. v. Learning Annex, Inc.*, 830 F.2d 541, 543 (4th Cir. 1987) (refusing to enforce contract in which terms of acceptance did not mirror terms of offer); see also *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619, 621-22 (N.Y. 1915) (determining that buyer proposed counteroffer by including clause in purported acceptance that required seller to acknowledge buyer's acceptance of offer). *Poel* provides the classic example of a formalistic application of the mirror-image rule. See John E. Murray, Jr., *The Chaos of the*

offeror acts upon the contract despite the varying terms of the offeree's purported acceptance, the offeror constructively accepts the terms of the offeree's counteroffer.<sup>30</sup> Furthermore, under the last-shot doctrine, the terms of the counteroffer will be the terms of the resulting contract.<sup>31</sup> The last-shot doctrine, therefore, provides that the last party to send a form determines the terms of the contract when the other party accepts the counteroffer through performance.<sup>32</sup>

The mechanical and formalistic application of common-law principles produces unsatisfactory results in commercial transactions.<sup>33</sup> The application of these principles allows for "welshing" on bona fide agreements,<sup>34</sup> gives an unwarranted preference to sellers of goods,<sup>35</sup> and produces results that unfairly surprise one of the parties.<sup>36</sup> As a result, the N.C.C.U.S.L. and the A.L.I.

*"Battle of Forms": Solutions*, 39 VAND. L. REV. 1307, 1315 (1986) (stating that *Poel* is "classic illustration of pre-Code, mechanical jurisprudence"). *But see* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1235-36 n.52 (1982) (contending that critics place too much emphasis on *Poel*). Baird and Weisberg argue that "[t]he decision is altogether exceptional in its rigid application of the mirror image rule and, in any event, is not so clearly wrong as almost all have readily concluded." *Id.*

30. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991) (explaining that under last-shot rule, if offeror acted on contract despite variance in terms between offer and acceptance, then terms of counteroffer would bind offeror).

31. *See* Brewster of Lynchburg, Inc. v. Dial Corp., 33 F.3d 355, 362 (4th Cir. 1994) (stating that under last-shot doctrine, last terms sent prior to performance constitute contract); Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986) (explaining that at common law, agreement contains terms included in last form sent).

32. *See* Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 762 (D. Ariz. 1993) (stating that terms of party who sends last form become terms of contract at common law); *see also* 1 FARNSWORTH, *supra* note 27, § 3.21, at 298 (arguing that common-law doctrine favors party who fires "last shot").

33. *See* Reaction Molding Techs., Inc. v. General Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa.) (observing that mirror-image rule ignored modern business practices and frustrated business), *amended by* 588 F. Supp. 1280 (E.D. Pa. 1984); Stephens, *supra* note 28, at 820 (stating that common-law doctrines ignore true intentions and expectations of parties and, therefore, lead to results that are unjust and detrimental to commerce).

34. *See* Murray, *supra* note 29, at 1316 (arguing that application of mirror-image rule allowed "welsher" to avoid its contractual obligations); Daniel T. Ostas & Frank P. Darr, *Redrafting UCC Section 2-207: An Economic Prescription for the Battle of the Forms*, 73 DENV. U. L. REV. 403, 405 (1996) (arguing that mirror-image rule allowed parties to ignore bona fide agreements).

35. *See* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1580 (10th Cir. 1984) (noting that purpose of UCC Section 2-207 was to "reform the infamous common law mirror-image rule and associated last-shot doctrine that enshrined the fortuitous positions of senders of forms and accorded undue advantages based on such fortuitous positions").

36. *See* Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework*

promulgated Article 2 of the UCC in an attempt to make contract law more reflective of modern commercial relationships.<sup>37</sup>

*B. Sections 2-204 and 2-206: Principles of Contract Formation*

The underlying purpose of Article 2 is to identify the parties' bargain-in-fact.<sup>38</sup> Sections 2-204 and 2-206 effectuate this purpose in the context of contract formation by liberalizing the common-law requirements of formal offer and formal acceptance.<sup>39</sup> Therefore, the UCC approach to contract formation emphasizes the parties' factual bargain<sup>40</sup> rather than the parties'

*for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893, 901-02 (1991) (illustrating that operation of mirror-image rule and last-shot doctrine "resulted in seriously unpleasant economic surprise"). Professor Brown illustrates that the effects of the mirror-image rule caused unfair surprise to one of the parties in two ways. First, under the mirror-image rule, courts would refuse to enforce an agreement because of variance from the offer even though the parties thought they had formed a contract. *Id.* at 902. Second, if the offeror performed the contract despite the variance, the terms of the contract would be the terms of the counteroffer rather than the terms proposed by the offeror. *Id.*

37. See *Waukesha Foundry, Inc. v. Industrial Eng'g, Inc.*, 91 F.3d 1002, 1003 (7th Cir. 1996) (stating that Article 2 attempts to harmonize law of contract with realities of commercial transactions); U.C.C. § 1-102(2)(a) (1995) (stating that underlying purpose of UCC is to "simplify, clarify and modernize the law governing commercial transactions"); see also *Arizona Retail*, 831 F. Supp. at 762 (stating that drafters of UCC sought to abolish "common-law rules that made little sense in light of modern business practices").

38. See John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 7 (1981) (arguing that identification of parties' bargain-in-fact is "quintessential purpose" of Article 2); see also *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 395 N.Y.S.2d 151, 152 (N.Y. 1977) (discussing underlying philosophy of Article 2). The *Kleinschmidt* court described the basic philosophy of Article 2:

Practical business people cannot be expected to govern their actions with reference to nice legal formalisms. Thus, when there is basic agreement, however manifested and whether or not the precise moment of agreement may be determined, failure to articulate that agreement in the precise language of a lawyer, with every difficulty and contingency considered and resolved, will not prevent formation of a contract. But, of equal importance, if there be no basic agreement, the code will not imply one.

*Id.* (citation omitted).

39. See *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 713 F. Supp. 1350, 1353-54 (D. Idaho 1989) (stating that UCC addresses problems associated with common-law approach by eliminating need for formal offer and acceptance), *rev'd on other grounds*, 940 F.2d 1253 (9th Cir. 1991); Brown, *supra* note 36, at 899 (describing Article 2's contract formation policy as effectuating parties' intent by eliminating some mechanical and cumbersome common-law rules).

40. See John E. Murray, Jr., *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597, 600 (1978) (describing factual bargain as "the actual or presumed assent of the parties").



adherence to a series of formal rules.<sup>41</sup>

### 1. Section 2-204: General Principles of Contract Formation

Section 2-204<sup>42</sup> establishes the general principles of contract formation. While Section 2-204 clearly liberalizes the rules for contract formation,<sup>43</sup> it does not eliminate the requirement that parties objectively manifest their mutual assent.<sup>44</sup> Section 2-204 provides that when parties intend to contract, the technical rules of offer, acceptance, and indefiniteness will not frustrate their agreement.<sup>45</sup>

Section 2-204's three subsections implement Article 2's emphasis on protecting the factual bargain of the parties by relaxing the formal require-

41. See Murray, *supra* note 38, at 5-6 (explaining that Sections 2-204 and 2-206 focus on parties' factual bargain).

42. U.C.C. § 2-204 (1995). Section 2-204 provides:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) 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.

*Id.* Every state except Louisiana has adopted the official version of Section 2-204. See 2 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-204:2, at 384-85 (3d ed. 1997) (providing list of jurisdictions that have adopted Section 2-204).

43. See 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-204:2, at 213 (1998) (explaining that Section 2-204 liberalizes rules of contract formation).

44. See DP-Tek, Inc. v. AT&T Global Info. Solutions Co., 891 F. Supp. 1510, 1517 (D. Kan. 1995) (stating that Article 2 does not eliminate requirement that "the parties must have intended to enter into a binding agreement and that there be a mutual manifestation of assent on . . . material point[s]"), *aff'd*, 100 F.3d 828 (10th Cir. 1996); 3 RICHARD W. DUESENBERG & LAWRENCE P. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 4.02, at 4-5 (1997) (stating that Section 2-204 does not displace common-law requirement of mutual assent to terms of agreement); see also *Drug Line, Inc. v. Sero-Immuno Diagnostics, Inc.*, 458 S.E.2d 170, 170-71 (Ga. Ct. App. 1995) (refusing to enforce contract in which terms were vague and uncertain); *Herm Hughes & Sons, Inc. v. Quintek*, 834 P.2d 582, 585 (Utah Ct. App. 1992) (finding that significant divergence with respect to payment terms and one party's rejection of other party's proposal did not indicate meeting of minds).

45. See 1 HAWKLAND, *supra* note 43, § 2-204:2, at 217-18 (explaining that technical rules of offer, acceptance, and indefiniteness will not frustrate formation of contract if parties reached actual agreement); John E. Murray, Jr., *Intention Over Terms: An Exploration of UCC § 2-207 and New Section 60 Restatement of Contracts*, 37 FORDHAM L. REV. 317, 326 (1969) (emphasizing that flexible provisions of Section 2-204 apply only if parties intend to contract); see also *Computer Network, Ltd. v. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 674 (Mo. Ct. App. 1988) (stating that Section 2-204 requires agreement between negotiating parties).

ments of offer and acceptance.<sup>46</sup> Specifically, subsection (1) recognizes that contracting parties may reach their agreement through oral or written communications,<sup>47</sup> through their course of conduct,<sup>48</sup> or through a combination thereof.<sup>49</sup> Similarly, subsection (2) eliminates the requirement that parties be able to pinpoint the exact moment that they reached their agreement.<sup>50</sup> Furthermore, subsection (3) explains that, as long as the parties intended to enter into a binding agreement, their failure to agree on every term in the contract does not necessarily render the agreement unenforceable.<sup>51</sup> Rather, under subsection (3), the ultimate test for definiteness<sup>52</sup> is whether the parties

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46. See Murray, *supra* note 38, at 5-6 (explaining Section 2-204's emphasis on parties' factual bargain).

47. See Southeastern Adhesives Co. v. Funder America, Inc., 366 S.E.2d 505, 507-08 (N.C. Ct. App. 1988) (finding that contract was formed when buyer telephoned order to seller).

48. See Quaker State Mushroom Co. v. Dominick's Finer Foods, Inc., 635 F. Supp. 1281, 1285 (N.D. Ill. 1986) (recognizing that conduct of parties may suffice to create contract); Nebraska Builders Prods. Co. v. Industrial Erectors, Inc., 478 N.W.2d 257, 265 (Neb. 1992) (stating that parties' conduct supported finding that contract existed).

49. See Crest Ridge Constr. Group, Inc. v. Newcourt, Inc., 78 F.3d 146, 150 (5th Cir. 1996) (finding sufficient evidence of enforceable contract when parties exchanged documents that industry considered binding and parties' conduct revealed agreement); Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475, 481 (5th Cir. 1995) (determining that conduct of parties, viewed in combination with writings exchanged between parties, evidenced that binding agreement existed).

50. See U.C.C. § 2-204(2) (1995) (providing that agreement may constitute contract even though moment of formation is indeterminable).

51. See Computer Network, Ltd. v. Purcell Tire & Rubber Co., 747 S.W.2d 669, 674 (Mo. Ct. App. 1988) (explaining that failure to agree on all terms does not render contract unenforceable if parties intended to contract); see also *Crest Ridge Constr. Group*, 78 F.3d at 151 (stating that failure of parties to specify payment terms does not require reversal of jury verdict awarding contract damages); Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 100 (3d Cir. 1991) (finding contract sufficiently definite despite omission of warranty terms); Barto v. United States, 823 F. Supp. 1369, 1374 (E.D. Mich. 1993) (stating that absence of price term is not determinative as to whether binding contract exists); H.C. Schmieding Produce Co. v. Cagle, 529 So. 2d 243, 248 (Ala. 1988) (finding that agreement in which parties approximated delivery date as harvest time was enforceable); Kysar v. Lambert, 887 P.2d 431, 437 (Wash. Ct. App. 1995) (rejecting argument that failure to provide shipment term prevented formation of contract).

52. See Computer Network, Ltd. v. Purcell Tire & Rubber Co., 747 S.W.2d 669, 676 (Mo. Ct. App. 1988) (stating that ultimate test for definiteness is whether reasonably certain basis for giving appropriate remedy exists); see also H.C. Schmieding Produce Co. v. Cagle, 529 So. 2d 243, 248 (Ala. 1988) (describing two-prong test under Section 2-204(3): parties must have intended to contract, and agreed-upon terms must provide reasonably certain basis for giving appropriate remedy). The H.C. Schmieding test is not inconsistent with the *Computer Network* analysis because the requirement that the parties must have intended to contract applies to all inquiries under Section 2-204. See *Computer Network*, 747 S.W.2d at 674

intended to contract<sup>53</sup> and whether there is a reasonably certain basis for remedying the breach of the contract.<sup>54</sup>

## 2. Section 2-206: Protecting the Parties' Factual Bargain

Section 2-206<sup>55</sup> establishes the specific rules for determining whether parties have reached an agreement.<sup>56</sup> Similar to Section 2-204, Section 2-206 liberalizes various common-law principles of offer and acceptance that might otherwise frustrate the parties' factual bargain.<sup>57</sup> In particular, Section 2-206

(stating that Section 2-204 requires agreement between negotiating parties); *supra* note 44 and accompanying text (explaining that Section 2-204 does not eliminate requirement of mutual assent).

53. See *Bethlehem Steel Corp. v. Litton Indus., Inc.*, 468 A.2d 748, 758 (Pa. Super. Ct. 1983) (finding that lower court did not abuse its discretion by finding that omission of terms showed absence of intent to contract), *aff'd*, 488 A.2d 581 (Pa. 1985); *Novelly Oil Co. v. Mathy Constr. Co.*, 433 N.W.2d 628, 632-33 (Wis. Ct. App. 1988) (approving finding of trial court that failure to agree on essential terms evidences lack of intent to be bound).

54. See *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 831 F. Supp. 94, 109 (E.D.N.Y. 1993) (finding no enforceable contract when parties' failure to agree on two essential terms meant that court could not determine if parties had performed or had breached contract), *aff'd in part, vacated in part*, 47 F.3d 39 (2d Cir. 1995); *Drug Line, Inc. v. Sero-Immuno Diagnostics, Inc.*, 458 S.E.2d 170, 170 (Ga. Ct. App. 1995) (refusing to enforce "vague, indefinite and uncertain" contract).

55. U.C.C. § 2-206 (1995). Section 2-206 provides:

- (1) Unless otherwise unambiguously indicated by the language or circumstances
  - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
  - (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
- (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

*Id.* Every state except Louisiana has adopted Section 2-206. See 2 ANDERSON, *supra* note 42, § 2-206:2, at 514-15 (providing list of jurisdictions that have adopted Section 2-206). Alaska's version of Section 2-206, the only variation from the official version, includes a special provision applicable to door-to-door solicitations. *Id.* (citing ALASKA STAT. § 45.02.350 (Michie 1995)).

56. See 1 HAWKLAND, *supra* note 43, § 2-206:1, at 245 (stating that Section 2-206 is relevant to determining whether parties have reached agreement).

57. See Murray, *supra* note 45, at 327 ("Section 2-206 is designed to overcome the archaic and unrealistic notion that offerors usually care how their offers are accepted.").

gives offerees more flexibility to choose the means or the medium of acceptance than they had under pre-Code common law.<sup>58</sup>

At common law, the offeror is the master of the offer and can specify the appropriate time, place, and manner of acceptance.<sup>59</sup> Although Section 2-206 does not abandon this common-law principle,<sup>60</sup> subsection (1)(a) requires the offeror to specify unambiguously the required manner of acceptance.<sup>61</sup> If the offeror does not unambiguously specify the appropriate manner of acceptance, the offeree may accept in any reasonable manner<sup>62</sup> and by any reasonable medium.<sup>63</sup> Likewise, subsection (1)(b) allows a seller more flexibility in responding to a buyer's offer to purchase goods: The seller can ship the goods,<sup>64</sup> promise to ship the goods, or ship nonconforming goods as an accommodation to the buyer.<sup>65</sup> Moreover, subsection (2) allows the offeree to accept

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58. See U.C.C. § 2-206(1) (1995) (providing that unless unambiguously indicated otherwise, party may accept offer "in any manner and by any medium reasonable in the circumstances").

59. See 1 FARNSWORTH, *supra* note 27, § 3.12, at 247 (explaining that at common law, offeror is master of offer).

60. See *Beard Implement Co. v. Krusa*, 567 N.E.2d 345, 350 (Ill. App. Ct. 1991) (construing Section 2-206 as approving common-law rule that offeror is master of offer (citing *Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978))); 3 DUESENBERG & KING, *supra* note 44, § 4.02[1], at 4-15 (stating that Section 2-206 preserves rule that offeror can explicitly provide means and manner of acceptance).

61. See U.C.C. § 2-206 cmt. 1 (1995) (stating that any reasonable manner of acceptance is appropriate "unless the offeror has made quite clear that it will not be acceptable").

62. See 1 JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 1-5, at 34 (4th ed. 1995) (explaining that Section 2-206(1)(a) eliminates presumption that offer calls for acceptance by return promise and that it allows acceptance by any means reasonable under circumstances); see also *Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1204 (6th Cir. 1981) (concluding that purchase order operated as acceptance of offer); *Barto v. United States*, 823 F. Supp. 1369, 1374 (E.D. Mich. 1993) (determining that beginning of performance was effective as acceptance (citing U.C.C. § 2-206 cmt. 3 (1995))); *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 713 F. Supp. 1350, 1355 (D. Idaho 1989) (finding that defendant's acceptance of benefits under agreement constituted acceptance of offer), *rev'd on other grounds*, 940 F.2d 1253 (9th Cir. 1991).

63. U.C.C. § 2-206(1)(a) (1995).

64. See *Winter Panel Corp. v. Reichhold Chems., Inc.*, 823 F. Supp. 963, 970 (D. Mass. 1993) (explaining that shipment of goods completes contract under Section 2-206(1)(b)).

65. See *Corinthian Pharm. Sys. v. Lederle Lab.*, 724 F. Supp. 605, 611 (S.D. Ind. 1989) (finding shipment of nonconforming goods to be accommodation when seller had no obligation to make shipment and seller sent buyer notification of accommodation); see also 3 DUESENBERG & KING, *supra* note 44, § 4.02[1], at 4-17 to 4-19 (discussing application of Section 2-206(1)(b)). Duesenberg and King state that the drafters of the UCC intended Section 2-206(1)(b) to cure the problems associated with the "unilateral contract trick." *Id.* at 4-17. The unilateral contract trick occurs when a seller ships nonconforming goods and, when sued for breach of contract, defends on the ground that the shipment of nonconforming goods did not

an offer by beginning performance if the commencement of performance is a reasonable mode of acceptance and the offeror receives notification of the performance within a reasonable time.<sup>66</sup>

### C. Section 2-207: Divergent Terms in an Acceptance or a Confirmation

Courts and commentators have intensely analyzed<sup>67</sup> and criticized<sup>68</sup> Section 2-207.<sup>69</sup> According to the courts and at least one commentator, the

constitute an acceptance of the offer. *Id.* Under this theory, therefore, the buyer would have no contract on which to sue. *Id.* at 4–18.

66. See U.C.C. § 2-206 cmt. 3 (1995) (explaining conditions under which beginning of performance can be valid acceptance).

67. See generally Baird & Weisberg, *supra* note 29 (arguing that formal rules of contract formation are fundamentally sound and may provide better results than Section 2-207); Paul Barron & Thomas W. Dunfee, *Two Decades of § 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171 (1975) (analyzing application of Section 2-207 and proposing revision); Brown, *supra* note 36 (arguing that Section 2-207 restores common-law balance of power between offeror and offeree in contract formation when parties use preprinted forms and proposing methodology for applying Section 2-207); Alexander M. Meiklejohn, *Castles in the Air: Blanket Assent and the Revision of Article 2*, 51 WASH. & LEE L. REV. 599 (1994) (arguing that drafters of Revised Article 2 should eliminate Section 2-207 and notion of blanket assent); Murray, *supra* note 38 (explaining importance of interpreting Article 2 consistently with its underlying purpose of identifying parties' factual bargain); Murray, *supra* note 29 (analyzing problems of interpreting and construing Section 2-207); Murray, *supra* note 45 (discussing application of Section 2-207 to purported acceptance that contains additional or different terms); John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986) (discussing problematic applications of Section 2-207 and suggesting new draft of that section); Murray, *supra* note 40 (examining analyses of Section 2-207 that suggest variance with underlying policies of section); Stephens, *supra* note 28 (considering Code approach to battle-of-forms and proposing solution); E. Hunter Taylor, Jr., *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 U. CIN. L. REV. 419 (1977) (discussing application of Section 2-207 to battle-of-forms situation); Charles M. Thatcher, *A Critique of the Murray Model for Revising U.C.C. § 2-207 and a Derivative Proposal for Revision*, 39 S.D. L. REV. 93 (1994) (evaluating Professor Murray's model for revising Section 2-207 and suggesting derivative proposal); Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327 (1983) (evaluating approaches to Section 2-207 and proposing alternative methodology). It is beyond the scope of this Note to provide a detailed analysis of the many issues arising from courts' and commentators' interpretations of Section 2-207.

68. See *Reaction Molding Techs., Inc. v. General Elec. Co.*, 585 F. Supp. 1097, 1104 (E.D. Pa.) (comparing Section 2-207 to "defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair"), *amended by* 588 F. Supp. 1280 (E.D. Pa. 1984); *Southwest Eng'g Co. v. Martin Tractor Co.*, 473 P.2d 18, 25 (Kan. 1970) (describing Section 2-207 as "murky bit of prose"); 3 DUESENBERG & KING, *supra* note 44, § 3.03, at 3–12 (describing Section 2-207 as "one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it reads is not altogether satisfactory").

69. U.C.C. § 2-207 (1995). Section 2-207 provides:

drafters of Article 2 designed Section 2-207 to preserve the parties' factual agreement despite variances between the responsive documents.<sup>70</sup> In addition, Section 2-207 promotes neutrality<sup>71</sup> and avoids unfair surprise<sup>72</sup> by abandoning common-law rules that preferred one party over another.

Section 2-207 applies in the following two situations: (1) one or both parties to an oral or an informal contract send to the other party a written confirmation that includes the contract terms and terms the parties have not yet discussed, and (2) the offeree's purported acceptance contains additional or different terms from the offer.<sup>73</sup> Section 2-207 has three distinct provisions. Subsection (1) explains that a party does not prevent the formation of a contract by including additional or different terms in an acceptance or a

(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 provision of this Act.

*Id.* Every state except Louisiana has adopted Section 2-207. See 2 ANDERSON, *supra* note 42, § 2-207:2, at 558-59 (providing list of jurisdictions that have adopted Section 2-207). Massachusetts and Montana have varied from the official version by including the word "or different" in subsection (2) after "additional." *Id.* at 559 (citing MASS. GEN. LAWS ch. 106, § 2-207 (1995) and MONT. CODE ANN. § 30-2-207 (1995)).

70. See Leonard Pevar Co. v. Evans Prods. Co., 524 F. Supp. 546, 550 (D. Del. 1981) (explaining that drafters of UCC intended to preserve parties' agreement despite additional terms of standardized forms); Album Graphics, Inc. v. Beatrice Foods Co., 408 N.E.2d 1041, 1047 (Ill. App. Ct. 1980) (stating that general purpose of Section 2-207 is to allow parties to enforce their agreements despite discrepancies in offer and acceptance or in contract and written confirmation); Brown, *supra* note 36, at 901 ("[T]he principal function of section 2-207 is to prevent the inevitable discrepancies between forms from defeating the commercial expectation that their exchange results in an enforceable contract.").

71. See Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986) (stating that neutrality is one principle underlying Section 2-207).

72. See Murray, *supra* note 29, at 1360 (asserting that primary purpose of Section 2-207 is avoiding unfair surprise and oppression).

73. U.C.C. § 2-207 cmt. 1 (1995).

written confirmation unless the party makes the acceptance conditional on the other party's assent to the terms.<sup>74</sup> Subsection (2) provides situations in which additional terms that a party proposes in an acceptance or a written confirmation become part of the contract.<sup>75</sup> Finally, subsection (3) states that the conduct of the parties may establish a contract, and it determines the terms of a contract that the parties form through their conduct.<sup>76</sup>

### 1. *Do the Parties' Writings or Conduct Establish a Contract?*

The general rule under Section 2-207(1) is that a definite expression of acceptance or a written confirmation of an oral agreement operates as an acceptance even though it contains terms additional to or different from the terms of the offer.<sup>77</sup> In regard to written confirmations, subsection (1) clarifies that a confirmation that varies from the terms of the contract does not negate contractual intent.<sup>78</sup> Rather, terms in a confirmation that add to the terms of the contract become proposals for modification of the contract under Section 2-207(2).<sup>79</sup>

Subsection (1) abandons the common law mirror-image rule<sup>80</sup> for transactions under Article 2 by turning common-law counteroffers into acceptances.<sup>81</sup> However, although Section 2-207(1) abandons the common-law rule that any disparity from an offer in an acceptance constitutes a counteroffer, subsection (1) preserves the right of the offeree to make a counteroffer.<sup>82</sup> It does so by

74. *Id.* § 2-207(1).

75. *Id.* § 2-207(2).

76. *Id.* § 2-207(3).

77. *See* Ralph Shrader, Inc. v. Diamond Int'l Corp., 833 F.2d 1210, 1213 (6th Cir. 1987) (stating general rule of Section 2-207(1)).

78. *See* Brown, *supra* note 36, at 940-41 (explaining that subsection (1) clarifies that confirmation which differs from terms of contract does not negate contractual intent).

79. *See* Leonard Pevar Co. v. Evans Prods. Co., 524 F. Supp. 546, 550 (D. Del. 1981) (applying Section 2-207(2) to additional terms in written confirmation). Courts generally do not consider whether a written confirmation is conditional on the offeror's assent to the new or different terms. *See id.* at 550 n.17 (explaining that proviso of subsection (1) does not apply to written confirmations); Album Graphics, Inc. v. Beatrice Foods Co., 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980) (determining that party cannot make written confirmation conditional on other party's assent to new or different term because parties have already formed contract).

80. *See supra* notes 29-30 and accompanying text (discussing common law mirror-image rule).

81. *See* Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1166 (6th Cir. 1972) (stating that UCC drafters designed subsection (1) to alter common law mirror-image rule); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 762-63 (D. Ariz. 1993) (stating that Article 2 turns pre-Code counteroffers into acceptances).

82. *See* 1 HAWKLAND, *supra* note 43, § 2-207:2, at 266 (explaining that while purpose

providing that a party may make acceptance expressly conditional on the offeror's assent to the new or different terms.<sup>83</sup>

In determining whether an acceptance that varies from the terms of the offer operates as an acceptance, subsection (1) directs courts to make two inquiries.<sup>84</sup> First, the court must determine whether the purported acceptance is a definite and timely expression of acceptance.<sup>85</sup> Second, subsection (1) requires that courts determine whether the offeree has made the acceptance expressly conditional on the offeror's assent to the new or different terms.<sup>86</sup> Under the traditional approach, an acceptance is conditional on assent only if the acceptance clearly reveals that the offeree is unwilling to proceed with the transaction unless the offeror assents to the new or different terms.<sup>87</sup>

If the court determines either that the offeree did not express the acceptance definitely or that the offeree made the acceptance expressly conditional

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of Section 2-207(1) is to overturn mirror-image rule, subsection (1) preserves right of offeree to make counteroffer).

83. U.C.C. § 2-207(1) (1995) (precluding formation of contract if offeree makes acceptance conditional on offeror's assent to new or different terms).

84. *See id.* (requiring purported acceptance to be "definite and reasonable expression of acceptance" and not be "expressly made conditional on assent to the additional or different terms").

85. *See id.* (stating that expression of acceptance must be definite and reasonable); *see also Dorton*, 453 F.2d at 1166 (explaining that Sections 2-204 and 2-206 determine whether offeree has definitely expressed intent to accept offer).

86. U.C.C. § 2-207(1) (1995) (stating that purported acceptance is not operative if offeree expressly conditions acceptance on offeror's assent to new or different terms).

87. *See Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972) (developing traditional test for determining whether offeree's acceptance is conditional on offeror's assent to new or different terms); *see also McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 488 (6th Cir. 1989) (finding that proviso applied when offeree's form of acceptance tracked language of subsection (1)); *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1444 (9th Cir. 1986) (determining that proviso of Section 2-207(1) applied because acceptance tracked language of statute); *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926-27 (9th Cir. 1979) (finding that provision which stated that acceptance constituted agreement to all terms in form did not constitute acceptance conditional on assent); *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 339 S.E.2d 527, 530 (S.C. Ct. App. 1986) (refusing to find provision which stated that acceptance was subject to its terms to be within exception of Section 2-207(1)). *But see Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962) (determining that response which materially altered contract to offeror's disadvantage was conditional acceptance), *overruled by Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184 (1st Cir. 1997); *cf. Ralph Shrader, Inc. v. Diamond Int'l Corp.*, 833 F.2d 1210, 1214-15 (6th Cir. 1987) (applying proviso of subsection (1) to case in which offeree stated that its acceptance was only on given terms and that offeror should have advised offeree immediately if terms were unacceptable); *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 509 (7th Cir. 1968) (finding that proviso applied when offeree predicated acceptance on modification, clarification, or addition).



on the offeror's assent to the new or different terms, the transaction aborts.<sup>88</sup> Therefore, after determining that an acceptance is indefinite or conditional, courts can find the existence of an enforceable agreement in only two ways. First, the court can find that the other party expressly assented to the terms of the purported acceptance.<sup>89</sup> Under the majority approach, the acceptance of the goods is not sufficient to constitute assent to the counterofferee's terms.<sup>90</sup> Second, if the parties' subsequent conduct reveals that the parties believe that they have entered into a binding agreement, their conduct can establish a contract under subsection (3).<sup>91</sup>

Subsection (3), therefore, applies when the parties' writings do not form a contract but their conduct indicates the existence of a binding agreement.<sup>92</sup> In such circumstances, Comment 7 to Section 2-207 indicates that the general principles of Section 2-204 determine whether the parties have reached a binding agreement.<sup>93</sup> According to subsection (3), the terms of a contract based on conduct are the terms on which the writings of the parties agree and the applicable supplementary terms of the UCC.<sup>94</sup>

## 2. *What Are the Terms of the Contract?*

Subsection (2) of Section 2-207 applies in two situations. First, subsection (2) applies if the offeree's expression of acceptance is sufficiently definite and the offeree does not condition acceptance on assent to additional or different terms.<sup>95</sup> Second, if at least one of the parties to the contract sends a

88. See *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1166 (6th Cir. 1972) (explaining that "entire transaction aborts" upon court's finding that offeree conditioned acceptance on offeror's assent to new or different terms).

89. See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443 (9th Cir. 1986) (recognizing that offeror can assent to terms of offeree's conditional acceptance).

90. See *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, 189 (1st Cir. 1997) (determining that acceptance of goods is insufficient to show assent when terms of parties' forms conflict).

91. See *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 488 (6th Cir. 1989) (finding that parties' course of conduct established contract under subsection (3)).

92. See *Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F. Supp. 1441, 1448 (E.D. Cal. 1991) (concluding that parties' conduct evidenced contract under subsection (3)); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1048 (Ill. App. Ct. 1980) (stating that Section 2-207(3) applies when parties behave as if they have contract even though writings of parties do not establish binding agreement).

93. U.C.C. § 2-207 cmt. 7 (1995); see *supra* notes 42-54 and accompanying text (discussing Section 2-204's principles of contract formation).

94. *Id.* § 2-207(3).

95. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1169-70 (6th Cir. 1972) (stating that if offeree does not make acceptance conditional on assent to new or different terms, new

written confirmation of an oral or an informal contract, subsection (2) is the operable provision.<sup>96</sup> Under those two circumstances, the additional terms in an acceptance or a written confirmation are proposals for modification of the contract.<sup>97</sup> In a transaction involving a consumer, the common-law rule states that additional terms become part of the contract only if the offeror agrees to the terms.<sup>98</sup> However, if the transaction is between merchants, Section 2-207(2) provides that the additional terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer, the terms materially alter the contract, or the other party objects to the terms.<sup>99</sup>

Section 2-207 does not specifically explain what types of terms materially alter a contract,<sup>100</sup> and most courts purport to inquire into the facts of each individual case rather than adopt per se rules of materiality.<sup>101</sup> Specifically, courts, consistent with Comment 4 to Section 2-207,<sup>102</sup> focus on the degree of

or different terms are proposals for modification of contract under subsection (2)).

96. *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1123-24 (5th Cir. 1985) (finding that subsection (2) determines whether additional terms in written confirmation become part of contract).

97. *See id.* at 1123 (determining that analysis under Section 2-207(2) is same for acceptances and confirmations). Subsection (2) does not provide explicitly the analysis for determining whether terms in the offeree's response that differ from the terms of the offer become part of the contract. *See Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1175 (7th Cir. 1994) (discussing application of Section 2-207(1) when offeree's response contains terms that differ from terms of offer). Three possible approaches to this problem are as follows: (1) discrepant terms drop out of the contract and the Code's default terms fill the resulting gap; (2) offeree's discrepant terms fall out of the contract and offeror's terms become part of the contract; or (3) new terms in acceptance that are not materially different from the terms of the offer become part of the contract. *See id.* (describing three approaches to terms in acceptance that differ from terms of offer). The majority view is that discrepant terms fall out of the contract and that UCC replaces the terms with a gap-filler. *Id.* at 1178 (finding that Illinois would most likely adopt majority approach).

98. *See* 3 DUESENBERG & KING, *supra* note 44, § 3.03[1], at 3-19 (stating that unless transaction is between merchants, parties must accept or assent to additional terms); 1 HAWKLAND, *supra* note 43, § 2-207:3, at 275 (explaining that unless transaction involves merchants, parties must agree to additional or different terms).

99. U.C.C. § 2-207(2) (1995).

100. *See id.* § 2-207 cmts. 4 & 5 (providing examples of material and nonmaterial alterations).

101. *See Waukesha Foundry, Inc. v. Industrial Eng'g, Inc.*, 91 F.3d 1002, 1008 (7th Cir. 1996) (stating that issue of materiality requires inquiry into parties' relationship, expectations, and course of dealing); *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1245 (E.D. Pa. 1991) (stating that per se rule is contrary to UCC's emphasis on circumstances surrounding contractual relationship). *But see Winter Panel Corp. v. Reichhold Chems., Inc.*, 823 F. Supp. 963, 971 (D. Mass. 1993) (agreeing with line of cases which found that damage limitation clauses are material alterations and stating that damage limitation clauses are significant in any contract).

102. U.C.C. § 2-207 cmt. 4 (1995).

surprise or hardship that the inclusion of the term would impose on the nonassenting party.<sup>103</sup> In deciding whether a term materially alters the contract, courts have focused on the prior dealings between the parties,<sup>104</sup> the customs of the industry,<sup>105</sup> the alteration in distribution of risk between the parties,<sup>106</sup> and the economic hardship on a party that the term imposes.<sup>107</sup>

### III. Seventh Circuit's Approach to Contract Formation

The UCC presents a flexible approach to contract formation.<sup>108</sup> In *ProCD, Inc. v. Zeidenberg*,<sup>109</sup> the United States Court of Appeals for the Seventh Circuit liberally applied the UCC contract formation provisions and recognized the enforceability of an accept-or-return offer in the context of computer software.<sup>110</sup> Subsequently, in *Hill v. Gateway 2000, Inc.*,<sup>111</sup> the Seventh Cir-

103. See *Trans-Aire Int'l, Inc. v. Northern Adhesive Co.*, 882 F.2d 1254, 1260-61 (7th Cir. 1989) (stating that term is material alteration if surprise or hardship would result if one party incorporated term without express awareness of other party (citing U.C.C. § 2-207 cmt. 4 (1995))).

104. See *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 714-15 (7th Cir. 1987) (finding that evidence of prior course of dealings is relevant as to unfair surprise); *Dixie Aluminum Prods. Co. v. Mitsubishi Int'l Corp.*, 785 F. Supp. 157, 160 (N.D. Ga. 1992) (stating that course of dealing between parties is relevant to issue of unfair surprise).

105. See *Herzog Oil Field Serv., Inc. v. Otto Torpedo Co.*, 570 A.2d 549, 551 (Pa. Super. Ct. 1990) (determining that interest term was not material alteration because common practice in commercial transactions is to charge interest on balances).

106. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991) (stating that disclaimer of warranty and limitation of remedies provision altered distribution of risk and did not become part of parties' agreement under Section 2-207(2)).

107. See *Trans-Aire Int'l*, 882 F.2d at 1262 (concluding that indemnification clause imposes significant economic hardship).

108. See *supra* notes 38-41 and accompanying text (discussing underlying purpose of Article 2).

109. See *infra* notes 117-76 and accompanying text (discussing *ProCD*).

110. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449, 1455 (7th Cir. 1996) (enforcing shrinkwrap license). Prior to *ProCD*, no courts enforced shrinkwrap licenses. See *Step-Saver Data Sys.*, 939 F.2d at 105 (finding that terms of box-top license were not part of parties' agreement); *Arizona Retail Sys., Inc. v. Software Link*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (concluding that terms of license agreement were not part of agreement between parties). See generally Darren C. Baker, Note, *ProCD v. Zeidenberg: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 NW. U. L. REV. 379 (1997) (examining implications of *ProCD* for law concerning enforceability of shrinkwrap licenses); Christopher L. Pitet, Note, *The Problem with "Money Now, Terms Later": ProCD, Inc. v. Zeidenberg and the Enforceability of "Shrinkwrap" Software Licenses*, 31 LOY. L.A. L. REV. 325 (1997) (discussing history of shrinkwrap licenses and analyzing enforcement of shrinkwrap licenses in *ProCD*).

111. See *infra* notes 177-96 and accompanying text (discussing *Hill*).

cuit expanded its ruling in *ProCD* and determined that accept-or-return offers are enforceable in any commercial transaction.<sup>112</sup> Specifically, by finding that the parties do not form a contract until after the buyer receives and does not return the product, the Seventh Circuit reasoned that the buyer accepts all the seller's contract terms that accompany the delivered product if the buyer fails to return the product.<sup>113</sup>

However, the Seventh Circuit's analysis of accept-or-return offers is subject to three criticisms. First, the Seventh Circuit misapplies and misinterprets the contract formation provisions of the current UCC.<sup>114</sup> Second, the court unwarrantedly favors the seller of goods.<sup>115</sup> Third, the court enforces terms that unfairly surprise one of the parties.<sup>116</sup>

#### A. *ProCD, Inc. v. Zeidenberg*

*ProCD, Inc.* (*ProCD*) created and sold a national directory that listed the names, street addresses, telephone numbers, zip codes, and, when appropriate, industry codes of over 95,000,000 residential and commercial listings.<sup>117</sup> Under various trade names, including the trademark name "Select Phone," *ProCD* sold CD-ROM discs containing both the directory and the software needed to access, retrieve, and download the information.<sup>118</sup> In the boxes containing the discs, *ProCD* included a user guide that contained a series of terms under the heading "Single User License Agreement."<sup>119</sup> Small print on the outside of the Select Phone box referred to the enclosed agreement, but it

112. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir.) ("*ProCD* is about the law of contract, not the law of software."), *cert. denied*, 118 S. Ct. 47 (1997).

113. See *id.* at 1150 (determining that Hills accepted terms of Gateway's offer by failing to return computer within 30 days).

114. See *infra* notes 197-242 and accompanying text (arguing that Seventh Circuit misapplies Sections 2-204 and 2-206 and misinterprets Section 2-207).

115. See *infra* notes 243-53 and accompanying text (contending that Seventh Circuit favors seller of goods by enforcing accept-or-return offers).

116. See *infra* notes 254-61 and accompanying text (claiming that Seventh Circuit enforces terms that unfairly surprise one party).

117. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

118. *Id.*

119. *Id.* The opening paragraph of the license agreement states:

Please read this license carefully before using the software or accessing the listings contained on the discs. By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it.

*Id.*

did not detail the agreement's specific terms.<sup>120</sup> The agreement, the computer screen that appeared upon installation of the software, the field that appeared on the computer screen before the user could access the listings, and the warnings that appeared on most of the screens all informed the user that ProCD copyrighted the software and that the user could copy the software only for authorized purposes.<sup>121</sup>

In 1994, Matthew Zeidenberg, a computer-science student, purchased a copy of Select Phone from a retail store.<sup>122</sup> In 1995, Zeidenberg purchased an updated version of Select Phone.<sup>123</sup> Also in 1995, Zeidenberg formed the corporation Silken Mountain Web Services, Inc. (Silken Mountain) for the purpose of establishing a database of telephone listings over the Internet.<sup>124</sup> After incorporation, Silken Mountain began assembling its own telephone listings database by using data from Select Phone and data from another company's product.<sup>125</sup> Silken Mountain also created a computer program that allowed users to search for listings on its database.<sup>126</sup> In May of 1995, Silken Mountain contracted with Branch Information Services for Internet access.<sup>127</sup>

After learning that Silken Mountain was providing the database to third parties via the Internet, ProCD immediately demanded that Silken Mountain terminate its activities.<sup>128</sup> Although he admitted to ProCD that he had downloaded data from Select Phone, Zeidenberg refused to stop providing access to the database over the Internet.<sup>129</sup> Consequently, ProCD sued Zeidenberg and Silken Mountain<sup>130</sup> alleging breach of the software licensing agreement and seeking injunctive relief.<sup>131</sup> In response, Zeidenberg argued that the terms

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120. *Id.* at 645.

121. *Id.* at 644-45.

122. *Id.* at 645.

123. *Id.*

124. *Id.* Zeidenberg was the sole shareholder, sole employee, and sole officer of Silken Mountain. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* After learning of ProCD's demand that Zeidenberg discontinue the service, Branch Information Services terminated its relationship with Silken Mountain Web Services (Silken Mountain). *Id.* Silken Mountain later entered into a contract with Ivory Tower Information Services for Internet access. *Id.*

130. Because Zeidenberg did not argue that different restrictions applied to Silken Mountain than applied to him, the author discusses only the arguments advanced by Zeidenberg.

131. *Id.* at 644. In addition to the breach of contract claim, ProCD alleged violations of the federal Copyright Act, the Wisconsin Computer Crimes Act, the state misappropriation statute, and state unfair competition regulations. *Id.*

of the software licensing agreement were not enforceable against him and that federal copyright law preempted ProCD's claims.<sup>132</sup> In September of 1995, the United States District Court for the Western District of Wisconsin issued a preliminary injunction against Zeidenberg that prevented him from distributing the Select Phone directory over the Internet.<sup>133</sup>

In ruling on the parties' motions for summary judgment, the district court determined whether the terms of the software license agreement bound Zeidenberg.<sup>134</sup> Because the sale of software is essentially a sale of goods,<sup>135</sup> the court found that Article 2 of the UCC controlled the enforceability of the "shrinkwrap license."<sup>136</sup> Specifically, the court considered the application of

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132. *Id.*

133. *Id.* at 645-46.

134. *See id.* at 650 (analyzing whether user agreement was enforceable under UCC). In addition to ruling on the breach of contract claim, the district court considered whether Zeidenberg infringed on ProCD's copyright and whether federal law preempted the license agreement. *Id.* at 644. The district court found that Zeidenberg's use of Select Phone's software was not inconsistent with ProCD's copyright. *Id.* at 647-50. Furthermore, the court concluded that federal copyright law preempted ProCD's breach of contract, misappropriation, and unfair competition claims. *Id.* at 657-59. Likewise, the court determined that federal copyright law preempted the alleged violations of the Wisconsin Computer Crimes Act. *Id.* at 655-62. Therefore, even if the terms of the software license agreement bound Zeidenberg, federal copyright law prohibited the enforcement of that contract. *Id.* at 657-59.

135. *See id.* at 650-51 (determining that Article 2 applies to sale of software). Most courts that have considered the issue of whether Article 2 applies to software licensing agreements have determined that the sale of software is a sale of goods and, therefore, have applied Article 2 to disputes arising from the sale of software. *See, e.g.,* Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 654-55 (7th Cir. 1998) (applying UCC to dispute arising from sale of software); Comshare, Inc. v. United States, 27 F.3d 1142, 1145 n.2 (6th Cir. 1994) (observing that "[c]ourts and academic commentators have been moving toward the position that computer software is a 'good' covered by the sales provisions of the Code"); Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 674-76 (3d Cir. 1991) (holding that software falls within UCC definition of "good"); NMP Corp. v. Parametric Tech. Corp., 958 F. Supp. 1536, 1542 (N.D. Okla. 1997) (observing that majority of courts have determined that Article 2 applies to software licensing agreements). *But see* Data Processing Servs., Inc. v. L.H. Smith Oil Corp., 492 N.E.2d 314, 317-20 (Ind. Ct. App. 1986) (finding that contract to provide computer programming was contract for services and, therefore, did not fall within Article 2); Micro-Managers, Inc. v. Gregory, 434 N.W.2d 97, 100 (Wis. Ct. App. 1988) (determining that Article 2 did not apply to contract for development of computer program because contract was predominantly for services). The N.C.C.U.S.L. and the A.L.I. have proposed the addition of Article 2B to the UCC to govern licenses and software contracts. *See* U.C.C. § 2B-103(a) (Tentative Draft April 1998) (providing that Article 2B applies to licenses and to software contracts). The adoption of Article 2B would resolve the issue of whether the UCC applies to a software license.

136. *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995) (describing shrinkwrap licenses). According to Professor Lemley, "[t]he prototypical example [of a shrinkwrap license] is a single piece of paper containing license terms which has been wrapped in transparent plastic along with one or more computer

Sections 2-206,<sup>137</sup> 2-207,<sup>138</sup> and 2-209<sup>139</sup> to the alleged contract.<sup>140</sup>

The court rejected ProCD's claim that under Section 2-206, the formation of the contract was not complete until after Zeidenberg had the opportunity to inspect and to reject the terms of the agreement.<sup>141</sup> Rather, the court decided that Zeidenberg accepted ProCD's offer to sell Select Phone when he purchased the product.<sup>142</sup> Accordingly, the court found that the parties formed the contract at the time of sale.<sup>143</sup> Thus, Zeidenberg accepted the contract before he received the terms of the shrinkwrap license. Therefore, the terms could become part of the contract only through the reference to the agreement on the outside of the box, as a modification under Section 2-207, or as a modification under Section 2-209.<sup>144</sup>

In addressing whether the terms became part of the contract, the district court relied on *Step-Saver Data Systems, Inc. v. Wyse Technology*<sup>145</sup> and *Arizona Retail Systems, Inc. v. Software Link, Inc.*<sup>146</sup> for its analysis.<sup>147</sup> In

disks." *Id.* (footnote omitted). The theory behind the use of the shrinkwrap license is that the software purchaser will read the license before opening the package and using the software. *Id.* Professor Lemley observes that the term "shrinkwrap license" includes licenses printed on the outside of the box, licenses included within the box, and licenses shrinkwrapped with the manual. *Id.*; see *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 650 (W.D. Wis.) (determining that Article 2 governs enforceability of shrinkwrap license), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

137. See *supra* notes 55-66 and accompanying text (providing analysis of Section 2-206).

138. See *supra* notes 67-107 and accompanying text (providing analysis of Section 2-207).

139. See U.C.C. § 2-209 (1995) (allowing parties to modify contract). Section 2-209 allows parties to a contract to modify the terms of an existing contract. See *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763 (D. Ariz. 1993) ("Section 2-209 picks up where section 2-207 leaves off – i.e., after the formation of the contract.").

140. See *ProCD*, 908 F. Supp. at 651 (discussing possible approaches to analyzing alleged contract under UCC).

141. See *id.* at 651-52 (rejecting ProCD's argument that acceptance was contingent on Zeidenberg's rights of inspection, rejection, or revocation).

142. See *id.* at 652 (stating that contract formed when buyer purchased product).

143. See *id.* ("Defendant accepted plaintiff's offer to sell Select Phone in a reasonable manner at the moment they purchased the product by exchanging money for the program." (emphasis added)).

144. See *id.* at 652-53 (discussing two possible methods for analyzing alleged contract: (1) whether reference to user agreement on outside of box incorporated terms into contract, or (2) whether terms of user agreement modified contract under Section 2-207 or Section 2-209).

145. 939 F.2d 91 (3d Cir. 1991).

146. 831 F. Supp. 759 (D. Ariz. 1993).

147. *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 652 (W.D. Wis.) (finding that *Step-Saver* and *Arizona Retail* provide insight into application of UCC), *rev'd*, 86 F.3d 1447 (7th Cir. 1996). The *ProCD* court observed that *Step-Saver* and *Arizona Retail* were the two leading cases on the enforceability of shrinkwrap licenses. *Id.*

both *Step-Saver* and *Arizona Retail*, the courts found that the terms of a shrinkwrap license could not be part of an initial offer to sell a product if the buyer was unaware of the terms prior to ordering and to receiving the software.<sup>148</sup> As a result, the *Step-Saver* and *Arizona Retail* courts considered whether the terms of the license became part of the contract through the reference to the license on the outside of the product's package or as a contract modification under Section 2-207 or Section 2-209.<sup>149</sup> In *Step-Saver* and *Arizona Retail*, the courts concluded that the terms of the shrinkwrap license

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In *Step-Saver*, the court considered whether, under Section 2-207, the parties' contract included the terms contained in a box-top license that the seller printed on a computer program's package. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 95-98 (3d Cir. 1991). First, the *Step-Saver* court found that even without the terms of the box-top license, the contract was sufficiently definite. *Id.* at 100. Second, after considering the three tests that courts use to determine if a writing constitutes a conditional acceptance, the *Step-Saver* court found that the box-top license did not constitute a conditional acceptance. *Id.* at 101-03. According to the *Step-Saver* court, the acceptance was not conditional because the seller did not clearly express its unwillingness to proceed with the transaction unless the parties incorporated the box-top license into their agreement. *Id.* Third, the *Step-Saver* court found that a party could not establish a course of conduct sufficient to incorporate an otherwise excluded term by repeatedly sending a term to the other party if neither party takes action on the term. *Id.* at 103-04. Fourth, the court determined that because the inclusion of the box-top license terms would materially alter the contract, the terms did not become part of the parties' agreement. *Id.* at 105. Therefore, the *Step-Saver* court concluded that the parties did not intend the terms of the box-top license to express the terms of their agreement. *Id.* at 106.

In *Arizona Retail*, the court considered whether terms in a license agreement that accompanied the delivery of software became part of the parties' agreement. *Arizona Retail Sys., Inc. v. Software Link*, 831 F. Supp. 759, 760 (D. Ariz. 1993). *Arizona Retail Systems (ARS)* engaged in two sets of transactions with *The Software Link (TSL)*. *Id.* at 763. In the initial transaction, TSL sent ARS both an evaluative copy and a live copy of software to which TSL had affixed a shrinkwrap license. *Id.* As to the initial transaction, the *Arizona Retail* court found that the parties formed their contract when ARS opened the shrinkwrap license because ARS had notice of the terms. *Id.* As to the subsequent purchases of software, the *Arizona Retail* court found that the license agreement was a proposal to modify the parties' contract. *Id.* at 765. However, because ARS never expressly assented to the terms, the *Arizona Retail* court found that the terms of the license did not become part of the contract. *Id.*

148. See *ProCD*, 908 F. Supp. at 653 (stating that *Step-Saver* and *Arizona Retail* courts determined that terms of shrinkwrap license were not part of agreement to order and ship software (citing *Step-Saver*, 939 F.2d at 105-06; *Arizona Retail*, 831 F. Supp. at 763-66)). The *Arizona Retail* court's analysis differed from the *Step-Saver* court's analysis because in *Arizona Retail*, in the initial transaction, the seller sent the buyer both an evaluative copy of the software and a live copy that the seller had affixed with the shrinkwrap license. *Id.* Because the buyer opened the live copy only after using the evaluative copy, the *Arizona Retail* court found that the terms of the shrinkwrap license became part of the contract. *Id.* However, the *Arizona Retail* court found that the shrinkwrap license terms did not become part of subsequent transactions and that in those transactions, the parties formed their agreement at the point of sale. *Id.*

149. See *id.* (describing *Step-Saver* and *Arizona Retail* courts' analyses).



did not become part of the parties' contract.<sup>150</sup>

Consistent with *Step-Saver* and *Arizona Retail*, the district court in *ProCD* considered whether the terms of the shrinkwrap license became part of the contract through the reference to the agreement on the box, Section 2-207, or Section 2-209.<sup>151</sup> First, the district court found that the reference to the shrinkwrap license on the box did not incorporate the terms into the agreement because Zeidenberg did not have a reasonable opportunity to review the terms.<sup>152</sup> Second, regardless of whether Section 2-207 or Section 2-209 applied to the alleged contract, the district court determined that the terms did not become part of the agreement under either section because Zeidenberg did not expressly agree to them.<sup>153</sup> The court, therefore, concluded that the terms of the shrinkwrap license did not bind Zeidenberg.<sup>154</sup> ProCD appealed the district court's refusal to enforce the terms of the shrinkwrap license to the United States Court of Appeals for the Seventh Circuit.<sup>155</sup>

On appeal, the Seventh Circuit considered whether the terms of the user agreement printed on the inside, rather than on the outside, of the box were enforceable.<sup>156</sup> First, in finding that the terms of the user agreement bound

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150. See *id.* at 652 (explaining that both *Step-Saver* and *Arizona Retail* courts found shrinkwrap licenses unenforceable).

151. See *id.* at 654-55 (considering whether terms of shrinkwrap license became part of contract through reference to agreement on outside of product's package or as modification under Section 2-207 or Section 2-209).

152. See *id.* at 654 (deciding that terms of user agreement were not incorporated into contract even though reference to agreement appeared on outside of box). The court found that Zeidenberg's second and third purchases of Select Phone were not subject to the terms of the license agreement because parties should have the opportunity to review the terms that will bind them every time they contract. *Id.* The court emphasized that the parties should have this opportunity because of the possibility that the seller will alter the terms between different versions of their product. *Id.*

153. See *id.* at 655 (finding that contract did not include terms of user agreement under Section 2-209 or Section 2-207 because Zeidenberg did not expressly assent to terms). The *ProCD* court stated that Section 2-209 requires a party to assent expressly to any proposed modification of the contract. *Id.* The *ProCD* court found that a party's continuation with an agreement, however, does not necessarily constitute assent. *Id.*

154. See *id.* (concluding that user agreement did not bind Zeidenberg because he did not have opportunity to bargain or to object to proposed agreement and because he did not expressly assent to terms).

155. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (reviewing holding of district court).

156. See *id.* (reviewing holding of district court). The Seventh Circuit reversed the district court's determination that even if the software license agreement was enforceable, federal copyright law preempted the enforcement of that contract. *Id.* at 1453-55; see *supra* note 134 (discussing district court's finding that federal copyright law preempted enforcement of software license agreement). It is beyond the scope of this Note to discuss and to critique the court's

Zeidenberg, the court of appeals emphasized the liberal provisions of contract formation that Section 2-204 embodies.<sup>157</sup> Second, the court of appeals pragmatically justified its ruling by recognizing the prevalence of transactions in which payment precedes the communication of detailed terms.<sup>158</sup>

The Seventh Circuit agreed with the district court that a contract includes only those provisions to which the parties agree.<sup>159</sup> However, the court of appeals indicated that the UCC envisions a liberal approach to the formation of contracts that prevents the dismissal of an alleged contract simply because the offeror included the terms on the inside, rather than on the outside, of the product's box.<sup>160</sup> In particular, according to the Seventh Circuit, Section 2-204(1) permits parties to form contracts in many ways.<sup>161</sup> Furthermore, under the UCC, an offeror can propose a contract that limits the type of conduct that constitutes an acceptance.<sup>162</sup> In this case, for example, the court of appeals found that ProCD presented a contract that Zeidenberg could accept by using the product after having an opportunity to review the proposed terms of the contract.<sup>163</sup> By using the product and by not returning it within thirty days, Zeidenberg accepted the offer and was bound to its terms.<sup>164</sup> Consequently, the terms of the software license agreement took effect.<sup>165</sup>

The Seventh Circuit also observed that UCC Section 2-606<sup>166</sup> allows parties to structure their relations so that an acceptance is effective only after the buyer receives the goods and has the opportunity to inspect and to reject

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reasoning and analysis on this issue.

157. *See id.* at 1452 (observing that UCC permits contract formation in many ways).

158. *See id.* at 1451-52 (providing examples of transactions in which exchange of money precedes communication of detailed terms of agreement).

159. *See id.* at 1450 (approving of district court's conclusion that contract includes only terms on which parties agree and that one cannot assent to hidden terms).

160. *See id.* at 1452 ("So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways.").

161. *See id.* (arguing that UCC does not restrict formation of contract to point of sale).

162. *See id.* (observing that vendor, as master of offer, can propose limits on manner of acceptance). An offeree may accept the offer by performing the conduct that the offeror prescribed for acceptance. *Id.*

163. *See id.* (stating that ProCD proposed contract that buyer was to accept by using product after opportunity to consider terms).

164. *See id.* (asserting that Zeidenberg accepted contract by using software after having opportunity to review terms).

165. *See id.* (determining that terms of software license agreement were effective against Zeidenberg).

166. U.C.C. § 2-606 (1995). Section 2-606 provides:

the goods.<sup>167</sup> The court first acknowledged that Section 2-606 deals with acceptance of goods after delivery rather than acceptance of an offer.<sup>168</sup> The court then stated that Section 2-606 nevertheless shows the UCC's flexibility in allowing parties to provide an opportunity for the buyer to inspect the goods or the terms before making a final decision.<sup>169</sup>

In analyzing the enforceability of the license agreement, the Seventh Circuit emphasized that accept-or-return transactions provide a valuable means of contracting.<sup>170</sup> Specifically, the Seventh Circuit cited the comments to Section 211 of the *Restatement (Second) of Contracts* which indicate that standardized agreements are essential to mass production and distribution.<sup>171</sup> Notably, the court cited the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*<sup>172</sup> in support of its contention regarding the practicality of the use of these agreements.<sup>173</sup> Moreover, the Seventh Circuit in *ProCD*

- (1) Acceptance of goods occurs when the buyer
  - (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
  - (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
  - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

*Id.*

167. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (arguing that Section 2-606 demonstrates that UCC allows parties to structure their dealings in manner that permits buyer to inspect goods before making final decision).

168. See *id.* at 1453 (acknowledging that Section 2-606 relates to acceptance of goods after delivery rather than acceptance of offer).

169. See *id.* (explaining that Section 2-606 demonstrates that "UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review").

170. See *id.* at 1451 ("Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.").

171. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981)).

172. 499 U.S. 585 (1991).

173. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (citing *Carnival Cruise Lines*). In *Carnival Cruise Lines*, the United States Supreme Court considered the enforceability of a forum selection clause contained in a ticket that Carnival Cruise Lines issued to a cruise line passenger. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991). The Shutes filed suit against Carnival Cruise Lines in Washington for injuries that Eulala Shute allegedly sustained because of the cruise line's negligence. *Id.* at 588. Carnival Cruise Lines sought to enforce the forum selection clause that it had included in the Shute's cruise ticket to

discussed the prevalence of transactions in which the exchange of money occurs before the dispatch of terms.<sup>174</sup> The Seventh Circuit stated that the use of accept-or-return offers, in addition to being more convenient for buyers and sellers, benefits buyers because the use of these offers allows sellers to make their goods available at a lower price.<sup>175</sup> Consequently, the court enforced the terms of the software license agreement.<sup>176</sup>

### B. *Hill v. Gateway 2000, Inc.*

*Hill v. Gateway 2000, Inc.* gave the Seventh Circuit the opportunity to revisit the subject of its *ProCD* opinion. Specifically, in *Hill*, the Seventh Circuit emphasized that its liberal approach to contract formation in *ProCD* did not apply only to shrinkwrap licenses.<sup>177</sup> Rather, the Seventh Circuit concluded that its analysis applies to all accept-or-return offers regardless of the type of goods or the parties involved in the transaction.<sup>178</sup>

require the Shutes to bring their suit in Florida. *Id.* The *Carnival Cruise Lines* Court observed that courts presume forum selection clauses to be enforceable unless it would be unreasonable to enforce the particular clause at issue. *Id.* at 591. Furthermore, the Court stated that the Shutes had conceded that they had proper notice of the clause. *Id.* at 590. In considering the reasonableness of enforcing the forum selection clause at issue, the Court recognized that it would be unreasonable to assume that a cruise line passenger could negotiate the terms of a cruise line ticket. *Id.* at 593. Because the individual passengers could not negotiate the clause with the cruise line, the Court refined its analysis of forum selection clauses to account for the realities of form passage contracts. *Id.* After finding that the forum selection clause was reasonable in this case and that the Shutes had not satisfied the heavy burden of showing inconvenience, the *Carnival Cruise Lines* Court found that the lower court erred in refusing to enforce the forum selection clause. *Id.* at 595.

174. *See ProCD*, 86 F.3d at 1451-52 (providing examples of transactions in which party does not learn of terms of agreement until after paying for goods). Judge Easterbrook observed that insurance policies, airline tickets, and concert tickets are examples of transactions in which the purchaser pays for the goods before receiving all the terms of the agreement. *Id.* at 1451.

175. *See id.* at 1453 ("[A]djusting terms in buyers' favor might help Matthew Zeidenberg today . . . but would lead to a response, such as a higher price, that might make consumers as a whole worse off."). The facts of *ProCD* most likely motivated the Seventh Circuit's concern that a failure to enforce an accept-or-return offer would lead to higher prices for consumers. Specifically, ProCD engaged in price discrimination in marketing Select Phone: ProCD sold the product to commercial entities at a higher price than it sold the product to consumers. *Id.* at 1449. In order to make the price discrimination effective, ProCD limited the purchaser's use of the product in the shrinkwrap license. *Id.* at 1450. The Seventh Circuit, therefore, appears to have been concerned that if it found the shrinkwrap license to be unenforceable, ProCD would be unable to offer its product to consumers at a lower price. *Id.* at 1453.

176. *See id.* at 1449, 1455 (discussing outcome of *ProCD*).

177. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir.) ("*ProCD* is about the law of contract, not the law of software."), *cert. denied*, 118 S. Ct. 47 (1997).

178. *Id.*

As discussed in Part I, the Hills initiated a class action suit against Gateway after experiencing a series of problems with their Gateway computer system.<sup>179</sup> The Hills alleged breach of contract and sought a declaratory judgment that the arbitration, disclaimer, and limited warranty clauses that Gateway had shipped to the Hills with their computer system were unenforceable.<sup>180</sup> Despite Gateway's request, the United States District Court for the Northern District of Illinois refused to enforce the arbitration clause.<sup>181</sup> In its decision, the district court found no valid arbitration agreement because Gateway failed to give the Hills adequate notice of the arbitration clause.<sup>182</sup> Gateway appealed the decision to the United States Court of Appeals for the Seventh Circuit.<sup>183</sup>

Judge Frank Easterbrook, writing for the court, found that the *ProCD* opinion controlled the outcome of *Hill* because both cases involved the enforceability of accept-or-return transactions under the UCC.<sup>184</sup> As in *ProCD*, the Seventh Circuit emphasized two themes in finding that the terms which the seller shipped with the products bound the consumer purchaser of goods.<sup>185</sup> First, the *Hill* court stated that because of practical considerations, vendors should be free to enclose the full legal terms governing the sale with the product rather than having to disclose all terms before the exchange of money.<sup>186</sup> Second, the court stressed that a vendor, as master of the offer, can prescribe the conduct that constitutes acceptance and that the UCC permits parties to form contracts in ways other than just at the point of sale.<sup>187</sup>

179. See *supra* notes 3-10 and accompanying text (discussing facts of *Hill*).

180. See *Hill v. Gateway 2000, Inc.*, No. 96-C-4086, 1996 WL 650631, at \*1 (N.D. Ill. Nov. 7, 1996) (discussing Hills' alleged grounds for suing Gateway), *rev'd*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 118 S. Ct. 47 (1997).

181. See *Hill*, 105 F.3d at 1148 (stating that district court refused to enforce arbitration clause).

182. See *id.* (explaining district court's rationale for refusing to enforce arbitration clause). The district court did not transcribe its denial of Gateway's motion to compel arbitration in a formal written opinion. The Seventh Circuit stated that "Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that '[t]he present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause.'" *Id.*

183. See *id.* (stating that Gateway appealed district court's refusal to enforce arbitration clause).

184. See *id.* at 1149 (finding that *ProCD* analysis applied to dispute because both cases involved accept-or-return transactions that were subject to UCC).

185. See *supra* notes 157-58 and accompanying text (explaining two issues upon which *ProCD* court focused).

186. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir.) ("Practical considerations support allowing vendors to enclose the full legal terms with their products."), *cert. denied*, 118 S. Ct. 47 (1997).

187. See *id.* at 1148-49 (asserting that UCC permits parties to form contracts in many ways and that offeror, as master of offer, can limit types of conduct that constitute acceptance).

In discussing the pragmatic effects of accept-or-return offers, the *Hill* court stressed, as the court had in *ProCD*, that in many transactions people pay for products before receiving the terms of their agreement.<sup>188</sup> Moreover, according to the *Hill* court, accept-or-return transactions benefit customers because they eliminate costly and ineffective steps.<sup>189</sup> The *Hill* court also observed the difficulties inherent in communicating the lengthy terms to the buyer prior to the completion of the sale as support for the use of accept-or-return offers.<sup>190</sup>

The *Hill* court asserted that the crucial issue in *ProCD* involved the formation of the contract and not the incorporation of particular terms into the contract.<sup>191</sup> In emphasizing that *ProCD* focused on contract formation, the *Hill* court rejected the Hills' attempts to distinguish *ProCD* and *Hill*. Specifically, the *Hill* court dismissed the Hills' contention that the shrinkwrap license in *ProCD* was an executory contract<sup>192</sup> and that, unlike the Hills, Zeidenberg was a merchant.<sup>193</sup> In addition, the *Hill* court rebuffed the Hills' argument that *ProCD* enforced the terms of the shrinkwrap license because the Select Phone box included a reference to the enclosed license in small print on the outside of the box.<sup>194</sup> The *Hill* court rejected these attempts to distinguish *ProCD* by

188. *See id.* at 1149 (claiming that payment commonly precedes revelation of full terms in commercial transactions).

189. *See id.* (arguing that practical considerations support use of accept-or-return transactions).

190. *See id.* (demonstrating difficulties involved in disclosing full terms to buyer prior to completion of sale in certain situations). In support of the use of accept-or-return transactions, Judge Easterbrook noted the practical consideration that one cannot expect either cashiers in face-to-face transactions or staff in telephone order sales to read the full legal terms of the agreement to the customer before completing the sale. *Id.*

191. *See id.* at 1150 (explaining nature of issue in *ProCD* and *Hill*). The *Hill* court summarized the *ProCD* decision stating:

The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed – in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms.

*Id.*

192. *Id.* at 1149. The *Hill* court also found that in addition to being legally wrong, the Hills' argument was factually incorrect because both the contract in *Hill* and the contract in *ProCD* were executory. *Id.*

193. *See id.* (rejecting Hills' attempts to distinguish *ProCD*). The Hills argued that *ProCD* was not applicable to the dispute because the buyer in *ProCD*, unlike the Hills, was a merchant. *Id.* Because of this distinction, the Hills claimed that Section 2-207(2) compelled a different result for the two cases. *Id.* The *Hill* court, however, rejected both the Hills' attempt to invoke Section 2-207 and their characterization of the buyer in *ProCD*. *Id.*; *see infra* notes 227-42 and accompanying text (discussing Seventh Circuit's interpretation of Section 2-207).

194. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.) (finding that absence

maintaining that, because *ProCD* involved the formation of the contract, the prior case was applicable to the *Hill* case.<sup>195</sup> As a result, the *Hill* court remanded the case to the district court and instructed the district court to compel the Hills to arbitrate their claims against Gateway.<sup>196</sup>

### C. Critique of the Seventh Circuit's Approach to Contract Formation

#### 1. Seventh Circuit's Approach Misapplies and Misinterprets the Uniform Commercial Code

The Seventh Circuit's approach to contract formation in *Hill* misapplies and misinterprets the UCC. First, the *Hill* court misapplied Sections 2-204 and 2-206 to the facts of the dispute and, therefore, ignored the agreement that the parties reached when the Hills ordered the computer from Gateway.<sup>197</sup> Second, as a result of its misunderstanding of the scope of Section 2-207,<sup>198</sup> the Seventh Circuit refused to give proper consideration to the effect of the divergent terms that Gateway included with the products.<sup>199</sup>

#### a. Sections 2-204 and 2-206

##### i. Section 2-204

In *Hill*, the Seventh Circuit emphasized the flexibility of the UCC approach to contract formation.<sup>200</sup> Specifically, the Seventh Circuit stated that Section 2-204 allows parties to form a contract in any manner that is sufficient to show agreement.<sup>201</sup> Although the Seventh Circuit correctly noted that

of notice on Gateway computer box did not distinguish *Hill* from *ProCD*), *cert. denied*, 118 S. Ct. 47 (1997).

195. *See id.* at 1149-50 (rejecting Hills' attempts to distinguish *ProCD*).

196. *See id.* at 1151 (discussing outcome of *Hill*).

197. *See infra* notes 200-26 and accompanying text (discussing Seventh Circuit's misapplication of Sections 2-204 and 2-206 in *Hill*).

198. *See Hill*, 105 F.3d at 1150 (arguing that Section 2-207 is irrelevant to disputes that involve only one form (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996))). Because the *Hill* court found that the parties did not form their contract until after the Hills had the opportunity to inspect and to reject the terms, the court did not determine whether additional terms became part of the contract. *Id.* However, if one accepts the argument that the parties formed their contract at the time of sale, the application of Section 2-207 becomes crucial to determining the terms of the contract. *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 104 (3d Cir. 1991) (finding that terms of box-top license did not become part of contract under Section 2-207).

199. *See infra* notes 227-42 and accompanying text (arguing that Seventh Circuit misinterpreted Section 2-207 in *Hill*).

200. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir.) (arguing that UCC permits parties to form contracts in many different ways (citing *ProCD*, 86 F.3d at 1451-52)), *cert. denied*, 118 S. Ct. 47 (1997).

201. *See U.C.C. § 2-204(1)* (1995) (providing that parties may form contract in any manner

Section 2-204 reflects the UCC's liberal contract formation provisions,<sup>202</sup> the court misapplied the section to the facts in *Hill*. In particular, rather than help identify the parties' bargain-in-fact,<sup>203</sup> the Seventh Circuit's analysis frustrated the parties' reasonable expectations.

First, the Seventh Circuit ignored the apparent agreement<sup>204</sup> that existed between the Hills and Gateway when the Hills ordered the computer from Gateway.<sup>205</sup> According to traditional contract analysis, parties form a contract at the time of sale.<sup>206</sup> Typically, courts have found that the seller offers to sell a product by placing the product on a shelf in a retail store or by including the product in a catalogue.<sup>207</sup> Because paying for the goods is a reasonable means of accepting the offer, the parties form their contract at the time of sale.<sup>208</sup>

The Seventh Circuit did not adequately explain in *Hill* how it reached the conclusion that the parties did not form a contract when the Hills ordered the computer from Gateway. First, the facts did not indicate that the Hills knew at the time of the sale that Gateway would ship additional terms with the product or that Gateway intended the parties to form their contract only after the buyer had the opportunity to review the additional terms.<sup>209</sup> Had the seller

sufficient to show agreement); *supra* notes 42-54 and accompanying text (discussing Section 2-204).

202. See *supra* note 187 and accompanying text (stating that *Hill* court emphasized that UCC permits parties to form contracts in many ways).

203. See *Murray*, *supra* note 38, at 7 (arguing that purpose of Article 2 is fair identification of parties' bargain-in-fact).

204. See U.C.C. § 1-201(3) (1995) (defining agreement as "bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance").

205. See *Hill*, 105 F.3d at 1150 (concluding that Hills accepted Gateway's offer by keeping computer beyond 30 days and that parties did not form contract at point of sale).

206. See Kell Corrigan Mercer, Case Note, *Consumer Shrink-Wrap Licenses and Public Domain Materials; Copyright Preemption and Uniform Commercial Code Validity in ProCD v. Zeidenberg*, 30 CREIGHTON L. REV. 1287, 1338 (1997) (arguing that Seventh Circuit's analysis in *ProCD* "ignores established contract precedent which views a sale as a contract" (citing *Barry v. Barry*, 78 F.3d 375, 382 (8th Cir. 1996); *In re Wood*, 47 B.R. 774, 778 (Bankr. W.D. Wis. 1985); *Cross-Abbott Co. v. Howard's, Inc.*, 207 A.2d 134, 138 (Vt. 1965))); see also *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100 (3d Cir. 1991) (finding that buyer and seller formed contract at point of sale).

207. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp 640, 651-52 (W.D. Wis.) (finding that ProCD offered to sell Select Phone by placing product on shelf in store), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

208. See *id.* at 652 (determining that Zeidenberg accepted ProCD's offer by paying for product); Mercer, *supra* note 206, at 1338-40 (contending that parties in *ProCD* formed contract at point of sale).

209. See *Hill v. Gateway 2000, Inc.*, No. 96-C-4086, 1996 WL 650631, at \*2 (N.D. Ill. 1996) (stating that Hills had no notice of Agreement or Warranty until after Hills purchased computer system), *rev'd*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 118 S. Ct. 47 (1997); see also *ProCD*, 908 F. Supp. at 654 (stating that Zeidenberg did not have opportunity to inspect or to



made the buyer aware that the contract would not be complete until after delivery, the Seventh Circuit's analysis would have been correct.<sup>210</sup> However, because the buyer did not know of the additional terms or that the formation of the contract was subject to the buyer having the opportunity to inspect and to reject the terms or the goods, the buyer would have reasonably expected the purchase of the goods to complete the formation of the contract.<sup>211</sup>

Furthermore, the parties' objective manifestations when the Hills ordered the computer indicated the existence of a binding agreement. According to traditional contract law, only the intentions that a party objectively manifests can bind the other party.<sup>212</sup> Gateway indicated in its advertising to potential buyers that the only act necessary to complete the formation of a sales contract was to call Gateway and order a computer.<sup>213</sup> Moreover, Gateway did not objectively manifest at the time of sale that it did not intend for the terms of the sales contract to bind the parties until after the buyer had the opportunity to inspect and to reject the terms. Rather, Gateway only communicated that intent when it shipped the computer system to the Hills with the list of terms.<sup>214</sup> Because Gateway failed to manifest objectively to the Hills that it

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consider terms of shrinkwrap license before purchasing software). Because the Hills did not have notice of the terms of the Agreement, they also did not have notice of the clause that required them to return the product within a specified amount of time if they did not agree to the terms of the agreement. *See Hill*, 105 F.3d at 1148 (explaining that clause requiring Hills to return computer within 30 days if they objected to terms of Agreement was part of terms that Gateway shipped with computer).

210. *See Beard Implement Co., Inc. v. Krusa*, 567 N.E.2d 345, 348 (Ill. App. Ct. 1991) (construing Section 2-206(1) as preserving common-law rule that offeror can prescribe manner of acceptance); *supra* notes 59-61 and accompanying text (arguing that Section 2-206 preserves common-law rule that offeror is master of offer).

211. *See ProCD*, 908 F. Supp. at 652 (stating that parties would not reasonably expect formation of contract to require further action after time of sale); *see also Pitet*, *supra* note 110, at 342 (contending that vendor in *ProCD* did not clearly demonstrate its intent to prevent contract formation at point of sale).

212. *See Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties."); *see also Mid-South Packers, Inc. v. Shoney's Inc.*, 761 F.2d 1117, 1122 (5th Cir. 1985) (finding that one party's secretly harbored intent did not bind other party); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1576 (10th Cir. 1984) (stating that contract requires objective manifestations of mutual assent); *Jo-Ann, Inc. v. Alfin Fragrances, Inc.*, 731 F. Supp. 149, 155 (D.N.J. 1989) (applying objective theory of mutual assent); *Computer Network, Ltd. v. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 674-75 (Mo. Ct. App. 1988) (stating that contracting parties must objectively manifest their assent to be bound to agreement).

213. *See Hill*, 1996 WL 650631, at \*1 (describing Gateway's method of advertising its computer system). The district court stated that Gateway "offered" the computer system by advertising in media directed at computer buyers. *Id.*

214. *See id.* at \*2 (stating that Gateway sent additional terms to Hills in computer system's shipping box).

did not intend to form a contract at the time of sale, the parties' conduct at the time of sale created a binding agreement.<sup>215</sup>

In a comparable case, the United States Court of Appeals for the Third Circuit found that contracting parties formed their binding agreement at the time of sale rather than after the buyer received and had the opportunity to inspect the goods.<sup>216</sup> In *Step-Saver Data Systems, Inc. v. Wyse Technology*,<sup>217</sup> the court determined that the parties formed their contract at the point of sale despite a clause that the seller included in the product's box-top license<sup>218</sup> that required the buyer to return the product within fifteen days if the buyer did not agree to the terms of the license.<sup>219</sup> In particular, the *Step-Saver* court found that the parties' agreement at the point of sale was sufficiently definite to constitute a contract: the parties had determined the specific goods involved, the quantity, and the price.<sup>220</sup>

The Hills and Gateway, like the parties in *Step-Saver*, had determined the specific goods involved, the quantity, and the price when the Hills ordered the computer from Gateway.<sup>221</sup> Furthermore, as discussed above, the parties' objective manifestations indicated that they intended to enter into a binding agreement at the point of sale.<sup>222</sup> For these reasons, the *Hill* court erred in ignoring the apparent agreement that the Hills and Gateway had reached at the point of sale.

## ii. Section 2-206

A second problem with the *Hill* court's contention that the parties did not form their contract until after the buyer had the opportunity to inspect and to reject the product is that the Seventh Circuit misconstrued the offeror's power to condition the manner of acceptance under the UCC.<sup>223</sup> As discussed in Part II, under Section 2-206, the offeree can accept an offer by any means reason-

215. See *supra* note 44 (listing cases which explain that courts apply objective standard in determining whether parties intend to contract).

216. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100 (3d Cir. 1991) (determining that contract which parties formed was sufficiently definite contract at point of sale).

217. See *supra* note 147 (discussing *Step-Saver*).

218. See *supra* note 136 (stating that box-top license is type of shrinkwrap license).

219. See *Step-Saver*, 939 F.2d at 96-97 (describing box-top license).

220. See *id.* at 100 (determining that agreement met standards of Section 2-204(3)).

221. See *Hill v. Gateway 2000, Inc.*, No. 96-C-4086, 1996 WL 650631, at \*1 (N.D. Ill. 1996) (stating that "the Hills purchased a 10th Anniversary System from Gateway for \$4,009 plus tax and shipping"), *rev'd*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 118 S. Ct. 47 (1997).

222. See *supra* notes 200-22 and accompanying text (arguing that Gateway and Hills objectively expressed intent to enter into binding agreement at time of sale).

223. See *supra* notes 59-63 and accompanying text (discussing offeror's power to condition manner of acceptance under Section 2-206).

able under the circumstances unless the offeror *unambiguously* prescribes the appropriate time, place, and manner of acceptance.<sup>224</sup> In *Hill*, Gateway did not indicate unambiguously to the Hills at the time of sale that the appropriate manner of acceptance would be to keep the product after having the opportunity to review the terms.<sup>225</sup> Because the seller did not unambiguously condition that the appropriate manner of acceptance would be a failure to return the product after having the opportunity to inspect the terms of the agreement, the buyer was free to accept the seller's offer by purchasing the goods.<sup>226</sup>

*b. Section 2-207*

The above analysis demonstrates that the Seventh Circuit misapplied Sections 2-204 and 2-206 by refusing to construe the time of sale as the formation of the contract. Additionally, the Seventh Circuit erred in its interpretation of Section 2-207. The *Hill* court erroneously asserted that Section 2-207 was not relevant to the dispute because Section 2-207 does not apply in cases involving only one form.<sup>227</sup> This argument misinterprets Section 2-207 in two ways. First, neither the UCC text nor the Official Comments limit Section 2-207's applicability to transactions involving more than one form.<sup>228</sup> Second, limiting the applicability of Section 2-207 to cases involving more than one form is contrary to the policies underlying the section.<sup>229</sup>

First, neither the text of Section 2-207 nor its Official Comments explicitly require both parties to submit a form in order for the section to apply.<sup>230</sup>

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224. See *Beard Implement Co., Inc. v. Krusa*, 567 N.E.2d 345, 348 (Ill. App. Ct. 1991) (illustrating that Section 2-206 requires offeror to state any requirement for manner of acceptance unambiguously).

225. See *Hill*, 1996 WL 650631, at \*2 (illustrating that Hills received terms of agreement with computer system rather than at point of sale).

226. See *supra* notes 59-63 and accompanying text (explaining that offeree can accept offer in any manner reasonable under circumstances if offeror does not unambiguously prescribe proper manner of acceptance).

227. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.) (stating that Section 2-207 does not apply in cases involving only one form (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996))), *cert. denied*, 118 S. Ct. 47 (1997); see also *ProCD*, 86 F.3d at 1452 (arguing that Section 2-207 and *Step-Saver* are irrelevant to disputes involving only one form).

228. See *infra* notes 230-32 and accompanying text (arguing that text of Section 2-207 does not limit applicability of section to disputes involving more than one form).

229. See *infra* notes 235-37 and accompanying text (contending that limiting Section 2-207 to cases involving multiple forms frustrates policies underlying that section).

230. See U.C.C. § 2-207 (1995) (determining effect of additional or different terms in acceptance or written confirmation); *supra* notes 67-107 and accompanying text (discussing Section 2-207).

Rather, the comments explain that Section 2-207 applies in two situations. Section 2-207 applies when the parties have reached an oral agreement and one or both parties send a form embodying the discussed terms along with the newly added terms.<sup>231</sup> Also, if the purported acceptance to an offer contains additional or different terms, Section 2-207 is the operable provision.<sup>232</sup> Thus, neither the plain language of Section 2-207 nor the Official Comments to the section support the *Hill* court's contention that the section is irrelevant in cases involving only one form.

Furthermore, although most commentators emphasize that Section 2-207 applies in the context of the battle of forms, they have not limited their analyses of Section 2-207 to disputes involving multiple forms.<sup>233</sup> Rather, many commentators have stressed that Section 2-207 applies to any contract for the sale of goods in which the terms of the acceptance or written confirmation vary from the terms of the offer or the oral agreement.<sup>234</sup> In sum, the Seventh Circuit's conclusion that Section 2-207 is irrelevant in a case involving only

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231. See U.C.C. § 2-207 cmt. 1 (1995) (describing situations in which drafters intended Section 2-207 to apply). Official Comment 1 states:

1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals . . .

*Id.*

232. See *id.* (describing situations in which drafters intended Section 2-207 to apply).

233. See Meiklejohn, *supra* note 67, at 605 n.28 ("Nothing in § 2-207's text limits its coverage to transactions involving form documents."); Mercer, *supra* note 206, at 1341 (stating that *ProCD* court erred in limiting application of Section 2-207 to cases involving two or more forms); Mark A. French, Recent Development, 12 OHIO ST. J. ON DISP. RESOL. 811, 816 (1997) (characterizing Seventh Circuit's contention that Section 2-207 applies only to situation in which two forms are exchanged as misunderstanding); see also 1 WHITE & SUMMERS, *supra* note 62, § 1-3, at 9 (listing eight situations to which Section 2-207 applies). White and Summers do not limit their list of applicable situations to those involving the use of multiple forms. *Id.*

234. See 3 DUESENBERG & KING, *supra* note 44, § 3.03, at 3-12 to 3-13 (stating that Section 2-207 "deals with all contracts for the sale of goods" and "is not limited to contracts entered into through the exchange of printed forms" but "is a section applicable across the board to all sales contracts wherein the responsive document to an offer varies the exact terms of the offer"); see also 1 HAWKLAND, *supra* note 43, § 2-207:1, at 262 ("The section, however, is not limited to situations where forms have been used, though most commonly that is where it will come into operation."). But see Brown, *supra* note 36, at 899 ("Although the drafters failed to make explicit their intention to limit section 2-207's innovations to agreements in which at least one party's preprinted form plays a role, such a limitation is generally understood and makes good sense."); *id.* at n.23 (discussing rationale for requiring at least one form for application of Section 2-207).

one form not only lacks support in the language of Section 2-207 and the Official Comments, but it lacks support from commentators as well.

Second, limiting the scope of Section 2-207 to transactions involving multiple forms frustrates the policies underlying the UCC and, more specifically, the policies of Section 2-207. The drafters of the UCC intended Article 2 to identify the parties' bargain-in-fact.<sup>235</sup> Section 2-207, in particular, protects the factual bargain of the parties by recognizing the existence of an enforceable contract despite the insertion of additional or different terms in an acceptance or a written confirmation.<sup>236</sup> Although an acceptance or a confirmation that includes a different or an additional term is likely to appear in a battle-of-forms case, divergent acceptances and confirmations are not limited to that context. By refusing to recognize that Section 2-207 addresses concerns that extend beyond the classic battle-of-forms case, the Seventh Circuit frustrates the policies underlying the section.<sup>237</sup>

Rather than summarily dismissing the buyer's Section 2-207 argument, the Seventh Circuit in *ProCD* and *Hill* should have analyzed the documents that the sellers included with the products as written confirmations of oral agreements that included different or additional terms.<sup>238</sup> The panels should have characterized the documents as confirmations because, under Section 2-204, the parties in both cases formed their contracts at the point of sale.<sup>239</sup> Applying this analysis to *Hill*, one finds that because the parties had formed the contract before the Hills received the computer system, the documents included with the goods would be a written confirmation of the prior agreement under Section 2-207(1).<sup>240</sup> As a result, because the confirmation added

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235. See Murray, *supra* note 29, at 1311 (stating that underlying policy of Article 2 is precise and fair identification of parties' factual bargain); *supra* notes 38-41 and accompanying text (discussing policies of Article 2).

236. See U.C.C. § 2-207(1) (1995) (allowing acceptance or written confirmation that contains additional or different terms from offer to operate as acceptance); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1047 (Ill. App. Ct. 1980) (explaining that purpose of Section 2-207 is to allow parties to enforce their agreements despite discrepancies between offer and acceptance or between oral agreement and written confirmation).

237. See generally Murray, *supra* note 38 (emphasizing importance of interpreting Article 2 consistently with its underlying policies).

238. See French, *supra* note 233, at 816 (asserting that terms that Gateway sent with computer system were part of written confirmation of oral agreement); Mercer, *supra* note 206, at 1342-43 (arguing that *ProCD* court should have analyzed software license agreement as written confirmation of parties' agreement); see also *supra* notes 77-79 and accompanying text (discussing written confirmations under Section 2-207).

239. See *supra* notes 200-22 and accompanying text (arguing that Hills and Gateway formed their contract at point of sale).

240. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100 (3d Cir. 1991) (analyzing box-top license that seller sent with product as written confirmation); *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758, 765 (10th Cir. 1983) (finding that invoice that seller sent

terms to the prior agreement, the terms would be proposals for modification under Section 2-207(2).<sup>241</sup> Finally, because the transaction was between a merchant and a consumer, the terms would become part of the contract only if the buyer expressly assented to the terms.<sup>242</sup>

## 2. Seventh Circuit's Approach Favors the Seller

A second problem with the Seventh Circuit's approach to contract formation in *Hill* is that the approach is inconsistent with the UCC's emphasis on neutrality. Several courts have observed that the drafters of the UCC intended Article 2 to promote neutrality and to abandon common-law principles that unduly favored one party.<sup>243</sup> In *Hill*, however, the Seventh Circuit adopted an approach that, similar to the problematic common law last-shot doctrine, favors the seller of goods.<sup>244</sup> Specifically, the Seventh Circuit's approach allows the seller to impose additional terms on the buyer after the buyer has agreed to purchase the goods, so long as the seller includes a statement that the buyer must return the goods if it disagrees with the altered terms.<sup>245</sup> The buyer, therefore, is left with the options of either abandoning the transaction completely by returning the goods or accepting the seller's terms.<sup>246</sup> Furthermore, because some businessmen and consumers might not read the terms on the back of standardized forms and, thus, would not even know of their option to return the goods, the Seventh Circuit's approach results in the seller's unilateral imposition of terms onto the buyer.

with goods qualified as acceptance or written confirmation under Section 2-207); *Sudenga Indus., Inc. v. Fulton Performance Prods.*, 894 F. Supp. 1235, 1236-38 (N.D. Iowa 1995) (determining that invoices that seller issued contemporaneously with shipment of goods were written confirmations under Section 2-207); *Herzog Oil Field Serv., Inc. v. Otto Torpedo Co.*, 570 A.2d 549, 550 (Pa. Super. Ct. 1990) (construing invoice that seller sent after delivery of goods as written confirmation).

241. See *supra* notes 96-97 and accompanying text (explaining application of Section 2-207(2) when written confirmation includes additional or different terms).

242. See *supra* note 98 and accompanying text (explaining that in transaction between merchant and consumer, terms become part of contract only if consumer expressly assents).

243. See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1444 (9th Cir. 1986) (stating that neutrality is one policy underlying Section 2-207); *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 551 (D. Del. 1981) ("The Code disfavors any attempt by one party to impose unilaterally conditions that would create hardship on another party.").

244. See *supra* notes 31-32 and accompanying text (discussing common law last-shot doctrine).

245. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.) (enforcing terms that Gateway sent with computer system because Hills kept computer for more than 30 days), *cert. denied*, 118 S. Ct. 47 (1997).

246. See *French, supra* note 233, at 820 (asserting that Seventh Circuit's approach to contract formation leaves consumers with choice of "accepting the terms of the contract completely at their own peril, or wholly rejecting the contract and abandoning the transaction").

The decision not to enforce the terms of an accept-or-return offer, however, creates the practical problems that Judge Easterbrook emphasized in *Hill*.<sup>247</sup> For example, Judge Easterbrook correctly observed that one cannot expect cashiers and telephone sales staff to read the full legal terms of a contract to a buyer before completing the sale.<sup>248</sup> Similarly, the United States Supreme Court, in *Carnival Cruise Lines, Inc. v. Shute*,<sup>249</sup> recognized the practical difficulties that have contributed to the increased use of form contracts.<sup>250</sup> In *Carnival Cruise Lines*, the Court enforced a forum selection clause that the cruise line had enclosed in terms that it sent to the cruise passenger with the passenger's ticket.<sup>251</sup> In determining that the forum selection clause was enforceable, the Court emphasized that it was unreasonable to assume that cruise passengers would be able to negotiate the terms of the contract with the cruise line.<sup>252</sup> Both the practical considerations that Judge Easterbrook outlined in *Hill* and the Supreme Court's opinion in *Carnival Cruise Lines*, therefore, reveal that the proper approach to accept-or-return offers should protect the buyer from unilateral impositions of terms by the seller while still allowing the seller to conduct its business effectively.<sup>253</sup>

### 3. Seventh Circuit's Approach Results in Unfair Surprise to the Buyer

In *Hill*, the Seventh Circuit rejected the Hills' argument that they did not have sufficient notice of the arbitration clause.<sup>254</sup> The *Hill* court stated that buyers can learn of additional terms in three ways.<sup>255</sup> First, they can ask the vendor to send a copy of any terms governing the sale before they purchase the product.<sup>256</sup> Second, they can consult public sources such as magazines or

247. See *Hill*, 105 F.3d at 1149 ("Practical considerations support allowing vendors to enclose the full legal terms with their products.").

248. See *id.* (stating that if sales staff tried to read full legal terms to buyers before completing sale, "the droning voice would anesthetize rather than enlighten many potential buyers").

249. See *supra* note 173 (discussing *Carnival Cruise Lines*).

250. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (recognizing that cruise passengers cannot negotiate terms of their commercial cruise tickets).

251. See *id.* at 595 (concluding that forum selection clause was enforceable).

252. See *id.* at 593 (discussing practical considerations). The Court stated that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." *Id.*

253. See *Baker, supra* note 110, at 409-18 (discussing important practical benefits of shrinkwrap licenses).

254. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.) (rejecting Hills' argument that terms shipped with computer system were unenforceable because Hills lacked notice of terms), *cert. denied*, 118 S. Ct. 47 (1997).

255. See *id.* (listing ways in which buyer can learn of additional terms of agreement).

256. See *id.* (stating that buyer can request copy of terms prior to purchasing product).

the vendor's World Wide Web site.<sup>257</sup> Finally, they can inspect the terms after they receive the product from the vendor.<sup>258</sup> The *Hill* court, therefore, placed on the buyer both the burden of discovering the terms and the cost of avoiding the terms if the buyer finds them undesirable.<sup>259</sup>

The Seventh Circuit's apparent willingness to place the burden of discovering unfair terms on the buyer is problematic. First, by placing the burden on the buyer, the court relieves the seller of any responsibility for alerting potential buyers to the terms of its sales.<sup>260</sup> However, because the seller is clearly in a position to include this information in its advertising or on its products' labels, placing the burden of discovering the terms on the buyer is unreasonable.<sup>261</sup> Second, requiring the buyer to discover any unfair terms places the buyer in a disadvantageous position by subjecting the buyer to the unfair surprise of additional or different terms.

#### IV. Proposed Revisions to Article 2

The foregoing analysis reveals that the Seventh Circuit's decision in *Hill* is problematic because of its interpretation of the UCC and because it favors the seller and enforces terms that unfairly surprise the buyer. This Part examines the current efforts by the A.L.I. and the N.C.C.U.S.L. to revise Article 2 of the UCC. Specifically, this Part considers whether recent drafting efforts solve the problems that accept-or-return offers create.

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257. See *id.* (explaining that buyer can discover terms of contract by consulting public sources).

258. See *id.* (noting that buyer can inspect terms of contract after receiving product and terms).

259. See French, *supra* note 233, at 817 (stating that *Hill* court placed burden of discovering terms of contract on buyer).

260. See Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. B.J., Nov. 1997, at 8, 12 (stating that court's decision in *Hill* shifts costs of discovering additional terms to consumers).

261. See *id.* at 12 (arguing that requiring vendor to notify buyer of important additional terms is not unreasonable). Professor Sternlight proposed several ways that Gateway could have notified buyers of its arbitration clause:

Gateway might have easily [alerted its customers to the existence of the arbitration clause] in any number of ways: by noting the existence of the arbitration clause in its advertisements where it already mentioned the limited warranty; by requiring its cashiers to mention the arbitration clause and then offering to read it or send it upon the customer's request; or by at least including mention of the clause on the written confirmation that the company sent to its customers prior to shipment of the computer.

*Id.* (footnote omitted); see Pitet, *supra* note 110, at 347-51 (proposing that courts require vendor to provide notice to buyer that parties do not form contract at point of sale, to give notice to buyer of existence of additional terms, and to allow buyer opportunity to review terms prior to purchase).



*A. May 1998 Draft*

*1. Proposed Sections 2-204 and 2-206*

Proposed Sections 2-204<sup>262</sup> and 2-206<sup>263</sup> govern contract formation issues in the proposed revisions to Article 2.<sup>264</sup> Similar to their counterparts in the current UCC,<sup>265</sup> the proposed contract formation provisions eliminate the constraints of the traditional common-law rules of offer and acceptance.<sup>266</sup> In

262. U.C.C. § 2-204 (Discussion Draft May 1998). Proposed Section 2-204 states:

- (a) A contract may be made in any manner sufficient to show agreement, including by offer and acceptance and conduct of both parties which recognizes the existence of a contract.
- (b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.
- (c) Even if one or more terms are left open, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for an appropriate remedy.
- (d) Conspicuous language in a record which expressly conditions the intention of the proposing party to contract upon agreement by the other party to terms proposed in the record prevents contract formation unless the required agreement is given.

*Id.*

263. *Id.* § 2-206 (Discussion Draft May 1998). Proposed Section 2-206 states:

- (a) Unless otherwise unambiguously indicated by the language or circumstances:
  - (1) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances. Subject to Section 2-204(d), a definite and seasonable expression of acceptance operates as an acceptance even though it contains terms that vary the offer.
  - (2) An order or other offer to buy goods for prompt or current shipment shall be construed to invite acceptance by either a prompt promise to ship or a prompt or current shipment of conforming goods. If under the circumstances the order or offer is construed to invite acceptance by the shipment of non-conforming goods, the non-conforming shipment is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation.
- (b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the contract as discharged.

*Id.*

264. U.C.C. § 2-203 note 1 (Discussion Draft July 1997) (stating that Sections 2-203 and 2-205 (proposed Sections 2-204 and 2-206 in May 1998 draft) control issues of contract formation).

265. *See supra* notes 38-66 and accompanying text (discussing current UCC's contract formation provisions, Sections 2-204 and 2-206).

266. *See Ostas & Darr, supra* note 34, at 418 (stating that contract formation provisions of 1993 discussion draft remove constraints of common law).

particular, these provisions recognize the parties' contract so long as the parties have intended to contract.<sup>267</sup>

Proposed Section 2-204 provides the general principles of contract formation.<sup>268</sup> The majority of proposed Section 2-204 is simply a restatement of current Section 2-204.<sup>269</sup> The most important difference between proposed Section 2-204 and its counterpart in the current UCC is the integration of current Section 2-207's contract formation concepts with the general principles of formation.<sup>270</sup> Specifically, proposed Section 2-204(b) allows parties to form a contract even though their records<sup>271</sup> do not otherwise establish a contract.<sup>272</sup> Thus, proposed Section 2-204(b) incorporates the general rule of current Section 2-207(1) that the inclusion of terms in an acceptance that vary from the offer does not preclude the formation of a contract.<sup>273</sup>

Proposed Section 2-206 provides the specific rules for the acceptance of a contract.<sup>274</sup> In essence, proposed Section 2-206 continues the general rules that current Section 2-206 embodies.<sup>275</sup> The proposed section's most impor-

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267. See U.C.C. § 2-204(a)-(c) (Discussion Draft May 1998) (recognizing agreement that fails common-law rules of contract formation as enforceable if parties intended to contract).

268. See *id.* § 2-204(a)-(c) (Discussion Draft May 1998) (providing proposed UCC's general contract formation principles).

269. Compare U.C.C. § 2-204 (1995) (providing current UCC's general contract formation principles) with U.C.C. § 2-204 (Discussion Draft May 1998) (providing proposed UCC's general contract formation principles). Both provisions allow contracting parties to form their contract (1) in any manner sufficient to show agreement, (2) even though the moment of the contract's formation is indeterminable, and (3) despite their failure to agree upon all the terms of their contract. U.C.C. § 2-204(1)-(3) (1995); U.C.C. § 2-204(a)-(c) (Discussion Draft May 1998). Furthermore, under both provisions, the applicable test for determining whether a contract is sufficiently definite is whether the parties intended to contract and whether a reasonably certain basis for remedying a breach of that contract exists. U.C.C. § 2-204(3) (1995); U.C.C. § 2-204(c) (Discussion Draft May 1998).

270. See *supra* notes 77-94 and accompanying text (discussing contract formation under Section 2-207).

271. See U.C.C. § 2-102(a)(26) (Discussion Draft May 1998) (defining record as "information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form").

272. See *id.* § 2-204(b) (Discussion Draft May 1998) (stating that parties may form contract even though records do not establish contract).

273. See *id.* (integrating contract formation rules of current Sections 2-204 and 2-207).

274. See *id.* § 2-206 (Discussion Draft May 1998) (providing proposed UCC's specific rules for acceptance of contract).

275. Compare U.C.C. § 2-206 (1995) (providing current UCC's specific rules for acceptances) with U.C.C. § 2-206 (Discussion Draft May 1998) (providing proposed UCC's specific rules for acceptances). Both sections provide specific rules for acceptances that apply unless the language or circumstances unambiguously indicate otherwise. U.C.C. § 2-206(1) (1995); U.C.C. § 2-206(a) (Discussion Draft May 1998). These rules allow a party to accept an offer in any manner or by any means reasonable under the circumstances. U.C.C. § 2-206(1)(a)

tant deviation from the current section is that the proposed section explicitly states that a definite and seasonable expression of acceptance which contains terms that vary from the offer is a valid acceptance.<sup>276</sup> This provision, therefore, incorporates the contract formation principles of current Section 2-207(1) into the specific rules of acceptance.<sup>277</sup>

Proposed Sections 2-204(b) and 2-206(a)(1) avoid the Seventh Circuit's analysis of current Section 2-207 in *Hill*.<sup>278</sup> Specifically, the proposed revisions separate issues of contract formation from problems of determining which terms become part of the contract.<sup>279</sup> In particular, proposed Sections 2-204(b) and 2-206(a)(1) provide that neither the failure of the records to establish a contract<sup>280</sup> nor the inclusion of varying terms in an acceptance<sup>281</sup> precludes the formation of a contract. Because the proposed revisions include these provisions as part of the general principles of contract formation, courts should not limit their application to disputes involving multiple forms. Hence, in comparison to the Seventh Circuit's faulty interpretation of current Section 2-207, the structural change of the proposed revisions prevents courts from limiting their application to multiple form disputes.

However, proposed Sections 2-204 and 2-206 do not alter the heart of the Seventh Circuit's ruling in *Hill*. Essentially, the focal point of *Hill* is the court's decision that the parties did not form a contract at the point of sale, but rather that they formed a contract only after the buyer had the opportunity to

(1995); U.C.C. § 2-206(a)(1) (Discussion Draft May 1998). Furthermore, the sections construe an offer to purchase goods as authorizing acceptance by either a prompt promise to ship or a prompt shipment of the goods. U.C.C. § 2-206(1)(b) (1995); U.C.C. § 2-206(a)(2) (Discussion Draft May 1998). Additionally, if beginning performance is a reasonable mode of acceptance, both sections state that an offeror may treat the offer as having lapsed if he does not receive notice of acceptance within a reasonable time. U.C.C. § 2-206(2) (1995); U.C.C. § 2-206(b) (Discussion Draft May 1998). The only difference between the two provisions is that the shipment of nonconforming goods is not an acceptance under the proposed provision if the offer is construed to permit acceptance by the shipment of nonconforming goods and the offeree notifies the offeror that the goods are offered as an accommodation. U.C.C. § 2-206(1)(b) (1995); U.C.C. § 2-206(a)(2) (Discussion Draft May 1998).

276. U.C.C. § 2-206(a)(1) (Discussion Draft May 1998).

277. *Id.* Although the proposed section does not define a definite expression of acceptance, the drafters' notes to the July 1997 discussion draft state that an acceptance that contains varying terms from the offer will likely be a definite acceptance only if the varying terms are in the boilerplate. *See* U.C.C. § 2-205 note 1 (Discussion Draft July 1997) (explaining that varying terms will likely not preclude formation of contract if varying terms are in boilerplate language).

278. *See supra* notes 227-42 and accompanying text (discussing Seventh Circuit's interpretation of Section 2-207).

279. *See* U.C.C. § 2-204 note 2 (Discussion Draft May 1998) (stating that revisions separate issues of contract formation from issues of what terms become part of contract).

280. *Id.* § 2-204(b) (Discussion Draft May 1998).

281. *Id.* § 2-206(a)(1) (Discussion Draft May 1998).

inspect and to reject the goods.<sup>282</sup> Because proposed Sections 2-204 and 2-206 essentially replicate current Sections 2-204 and 2-206, these sections do not prevent courts from enforcing an accept-or-return offer.<sup>283</sup> Rather, these proposed sections are vulnerable to the *Hill* court's analysis. Therefore, they do not present a sufficient solution to the problem of the inherent bias and the unfair surprise associated with accept-or-return offers.

## 2. Proposed Section 2-207

Proposed Section 2-207<sup>284</sup> provides the analysis for determining the terms of the parties' contract.<sup>285</sup> This section, therefore, applies only if the parties have formed a contract under proposed Sections 2-204 and 2-206.<sup>286</sup>

282. See *supra* notes 200-22 and accompanying text (examining Seventh Circuit's finding that parties did not form contract at time of sale).

283. See *supra* note 269 and accompanying text (explaining that majority of proposed Section 2-204 is restatement of current Section 2-204); *supra* notes 274-75 and accompanying text (stating that proposed Section 2-206 continues general rules that current Section 2-206 embodies).

284. U.C.C. § 2-207 (Discussion Draft May 1998). Proposed Section 2-207 states:

- (a) This section is subject to Sections 2-202 and 2-105.
- (b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms varying from the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the contract includes:
  - (1) terms in the records of the parties to the extent that the records agree;
  - (2) terms not in records to which the parties have otherwise agreed;
  - (3) terms supplied or incorporated under any provision of this [Act]; and
  - (4) terms in a [form] record supplied by a party to which the other party has expressly agreed.
- (c) If a contract is formed by any manner permitted under this article and either party or both parties confirms the agreement by a record, the contract includes:
  - (1) terms agreed to prior to the confirmation;
  - (2) terms in a confirming record that do not materially vary the prior agreement and are not seasonably objected to;
  - (3) terms in confirming records to the extent that they agree; and
  - (4) terms supplied or incorporated under any provision of this [Act].

*Id.*

285. See *id.* (supplying analysis for determining whether varying terms become part of contract). Prior discussion drafts included a specific provision for determining whether nonnegotiated terms become part of a consumer contract in which the consumer has agreed to a record. See U.C.C. § 2-206 (Discussion Draft March 1998) (providing analysis for determining whether nonnegotiated terms are part of consumer contract). The drafting committee has bracketed proposed Section 2-206 of the March 1998 draft for further discussion. See U.C.C. § 2-105 note 2 (Discussion Draft May 1998).

286. See U.C.C. § 2-207 note 1 (Discussion Draft May 1998) (explaining that Section 2-207 determines terms of contract formed under other sections of Article 2).

As a result, the counterpart for this provision in the current UCC is Section 2-207.<sup>287</sup>

Proposed Section 2-207 applies in two situations. First, it applies if the parties form their contract by an offer and an acceptance or by their conduct and (1) the terms of the acceptance vary from the terms of the offer or (2) both the offer and the acceptance are in records.<sup>288</sup> Second, it applies if the parties reach an agreement and one party sends a record to confirm the agreement.<sup>289</sup> Under proposed Section 2-207, the terms of a contract that the parties form by offer and acceptance or by conduct are the terms upon which the parties' records agree, the terms upon which the parties agree even if they are not expressed in a record, the terms that the UCC supplies or incorporates, and the terms in the record of a party to which the other party has agreed.<sup>290</sup> The terms of a contract that either one or both parties confirms by a record are the terms agreed to prior to the confirmation, the terms in the confirming record that do not materially vary the terms of the agreement and to which the other party does not object, the terms in the parties' records to the extent they agree, and the terms supplied by the UCC.<sup>291</sup>

Similar to proposed Sections 2-204 and 2-206, proposed Section 2-207 does not explicitly address the enforceability of accept-or-return offers. Furthermore, these sections do not protect a buyer from terms that the seller could impose by shipping an ordered product to the buyer subject to an accept-or-return offer. Proposed Section 2-207 does not determine whether the seller could enforce the terms of an accept-or-return offer because proposed Section 2-207 applies only if the parties' records do not establish a contract or if one or both of the parties confirms an agreement in writing.<sup>292</sup> Therefore, because the *Hill* approach to contract formation provides that the parties do not form the contract until after the buyer has examined the terms,<sup>293</sup> the inclusion of additional terms upon shipping a product to the buyer would not trigger the application of proposed Section 2-207.<sup>294</sup>

287. See *supra* notes 67-107 and accompanying text (discussing application of Section 2-207).

288. U.C.C. § 2-207(b) (Discussion Draft May 1998).

289. *Id.* § 2-207(c) (Discussion Draft May 1998).

290. *Id.* § 2-207(b) (Discussion Draft May 1998).

291. *Id.* § 2-207(c) (Discussion Draft May 1998).

292. See *id.* § 2-207 (Discussion Draft May 1998) (providing analysis for determining whether terms become part of contract when terms of acceptance vary from terms of offer, when conduct of parties establishes contract but their writings do not, and when one or both parties sends written confirmation).

293. See *supra* notes 184-96 and accompanying text (detailing *Hill* approach to contract formation).

294. See *supra* notes 288-89 and accompanying text (discussing application of proposed Section 2-207).

*B. Proposed Statutory Solution: Sections 2-105(b) and 2-204(e)*

Recent drafts of the proposed revisions to Article 2 of the UCC indicate that the drafting committee is considering whether to address the problem of accept-or-return offers with a specific statutory provision.<sup>295</sup> Although the committee has not taken final action concerning this issue, the committee is considering the following addition to revised Section 2-204:

(e) Subject to Sections 2-207 and 2-209(a), if, after the buyer has become obligated to pay for or has taken delivery of the goods, the seller proposes terms in a record that vary those already disclosed or agreed to and to which the buyer agrees, the varying terms become part of the contract unless they are unconscionable under Section 2-105.<sup>296</sup>

The drafting committee is contemplating the following definition of an unconscionable term:

(b) In a consumer contract [contract between and [sic] individual and a merchant], non-negotiable [non-negotiated] terms in a record which the [consumer] [individual] has authenticated or to which it has agreed by conduct are unconscionable if:

(1) the consumer [individual] had no knowledge of them; and

(2) the term:

(A) varies unreasonably from applicable industry standards or commercial practices;

(B) substantially conflicts with one or more negotiated terms in the agreement; or

(C) substantially conflicts with an essential purpose of the contract.<sup>297</sup>

The interplay of Sections 2-105(b) and 2-204(e) limits the ability of a seller of goods to add terms to a contract after the sale or after the delivery of the goods.<sup>298</sup> Specifically, the provisions preclude a seller from adding or modify-

295. See U.C.C. § 2-203 note 5 (Discussion Draft March 1998) (stating that drafting committee favors statutory solution to "Gateway" problem).

296. U.C.C. § 2-204(e) (Discussion Draft May 1998). Compare *id.* § 2-204(e) (Discussion Draft May 1998) (enforcing terms of contract that seller proposes after sale or delivery of goods unless terms are unconscionable) with U.C.C. § 2B-208(a) (Tentative Draft April 1998) (refusing to enforce terms of mass-market license unless party agrees to terms prior to initial performance or prior to using or to accessing information).

297. U.C.C. § 2-105(b) (Discussion Draft May 1998) (brackets in original).

298. See *id.*; *id.* § 2-204(e) (Discussion Draft May 1998). The drafting committee has described proposed Section 2-204(e) as adopting the rolling contract concept. See *id.* § 2-204 note 5 (Discussion Draft May 1998) (explaining that subsection (e) adopts rolling contract concept). According to the drafting committee, the rolling contract concept recognizes that "[c]ontract formation and term definition is a process, rather than a single event." U.C.C. § 2B-207 note 5 (Tentative Draft April 1998). Although proposed Section 2-204(e) adopts the rolling contract concept, proposed Section 2-105(b) limits the potential for unfair surprise and bias from the adherence to this concept by refining the definition of unconscionable. See U.C.C.

ing terms when the buyer has no knowledge of the new terms and the terms vary unreasonably from the industry practice or the terms conflict with the contract's essential purpose or negotiated terms.<sup>299</sup>

In order to evaluate whether proposed Sections 2-105(b) and 2-204(e) provide a workable solution to the problems that accept-or-return offers create, it is helpful to apply the proposed provisions to the facts of *Hill*. According to the language of Section 2-204(e), the application of proposed Section 2-204(e) is subject to proposed Section 2-207 and 2-209(a).<sup>300</sup> In this case, neither proposed Section 2-207 nor proposed Section 2-209(a) provide that the arbitration clause necessarily became part of the Hills' contract with Gateway. Specifically, the arbitration clause would not become part of the parties' agreement under proposed Section 2-207(c) as part of a written confirmation of a prior agreement because the Hills had not previously agreed to the term and because the term most likely materially varied the prior agreement.<sup>301</sup> Similarly, proposed Section 2-209(a) would not include the arbitration clause in the parties' contract because the parties did not agree to modify the terms of their agreement.<sup>302</sup>

Because neither proposed Section 2-207 nor proposed Section 2-209(a) include the arbitration clause as part of the parties' contract, one must decide whether proposed Section 2-204(e) dictates the outcome in *Hill*. Proposed Section 2-204(e) clearly applies in *Hill* because Gateway proposed additional, nonnegotiable terms to the original agreement when it shipped the product to the Hills.<sup>303</sup> Because the Hills did not have knowledge of the arbitration clause prior to the sale or the delivery of the goods,<sup>304</sup> proposed Section 2-105(b) would characterize the arbitration clause as unconscionable if the inclusion of an arbitration clause is either unreasonable in the computer retail industry or contrary to the negotiated terms of the agreement or to the essential purposes of the agreement.<sup>305</sup> If the arbitration clause is unconscionable

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§ 2-105 note 2 (Discussion Draft May 1998) (stating that proposed definition of unconscionable provides more protection for consumers than prior definitions).

299. *Id.* § 2-105(b) (Discussion Draft May 1998); *id.* § 2-204(e) (Discussion Draft May 1998).

300. *Id.* § 2-204(e) (Discussion Draft May 1998). Section 2-209(a) provides: "An agreement made in good faith modifying a contract under this article needs no consideration to be binding." *Id.* § 2-209(a) (Discussion Draft May 1998).

301. *See supra* note 291 and accompanying text (discussing terms of contract in which one or both parties confirm by record).

302. *See supra* note 300 (quoting text of Section 2-209(a)).

303. *See supra* note 5 and accompanying text (explaining that Gateway proposed additional terms to contract when it shipped computer to Hills).

304. *See supra* note 6 and accompanying text (stating that Hills did not have notice of arbitration clause prior to purchasing computer).

305. U.C.C. § 2-105(b) (Discussion Draft May 1998).

under Section 2-105(b), then Section 2-204(e) would exclude the arbitration clause from the parties' contract.<sup>306</sup>

Proposed Sections 2-105(b) and 2-204(e) eliminate the risk that the seller will unilaterally impose terms on the buyer, and as a result, the proposed sections protect the buyer from unfair surprise.<sup>307</sup> Specifically, the proposed sections protect the buyer of goods because the sections require courts to consider the substance of the terms that a seller attempts to propose after the sale of goods.<sup>308</sup> The proposed sections, however, do not protect the buyer solely at the expense of the seller. Rather, the proposed sections enforce terms proposed by the seller after the buyer has purchased goods so long as the terms are not unreasonable in the applicable industry or contrary to the purposes of the contract or the negotiated terms.<sup>309</sup> Furthermore, if the seller makes the terms known to the buyer before the time of sale, the seller's terms become part of the contract.<sup>310</sup> Proposed Sections 2-105(b) and 2-204(e), therefore, provide an incentive for a seller to disclose the complete terms of its agreement at or prior to the sale. Therefore, proposed Sections 2-105(b) and 2-204(e) reduce the risk of unfair surprise and eliminate the biased *Hill* approach while still allowing the seller to conduct its business effectively.

#### V. Conclusion

At least one court has adopted the Seventh Circuit's liberal approach to contract formation and has enforced an accept-or-return offer.<sup>311</sup> However, as the foregoing analysis demonstrates, the Seventh Circuit's approach to contract formation is inconsistent with the policies of the UCC. Moreover, in addition to being an inaccurate interpretation of the UCC, the Seventh Circuit's enforcement of accept-or-return offers ignores the reasonable expectations of the parties and prefers sellers. Because the Seventh Circuit's ap-

306. *Id.* § 2-204(e) (Discussion Draft May 1998).

307. *See id.* § 2-204(e) note 5 (Discussion Draft May 1998) ("The objective is to reduce the risk of unfair surprise when a buyer receives previously undisclosed terms after paying for or taking delivery of the goods."); *supra* notes 254-61 and accompanying text (discussing problem of unfair surprise).

308. *See* U.C.C. § 2-204(e) (Discussion Draft May 1998) (providing that term seller proposes after sale of goods is unenforceable if unconscionable under Section 2-105).

309. *Id.* § 2-105(b)(2) (Discussion Draft May 1998).

310. *See id.* § 2-105 note 2 (Discussion Draft May 1998) ("[I]f a consumer . . . has knowledge of the term in a record to which it has agreed, the term is enforceable under 2-105(b) even though it is harsh, or substantially conflicts with negotiated terms, or eliminates the essential purposes of the contract.").

311. *See* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S. 569, 571-72 (N.Y. App. Div. 1998) (determining that, similar to clause in *Hill*, arbitration clause sent by seller with product was "simply one provision of the sole contract 'proposed' between the parties" because parties did not form contract until after buyer retained merchandise for more than 30 days).



proach to accept-or-return offers is unsatisfactory, courts should not adopt the Seventh Circuit's reasoning in *Hill*.

Both the current version of the UCC and the proposed revisions to the UCC are susceptible to the Seventh Circuit's analysis of accept-or-return offers. Therefore, the drafting committee to Revised Article 2 should take notice of the problems inherent in the Seventh Circuit's approach and should strengthen its efforts to create a specific statutory solution to confront the Seventh Circuit's approach. In particular, the drafting committee and state legislatures evaluating whether to adopt Revised Article 2 should adopt a statutory solution similar to Sections 2-105(b) and 2-204(e) that allows courts to review the substance of terms that a seller proposes after the point of sale or after the delivery of the goods when the buyer lacks knowledge of the terms.